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Feminist Legal Theory as a Way to Explain the Lack of Progress of Women's Rights in Afghanistan: The Need for a State Strength Approach

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FEMINIST LEGAL THEORY AS A WAY TO EXPLAIN
THE LACK OF PROGRESS OF WOMEN'S RIGHTS
IN AFGHANISTAN: THE NEED FOR A STATE
STRENGTH APPROACH¹

ISAAC KFIR*

ABSTRACT

Cultural and religious practices are critical to explaining Afghanistan's dreadful reputation concerning the preservation, protection, and promotion of women's rights. Those advocating misogynistic practices assert that the calls for reforms challenge their religion and culture, while also claiming that many women's issues exist within the private realm. Accordingly, they assert that reforms that aim at addressing disempowerment are not vital to the state and go beyond the established limits of state authority. Building on feminist legal theory, which distinguishes between the public and private spheres, I argue in Afghanistan misogynistic and discriminatory practices stem from contrived cultural and religious norms. Using the notion of state strength, this Paper advances the idea that the discourses countering the lack of official action in ending discrimination must emphasize that unless women's role in contemporary Afghan society is strengthened, the state will continue to remain weak.²

INTRODUCTION

- I. STATE STRENGTH: MOBILIZATION OF RESOURCES
& UTILITARIANISM
- II. FEMINISM, FEMINIST LEGAL THEORY, GENDER DISCRIMINATION
& INTERNATIONAL LAW

1. The opinions and conclusions of this Paper, as well as its faults, are solely those of the author. I wish to thank Professors Lauryn Gouldin and Todd Berger, Syracuse College of Law; Professor Corri Zoli, Institute for National Security and Counterterrorism (INSCT); and Professor Renee de Nevers, Maxwell School of Public Administration, Syracuse University, for helpful comments and conversations. Special thanks to Maddy Dwertman for her wonderful and careful editorial assistance.

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2. This Essay is dedicated to Fakhra Younas. I never met you, but your story has inspired me.

III. ISLAM, WOMEN'S RIGHTS AND ISLAMISM

- A. *Islamism: Its Role and Impact on Women's Rights*
- B. *Family Law and Women*
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IV. AFGHANISTAN AND WOMEN

- A. *Afghan Women in the Post-9/11 Period*
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CONCLUSION

INTRODUCTION

In 2011, the Thompson Reuters Foundation published a survey identifying the five worst countries in the world for women to live in.³ The worst was Afghanistan, followed by the Democratic Republic of the Congo (DRC), Pakistan, India and Somalia.⁴ Afghanistan's ranking can be attributed to high incidence of targeted violence against female public officials, appalling health care facilities for women and widespread violence against women.⁵

Many in the non-Western world condemn surveys such as that conducted by the Thompson Reuters Foundation, arguing that they represent a poor grasp of non-Western societies and a deep misunderstanding of cultural norms.⁶ Images produced by the media promulgate the view that women are either brave opponents or passive victims.⁷ Professor Lila Abu-Lughod captured this tension: "[A]nthropologists, feminists, or concerned citizens . . . should be wary

3. Owen Bowcott, *Worst Place in The World for a Woman: Violence Puts Afghanistan at Top of List: Congo, Pakistan, Somalia and India Also in Top Five: Rape, Infanticide and Poverty Rife, Says Report*, GUARDIAN, June 15, 2011, at 19.

4. *Id.*

5. *Id.* See also U.N. Assistance Mission to Afghanistan, *A Long Way to Go: Implementation of the Elimination of Violence Against Women Law in Afghanistan* (2011), at 1, available at http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf, archived at <http://perma.cc/8UQ7-QREQ>.

6. Lila Abu-Lughod discusses some of these issues in her article. See Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Others*, 104 AM. ANTHROPOLOGIST 783, 788–89 (2002) (challenging and rejecting the view that Muslim women need to be saved).

7. See Krista Hunt, *The Strategic Co-optation of Women's Rights*, 4 INT'L FEMINIST J. POL. 116, 117 (2002) (arguing that the increased interest in women's issues in relation to Afghanistan and other places stems from the desire to further legitimize the "war on terror").

of taking on the mantles of those 19th-century Christian missionary women who devoted their lives to saving their Muslim sisters.”⁸ This may explain why increasingly the non-Western feminist movement has chosen to promote its agenda of empowering women through local cultural norms,⁹ guaranteeing that the campaign for equality in these societies has taken a different route.¹⁰

Afghanistan, which is transitioning out of conflict, emphasizes the difficulty of harmonizing cultural and religious norms in traditional societies where religion is central while observing to basic human rights.¹¹ Given the large foreign presence in Afghanistan—coupled with heightened expectations over women issues¹²—donors expect and to some extent demand that Afghans share the donor’s conception of gender equality.¹³ Concomitantly, donors denounce the way the Taliban and their like-minded supporters view and treat women.¹⁴ Notwithstanding the long international engagement in

8. Abu-Lughod, *supra* note 6, at 789. Abu-Lughod also argues:

A first step in hearing [women’s] wider message is to break with the language of alien cultures, whether to understand or eliminate them. Missionary work and colonial feminism belong in the past. Our task is to critically explore what we might do to help create a world in which those poor Afghan women, for whom “the hearts of those in the civilized world break,” can have safety and decent lives.

Id. at 789–90.

9. See, e.g., Melissa Steyn, *A New Agenda: Restructuring Feminism in South Africa*, 21 *WOMEN’S STUD. INT’L F.* 41, 43–44 (1998) (highlighting how the feminist movement in South Africa has sought to move away from the feminist movement of the apartheid era and adopt a more inclusive and diverse agenda).

10. See, e.g., Ruth Bader Ginsburg, *Gender and the Constitution*, 44 *U. CIN. L. REV.* 1, 41 (1975) (discussing how the law is a tool to sustain traditional views and is a mechanism to foster social change); Mala Htun & S. Laurel Weldon, *State Power, Religion, and Women’s Rights: A Comparative Analysis of Family Law*, 18 *IND. J. GLOBAL LEGAL STUD.* 145, 145–47 (2011) (taking a cross-national approach to family law to highlight how some countries have resisted reform due to alleged conflict with inherited legal traditions); Muna Ndulo, *African Customary Law, Customs and Women’s Rights*, 18 *IND. J. GLOBAL LEGAL STUD.* 87, 87–92 (2011) (explaining the need for African courts to reform African customary law to end discriminatory practices); Astri Suhrke, *Reconstruction as Modernisation: The “Post-Conflict” Project in Afghanistan*, 28 *THIRD WORLD Q.* 1291, 1291 (2007) (arguing that post-conflict reconstruction in Afghanistan contains a radical element because modernization has led to tensions associated with social change).

11. Huma Ahmed-Ghosh writes that her impression, based on conversations with Afghan women, is that Afghan women desire not western human rights but rights that lie “within the framework of Islam and not as a cultural imposition from the West.” She adds, “Afghan women felt that the U.S. was pushing them to undermine Islam.” Huma Ahmed-Ghosh, *Voices of Afghan Women: Women’s Rights, Human Rights, and Culture*, 27 *T. JEFFERSON L. REV.* 27, 29 (2004–2005) [hereinafter Ahmed-Ghosh, *Voices*].

12. Laura Bush, *Remember Afghanistan’s Women*, *WASH. POST*, May 19, 2012, at A17.

13. Hilary Rodham Clinton, *Remarks at the U.S.-Afghan Women’s Council 10th Anniversary Celebration Luncheon*, U.S. DEPT. OF STATE (Mar. 21, 2012), available at <http://www.state.gov/secretary/rm/2012/03/186618.htm>, archived at <http://perma.cc/8XYA-M2P5>.

14. In the preamble section to UN Security Council Resolution 1193, it is declared that the Council has deep concern with “the continuing discrimination against girls and

Afghanistan, the country remains one of the worst countries for women to live in¹⁵ as misogynist cultural and religious norms that Afghan men create, shape and control, remain prevalent.¹⁶ Many Afghan women must depend on male relatives even though the Afghan constitution demands equal rights in accordance with international human rights law.¹⁷ The consequence of this dependence is that an Afghan woman's ability to determine her own present and future is greatly curtailed, while her basic fundamental rights are ignored.¹⁸ The situation exists because Afghan men select what power and rights Afghan women will and should have.¹⁹ Consequently, when it comes to empowerment,²⁰ Afghan women face difficulties at all levels of Afghan society.²¹

Substantial literature exists on the interaction between religion, culture and women, as well as on Muslim women in contemporary Muslim society.²² The literature concentrates on such issues as the

women . . .” S.C. Res. 1193, ¶14 U.N. Doc. S/RES/1193 (Aug. 28, 1998). The Council therefore urged the Taliban to cease its actions vis-à-vis women. *Id.* In Security Council Resolution 1214, the Council altered its language to demand “that the Afghan factions put an end to discrimination against girls and women . . .” S.C. Res. 1214, ¶28 U.N. Doc. S/RES/1214 (Dec. 8, 1998); *see also Taliban-style Curbs for Women in Afghanistan Again?*, KASHMIR MONITOR, July 22, 2013, available at <http://kashmirmonitor.in/news-taliban-style-curbs-for-women-in-afghanistan-again-51330.aspx>, archived at <http://perma.cc/S2AM-4B4D>.

15. *See, e.g., The Women of Afghanistan: Important Gains in Women's Rights Could Be at Risk When American Troops Leave*, N.Y. TIMES, Aug. 16, 2012, at A22.

16. *See* Lynne L. Manganaro & Nicholas O. Alozie, *Gender Role Attitudes: Who Supports Expanded Rights for Women in Afghanistan?*, 64 SEX ROLES 516, 526–27 (2011) (examining how men and women view gender roles in Afghanistan and concluding that men remain more conservative than women even though education and urban life help counter such sentiments); Valentine M. Moghadam, *Patriarchy in Transition: Women and the Changing Family in the Middle East*, 35 J. COMP. FAM. STUD. 137, 157 (2004) (declaring that “the Arab-Islamic family and its concomitants—rigid sex roles, women’s legal status as minors, the prerogatives of fathers and husbands, high fertility—have been challenged by socioeconomic developments (industrialization, the expansion of the urban labor market, and education) and political action (state legal reform and women’s movements.)”); Jawid Omid, *Violence Against Women Still Prevalent in Post-Taliban Afghanistan*, XINHUA NEWS, Dec. 16, 2013, available at http://news.xinhuanet.com/english/world/2013-12/16/c_132971788.htm, archived at <http://perma.cc/URL9-36X2>.

17. Naila Kabeer et al., *Afghan Values or Women's Rights? Gendered Narratives About Continuity and Change in Urban Afghanistan* 8 (IDS, Working Paper No. 387, Dec. 2011), available at <http://www.ids.ac.uk/files/donfile/Wp387.pdf>, archived at <http://perma.cc/Y75P-CAPV>.

18. *Id.*

19. *Taliban-style Curbs for Women in Afghanistan Again?*, *supra* note 14.

20. Empowerment refers to the idea of enhancing the capacity of an individual to make and apply choices. *See* THE WORLD BANK, EMPOWERMENT AND POVERTY REDUCTION: A SOURCEBOOK 13–14 (Deepa Narayan ed., 2002); Kabeer et al., *supra* note 17, at 5.

21. Kabeer et al., *supra* note 17, at 7.

22. *See* Amber Rose Maltbie, Note, *When the Veil and Vote Collide: Enhancing Muslim Women's Rights Through Electoral Reform*, 41 MCGEORGE L. REV. 967, 967–68 (2009–2010) (indicating how Muslim women’s participation in the electoral process in new democracies

need to reject certain misogynistic practices,²³ women and humanitarianism,²⁴ women and conflict,²⁵ and women in post-conflict settings.²⁶ In recognizing this and drawing from the aforementioned research, this Paper contributes to the discourse by arguing that opponents have moved women's rights issues into the "private sphere,"²⁷ ensuring that gender is constructed according to social, religious and cultural norms²⁸ while making the state less likely to address limits on women's participation in the public sphere.²⁹ Thus, when for example the Afghan Ulema Council decreed that men and women should not mix in the workplace, it not only imposed restrictions on women's employability but also limited opportunities for women, as not many people would wish to challenge the Council.³⁰ Shaheen Sardar Ali captures this challenge:

By applying the Islamic paradigm of equality of human dignity and worth, and requiring "those in authority" i.e., men and the

can be suppressed by demanding that they lift their veil); Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L L. 307, 402–03 (1993–1994) (rejecting an Orientalist approach to the study of gender and human rights while arguing that Islam and international human rights law are compatible); see also Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 UTAH L. REV. 287, 306 (1997); Beth Baron, *Women, Honour, and the State: Evidence from Egypt*, 42 MIDDLE E. STUD. 1, 2–3 (2006); Serida Lucrezia Catalano, *Shari'a Reforms and Power Maintenance: The Case of Family Law in Reforms in Morocco and Algeria*, 15 J. N. AFR. STUD. 535, 537 (2010); L. Elizabeth Chamblee, Note, *Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1074–76 (2003–2004).

23. See BENAZIR BHUTTO, DAUGHTER OF DESTINY: AN AUTOBIOGRAPHY xi (1989); TEHMINA DURRANI, MY FEUDAL LORD 363 (1991); MUKHTAR MAI, IN THE NAME OF HONOR: A MEMOIR 143 (2007); Farah Deeba Chowdhury, *Theorising Patriarchy: The Bangladesh Context*, 37 ASIAN J. SOC. SCI. 599, 620–22 (2009).

24. See, e.g., Karen Engle, "Calling in the Troops:" *The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 190 (2007) (expressing unease at the notion of military humanitarian intervention which in effect calls for military action—violence—as a means to protect victims of human rights violations).

25. MEGAN H. MACKENZIE, FEMALE SOLDIERS IN SIERRA LEONE: SEX, SECURITY AND POST-CONFLICT DEVELOPMENT 3 (2012); FREDLINE A.O. M'CORMACK-HALE, GENDER, PEACE AND SECURITY: WOMEN'S ADVOCACY AND CONFLICT RESOLUTION 1 (2012); FIONNUALA NI AOLAIN ET AL., ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS 27 (2011).

26. Navnita Chadha Behera, *Introduction to GENDER, CONFLICT AND MIGRATION* 25–26 (Navnita Chadha Behera ed.) (2006); Faegheh Shirazi, *Introduction to MUSLIM WOMEN IN WAR AND CRISIS: REPRESENTATION AND REALITY* 1 (Faegheh Shirazi ed., 2010).

27. See *infra* Part II.

28. See, e.g., Nancy Hatch Dupree, *Cultural Heritage and National Identity in Afghanistan*, 23 THIRD WORLD Q. 977, 978 (2002).

29. Frud Bezhan, *Karzai Backs Afghan Clerics Over Stronger Restrictions on Women*, RADIO FREE EUROPE (Mar. 8, 2012), http://www.rferl.org/content/karzai_backs_afghan_clerics_on_women/24507032.html, archived at <http://perma.cc/5MBZ-MQKK>.

30. *Id.*

State to accept responsibility for fulfilling the material needs of women, children and other disadvantaged sections of society in their charge, and provide them access and control over resources, a move towards substantive as opposed to mere formal equality for all may be possible.³¹

Ultimately, the Afghan state, whose institutions men dominate, is either able to impose values and norms detrimental to women's rights or to ignore legal and moral obligations towards women.³² This Paper, after reviewing the various challenges faced by Afghan women and reviewing the current situation in Afghanistan, suggests that reframing the case for women's rights through the language of "state strength" would help challenge those opposing women's rights and women's empowerment. It is argued that Afghanistan will remain a perpetually weak state until it acknowledges gender inequality and actively rejects it, as inequality in any form undermines the state.³³ Notably, the Paper assumes neither that Afghan women need external actors to "save" them³⁴ nor that Islam—when understood correctly—is the cause of discriminatory practices.³⁵ Rather, it recognizes:

When the state is incapable or unwilling to represent the interests of members of society, the importance of family and kinship relations is inflated. Consequently, any challenges to patriarchal authority in the domestic sphere—including but not limited to

31. SHAHEEN SARDAR ALI, GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? 88 (2000).

32. Bezhan, *supra* note 29.

33. A good example of this is the case of Azra Jafari, the mayor of the town of Nili in Daykundi province. Initially, the cleric opposed Jafari because he felt that such a position was inappropriate for a woman. However, once he saw the changes that Jafari began implementing in the town, he changed his opinion and supported her. Golnar Motevalli, *Afghanistan's First Female Mayor Proves Critics Wrong*, THE GUARDIAN, Feb. 24, 2013, <http://www.guardian.co.uk/world/2013/feb/24/afghanistan-first-female-mayor>, archived at <http://perma.cc/ZJB7-R8YC>.

34. Within the legal feminist movement, there is increasing opposition or distaste towards the idea that non-Western women need to be saved by their western counterparts. See, e.g., Abu-Lughod, *supra* note 6, at 788; Ahmed-Ghosh, *Voices*, *supra* note 11, at 29; Engle, *supra* note 24, at 218.

35. See Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311, 312 (1995) (highlighting commonly expressed discrepancies and inaccuracies about Islam's treatment of women); Bharathi Anandhi Venkatraman, Comment, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 2011 (1994–1995) (discussing the cultural bias within the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with respect to Muslim countries and concluding that "the Women's Convention itself should be divested of any culturally insensitive or unworkable language. Ultimately, its aim and purpose should be to afford women choices and not to force women into lifestyles that they consider disagreeable").

challenges to the use of violence—can be construed as threatening to the family as an institution. This, in turn, lends itself to the idea that increasing the rights of women would corrode and menace the family, and, by extension, the social order. As the irony comes full circle, many states are willing to champion or accept the notion that women's rights—and those who advocate them—are threatening to society in order to shift critical attention from their own failings or to justify their own refusal to reform family and criminal laws.³⁶

The argument is developed in the following manner. First, it identifies that September 11 heightened interest in Islam, pressing Muslims to ponder and question many practices and norms as part of a desire to understand why nineteen men were willing to cause such destruction.³⁷ Interestingly, the introspection has brought some legislative reforms, particularly as to women's role, position and rights in public spaces.³⁸ Accordingly, the approach taken is that that Islam is not the reason why women in Afghanistan endure discriminatory practices. Rather, discrimination stems from contrived cultural and religious norms that surface out of misreading, misunderstandings or manipulation of the Qur'an.³⁹ Accordingly, in claiming the existence of contrived cultural and religious practices,⁴⁰ it is argued that these norms are synthetic and their purpose is to uphold traditional

36. Lisa Hajar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 31 (2004).

37. See, e.g., JARED COHEN, CHILDREN OF JIHAD: A YOUNG AMERICAN'S TRAVEL AMONG THE YOUTH OF THE MIDDLE EAST 34–35 (2007); FAWAZ A. GERGES, JOURNEY OF THE JIHADIST: INSIDE MUSLIM MILITANCY 5 (2006).

38. Over the last few years, women's representation in Muslim states has increased and women-based NGOs have become more vocal and effective in gaining certain rights for their constituents. This trend is evidenced, for example, in the changing role, presence and advocacy of women's groups in Saudi Arabia. Hanan Al-Ahmadi of the Institute of Public Administration in Riyadh, while recognizing the need for more work, has noted the advances made by Saudi women over the past 10 years, particularly their increased participation in decision-making processes in the public and private sectors. Hanan Al-Ahmadi, *Challenges Facing Women Leaders in Saudi Arabia*, 14 HUM. RESOURCES DEV. INT'L 149 (2011). However, as Chamblee argues, the UN and human rights organizations have generally "kept a cautious distance from Islamic religious and cultural matters mentioning the problems, but refusing to address them with anything more than study." Chamblee, *supra* note 22, at 1104.

39. Shaheen Sardar Ali states: "A book of Divine revelation such as the *Qur'an* coming together over twenty-three years, is by its very nature open to varying interpretations." SARDAR ALI, *supra* note 31, at 87; see also Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 3, 4 (1984) (arguing that the Islamic jurists that claimed that the gates of *Ijtihad* had been closed were marginalized and came to exist outside of Sunnism).

40. Culture is understood as shared codes or norms serving as blocs that structure communities. Nina Eliasoph & Paul Lichterman, *Culture in Interaction*, 108 AM. J. SOC. 735, 735–36 (2003).

authority and/or support an anachronistic power system. By devising norms and exhibiting them as cultural or religious, the proponents do so in reference to idyllic community, allowing them to further defend these indefensible social restrictions.⁴¹ Moreover, opponents recognize that as it is no longer acceptable or permissible to treat Afghan women as second-class citizens,⁴² the argument in favor of empowerment is shaped to describe reform as a challenge to one's culture and religion and therefore it is not only allowed but it is vital.⁴³ Second, the reason of discrimination, from a religious standpoint, stems from a misogynistic orthopraxy linked to Islamism,⁴⁴ a pervasion of Islamic law.⁴⁵ The third pillar posits that there has been

41. It is at times assumed that the reason for high level of fertility in the Arab (Muslim) world stem from religious practices, however as the case of Iran and Algeria show the infusion of oil money and changes in social (cultural) norms, women's education increased which had an impact on when women got married, which in turn had affected fertility rates. Phillippe Fargues, *Women in Arab Countries: Challenging the Patriarchal System?*, 13 REPROD. HEALTH MATTERS 43, 44–47 (2005). The debate over the *purdah* (curtain) in South Asia is another good example in that what promotes it is status, division of labor and the need for moral standards. Hanna Papanek, *Purdah in Pakistan: Seclusion and Modern Occupations for Women*, 33 J. OF MARRIAGE & FAM., 517, 518 (1971).

42. Afghanistan has ratified sixteen international human rights conventions, from the 1948 Genocide Convention, to the Convention on the Elimination of All Forms of Discrimination against Women (1979) to the International Convention for the Protection of All Persons from Enforced Disappearance (2006). *Chapter IV: Human Rights*, UN TREATY COLLECTION, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, archived at <http://perma.cc/BU2U-KJK3>. Moreover, the Afghan Constitution prohibits discrimination. In the preamble it is stated Afghans seek to establish a "civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples' freedoms and fundamental rights." CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (2004). Article 62 requires that the president of Afghanistan be a Muslim though no reference is made to their gender.

The individual who becomes a presidential candidate shall have the following qualifications: 1. Shall be a citizen of Afghanistan, Muslim, born of Afghan parents and shall not be a citizen of another country; 2. Shall not be less than forty years old the day of candidacy; 3. Shall not have been convicted of crimes against humanity, a criminal act or deprivation of civil rights by court. No individual shall be elected for more than two terms as President. The provision of this article shall also apply to Vice-Presidents.

Id. at art. 62.

43. A good example of this was Afghan reaction to the law protecting women's rights, with opponents claiming that the law was designed to appease the West. Azam Ahmed & Habib Zahori, *Despite West's Efforts, Afghan Youths Cling to Traditional Ways*, N.Y. TIMES, Aug. 1, 2013, at A1.

44. See *infra* Part III.B.

45. Ziba Mir-Hosseini highlights this challenge by declaring:

Muslim jurists claim, and all Muslims believe, that justice and equality are intrinsic values and cardinal principles in Islam and the sharia. If this is the case, in a state that claims to be guided by the sharia, why are justice and equality not reflected in the laws that regulate gender relations and the rights of men and women? Why do Islamic jurisprudential texts—which define the

limited state action because opponents of reform successfully place the discourse on women's rights within the "private" realm,⁴⁶—a space deemed beyond the reach of government action.⁴⁷ Thus, increasingly, women's rights are becoming associated with the affairs of the family,⁴⁸ which in Afghan society is the most private of realms.⁴⁹ Furthermore, the Afghan government is weak, making it dependent on conservatives and Islamists,⁵⁰ explaining its willingness if not need to adopt a conservative agenda while at the same time claiming that international demands for reforms are rooted in an interventionist anti-Islamic western culture.⁵¹ The final pillar is with the notion of state strength,⁵² understood through the polysemous concept

terms of the sharia—treat women as second-class citizens and place them under men's domination?

Ziba Mir-Hosseini, *Muslim Women's Quest for Equality: Between Islamic Law and Feminism*, 32 CRITICAL INQUIRY 629, 629 (2006).

46. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625 (1991) (distinguishing between private and public with respect to international law, and arguing that such a distinction is detrimental to women's rights). Hanan Al-Ahmadi's empirical study of 160 Saudi women leaders, for example, highlights that structural issues and a lack of investment rather than Islam undermine the promotion of women in Saudi Arabia. Al-Ahmadi, *supra* note 38, at 152.

47. Jessica Pfisterer, *Letting the Pillar of Society Fall: Failing Health Care and Maternal Mortality in Afghanistan*, 12 GEO. J. GENDER & L. 61, 62 (2011) (highlighting that the high maternal mortality rate in Afghanistan is linked to the status of women in the family and society. The implication being that the Afghan government cannot compel Afghans to ensure that women receive appropriate health care).

48. In a recent case, an Afghan judge allowed three individuals—all family members—convicted of torturing a child bride to go free, claiming that there was no evidence to show abuse, even though Sahar Gul by the end of her ordeal could not walk and needed serious medical attention. Emma Graham-Harrison, *Afghan Judges Free Three Jailed for the Torture of Child Bride Sahar Gul*, THE GUARDIAN, July 11, 2013, <http://www.theguardian.com/world/2013/jul/11/afghan-judges-free-sahar-guls-torturers>, archived at <http://perma.cc/ET9R-GP6L>.

49. The private (family) realm is sacred because so much of Afghan life is dependent on honor, which means that if it is sullied or defamed, it requires an act of violence to restore the lost honor. THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 59 (2010).

50. In March 2012, for example, the Afghan Ulema Council issued a statement declaring, "[m]en are fundamental and women are secondary." The statement appeared on the website of the President of Afghanistan, Hamid Karzai, suggesting that he supports it. The statement led Shukria Barakzai, a female lawmaker from Kabul to assert: "The government thinks that 2014 is nearing and the foreigners are leaving Afghanistan and they want to reach out to the Taliban with such statements." Charles Levinson, *Afghan Women Seen Losing Ground*, WALL ST. J., Mar. 7, 2012, at A12.

51. When discussing the case of the Qur'an burning and the killing of 16 Afghan civilians by a U.S. soldier, Hafez Abdul Qayoom, a member of the Afghan Ulema Council, stated: "To Muslims, and especially to Afghans, religion is much higher a concern than civilian or human casualties When something happens to their religion, they are much more sensitive and have much stronger reaction to it." Rod Nordland, *When Koran Burnings Incite Riots and a Mass Murder Doesn't*, N.Y. TIMES, Mar. 15, 2012, at A4.

52. See *infra* Part I.

of national security.⁵³ Such an approach encourages one to use the need for state security to challenge those that oppose reform, as effectively what is argued is that by preventing change opponents of empowerment seek to keep the state weak and vulnerable.⁵⁴ The Paper concludes by arguing that empowering women ensures that Afghanistan could become a strong, stable state, the principal purpose of any national security strategy, which “encompasses the decisions and actions deemed imperative to protect domestic core values from external threats.”⁵⁵ Consequently, to develop a successful campaign for women’s rights there is a need to rely less on international law, and even outside actors, as both have little appeal in Afghanistan, beyond Afghan high society and focus on the Afghan constitution and *shari’ah*, both of which have the means to end discriminatory practices.⁵⁶ An important element is the assumption that the state and its key organs (including key officials) are not hostile towards the empowerment of women, but that they are weak, fearful of being overthrown, and are beholden to conservative forces.⁵⁷

Part I analyzes the broad principles of state strength holding that a strong state has a government capable of providing basic security and services to all people while also preventing a minority from imposing its will on society to the detriment of society.⁵⁸ Concomitantly, a strong state protects minorities.⁵⁹ Nonetheless, defining state strength in the twenty-first century necessitates moving beyond a realist conception of the state—a state’s ability to resist internal and external threats by its ability to mobilize its internal resources—as it must also include a capacity to uphold, promote and protect the ability of

53. P.G. Bock & Morton Berkowitz, *The Emerging Field of National Security*, 19 WORLD POL. 122, 124 (1966) (arguing that national security is difficult to define due to institutional proliferation, the technical nature of problems associated with national security and scholars tackling separate problems in incongruous ways).

54. Ian Boxill draws a link between tourism and national security, highlighting how insecurity undermines tourism, a vital source of income for some states. Boxill is undoubtedly correct in his conclusion that when it comes to national security, there is a need for a holistic approach. Ian Boxill, *Linking Tourism Security to National Security: A Brief Comment on the Implications of the Christopher Coke Saga*, 4 WORLDWIDE HOSPITALITY & TOURISM THEMES 26, 26–28 (2012).

55. Melvyn P. Leffler, *National Security*, 77 J. AM. HIST. 143, 143 (1990).

56. In 2001, the Bangladeshi high court ruled that religious edicts that prevent women from voting are illegal. The country’s election commission also announced that it would consider disqualifying candidates who opposed equal political rights. Lipika Pelham, *Support for Bangladesh Female Franchise*, BBC NEWS, May 21, 2001, http://news.bbc.co.uk/2/hi/south_asia/1345020.stm, archived at <http://perma.cc/VG7G-7KYL>.

57. Kabeer et al., *supra* note 17, at 21.

58. Michael Mastanduno et al., *Toward a Realist Theory of State Action*, 33 INT’L STUD. Q. 457, 462–63 (1989).

59. Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT’L L. REV. 483, 489 (2002–2003).

its people to maximize their happiness.⁶⁰ Thus, the aim is to balance a Westphalian, westernized conception of state formation with post–Cold War notions of human security.

Part II examines feminist legal theory, the public-private divide, which serves as an analytical tool and why the Afghan state is failing to abide by its constitutional and international commitments.⁶¹ The Afghan government depends on local power brokers and conservative elements that are naturally hostile towards the empowerment of women.⁶² Accordingly, women’s participation in any sector is therefore dependent on the men who are defining spheres in Afghanistan.⁶³ Thus, for example, membership in the *Wolesi Jirga* (Council of People), a public body, is accepted, but the same degree of tolerance does not infiltrate education or economic empowerment, often defined as private issues existing within the purview of the patriarchal family.⁶⁴ In other words, female participation is not a basic right, even though gender discrimination is prohibited under the Afghan Constitution,⁶⁵ it is accepted because reforms cannot challenge social or religious practices.⁶⁶

Part III provides a schematic look at Islam and its relationship with women to dismiss the notion that Islam is the reason for the subordination of Afghan women.⁶⁷ Discriminatory practices and subjugation are brought about by the adoption of Islamism—a politicized

60. Cullen S. Hendrix, *Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict*, 47 PEACE RES. 273, 274 (2010).

61. See, e.g., Cheshmak Farhoumand-Sims, *CEDAW and Afghanistan*, 11 J. INT’L WOMEN STUD. 136, 142 (2009) (recounting the opposition to the CEDAW in Afghanistan in 2004 and discussing “a clear campaign to discredit the Convention as ‘Western,’ ‘un-Islamic,’ and incompatible with Afghan culture and religion. This was evident . . . when questions from the participants [in training sessions] pointed to incorrect information about the Convention being spread by Imams in communities and the media.”).

62. *Id.* at 148–50.

63. Jan Harvey, *Afghan Women Need Men in Rights Push: Those Who Can Change Decades of Inequality only Hear Male Voices*, CHI. TRIB., Jan. 6, 2012, at 18.

64. Farhoumand-Sims, *supra* note 61, at 144.

65. See *infra* Part IV.A.1.

66. The religious argument is especially important because under the repugnancy clause, any law that the Courts deem to offend Islam is invalid as stated in art. 3, “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.” CONSTITUTION, *supra* note 42, at art. 3 (2004).

67. Islam ensures that Muslim societies largely resemble one another because of the adherence to Islam. ERNEST GELLNER, *MUSLIM SOCIETY* 1–7 (1981). Khaled A. Beydoun, writing about Saudi Arabia, argues that the interpretation of Islam and the dominance of Wahhabism rather than Islam prevents women from asserting their position in Saudi society: “To say that *Wahhabism* is the ‘established or entangled’ sect in Saudi Arabia is a severe understatement. Rather, it is the prism by which law and policy is shaped and ratified; a prism that thoroughly perceives the political participation of women as unholy, and wholly abhorrent.” Khaled A. Beydoun, *Fast Tracking Women into Parliamentary Seats in the Arab World*, 17 SW. J. INT’L L. 63, 82 (2011).

version of Islam that is highly genderized.⁶⁸ Contemporary Islamists engage in a process of coercing an interpretation of an eschewed version of Islam that includes cultural and tribal practices that are inherently antiwomen.⁶⁹ The section also reviews the development of Muslim Feminism under which Muslim women advocate for their rights through the Qur'an.⁷⁰ This type of advocacy sometimes places Muslim women on a collision course with their western counterparts.⁷¹ Nevertheless, the views of Muslim feminists play an important role in the empowerment of women and are at times best suited to challenge their oppressors.⁷²

Part IV, composed of several subsections, offers an examination of the position of women in Afghan society. A historical approach shows that Afghan women have enjoyed certain rights—many of which were public—that contemporary Afghan society identifies as existing in the private realm.⁷³ The pervasive sense of insecurity that befell Afghanistan in the 1970s and enabled men to deny women equal rights by using contrived religious and cultural norms helps to explain this transference of rights.⁷⁴ It is noteworthy that Afghan women

68. See, e.g., Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT'L & COMP. L.Q. 327, 329–30 (1995) (surveying the way the UN has sought to ensure religious tolerance in preventing or redressing human rights abuses); Tahir Mahmood, *Religion in Contemporary Legal Systems*, 2011 BYU L. REV. 605, 605–06, 611 (2011) (on how religion needs to adapt so that it does not breach international human rights law).

69. L. Elizabeth Chamblee argues that only when Islamists take control of a political system does the international community become involved, arguably because of concerns relating to security. At the same time, she notes that when the regime introduces and implements legislation that greatly undermines women's rights the international community accepts them if they are described or presented as cultural. Chamblee, *supra* note 22, at 1075–76 (2003–2004); see also Hunt, *supra* note 7, at 116; Cherryl Walker, *Uneasy Relations: Women, Gender Equality and Tradition*, 115 THESIS ELEVEN, 77, 86–90 (2013) (noting that in post-apartheid South Africa, traditional rights take precedence over equality because of internal African National Congress politics).

70. Mir-Hosseini, *supra* note 45, at 640.

71. See *infra* Part II.

72. This is where Article 22 of the Constitution is useful because it prohibits discrimination against any Afghan citizen and emphasizes that every Afghan citizen—man and woman—has equal rights before the law. CONSTITUTION, *supra* note 42, at art. 22 (2004). Nusrat Choudhury further argues that the Afghan Constitution, through Article 22 and Article 7, which refers to Afghanistan's international obligations, allows secular Afghan women advocates to call on the parliament to adopt legislation in line with the government's obligation under Article 7. Conversely, Muslim feminists may use the Constitution's Islamic provisions to call on Parliament to adopt legislation that provides women with rights as decreed by Islam. Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155, 175–76 (2007–2008).

73. See Elizabeth Thompson, *Public and Private in Middle Eastern Women's History*, 15 J. WOMEN'S HIST. 52, 56–59 (2003).

74. See *infra* Part IV.

serve as the barometer of a man's honor.⁷⁵ In other words, a man's honor is dependent on the "purity" of his female relation.⁷⁶ The section proceeds to examine how Afghan women have fared under the newly adopted constitution and how the Supreme Court has implemented the constitution with respect to women. The final two subsections review the role of the Afghan Ministry of Women and Afghan NGOs, both of which endeavor to promote women's rights.⁷⁷ These two areas are important because the Ministry clearly operates in the public space while the NGO sector negotiates between public and private spaces.⁷⁸ Looking at the Ministry and the NGO sector facilitates a closer examination of the role of Afghan feminism; it mirrors current debates about feminism in the Muslim World that remain bifurcated between Muslim Feminism, which follows traditional liberal feminism, and Islamic Feminism, which argues for a Qur'anic approach to gender issues.⁷⁹ While some advocate for an Islamic approach to women's rights, others embrace international human rights norms as their mantra.⁸⁰ Rahela Hashim Sidiqi, a senior adviser at Afghanistan's civil service commission summed up the challenge by noting that Afghan feminism is not about overturning cultural norms, but rather about humanizing it—"If it shows respect to wear a scarf . . . I wear a scarf."⁸¹ Finally, the importance of the Afghan Ministry of Women and of the Afghan NGO sector has increased because there has been greater attention afforded to women's issues.⁸² This may explain why the Taliban targets women working for these institutions.⁸³ The Taliban has come to recognize that many Afghans see the value of

75. Huma Ahmed-Ghosh declares: "The honor of the family, the tribe, and ultimately the nation is invested in women." Huma Ahmed-Ghosh, *A History of Women in Afghanistan: Lessons Learnt for the Future, Or Yesterdays and Tomorrow: Women in Afghanistan*, 4 J. INT'L WOMEN STUD. 1, 3 (2003) [hereinafter Ahmed-Ghosh, *Lessons*].

76. *See id.* at 2–3.

77. *See infra* Parts IV.A.3–B.

78. *See infra* Part IV.B.

79. *See infra* Part II.

80. *See* Chamblee, *supra* note 22, at 1105, 1115, 1129.

81. Michael Gerson, *An Afghan Feminism*, WASH. POST, July 10, 2009, at A23; *see also* Harvey, *supra* note 63, at 18.

82. Ahmed-Ghosh, *Lessons*, *supra* note 75, at 12.

83. Reportedly, from 2011 to 2012 there was a 12 percent reduction in civilian casualties overall, but a 20 percent increase in injuries to women and girls. The most striking statistic was the 700 percent increase in the number of government employees targeted by the Taliban. Golnar Motevalli, *Taliban Targeting Afghan Women and Government Workers*, *UN Report Finds*, THE GUARDIAN, Feb. 19, 2013, <http://www.guardian.co.uk/world/2013/feb/19/taliban-targeting-women-un-report>, archived at <http://perma.cc/9X9T-R2FT>; *see also* Anup Kaphle, *List of Prominent Afghan Officials Assassinated (and Targeted) in 2012*, WASH. POST, Dec. 10, 2012, <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/10/list-of-prominent-afghan-officials-assassinated-and-targeted-in-2012/>, archived at <http://perma.cc/XD45-P968>.

incorporating women into the public sphere so they now seek to undermine the process of women's empowerment by targeting women,⁸⁴ schools⁸⁵ and health facilities.⁸⁶ It would therefore serve as a testament to the strength of the state if it withstands the assault on the rights of Afghan women.⁸⁷ Thus, the aim of these two subsections is to highlight through a short narrative and anecdotal evidence the limitations and successes of the Afghan Ministry of Women and of the Afghan NGO sector in promoting women's rights.

I. STATE STRENGTH: MOBILIZATION OF RESOURCES & UTILITARIANISM

A central feature in international relations is the state.⁸⁸ A realist conception of state strength focuses on power and the state and less about the people living in the state.⁸⁹ Consequently, realists tend to focus on capacity, albeit military: the ability of the state to deter or repel challenges to its authority; bureaucratic administrative capacity (the ability of the state to collect and manage information); and, quality and coherence of political institutions.⁹⁰ Such a conception of the state adheres to the view that a strong state is one that is able to mobilize and extract resources within its territory providing it with power and wealth that in turn lead to security for the state and its people.⁹¹ Put differently, a state that cannot mobilize and extract resources is perceived as weak and ripe for external intervention as others seek to exploit its weakness for their own national interest.⁹² Thus, although there is more debate concerning weak states as such

84. Thomas H. Johnson, *Taliban Adaptations and Innovations*, 24 *SMALL WARS & INSURGENCIES* 3, 4–5, 19 (2013) (reviewing the ability of the Taliban to adapt its tactics to attain its agenda).

85. Annabel Symington, *Schoolgirls Struggle Back to Normality After Taliban Attack*, *IRISH TIMES*, Mar. 12, 2013.

86. *Suicide Bombers Target Hospital, Markets, Killing 38, Wounding 100*, *NANAIMO DAILY NEWS*, Aug. 15, 2012, at A10.

87. See Ahmed-Ghosh, *Lessons*, *supra* note 75, at 11.

88. Ian Brownlie defines the state as having the following elements: a defined territory, a permanent population and an effective government. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 73–76 (3rd ed. 1979); see also HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1985, 6th ed.).

89. Mastanduno et al., *supra* note 58, at 461–63.

90. Hendrix, *supra* note 60, at 274, 283. Stuart Eizenstat, John Porter and Jeremy Weinstein measure “weak,” “failing” and “failed” states using three criteria: security, the ability to provide basic services and the protection of civil rights. Stuart Eizenstat et al., *Rebuilding Weak States*, 84 *FOREIGN AFF.* 134, 136 (2005); Stewart Patrick, *Weak States and Global Threats: Fact or Fiction?*, 29 *WASH. Q.* 27, 29 (2006).

91. Mastanduno et al., *supra* note 58, at 462–63.

92. See *id.* at 470.

states have not descended into the abyss of lawlessness, chaos and insecurity are often equated with failed states.⁹³ A weak state may have a government and the ability to provide some security, maintain general control over its borders, provide some public services, and sign onto or even fulfill elements of international agreements,⁹⁴ however, it is weak in terms of its ability to operate within well-established parameters (a defined rule of law system that is uniformly and neutrally implemented and imposed).⁹⁵ The state imposes its will when it needs to and often relies on the military to exercise its will.⁹⁶ The state's capacity to provide basic services, functions and goods is greatly limited, while government authority is restricted by its own recognition that it governs at the will of select and powerful groups who may opt to undermine the government when they deem it as a threat to a group's interest.⁹⁷ Moreover, in weak states, government stability and longevity is fickle, as their primary concern is survival. This may explain why they make unsavory deals.⁹⁸ Transition typically occurs through non-political means—revolutions or coups as opposed to the ballot box.⁹⁹ This therefore raises questions concerning good governance defined by internationally recognized standards of accountability, transparency and anticorruption. Hallmarks of good governance include basic security, the protection of human rights, economic liberalization, concentrated or structured public sector spending, democratization, civil society, and other priorities such as health care and education.¹⁰⁰

Another approach in determining state strength is utilitarianism, understood in terms of the action that one takes, or more specifically,

93. Gerald Helman and Steven Ratner assert that a failed state is “utterly incapable of sustaining itself as a member of the international community.” Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3, 3 (1992–1993), available at http://www.foreignpolicy.com/articles/2010/06/21/saving_failed_states, archived at <http://perma.cc/ZGF7-7NRE>.

94. For Robert Jackson and Carl Rosberg, African states epitomize the weak state typology; they endure political instability and are economically weak, but they retain their statehood. Robert H. Jackson and Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 WORLD POL. 1, 1 (1982).

95. *See id.* at 6.

96. *See id.* at 7–8.

97. *See id.* at 8.

98. The situation in post-civil war Yemen is a case in point, as even though South Yemen had more progressive legislation in relation to family law and women's rights, once the two Yemens became united, the South Yemenis accepted the North's more religious orientation. There are two explanations for this stance: peace was more important or because it allowed men in the South to enter into polygamous unions, something that they could not do when South Yemen was independent. Maxine Molyneux, *Women's Rights and Political Contingency: The Case of Yemen, 1990–1994*, 49 MIDDLE E. J. 418, 420 (1995).

99. Patrick, *supra* note 90, at 31.

100. Cynthia Hewitt de Alcántara, *Uses and Abuses of the Concept of Governance*, 50 INT'L SOC. SCI. J. 105, 112 (1998).

the view that the right action is the one that maximizes a good with human security.¹⁰¹ The former underlines desirable actions whose purpose is to maximize happiness;¹⁰² whereas, the latter focuses on individuals and two basic rights viewed through a freedom lens: freedom from want and freedom from fear.¹⁰³ Accordingly, for utilitarians an action is right or wrong depending on the amount of harm it would cause as a relational concept and the consequences that would come from the action;¹⁰⁴ whereas, for human rights advocates a society that creates, recognizes, defends and promotes rights is strong because individuals have equal treatment and are willing to accept the duties of citizenship.¹⁰⁵

When applied to a post-conflict setting, the process begins by first recognizing that the state is weak, mainly because the conflict had undermined if not destroyed state institutions in addition to normative values that the society may have held prior to the conflict.¹⁰⁶ In developing the human rights agenda, the state therefore has to identify basic rights and equality of rights—human rights of equal value—which are then codified.¹⁰⁷ The next step is upholding those rights, necessitating a distinction between rhetoric and action, as some may support certain actions, including ratification of international norms, but in reality they ignore their obligations.¹⁰⁸ Thus, one of the key challenges for a society transitioning out of conflict is to reintroduce and to an extent even impose a system of law (rule of law), but to maintain respect for the law because as Jaime Malamud-Goti, the former advisor in human rights and legal matters to President Raul Alfonsín writes, “a rights-based democratic society constitutes the requisite environment in which individuals can flourish.”¹⁰⁹

In sum, a realist-utilitarian-influenced approach to defining state strength recognizes that the state has to maximize its capacity as a

101. R.B. Brandt, *Utilitarianism and Moral Rights*, 14 CANADIAN J. PHILOSOPHY, 1, 5 (1984).

102. *Id.* at 2–3.

103. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1994 3, 26–33 (1994) (providing the first definition of human security).

104. A. C. Ewing, *Utilitarianism*, 58 ETHICS 100, 102 (1948).

105. Francis M. Deng, *Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced*, 8 LEIDEN J. INT'L L., 249, 258 (1995).

106. *See id.* at 271.

107. Vrinda Narain, *Muslim Women's Equality in India: Applying a Human Rights Framework*, 35 HUM. RTS. Q. 91, 91–103 (2013) (evaluating the potential of a human rights framework to serve as an analytical tool in assessing Muslim women's exclusion in India); Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 282–83 (2007).

108. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference*, 111 YALE L.J. 1935, 1947 (2001–2002).

109. Jaime Malamud-Goti, *Punishment and a Rights-Based Democracy*, 10 CRIM. JUST. ETHICS 3, 5 (1991).

way to provide security, which it accomplishes through the promotion of equality, which lies at the heart of human rights.¹¹⁰ Such a view demands that the state and specifically its institutions do all that they can to pursue, promote and protect the human rights of all of the inhabitants as only through such an approach could happiness, and by extension security, be attained for all.¹¹¹

II. FEMINISM, FEMINIST LEGAL THEORY, GENDER DISCRIMINATION & INTERNATIONAL LAW

Throughout the twentieth century, interest in promoting, protecting, and preserving women's fundamental rights increased.¹¹² The campaign to end gender discrimination received a major boost once governments adopted legislation, mechanisms, and norms that not only granted women rights that they had been denied, but also enhanced their personal security and status in society.¹¹³ Across the western world, governments adopted aggressive antidiscriminatory legislation and other measures designed to promote equality and the ending of unfair practices.¹¹⁴ In non-Western societies, changes with respect to the need to acknowledge women's rights as human rights was and has been difficult because some societies have customary and cultural values which rebuff equality values, especially concerning women's.¹¹⁵ This dichotomy is evident in the discourse among

110. See *supra* notes 88–108 and accompanying text.

111. *Id.*

112. An unprecedented level of discussion about women's issues took place in the 1990s, especially with the Beijing Platform (1995) and Security Council Resolution 1325 (2000). See Rhonda Copelon, *Introduction: Bringing Beijing Home*, 21 *BROOK. J. INT'L L.* 599, 601–03 (1996) (highlighting the significant conceptual progress that has occurred with respect to women's rights, particularly the international recognition at Beijing that “women's rights are human rights”).

113. See, e.g., Gayle Binion, *Human Rights: A Feminist Perspective*, 17 *HUM. RTS. Q.* 509, 512–13 (1995) (exploring a women-based approach to understanding human rights that recognizes that women's experiences vary and feminism is multilayered).

114. See Sex Discrimination Act (SDA), 1975, 65 (covering sex and married persons discrimination in a UK legislative act); see also Equal Pay Act (EPA), 1970, 41 (prohibiting unequal pay when women perform the same or comparable work to that performed by men in the UK); Civil Rights Act of 1964 (Title VII) 42 U.S.C. §§ 701–18 (2014) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); Equal Pay Act of 1963 (EPA) 29 U.S.C. §§ 206(d)–62 (protecting men and women who perform substantially equal work in the same establishment from sex-based wage discrimination). In addition to legislation, states have also created commissions, such as the Equal Employment Opportunity Commission (USA), to oversee racial or gender-based equality. See U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov>, archived at <http://perma.cc/LTY2-ACBS>.

115. See Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 *HUM. RTS. Q.* 838, 839, 843–44 (2000) (examining the challenge of balancing universal rights with cultural traditions); Ndulo, *supra* note 10, at 87, 89 (examining the place of African customary law in an African

liberal feminists,¹¹⁶ intersectional feminists,¹¹⁷ and anti-essentialist feminists.¹¹⁸ Radhika Coomaraswamy, the former Special Rapporteur on Violence against Women captures this in her analysis of identity:

For many women, their sense of identity arises as a result [of] their experience as women, living within groups primarily governed by men. Though their sense of self and dignity comes from how the wider society treats women, they often have to face discrimination within local groups. They may have to submit to discriminatory practices and laws, as well engage in rituals, customs, and habits that reinscribe the subordinate status of women within the hierarchy of their religious, ethnic, or tribal identity. Many women acquiesce because they see their group identity as the most important aspect of their lives. Others resist, only to be branded as traitors or “bad women” who bring the group into disrepute.¹¹⁹

With the development of the process of addressing gender inequality, feminism and feminist legal theory became more sundry and interesting, as feminism evolved, though a shared basis remains: the need to recognize the intrinsic inequity that women face in a male-dominant society.¹²⁰ The key strands identified within feminism are:

legal system and the tensions that exist between African customary law and both domestic and international human rights norms).

116. Susan Wendell describes the focus of liberal feminism as “equality of opportunity.” Liberal feminists promote the idea of equal legal rights for women and an end to State discrimination. Their commitment to education and the law places the State at the epicenter of liberal feminism. Susan Wendell, *A (Qualified) Defense of Liberal Feminism*, 2 HYPATIA 65, 65–66 (1987). See also Valerie Bryson, *Men and Sex Equality: What Have They Got to Lose?*, 20 POL. 3, 3, 6, 8 (2000) (arguing that because genuine gender equality may result in short-term losses for men, even though it will benefit them in the long run, men cannot be trusted to embrace gender equality and women must remain active).

117. Intersectional feminists challenge the notion of a single feminist discourse, calling attention to the role of both race and sex in the experiences of Black women. See Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *Feminist Theory and Antiracist Politics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE OF LAW 195, 212–13 (David Kairys ed., 2d ed. 1990); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 16–17 (1995) (providing a review of anti-essentialism and intersectionalism).

118. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 615–16 (1989–1990) (noting that anti-essentialism acknowledges the failure of liberal feminist discourse to address the issue of race and rejects the idea of a single female voice).

119. Coomaraswamy, *supra* note 59, at 484.

120. Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 157–58 (2010–2011) (reviewing the evolution of feminism). See also Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 277–78 (2008). Coomaraswamy also highlights the natural tension that exists between northern and southern women. She asks:

In a world where western imperialism has historically been the champion of third world females in Asia or Africa, the struggle for women’s rights acquires another dimension. How does one fight for women’s rights without

liberal feminists, cultural feminists, radical feminists and third-wave feminists.¹²¹ Liberal feminists concentrate on challenging jurisdictional boundaries within society and a recognition that certain issues are private and others public.¹²² Ultimately, liberal feminists call for equal entitlement and an end to discriminatory practices through legislation.¹²³ Cultural feminists isolate the source of gender injustice in the way society portrays masculine and feminine roles that lead to the devaluation of feminine roles.¹²⁴ Radical feminists stress that inequality comes from the subjugation of women by men, through sexuality—understood as a social process that desires, generates, directs, conveys and forms the person.¹²⁵ Third-wave feminism,¹²⁶ champions a commitment to freedom, equality, justice and self-actualization.¹²⁷ There are three main tactical disparities between

being complicit in the racism and prejudice that characterizes Northern attitudes toward Southern countries or the majority-minority dynamics within particular societies?

Coomaraswamy, *supra* note 59, at 484.

121. *Cf.* Chamallas, *supra* note 120, at 157–58.

122. *See id.* at 625–26 (distinguishing between private and public with respect to international law, and arguing that such a distinction is detrimental to women's rights); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 451–53 (1977–1978) (arguing the need for an Equal Rights Amendment to the Constitution and woman's rights under the laws); Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 10–11, 18, 21 (1989); Wendell, *supra* note 116, at 66.

123. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 25–26 (1990) (analyzing existing and emerging feminist themes that dominate contemporary legal discourse); *see also* Carol Pressman, *The House that Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L.SCH. J. HUM. RTS. 311, 329–30 (1997–1998) (recognizing Ruth Bader Ginsburg's appreciation of the fact that men and women need not be the same to be treated equally).

124. CAROL GILLIGAN, IN DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 5–6 (1982).

125. Catharine A. MacKinnon notes:

As work is to Marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.

Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982).

126. *See* Rita Alfonso & Jo Triglio, *Surfing the Third Wave: A Dialogue Between Two Third Wave Feminists*, 12 HYPATIA 7, 7–10 (1997); Amber E. Kinser, *Negotiating Spaces For/Through Third-Wave Feminism*, 16 NWSA J. 124, 124, 131, 133, 135, 147 (2004); Deborah L. Siegel, *The Legacy of the Personal: Generating Theory in Feminism's Third Wave*, 12 HYPATIA 46, 46, 51, 56, 58 (1997).

127. Stacy Gillis, Gillian Howie and Rebecca Munford write that first-generation feminism was a response to the political, social, economic and public exclusion of women.

second and the third-wave feminists. First, third-wave feminists use “personal narratives to illustrate an intersectional and multi-perspective vision of feminism.”¹²⁸ Second and third-wave feminists, instead of synthesizing action and theoretical justification, embraced a multivocal approach that does not rest on the category of “woman” but rather takes multivocality, inclusiveness and non-judgmental approaches in constructing its analysis.¹²⁹

It is within third-wave feminism that one finds the clearest manifestation of Muslim feminism, as it argues for a female presence within Islam.¹³⁰ Nonetheless, there are two discernable, distinctive strands of Muslim feminism: secular feminism¹³¹ and Islamist feminism.¹³² The latter “draws on and is constituted by multiple discourses including secular nationalist, Islamic modernist, humanitarian/human rights, and democratic” discourses.¹³³ Conversely, “Islamic feminism is expressed in a single or paramount religiously grounded discourse

Second-generation feminists sought greater social inclusion, concentrating on issues of motherhood, reproduction, sexual violence and sexual expression. Third-generation feminists focus on their “otherness” from the previous generations. Stacy Gillis et al., *Introduction*, in *THIRD WAVE FEMINISM: A CRITICAL EXPLORATION* xxi–xxiv (Stacy Gillis et al. eds., 2d ed. 2007).

128. R. Claire Snyder, *What is Third-Wave Feminism?: A New Directions Essay*, 34 *SIGNS* 175, 175–76, 184 (2008).

129. *Id.* at 175–76, 192 (2008) (highlighting the differences between second and third-generation feminism and asserting “[t]hird wave feminism rejects grand narratives for a feminism that operates as a hermeneutics of critique within a wide array of discursive locations, and replaces attempts at unity with a dynamic and welcoming politics of coalition”); see also Siegel, *supra* note 126, at 51. Miriam Cooke’s conception of the Muslim woman typifies this approach; she integrates gender and religion because she views the two as one. See Miriam Cooke, *The Muslimwoman*, 1 *CONT. ISLAM* 139, 139–40 (2007); Miriam Cooke, *Deploying the Muslimwoman*, 24 *J. FEM. STUD. IN RELIGION* 91 (2008).

130. See Sherin Saadallah, *Muslim Feminism in the Third Wave: A Reflective Inquiry*, in *THIRD WAVE FEMINISM: A CRITICAL EXPLORATION* 216, 218 (Stacy Gillis et al. eds., 2d ed. 2007); see also Margot Badran, *Understanding Islam, Islamism, and Islamic Feminism*, 13 *J. WOMEN’S HIST.* 47, 47, 51 (2001) [hereinafter Badran, *Understanding Islam*] (rejecting the claim that religion is bad for women).

131. Valentine M. Moghadam describes secular feminism as a rejection of religion because it is based in “laws, policies, or institutions” and calls for critical analysis of religion. Valentine M. Moghadam, *Feminism and Islamic Fundamentalism: A Secularist Interpretation*, 13 *J. WOMEN’S HIST.* 42, 43–45 (2001).

132. See Shahrzad Mojab, *Theorizing the Politics of ‘Islamic Feminism,’* 69 *FEMINIST REV.* 124, 124, 131 (2001); see also Valentine M. Moghadam, *Islamic Feminism and Its Discontents: Toward a Resolution of the Debate*, 27 *SIGNS* 1135, 1142–44, 1156–57, 1163 (2002) (recognizing the presence of Islamic feminism and secular feminism while arguing for synergy to move the debate forward).

133. Fereshteh Ahmadi, *Islamic Feminism in Iran: Feminism in a New Islamic Context*, 22 *J. FEMINIST STUD.* 33, 33, 50 (2006) (highlighting how Iranian feminists use holy text to reexamine the role of women in Islam and by extension in Iran); Margot Badran, *Between Secular and Islamic Feminism/s: Reflections on the Middle East and Beyond*, 1 *J. MIDDLE E. WOMEN’S STUD.* 6, 6 (2005) [hereinafter Badran, *Between Secular and Islamic Feminism/s*]; see also Badran, *Understanding Islam*, *supra* note 130, at 48–49 (arguing for a wider approach to what is Islamism, specifically from a gender perspective).

taking the Qur'an as its central text."¹³⁴ The 1979 Iranian revolution accentuated this dichotomy,¹³⁵ generating space for a fresh dialogue between Islam, feminism and women as Iranian women envisioned the revolution as "a catalyst for the emergence of new reformist and feminist voices in Islam that are changing the terms of reference of Islamic discourses from within."¹³⁶

Recognizing the historical debate within the Muslim community about the role of feminism in society highlights that Muslim women, both Islamists and liberals, have always demanded and continue to demand recognition not only of their rights, but also of their position in society as women, nationalists, mothers, wives and workers.¹³⁷ Moreover, the debate surrounding feminism and Islam validates the conclusions of Irfan Ahmad's study of *Jamaat-e-Islami*: "[I]t is not the Qur'an *per se*, which legitimates gender hierarchy, but the person making interpretation thereof and the context in which it is done."¹³⁸

The process of identifying and inaugurating a women's international human rights regime arose with the adoption of the Convention on the Declaration of Elimination of Discrimination against Women (CEDAW).¹³⁹ The Convention, while focusing on ending discriminatory practices against women in the private and the public spheres, has also had to contend with the gendered nature of international law¹⁴⁰

134. Badran, *Between Secular and Islamic Feminism/s*, *supra* note 133, at 6.

135. Nahid Yeganeh, *Women, Nationalism and Islam in Contemporary Political Discourse in Iran*, 44 FEMINIST REV. 3 (1993). Margot Badran highlights the unique way in which feminism developed in the Middle East, asserting that while the initial focus of Western feminists was equal gender rights, Middle Eastern women's movements were involved in national liberation, which meant that political rights became infused with personal (citizen) status rights. However, as the post-colonial Middle East state developed, religion slowly seeped into the discourse. Margot Badran, *Unifying Women: Feminist Pasts and Presents in Yemen*, 10 GENDER & HIST. 498, 498–500 (1998).

136. Mir-Hosseini, *supra* note 45, at 631 (2006); *see also* Yeganeh, *supra* note 135, at 16–17 (arguing that the Iranian Islamic revolution had promised women participation, but in reality "undermined [women's] position within the family and violated their individual and human rights").

137. Badran, *Between Secular and Islamic Feminism/s*, *supra* note 133, at 6; *see also* Nawar Al-Hassan Golley, *Is Feminism Relevant to Arab Women?*, 25 THIRD WORLD Q. 521, 526 (2004).

138. Irfan Ahmed, *Cracks in the "Mightiest Fortress": Jamaat-e-Islami's Changing Discourse on Women*, 42 MOD. ASIAN STUD. 549, 551 (2008).

139. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.refworld.org/docid/3b00f2244.html>, archived at <http://perma.cc/MN39-8RG2> [hereinafter CEDAW].

140. Article 27 of the Fourth Geneva Convention declares: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 75 U.N.T.S. 287. The phrasing

and social and cultural norms that permit discriminatory practices and attitudes.¹⁴¹ A number of Muslim states took the position, for example, that the application of Article 2¹⁴² challenges *shari'a* and, therefore, their social, political and civil systems.¹⁴³ Prima facie, the issue for a number of Muslim states with certain international legal norms can be attributed to the idea of a public-private sphere, which Muslim states consider a western concept alien to Islamist¹⁴⁴ society because of its close association with modernity.¹⁴⁵

suggests that the offense of rape, though committed against a woman, is viewed not as an act of violence, but rather as a crime against the family. See Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 200–21 (2000–2001) (explaining further that international rape as a crime, described males relatedness to a female victim, offending ego and/or the family).

141. In its Preamble, CEDAW calls for “a change in the traditional role of men as well as the role of women in society and in the family.” CEDAW argues that changing traditional conceptions renders equality between men and women possible. In doing so, it recognizes that traditional norms, especially those related to the family and children, have allowed for discriminatory practices. CEDAW, *supra* note 139. See also the UN General Assembly Declaration on the Elimination of Violence against Women, which recognizes that:

violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. . . .

G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993).

142. Numerous countries attached reservations to Article 2, which provides:

State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.

CEDAW, *supra* note 139, at art. 2.

143. Urfan Khaliq, *Beyond The Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 12–13, 18, 21 (1995).

144. See *infra* Part III.A.

145. Nilufer Gole, *Islam in Public: New Visibilities and New Imaginaries*, 14 PUB. CULTURE 173, 173, 175, 187–88 (2002) (noting that the growing visibility of Islam is

Much of the debate about women's rights also appears in discussions of cultural rights and the rights of indigenous communities to sustain traditional norms, some of which counter the idea of equality.¹⁴⁶ Article 5 of United Nations Declaration on the Rights of Indigenous Peoples, for example, declares: "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."¹⁴⁷ This stands in contrast to Article 3 of the International Convention of Civil and Political Rights, which holds: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."¹⁴⁸ Ominously, the dichotomy tends to impact women more than men¹⁴⁹ as men, due to their position in society, govern, control and structure the norms, allowing them to adopt measures that uphold the discriminatory practices.¹⁵⁰

Feminist engagement with international law arguably peaked in the 1990s through international meetings, coupled with changes in international criminal law that led to the recognition of sexual violence

leading to an eruption of religious-based discussions in which Muslims strive to address the challenges of modernity).

146. *See id.* at 185.

147. The Declaration's Preamble also recognizes "that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests." G.A. Res., 61/295 U.N. Doc., A/RES/61/295 at 2, 4, *available at* <http://www.refworld.org/docid/471355a82.html>, *archived at* <http://perma.cc/59YL-9G6Q>.

148. International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966).

149. This is most apparent with respect to marriage and the rights of indigenous women who marry outside of the community. Radhika Coomaraswamy points out that, in the case of Sandra Lovelace, the Human Rights Committee opted not to "delve into issues that would require the right to equality on the part of women to trump the right to culture" because "[f]or indigenous people, there exists a serious question of survival. Free marriage across boundaries may result in their assimilation and disappearance. Tribes have tried to control this possibility by limiting the marriage options of their women." Coomaraswamy, *supra* note 59, at 500.

150. Nadine Puechguirbal, for example, demonstrates how male power is sustained by consistently defining women as vulnerable individuals. Nadine Puechguirbal, *Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents*, 17 INT'L PEACEKEEPING 172, 172–73 (2010). Eleanor A. Doumato describes how the Saudi government reacted to a women's driving demonstration in November 1990. The Interior Ministry, led by Prince Naif, supported the *mutawwi'in* (religious police). The government, first issued a ban on all political activity by women, followed by a *fatwa* by Shaykh 'Abd Allah ibn 'Abd al-'Aziz ibn Baz from the government-sponsored Directorate of Islamic Research, Ruling, Propaganda and Guidance claiming that *shari'a* prohibits women from driving. The government also confiscated the passports of the husbands of the women who had demonstrated and others were suspended from government employment. Eleanor A. Doumato, *Gender, Monarchy, and National Identity in Saudi Arabia*, 19 BRITISH J. MIDDLE E. STUD. 31, 31–32 (1992).

as an international crime.¹⁵¹ Pinnacle moments with respect to international law and women's rights include the unanimous adoption of Security Council Resolution 1325¹⁵² and the Rome Statute, both of which incorporate sexual violence as an international crime.¹⁵³ These measures heightened the need to espouse, promote and accept a gender regime.¹⁵⁴ The adoption of Security Council resolutions 1325,¹⁵⁵ 1820,¹⁵⁶ and 1889¹⁵⁷ presented a new language that recognized women as "subjects of international law, enjoying autonomy and rights," as opposed to vulnerable victims.¹⁵⁸ Security Council Resolution 1325 also promoted institutional change by insisting on the integration of a gender perspective in UN peace and security work.¹⁵⁹ By mandating consciousness of gender issues, the resolutions empowered local women's groups.¹⁶⁰

The claim that Islam must permeate every aspect of the state makes application of the public-private divide exceedingly difficult in many Islamic states. This view rises from a distinctive Islamist¹⁶¹ jurisprudence that maintains that religion lies at the epicenter of everything.¹⁶² And yet, because Muslim states have been willing to

151. Fionnuala Ní Aoláin et al., *Criminal Justice for Gendered Violence and Beyond*, 11 INT'L CRIM. L. REV. 425, 432–37 (2011); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 295, 346–49 (2003); *Economic and Social Council, Report on the Situation of Human Rights in Rwanda, Submitted by Rene Degni-Segui*, UN Doc. E/CN.4/1996/68 (Jan. 29, 1996), available at <http://www1.umn.edu/humanrts/mission/country52/68-rwa.htm>, archived at <http://perma.cc/RJ4P-58EG>; *The Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T (Sept. 2, 1998), available at <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>, archived at <http://perma.cc/7ETA-44UJ>.

152. S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

153. Significantly, the Rome Statute does not recognize rape and sexual violence as standalone crimes, but as a subset of genocide (Article 6(d)—"Imposing measures intended to prevent births within the group;"); a crime against humanity (Article 7(g)—"Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;"); or a war crime (Article 8(b)(xxii)—"Committing rape, sexual slavery, enforced prostitution, forced pregnancy"). Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (June 15, 1998) [hereinafter Rome Statute]; see also S.C. Res. 1325, *supra* note 152.

154. Rome Statute, *supra* note 153.

155. S.C. Res. 1325, *supra* note 152.

156. S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).

157. S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009).

158. Dianne Otto, *Power and Danger: Feminist Engagement with International Law Through the UN Security Council*, 32 AUSTRALIAN FEMINIST L.J. 97, 103 (2010).

159. See, e.g., Nadine Puechguirbal, *Gender Training for Peacekeepers: Lessons from the DRC*, 10 INT'L PEACEKEEPING 113, 114 (2003).

160. Otto, *supra* note 158, at 118–19; Elisabeth Porter, *Women, Political Decision-Making, and Peace-Building*, 15 GLOBAL CHANGE, PEACE & SECURITY 245, 254–55 (2003).

161. See *infra* Part III.B.

162. See, e.g., ABUL'LA MAUDUDI, *THE RELIGION OF TRUTH* 2–8 (Misbahul Islam Faruqi ed., 1970).

adopt international human rights agreements, including conventions demanding gender equality, others claim that the rights accorded under these treaties are only for the public sphere and not the private.¹⁶³ Opposition towards a typically gender-neutral understanding of international human rights law and a pledge to maintain the separation between private and public spaces incentivizes conservatives to locate issues within the private sphere into which such rights arguably do not extend.¹⁶⁴ The roots of this approach lies in the early anti-colonial movement during which conservative groups continued to demand that women maintain traditions.¹⁶⁵ For conservative groups, “[t]he private was seen as the space for women who would keep the family insulated from the pressures of the public colonial world. Women then became the custodians of the culture of ethnic, religious, and tribal groups.”¹⁶⁶

In contemporary society, numerous Islamic states,¹⁶⁷ including Afghanistan, sustain a division between the public and private.¹⁶⁸

163. Donna Arzt, for example, notes the opposition of the Saudi delegate to Article 18 of the International Convention on Civil and Political Rights. The Saudi delegate argued that the prohibition against coercion regarding the practice of one’s chosen religion raised doubt among those for whom religion is a way of life. Addressing the conventions on women, Arzt points out that the Saudi delegates to the UN in 1948 also opposed provisions on women’s rights, arguing that Islamic law addresses these rights and that marriage should not be burdened by international requirements that call for wives to be of full age and enjoy equal rights. Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 217–19 (1990). See also Theresa Perkins, Note, *Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo*, 30 B.U. INT’L L.J. 529, 562–64 (2012) (pointing out how Kosovo, Tunisia and Turkey have adhered to and at times manipulated international human rights law in relation to religious veiling).

164. See *infra* Part III.A.

165. See Badran, *Between Secular and Islamic Feminism/s*, *supra* note 133, at 6–7.

166. Coomaraswamy, *supra* note 59, at 487. Adrien Wing writes: “custom and customary law in the Palestinian community are based upon patriarchy that has resulted in women’s continued social and legal subordination. Men govern the public and private lives of women, often limiting them to their historical roles as nurturers and repositories of family honor.” Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT’L L.J. 149, 157 (1994).

167. An Islamic State is understood as a state that places Islam at its epicenter. Pakistan is a fitting example of an Islamic state. It began as an Islamic Republic (or a Muslim State) and later turned into an Islamic State in 1973. Ziring distinguishes the two, asserting that an Islamic Republic separates religion from politics and government as it stresses the need for a secular, constitutional government and society, while an Islamic State governs along Islamic precepts, rejecting the values that the Islamic Republic espouses. Lawrence Ziring, *From Islamic Republic to Islamic State in Pakistan*, 24 ASIAN SURV. 931, 931–32 (1984).

168. This was made abundantly clear under Taliban rule; women had to wear the veil in public even though the veil is arguably a religious symbol. Anastasia Telesetsky, *In the Shadows and Behind the Veil: Women in Afghanistan Under the Taliban Rule*, 13 BERKELEY J. INT’L L. 293 (1998). However, as Perkins explains women wear the veil for a number of reasons, including community identification, tradition, and as a personal choice. Perkins, *supra* note 163, at 533–36.

This type of behavior is most visible when it comes to the enactment of laws that view whom domestic actors as secular or western, which leads the government to adopt the CEDAW albeit with reservations.¹⁶⁹ Nonetheless, measures that address the private sphere—marriage, inheritance, divorce, custody, etcetera—are characterized not only by a demand but a commitment to keep the state out.¹⁷⁰ As Professor Asifa Quraishi, a scholar and activist in the field of Islamic Law and women notes: “when *shari’a*-based legislation is opposed as contrary to international rights norms, such opposition often triggers an almost knee-jerk reaction among many Muslims to fiercely defend these laws as if they were defending their religion itself against a crusade-like attack.”¹⁷¹ Quraishi therefore argues that the reaction is often more about repudiating the international community than it is about Islamic law, which suggests that one has to work with Islamic jurist and *shari’a* courts¹⁷² though not with the neoliberal international system.¹⁷³

III. ISLAM, WOMEN’S RIGHTS AND ISLAMISM

This section highlights that Islam is not hostile to women and women’s rights, but that the combination of tribal and patriarchal norms buoyed by contrived interpretation of Islamic law and empowered by the rise of Islamism—political Islam¹⁷⁴—fuels misogyny.¹⁷⁵

169. Venkatraman, *supra* note 35, at 1950–51, 2000–06 (defending the reservation that a number of Muslim states attached to CEDAW because the convention encapsulates inherent cultural bias with respect to Muslim-majority states).

170. SARDAR ALI, *supra* note 31, at 93–94.

171. Asifa Quraishi, *What if Sharia Weren’t the Enemy?: Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 175 (2011).

172. Ayesha Imam, a member of the international solidarity network Women Living Under Muslim Laws (WLUML) and founding director of BAOBAB For Women’s Human Rights, argues that the way to advance women’s rights and protection is through Muslim Law. She further notes that the involvement of the international community and of international human rights may be detrimental to the cause. Ayesha Imam, *Working Within Nigeria’s Sharia Courts* Human Rights Dialogue 2.10 (Fall 2003): “Violence Against Women,” CARNEGIE COUNCIL (2003), <https://www.carnegiecouncil.org/publication/archive/dialogue/2-10articles/1053.html>, archived at <http://perma.cc/M6MZ-G845>; see also Ayesha Imam, CARNEGIE COUNCIL (Dec. 15, 2010), https://www.carnegiecouncil.org/people/data/ayesia_iman.html, archived at <http://perma.cc/L57W-9ZCX>.

173. For a critique of the international community and its approach to peacebuilding see Roger Mac Ginty, *Routine Peace: Technocracy and Peacebuilding*, 47 COOPERATION & CONFLICT 287, 290–91 (2012) (highlighting how bureaucratization and institutionalism help promote neoliberal values in peacebuilding, often at the interests of local communities); see also Oliver P. Richmond, *The Legacy of State Formation Theory for Peacebuilding and Statebuilding*, 20 INT’L PEACEKEEPING 299, 299–300 (2013) (noting the role of power and realist conception of the state when it comes to liberal peacebuilding).

174. See *infra* Part III.A.

175. See Mir-Hosseini, *supra* note 45, at 629 (noting that the Iranian Islamic revolution betrayed women by subverting their rights and denying them justice); Sayeh & Morse, *supra* note 35, at 313 (challenging the assumption that Islam is the cause of the limited

Conservatives, who view empowerment policies as a challenge to Islamic, tribal and cultural norms, take the view that the policies must be coached as private space issues,¹⁷⁶ which therefore leads to the argument that opposition is not based on gender but rather on a need to remain true to one's culture or religion.¹⁷⁷ Thus, critical to the analysis below is recognizing three key issues: first, Islam is not only a religion; it is an all-encompassing way of life.¹⁷⁸ This makes it difficult to question certain principles,¹⁷⁹ unless the Qur'an and/or the *Sunnah* (general behavior of the Prophet) offer a clear account.¹⁸⁰ Second, for the Islamist the "gate of *ijtihad*" (reasoning) was closed in the ninth century, which means that opponents of women's rights claim that new interpretations of Islamic law are not allowed.¹⁸¹ Simply, the argument is that this is what was decreed and Muslims are bound by what had been decreed.¹⁸² Third, Muslim societies are conservative,¹⁸³ though, the sense of a conservatism intensifies in relation to the family and to honor, which has a direct impact on the public-private divide as those opposing the empowerment of women increasingly take the Islamist interpretation when it comes to family and honor in rejecting reforms.¹⁸⁴

The jurisdictional methodology of Islamic law, which originates with the divine and moves to the earthly, reflects this broad view of

development of women's rights in Muslim societies); Kathryn J. Webber, *The Economic Future of Afghan Women: The Interaction between Islamic Law and Muslim Culture*, 18 U. PA. J. INT'L ECON. L. 1049, 1052 (1997) (highlighting that Islam itself is not antiwoman; rather, the Taliban's interpretation of Islam, which is infused with misogynistic social norms and customs, limits Afghan women's economic opportunities).

176. Bharathi Venkatraman, for example, argues that the Report of the Committee on the Elimination of Discrimination against Women, which criticizes arranged marriages, common in Islamic States, highlights a cultural bias. Venkatraman, *supra* note 35, at 2000–02 (1995).

177. *Id.*

178. See JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 3, 16–17, 158–59 (2d ed. 1990).

179. M. M. Slaughter writes: "[N]o distinction was made between religious law and that of the secular state . . . Law, consequently, is God-given and is constitutive of Islam and of the Islamic community." M. M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 165 (1993).

180. See Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491, 491–93 (1987) (discussing the relationship between Islamic law, international law and women's rights); see also WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 21 (2009).

181. Hallaq, *supra* note 39, at 3–4 (rejecting the notion that the gates of *Ijtihad* were closed and arguing that Islamic legal theory has continued to apply reasoning in interpreting Islamic law).

182. *Id.*

183. See, e.g., ERNEST GELLNER, MUSLIM SOCIETY 1–2 (1991).

184. For example, Egypt's four reservations to the CEDAW all involved family issues. Anna Jenefsky, *Permissibility of Egypt's Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women*, 15 MD. J. INT'L L. & TRADE 199 (1991).

Islam and the corresponding demands of its disciplines.¹⁸⁵ At the top of Islamic law is the Qur'an, which is comprised of the verbatim words of Allah (God) as revealed to the Prophet Mohammed over a period of twenty-three years and is therefore the most authoritative guide to how Muslims should conduct themselves.¹⁸⁶ Thus, the centrality of the Qur'an stems from the fact that *'huda'* (guiding light) provides its reader with knowledge to help the reader live a righteous existence.¹⁸⁷ The Qur'an's centrality within the Muslim community can be ascribed to this provision of knowledge—both divine and earthly.¹⁸⁸ The thread that links Muslims together, the Qur'an "is aimed at establishing basic standards for Muslim societies and guiding these communities in terms of their rights and responsibilities."¹⁸⁹ The challenge however is that within the Qur'an's 114 *surahs* (chapters)¹⁹⁰ and 6237 *ayat* (verses), only approximately 190 *ayat* are legal rules.¹⁹¹ The limited number of legal rules has led to the development of secondary Islamic sources: the *Sunnah*, which comprises of the narratives and practices sanctioned by the Prophet Mohammed in a series of *hadiths* (reports); *ijma* (consensus of opinion), which is based on rational proof and reasoning that come from divine revelation; the *qiyas*, which use analogical reasoning to cover the application of *sharia* to new situations and ideas; and *urf* (custom),¹⁹² the collective practice of a group of people, which complements rules that the Qur'an does not fully explain.¹⁹³ Consequently, a practicing Muslim has to combine the

185. Sayeh & Morse, *supra* note 35, at 312–18.

186. *Id.*

187. Muin-ud-din Ahmad Khan, *The Concept of Knowledge in the Quran*, 18 HUMANOMICS 26, 26–27 (2002).

188. See, e.g., Ashraf U. Kazi & Abdel K. Halabi, *The Influence of Quran and Islamic Financial Transactions and Banking*, 20 ARAB L.Q. 321, 322 (2006) (highlighting the role of the Quran in guiding day-to-day life, including financial transactions and banking).

189. Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining The Theory and Practice of Polygamy and Talaq*, 21 INT'L J. L. POL'Y & FAM. 108, 108, 110 (2007) (assessing the compatibility of international human rights law and Islamic family law, while highlighting the impact of socio-economic, political and indigenous tribal values on the development of Islamic law).

190. ABDULLAH YUSUF ALI, *THE MEANING OF THE HOLY QUR'AN* vii–viii (11th ed. 2006).

191. Gamal Moursi Badr writes that "[t]he Qur'an is far from being a legal code. In fact it contains very few legal provisions. Out of a total of 6237 verses only 190 verses or [three percent] of the total can be said to contain legal provisions." Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187, 188 (1977–1978).

192. Modern Muslim society continues to rely on *urf*. See Wing, *supra* note 166, at 152–53 (explaining that modern Muslim society continues to rely on *urf*).

193. Helena Malikiyar notes that "[w]hen the great jurists such as Abu Hanifa and Malik ibn Anas attempted to fill the gaps in Islamic *fiqh* (jurisprudence), they incorporated a great deal of customary practices and traditionally established norms of their environment. The Hanafi rulings on marriage and divorce . . . reflect their founder's strictly patriarchal heritage." Helena Malikiyar, *Development of Family Law in Afghanistan: The Roles of the Hanafi Madhab, Customary Practices and Power Politics*, 16 CENT. ASIAN SURV. 389, 390 (1997). The Qur'an, for example, requires that a husband provide for his wife, without

divine with the earthly.¹⁹⁴ While duties (*farud*) are discernible within the Qur'an, rights (*huquq*) are less visible.¹⁹⁵ Islam's strong emphasis on communitarian values¹⁹⁶ adds further complexity. Famed jurist Sayyid Jamal al-Din al-Afghani, for example, cautioned against tribalism because it rejects the uniform application of Islam.¹⁹⁷ The additional element of reasoning is controversial because the nature of the Qur'an and its limited number of legal rules make it difficult at times to reach a collective agreement (*ijtihad jama'i*).¹⁹⁸ Few statements within the Qur'an are unambiguous, such that legal pluralism—which highlights the flexibility and adaptability of Islamic law when the application of reasoning necessitates developments—plays an important role in its interpretation.¹⁹⁹ Jurists al-Amidi and al-Baydawi, however, take the position that only Muslim adults who are well-versed in all aspects of Islamic law can engage in *ijtihad*.²⁰⁰ These three elements are also affected by Muslim society's loyalty to a system of social hierarchy in which free, adult Muslim men enjoy the most civil and political rights.²⁰¹ Free mature Muslim women occupy the second tier, with slave non-Muslim female minors occupying the lowest tier.²⁰² The rights of women draw on the first four sources: the Qur'an, *hadiths*, *ijma*, and *qiyas*.²⁰³ Male dominance, however, ensures that *urf* reasoning, disguised as true source of Islamic law, takes precedence, therefore limiting the body of women's rights.²⁰⁴

stating how much. Christie S. Warren, *Lifting the Veil: Women and Islamic Law*, 15 CARDOZO J.L. & GENDER 33, 38 (2008).

194. Warren, *supra* note 193, at 34.

195. Arzt, *supra* note 163, at 206.

196. Slaughter notes:

Islamic society thus is defined by a system of duties and obligations that God commands man to follow. This will create a just society; in Islam this means one that conforms to the will of God. Islam is therefore an intensely legal religion where the law expresses the *nomos* and essence of the community. This community, or *ummah*, replaces other boundaries of corporate identity such as family, tribe, and nation. The *ummah* is open to all who recognize Allah and his Prophet Mohammed. Neither membership nor allegiance is determined by race, caste, or class.

Slaughter, *supra* note 179, at 173.

197. Sayyid Jamal al-Din al-Afghani, *Islamic Solidarity*, in ISLAM IN TRANSITION: MUSLIM PERSPECTIVES 16–18 (John J. Donohue & John L. Esposito eds., 2007).

198. Hallaq, *supra* note 39, at 7–8.

199. *Id.* at 4.

200. Nadirsyah Hosen, *Nahdlatul Ulama and Collective Ijtihad*, 6 NEW ZEALAND J. ASIAN STUD. 5, 5 (2004).

201. Shaheen Sardar Ali asserts that of 6666 verses in the Qur'an at the most only six verses reinforce the social hierarchy claim. SARDAR ALI, *supra* note 31, at 43.

202. Khaliq, *supra* note 143, at 13–14.

203. SARDAR ALI, *supra* note 31, at 42.

204. Writing about Palestinian women, Professor Wing states: "As a result of customary norms, women are governed by a system of patriarchy in which their roles are limited to nurturers and repositories of family honor." Wing, *supra* note 166, at 152–53. See also John

A. Islamism: Its Role and Impact on Women's Rights

Islam has had to contend with many strands that espouse interpretations and agendas manifestly different from those of the mainstream.²⁰⁵ Since 9/11, conservative interpretations of Islam have become more frequently associated with fundamentalists, radicals and, in extreme cases, jihadists.²⁰⁶ The interconnectedness of politics, Islam and Islamic religious revivalism has facilitated the rise of Islamism.²⁰⁷ Often viewed as a political movement, Islamism appears in different shades and variations.²⁰⁸ Islamists are interested in not only ensuring that Muslims practice Islam in the same manner as the Prophet Mohammed and his immediate followers, but also that Islam is at the center of society: state.²⁰⁹ This demands participation in the political process as a key way to change policy or introduce new

Hursh, *Advancing Women's Rights Through Islamic Law: The Example of Morocco*, 27 BERKELEY J. GENDER L. & JUST., 252, 252, 275 (2012) (reviewing women's rights in Morocco following the 2004 changes to Morocco's Code of Personal Status); Alexandra J. Zolan, *The Effect of Islamization on the Legal and Social Status of Women in Iran*, 7 B.C. THIRD WORLD L.J. 183, 193 (1987) (noting how the status of women changed after the Iranian revolution due to the implementation of traditional Islamic precepts related to women, their position and duties vis-à-vis the family).

205. MOHAMMED AYOUB, *THE MANY FACES OF POLITICAL ISLAM: RELIGION AND POLITICS IN THE MUSLIM WORLD* 22, 34 (2008).

206. *Id.* at 1, 17.

207. See OLIVER ROY, *THE FAILURE OF POLITICAL ISLAM* 4, 13 (Carol Volk trans., 1994); Guilain Denoeux, *The Forgotten Swamp: Navigating Political Islam*, 9 MIDDLE E. POL'Y 56, 61 (2002); Graham E. Fuller, *The Future of Political Islam*, 81 FOREIGN AFF. 48, 49 (2002).

208. Mohammed Ayoob writes:

In practice, no two Islamisms are alike because they are determined by the contexts within which they operate. What works in Egypt will not work in Indonesia. What works in Saudi Arabia will not work in Turkey. Anyone familiar with the diversity of the Muslim world—its socioeconomic characteristics, cultures, political systems, and trajectories of intellectual development—is bound to realize that the political manifestations of Islam, like the practice of Islam itself, are to a great extent context specific, the result of the interpenetration of religious precepts and local culture, including political culture.

Mohammed Ayoob, *Political Islam: Image and Reality*, 21 WORLD POL'Y J. 1, 1–2 (2004); Fuller, *supra* note 207, at 49–50.

209. Professor Maha Azzam notes:

The roots of contemporary radicalism lie more in the secular tradition and experience than in the realms of religion and its legacy, which now offer so many new trajectories in regard to legitimate political action and the resort to violence. There is a shared anger and sense of humiliation across different ideological and political groups in the Muslim world. Islamism has harnessed these feelings and provided more effective networks and a more expressive language of resistance than other ideological currents at this historical juncture. Islamist groups continue to gain ground, partly because of an increase in religiosity and faith in Muslim societies and partly because of politics. With the growing Islamization of Muslim societies culturally, the ground is being prepared for a greater acceptance among many for an Islamization of the state as well.

Maha Azzam, *Islamism Revisited*, 82 INT'L AFF. 1119, 1121 (2006).

measures through the political process.²¹⁰ As Islamic law was incorporated into criminal and civil justice systems,²¹¹ the Muslim state took over the legal realm by funding the Islamic court system.²¹² The state thus became purveyor, interpreter and executor of the law, effectuating a synergy of religion and customary tribal norms.²¹³ As Wael B. Hallaq notes, this shift was possible because God revealed textual signs “that form the speculative, hermeneutical basis of legal construction.”²¹⁴ As the state became more established as a political entity, it absorbed the responsibility for legal authority at the expense of the *faqih*s (traditional legal scholars).²¹⁵ The meaning of this change becomes especially visible in circumstances in which the state is weak and rulers are able to impose their will on the people either through oppression or through social, economic or cultural incentives; as rulers that view themselves as the embodiment of the state, seek support from either cultural leaders or, more commonly, religious leaders, they established a unique alliance that necessitates mutual support.²¹⁶

In Islamist societies, debates over private and a public are not particularly visible.²¹⁷ Islamic law has incorporated cultural and

210. Stacey Philbrick Yadav writes:

Islamists can be understood as actors who seek to transform the terms of public debate, whether institutionally or discursively. In the institutional realm, this means changing the formal rules that order the relationship between state and society, while discursive change is reflected in the informal rules and norms that give shape to this relationship.

Stacey Philbrick Yadav, *Understanding “What Islamists Want:” Public Debate and Contestation in Lebanon and Yemen*, 64 MIDDLE E. J. 199, 200 (2010).

211. Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT’L L. 759, 760–61 (2004) (discussing how Islamic law and institutions must co-exist with democratic governance).

212. Amira Sonbol writes:

One of the main reasons for the change in treatment of women in modern *Shari’ah* courts is that when modern States built new separate *Shari’ah* courts, they did not apply precedents from pre-modern *Shari’ah* courts. Rather, modern States constructed legal codes compiled by committees, handed the new codes to *qadis* educated in newly opened *qadi* schools, and had them apply the codes in court.

Amira Sonbol, *Women in Shari’ah Courts: A Historical and Methodological Discussion*, 27 FORDHAM INT’L L.J. 225, 232–33 (2003).

213. *Id.*

214. Wael B. Hallaq, *Juristic Authority vs. State Power: The Legal Crisis of Modern Islam*, 19 J.L. & RELIGION 243, 245 (2003).

215. *Id.* at 258.

216. The most visible example of this type of relationship is Saudi Arabia where religion serves as a source of legitimacy for the ibn Saud royal family who in return only support the Wahhabi version of Sunni Islam. See Michael G. Nehme, *Saudi Arabia 1950–80: Between Nationalism and Religion*, 30 MIDDLE E. STUD. 930, 934 (1994); Joseph Nevo, *Religion and National Identity in Saudi Arabia*, 34 MIDDLE E. STUD. 34, 34, 37 (1998).

217. Elizabeth Thompson, *Public and Private in Middle Eastern Women’s History*, 15 J. WOMEN’S HIST. 52, 52 (2003) (calling for greater discussion of the “public” and “private” in examinations of the history of women’s issues in Muslim societies).

traditional legal norms disguised as religious law with respect to women and their rights.²¹⁸ Male domination renders the public-private dichotomy difficult to discern: men define the bounds of private and public,²¹⁹ and, male dominance within judicial and political systems, coupled with a willingness to apply the repugnancy clause²²⁰ when interpreting laws, ensures a propensity to rule against women and women's rights that challenge patriarchy.²²¹

B. Family Law and Women

When it comes to Muslim women, the gender debate occurs in two increasingly interconnected spheres: (1) the religious sphere that relies on the Qur'an and specifically Islamic law;²²² and (2) the cultural-socio-economic sphere²²³ that posits arguments designed to either defend or reject the current status of Muslim women.²²⁴ Thus, those opposing the empowerment of women may argue that empowerment would undermine social values, specifically the family.²²⁵ An integral element in the debate is the rewriting or reinterpretation of history and religion.²²⁶ The role of culture and religion is

218. *Id.* at 54–55.

219. In Afghanistan and other countries in which the Constitution declares the country is an Islamic Republic (Art. 1) and no law can challenge Islamic law (Art. 3), the division between the private and public is non-existent. Islamic law is supreme. CONSTITUTION, *supra* note 42, at Ch. 1, art. 1, 3. In the United Kingdom, for example, Islamic courts have the authority to rule on Muslim civil cases, specifically, but not exclusively, cases relating to family law, including domestic violence among married couples, and financial disputes. *Shari'a* courts operate as arbitration tribunals. Abul Taher, *Revealed: UK's First Official Shari'a Courts*, SUNDAY TIMES, Sept. 14, 2008, at 2.

220. "Repugnancy clauses" are "constitutional provisions that, in language that varies from nation to nation, require legislation to conform to some core conception of Islam." Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 WILLAMETTE L. REV. 427, 427 (2012).

221. See Amy C. Alexander & Christian Welzel, *Islam and Patriarchy: How Robust is Muslim Support for Patriarchal Values?*, 21 INT'L REV. OF SOC. 249, 271 (2011) (finding that Muslim support for patriarchy is strong).

222. See, e.g., An-Na'im, *supra* note 180, at 492.

223. BEVERLEY MILTON-EDWARDS, *CONTEMPORARY POLITICS IN THE MIDDLE EAST* 174 (2000); see also Webber, *supra* note 175, at 1052 (noting that Islamic law grants women specific economic rights, while recognizing that social and cultural norms limit women's economic power).

224. MILTON-EDWARDS, *supra* note 223, at 174–75.

225. Opponents of female empowerment who take a cultural approach argue that empowerment came at a social cost as it challenges traditional norms in relation to masculinity. Margrethe Silberschmidt, *Disempowerment of Men in Rural and Urban East Africa: Implications for Male Identity and Sexual Behavior*, 29 WOR. DEV. 657, 658 (2001) (discussing a case study finding that after economic hardship, women's empowerment is inversely related to male self-esteem and arguing that patriarchy helps disguise male growing sense of disempowerment).

226. A good example of this is the debate over polygamy. Before the Battle of Uhud, polygamy was associated with *jahiliyya*—pre-Islamic times. After the battle, however,

well-established,²²⁷ but it becomes most visible with respect to sexuality²²⁸ and family law, specifically divorce²²⁹ and children and women's obedience to their husband or male relatives.²³⁰ Iranian feminist Ziba Mir-Hosseini captured this development, arguing that the most developed area of *fiqh* (science of jurisprudence) is Islamic family law.²³¹ This is ironic because family law is also the area in which "the boundary between sacred and temporal has been most blurred."²³² Thus, jurisprudence is central to women's rights and the position of women in Islam; it is through *fiqh* that Muslim jurists interpret the *shari'a*, which is then applied to society as a whole.²³³ Notably, when delving into the discourse, there exists a need to distinguish between

the Prophet Mohammed allegedly allowed Muslim men to take multiple wives because only ten percent of the men who went to battle with Mohammed survived, leaving many women and children without a husband/father to support them. Brooke D. Rodgers-Miller, Note, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 543–45 (2005).

227. See, e.g., Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 5 (1997) ("Many aspects of the life of Muslims in Muslim countries, including their views on the education of women and their family laws, rest in substantial part on medieval Islamic jurisprudence. Scholars based this jurisprudence on two components: religious and cultural.").

228. Justin Leites, *Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World*, 22 COLUM. HUM. RTS. L. REV. 251, 255–60 (1991).

229. Arguably, only men have the right to seek a divorce. Karin Carmit Yefet, *The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, 34 HARV. J.L. & GENDER 553, 557 (2011).

230. Conservative Muslims refer to Sura 4, Verse 34 in the Qur'an to justify men's dominance within the family. The verse states:

(Husbands) are the protectors And maintainers of their (wives) Because Allah has given The one more (strength) Than the other, and because They support them From their means. Therefore the righteous women Are devoutly obedient, and guard In (the husband's) absence What Allah would have them guard. As to those women On whose part ye fear Disloyalty and ill-conduct, Admonish them (first), (Next) refuse to share their beds, (And last) spank them (lightly); But if they return to obedience, Seek not against them means (of annoyance): For Allah is Most High Great (above you all).

YUSUF ALI, *supra* note 190, at 195–96; see also Hajjar, *supra* note 36, at 10 (looking at the relationship among domestic violence, impunity and the state, and how religion is used to block legislation that would prevent domestic violence).

231. Mir-Hosseini, *supra* note 45, at 643.

232. *Id.*

233. See, e.g., Asma T. Uddin, *Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia*, 7 U. ST. THOMAS L.J. 603, 603 (2010) (analyzing regulations and their impact on society in Aceh). Shannon Dunn and Rosemary Kellison note a German case in which a woman of Moroccan descent petitioned a German court for a speedy divorce on the grounds that her husband was physically abusive towards her and had threatened to kill her. Even though the police had come to the couple's home, Judge Christa Datz-Winter refused the petition, arguing that wife beating was common in Moroccan culture and the Qur'an permits such violence. Shannon Dunn & Rosemary B. Kellison, *At the Intersection of Scripture and Law: Qur'an 4:34 and Violence against Women*, 26 J. FEMINIST STUD. & RELIGION 11, 11–12 (2010).

the religion that is Islam and those that interpret it.²³⁴ As Amina Wadud notes: “[A]fter the death of the Prophet, Islam, as it has been practiced, has been less than just to women.”²³⁵ She adds:

[S]ocial groups—have not always lived up to complete gender justice. The absence of justice and equality for women in Muslim society was not the intention of Islam as established in the Qur’anic worldview, nor was it an intention of Muslim societies to dishonor women. However, when such injustice has been made apparent, we must alleviate its impact and correct its harm, rather than defend it on the grounds that it was unintentional.²³⁶

Islam guaranteed Muslim women an independent legal personality that includes a right to hold property, have their own inheritance, enjoy education—as long as it is separated from that of men—and participate in public life.²³⁷ Also, when it comes to family law, Islam not only restricted polygamy, but guaranteed a wife’s right to maintenance and right treatment.²³⁸ This view is based on the claim that Islam does not distinguish between men and women when it comes to their relationship with Allah.²³⁹ These scholars thus maintain that a distinction exists between Islamic law and its interpretation.²⁴⁰ Islamists however reject the aforementioned view, taking a distinctive view of women and their rights, which stems from the way they interpret the Qur’an, Islamic Law,²⁴¹ and *fiqh*, which they use to justify

234. Ziba Mir-Hosseini argues that the loss of stature and rights of women in Iran can be attributed to the rising importance that clerics placed on *fiqh*, especially in the realm of family law. She claims:

The Islamic judges in whose courts I sat in the 1980s often told me that I had chosen the wrong place to learn about the sharia. I should to [sic] go to the seminaries, they said, to read *fiqh* texts and discuss them with the *ulama*; the courts had nothing to teach me about the sharia.

Mir-Hosseini, *supra* note 45, at 635.

235. Amina Wadud, *Towards a Qur’anic Hermeneutics of Social Justice: Race, Class and Gender*, 12 J.L. & RELIGION 37, 47 (1996).

236. *Id.*

237. See Webber, *supra* note 175, at 1060–62, 1068, 1070; see also Sayeh & Morse, *supra* note 35, at 324–25 (1995).

238. Sayeh & Morse, *supra* note 35, at 328–29.

239. Khaliq, *supra* note 143, at 12–13; Sadia Kausar, Sjaad Hussain & Mohammad Mazher Idriss, *Does the Qur’an Condone Domestic Violence?*, in HONOUR, VIOLENCE, WOMEN AND ISLAM 96, 96 (Mohammad Mazher Idriss & Tahir Abbas eds., 2010).

240. See ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS xi (4th ed. 1995) (explaining that Islam is only one factor in contemporary human rights in Muslim society); Webber, *supra* note 175, at 1052–53, 1057–58 (illustrating the difference between Islam and social norms in economic laws).

241. See J. Malcolm Garcia, *Why Syria’s Islamists are Gaining*, INT’L HERALD TRIB., Feb. 16–17, 2013, at 8; Camilla Hall & Michael Peel, *Women Anxious After Islamist Election Victory*, FIN. TIMES, Apr. 17, 2012, at 3; Patrick Kingsley, *International: Islamists Critical of UN Move on Women’s Rights*, THE GUARDIAN, Mar. 16, 2013, at 31; Trudy

their discriminatory agenda.²⁴² The clearest manifestation of the Islamist agenda vis-à-vis women is its defense of polygamy²⁴³ based on *Surah* 4:3, which reads: “Marry women of your choice, [t]wo, or three, or four.”²⁴⁴ The Islamists also apply other *surahs*, such as *surah* 24:31 to support the segregation of women and as a defense for the veil.²⁴⁵ Polygamy, segregation of the sexes and the veil are common in traditional, rural Muslim societies that sustain their cultural and tribal heritage.²⁴⁶ As a result, the link between culture and religion is at times blurred in traditional Muslim society.²⁴⁷

C. Family, Tribal Practices, Patriarchy and Insecurity

The masculine interpretation of Islam becomes most visible in societies with a strong tribal identity—Saudi Arabia, Yemen, Iraq,

Rubin, *Worldview: Women Apprehensive Over Rise of Islamist Parties*, PHILA. INQUIRER, Oct. 30, 2011, at D01.

242. See Sayeh & Morse, *supra* note 35, at 312.

243. Heather Johnson, Note, *There Are Worse Things than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563, 563, 565–69 (2005) (reviewing the debate over polygamy in Islam and noting the different interpretation of *Surah* 4:3).

244. ABDULLAH YUSUF ALI, *THE MEANING OF THE HOLY QUR’AN* 184 (1997). The problem with this *Surah* is that when it is read in its fullest, a different image emerges.

If ye fear that ye shall not [b]e able to deal justly [w]ith the orphans, [m]arry women of your choice, [t]wo, or three, or four; [b]ut if ye fear that ye shall not [b]e able to deal justly (with them), [t]hen only one, or (a captive) [t]hat your right hands possess. That will be more suitable, [t]o prevent you [f]rom doing injustice.

Id. When the Prophet Mohammed’s wife Khadija died, this *Surah* arguably permitted his marriage to a number of women as a way to strengthen Islam and gain protection from enemies that wanted to harm him and Islam. Leila Ahmed, *Women and the Advent of Islam*, 11 SIGNS 665, 678–88 (1985) (recognizing the difficulty of discerning to the impact of Islam on women).

245. See, e.g., Valorie K. Vojdik, *Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities*, 33 HARV. J.L. & GENDER 661, 666–76 (2010) (arguing that the debate over the veil in Turkey is as much about power as it is about religion, secularism and the relationship between the West and Islam); see also Mayer, *supra* note 22, at 402–04 (arguing that Islamism represents an interpretation of Islamic law and that the construction of Islamic precepts vis-à-vis women in Saudi Arabia and Iran stems from that distinctive interpretation).

246. See, e.g., Sarah Carmichael, *Marriage and Power: Age at First Marriage and Spousal Age Gap in Lesser Developed Countries*, 16 THE HISTORY OF THE FAMILY 416 (2011) (finding that education and urbanization have an impact on the age at which one marries).

247. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights*, 12 AM U. J. INT’L L. & POL’Y 1, 5 (1997).

The cultural component gave rise to certain fundamental social and political assumptions. These assumptions have become so deeply-rooted in Islamic jurisprudence that many Muslims are no longer aware of their non-religious origins. The assumptions gave rise to a then common model of state and family relationships which are best described today as authoritarian/patriarchal.

Id.

Sudan, Pakistan and Afghanistan.²⁴⁸ In these tribal societies, the role and the significance of the family increase.²⁴⁹ Economic progress and social movement occur through the family,²⁵⁰ which also imposes enormous restrictions on women who sustain the tribe through procreation, thereby compelling men to control them.²⁵¹ Albert Hourani views the “tribe” as a natural phenomenon of rural society in which people come together because cooperation is central for survival.²⁵² Russel Barsh asserts that the term tribal in contemporary social science denotes a group of related people that share a kinship that sets them apart from others.²⁵³ “In a tribe, *kinship* is the principal institution; social, economic, cultural, religious and political activity is organized around kinship groupings, such as lineages and clans. Kinship relationships govern most individual rights and responsibilities.”²⁵⁴

In societies in which insecurity is pervasive and the state is either non-existent or perpetually weak, individuals believe that they can only rely on themselves for security. This explains the development

248. The influence of tribal culture on women is evident in Afghanistan in which familial or kinship ties have extended into political and religious worlds. Dupree, *supra* note 28, at 986 (explaining that Afghans remain committed to their identity, which is based on tradition, location and culture, in spite of attempts to promote a national identity); *see also* Vojdik, *supra* note 245, at 672–79 (using masculinities theory to examine the veil and its relationship to gender, political power and the state).

249. Hamza A. Alavi, *Kinship in West Punjab Villages*, 6 CONTRIBUTIONS TO INDIAN SOCIOLOGY 1, 1–3, 5 (1972).

250. In Pakistan, for example, the *biraderi* (brotherhood) of participation links families together. *Id.* at 1–2. Daniyal Mueenuddin, a Punjabi mango farmer describes *biraderi*: In Pakistan, your primary loyalty is to your biraderi, an untranslatable word, something like clan, but more visceral and entailing greater responsibility and connection. You marry among your biraderi, you must travel and be present when a member of your biraderi is married or buried and, in times of trouble, you stand by your biraderi.

Daniyal Mueenuddin, *A Lifetime, Washed Away*, N.Y. TIMES, Aug. 19, 2010, at A27. In the Arab World, the concept of *wasta*—mediation or intercession—allows one to intercede to provide a benefit to a client or family member. Robert B. Cunningham & Yasmin K. Sarayrah, *Taming “Wasta”: to Achieve Development*, 16 ARAB STUD. Q. 29, 29 (1994); Jihad Makhoul & Lindsey Harrison, *Intercessory Wasta and Village Development in Lebanon*, 26 ARAB STUD. Q. 25, 31 (2004).

251. Sherifa Zuhur, *Of Milk-Mothers and Sacred Bonds: Islam, Patriarchy, and New Reproductive Technologies*, 25 CREIGHTON L. REV. 1725, 1726 (1991–1992) (highlighting the importance of children, specifically sons: “Failure to bear sons often resulted in divorce and a return to a woman’s parental home, or in her husband’s marriage to another wife through the institution of polygamy. The pain of childlessness held devastating economic and social meaning for Muslim women.”).

252. Albert Hourani, *Conclusion: Tribes and States in Islamic History*, in TRIBE & STATE FORMATION IN THE MIDDLE EAST 303–04 (Philip S. Khoury & Joseph Kostiner, eds., 1990); *see also* TAMIM AL-BARGHOUTI, THE UMMA AND THE DAWLA: THE NATION STATE AND THE ARAB MIDDLE EAST 38–39 (2008).

253. Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL’Y 74, 75 (1999).

254. *Id.*

of the tribe and its continued existence.²⁵⁵ Fawaz Gerges writes that a tribalist society, “is disproportionately more religious than other social configurations. Among members of a tribe, the good of the individual is subservient to the collective good. When overlapping with religious and ideological affinities, tribal loyalties can be a powerful motivator.”²⁵⁶ Accordingly, the family is sacrosanct in tribal societies because it not only holds the tribe together, but also enables the tribe to withstand threats through filial linkages—all have to stand together against any threat or insult.²⁵⁷ Religious values only serve to place more demands on the family, which becomes central not only to the survival of the tribe but to the *umma* (community of the faithful).²⁵⁸ Islamists who espouse this rationale are therefore able to argue that the primary role of women is to raise children and look after the family,²⁵⁹ which in turn strengthens the community.²⁶⁰ Donna Lee Brown writes:

For conservative religious groups (including Muslim activists), women’s behavior has become shorthand for the health of a society. Moreover, women’s roles have become a mark of piety and religiosity. Men’s religiosity is judged by the demeanor of their women and the women’s conformity to ideal norms of behavior. The well-being of the community hinges upon visible patterns of female conduct.²⁶¹

The final ingredient within tribal societies, the importance of which is heightened by customary practices, is honor. Honor plays

255. See AL-BARGHOUTI, *supra* note 252, at 62–63, 93.

256. GERGES, *supra* note 37, at 108.

257. A contemporary example of this is the notion of “honor killing” a practice that involves the participation of families, immediate or extended, pain killing a person deemed to have brought shame and dishonor to the family and the tribe. See, e.g., Mazna Hussain, “Take My Riches, Give Me Justice”: A Contextual Analysis of Pakistan’s Honor Crimes Legislation, 29 HARV. J.L. & GENDER 223, 223–24 (2006) (noting that Mukhtar Mai was raped on the alleged order of Mastoi tribal council to punish Mai’s brother who was accused of having sexual relations with a woman from the Mastoi tribe); see also Rachel A. Ruane, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT’L L. REV. 1523, 1526 (2000).

258. NAZIH N. AYUBI, POLITICAL ISLAM: RELIGION AND POLITICS IN THE ARAB WORLD 35–36 (2003); Beth Baron, *Women, Honour, and the State: Evidence from Egypt*, 42 MIDDLE E. STUD. 1, 1–3 (2006).

259. C. Christine Fair’s study of madrasas in Pakistan emphasizes the role that women (mothers) play in fostering Islamic observance. At its most extreme, it encourages suicide terrorism. See C. Christine Fair, *Who Are Pakistan’s Militants and Their Families?*, 20 TERRORISM & POLITICAL VIOLENCE 49, 61 (2008); C. Christine Fair, *The Educated Militants of Pakistan: Implications for Pakistan’s Domestic Security*, 16 CONT. S. ASIA 93, 96 (2008); C. Christine Fair, *Militant Recruitment in Pakistan: Implications for Al Qaeda and Other Organizations*, 27 STUD. CONFLICT & TERRORISM 489, 495 (2004).

260. GERGES, *supra* note 37, at 52–54.

261. Donna Lee Bowen, *Islamic Law and the Position of Women*, in ISLAM AND SOCIAL POLICY 44 (Stephen P. Heyneman, ed. 2004).

a central role in the maintenance, preservation and expansion of discriminatory practices.²⁶² Studies suggest, in fact, that the issue of honor is not associated with religion as much as it is linked to cultural and tribal norms.²⁶³ The issue of honor became central to the formation of the Arab state; the state is considered a feminine entity and defense obligations fall on men.²⁶⁴ When the state is dishonored by a failure to adhere to strict Islamic or customary norms, men are also dishonored because they are unable to protect the state.²⁶⁵ As Beth Baron explains, “[h]onour in the Arab world is thus a collective affair[;] . . . [it] helped define the parameters of the collective. The entire family’s honour—and here family meant those related by blood through the male line—resides in the conduct of its women.”²⁶⁶

In contemporary Muslim society, “honor killings” exemplify the centrality of honor to the family and a woman’s position in society.²⁶⁷

262. See ARE KNUDSEN, VIOLENCE AND BELONGING: LAND, LOVE AND LETHAL CONFLICT IN THE NORTH-WEST FRONTIER PROVINCE OF PAKISTAN 129–30 (2009) (presenting an ethnographic study of the people of NWFP that highlights the impact of honor on society and its role in perpetuating often decade-long feuds). A study of 865 ninth-grade students in Jordan revealed that about approximately 40 percent of boys and around 20 percent of girls subscribe to the view that the killing of a daughter, sister or wife who has shamed or dishonored the family is justifiable. Manuel Eisner & Lana Ghuneim, *Honor Killing Attitudes Amongst Adolescents in Amman, Jordan*, 39 *AGGRESSIVE BEHAVIOR* 405, 405, 415 (2013); see also Masood Ali Shaikh et al., *Attitudes About Honour Killing Among Men and Women—Perspective From Islamabad*, 22 *J. AYUB MED. C. ABOTTABAD* 38, 39 (2010) (finding that of the 600 individuals that participated in the study, 343 or 57.1 percent found it acceptable and justifiable to kill one’s wife as a mean to save one’s honor).

263. Eisner and Ghuneim conclude: “[S]upport for honor killings is more widespread amongst adolescents from poorer and more traditional family backgrounds.” Eisner & Ghuneim, *supra* note 262, at 413. Moreover, they assert that traditionalism, a belief in female chastity and a tendency to morally neutralize aggressive behaviors inform attitudes towards honor killings. *Id.*

264. See Christina A. Madek, Note, *Killing Dishonor: Effective Eradication of Honor Killing*, 29 *SUFFOLK TRANSNAT’L L. REV.* 53, 55 (2006) (arguing that honor killings have become more entrenched and prominent in Islamic culture even though the Qur’an neither condones nor promotes the practice); Ruane, *supra* note 257, at 1567–68 (examining how the issue of women’s right is addressed in Jordan and Pakistan and why international law fails to provide solutions).

265. See Beth Baron, *The Construction of National Honor in Egypt*, 5 *GENDER & HIST.* 244, 250 (1993).

266. Beth Baron, *Women, Honour, and the State: Evidence from Egypt*, 42 *MIDDLE E. STUD.* 1, 1 (2006).

267. Lindsey N. Devers and Sarah Bacon write:

Honor crimes are a fatal form of social control and are a result of a broader form of gender threat. . . . At the individual level, women who violate these norms are considered a threat the community simply by the fact that they are antisocial or deviant to social mores and norms. At the macro level, because there is a lack of punishment by the state, men receive lenient punishment because this type of crime is seen as a traditional, cultural and familial, rather than an issue of law.

Lindsey N. Devers & Sarah Bacon, *Interpreting Honor Crimes: The Institutional Disregard Towards Female Victims of Family Violence in the Middle East*, 3 *INT’L J. CRIM. & SOC. THEORY* 359, 369 (2010).

Ideas about the proper conduct of women mold the concept of honor while the duty of restoring honor falls on men.²⁶⁸ A belief in male ownership of women gives rise to the notion that one can and should kill or harm a female family member if she behaves immorally or immodestly.²⁶⁹ The high incidence of honor killings²⁷⁰ suggests that men have responded to female immodesty in an increasingly extreme manner—with the spilling of blood.²⁷¹

IV. AFGHANISTAN AND WOMEN

Afghanistan has been in a state of persistent conflict since the 1970s. In 1973, Prince Daoud overthrew King Zahir Shah, ushering in a period of instability²⁷² that became worse after the Saur Revolution of 1978.²⁷³ The 1979 Soviet invasion then led to a ten-year war.²⁷⁴ With the Soviet withdrawal, Afghanistan descended into further violence (akin to a civil war) as the different mujahedeen groups fought for supremacy.²⁷⁵ This period facilitated the rise of the Taliban, which in turn faced opposition from other factions such as the Northern Alliance.²⁷⁶ Following 9/11, a U.S.-led international force invaded

268. *Id.* at 360–61.

269. *Id.*

270. Ali Shaikh et al., *supra* note 262, at 38 (finding that of the 600 individuals that participated in the study, 343 or 57.1 percent found it acceptable and justifiable to kill one's wife as a means to save one's honor).

271. In a piece on honor killing in Jordan, Douglas Jehl uses the case of Basma Goul, whose husband accused her of being unfaithful. Jehl notes that the accusation resulted in the ostracization of the Goul family; Basma's eight sisters were deemed unmarriageable and her five brothers were taunted in the streets. Basma's sixteen-year-old brother ultimately killed her. Douglas Jehl, *Murder for Honor*, N.Y. TIMES UPFRONT, Dec. 13, 1999, at 18.

272. Prince Daoud adopted a very ambitious program of economic and social reform akin to Stalin's infamous five-year plans that included the nationalization of banks and insurance as well as major reforms to agriculture, taxation, commercial and criminal law. NANCY PEABODY NEWELL & RICHARD S. NEWELL, *THE STRUGGLE FOR AFGHANISTAN* 47 (1981); David Chaffetz, *Afghanistan in Turmoil*, 56 INT'L AFF. 15, 16 (1980).

273. The Saur Revolution led to the emergence of the People's Democratic Party of Afghanistan (PDPA). Primarily a student movement in the 1960s, the PDPA benefitted from the liberal policies of King Zahir Shah. It was supported by the Soviet Union and its aims were Marxist in nature, as it advocated the transformation of Afghanistan into a communist state. Alam Payind, *Soviet-Afghan Relations from Cooperation to Occupation*, 21 INT'L J. MIDDLE E. STUD. 107, 113–14 (1989). The catalyst for Daoud's overthrow was the April 17, 1978 assassination of prominent Parcham activist Mir Akbar Khayber. Khayber's funeral drew thousands and the Daoud regime panicked, initiating a wave of arrests of PDPA members. On April 27, members of the PDPA and the military stormed Daoud's palace, killing him and his family. William Maley, *Afghanistan: An Historical and Geographical Appraisal*, 92 INT'L REV. OF THE RED CROSS 859, 863 (2010).

274. *Id.* at 865.

275. *Id.* at 869.

276. MARTIN EWANS, *AFGHANISTAN: A SHORT HISTORY OF ITS PEOPLE AND POLITICS* 183

Afghanistan, erecting a new political system and engaging in low-intensity conflict against Taliban, Al Qaeda and other groups.²⁷⁷

Afghan women, like most women in conflict, have endured immeasurable hardship and pain.²⁷⁸ Although conflict affects men and women differently,²⁷⁹ conflict has only exacerbated the suffering of Afghan women.²⁸⁰ Patriarchal cultural and religious practices also contribute to the historically weak position of women in Afghan society.²⁸¹ Thus, this section maintains that gender equality has failed to develop in Afghanistan not because of Islam or Islamic law but because of cultural practices that keep women in a state of servitude by preventing them from acquiring education or independent employment.²⁸² Men have strengthened the binding nature of cultural norms—many of which developed out of the continuous state of insecurity—by attaching a conservative interpretation of Islamic law to these cultural norms.²⁸³ As cultural practices are transformed into Islamic norms, it becomes more difficult to challenge these practices.²⁸⁴ Afghan culture,

(2001); AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL 221 (2004).

277. SAIKAL, *supra* note 276, at 229.

278. See Telesetsky, *supra* note 168, at 296 (recounting the limitations imposed on women under the Taliban); Sima Wali et al., *The Impact of Political Conflict on Women: The Case of Afghanistan*, 89 AM. J. PUB. HEALTH, 1474, 1475 (1999) (highlighting the negative impact of conflict on the mental health of Afghan women).

279. During the campaign against the Soviet Union, women who had to escape to refugee camps in Pakistan and Iran often lost their homes and husbands to the fighting. When the war ended, Afghanistan descended into a state of civil conflict during which criminals frequently preyed on women. When the Taliban emerged, women were driven from the public space and were prevented from working or engaging in other activities that the Taliban deemed un-Islamic. See Wali, *supra* note 278, at 1475–76.

280. In a study on cultural values in Afghanistan, Nancy Dupree notes that the Soviet invasion placed greater emphasis on cultural values:

Torn from their protected home environments, the mostly rural refugees settled in kin-related groups for whom the preservation of cultural values was paramount. Upholding family honour and maintaining a good reputation in the eyes of the foreigners surrounding them was essential. Sadly, to many among the mujahideen (freedom fighters) who exercised power over these refugee populations, presenting the proper image meant imposing the strictest rules of physical and psychological seclusion on women, causing considerable strain.

Dupree, *supra* note 28, at 984.

281. For example, *Pashtunwali* (Code of the Pathan), an informal justice system resolves conflicts between families by “giving” daughters. See Moghadam, *supra* note 16, at 144.

282. For an interesting, albeit somewhat controversial insight into the position of women in post-Taliban Afghanistan, see ASNE SEIERSTAD, THE BOOKSELLER OF KABUL ix (Ingrid Christophersen trans. 2004).

283. See Moghadam, *supra* note 16, at 147.

284. Mark Drumbl writes: “In Afghanistan, local justice involves a fusion of Islamic and customary law that responds to and reflects endemic cultures of war.” Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT’L L. 349, 352 (2004).

which positions women as guardians of the family's honor and protectors of cultural heritage, also contributes to gender inequality.²⁸⁵ The burden on Afghan women is greater, in part, because a woman's honor is conflated with familial honor.²⁸⁶ Geographical divides between the center (Kabul and the other major cities) and the periphery (rural society) also intensify misunderstandings about Afghanistan and Afghan women.²⁸⁷ As Huma Ahmed-Ghosh notes:

Rural Afghanistan is the root of tribal powers that have frequently doomed Kabul-based modernization efforts. Social traditionalism and economic underdevelopment of rural Afghanistan have repeatedly contested the center (Kabul), thus a better understanding of tribal controlled areas is essential to empower women in these regions. For women in rural Afghanistan, control over their lives and gender roles is determined by patriarchal kinship arrangements. These kinship relationships are derived from the Quran and tribal traditions where men exercise unmitigated power over women. While Islam is deeply entrenched in the country, a hybridized compromise of Islamic and secular ideals of gender relations, along with economic reconstruction of rural Afghanistan will be proposed as a process towards enhancing women's status.²⁸⁸

Competing views and narratives populate writing on Afghanistan; while some focus on the progress that has taken place since the Taliban period, others highlight the limited nature of development.²⁸⁹ Contemporary Afghanistan is also characterized by fluidity such that great variance exists among provinces and within provinces during different seasons.²⁹⁰ Writing about women in Afghanistan is further complicated by differences between theory and reality²⁹¹ making it

285. This was most evident in the Afghan refugee camps in Pakistan. Saba Gul Khattak, *In/Security: Afghan Women Refugees*, in *WOMEN, SECURITY, SOUTH ASIA: A CLEARING IN THE THICKETS* 112–33, 124 (Farah Faizal & Swarna Rajagopalan eds., 2005).

286. Ahmed-Ghosh, *Lessons*, *supra* note 75, at 2–3.

287. *Id.*

288. *Id.* at 1.

289. Discussions about the education sector typify the two approaches. Although there has been a proliferation of education facilities and substantive growth in enrollment, the provision of education remains uneven and poor. *See, e.g.*, Antonio Giustozzi & Claudio Franco, *The Battle for the Schools: The Taleban and State Education*, *AFGHANISTAN ANALYSTS NETWORK*, 11 (2011), available at <http://aan-afghanistan.com/uploads/2011TalebanEducation.pdf>, archived at <http://perma.cc/LX6P-W8KN>.

290. For example, there are less insurgent attacks during winter months due to inclement weather. C. J. Chivers, *A Long, Hot Summer—A New Fighting Season Has Begun for U.S. Marines in Afghanistan*, *PITTSBURGH POST-GAZETTE*, May 23, 2010, at A4.

291. Carolyn Kissane, *The Way Forward for Girls' Education in Afghanistan*, 13 *J. INT'L WOMEN STUD.* 10, 14 (2012) (maintaining that “there is a gap between the de jure right to education and the de facto ability to access it.”).

difficult at times to distinguish between fact and fiction.²⁹² And, as Huma Ahmed-Ghosh argues, Afghan women's approach to human rights differs from that of their western counterparts in that it focuses more on religion and social norms as opposed to demanding and gaining specific rights: "it is clear they want to reconnect and reunite with their families, lead good Muslim lives, and find work to support their families."²⁹³

When focusing on the public-private divide when promoting norms of gender equality, claims concerning foreign intervention and influence emerge.²⁹⁴ Opponents of gender equality portray it as a western concept,²⁹⁵ a program designed to penetrate the private realm of Afghan society.²⁹⁶ Many Afghan men accept women serving in parliament or holding other public positions.²⁹⁷ Yet, they continue to

292. See, e.g., James Khalil, *Neither Fact nor Fiction: The Validity of Opinion Polling in Afghanistan*, SMALL WARS J. (Dec. 26, 2011), available at <http://smallwarsjournal.com/jrnl/art/Neither-Fact-Nor-Fiction-The-Validity-of-Opinion-Polling-in-Afghanistan>, archived at <http://perma.cc/BEG8-MWFZ>. In a speech before the UN Commission on the Status of Women, Hussn Banu Ghazanfar, Minister of Women's Affairs, pointed to nine key achievements in post-Taliban Afghanistan, which include (among others): increasing the number of companies managed by women to over 700; a 25 percent increase in the number of women within the Afghan government; a 31 percent increase in the number of female teachers; and the establishment of Prosecution Offices on the Elimination of Violence against Women in ten provinces. Hussn Banu Ghazanfar, Minister of Women's Affairs, Statement at Fifty-Seventh Session of the UN Commission on the Status of Women, New York (Mar. 2013), <http://www.un.org/womenwatch/daw/csw/csw57/generaldiscussion/memberstates/afghanistan.pdf>, archived at <http://perma.cc/57HP-DYE8>.

293. Ahmed-Ghosh, *Voices*, *supra* note 11, at 31.

294. See Choudhury, *supra* note 72, at 166; see also Leela Jacinto, *Abandoning the Wardrobe and Reclaiming Religion in the Discourse on Afghan Women's Islamic Rights*, 32 SIGNS 9, 13 (2006).

295. See Ali M. Latif, *Afghan Women in Fight Over Rights Law*, AL-JAZEERA (May 30, 2013), <http://www.aljazeera.com/indepth/features/2013/05/201352711108360922.html>, archived at <http://perma.cc/WC9S-T3N8>; see also Borhan Osman, *The EVAW Law—An Evil Law? The Backlash at Kabul University*, AFGHANISTAN ANALYSTS NETWORK (May 26, 2013), <http://www.afghanistan-analysts.org/the-evaw-law-an-evil-law-the-backlash-at-kabul-university>, archived at <http://perma.cc/A2AQ-XLQY>.

296. The Afghan-born writer Nushin Arbabzadah captures the critiques of men concerning the western world's approach to women's rights:

Afghan families were far from perfect but they had the advantage of resting on centuries of tradition rather than relying on whimsical policies formulated in the distant cities of London, New York and Washington. Weighing up the pros and cons of individual liberation in a traditional society versus the merits of sticking to tried and tested traditions, most women opted for the latter.

Nushin Arbabzadah, *Afghan Women Remain Wary of Politics—and Rightly So*, THE GUARDIAN, Mar. 9, 2011, <http://www.theguardian.com/commentisfree/2011/mar/09/afghan-women-politics-taliban-afghanistan>, archived at <http://perma.cc/NW3X-URNR>.

297. See Susan Sachs, *In Broken Justice System, Women in Kabul Find Their Legal Voice*, THE GLOBE & MAIL, Feb. 21, 2011, at A8; Heidi Vogt, *Enlisting Afghan Men to Empower Women*, THE ADVERTISER, Apr. 18, 2009, at 64.

resist changes within the private sphere.²⁹⁸ Furthermore, concerns with communal reputation blur the private-public divide in ways that contribute to the persistence of gender inequality. For example, support for the education of girls may be undermined by cultural or traditional norms that lead parents to fear that sending their daughter to school may result in communal castigation.²⁹⁹ Carolyn Kissane points out that Afghan parents insist that only women teach their daughters; the scarce number of female teachers often hinders girls' access to education.³⁰⁰ Similar issues surface with domestic abuse.³⁰¹ In spite of calls to end such practices, others argue that it is an intrusion into the private realm and, therefore, outside the bounds of public discussions.³⁰²

Ending discrimination and empowering women in Afghanistan is highly complex because it influences every facet of Afghan culture and history.³⁰³ Ideological differences across geographic space also pose challenges to addressing gender inequality.³⁰⁴ In sum, despite over a decade of international intervention in Afghanistan, many ordinary women remain second-class citizens, receiving no support or assistance from the state, while the international community, although speaking in favor of women's empowerment, fails to act when evidence of mistreatment and abuse emerges.

298. Arbabzadah, *supra* note 296, at 2.

299. Isobel Coleman, *Beyond the Burqa: The Future of Afghan Women's Rights*, 5 GEO. J. INT'L AFF. 57, 59–60 (2004).

300. Carolyn Kissane, *The Way Forward for Girls' Education in Afghanistan*, 13 J. INT'L WOMEN STUD. 10, 16 (2012) (claiming “the fact that notions of democratic reforms are automatically held suspect by many of those in positions of formal and informal power within the country is both exacerbated by and exacerbates limited access of education for girls and women”).

301. *See, e.g.*, Emma Graham-Harrison, *Sahar Gul Seared Afghanistan's Conscience but Her Tormentors are Free*, THE GUARDIAN, July 11, 2013, <http://www.guardian.co.uk/world/2013/jul/11/sahar-gul-afghanistan-tormentors-free>, archived at <http://perma.cc/MEJ7-SW7A>.

302. *See id.*; *see also* Graham-Harrison, *supra* note 48.

303. For example, Meri Melissi Hartley-Blecic suggests that King Amanullah's reformist agenda and his wife's behavior were instrumental in his overthrow. Meri Melissi Hartley-Blecic, *The Invisible Women: The Taliban's Oppression of Women in Afghanistan*, 7 ILSA J. INT'L & COMP. L. 553, 556 (2001); *see also* Norman B. Hannah, *Afghanistan: The Great Gamble*, 6 ASIAN AFF. 187, 189–93 (1979).

304. For example, in three districts in Nangarhar Province women are treated as familial possessions that may be traded. Shakila Abrahamkhil, *Trading of Women Rife in East Afghanistan, Report Claims*, TOLONews (Mar. 30, 2013), available at <http://www.tolonews.com/en/afghanistan/9961-trading-of-women-rife-in-east-afghanistan-report-claims>, archived at <http://perma.cc/49L5-J6PA>; *see also* Vincent Icheku, *Post-Taliban Measures to Eliminate Gender Discrimination in Employment*, 30 EQUAL., DIVERSITY & INCLUSION: AN INT'L J. 563, 566 (2009) (noting “the distribution of the success [in terms of employment of women] was not even within all Afghan provinces”).

A. *Afghan Women in the Post-9/11 Period*

Women in post-2001 Afghanistan are undoubtedly in a much better situation than they were under the Taliban, but it remains unclear how long this will continue.³⁰⁵ Many avenues previously closed have—in theory and in practice—opened up because the state no longer demands that women remain hidden from public spaces. The internationally led reconstruction program has focused on improving the lives of ordinary Afghans and particularly of women³⁰⁶ who were disproportionately impacted by decades of conflict and Taliban rule.³⁰⁷ Great emphasis has been placed on providing women with representation. The Afghan Constitution, for example, allocates seats to women to ensure that women have the same rights as men and to facilitate the adoption, promotion and enforcement of laws.³⁰⁸

Decades of discrimination rooted in religion, culture and tribal practices have placed Afghan women in an almost impossible situation. Women must simultaneously challenge established cultural and religious norms, overcome a lack of education and economic rights, and grapple with pervasive insecurity arising from ongoing insurgency and criminal activity.³⁰⁹ Thirty years of conflict has created

305. See, e.g., *Violent Crime Against Afghan Women Hits Record Levels, Says Rights Chief*, AL-JAZEERA AMERICA (Jan. 5, 2014), <http://america.aljazeera.com/articles/2014/1/5/violent-crime-againstafghanwomenhitsrecordlevels.html>, archived at <http://perma.cc/M5WA-UMX6> (highlighting the rise in violence against women).

306. In his 2002 State of the Union address, President Bush declared:

The last time we met in this chamber, the mothers and daughters of Afghanistan were captives in their own homes, forbidden from working or going to school. Today women are free, and are part of Afghanistan's new government.

And we welcome the new minister of women's affairs, Doctor Sima Samar.

President George W. Bush, *The State of the Union Address* (Jan. 30, 2002) (transcript available at <http://www.theguardian.com/world/2002/jan/30/usa?INTCMP=SRCH>, archived at <http://perma.cc/8JD6-79MT>).

307. During the war against Soviet occupation, combatants in the civil war targeted women who had to endure sexual violence, abuse, forced marriages and kidnapping. When the Taliban rose to power in 1994, its various edicts prevented women from leaving the home unaccompanied by a close male relative, prohibited women from working in the public sphere (except health care) and banned all girls above the age of eight from attending schools. Religious police enforced these edicts through public beating. Laura Grenfell, *The Participation of Afghan Women in the Reconstruction Process*, 12 HUM. RTS. BRIEF 22, 22 (2004).

308. *Id.* at 23. This mirrors the development of western feminism, which focused on acquisition of the right to vote during its first wave. See Kathleen Kelly Janus, *Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory*, 20 DUKE J. GENDER L. & POL'Y 225, 227 (2013); Chamallas, *supra* note 120, at 157.

309. One example of the toll this has had on women is the extremely high maternal mortality rate. Some suggest that improving education, literacy, and employment opportunities for women, along with training female health workers, will help reduce Afghanistan's high maternal mortality rate. Pfisterer, *supra* note 47, at 62. Radhika Coomaraswamy also discusses the positive impact of women's land ownership:

what Hussn Banu Ghazanfar, Minister for Women's Affairs, terms a "morale of violence."³¹⁰ Certain historical events assist in better understanding the position of women in contemporary Afghan society. Under the rule of Amir Abdur Rahman, known in Afghan folklore as the "Iron Amir," the central authority challenged cultural and religious norms concerning women.³¹¹ Rahman, for example, abolished the custom of forcing a widow to marry her deceased husband's next of kin, raised the age of marriage and implemented a right to divorce under specific circumstances.³¹² Amir Habibullah Khan, who succeeded his father in 1901, continued the reformist tradition by putting a ceiling on marriage ceremony expenditures to prevent unnecessary extravagance, while his wife appeared in public and wore western clothing.³¹³ Habibullah also supported Mahmud Beg Tarzi's effort to encourage women's participation in the public sphere by establishing a school for girls with an English curriculum.³¹⁴ In the 1920s, King Amanullah continued to expand women's rights, but the process of reformation stymied with his abdication in 1929.³¹⁵ Under Prime Minister Daoud, who served his cousin King Zahir Shah, Afghan women attained certain basic fundamental rights, particularly in the field of education.³¹⁶ In 1959, in a highly controversial move, the wives and daughters of the Afghan royal family appeared unveiled in public.³¹⁷ The first public unveiling since King Amanullah³¹⁸ highlights how radical Afghan society was in the 1960s. The early 1960s

[D]omestic violence might decrease if women have their own plot of land and their own economic resources. Women's access to land will also give access to credit, information, and technology to work the land. Access to land also provides security against poverty in old age. With access to land, women's status and bargaining power will increase dramatically.

Coomaraswamy, *supra* note 59, at 504.

310. Ghazanfar, *supra* note 292.

311. Ahmed-Ghosh, *Lessons*, *supra* note 75, at 3.

312. *Id.* at 2–3.

313. *Id.* at 3.

314. *Id.* at 4. Between 1911 and 1919, Mahmud Tarzi published a bimonthly newspaper that included editorials and articles pertaining to women's rights under Islamic law. Tarzi even devoted one section to accounts of *Namwaran zanan-i-jahan* (Famous Women of the World). *See id.* at 3–4; *see also* Malikiyar, *supra* note 193, at 392.

315. EWANS, *supra* note 276, at 93, 96.

316. American diplomat Norman Hannah recalls encounters with Prime Minister Daoud in the late 1950s and early 1960s during which he saw a succession of cabinet ministers and their wives appearing before Prime Minister Daoud. Hannah writes that the wives were not wearing "traditional shrouds, but colorful flowing blouses and vests plus billowing *shelvar*—a kind of loose silken trousers fastened at the ankle—and, most important of all, no veil. All went immediately to pay their respects to the Prime Minister, whose wife also put in an appearance." Hannah, *supra* note 303, at 190.

317. Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 1, 1–5 (2005).

318. *See id.* at 2, 5 (exploring the incorporation of religion into the post-intervention constitutions of Iraq and Afghanistan and the countries' transitions to Islamic democracy).

were characterized by substantial economic reforms, such as road construction, and a more democratic constitution.³¹⁹ The 1973 Daoud Revolution and the ensuing two decades of conflict, however, increasingly undermined the limited gains made by women.³²⁰ Such progress was reversed completely when the Taliban rose to power in the mid-1990s.³²¹ While Daoud and the PDPA government introduced measures that empowered women,³²² the Taliban, with its unique brand of Islam, drove women from the public sphere, forbade women from working outside of the home and introduced a new moral code that more closely regulated the movement of women and diminished their rights.³²³

This abbreviated history reveals that Afghan women had greater freedom to develop and participate in the public sphere before the advent of conflict, which was accompanied by rising Islamism and its contrived religious and cultural norms that have negatively impacted women's position in Afghan society. In twenty-first-century Afghanistan, the construction of gender is understood in social, religious and cultural terms, a shift that makes the state less likely to address the marginalization of women.³²⁴ Understandings of gender also lead "Afghan women [to] discuss gender in the context of social relations, Islamic religion, culture, domination, subordination and masculinity. They see gender as a process embedded in all social relations and institutions."³²⁵

The removal of the Taliban was supposed to usher in a new era for Afghan women.³²⁶ In the initial period following its removal,

319. EWANS, *supra* note 276, at 119–20. The process of the drafting the new constitution was significant. In 1963, a seven-man constitutional committee, that included renowned, liberal Afghan activist Mohammed Siddiq Farhang, was established. Assisted by a French constitutional adviser, the committee took a year to draft the constitution, which was then reviewed by a thirty-two-member Constitutional Advisory Commission. The 1964 *Loya Jirga*, convened to review and formally approve the included 452 members, four of which were women. *Id.* at 120; *see also* Grenfell, *supra* note 307, at 23.

320. EWANS, *supra* note 276, at 130–31.

321. *Id.* at 206–07.

322. Helena Malikyar notes that the Civil Law of 1977 stated that females are competent to marry at the age of sixteen and Article 27 of the 1977 Constitution established the principle of equality between men and women. Malikyar, *supra* note 193, at 394–95.

323. Telesetsky, *supra* note 168, at 296.

324. For example, in a recent announcement, the Afghan Ulema Council issued a statement that men and women should not mix in the workplace; this position did not draw any condemnation from President Karzai. *See* Bezhan, *supra* note 29.

325. ELAHEH ROSTAMI-POVEY, *AFGHAN WOMEN: IDENTITY AND INVASION* 4 (2007).

326. Frida Ghitis points out:

In the Afghan capital, deviating from the strictest interpretation of Islam may no longer be grounds for death, but as the day-to-day realities of post-Taliban life become apparent, it is clear that liberation from the tyranny of the Taliban is a relative matter. In the heady days following the overthrow of the

women anticipated greater participation in the reconstruction discourse.³²⁷ Promises regarding the incorporation of women into Afghan public spaces³²⁸ and the process of drafting and ratifying the Afghan constitution created a sense of optimism.³²⁹ Slowly and assuredly, however, Afghan women have increasingly felt the enmity of tradition pushing back against their empowerment;³³⁰ many of the hopes that accompanied the 2001 intervention have dissipated and Afghanistan continues to be ranked as the worst country for women to live in.³³¹ One interesting development has been the appearance of ‘moral crimes’ which are essentially crimes that are not codified by Afghan statutes, such as the crime of “running away.”³³²

Taliban, as the U.S. rejoiced in its victory, politicians pointed to the freeing of Afghan women as one of the great victories of the war on terror.

Frida Ghitis, *Women Must Be Freed from Koranic Brutalities*, L.A. TIMES, Aug. 21, 2002, at B13.

327. See Anne Barnard, *Women Cherish Taliban Setback*, BOSTON GLOBE, Nov. 13, 2001, at A3.

328. Under Article 83 of the Constitution, each province must have at least two female delegates elected to the *Wolesi Jirga*:

The elections law shall adopt measures to attain, through the electorate system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least two females shall be the elected members of the House of People from each province.

CONST. OF THE ISLAMIC REP. OF AFGHANISTAN Jan. 26, 2004, art. 83.

329. Laura Grenfell writes that out of the 1500 delegates who attended the Emergency Loya Jirga in 2002, whose purpose was to elect the Afghan Transitional Administration, 220 were women. In the 2003 Constitutional Loya Jirga, around 20 percent of the 500 delegates and seven of the thirty-five members of the Constitutional Commission were women. Grenfell, *supra* note 307, at 23.

330. In a 2003 report, the International Crisis Group noted:

The promise of an Afghan government committed to gender equality is so far more aspiration than fact. This gap between objectives and practices has several causes, including absence of effective governmental structures through which gender policy can be crafted and implemented; failure to acknowledge the deep social structures that incorporate inequitable gender norms; and absence of broad public support for such reforms.

INTERNATIONAL CRISIS GROUP (ICG), ICG ASIA REPORT NO. 48, AFGHANISTAN WOMEN AND RECONSTRUCTION 1 (2003), available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/048%20-%20Afghanistan%20-%20Women%20and%20Reconstruction.pdf>, archived at <http://perma.cc/R85K-CGCK>.

331. See Bowcott, *supra* note 3; see also Benazeer Roshan, *The More Things Change, The More They Stay the Same: The Plight of Afghan Women Two Years After the Overthrow of the Taliban*, 19 BERKELEY WOMEN'S L.J. 270, 271, 276 (2004) (highlighting the limited progress toward empowering women in post-Taliban Afghanistan); Nazia, *Afghanistan: My Husband Cut Off My Ears and Nose and Broke My Teeth*, IRIN NEWS (Dec. 26, 2007), <http://www.irinnews.org/HOVReport.aspx?ReportId=76003>, archived at <http://perma.cc/LF7N-6YX8> [hereinafter *Nazia, Afghanistan*].

332. For an in-depth review of the crime of “running away” see Human Rights Watch, *“I Had To Run Away”: The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan*, 5 (2012), available at http://www.hrw.org/sites/default/files/reports/afghanistan0312webcover_0.pdf, archived at <http://perma.cc/V8K3-WHVX>.

1. *The Afghan Constitution, Women and the Supreme Court*

The U.S.-led invasion of Afghanistan was accompanied by promises of improved conditions for Afghan women.³³³ The new constitution, drafted in 2003 and ratified in 2004, was touted as “the most enlightened [constitution] in the Islamic world.”³³⁴ Barnett Rubin, a former adviser to UN Special Representative for Afghanistan Lakhdar Brahimi during the 2001 Bonn talks and a leading expert on Afghanistan, writes that the 502 delegates to the Afghan Constitutional Loya Jirga (Grand Council) who approved the new constitution

hoped that this relatively liberal Islamic constitution would provide a framework for the long task of consolidating basic state structures, as the country struggled to emerge from decades of anti-Soviet jihad, interfactional and interethnic civil war, and wars of conquest and resistance by and against the radical Islamists of the Taliban movement.³³⁵

In other words, there was very little about gender equality as the focus was more on adopting legislation and implementing it, which meant that from the donor country the assumption was that once a Western-based normative system emerged in Afghanistan it would begin the process of undoing discriminatory practices.³³⁶ This section therefore emphasizes the value constitutions hold as the essence of a rule of law system.³³⁷ What has become apparent in Afghanistan is that the constitution may promote equality, but if government and judicial institutions opt not to impose the law or interpret the law in a certain way, having a legal mechanism to prevent discrimination is redundant.

Afghan constitutional history began on April 9, 1923 when the country adopted its first constitution.³³⁸ The constitution included

333. See Richard Benedetto, *Bush Details New Initiatives to Aid Afghanistan*, USA TODAY, June 16, 2004, at A6.

334. Zalmay Khalilzad, *Afghanistan's Milestone*, WASH. POST, Jan. 6, 2004, at A17.

335. Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, 15 J. OF DEMOCRACY 5, 5 (2004).

336. See *id.*

337. The 2004 Constitution is Afghanistan's sixth constitution. The hierarchy of Afghan domestic law begins with the Constitution, which is binding upon all courts. When no constitutional provision on a given subject exists, courts may look to statutory legislation. Article 130 of the Constitution permits the usage of *shari'a*. Should *shari'a* not exist under Article 2 of the Civil Code, courts may use customary law. SHEILA REED, CONOR FOLEY & HAMAYOUN HAMED, INTERNATIONAL DEVELOPMENT LAW ORGANIZATION REPORT, EVALUATION REPORT 2008 (Afghanistan) 16 (Aug. 2008), available at http://www.idlo.org/DOC_News/277DOC1.pdf, archived at <http://perma.cc/XKR3-EAZR>.

338. Travis, *supra* note 317, at 3.

a number of provisions that evidenced a desire to pursue neoliberal values, such as gender equality.³³⁹ A commitment to neoliberal norms also appears in the preamble to the 2004 Constitution, which affirms the country's faith in both God and democratic values.³⁴⁰ This affirmation indicates the drafters' desire to strike a balance between Islamic and neoliberal values.³⁴¹ In principle, the Afghan constitution complies with international standards regarding gender and women's rights, providing for constitutional guarantees of gender equality³⁴² and the representation of Afghan women in Parliament.³⁴³ In spite of these constitutional provisions, the status of women remains weak in Afghanistan.³⁴⁴ Women continue to be killed for challenging Afghan cultural and religious norms.³⁴⁵ They also continue to endure domestic violence³⁴⁶ and encounter obstacles that prevent them from attaining equal rights.³⁴⁷

Although this reality is the product of numerous factors, two have exacted the greatest influence: Islam and culture. Islam and culture are intertwined in contemporary Afghanistan, making it difficult to

339. CONSTITUTION OF AFGHANISTAN art. 16, Apr. 9, 1923 (stating that all Afghans should be accorded equal rights under the law, thus espousing gender equality).

340. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN pmb., Jan. 26, 2004.

341. The preamble declares: "Believing firmly in Almighty God, relying on His divine will, and adhering to the Holy religion of Islam. . . ." It further states that the people of Afghanistan will observe "the United Nations Charter as well as the Universal Declaration of Human Rights." *Id.*

342. Article 22 of the Constitution declares, "The citizens of Afghanistan, man and woman, have equal rights and duties before the law." *Id.* art. 22.

343. The Afghan Parliament is bicameral; it has a lower house—*Wolesi Jirga* (Council of People)—and an upper house—*Meshrano Jirga* (Council of Elders). KENNETH KATZMAN, CONG. RESEARCH SERV. RS21922 AFGHANISTAN: POLITICS, ELECTIONS, AND GOVERNMENT PERFORMANCE 9 (2014), available at <http://www.fas.org/sgp/crs/rpw/RS21922.pdf>, archived at <http://perma.cc/AJP8-DYFY>.

344. Pfisterer, *supra* note 47, at 73–74 (arguing that Afghanistan regularly violates Article 3 of the Universal Declaration of Human Rights which guarantees a right to life); see also Jennifer Kristen Lee, *Legal Reform to Advance the Rights of Women in Afghanistan Within the Framework of Islam*, 49 SANTA CLARA L. REV. 531, 532–33 (2009).

345. See Mustafa Andalib & Mirwais Harooni, *Hundreds of Afghan Girls' Schools Close: Karzai Calls on Taliban to Stop Campaign Against Education*, REUTERS, May 10, 2012, at A6; Mirwais Harooni, *Women, Children Beheaded in Afghan 'Honour Killing'*, REUTERS, July 4, 2012, available at <http://in.reuters.com/article/2012/07/04/afghanistan-honourkilling-idINDEE8630DN20120704>, archived at <http://perma.cc/NWP7-GSWU>; William Marsden, *Afghan Women with Jobs Killed*, VICTORIA TIMES COLONIST, Aug. 17, 2011, at A9.

346. See, e.g., *Nazia, Afghanistan*, *supra* note 331 (recounting the story of a sixteen-year-old bride and the violence that she endured at the hands of her forty-year-old husband).

347. The killing of Afghan actress Benafsha in September 2012 provides a clear example of the violence women endure. Benafsha and two friends, in response to death threats, were in the process of relocating to a different part of Kabul, when she was stabbed outside of a Mosque. Her two friends were arrested and subjected to virginity tests. Emma Graham-Harrison, *Kabul Attack on Female Actors Leaves Survivors Facing More Punishments*, GUARDIAN (Sept. 6, 2012) <http://www.theguardian.com/world/2012/sep/06/afghanistan-attack-female-actors?print>, archived at <http://perma.cc/TFC2-8MT9>.

identify where culture begins and religion ends.³⁴⁸ Years of conflict, external interventions, and a faith in religious solutions have linked Afghan cultural norms with militant interpretations of Islam.³⁴⁹ The dominant *madhhab* (school of law) in Afghanistan since 1747 has been Hanafi.³⁵⁰ Mohammad Hashim Kamali, Chairman of the International Institute of Advanced Islamic Studies (LAIS) in Malaysia and a member of the Afghan Constitutional Review Commission (CRC), has argued that cultural practices have undermined women's rights in Afghanistan.³⁵¹ Kamali argues that "the ubiquitous practice of child marriage, exorbitant bride price (*walwar*), and dower (*mahr*), forced marriage not only of widows but also of adult boys and girls, and widespread abuses of guardianship powers"³⁵² are largely customary rather than Islamic practices.³⁵³ The sale and exchange of women, also a customary practice not based on Islamic law, continues to take place in Afghanistan.³⁵⁴ The Afghan Ministry of Hajj and Religious Affairs has counseled patience in challenging this practice. According to Dai-ul-Haq Abed, Deputy Minister of Hajj and Religious Affairs, "[t]he phenomenon is decreasing but not eradicated."³⁵⁵ Reportedly, one way in which Islam and culture come together to undermine women's rights is through the punishment of women and girls that leave their homes without permission from their *mahram* (husband or male relative).³⁵⁶ This "crime" is discretionary, which means that the police, prosecutors and judges use their discretionary powers under the Afghan Penal Code to prosecute women for attempting to commit *zina* often on circumstantial evidence.³⁵⁷ Thus, generally what follows is that the individual is accused of running away from home enabling Afghan authorities to investigate the "crime" as an attempted *zina* (engaging in sexual intercourse outside of marriage) or as a *ta'zir* (crimes not mentioned in the Qur'an, thus allowing for judicial

348. EWANS, *supra* note 276, at 6.

349. Historically, Afghanistan was not known as a hotbed for Islamic militancy. Decades of conflict and foreign intervention, however, have fueled this development. See Ashraf Ghani, *Islam and State-Building in a Tribal Society of Afghanistan: 1880–1901*, 12 MODERN ASIAN STUD. 269, 270 (1978); see also EWANS, *supra* note 276, at 9.

350. Malikyar, *supra* note 193, at 390–91. The Hanafi School is one of the four schools of Islamic jurisprudence within Sunni Islam named after Abu Hanifa ibn Thabt. It started in Iraq. Its influence expanded eastward so that it is the dominant school in Central Asia and the Subcontinent. *Id.*

351. Mohammad Hashim Kamali, *References to Islam and Women in the Afghan Constitution*, 22 ARAB L.Q. 270, 299 (2008).

352. *Id.* Kamali argues that his intervention led to the adoption of Article 54, which calls for the elimination of tribal customs contrary to Islam.

353. *Id.* at 295, 299.

354. Abrahamkhil, *supra* note 304.

355. *Id.*

356. UNAMA, *supra* note 5, at 16–17.

357. *Id.*

discretion on how to administer them).³⁵⁸ Moreover, the Afghan Supreme Court has taken the position that if a woman has difficulties within the home, running away is not a solution, as the Court expects the woman to seek government help, whether it is from the police, government agency or judicial institution.³⁵⁹

Since the U.S.-led invasion, the Afghan judicial system³⁶⁰ and its judges have been a disappointment in the struggle for women's rights.³⁶¹ The three institutions that oversee the judicial system—the Supreme Court, the Attorney General's Office and the Ministry of Justice—frequently engage in turf wars.³⁶² Prosecutors, police officers and international advisors interviewed by the International Crisis Group in Kabul, Parwan and Nangarhar identified poor relations between the three branches as the primary cause of corruption and the weak rule of law.³⁶³ Corruption is rife.³⁶⁴ Judges are poorly

358. *See id.*; *see also* N. J. Coulson, *The State and the Individual in Islamic Law*, 6 INT'L & COMP. L.Q. 49, 53 (1957) (noting that the purpose of *ta'zir*, which means to prevent, is "to serve as a correction for the offender himself and a deterrent for others").

359. Human Rights Watch, *supra* note 332, at 5.

360. The Constitution provides for a three-tier judicial system comprised of the Supreme Court (*Stera Mahkama*), High Court (Appeal Courts), and Primary Courts. The Ministry of Justice is composed of two departments—a legal drafting department (the *Taqnin*) and a law department (the *Hoquq*). Each province and many districts have a separate law department that conducts preliminary investigations and often mediates cases before they are brought to court. The *Taqnin* is responsible for reviewing draft laws and national legislation to ensure compliance with the Constitution, Islamic law and international legal standards. The Office of the Prosecutor General, an independent body, is constitutionally charged with investigating and prosecuting cases. REED, *supra* note 337, at 15–16.

361. *See* Choudhury, *supra* note 72, at 198.

The structural characteristics of the Afghan legal system—the politicization and gender-bias of the judiciary, the weakness of the formal legal system, and the lack of clarity surrounding applicable law—render judicial review a serious threat to enactment and enforcement of women's rights legislation. They also suggest the existence of serious institutional barriers to persuading judges to adopt understandings of Islamic and Afghan law that encompass women's rights.

Id.

362. UNITED STATES INSTITUTE OF PEACE, ESTABLISHING THE RULE OF LAW IN AFGHANISTAN, SPECIAL REPORT 117, 6 (Mar. 2004), *available at* <http://www.usip.org/files/resources/sr117.pdf>, *archived at* <http://perma.cc/3TG5-H4Z4>.

363. INTERNATIONAL CRISIS GROUP, ICG ASIA REPORT NO. 195, REFORMING AFGHANISTAN'S BROKEN JUDICIARY 1, 13 (Nov. 17, 2010), *available at* <http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.pdf>, *archived at* <http://perma.cc/3JYU-VBTY>; *see also* Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, 2007 ARMY LAW. 45, 52–53.

364. In February 2012, the Afghan Supreme Court dismissed and prosecuted sixty Afghan judges for involvement in administrative corruption. *Afghan Judges Arrested and Tried for Corruption Charges*, KHAAMA PRESS (Feb. 29, 2012), *available at* <http://www.khaama.com/afghan-judges-arrested-and-tried-for-corruption-charges-774>, *archived at* <http://perma.cc/Y7XT-QRE7>.

trained by³⁶⁵ a judicial education system that requires law students to follow either a religious Islamic legal education or a non-religious legal education.³⁶⁶ The structure of legal training contributes to the lack of clarity regarding interpretation of laws and what type of law a judge should apply. Most judges interpret laws, especially laws addressing gender issues,³⁶⁷ conservatively.³⁶⁸

The limited authority of the Afghan Supreme Court also affects the empowerment of women. The Supreme Court “has limited administrative authority in the provinces, and even less ‘legal’ authority—in the sense that it does not cast an [sic] legalistic or intellectual shadow over the judiciary as a whole.”³⁶⁹ The Court, which has nine justices, all of whom are men, consistently fails to promote, protect and enhance women’s rights.³⁷⁰ The Court’s conservative religious agenda dates back to its first chief justice, Fazl Hadi Shinwari, a religious conservative who lacked both legal and formal religious training.³⁷¹ Shinwari’s appointment came out of political consideration, as he was an ally of President Karzai.³⁷² He brought a tremendous conservative (religious) support because he was previously a head of a madras, a position that fostered his acceptance among clerics and mullahs around the country.³⁷³ Although Shinwari has left the bench, many

365. Lee, *supra* note 344, at 545.

366. Geoffrey Swenson and Eli Sugerman discuss deep structural flaws within the Afghan legal education system, claiming that “nobody, including the Afghan government, knows how lawyers practice in Afghanistan.” Geoffrey Swenson & Eli Sugerman, *Building the Rule of Law in Afghanistan: The Importance of Legal Education*, 3 HAGUE J. ON THE RULE OF L. 130 (2011).

367. The United Nations Assistance Mission to Afghanistan (UNAMA) has found that prosecutors and the Afghan National Police tend to refer cases to *jirgas* and *shuras* for advice or resolution. The Report notes that this practice “often undermined implementation of the EVAW law and reinforced harmful practices.” UNAMA, *supra* note 5, at 4.

368. INTERNATIONAL CRISIS GROUP, *supra* note 363, at 14.

369. J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan* 9 (Ctr. on Democracy, Dev. & the Rule of Law, Stanford Inst. for Int’l Studies, Working Paper No. 19, 2004), available at http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf, archived at <http://perma.cc/MHG8-P6Lb>.

370. Nina Shea notes that soon after Afghanistan’s post-Taliban cabinet was announced, the Fazul Hadi Shinwari denounced Sima Samar, Afghanistan’s first Minister of Women’s Affairs for speaking out “against the Islamic nation of Afghanistan.” Samar was charged with blasphemy for allegedly telling a Canadian that she did not believe in *shari’a*. Nina Shea, *Sharia in Kabul?*, NAT’L REV., Oct. 28, 2002, at 20.

371. In a 2003 op-ed, Preeta D. Bansal and Felice D. Gaer recall a meeting with Chief Justice Shinwari in which he made clear that Qur’anic law alone governs freedom of expression, freedom of religion, and equality between men and women. Preeta D. Bansal & Felice D. Gaer, Opinion, *Silenced Again in Kabul*, N.Y. TIMES, Oct. 1, 2003, <http://www.nytimes.com/2003/10/01/opinion/silenced-again-in-kabul.html?pagewanted=all&src=pm>, archived at <http://perma.cc/67NQ-G3NE>.

372. Carlotta Gall, *Afghan Lawmakers Review Court Nominees*, N.Y. TIMES, May 17, 2006, at A.10.

373. *Id.*

of his judicial appointees (who also lack a legal education) remain on the bench and the Court has maintained its conservative attitude towards religious freedom, freedom of expression and gender equality.³⁷⁴ The Court, for example, has concluded that Article 42 of the Law on the Elimination of Violence Against Women, which prohibits the postponement, pardoning or reduction in sentence for those found guilty of committing an act of violence against women, breaches the Afghan constitution.³⁷⁵ The Court has continued to undercut women's rights when in August 2010, for example, it issued Supreme Court Approval 572, designed to provide guidance to prosecutors engaged in the potential prosecution of women accused of attempted *zina*.³⁷⁶ Instead of clarifying the situation, what Supreme Court Approval 572 has done is provide the police and prosecution with the authority to examine the purpose as to why the woman had run away, as opposed to accepting that preventing a woman from leaving her home without permission is a fundamental breach of her right, leading UNAMA to note the investigator needs to determine a female's marital status and the place from where she ran.³⁷⁷ Though her motive for leaving is considered, there is no instruction to investigate the potential perpetrator of violence against her should it be concluded the woman fled her home due to violence.³⁷⁸ In most cases, unless a woman or girl is able to prove that she left her house to escape violence and went to an institution deemed appropriate (i.e., a DoWA), she is suspected of "attempted *zina*."³⁷⁹

2. *The Afghan Ministry of Women's Affairs (MoWA)*

The 2001 Bonn Agreement paved the way for the establishment of an Afghan Ministry of Women's Affairs (MoWA).³⁸⁰ The Ministry

374. In a 2010 report, the International Crisis Group stated that the Supreme Court operates as a bully pulpit for Islamist fundamentalists linked to Saudi-backed jihadist Abd ul-Rabb al-Rasul Sayyaf. INTERNATIONAL CRISIS GROUP, *supra* note 363, at 13.

375. The Law on the Elimination of Violence Against Women (EVAW), Art. 40–42, Aug. 1, 2009, available at http://www.laoa.af/laws/law_on_elimination_of_violence_against_women.pdf, archived at <http://perma.cc/VZ59-MQCY> [hereinafter EVAW]. According to the United Nations, the Court ruled on July 27, 2011 that the measure breaches the constitution because it limits the power of the president to grant pardons. UNAMA, *supra* note 5, at 8.

376. UNAMA, *supra* note 5, at 16–17.

377. *Id.*

378. *Id.* at 19.

379. *Id.* at 7.

380. GENDER AND POST-CONFLICT RECONSTRUCTION LESSONS LEARNED FROM AFGHANISTAN, JOINT WORKSHOP OF THE UNITED NATIONS INTER-AGENCY NETWORK ON WOMEN AND GENDER EQUALITY AND THE OECD-DAC NETWORK ON GENDER EQUALITY (July 10–11, 2003); see also Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, III(A)(3), IV(2), V(4). Annex IV

was entrusted with the duty of advancing the role of women in Afghan society and with the responsibility of coordinating government initiatives to promote the inclusion of women in Afghan social life.³⁸¹ Although MoWA was created to help end gender inequality in Afghanistan,³⁸² the fact that Afghanistan was recently identified as the worst country for women to live in suggests that MoWA has not been effective. Its ineffectiveness is arguably attributable to the nature of Islamic education in Afghanistan. Muslim feminists such as Fatima Gailani, president of the Afghan Red Crescent Society, identify the type of Islam taught in Afghanistan as the source of discrimination.³⁸³ Gailani also emphasizes the role of the family—the private sphere—in fostering discriminatory practices against women.³⁸⁴

MoWA's ineffectiveness can also be attributed to the difficult conditions under which it operates. MoWA has to contend with a fickle president and political system that does not value MoWA's efforts to empower women, treating it instead as a tool to appease the international community.³⁸⁵ Although President Karzai publicly supports the

(Dec. 22, 2001) available at <http://www.un.org/womenwatch/ianwge/taskforces/communique03.pdf>, archived at <http://perma.cc/6FQL-PTTL>.

381. WORLD BANK, AFGHANISTAN: NATIONAL RECONSTRUCTION AND POVERTY REDUCTION—THE ROLE OF WOMEN IN AFGHANISTAN'S FUTURE 4, 8–9 (Mar. 2005), available at <http://siteresources.worldbank.org/AFGHANISTANEXTN/Resources/AfghanistanGenderReport.pdf>, archived at <http://perma.cc/M3N3-LNW5>.

382. See GENDER AND POST-CONFLICT RECONSTRUCTION LESSONS LEARNED FROM AFGHANISTAN, *supra* note 380.

383. Olivia Ward, *Afghan President Endorses Cleric's Code that Downgrades Women's Rights*, TORONTO STAR, Mar. 7, 2012, at A1.

384. In a 2007 interview Gailani stated:

In most parts of the country women face exactly the same discrimination they faced five years ago. This discrimination does not come from the government; it comes from their own families. Personally, I never think about my gender, whether I am in the Red Crescent or when I was recently working on the new Constitution. I had to go from village to village to speak to different people, sitting in the mosque talking to a congregation of men. I think that when you reach a certain level of education, people will respect you. But the dilemma is how to encourage fathers, brothers and families to give this chance to their daughters.

Franz Rauchenstein, *Interview with Ms. Fatima Gailani, President of the Afghan Red Crescent Society*, 89 INT'L REV. RED CROSS 7, 9 (2007); see also Noorjahan Akbar, *Justice for Women*, DAILY OUTLOOK AFGHANISTAN, Apr. 16, 2012, http://outlookafghanistan.net/topics.php?post_id=3959, archived at <http://perma.cc/QQ9D-J3DU>.

385. In 2012, President Karzai supported a "code of conduct" drafted by the Ulema Council that declared that women are secondary and men are fundamental. Ward, *supra* note 383. President Karzai defended the Council's declaration, claiming it reflects a religious perspective that is representative of the people of Afghanistan. Ghanizada, *Karzai Support Ulema's Declaration on Gender Segregation*, KHAAMA PRESS, Mar. 7, 2012, <http://www.khaama.com/karzai-support-ulemas-declaration-on-gender-segregation-814>, archived at <http://perma.cc/NRD7-UFKK>. But, in a November 2012 radio address President Karzai claimed that domestic violence is an unacceptable violation of Islamic law. *President Karzai: Violence Against Women May Destroy Families*, Office of the President, Islamic

empowerment of women, he works with conservatives who oppose women's empowerment to ensure his political survival.³⁸⁶ For example, Karzai supported the establishment of the Ministry of the Hajj and Religious Affairs (MOHRA) to prevent vice and promote virtue, much like the notorious Department for the Promotion of Virtue and Prevention of Vice.³⁸⁷ The MOHRA has been slow in addressing un-Islamic customary practices, such as the selling of women.³⁸⁸ Questions remain regarding its commitment to reforming Afghan Islamic practices that have morphed over decades of conflict,³⁸⁹ especially because the Ulema Council continues to wield enormous influence.³⁹⁰ MoWA also operates with limited funds³⁹¹ and does not enjoy the same stature as the Ministry of Defense, the Ministry of Interior or the Ministry of Education or Health.³⁹² Suggestions that the minister

Republic of Afghanistan (Nov. 12, 2012), <http://president.gov.af/en/news/15111>, *archived at* <http://perma.cc/62B8-G6TN>.

386. Pamela Constable noted the Karzai administration supported a campaign to clamp down on vice "in response to pressure from domestic religious leaders and partly to upstage Islamic Taliban insurgents who are stepping up attacks across the south." Pamela Constable, *In Afghanistan, A Crackdown on Imported Pleasures*, WASH. POST, Aug. 7, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/06/AR2006080600570.html>, *archived at* <http://perma.cc/QK8Z-QQBN>.

387. Christina Lamb, "Ministry of Vice" Fills Afghan Women with Fear, SUNDAY TIMES, July 23, 2006, at 23.

388. Abrahamkhil, *supra* note 304.

389. See, e.g., U.N. Assistance Mission in Afghanistan (UNAMA HR) & Office of the United Nations High Commissioner for Human Rights, HARMFUL TRADITIONAL PRACTICES AND IMPLEMENTATION OF THE LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN IN AFGHANISTAN 1 (Dec. 9, 2010), *available at* http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf, *archived at* <http://perma.cc/YHS2-ZFPB> [hereinafter UNAMA HR] ("Afghan men and women interviewed by UNAMA HR reported that many Afghans believe that practices that subordinate women to the will of men and sharply limit their realms of activity, originate in the Holy Koran.").

390. The Council is composed of 150 leading Afghan religious scholars and represents a network of 3,000 Afghan clerics. KATZMAN, *supra* note 343, at 47.

391. In 2011, Hussan Ghazanfar claimed that MoWA has a budget of \$1 million. Rod Nordland, *Women's Shelters Waste Funds, Afghan Says*, N.Y. TIMES, Feb. 16, 2011, at A.8. The budget of the Afghan Human Rights Commission, most of which comes from foreign donors, is estimated at \$7.5 million. Rod Nordland, *Critics Question Karzai Choices for Human Rights Panel*, N.Y. TIMES, July 2, 2013, at A.4.

392. In 2011, fourteen Afghan ministries received direct assistance from USAID and the State Department. According to information provided to the US Senate Committee on Foreign Relations, the following ministries receive U.S. aid: Ministry of Finance (\$30 million), Ministry of Communications and Information Technology (\$1 million), Ministry of Public Health (\$236.5 million), USAID Salary Sup Special Posts (\$2 million), Ministry of Agriculture, Irrigation, and Livestock, Independent Directorate of Local Governance (\$85 million), Ministry of Finance and World Bank (\$2,079.5 million), Ministry of Education (\$25 million through Danish Development Agency), Ministry of Transportation and Civil Aviation (\$6 million). No information was provided for the Ministry of Counter Narcotics, Ministry of Women's Affairs, Ministry of Justice, Attorney General's Office, or Ministry of

owes her position to the president has not helped matters. Such beliefs foster concern that the minister will pursue the president's agenda,³⁹³ while failing to address issues of competency, corruption and accountability that have characterized the Karzai administration.³⁹⁴ MoWA's agenda has been shaped by cultural and traditional norms, the rising level of Islamism and the politicization of women's rights.³⁹⁵ Because women remain in the margins of society,³⁹⁶ MoWA focuses primarily on resolving abuse and elopement and opening training centers in select areas of the country.³⁹⁷ Donors have not effectively intervened to help improve the situation; most provide aid to specific programs³⁹⁸ or do not provide enough aid.³⁹⁹ Notably, the donors rarely consult with the ministry, and programs are often subsumed by political debates about the rights of women.⁴⁰⁰

Interior. MAJORITY STAFF OF S. COMM. ON FOREIGN REL., 112TH CONG., EVALUATING U.S. FOREIGN ASSISTANCE TO AFGHANISTAN 20, note 69 (Comm. Print 2011).

393. See, e.g., Manizha Naderi, *This Is a Blatant Bid to Curb the Rights of Afghan Women*, THE TIMES (UK), Feb. 16, 2011, at 20.

394. Reportedly, it costs around \$100,000 to become a provincial police chief, \$25,000 to settle a lawsuit and \$6,000 to bribe the police. Dexter Filkins, *Bribes Corrode Afghan's Trust in Government*, N.Y. TIMES, Jan. 2, 2009, at A1.

395. Some claim that the Afghan Ministry of Information and Culture called on women TV presenters to avoid heavy makeup and wear headscarves in February 2012 to show the Taliban, with which it was seeking to negotiate, that the government's agenda comported with the Taliban's commitment to institute Islamic precepts. Mina Habib, *Afghan Clerics' Conservative Blueprint for Women*, INSTITUTE FOR WAR & PEACE REPORTING, Mar. 7, 2012, <http://iwpr.net/report-news/afghan-clerics-conservative-blueprint-women>, archived at <http://perma.cc/6BGH-BY38>.

396. During the 2009 election, for example, "a combination of fear, tradition, apathy and poor planning conspired to deprive many Afghan women of rights they had only recently begun to exercise." Pamela Constable, *Many Women Stayed Away From the Polls In Afghanistan*, WASH. POST, Aug. 31, 2009, at A1. According to reports, insecurity prevented women from voting in many districts. As a result, some men voted on behalf of women. *Id.*

397. See, e.g., MEDICA MONDIALE, WOMEN, PEACE AND SECURITY IN AFGHANISTAN, IMPLEMENTATION OF UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325 32 (2007), available at http://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/Dokumente/English/Documentations_studies/medica_mondiale_-_Report_on_Women_Peace_and_Security_-_October_2007.pdf, archived at <http://perma.cc/5V95-2N6J>.

398. Roya Rahmani, *Donors, Beneficiaries, or NGOs: Whose Needs Come First? A Dilemma in Afghanistan*, 22 DEV. IN PRAC. 295, 295 (2012) (noting that donors' lack of understanding of local context has a detrimental effect on local NGO work). Isobel Coleman notes that total USAID funding for educational initiatives between 2004 and 2006 was only \$100 million, most of which was devoted to handicap-accessible, earthquake-proof school construction. Coleman, *supra* note 299, at 61.

399. *Afghan Women Want Tokyo [to] Push Socio-economic Agenda*, PAJHWOK REPORT, June 25, 2012, <http://www.pajhwok.com/en/2012/06/25/afghan-women-want-tokyo-push-socio-economic-agenda>, archived at <http://perma.cc/79WC-7AAF>.

400. This is evident in the debate about who should manage women's shelters. The Afghan government depicted the shelters as inefficient and corrupt because it wanted

3. *The Law on Elimination of Violence Against Women (EVAW)*

In August 2009, Afghanistan adopted the EVAW, which is designed to protect women and girls.⁴⁰¹ Notably, President Karzai, who introduced the measure as an executive decree, signed EVAW into law six years after his interim government had ratified—without reservations—the Convention for the Elimination of Discrimination Against Women (CEDAW), which Babrak Karmal had signed on August 14, 1980.⁴⁰² The 2009 legislation criminalizes child marriages, forced marriages, the selling and buying of women for the purpose of marriage, the use of women and girls for conflict resolution, killing, torture, rape and other kinds of violence,⁴⁰³ forced isolation,⁴⁰⁴ forced self-immolation⁴⁰⁵ and denying women the right to education, work and health services.⁴⁰⁶ EVAW also prescribes preventive measures⁴⁰⁷ for implementation by seven government ministries to help end

to control these institutions. Naderi, *supra* note 393, at 20. Others claim that foreigners use the shelters to convert Afghans to Christianity. Maria Abi-Habib, *TV Host Targets Afghan Women's Shelters*, WALL ST. J., Aug. 3, 2010, <http://online.wsj.com/article/SB10001424052748704875004575374984291866528.html>, archived at <http://perma.cc/LW2X-BQ7H>.

401. UNAMA, *supra* note 5, at 1.

402. Cheshmak Farhoumand-Sims, *CEDAW and Afghanistan*, 11 J. INT'L WOMEN STUD. 136, 141–42 (2009). Afghanistan acceded to the CEDAW on March 5, 2003. It is also a signatory to the Covenant on Civil and Political Rights (ratified Apr. 24, 1983); the Covenant on Economic, Social, and Cultural Rights (ratified Apr. 24, 1983); the Convention on the Elimination of Racial Discrimination (ratified Aug. 5, 1983); the Convention on the Elimination of Discrimination Against Women (ratified Mar. 4, 2003); the Convention Against Torture (ratified June 26, 1987); and the Convention on the rights of the Child (ratified Apr. 27, 1994) and its optional protocols on the Sale of Children, Child Prostitution, and Child Pornography and On the Involvement of Children in Armed Conflict (ratified Sept. 24, 2003). *Id.*; Lee, *supra* note 344, at 541–42; Alissa J. Rubin, *Effort to Strengthen an Afghan Law on Women May Backfire*, N.Y. TIMES, May 19, 2013, at A8.

403. Akbar, *supra* note 384.

404. Article 31 declares: “It is a crime to isolate a woman in the home, or from her relatives.” EVAW, *supra* note 375, at art. 31. It further states: “The offender may be sentenced to a maximum of 3 months in prison.” *Id.*

405. “It is illegal to mistreat women in ways that push them to burn themselves, swallow poison, or commit suicide. The punishment is more severe if the woman suffers injury or disability from these actions.” *Id.* art. 21.

406. Preventing or forbidding a girl or a woman from attending school or university, from working outside the home, or from visiting doctors for treatment is a crime. It is against the law for a father, brother, husband, any relative or stranger to prohibit women’s access to education, work, or medical care.

A person who does that will be punished with up to 6 months in prison.

Id. art. 35.

407. These measures refer to such actions as the prevention of violence (art. 4) in which the law calls for the punishment of the offender. Moreover the act states that the infliction of violence whether in public or private area is prohibited. The Act also called for protective and supportive measures thus under art. 8, MoWA in cooperation with other government ministries and agencies should help increase awareness as to the rights of men and women, highlighting the obligation to end violence against women. *Id.* art. 4.

violence against women.⁴⁰⁸ In 2013, Fawzia Kofi, a member of the Afghan Parliament introduced the EVAW, arguing for its adoption as a legislative measure instead of a presidential decree that can be reversed by a subsequent president.⁴⁰⁹

Debates surrounding EVAW have highlighted the continued pervasiveness of misogyny and contrived cultural values. Those opposing EVAW claim it breaches, disregards and undermines Islamic law,⁴¹⁰ particularly provisions criminalizing child marriage and forced marriage, banning the traditional practice of exchanging girls and women to settle disputes, making domestic violence a punishable crime, protecting rape victims from prosecution for adultery, limiting the number of wives a man can have to two and establishing shelters for battered women.⁴¹¹

The key issue with the legislation is that on the one hand it permits a victim of violence to approach the police, the Afghan Human Rights Commission, the Department of Women's Affairs or prosecutors, but at the same time it appears that there is a great demand to mediate the situation as opposed to prosecute, largely because this is deemed to challenge the family unit.⁴¹² In other words, there are cultural and social elements that undermine the development of a culture that demands protection for victims of violence and the prosecution of those that commit such acts.⁴¹³ Additionally, what is also troubling about the legislation is that if a compromise is reached after a conviction, the sentence is not imposed.⁴¹⁴

408. *UN Welcomes Statement by Afghanistan Confirming "Running Away" Is Not a Crime*, U.N. NEWS CTR. (Oct. 3, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43207&Cr=&Cr1=>, archived at <http://perma.cc/K2WG-NDKN>.

409. Feminist Newswire, *Afghan Violence Against Women Law Blocked in Parliament*, FEMINIST MAJORITY FOUND. BLOG, May 20, 2013, <http://feminist.org/blog/index.php/2013/05/20/afghan-violence-against-women-law-blocked-in-parliament/>, archived at <http://perma.cc/K9CS-KQY2>.

410. Saleha Sodat, *Law on Elimination of Violence Against Women Dropped by Parliament*, TOLONews (May 18, 2013), <http://www.tolonews.com/en/afghanistan/10536-law-on-elimination-of-violence-against-women-dropped-by-parliament>, archived at <http://perma.cc/8URR-29MG>.

411. For example, Obaidullah Barezai, a Member of Parliament from Southeast Urozgan Province, asserted that the prohibition against allowing parents to marry their daughter if she is under the age of sixteen contravenes Islamic law and practices. Barezai claimed that Hazrat Abu Bakr Siddiq, a companion of the Prophet Mohammed, married off his daughter when she was seven. *Controversy Over Elimination of Violence Against Women Law*, DAILY OUTLOOK AFGHANISTAN, May 21, 2013, http://www.outlookafghanistan.net/editorialdetail.php?post_id=7420, archived at <http://perma.cc/CB47-LVA9>.

412. UNAMA, *supra* note 5, at iii, 22–24.

413. The attempt to introduce the EVAW in parliament failed with a number of parliamentarians declaring that the articles were un-Islamic, with one member going so far as to state "[i]f the safe houses are approved by parliament you will witness millions martyrs [sic] in this country." Sodat, *supra* note 410.

414. U.N. Assistance Mission in Afghanistan, *A WAY TO GO: AN UPDATE ON IMPLANTATION OF THE LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN IN AFGHANISTAN*

A 2012 study by UNAMA examining the presidential decree discussed some indicators of progress, but concluded that “the overall use of the law remained low indicating there is still a long way to go before women and girls in Afghanistan are fully protected from violence through the law.”⁴¹⁵ The report included three additional key findings (not including an increase in violence against women) that expose the limited impact of EVAW on women’s empowerment in post-Taliban Afghanistan: (1) police and prosecutors frequently rely on traditional institutions controlled by powerful men to resolve violations; (2) women who turn to traditional institutions to resolve domestic disputes often remain at risk because tradition dictates that women who flee abuse must be returned to their families; (3) officials remain reluctant to arrest individuals accused of violence against women if they are connected to armed groups, including government-sanctioned groups such as the Arbaki, Afghan Local Police (ALP).⁴¹⁶ In December 2013, a new report was issued and its findings are troubling because they emphasized “that encouraging increases in reporting and registration of incidents of violence against women by police and prosecutors did not lead to a similar increase in the use of the EVAW law to resolve cases by prosecutors and courts particularly through criminal prosecution.”⁴¹⁷

The principal piece of legislation EVAW adopted to protect women and, by extension, promote and cement their rights has clearly failed. Domestic violence has increased⁴¹⁸ and violence against women continues to go either unpunished or underpunished.⁴¹⁹ MoWA lacks the influence necessary to impose its agenda on Afghan society and men continue to control the discourse about women’s rights.⁴²⁰ Women’s rights remain under attack.⁴²¹

12 (Dec. 2013), *available at* http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20REPORT%20on%20EVAW%20LAW_8%20December%202013.pdf, *archived at* <http://perma.cc/829G-Q6DP> [hereinafter UNAMA 2013].

415. U.N. Assistance Mission in Afghanistan, *STILL A LONG WAY TO GO: IMPLEMENTATION OF THE LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN IN AFGHANISTAN 2* (Dec. 2012), *available at* <http://unama.unmissions.org/LinkClick.aspx?fileticket=Qy9mDiEa5Rw%3d&tabid=12254&language=en-US>, *archived at* <http://perma.cc/XXJ5-XX98>.

416. *Id.* at 4.

417. UNAMA 2013, *supra* note 414, at 3.

418. In 2011, the Afghanistan Independent Human Rights Commission declared that more than 39,000 incidents of violence against women had been registered in a nine-month period. MoWA estimated only 6,000 cases of violence in 2010. Abasin Zaheer, *Senators Call for Giving Women Due Rights*, PAJHWOK AFGHAN NEWS, Nov. 27, 2011, <http://www.pajhwok.com/en/2011/11/27/senators-call-giving-women-due-rights>, *archived at* <http://perma.cc/QA5H-3D5X>.

419. *See* UNAMA 2013, *supra* note 414, at 18–19.

420. *Id.* at 21, 25, 37.

421. *See, e.g.,* Maria Abi-Habib, *Afghan Women Fear Rights Will Erode as U.S. Leaves*,

B. Non-Governmental Organizations and Afghan Women: RAWA

The role of Afghani and international NGOs in enhancing women's rights has increased since the 2001 U.S.-led invasion.⁴²² Domestic and international NGOs have enjoyed a greater freedom to operate than they did under the Taliban and have been instrumental in helping many Afghan girls and women access education and employment.⁴²³ The extent of this access, however, remains underexplored and successes are difficult to gauge.⁴²⁴ Afghan women activists, including those affiliated with international NGOs, work in a challenging environment⁴²⁵ that renders it difficult to provide a comprehensive review of all work within the NGO sector.⁴²⁶ The Afghan NGO community adheres to Muslim feminism, but some of its members take a more Islamist stance⁴²⁷ and others strive to balance international human rights norms with Afghan and Muslim values.⁴²⁸

The Revolutionary Afghan Women Association (RAWA), a leading Afghan NGO, was established in 1977 by Afghan poet Meena Kishwar Kamal to facilitate the participation of Afghan women in all aspects of public life.⁴²⁹ To understand RAWA and place it in context—whether within the Afghan social, political and cultural system or in relation

WALL ST. J., Nov. 13, 2012, <http://online.wsj.com/article/SB10001424127887324439804578109492792634554.html>, archived at <http://perma.cc/6XYF-FKSY>.

422. The International Development Law Organization (IDLO) has been instrumental in establishing Violence Against Women Unit within the Attorney General's Office. Since its opening in 2010, the Unit has received 237 cases, an average of twenty-six monthly (December 2010). The monthly caseload has nearly doubled since the Violence Against Women Unit was established. IDLO has also published a booklet describing crimes against women. INT'L DEV. LAW ORG., 2010 ANNUAL REPORT 6 (2010), available at http://www.idlo.org/Publications/AR2010_En.pdf, archived at <http://perma.cc/5FJY-ZCPS>.

423. Telesetsky, *supra* note 168, at 297–300.

424. See Jennifer L. Fluri, *Feminist-Nation Building in Afghanistan: An Examination of the Revolutionary Association of the Women of Afghanistan (RAWA)*, 89 FEMINIST REV. 34, 36 (2008).

425. For example, in June 2012, the Afghan Justice Minister for example claimed that women's shelters encourage "immorality and prostitution." Graham Bowley, *New Worries About Women's Rights and Ethnic Tensions Emerge in Afghanistan*, N.Y. TIMES, June 20, 2012, at A8.

426. See Rahmani, *supra* note 398, at 301.

427. Parliamentarian and activist Fawzia Koofi argues that one way to improve the lives of women is to engage with the religious polity. She stated: "[t]he role of the mullahs is crucial because we're an Islamic nation and the mosques are being used against women. Why not use them for women?" Miram Arghandiwal, *Afghan Women, Clerics, Eye Unlikely Alliance to Improve Rights*, REUTERS (July 16, 2013), <http://www.reuters.com/article/2013/07/16/us-afghanistan-women-idUSBRE96F0CF20130716>, archived at <http://perma.cc/3GAB-QLE7>.

428. Pamela Constable, *A Taboo Issue in Afghan Campaign: As Millions of Women Prepare to Vote, Debate on their Other Rights is Dampened*, WASH. POST., Sept. 8, 2004, at A14.

429. MELODY ERMACHILD CHAVIS, MEENA: HEROINE OF AFGHANISTAN 55–66 (2003); Drucilla Cornell, *Gender and September 11: A Roundtable*, FOR RAWA, 28 SIGNS 433, 434 (2002).

to feminism—it is important to appreciate that RAWA did not begin as a political movement.⁴³⁰ RAWA has taken, and continues to take, the position that acknowledging the social, cultural and religious limitations that Afghan women face on a daily basis would render it easier to provide Afghan women, mainly in rural areas, with rights.⁴³¹ Accordingly, RAWA regularly strives not to offend or challenge religious or tribal norms, which means that its engagement in political discourse, for example, occurs through its involvement in the social sphere, while being conscious of Islamic principles.⁴³² Thus, RAWA helps women to recognize that the negative treatment of women is unacceptable and mobilizes to bring about positive change.⁴³³ Jennifer Fluri explains:

RAWA remains outside the public political centre while enacting patriarchal reforms within kinship groups and through politically charged social programmes within the spaces of its private and clandestine operations. These political strategies, at times, mirror conventional and conservative methods for socially reproducing the organization's future membership and developing "citizens" for its idealized and ideologically constructed feminist nation.⁴³⁴

The key challenges faced by RAWA in post-Taliban Afghanistan are substantial and have been impacted by the shifting nature of the public-private divide. During the period of Soviet Jihad and the Taliban, RAWA had to work quietly and out of the public eye in order to provide women with basic support.⁴³⁵ In the post-Taliban period, as lines between the private and public have dissipated, RAWA members have taken a more careful line to avoid the accusation that they pose a challenge to Islamic precepts.⁴³⁶ In 2004, for example, Latif Pedram, a left-leaning writer raised the issue of divorce and polygamy

430. CHAVIS, *supra* note 429, at 59.

431. See Sonali Kolhatkar, *The Impact of U.S. Intervention on Afghan Women's Rights*, 17 BERKELEY WOMEN'S L.J. 12, 25–27 (2002).

432. In the words of one activist, RAWA "respect[s] Islam. But while any fundamentalist force rules Afghanistan—whether it be Taliban or Jehadis (such as the Northern Alliance)—democracy and secularism cannot be achieved." Chris Richards, *Interview with RAWA*, NEW INTERNATIONALIST, June 1, 2003, at 33.

433. Anne E. Brodsky, et. al. explore the concept of resilience in relation to RAWA. Their study highlights an initial need for greater consciousness among women and the subsequent need for intention, action, reflection and maintenance. Anne E. Brodsky et al., *Between Synergy and Conflict: Balancing the Processes of Organizational and Individual Resilience in an Afghan Women's Community*, 47 AM. J. CMTY. PSYCHOL. 217, 220, 224–25, 227–28 (2011).

434. Fluri, *supra* note 424, at 36.

435. Kolhatkar, *supra* note 431, at 27–28.

436. Jon Boone, *Revolutionaries Within: Burqas Conceal Women's Dangerous Battle for Rights: Underground Feminist Groups Has Cell Organisations to Foil Powerful Enemies*, THE GUARDIAN, May 1, 2010, at 29.

at a women's forum while campaigning for president by suggesting that a husband cannot treat four wives equally.⁴³⁷ Safia Siddiqui, a political activist and member of the group that sponsored the forum, reacted by claiming that Afghans do not wish to discuss such issues.⁴³⁸ Siddiqui stated, "[t]hese are our Islamic values, and society will accept us only if we respect those values."⁴³⁹ The space in which RAWA labors to sustain its activities also impacts which issues it chooses to address. It has, for example, shifted some of its focus to issues of health⁴⁴⁰ and children because they garner less attention and generate less controversy.⁴⁴¹ RAWA occupies two spheres: one public (the Internet) and one private.⁴⁴² RAWA's website, which contains critical views about contemporary Afghan society, resonates with a wider audience.⁴⁴³ Within Afghanistan, however, RAWA activists communicating through more traditional means adopt a more temperate and vigilant attitude to avoid accusations of being anti-Islamic.⁴⁴⁴ RAWA's programming must also conform to established gender roles.⁴⁴⁵ In its orphanages, for example, girls learn to sew and boys learn carpentry.⁴⁴⁶ The political goals of RAWA thus often "do not extend to the destabilization of gendered labour activities."⁴⁴⁷

CONCLUSION

Discussing the women's rights movement in the United States, former Supreme Court Justice Sandra Day O'Connor identified three

437. Constable, *supra* note 428.

438. *Id.*

439. *Id.*

440. One could argue that RAWA has returned to its original focus of empowering women by providing women with healthcare and education. CHAVIS, *supra* note 429, at 55–66, 162–70.

441. Anne E. Brodsky et al., *The Hope in Her Eyes: The Role of Children in Afghan Women's Resilience*, 82 AM. J. OF ORTHOPSYCHIATRY 358, 362–64 (2012) (discussing RAWA and the role of children as protectors; children actively support their mothers' involvement with RAWA and allow mothers to disguise their activities).

442. Journalist Jon Boone notes that due to official disapproval RAWA "has many of the attributes of an underground movement." Boone compares RAWA to a terrorist organization because it is forced to operate through a cell structure that protects its 2,000 members. Boone, *supra* note 436. Fluri writes: "The limits of women's empowerment are also bound by the physical structures and spaces controlled by RAWA." Fluri, *supra* note 424, at 4.

443. Michael Dartnell, *Post-Territorial Insurgency: The Online Activism of the Revolutionary Association of Women of Afghanistan (RAWA)*, in 14 SMALL WARS & INSURGENCIES 151, 167 (2003) (noting that "RAWA has operated its Website on the basis of a global vision, especially aiming at the US, UN, NGOs, sympathetic activists, and donors.").

444. Boone, *supra* note 436.

445. Fluri, *supra* note 424, at 46.

446. *Id.*

447. *Id.*

core lessons. First, change has to come from the public, not courts or the legislature.⁴⁴⁸ According to O'Connor, reform has "a much better chance of succeeding when it follows, rather than leads, public opinion,"⁴⁴⁹ because acquiring legal protection when society at large does not understand its value means very little.⁴⁵⁰ In the case of Afghanistan, efforts must focus on encouraging men to see the value of changing contrived cultural and religious precepts, including understandings of masculine identities.⁴⁵¹ Such a process undoubtedly raises concerns, because far too often it is the State through its institutions that is the instigator of discriminatory practices. Nevertheless the issue is that in states such as Afghanistan it is very hard to institute change unless it is through the State and its institutions. The second lesson identified by O'Connor is that women's participation in the political process is critical because it not only helps shape policy, but also inspires women to attain positions from which they can implement policy changes.⁴⁵² When women inhabit high official and national leadership positions, the domestic and international scene transforms.⁴⁵³ Recent attempts to diminish Afghan women's participation in the political sphere⁴⁵⁴ are troubling and demand immediate domestic and international attention.⁴⁵⁵ The final lesson is that "change

448. Sandra Day O'Connor, *The Legal Status of Women: The Journey Toward Equality*, 15 J. L. & RELIGION 29, 35 (2000–2001).

449. *Id.*

450. *Id.* Writing about Palestinian women, Adrien Katherine Wing argues that changing the status of women and enhancing women's rights through the reinterpretation of Islamic principles requires social change, which is very difficult to obtain. Wing, *supra* note 166, at 198.

451. For recommendations on how to engage men in the process of empowering women, see Anne Angarola, Steven E. Steiner & Shannon Zimmerman, *Engaging Men in Women's Rights and Empowerment in South Asia and the Middle East*, U.S. INST. OF PEACE (Apr. 26, 2013), <http://www.usip.org/publications/engaging-men-in-women-s-rights-and-empowerment-in-south-asia-and-the-middle-east>, archived at <http://perma.cc/D3MX-HM33>.

452. O'Connor, *supra* note 448, at 35.

453. *Id.* (stating "the visible presence of women in significant and powerful position has a real and tangible effect on the lives of other women striving to advance both personally and professionally."); see also Lesley J. Pruitt, *All-Female Police Contingents: Feminism and the Discourse of Armed Protection*, 20 INT'L PEACEKEEPING 67, 68–70 (2013) (reviewing the utility of using all-female formed police units in U.N. peacekeeping missions).

454. In July 2013, the Afghan parliament adopted a measure reducing the number of seats allotted to women on provincial councils. Atia Abawi, *Afghan Women Suffer Setback as Parliament Lowers Quota for Female Lawmakers*, NBC WORLDNEWS, July 18, 2013, http://worldnews.nbcnews.com/_news/2013/07/18/19534549-afghan-women-suffer-setback-as-parliament-lowers-quota-for-female-lawmakers, archived at <http://perma.cc/JGKD4-R86D>.

455. Emma Graham-Harrison, *West Demands More Progress from Afghanistan in Return for Aid*, GUARDIAN (July 3, 2013), <http://www.guardian.co.uk/world/2013/jul/03/west-demands-progress-afghanistan-aid>, archived at <http://perma.cc/69LR-3TRZ>.

can occur only when members of a large group surmount their individual differences and unite in pursuit of a concrete goal.”⁴⁵⁶ As O’Connor aptly noted, “[i]t has only been when we women have cast aside our differences and forged common ground that we have achieved meaningful change.”⁴⁵⁷ In applying these lessons to Afghanistan and the situation of Afghan women, it becomes clear the liberation of Muslim women requires building “a solid Muslim feminist jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them.”⁴⁵⁸ Albeit unappealing, there exists a vital need to more effectively engage Afghan men and foster male support for the empowerment of women—a goal that RAWA has effectively pursued since its establishment.⁴⁵⁹

Beyond restructuring the debate over women’s rights through the paradigm of Islamic discourse, which necessitates the use of Islam to challenge what are clear un-Islamic practices when it comes to women, the public discourse in Afghanistan must shift such that the empowerment of women is a question of State survival. Adopting measures such as ERAW without fostering acceptance among the religious polity or reforming the judiciary only makes the campaign for women’s rights more difficult because religious and judicial actors will continue to oppose new measures.⁴⁶⁰ Furthermore, the economy and the role that women can play in stimulating economic growth is also worthy of focus,⁴⁶¹ but without addressing issues such as attempted *zina* and the use of *ta’zir*, women are unable to leave their homes without permission. Ultimately, the issue of economic empowerment is presented primarily as a development or civil rights issue rather than an issue of state strength, which therefore means that insufficient attention is placed on economic empowerment.⁴⁶² In contemporary Afghanistan, women only contribute five percent

456. O’Connor, *supra* note 448, at 35.

457. *Id.*

458. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women’s Rights*, 12 AM. U. J. INT’L L. & POL’Y 1, 3 (1997).

459. See ANNE E. BRODSKY, WITH ALL OUR STRENGTH: THE REVOLUTIONARY ASSOCIATION OF THE WOMEN OF AFGHANISTAN 192–93 (2003); CHAVIS, *supra* note 429, at 144; Fluri, *supra* note 424, at 41.

460. Feminist Newswire, *supra* note 409.

461. Julian Simcock notes that the main concern of university students in Kabul is the economy. Julian Simcock, *Kabul’s Economy Is Worse than Its Security Issues*, THE ATLANTIC, Apr. 13, 2013, <http://www.theatlantic.com/international/archive/2013/04/kabuls-economy-is-worse-than-its-security-issues/274688/>, archived at <http://perma.cc/56JN-DPQ2>.

462. Donors have accepted economic empowerment as a development or civil rights rather than women’s issue. See, e.g., ANNE SIMMONS-BENTON ET AL., USAID AFG., ECONOMIC EMPOWERMENT STRATEGIES FOR AFGHAN WOMEN 2 (Mar. 2012), available at http://pdf.usaid.gov/pdf_docs/pnady804.pdf, archived at <http://perma.cc/FU2P-R7XM>.

to the country's economic output, for two main reasons: first, the country has not developed a comprehensive economic strategy and second, the government continues to allow cultural and religious norms to undermine women's economic empowerment.⁴⁶³ If one looks at such agencies as the Afghanistan Investment Support Agency (AISA), whose mission is to attract foreign investment, the focus is very much on men.⁴⁶⁴

Individuals have attempted to engage with MOHRA,⁴⁶⁵ even though the program lacks funds, because the Afghan government anticipates the withdrawal of international military support in 2014 and pending compromise with the Taliban.⁴⁶⁶ The Afghan government views a relationship with the Taliban, which has been reluctant to pursue the empowerment of women, as more important than gender equality.⁴⁶⁷ This may explain why Karzai has neither opposed some of the legislative changes that have weakened the positions of women, nor demanded substantial reforms within the judicial branch to address the failings of the courts.⁴⁶⁸ Other ministries, such as those of education and justice, and non-state actors, such as the Ulema Council, must also participate in the process because they receive more funding than MoWA and wield more influence.⁴⁶⁹ Empowering women and ending discrimination are state strength issues. Ultimately, the argument is somewhat counterintuitive, holding that if the Afghan government wished to end discriminatory practices, as evidenced by its willingness to sign the international human rights

463. Sayed Tareq Majidi, *Women 5 Percent of National Economy: AREU*, TOLONEWS, Dec. 12, 2013, <http://www.tolonews.com/en/afghanistan/13068-women-contribute-5-percent-of-national-economy-areu>, archived at <http://perma.cc/SR8S-QSVZ>.

464. When visiting the AISA's website the only images that one receives are of men. See AFGHANISTAN INVESTMENT SUPPORT AGENCY (last visited Nov. 4, 2014), <http://www.aisa.org.af/vision.php>, archived at <http://perma.cc/YHH8-DJYH>. This may explain why only 1,000 women have received business licenses from the Agency. Majidi, *supra* note 463.

465. A key recommendation of the 2010 UNAMA and OHCHR report is for MOHRA and MoWA to "develop and deliver training and awareness-raising programmes for mullahs, imams and religious teachers about women's rights and the ERAW law. Religious leaders should speak out about harmful practices that are inconsistent with Islamic teaching and principles and hold open discussions among Sharia experts on Islam and women's rights." UNAMA HR, *supra* note 389, at v.

466. John Cantwell, *Negotiations with the Taliban a Bitter but Necessary Pill*, THE AGE (Melbourne), June 21, 2013, at 19; Nordland, *supra* note 391 (noting that Maulavi Abdul Rahman Hotak, one of the commissioners appointed to the Afghanistan Independent Human Rights Commission is former Taliban government official whom the U.S. detained in Bagram for three years).

467. See Moh. Sayed Madadi, *More of the Same in Afghanistan*, FOREIGN POLICY (April 2, 2014), available at http://southasia.foreignpolicy.com/posts/2014/04/02/more_of_the_same_in_afghanistan, archived at <http://perma.cc/US93-AFGN>.

468. See Ward, *supra* note 383; see also Matthew Rosenberg, *A New Hard Line Against Afghan Women*, INT'L HERALD TRIB., Mar. 17, 2012, at 5.

469. SIMMONS-BENTON ET AL., *supra* note 462, at 15–16.

conventions, then it follows that its lack of widespread authority facilitates its decision not to use valuable resources to promote a policy it knows could bring about its downfall.⁴⁷⁰

Evoking state strength renders possible the adoption of a host of measures that would otherwise be deemed offensive.⁴⁷¹ The argument becomes not about women per se, but about protecting and promoting the existence of the state. In fact, when applying state strength to women's issues, the state may argue that it too must confront the public-private divide, turning issues that conservatives view as private into public issues. If the public-private divide remains in place, Afghanistan will never transition out of its fragile state status.

470. It might be useful to note here that King Amanullah was arguably overthrown because conservatives were unhappy with his campaign to empower women. Coleman, *supra* note 299, at 58.

471. This is evident in discourse of U.S. proponents of surveillance who argue that extreme measures must be taken in time of crisis or war. Rich Simon, *Lawmakers Promise More Scrutiny of NSA Surveillance*, L.A. TIMES, July 28, 2013, <http://www.latimes.com/news/politics/la-pn-lawmakers-promise-more-scrutiny-of-surveillance-20130728,0,5449381.story>, archived at <http://perma.cc/F5E9-76T7>.