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FREEDOM OR THEOCRACY?:
CONSTITUTIONALISM IN AFGHANISTAN AND IRAQ

By Hannibal Travis

“Afghans are victims of the games superpowers once played: their war was once our war, and collectively we bear responsibility.”

“In the approved version of the [Afghan] constitution, Article 3 was amended to read, ‘In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.’ … This very significant clause basically gives the official and nonofficial religious leaders in Afghanistan sway over every action that they might deem contrary to their beliefs, which by extension and within the Afghan cultural context, could be regarded as ‘beliefs’ of Islam.”

“The lopsided [electoral] victory by Iraq’s Shiite Muslim alliance gives it the biggest voice in shaping the nation’s new government and constitution…. Will Sharia, or Islamic law, become the main reference for national policy on divorce, censorship, the role of women in society, broadcasting and public morality, as many Shiite clerics and their followers insist?”

INTRODUCTION

During the past four years, the United States has replaced two dictatorial regimes in majority Islamic countries with more democratic governments. These interventions enforced the “Bush doctrine,” the declaration of President George W. Bush after the murder of nearly 3,000 Americans by Saudi and Egyptian terrorists on September 11 that all states “harboring” or supporting terrorists would see their leaders deposed and pro-American ones installed. The Bush doctrine, its adherents plausibly argue, has profoundly advanced the cause of human rights in Afghanistan and Iraq. Specifically, it liberated Afghans and Iraqis from dictatorships with two of the worst human rights records in the world, replacing them with constitutional democracies ostensibly devoted to respecting individual rights.

Activists for human rights and religious freedom have been more critical concerning the United States’ role in the political processes of Afghanistan and Iraq. They argue that the paradoxical effect of President Bush’s policies is to have replaced two unstable, marginalized regimes with what may become enduring and universally recognized Islamic fundamentalist states, albeit with greater democratic credentials. The new constitutions of Afghanistan and Iraq have enshrined Islam as the official religion and source of legislation, which no social policies may contravene. This codification of religious fundamentalism was an inevitable byproduct.
some observers contend, of the delegation of the nation-building process in both countries to religious extremists who enjoyed devoted followings of armed militiamen.

¶3 This article explores this debate by analyzing legal developments in Afghanistan and Iraq, with a particular focus on Afghanistan’s new constitution, ratified in early 2004 before the first post-Taliban elections were held. The Afghan constitution symbolizes the unmistakable liberation of Afghanistan’s people from the despotic and even genocidal rule of the Taliban, but its many provisions requiring compatibility of government policy with an unwritten code of Islamic law may allow grave human rights violations to continue, and frustrate democratic demands for respect for international human rights standards and the country’s civil law traditions. Accelerated judicial reform will be necessary to ensure that the provisions in the constitution for judicial review of laws for conformity to religious doctrine will not be utilized to implement theocratic rule, which is the result that many powerful Afghans, possessing armed militias used to intimidate their political opponents, are working towards.

¶4 Afghan modernizers and fundamentalists have enjoyed varying degrees of foreign support and intervention throughout the twentieth century. Depending on how the new constitution is interpreted, the past support of the U.S. and its allies to some of the most radical elements of the fundamentalist camp may have assured their enduring victory. Part I of the Article explores the historical context in which Afghanistan’s new constitution was drafted and ratified, and the unique responsibility of the U.S. and the Soviet Union in creating that context. Part II traces the rise and fall of the Taliban theocracy, which murdered thousands of political opponents and religious minorities, and intensified the fundamentalist oppression of Afghans instituted after the fall of the communist Afghan regime. Part III describes how after the rout of the Taliban, the U.S. accepted Afghan fundamentalists into prominent positions from which they could control the process by which Afghanistan would draft and ratify its new constitution and develop a post-Taliban legal system. Part IV proposes some test cases for judging the implementation of Afghanistan’s new constitution and judicial reform efforts from the perspective of democracy and individual rights, including new bans on blasphemy and political secularism that are ripe for systematic abuse, plans to revive fundamentalist punishments avoided by most modern states such as stoning and amputation, and the ongoing oppression and enslavement of Afghan women and girls.

¶5 The article concludes by drawing some parallels between the Afghan constitutional process and the ongoing process of transitioning Iraq from a nominally socialist dictatorship with a genocidal record into a so-called “Islamic democracy.” Many Iraqis, and almost all residents of majority Kurdish areas of northern Iraq, report being better off as a result of the U.S.-led operation to remove Saddam Hussein from power. But as in Afghanistan, the Iraqi delegates handpicked by the U.S and the U.N. to draft a constitution have established Iraq as a religious state. At the behest of powerful fundamentalists with private armies, the drafters of the interim Iraqi constitution included language providing for judicial review of legislation for conformity to an unspecified, but probably fundamentalist, version of religious law. At the same time, more than 100,000 Iraqis have died violently since the war began; Iraqi fundamentalists are murdering and raping members of the indigenous Christian population at an accelerated pace, prompting tens of thousands to flee the country; and Iraqi women are facing new restrictions on their freedom of movement and dress, as well as deprivation of their rights in marriage and divorce. The actions and public statements of Iraq’s most prominent religious leaders, to which the likely leaders of the new Iraq will defer if present trends continue, raise precisely the same sorts of concerns as the fundamentalist policies that have continued in Afghanistan.
HISTORICAL CONTEXT OF THE RISE OF THE TALIBAN THEOCRACY

Pre-Constitutional Afghanistan

¶6 Like many countries, Afghanistan had no written constitution prior to the twentieth century. The land was ruled either as a province of another empire, or independently by an Afghan monarch or local tribal leaders. For many centuries, the legal system had its basis in a combination of Sharia law and ancient customs such as the jirga, a council of tribal elders convened to settle important issues, and Pashtunwali, the Pashtun code of conduct emphasizing conservative family values and the seclusion of women from public view. Around the turn of the 20th century, Afghanistan opened up to secular influences and women’s rights by abolishing some forced marriages, raising the minimum marriageable age, liberalizing women’s access to divorce and rights of inheritance, and prohibiting extravagant gifts to a bride’s family that could be used in essence to purchase a girl from her parents.

Constitutional Monarchy

¶7 The events leading up to and following the adoption of the first Afghan constitution would be repeated many times in Afghan history: a set of policies looking towards the future and the West infuriated fundamentalists, whose opposition was violently suppressed but eventually succeeded, with foreign intervention, in deposing the regime responsible for the new policies.

¶8 On April 9, 1923, Amanullah Khan, the Amir of Afghanistan, secured the ratification by a Loya Jirga of Afghanistan’s first written constitution. The 1923 constitution set forth a blueprint for modernizing Afghanistan and assuring greater rights for Afghan women and religious minorities within the framework of Islamic governance. It guaranteed that all Afghan subjects would have “equal rights in accordance with Sharia and the laws of the state.” Some Afghans interpreted this provision as entitling Afghan women to citizenship and equal rights. The constitution promised greater rights to religious minorities such as the Hazaras, who as Shia Muslims had been labeled as infidels and massacred and enslaved in the nineteenth century for this reason. It abolished torture, slavery, and forced labor; created a legislature, although the Amir would appoint the Prime Minister and many of its members; and decreed that followers of religions other than Islam, such as Hinduism and Judaism, were entitled to the protection of the state. Elementary education became compulsory for all Afghan “citizens.”

¶9 Despite its modernizing aspirations, the 1923 constitution established what would be considered theocratic rule by contemporary standards. A “theocracy,” literally speaking, would be the direct rule by a divine being on Earth; this possibility having been disavowed by mainstream Christianity and Islam, most theocracies in fact consist of “government by priests or men claiming to know the will of God.” By this definition, Afghanistan’s 1923 constitution was theocratic by virtue of the authority it invested in men claiming to know the will of God. The constitution made the “sacred” and official religion of the state, and enshrined the King as the “servant and the protector of the true religion of Islam.” It instructed legislators to give “careful consideration” to the “requirements of the laws of Sharia.” Perhaps most importantly, it provided that in Afghan courts of justice, “all disputes and cases will be decided in accordance with the principles of Sharia and of general civil and criminal laws.” The judiciary, in this instance as in others, served as the key instrument of fundamentalist Islamic theocracy.

¶10 Taking on centuries-old customs, Amir Amanullah Khan introduced ambitious legislative reforms improving Afghan women’s rights. The Amir declared that Afghan women would no
longer “be treated as second-class Muslims.” In 1921, he enacted a Family Code banning child marriage, marriages between close relatives, excessive dowries, and the exchange of women as “blood money” in payment of interfamilial disputes. He opened girls’ schools and sent women students abroad for higher education. After 1923, the Amir introduced Afghanistan’s first civil code, which abolished polygamy and marriages to all girls under the age of 18. His wife Soraya appeared unveiled in public and participated actively in politics, citing the example of women in the “early years of Islam.”

Not satisfied with the constitution’s gestures towards theocracy, and disappointed with King Amanullah’s record as the “protector” of Islam, Afghanistan’s religious elite quickly moved to overthrow and reverse his modernizing reforms. The head of a prominent religious family, which served as “king makers” in Afghan society, immediately denounced the 1923 constitution as a “communist” document. A rebellion reached the outskirts of the capital Kabul, and was only repelled when the Amir mobilized his new air force to strafe and bomb the advancing insurgents, and then executed the revolt’s leaders.

Rebels having nearly toppled his regime, the Amir called a Loya Jirga to amend the 1923 constitution in several important respects designed to pacify Afghanistan’s religious elite. One amendment made the Hanafi school of Islamic law the official religious rite of Afghanistan. Additional concessions from the Amir included “watering down” the rights of women, reintroducing torture when “in accordance with the rules of the Sharia,” and allowing a Council of Islamic Scholars to “decide whether new laws were in accordance with Islamic law.”

After Amir Amanullah became King of Afghanistan in 1926, he announced further sweeping reforms aimed at helping Afghan women. He endorsed expanding Afghan girls’ access to education, proclaimed his opposition to the compulsory veiling of women, and imposed Western dress within the capital of Kabul. In response, Afghan religious leaders once again led conservative Afghan tribes in rebellion. Under siege, King Amanullah abdicated the throne in early 1929. Historians tend to blame the King’s overhasty reforms for his downfall, especially those dealing with mandatory veiling, the seclusion of women, and forced and underage marriages. But the West failed to support the King who admired its values, and Britain actively worked to overthrow him. Many Afghans and even the British press believed that the British Empire was behind Amanullah’s fall from power, given the Empire’s poor relations with him.

King Amanullah’s successors quickly overturned his reforms. But in doing so, they did not return Afghanistan to a pre-modern or pre-constitutional condition. Instead, they established an Islamic constitutional monarchy that, despite its theocratic aspects, also retained some of the 1923 constitution’s gestures towards reform.

A Loya Jirga in 1930 created Afghanistan’s next stable government and pronounced Nadir Shah as Afghanistan’s King. The King promulgated the second Afghan constitution in 1931. With a few minor changes, it endured as Afghanistan’s governing charter for more than 30 years. Like the 1923 constitution, it embraced tradition while looking tentatively towards the future. On the side of tradition, it made the Hanafi school of Islam the state religion, established a requirement that all legislation conform to the Sharia, and gave religious authorities the power to review Afghan laws and governmental policies for correspondence to Sharia law. But it also guaranteed compulsory elementary education, freedom of the press within the limits of the Sharia, and a limited role for democratically elected officials to participate in the drafting of legislation. Afghan women became eligible to vote in elections, although the authorities later declared this provision to be incompatible with Islamic law.
King Nadir Shah’s government enforced Afghan women’s obligation to wear the all-covering burqa, a tent-like covering that obscures the entire person and leaves only a mesh opening to see through. The new King reinvigorated purdah (the Persian word for “curtain”), or the prohibition against women participating in public life or having contact with any men other than their husbands or those close relatives whom they are forbidden to marry. In Afghanistan, these “restrictions severely limit women’s activities, including access to education and employment outside the home. Many [women] are largely confined to their homes.”

The King was assassinated in 1933, leaving his throne to his 19-year old son Zahir. King Zahir Shah would preside over the slow improvement of living conditions in Afghanistan for over 40 years after his father’s death in 1933. As Prime Minister, the King’s first cousin Muhammed Daoud Khan strove to develop Afghanistan’s economy by securing vast amounts of economic and military aid from the neighboring Soviet Union. The U.S. also initiated several important development projects in Afghanistan, but declined to supply military aid.

In 1959, Prime Minister Daoud created a major cultural crisis when the wives and daughters of the Afghan royal family appeared unveiled for the first time since Amanullah’s reign. Many religious leaders publicly condemned this display, but Daoud argued that Islam did not make the veiling and seclusion of women obligatory. Other educated women, particularly in Kabul, then began to abandon the veil, including growing numbers of nurses, midwives, and teachers. In response, the more conservative mullahs provoked riots and acid attacks on unveiled women, until Daoud had about 50 of them jailed and charged with treason and heresy. Daoud’s government quelled an armed uprising in Kandahar with advanced weaponry obtained from the Soviet Union. Daoud finally released the mullahs from custody, and they brought the unrest to a halt, agreeing that each Afghan family would be allowed to decide for itself whether its women would practice purdah.

In the 1960s, Afghanistan’s third constitution propelled the nation further towards democracy and respect for human rights, but like its 1923 model it would eventually fall to a combination of foreign intervention and the violent opposition of local radicals. This time, the communists and fundamentalists would divide the country between them.

King Zahir Shah set out to establish a constitutional monarchy that would provide for more democratic input and thereby build public support for the regime. Despite Daoud’s large victories in winning superpower development aid and ensuring greater participation for Afghan women in public life, the King successfully pressured him to resign as Prime Minister in 1963. The next year, a Loya Jirga ratified a new constitution, drafted with French assistance. Afghanistan’s 1964 constitution “limited the monarch’s absolute power through the creation of a parliament and the clear separation of powers.” The King could no longer enact laws without the approval of both houses of parliament. But he retained broad executive powers, including the powers to declare war and command the army; to appoint the Prime Minister and one-third of the Afghan Senate, dissolve the parliament, and veto legislation; and to appoint the members of the Supreme Court. The lower house of the Afghan parliament and one-third of the Afghan Senate would be elected to four-year terms by direct elections, subject to the King dissolving parliament and calling new elections at any time and for any cause.

The 1964 constitution loosened the requirements of previous Afghan constitutions that the state be governed in accordance with Sharia law. Like the 1923 constitution, it recognized Islam as the “sacred” and official religion of Afghanistan. But the 1964 constitution did not require that all Afghan laws conform to Sharia as such, stating that “there shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in
Similarly, the constitution no longer anointed the King as the “protector of the true religion of Islam”; instead it urged him to “protect the sacred principles of the religion of Islam.” These references to general “principles” provided the legislature with greater leeway to enact laws that presented some tension with the tenets of Islamic law taken literally.

Finally, the 1964 constitution no longer gave Sharia equal status with Afghanistan’s “general civil and criminal laws,” but made it authoritative only where no statute existed in the area.

One victory for religious conservatives in the 1964 constitution would have important consequences in post-Taliban Afghanistan, and that is the empowerment of the judiciary to enforce the Hanafi school of Islamic Sharia jurisprudence as Afghan law. The Hanafi school is perhaps the least accommodating of the four major schools of Sharia law to the autonomy of women and children, as it has traditionally been construed to allow marriages to be contracted by a guardian on behalf of a minor child and to forbid women from securing a divorce under most circumstances.

The 1964 constitution stated that where no law existed in an area, “the provisions of the Hanafi jurisprudence of the Shariaat of Islam shall be considered as law,” and required Afghan court, to render justice in cases not controlled by the constitution or statutory law “by following the basic principles of the Hanafi jurisprudence of the Shari'at of Islam.”

Although many subsequent commentators have stressed that the 1964 Constitution granted greater rights to Afghan women, the document did not make substantial advances in reforming women’s rights within the legal or judicial system. The 1964 constitution gave all Afghan “people” equal rights and obligations before the law, as the 1923 constitution had given all Afghan “subjects” equal rights and duties before the law. Following the example of the 1923 constitution, women’s equality and most of the other rights recognized in the 1964 constitution, including the right to liberty, property, freedom of speech and association, education, and employment, could be limited by provisions of the law. The 1964 constitution did innovate by granting Afghan women unprecedented opportunity to participate in government. Women won the right to vote in parliamentary elections, be elected to parliament, serve as members of government, and even become government ministers. These rights became a reality for the first time in Afghan history, as women helped vote several of their number into parliament, and a woman became Minister of Public Health in 1965.

Ultimately, the 1964 constitution’s most enduring legacy may be that radical elements in Afghan society misused its freedoms to prepare the way for dictatorship and the deaths of countless Afghans. Afghan communists, some of whom had been barred from Kabul University or recalled from study or work in the U.S. for expressing their radical ideas, became free to organize. Although the Kabul area elected a few Afghan women and leftists as representatives in the first elections under the 1964 Constitution, the parliament as a whole was dominated by the rural landowners and conservative religious leaders who could afford the high costs of running for office, which led many progressive young students and middle-class Afghans in Kabul to despair of democracy, and seek more radical solutions. In 1965, Muhammed Taraki and Babrak Karmal founded the People’s Democratic Party of Afghanistan (PDPA), the Communist Party of Afghanistan “in all but name.” The PDPA attracted a growing membership among young students and intellectuals in Kabul University and the urban Afghan middle class. Afghan voters elected three PDPA members to the Afghan parliament in 1965, including Karmal. The Principal of Kabul Teachers College, Hafizullah Amin, joined the PDPA and was elected to parliament in 1969. Each of these three men – Taraki, Karmal, and Amin – would go on to assume the helm of dictatorial left-wing Afghan regimes.
Prominent Afghan fundamentalists lacked the public support necessary to be elected as such to the parliament as PDPA members were, but they organized disciplined cadres of followers during the 1960s and 1970s. The ideas of the Egyptian fundamentalist Sayyed Qutb, the “intellectual light” of the Muslim Brotherhood, “attracted particular interest” in the Kabul Sharia faculty, which Kabul University opened in 1952. Al-Aznar of University in Egypt, which had taken the Kabul Sharia faculty under its wing, was a center of the Muslim Brotherhood’s fundamentalist political activity. The head of the Kabul Sharia department, Professor Ghulam Muhammed Niazi, was deeply influenced by the Muslim Brotherhood’s campaign for Islamic fundamentalist rule while studying at al-Aznar University. The fundamentalist program of the Muslim Brotherhood and its progeny of jihadist groups is, in brief, a holy war that would replace the corrupt monarchs of Muslim countries with Islamic states that would govern all aspects of life, strictly segregating men and women and providing “humanity a complete cure for all its ills.”

From his perch as professor of Sharia law, Professor Niazi led the fundamentalist movement in Afghanistan. He established cells in Kabul and Paghman dedicated to formulating strategy, and developed contacts with sympathetic government officials. Joining Professor Niazi in his campaign for an Islamic revolution in Afghanistan were two other graduates of al-Azhar University, whose fundamentalism would determine the course of Afghan history for generations: Burhanuddin Rabbani and Abdul Rasul Sayyaf. Mr. Rabbani, who had translated the writings of Sayyed Qutb into the Afghan language of Dari, succeeded Professor Niazi as Amir of the Islamic Association of Afghanistan in 1972. Around this time, a young student leader at Kabul University named Gulbuddin Hekmatyar joined the Muslim Brotherhood and shortly became famous for throwing acid in the faces of unveiled Afghan women. Rabbani, Sayyaf, and Hekmatyar would each go on to lead the fundamentalist revolt against the Afghan constitutional monarchy, then the Afghan communists, and finally against the Soviet occupation of Afghanistan. Eventually, each of them would govern entire mini-states, but none of them could ever quite manage to bring all of Afghanistan under his faction’s control.

Socialist and Communist Dictatorship

Despite Afghanistan’s slow but steady progress in promoting democratic input and women’s rights under Zahir Shah, Afghan leftists demanded immediate and sweeping change. But the socialist and communist ideology to which they turned sparked implacable opposition in Afghanistan’s conservative religious leaders, setting the stage for the decades-long struggle between Soviet-backed leftist governments and Pakistani-based fundamentalist jihadis.

With extremists organizing feverishly, the Afghan economy entered a tailspin in the early 1970s. Government corruption and a three-year drought from 1969 to 1972 brought on a famine that killed between 100,000 and 500,000 Afghans. The Afghan famine provided an opening for former Prime Minister Daoud, still popular with the Afghan military, to overthrow the monarchy in 1973. Young officers trained in the Soviet Union executed the coup. Afghanistan became a republic, and Daoud its first President. Half of his cabinet ministers in were communists allied with the Parcham faction of the PDPA led by Babruk Karmal, and hundreds more communists entered government ministries and provincial officialdom.

Daoud saw the fundamentalists as the greatest threat to a modern Afghanistan, so he arrested Professor Niazi and 200 other fundamentalist plotters in Kabul. By one account, this action began the war between leftists and fundamentalists that continued for almost 20 years, until the near-obliviation of the leftists and the communist movement after the dissolution of the
Soviet Union and the mujahideen victory in 1992.119 The fundamentalists who had fled to Pakistan from Daoud’s mass arrests, including Rabbani and Hekmatyar, helped organized a holy war against Daoud’s regime from their new base in Pakistan.120 The most successful operation was an incursion from Pakistan into Afghanistan’s Panjshir valley led by Ahmed Shah Massoud, who would become one of Rabbani’s best commanders.121 The revolution failed, however, and the fundamentalist movement splintered into factions led by Rabbani and Hekmatyar.122

The 1977 constitution granted President Daoud near-absolute powers, a common theme among Afghan regimes following the fall of the monarchy.123 It was otherwise a profoundly leftist document, contemplating dramatic economic and judicial reforms.124 All laws contrary to the “basic principles” of the religion of Islam remained unconstitutional,125 and judges in the Afghan courts would decide cases before them not governed by statutory law according to Hanafi law.126 But for the first time in Afghan history, the country’s constitution specifically stated that “women and men,” and not simply all Afghan “subjects” or “people,” were entitled to equality before the law and protection against discrimination.127 A unicameral legislature elected by all Afghans over the age of 18, half of which would be reserved for farmers and the working class, would draft legislation.128

The 1977 constitution was never truly implemented, because even as it was being prepared, the Soviet Union became concerned that Daoud was being drawn into a pro-American stance with Saudi money, and began pressuring the divided Afghan communists to unite to overthrow him, which they did.129 When Daoud issued an order for his communist opponents to be arrested, it triggered a revolution.130

During its long reign, and despite massive foreign aid, the monarchy had done little to improve Afghanistan’s standing as one of the poorest, least healthy, and worst educated countries in the world. In the late 1970s, even after some of Daoud’s reforms, 50% of Afghan children died before reaching the age of five, 80% of Afghan children received no education, and “the per capita income, at $157, was one of the lowest in the world.”131

In April 1978, communist military officers turned Afghanistan’s air force and tanks against the Daoud regime.132 The air force bombed the presidential palace, killing President Daoud and many members of his family.133 The first decree of the leaders of the revolution bestowed ultimate authority on the head of the PDPA, Nur Muhammed Taraki.134 Another decree gave men and women equal rights, prohibited forced marriages, established a minimum marriageable age of 16 for girls, and reduced the bride price to a low fixed minimum amount to discourage the widespread sale of young Afghan girls by their parents.135 “The Government called for women to enjoy freedom, to dress as they please, work in the civil service, armed forces and other institutions and enjoy other equal rights.”136 Taraki’s regime introduced universal education for boys and girls and a campaign against illiteracy, and enacted a “far-reaching redistribution of land” from large landlords to peasants.137

President Taraki’s government rapidly lost control of the country to anti-regime forces, which in early 1979 led several Afghan provinces in open rebellion, including Nuristan and Hazarajat.138 Iranian fundamentalists, fresh from establishing the Iranian theocracy under Ayatollah Ruhollah Khomeini, inspired a revolt in the large Afghan city of Herat close to the Iranian border,139 drawing on outrage there against the government’s efforts to promote Afghan women’s literacy.140 An army officer named Ismail Khan organized a mutiny of the Afghan armed forces in the Herat area.141 In response, the government bombed the city and waged a devastating assault with tanks and helicopters, killing up to 20,000 people and razing many
buildings. These events prompted Prime Minister Amin, who had gained influence over the Afghan security services, to seize power, killing his former comrade Taraki.

¶35 In July 1979, U.S. President Jimmy Carter signed a National Security Directive authorizing secret American aid to the Pakistan-based rebellion against the Afghan government. President Carter’s National Security Adviser advised him at the time that this aid would likely result in a Soviet invasion, and later boasted of “drawing the Russians into the Afghan trap.” On December 27, 1979, Soviet forces in and around Kabul captured the main government ministries, neutralized key Afghan army units, and fanned out to other major Afghan cities such as Herat and Kandahar. Soon the Soviet occupying army reached 85,000 men. Before the Red Army’s defeat almost another 700,000 men would follow.

¶36 The Soviets installed PDPA founder Babruk Karmal as President of Afghanistan. Karmal promulgated a new constitution in 1980 that purported to establish the rule of the Afghan people and recognize a similar list of individual rights as those recognized in previous constitutions. The constitution no longer enshrined Islam as a bulwark of the government’s legitimacy. All political parties other than the PDPA were outlawed. With the Red Army occupying the nerve centers of Afghan society, moreover, the Soviet leadership, rather than the PDPA or the Afghan people, was the real power in Afghanistan during the 1980s.

¶37 Karmal and his Soviet handlers reaffirmed and expanded the efforts of Daoud and Taraki regimes before them to promote greater equality for Afghan women. The communists “officially sanctioned a wider public role for women, whose status improved.” By 1985, 65% of the students at Kabul University were women, and Afghan women worked in most government agencies, social organizations, factories, the national airline, and the health care sector. By the time the communists lost power, “women accounted for 70 percent of teachers, 50 percent of government workers, and 40 percent of medical doctors.” Women worked as police officers, members of the military, and journalists. Afghan women increasingly appeared unveiled in public, as their counterparts in Soviet Central Asia had done decades previously. Communist reforms intruded into Afghan family life when the communists banned the purchase and sale of young girls as wives, and provoked rage by demanding that fathers allow their daughters to learn to read. The regime’s family courts were “mostly presided over by female judges” and protected women’s rights in marriage and divorce and to equitable child custody and support.

¶38 Whatever hope existed for true equality between Afghan women and men, rich and poor, was lost in the genocidal war between Soviet and Afghan communist forces and the fundamentalist insurgents backed by the Western and wider Islamic worlds. Both sides abandoned laws and constitutions in a common descent into wanton violations of human rights.

¶39 U.S. President Ronald Reagan and Pakistani dictator Zia ul-Haq directed billions in American military aid for the mujahideen, mostly to “the more extreme Sunni fundamentalist faction led by Gulbuddin Hekmatyar.” Hekmatyar used the money to organize a tightly disciplined faction for the day when he would “impose an authoritarian Islamic state that would sequestrer women and punish Moslems who don’t practice their faith.” With great violence, his party forced Afghan women refugees in Pakistan to bury themselves in burqas. Several Afghan women were murdered in Pakistan simply for failing to cover their hair.

¶40 Saudi Arabia favored the armies of Abdul Rasul Sayyaf, whose party “recruited thousands of fighters from Arab countries.” Like Hetmatyar, Sayyaf had little indigenous support in Afghanistan, but grew powerful because of the prolific Saudi money and foreign weaponry at its disposal. In 1980, Sayyaf recruited a number of “Afghan Arabs” to the Afghan cause, including Osama bin Laden, who was working with the CIA at the time.
CIA supported Pakistani efforts to “recruit radical Muslims from around the world” to fight in Afghanistan. Over 35,000 radicals from Muslim countries, mostly Arabs, signed up to fight in the “holy war,” and 65,000 had “direct contact” with the war. Over 12,000 Arabs and others received training in “bomb-making, sabotage and urban guerrilla warfare” in camps the CIA helped build. These Arab fighters would develop into the al Qaeda terrorist organization and become the military backbone of the Taliban movement.

By 1987, the communists and fundamentalists had killed more than one million Afghans by some estimates, and had driven another seven million from their homes. The Soviets carpet bombed major Afghan cities such as Herat and Kandahar into ruins, wiped half of Afghanistan’s villages off the map, and destroyed much of the country’s farmland. Nevertheless, the Afghan resistance continually replenished its dead with new recruits from the millions of refugees in Pakistan and Iran, and armed them with fresh infusions of American and Saudi aid. The mujahideen gained control of up to 90% of the countryside and became “immensely wealthy” by making it the world’s second largest opium producing land.

Although the scale of the bombing and shelling of Afghan cities and towns posed the greatest threat to human rights, the mujahideen’s fundamentalist policies promised to overturn decades of progress towards including Afghan women in public life. During the 1980s, women rarely walked the streets in rebel-controlled regions of Afghanistan. “Those who leave their homes wear the chador [or burqa], a voluminous shroud covering the wearer from head to toe, and may only survey the world through a 4-by-4-inch rectangle of netting extending from the tip of the nose to the eyebrows.” In Pakistani refugee camps run by the rebels, women were denied access to areas containing men, and prohibiting from seeing male doctors. (When the Taliban continued these policies, the U.S. cited them to help justify the war.)

In 1987, the new Soviet leader Mikhail Gorbachev decided to withdraw entirely from Afghanistan. The Soviets planned to leave the country to Najib Allah, the former head of the Afghan secret police, who had taken over from Karmal as the Afghan communist leader in 1986. Najib Allah convened a Loya Jirga in 1987 to signal the moderation of the communist regime’s policies. The 1987 constitution it passed once again enshrined Islam as the sacred religion of Afghanistan and provided that no law could be contrary to its “principles” and the other values in the constitution. It guaranteed equal rights to men and women and among religious minorities in a similar manner to previous constitutions, and provided for a number of individual rights to be defined in accordance with the law. The ruling communist PDPA party lost its majority of seats in parliament after elections held in 1988 pursuant to the new constitution, and a member of Daoud’s pre-communist government became Prime Minister. Najib Allah even reserved seats in parliament for mujahideen leaders, and invited them to lay down their arms and participate in a mixed government, an offer that they refused.

The Soviets completed their withdrawal from Afghanistan in 1989. The day after the last troops had returned, Gorbachev proposed a cease-fire between the communists and fundamentalist parties to U.S. President George H.W. Bush, with the two superpowers agreeing to halt shipments of weapons until democratic elections under U.N. supervision could be held. The Bush administration and the Afghan rebels refused to negotiate, with the result that for years, the mujahideen supplied by the U.S. continued devastating rocket attacks on Afghan towns and cities, killing up to 40 people in each blast.

Nevertheless, the Afghan communist regime of Najib Allah survived, sustained by a combination of rebel infighting and billions of dollars in Soviet military aid. Najib Allah convened a Loya Jirga in 1990, promising to achieve national reconciliation and moderate the
communist face of the Afghan government. The resulting 1990 constitution proclaimed Afghanistan a multi-party state to be governed according to laws in conformity with the principles of Islam, including the right to own and inherit property pursuant to Sharia law. The commanding heights of the economy remained state property, but private investment was allowed, at least in theory. The National Assembly, selected by a mixture of direct elections and appointments as under previous constitutions, approved laws prior to the President’s signature, with a Constitutional Commission exercising limited review.

Fundamentalist Rule

¶46 As many had predicted, the victory of the Afghan rebels brought civil war, fundamentalist outrages, and thousands of atrocities against civilians. The “Islamic revolution” triumphed in Kabul in April 1992. The military defense of Kabul unraveled due to the collapse of the Soviet Union in 1991 and the defection of Afghan communist military commander Rashid Dostum to the rebels in March of 1992. But after the communist regime fell, the war continued. With no communists left to fight, the mujahideen leaders were left to wage a bitter struggle for power among themselves, as Najib Allah had predicted in 1990.

¶47 The mujahideen perpetrated frequent massacres and “indiscriminate killing,” as well as “rape, torture and looting.” Joined by General Dostum’s tanks, Hekmatyar’s forces finished the job of destroying Afghanistan’s housing stock and architectural heritage by rocketing the Afghan capital Kabul into ruins. Almost 20,000 Afghans were killed or injured during the fighting in 1993. In 1994, the United Nations reported that Kabul, spared the type of bombing to which Kandahar had been subjected by the Soviets, had become “the most destroyed city in Afghanistan.” The warring factions killed about 50,000 Kabulis and committed many “medieval atrocities.”

¶48 The victorious fundamentalist armies subjected Afghan women to some of the worst treatment in Afghan history. The State Department reported that the mujaheddin were responsible for “innumerable cases of rape.” Human Rights Watch described 1992-1995 as the worst period in Afghan history, replete with “mass rapes” and the indiscriminate slaughter of civilians. Mujahideen fighters kidnapped many Afghan women for purposes of sexual slavery, as a “method of intimidating vanquished populations and of rewarding soldiers.”

¶49 While the soldiers of the victorious rebel armies ran wild, discipline was reserved for Afghan women. In 1994, the Supreme Court of the Islamic state of Afghanistan issued a series of rulings requiring a woman to “wear a full-body veil” and stating that she “must not leave her house without her husband’s permission,” and “must not look at strangers.” Other courts issued rulings ordering that women be stoned to death for adultery or other crimes.

¶50 The “valiant and courageous Afghan freedom fighters” also persecuted religious minorities viciously. On February 11 1993, the military forces of President Burhanuddin Rabbani and his ally Abdul Rasul Sayyaf occupied a Kabul suburb populated largely with minority Shia Hazaras. Their armies killed “up to 1,000 civilians”, beheading old men, women, children and even their dogs, stuffing their bodies down the wells.

¶51 Finally, Afghanistan under mujahideen rule became known for training and harboring international terrorists. Ramzi Yousef, who masterminded the 1993 World Trade Center bombing, had fought under the command of Abdul Rasul Sayyaf, the junior partner in Rabbani’s mujahideen government. The U.S. government issued a report in the 1990s in which it cited Saudi-backed mujahideen commander Sayyaf for “continuing to harbor and train potential
terrorists.” Sayyaf’s faction maintained close contact throughout the 1990s with Osama bin Laden, and welcomed him back to Afghanistan in 1996.

RISE AND FALL OF THE TALIBAN THEOCRACY

The Atrocities and Tyranny of the Taliban

Almost three years after the fall of the communist government, the mujahideen had failed to establish an effective central government or national judicial system. Instead of establishing law and order, their forces were killing, raping, and looting at will, and had “blocked food and medical supplies desperately needed by [the Afghan] people.” An estimated 100,000 Afghans died in Kabul alone prior to the Taliban takeover in 1996. All told, about 400,000 Afghan civilians died in the civil wars and humanitarian disasters of the 1990s.

In early 1994, according to their own legend, a group of former mujahideen fighters and Islamic students, or Taliban, joined together to fight the “Muslims who had gone wrong,” and started by freeing young boys and girls from local warlords who had kidnapped them for rape. As the future President of Afghanistan, Hamid Karzai, testified before Congress, the “Taliban emerged when Afghans were desperately looking for a savior,” and their “emergence was supported by the majority of the Afghan people” who hoped that they would “end the bloodshed” and bring “peace and stability.” The Taliban selected Muhammed Omar as their leader, a village mullah from a backward area of southern Afghanistan who had fought in the American-backed jihad against the post-Soviet Afghan government of Najib Allah.

The U.S. and its allies in Pakistan and Saudi Arabia initially supported the Taliban movement. Their critical military, financial, and diplomatic aid to the Taliban transformed a ragtag gang of fighters into a sophisticated army with tanks, artillery, bombers, and an intelligence capability. With fresh infusions of foreign financing and manpower for each new offensive, the Taliban defeated every major mujahideen commander. The Taliban captured Kandahar in 1994 largely by bribing local commanders with over $1.5 million probably provided by Saudi Arabia via Pakistan. They doled out more cash to buy control of Uruzgan and Zabul provinces, and occupied Herat with tens of thousands of Pakistani recruits and “arms, ammunition, and vehicles provided by Pakistan and Saudi Arabia.” In 1996, Saudi and Pakistani intelligence orchestrated the triumph of the Taliban revolution by helping ensure the fall of Kabul and Jalalabad. As many as 8,000 more residents of Kabul died in the fighting and the ensuing Taliban atrocities. In response, many of the mujahideen leaders whose factions had opened the way for the Taliban revolution by abusing the Afghan population for years formed the Northern Alliance. But angered by the looting and routine violence against civilians that had characterized mujahideen rule, some Kabul residents initially welcomed the Taliban, even after thousands of Kabulis died in the battle for the city.

The Taliban persecuted the Shia Muslims, who then made up as much as 20% of the Afghan population, even more brutally than had the mujahideen under Rabbani and Sayyaf. A mutiny in Mazari-Sharif opened the door to Taliban occupation of that city; although 3,000 Taliban died in an uprising that followed, the Taliban retook the city in 1998, backed by Pakistani intelligence officers and even Pakistani troops. The victorious Taliban slaughtered up to 8,000 civilians in a frenzy of killing and rape directly mostly at the Shia Hazara. The Hazara holdout of Bamiyan was the last major city to fall, with more mass murders of Shias the result, including of hospital patients roused from their beds. The post-Taliban governor of...
Bamiyan has estimated that 20,000 Shias and others died in this way. Iran mobilized its army to intervene against the massacres and systematic rape of Shias, but backed down under pressure from the U.N. Security Council. The genocidal killing continued into 2001, as Pakistan continued to deliver military aid to the Taliban in violation of U.N. sanctions.

[¶56] The Taliban aimed to install a government and legal system that would revive a life like pious Muslims had lived “1,400 years ago.” The Attorney General of the Taliban declared: “The Constitution is the Sharia so we don’t need a constitution.” The Taliban believed that the principal purpose of the anti-Soviet jihad had been the establishment of Sharia law, and indeed that is how the mujahideen leaders who had been fighting for Sharia from bases in Pakistan even prior to the communist coup in 1978 explained their war at the time.

[¶57] Saudi Arabia, the primary backer of the Taliban along with Pakistan, served as the model for the Taliban state. Saudi Arabia is a fundamentalist monarchy, whose constitution demands allegiance to its founding King and his “children’s children” in the name of religion. Its government tortures members of religious minorities and its religious police administer beatings to women who reveal their faces, hair, or bodies in public. The Saudi government helped create the Taliban, encouraged them to give refuge to bin Laden, and tutored them in theocracy. The Saudi Ministry for the Propagation of Virtue and the Prevention of Vice trained a similar Taliban agency in enforcing Saudi-style laws, including the near-total covering of women.

[¶58] The resulting system of Taliban law involved severe criminal sanctions, enforced with great capriciousness and corruption, against any activities viewed as sinful or otherwise harmful. The Taliban’s prohibitions addressed activities prohibited by religious tradition as harmful to the person (drugs and alcohol, gambling, and usury); sexuality and Western fashions (music and dancing, British or American hairstyles, the shaving of men’s beards, women’s high-heeled shoes, and fashion magazines); “idolatry” (photographs, paintings, statues, and sorcery); and other relatively harmless activities that might lead to gambling or distract from prayer (television, sports, kite-flying and the keeping of birds as pets). Proving the old adage that the law often falls behind advances in technology, however, the Taliban did not prohibit use of the Internet until July 2001, half a decade after banning kite-flying in 1996.

[¶59] The mode of enforcement of the Taliban’s prohibitions proved as uncompromising as the bans themselves. Torture by various methods was routine and vicious under the Taliban. Violations of the Taliban dress code and inappropriate male-female contact were cause for being beaten black and blue with clubs or rifle butts. Implementing Taliban law required stoning adulterers and amputating the hands of criminals, medieval punishments which had been abandoned by most Muslim countries.

[¶60] While Afghan men suffered conscription into the Taliban army, bitter fighting in the north of the country, imprisonment or murder for their religious or political affiliation, and denial of virtually any access to entertainment or unrelated members of the opposite sex, they enjoyed some ability to go to school, find a job, and travel. The Taliban kept Afghan women, by contrast, largely shuttered indoors. Upon taking power in Kandahar in 1994, the Taliban forbade the education of girls and the employment of most women outside of their homes. After becoming the rulers of most of Afghanistan in 1996, the Taliban’s religious police decreed that women must wear all-covering burqas, which many Afghan women could not even afford (as they cost about two months’ wages), effectively sentencing them to house arrest. The Taliban ordered women to stay in their homes as much as possible, ended the rudimentary
female education and employment that the *mujahideen* had allowed to continue, and allowed women to see only female doctors, while banning women from practicing medicine.

### Building a New Afghan Government

¶61 The Bush administration, in response to the terrorist attacks of September 11, 2001, demanded that the Taliban cease harboring Osama bin Laden and the *al Qaeda* terrorist organization, and threatened war and the destruction of their government if they refused. But the Taliban declined to hand over bin Laden, the Saudi terrorist leader and *mujahideen* fighter suspected of masterminding or inspiring the 9/11 attacks; bin Laden had contributed about $100 million to the Taliban by that time. A Taliban spokesman, however, indicated that the regime would hand bin Laden over for trial, provided that the U.S. provided evidence of his responsibility for the 9/11 attacks, which the U.S. had provided only to its “key allies.”

¶62 On October 7, 2001, the U.S. began bombing *al Qaeda* terrorist targets and Afghan military, electricity, and communications facilities. Special forces units on the ground provided the targeting coordinates for U.S. aerial bombing, which destroyed the Taliban tanks and troops that had held off the Northern Alliance opposition for years. Hundreds of Taliban conscripts and hardcore troops died in the fighting, including many prisoners of war summarily executed by Northern Alliance gunfire or suffocation in sealed truck containers. Thousands of Afghan civilians died in the U.S. bombing raids and the ground operations that mopped up after them. Whole families were cut down, sometimes as a result of apparently indiscriminate bombing based on inaccurate or misleading information.

¶63 Driving the Taliban before them, the luminaries of the anti-Soviet *jihad* retook their former positions in Herat, Bamiyan, and Kandahar, the prize of Kabul going to the forces of former President Rabbani, now led by Ahmed Shah Massoud’s successor Muhammad Fahim. Former *mujahideen* deputy foreign minister Hamid Karzai, leader of the largest Pashtun tribe, entered Afghanistan after September 11 to raise a Pashtun rebellion against the Taliban, joining Gul Agha Shirzai in taking Kandahar.

¶64 The occupation of Kabul by the Northern Alliance created a political crisis for the U.S. and the U.N., which had urged their forces to hold back from taking the city until a broad-based government could be formed. Under pressure from the U.S. and other nations, Northern Alliance commanders and other Afghan military factions agreed to participate in U.N.-sponsored talks held in Bonn, Germany. Almost two dozen Afghan delegates, mostly drawn from the Northern Alliance and the circle around former King Zahir Shah, signed an accord called for the creation of an Interim Authority to rule Afghanistan until a Transitional Authority government could be selected in a Loya Jirga six months later, and a “fully representative government” freely elected two years after that. Although loyalists to the former King Zahir Shah initially voted that he return to power, the U.S. and U.N. secured the delegates’ agreement to appoint Pashtun anti-Taliban leader Hamid Karzai as Chairman of the Afghan Interim Authority.

¶65 Over 1,000 elected and 700 selected delegates to the June 2002 Emergency Loya Jirga established the Islamic Transitional Authority of Afghanistan and elected Hamid Karzai as its President. Despite the support of a majority of delegates at one point, the former King of Afghanistan Mohammad Zahir Shah withdrew his name from consideration for the presidency, prompting Human Rights Watch to accuse the U.S. of “‘brazen’ interference in the loya jirga, [which was] promoted as the birth of Afghani democracy.” Some delegates also objected that *mujahideen* commanders who had killed innocent Afghan civilians were wielding too much
control over the Afghan political process. “We were told that this loya jirga would not include all the people who had blood on their hands,” said one delegate to applause.284

Warlord Theocracy and Human Rights Violations

¶66 Bonn’s aspirations for government under law and with respect for human rights have yet to be realized throughout Afghanistan. Of course, the Karzai administration inherited a miserable and barely functioning country from the Taliban and Northern Alliance forces who had controlled it through 2001: average life expectancy was only 40 years, 70% of Afghans were malnourished, more infants died in childhood and more mothers died in childbirth than in almost any other country ever recorded in human history, and millions of children had been orphaned in the various wars since 1978.285 But none of these poor health statistics can justify the sorts of human rights violations that have occurred in Afghanistan since the Taliban’s fall.

¶67 The Karzai government began as “an island in a sea of uncompromising warlords” who field large militias outside the framework of the Afghan National Army and exercise totalitarian theocratic powers.286 Most rural areas and even major cities are not under the firm control of the central government, especially at night.287 According to a member of the Afghanistan Independent Human Rights Commission, “trials do not take place in accordance with law. In provinces, warlords are the law, the judge, the government.”288

¶68 Abdul Rasul Sayyaf, a Wahhabi fundamentalist sent to Afghanistan in the 1980s by Saudi Arabia to promote its ideology,289 controls much of Kabul province.290 The governor of Kabul province and many of the city’s police and intelligence officials are loyal to him, his troops patrol western Kabul, and even President Karzai himself is reportedly “often forced to bow to [his] demands.”291 International peacekeepers in Kabul “have publicly accused … troops under his control of being responsible for a series of murders, abductions and extortion incidents in that sector of the city, aided by a cadre of loyalists in the police department.”292 Following mainstream Saudi ideology,293 his forces “continue to enforce strict Islamic social codes including restrictions on women’s education and dress.”294 Sayyaf’s forces have tortured villagers and old people for such crimes as listening to music.295 He views any attempt to question his authority as a form of blasphemy, and had two newspaper editors arrested on blasphemy charges and sentenced to death for criticizing his tactics.296

¶69 The authorities in Kandahar, Afghanistan’s second largest city, continue to implement the rural Pashtun traditions that the Taliban proclaimed to be requirements of Islam.297 Young girls are forced into marriage under pain of imprisonment; one received a five-year sentence for refusing to go along with an arranged marriage.298 The police jailed another woman for refusing to enter into a marriage with a man to whom she had been promised by her parents when she was only two years old.299 Kandahar’s post-Taliban legal officials imprisoned a woman who escaped after being held as a sex slave for seven years; she had been sold for about $200 during Taliban times to a man who raped her repeatedly.300 Because of cases like these, the head of a major nongovernmental organization working in Afghanistan reported that she could “see no change for most women” in Kandahar since the Taliban lost power.301

¶70 In the north, a campaign of ethnic cleansing against Pashtuns has raged. Soldiers and armed militia in northern Afghanistan have rounded up and shot dozens of Pashtun men at a time, raping many Pashtun women and young girls, a crime that can lead to the murder of its victim by members of her own family in conservative rural Afghanistan.302 The militia of former communist commander General Dostum raped whole families of women, including girls as
young as 10. A U.N. official called the abuses against ethnic Pashtuns “systematic and wide scale.” Thousands of Pashtuns fled their homes, some living in caves to keep warm.

For most of the past four years, a “hardline Islamist” ruled Herat, a historically more liberal city near the Iranian border that is widely viewed as a litmus test for human rights after the Taliban. The security forces of Governor Ismail Khan borrowed a page from neighboring Iran, which Khan called “the best model of an Islamic country in the world,” using beatings and torture to silence political opponents, journalists and human right activists.

Women complained that his regime resembled that of the Taliban, as their mode of dress was confined to two options: burqas or full-body veils (known as chadoris) that expose only the face. The police in Herat ordered that 10 forced gynecological examinations be conducted every day to test the chastity of girls or women arrested on suspicion of immoral conduct. Although President Karzai promoted Ismail Khan from Governor to the Ministry of Mines in September of 2004, he continued to field a militia, and thousands of petty warlords with similar ideologies continue to hold power in their respective fiefdoms.

The principal engine of theocratic tendencies on a national basis has been the Afghan courts, the policies of which have been indistinguishable in some respects from the Taliban’s. As a respected religious scholar among mujahideen, Sayyaf persuaded Afghan transitional president Hamid Karzai to declare Afghanistan an “Islamic” state after the Loya Jirga, and to ensure that “Afghanistan’s justice system will be based on the Koran and Sharia law.” Sayyaf, the Northern Alliance’s “No. 2 political leader,” threatened guerilla war against the government if his demands were not met. Foremost among these demands is gender apartheid.

Sayyaf prevailed upon President Karzai to appoint as Chief Justice of Afghanistan’s Supreme Court Fazal Hadi Shinwari, a fundamentalist member of Sayyaf’s political party who is not even trained in Afghan constitutional or statutory law. Shinwari has “called for Taliban-style punishments and brought back the Taliban’s dreaded Ministry for the Promotion of Virtue and Prevention of Vice,” which “deployed squads to stop public displays of ‘un-Islamic’ behaviour among Afghan women.” A list of laws and policies being enforced in Afghanistan reads like the Taliban’s handbook: women cannot speak in private with men, young people can be arrested if they marry without their parents’ consent, women are forbidden to travel without supervision of a male family member, married women are denied the ability to attend high school, education of women together with men is banned, and women are restrained from singing in public. Most women remain confined to their homes as many Afghan men, backed by the judiciary, continue to treat women “according to the old Taliban ways.”

Shinwari’s influence stretches far beyond the Supreme Court. He has “appointed most of Afghanistan’s current judiciary -- mostly clerics in rural areas -- as well as many of the country’s provincial governors, especially near Kabul.” He used this power to appoint Afghans with only informal religious training and little experience to the bench, including almost 130 of his political allies to the Afghan Supreme Court, while women judges with decades of experience in the Afghan judiciary were denied posts. As a result, the Afghan courts are “dominated by religious conservatives who have more in common with the Taliban than with Karzai.”

The U.S. promised that an Afghan commission on judicial reform would rein in Mr. Shinwari’s theocratic excesses. But due to the fundamentalists’ control over the political process, judicial reform long stood at a standstill, even backsliding into increasing control by extremists. The Judicial Reform Commission was dissolved in 2002, “reportedly obstructed by religious hard-liners.” The Supreme Court is itself violating the constitution by being packed with too many justices. Moreover, little or nothing has been done to ensure that
judges are qualified, that criminal defendants have access to defense attorneys, that lawyers have access to books containing the laws currently in effect, or that endemic corruption ends.\textsuperscript{328} Prison conditions are horrifying, and torture is common.\textsuperscript{329} Far from secular reformists gaining ground, Sayyaf himself is said to be next in line to be Afghanistan’s Chief Justice.\textsuperscript{330}

THE NEW AFGHAN CONSTITUTION

The Constitution Drafting Process

\textsection{76} The Bonn agreement provided for a Constitutional Commission to draft a new constitution for review and adoption by a Constitutional Loya Jirga to be convened by October 2003.\textsuperscript{331} President Karzai appointed a nine-member Constitutional Drafting Commission, which included two women,\textsuperscript{332} and a 35-member Constitutional Review Commission, which included seven women.\textsuperscript{333} President Karzai appointed Vice President Nematullah Shahrani, a prominent conservative, to head both commissions, a signal to many that the constitution would establish a national religion and mandate strict religious law.\textsuperscript{334}

\textsection{77} Past Afghan constitutions failed to ensure national unity and long-term stability, partially because the population as a whole felt excluded from the drafting process.\textsuperscript{335} To involve the Afghan people in the framing of their constitution, the Afghan government and international community planned to submit the draft document to a broadly representative Constitutional Loya Jirga, which was held in December 2003.\textsuperscript{336} In addition, the U.N. helped organize a public consultation process to include thousands of ordinary Afghans.\textsuperscript{337} Still, most rural Afghans never heard of the constitutional process underway in their country until it was already over.\textsuperscript{338}

The Ideological Battle for the Future of Afghanistan

\textsection{78} Given the decades-old struggle within Afghan society between secularists and fundamentalists, the role of religion in the new constitution was bound to be contentious. Fundamentalists such as Rabbani and Sayyaf used their representatives on the Constitutional Commission and the Supreme Court to fight for a constitutional mandate of theocracy.\textsuperscript{339} Experts warned that these leaders wanted their “conservative interpretation of Sharia law incorporated into the next Afghan Constitution.”\textsuperscript{340} International human rights activists, on the other hand, advocated a constitution that respected religious difference and closed the door on the totalitarian fundamentalism that killed so many Afghans in the 1990s. A commission of human rights activists and Islamic law scholars recommended that the new constitution shy away from mandating one man’s version of Sharia or Islam, and retain instead the flexibility of the 1964 constitution’s requirement of governance in conformity with the “basic principles of Islam.”\textsuperscript{341} Amnesty International and Human Rights Watch recommended other improvements to the draft constitution in terms of religious freedom and due process.\textsuperscript{342}

\textsection{79} Afghan activists also demanded strong protection for women’s rights. Afghanistan’s Deputy Minister for Women’s Affairs argued for an express ban on all forms of discrimination against women and a clear requirement of universal education of Afghan women.\textsuperscript{343} A conference convened in Kandahar of women leaders from across Afghanistan went further, demanding an “Afghan Women’s Bill of Rights” that included equal representation in parliament and the Constitutional Loya Jirga, compulsory education through high school with opportunities for higher education, full property and inheritance rights and participation in economic life, access to modern health services and reproductive care, freedom to decide whom to be married
to, enforcement of criminal laws against violence and sexual abuse, and an end to the exchange of women as compensation for crimes by one family against another (known as Bad).\footnote{344}

The draft constitution, unveiled to the public in early November 2003, proclaimed Afghanistan an Islamic state with a national religion.\footnote{345} Under the draft, no law could be “contrary to the sacred religion of Islam.”\footnote{346} Afghan judges must rule in accordance with the provisions of the conservative Hanafi school of jurisprudence of Sharia law,\footnote{347} the justices of the Supreme Court must swear to rule in accord with the “provisions” of religion, the President must swear an oath to safeguard religion, and the nation’s educational curriculum would be religious in nature.\footnote{348} These articles represented a significant departure from the 1964 constitution, which required Afghan law to be consistent merely with the general “principles” of Islam rather than a government official’s view of what the “religion” itself provides.\footnote{349} Under the new draft, “anything that is against Islam could not go forward,” because conservatives forces were empowered to “say virtually whatever they want is against Islam.”\footnote{350}

The draft constitution’s almost complete silence on women’s rights proved to be its most disappointing and even embittering flaw in the eyes of many activists for women’s rights and the rule of law. The draft guaranteed women almost 17% of the seats in the Afghan Senate,\footnote{351} but it did not explicitly guarantee women equal rights with men or prohibit discrimination against women, even though similar provisions are contained in several constitutions of majority Islamic countries in the Middle East, the Central Asian former Soviet republics, and South Asia.\footnote{352} Nor did it provide Afghan women with rights of equal access to employment, education, and health care, or with any protections against forced marriages, family violence, and sexual abuse.\footnote{353} Instead it provided all Afghan “citizens” with equal rights and protection against discrimination,\footnote{354} without stating clearly that women are citizens.\footnote{355} For these reasons, a Gender and Law Working Group convened by the Ministry of Women’s Affairs prepared a number of recommended amendments to the draft constitution, including an anti-discrimination clause, guarantees of equal rights and full citizenship for women; an end to forced marriages and trafficking in women; and a provision outlawing slavery and “slave-like practices.”\footnote{356}

\textit{The Afghan Constitution: Freedom or Theocracy?}

On January 4, 2004, the 1,500 Afghan delegates to the Constitutional Loya Jirga (CLJ) ratified the new constitution. The changes to the initial draft reflected a series of hard-fought compromises negotiated among several factions and hundreds of individuals. World leaders, including the President of Afghanistan, the representative of U.N. Secretary-General to Afghanistan, the U.S. Ambassador to Afghanistan, and the U.S. President, immediately hailed the new constitution as a triumph for human rights. President Karzai called it “the most enlightened in that part of the world.”\footnote{357} The U.S. Ambassador to Afghanistan praised the document as “one of the most enlightened constitutions in the Islamic world.”\footnote{358}

The Afghans who participated in the constitutional drafting process, and the international community, crafted a charter for their country that stands as an unqualified improvement over the Taliban’s unwritten code of theocratic oppression. Among other improvements, the constitution remedied the draft’s failure to enshrine women’s rights. It now provides that: “Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. [\footnote{359} The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law. This clause revives precedents in the 1977 and 1987 constitutions that specifically guaranteed that Afghan women would enjoy equal rights before the law and protection against discrimination.\footnote{360} Moreover, the new constitution envisions a level of participation by Afghan}
women in their country’s parliament that surpasses any historical precedent in that country, or indeed in most other countries. On paper, women are guaranteed over 25% of the seats in the lower house of parliament, and almost 17% of the upper house. But a close examination of the tight relationship the constitution establishes between religious doctrine and the judiciary reveals that the claim that the new constitution is the most “enlightened” in the region, even in the entire Islamic world, is implausible. Although women are equal “before the law,” the intention of the Afghan courts and many of the constitution’s drafters is that the laws will treat them very differently in many respects, and deny them many liberties available to men. And while they may be ensured a say in parliament, their ability to pass laws improving women’s plight in their country will be strictly limited by a veto power the constitution grants to radical fundamentalists in the Afghan judiciary. The constitution also omits elementary protections available to women in other countries where they have not been subjected to the kind of treatment suffered in Afghanistan for many years, such as a ban on slavery and slave-like practices, or a requirement that both parties consent to a marriage.

Many Afghans and international human rights groups have accordingly tempered their praise of the constitution. They have expressed fears that several provisions could be used to enforce medieval interpretations of Islamic Sharia law, suppress religious expression and political speech, and perpetuate Afghan laws and customs that ruthlessly oppress Afghan women. An agenda to accommodate a fundamentalist future for Afghanistan permeated the CLJ, and prevented the new constitution from realizing the promises of the U.S. and U.N. that Afghanistan would henceforth abide by international human rights standards. The warlords and fundamentalist leaders, who issued death threats against more moderate Afghan men and women to deter them from participating in or even attending the CLJ, prevailed on several critical issues that the assembly addressed. Their death threats and vote buying ensured that the “majority” of CLJ delegates were tied to the “warlord controlling the province they came from.” Nor did the intimidation end at the doors of the CLJ. The chairman of the CLJ, a former mujahideen leader, announced that female delegates should not “try to put yourself on a level with men. Even God has not given you equal rights, … because under his decision two women are counted as equal to one man.”

At the CLJ, the warlords that have ruled most of Afghanistan since the fall of the Taliban succeeded in transforming a clause providing that no law could be contrary to the religion of Islam “and the values of this Constitution” into one that says that “no law can be contrary to the beliefs and provisions of the sacred religion of Islam.” Afghan experts and human rights activists regard the new clause as much more subject to abuse by fundamentalists who seek to impose Taliban-like theocratic rule, because the “provisions” of Islam were precisely what the Taliban claimed to be enforcing. Female CLJ delegates and human rights activists therefore view this provision as introducing a strict version of Sharia law by the “back door.” The “beliefs and provisions” clause means “that Islamic law is the supreme law of the land,” and its content will inevitably be left for a Supreme Court staffed by “hard line Shariah jurists” to interpret. Under the new constitution, the Supreme Court, whose Chief Justice has consistently pushed for a theocratic state in which his interpretation of Islam would hold sway, “can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.” The constitution grants the Supreme Court, which the Chief Justice has packed with many
sympathetic judges who lack training in Afghanistan’s civil and secular laws, the “power to reject virtually any law or treaty as un-Islamic.”

While failing in some respects to adequately protect human rights, the new constitution doesn’t do enough to prohibit Taliban and other war criminals from keeping or winning government posts, and using them to impose fundamentalist rule. Such efforts had precedents in Nazi Germany and Imperial Japan, and would be revived in post-Saddam Hussein Iraq. The new constitution bars only those actually “convicted” of crimes against humanity from becoming President, a Minister, or member of the National Assembly or Supreme Court. The ineffectiveness of this provision results from the fact that despite “the enormous scale of war crimes, crimes against humanity and other serious human rights violations committed in Afghanistan, … no one has yet been tried by a competent court for crimes committed during the long years of conflict in the country.” Rather than convening trials, in late 2003 coalition forces “released the Taliban’s foreign minister from custody, and prominent Afghan officials … invited him and other Taliban to run for office in the upcoming elections, something that millions of Afghan women are still too afraid to do.” After the Karzai government took office, “many former Taliban officials [were] sitting in the same government positions they held when Mullah Mohammad Omar was still in charge.” Other Taliban officials have been wooed with “the offer of a place in the government.” Amnesty International thus declared the constitution’s efforts to deny power to war criminals “meaningless.”

In several other respects, implementation of the rights guaranteed in the constitution seems a distant dream. Shortly after the new constitution was adopted, U.N. Secretary General Kofi Annan’s special envoy to Afghanistan warned that “there is no rule of law in this country yet.” The Afghan Independent Human Rights Commission received complaints of hundreds of murders in 2003, most blamed on government officials and militia commanders. The Commission has found that “innocent people are put in jail for a very long time and for no reason.” There is no sign of these practices having been put to an end by the adoption of the new constitution.

TEST CASES FOR THEOCRACY UNDER THE SIXTH AFGHAN CONSTITUTION

Theocracy is a recurring problem in human history because the corruption and depredations of government by mere men make their countrymen long for a morally infallible ruler. But when political leaders use their military power to promote their own intolerant beliefs, the result has often been mass slaughter and widespread atrocities against members of other faiths, as occurred in the Crusades, counter-Reformation Europe, the European colonies of the New World and Africa, the Ottoman Empire during and after World War I, post-colonial India and Pakistan, and Sudan since 1989. But even mass killings have failed to preserve many theocracies from persistent rebellions led by subjects who chafe under the human rulers’ arrogant misrepresentation of their own narrow views as the mandate of heaven.

In the same way, the Taliban, and before them the fundamentalists among the mujahideen, forced Shia Muslim Afghans and secularists either to suffer repression or to take up arms against their rulers, which massacred them in return. In the near future, Afghans may be driven into a similar bind by theocratic policies promulgated under cover of constitutional legitimacy. Whether this happens may depend on the success of the warlords and the fundamentalists who dominate the Afghan judiciary in imposing fundamentalist policies that are as damaging to human rights as those that provoke so much opposition in neighboring Iran that mass killings and systematic torture have been deemed necessary to quell it.
Outlawing Secular Political Parties

¶91 A significant challenge to Afghans, especially women, seeking to implement their right to participate in parliamentary elections will be possible legal restrictions that could be used to silence political parties represent ethnic or religious minorities, secularists, or women. The new constitution bans political parties whose aims are “contrary to the principles of [the] sacred religion of Islam,” as well as those that primarily appeal to members of an underrepresented ethnic, linguistic or religious group. Afghan authorities understand the “principles” of Islam to include precepts of Sharia law “agreed upon by the major schools of jurisprudence (fiqh)”; as a result, any political party that “calls for full equality before the law of women and men could by this reasoning be defined as contrary to Islamic principles.” A key test case for the constitution will therefore be whether the political parties clause will be misused in this way.

Curtailing Political Debate

¶92 Another important test of the Afghan constitution’s ability to provide for peaceful and democratic change will be whether it protects freedom of speech and debate. The new constitution restricts free expression that intrudes upon religious sensitivities. A prominent member of Afghanistan’s Supreme Court has declared that: “In the constitution there is an article that says things that go against Islam are not allowed.” The Supreme Court has ordered two prominent journalists and the former Minister of Women’s Affairs to stand trial on spurious charges of blasphemy after they criticized Afghanistan’s warlords. Blasphemy is still an offense that is potentially subject to the death penalty under Afghan penal laws, and fundamentalist Afghans frequently issue death threats against people charged with it. The Supreme Court actually sentenced the two reporters to death, and a female writer was also sentenced to be executed, although none of these sentences has been carried out yet. Such prosecutions could represent a serious threat to the development of Afghan democracy.

Persecuting Religious Minorities

¶93 Particularly under the Taliban but throughout Afghan history, the country’s rulers have oppressed and murdered religious minorities, especially Shia Muslims among the Hazaras. The new constitution provides that “[f]ollowers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law.” But as with many other aspects of the constitution, whether and to what extent religious minorities will be protected depends on what the “provisions of law” limiting religious freedom may be. The Chief Justice of the Supreme Court has declared that: “The Islamic government, according to sharia, is bound to punish those who get involved in anti-Islamic activities…. We can punish them for propagating other religions - such as threaten them, expel them and, as a last resort, execute them, but only with evidence.” The Chief Justice believes that there are three ways to deal with adherents of minority religions: “One, is you politely invite him to join the Muslim faith. Two, if he refuses, insist that they obey the laws of Islam. And three, if he rejects that, [the Chief Justice] says, ‘I have no choice’ and points to the sword above his desk, and says, ‘behead him.’” The Chief Justice has also warned that anyone who preaches or describes Christianity to Afghans may face the death penalty. If these statements are translated into legal doctrine, the constitution’s protection of religious freedom may prove to be very weak.
Enforcing Medieval Punishments

Stoning for Adultery

¶94 The Chief Justice of the Afghan Supreme Court has made clear that he wants to see “adulterers whipped or stoned to death, the hands of robbers amputated and murderers publicly executed.”402 Although the Old Testament of the Bible contemplates the stoning of adulterers and other criminals, the Qur’an does not, and most modern states have abandoned the practice.403 Resuming the stoning of adulterers, as a local district court did when it ordered an Afghan woman to be stoned to death in late April 2005, would make Afghanistan’s laws even more theocratic than those of neighboring Iran, which abandoned the stoning of adulterers in 2002 after sentencing two women to be stoned to death the previous year.404 President Karzai has repeatedly insisted that Afghanistan will be governed by Sharia law, which many Afghans understand to provide for stoning in cases of adultery.405 Aides to Karzai have insisted that stoning will not be resumed on President Karzai’s watch, and the Constitution provides the President with the authority to reduce and pardon penalties, but only “in accordance with law.”406 But Karzai does not necessarily control what goes on in all of Afghanistan, and there is no guarantee that Karzai will always be President to veto court-ordered stonings. And because the Supreme Court is ultimately vested with the power to interpret the law and verify compliance with Islam, the Chief Justice may override a Karzai pardon in an emotionally or politically charged case.407 A renegade warlord, fundamentalist politician, or Supreme Court power grab could therefore return Afghanistan to the days of torturing and killing women under the pretext of piety.

Amputating Hands for Theft

¶95 The Chief Justice has pronounced that “a hand being chopped for theft” is necessary for “obvious and justified reasons - ridding society of crime.”408 Even President Karzai has expressed qualified support for the idea, noting that there are “strict rules” governing such punishments and it “is extremely, extremely difficult in the real interpretation of Sharia to cut off somebody’s hand. The hand-cutting part is only applicable, only applicable, if the society has been provided with all the means of work and earning and making a life.”409 This is somewhat reassuring, at least in those cases where President Karzai remains in control and convinced that “all the means of work” were not available to a defendant. But warlords, the Supreme Court, and future presidents may not be so gentle. Although amputation may seem preferable to some compared to life imprisonment under constant threat of rape, the sentence meted out to petty thieves in the U.S. under some circumstances,410 its revival would raise serious questions about Afghanistan’s compliance with its international treaty obligations.411

Discriminating Against Women

¶96 Virtually every world religion elevates men to the position of lordship over women, placing most forms of religious fundamentalism on a collision course with equal rights and full participation by all citizens in a democratic government.412 Like their fundamentalist counterparts in other nations, many powerful leaders in post-Taliban Afghanistan have a record of holding Afghan women to a far higher standard of pious conduct than men are expected to obey. Afghan women must shoulder most of the burden of preventing lust and extramarital sex,
by donning *burqas* and denying themselves access to most public spaces.\textsuperscript{413} They must submit to marriages against their will and not of their choosing, even under circumstances in which men would be free to refuse. The continuation of such practices will prove all the promises of equal rights for Afghan women before the law to be illusory.

**The Burqa and Forced Covering**

\textsuperscript{\textsection97} All of us remember how the U.S. condemned the *burqa* as the ultimate symbol of the oppression of women under the Taliban and the terrorists' ideology of “hate.” A State Department press release issued during the Afghan war called the *burqa* an “infamous and intolerable” form of torturing and imprisoning women in a “voluminous, tent-like full-body outer garment that covers [women] from head to toe.”\textsuperscript{414} Despite all the pain and discomfort it may cause, the allies of the U.S. in Afghanistan are still requiring women under their power to wear the *burqa*. Although American television gleefully reported that Afghan women had thrown out their *burqas* when the Taliban left,\textsuperscript{415} Afghan warlords are still requiring them to wear it.\textsuperscript{416} Most women still wear the *burqa*, not so much out of fidelity to their religious faith and the requirements of the Qur’an – which does not even mention veils, let alone *burqas* – but because they are forced to do so by the dictate of local warlords or the fear of marauding militiamen.\textsuperscript{417} “In post-Taliban Afghanistan, women have been raped for daring to think they could now go without the *burqa*.\textsuperscript{418}” Future Afghan governments will decide whether the *burqa* is part of the “beliefs and provisions of Islam,” or on the contrary, is incompatible not only with Islam but with the international human rights treaties to which Afghanistan is a party. The issue will likely be resolved by the Afghan courts, which extreme fundamentalists like Sayyaf and his allies on the Supreme Court look poised to control for the indefinite future.\textsuperscript{419}

**Involuntary Seclusion of Women**

\textsuperscript{\textsection98} Women in Afghan society remain burdened by laws and practices that keep them out of the public sphere. Religious leaders with no legal training act as judges, imprisoning young people for such crimes as dating, falling in love, or marrying without parental permission.\textsuperscript{420} A woman may commit a crime simply by having a conversation or being seen in public with an unrelated man.\textsuperscript{421} The former governor of Herat announced on radio and television that the police and Department of Vice and Virtue “must stop men and women who are unmarried from walking together on the street” and “are obliged to beat them.”\textsuperscript{422} This iron curtain of male-female segregation is hardly compatible with the full participation of women in a “broad-based and representational” government, which the U.S. has defined to include women.\textsuperscript{423}

**Forced and Underage Marriage**

\textsuperscript{\textsection99} More than two years after the Taliban fell, Afghan women are still being denied their rights in marriage and to divorce under both international and Islamic law, much more often than women in many other Islamic countries are. In July 2002, for example, almost 800 women per day applied for divorces to the judicial authorities of the Afghan government.\textsuperscript{424} But instead of being granted their divorces, some were imprisoned, including a dozen women subjected to forced marriages under the Taliban.\textsuperscript{425} The judiciary continues to apply its version of the Hanafi school of Islamic law to deny women the right to divorce under most circumstances, granting
relief from forced marriages only in “rare” cases. Women who run away from home without their husband’s permission can be sentenced to several years in prison.

Teenage girls are still routinely forced into marriages with men they have never met, often much older than they are. About 50% of Afghanistan’s marriages are compulsory. Afghan families often sell their daughters for excessive dowries equivalent to thousands of dollars, in a country where the average income is about $200. Many young women have resorted to setting themselves on fire to escape this contemporary form of slavery. Over 100 Afghan women died of self-immolation in the first ten months of 2004. Afghanistan’s high rate of forced marriages is fueling this unprecedented epidemic of fiery suicides. Although President Karzai has declared that there “can’t be any worse oppression” than forced marriage, the Afghan government contributes to it by imprisoning girls and women married against their will, if and when they flee. Girls and women have no legal alternative to suicide, as they are arrested and jailed for fleeing child marriages or abusive families. A jailer in Kabul told a reporter that: “If a girl in Afghanistan runs off with a boy or tries to escape from her family, that is a crime.” Moreover, Afghan tribal councils continue to resolve criminal cases “by ordering that the alleged perpetrator provide the family of the alleged victim with a young girl or girls, usually below the legal marriage age, in order to compensate for the alleged crime.” The girl “is then forcibly married to a male member of the victim’s family.” Thus, the Afghan criminal justice system “is more likely to violate the rights of women than to protect and uphold them.” The U.S. has tolerated these policies of the government and warlords it funds and helped gain power, even though it cited the “high rates of depression and suicide among Afghan women” as a reason to go to war against the Taliban.

International law recognizes forced marriage as a form of slavery to which Afghanistan must put an end if it aspires to membership in the community of civilized nations. For example, a treaty that Afghanistan signed on to in 1966 obliged States parties to abolish slave-like practices in which a “woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any person....” Likewise, the Universal Declaration of Human Rights states that women and men have equal rights before, during and after marriage, and that “[m]arriage shall be entered into only with the free and full consent of the intending spouse.” Finally, Afghanistan’s international obligations under the Convention on the Elimination of Discrimination Against Women are to guarantee that women have “the right to choose a spouse freely” and enjoy “the same rights and responsibilities in marriage and at the time of termination of marriage.”

Marriages of very young Afghan girls are a particularly grave problem. Young girls are still routinely promised in marriage to bring in an income to a poor family, or to satisfy a financial or “blood” debt. As a consequence, many young girls are pressured into marriages in their early teens and even as early as seven. The practice is not restricted to Afghanistan, but is common in rural parts of India and Africa.

The minimum marriageable age in Afghanistan is 16 by statute. However, the courts refuse to enforce this law. Nearly two years after the Taliban fell, Amnesty International reported one case in which a court refused to take any action on a criminal complaint against a 48 year old to whom an eight-year old girl had been forcibly married. This court may simply have been implementing government policy, for the Deputy Chief Justice of the Afghan Supreme Court has claimed that the “only source of legislation in Afghanistan is Islamic shariah law,” which some jurists interpret to allow a “father to contract binding marriages for both his sons and his daughters so long as they are minors (up to the age of nine or onset of menstruation for girls
and puberty, up to age fifteen at the latest, for boys). \(^{452}\) Although some jurists maintain that a girl may repudiate such a marriage upon attaining puberty by application to the court, social conditions tend to vitiate this right. \(^{453}\)

\*¶104 \* International law condemns child marriages in the same breath as other forced marriages. Very young girls cannot be said to give their free and full consent to a marriage as required by the Universal Declaration of Human Rights. \(^{454}\) Theoretically, therefore, Afghan courts could find further support in that treaty for enforcing their domestic law against child marriages. \(^{455}\) But the new constitution’s deference to religious law make it more likely that the courts will rule that the prohibitions on child marriage in international law and Afghan statutes are invalid because they contradict a fundamentalist view of the “beliefs and provisions” of Islam. \(^{456}\) Such a ruling would further diminish Afghan girls’ and women’s prospects for true “liberation.”

AN IRAQI THEOCRACY?

\*¶105 \* Despite many differences, there are important similarities between the situations in Iraq and Afghanistan. \(^{457}\) Both Iraq and Afghanistan are majority Muslim countries, with populations of similar sizes, occupied by the U.S. and its coalition allies as a result of their complicity in international terrorism. \(^{458}\) As in Afghanistan, regime change in Iraq has ended the rule of a vicious tyrant. Like Mullah Omar, Saddam Hussein presided over mass murder on a systematic basis (although in Iraq this occurred with support from most of the U.N. Security Council, not under conditions of international isolation as in Afghanistan). And similar struggles are underway in both countries between religious fundamentalists, who would implement a medieval version of religious law, and reformers who seek to modernize and secularize their society so as to guarantee the rights of women and ethnic or religious minorities.

*From the Ba’ath to a Religious State*

\*¶106 \* Any discussion of human rights in Iraq’s recent history must begin with the crimes committed by Saddam Hussein over the past few decades with the cooperation and support of several foreign powers. Saddam’s Ba’ath Arab Socialist party seized power in a U.S.-backed coup in 1963, \(^{459}\) and summarily executed thousands of Iraqi intellectuals identified as suspected leftists on lists provided by the CIA. \(^{460}\) After taking the helm of the Ba’ath party in 1979, Saddam launched two wars, against Iran in 1979 and Kuwait in 1990, which claimed the lives of more than 600,000 Iraqis. \(^{461}\) In the late 1980s and early 1990s, Saddam’s military put down Iranian-backed rebellions from the Kurdish and Shi’a communities in Iraq, \(^{462}\) killing 100,000 to 200,000 people. \(^{463}\) In order to commit these crimes, Saddam’s government secured massive financial and military support from an array of foreign powers, including the Soviet Union, France, China, Saudi Arabia, Kuwait, and the U.S. \(^{464}\)

\*¶107 \* Despite the disastrous wars, rebellions, and crimes against humanity under Saddam’s rule, Iraq’s population increased by almost five million people from 1980 to 1990. \(^{465}\) Life expectancy increased by almost 14 years on average between 1975 and 1990, as the government helped ensure that 90% of the population had access to safe drinking water and modern facilities for sanitation and health care. \(^{466}\) The 1991 Gulf War reversed much of this progress, as the U.S. deliberately bombed water purification, sewage, and electricity facilities, \(^{467}\) and lobbied for comprehensive economic sanctions to be imposed by the U.N. Security Council which eventually led to the deaths of one million Iraqis, \(^{468}\) including 500,000 Iraqi children. \(^{469}\)
Expressing outrage at Iraq’s poor human rights record, floating questionable assertions about the threat its unconventional weapons and ties to al Qaeda posed to international peace and security, and rejecting Iraq’s offers to allow U.S. military access to suspected weapons sites and to hold free elections, the Bush administration decided to invade the country and depose Saddam Hussein. The war claimed the lives of up to 60,000 Iraqi soldiers, along with about 100,000 innocent Iraqi civilians as of September 2004. The Iraqi death rate more than doubled, as the rates of disease, malnutrition, and infant mortality soared. War and looting destroyed Iraq’s hospitals and water infrastructure along with most public buildings. The unemployment rate for Iraqis doubled to 60 percent, the remains of the water and sanitation systems collapsed, and more than 3,000 schools were bombed, looted, or otherwise destroyed. Hundreds of thousands of people became homeless.

The Iraqi government appointed by the multinational forces enshrined religion as the basis of the new Iraq. After the end of “major combat operations,” the U.S. established a Coalition Provisional Authority (CPA) and an Iraqi Governing Council (IGC) to manage the country. The U.S. handed 60% of the seats on the Iraqi Governing Council to Shia Muslims with long-standing ties to the theocrats in Iran. These council members subsequently used their power to promulgate fundamentalist laws for the country, repealing more secular laws guaranteeing women’s equality that had been enforced by the previous regime. Article 7 of Transitional Administrative Law (TAL), which is intended to serve as an interim Iraqi constitution until a more permanent one can be ratified in late 2005, states that: “Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period.” According to a prominent commentator on religious freedom, every Arab state whose constitution establishes an official religion in this way has an abysmal record of respecting civil and political rights; such clauses are used to implement “state-coerced Islamization, discrimination and even state-sanctioned persecution of religious minorities, as, for example, in Iran, Saudi Arabia and Sudan.” The clause mandating compliance with all laws with the requirements of Islam goes beyond what previous Iraqi constitutions contemplated in fusing religion and the state, and hands religious fundamentalists veto power over the political development of the country. In effect, it establishes religious scholars as the authorities on what Iraq’s supreme law provides, outlaws secular government, and threatens to create a theocracy in Iraq.

The public statements of the Iraqi fundamentalist leaders most likely to implement the TAL confirm that its provisions make theocracy a distinct possibility. Iraq’s interim prime minister virtually declared allegiance to Ayatollah Ali Hussein al-Sistani, describing him as standing at the “forefront” of all of the country’s other religious authorities on the occasion of the handover of sovereignty from the CPA. The alliance of Ayatollah Sistani and the Supreme Council for the Islamic Revolution in Iraq resembles the movement of Ayatollah Khomeini of Iran in that it demands that fundamentalist religious law be used to deny equal rights to women and religious minorities. The alliance receives large donations from the spiritual capital of Iran and uses them to maintain private armies, along with a website detailing the characteristics of the planned fundamentalist state. Although Ayatollah Sistani has promised to be less active in politics than Ayatollah Khomeini believed that clerics should be, the latter also made reassuring statements to the West about democracy, religious freedom, and women’s rights, behaving quite differently once securely in power. The Iraqi Ayatollahs have been even less
In the January 2005 election, a coalition of Iraqi Shia fundamentalist parties claimed about half of all votes, and promptly declared that religious law would be implemented. The coalition will control more than 130 seats in the 275-member Iraqi National Assembly charged with drafting a permanent constitution. Its architect and inspiration, Ayatollah Sistani, has pledged that the coalition will insist upon making Islam the sole source of legislation in the permanent constitution and prohibiting any law that is contrary to his version of Islam. The close ties of leading Iraqi politicians to the Iranian theocracy do not bode well for Iraqi freedom. With opposition to the Iranian government’s most conservative religious policies reportedly widespread, some elements in the country’s leadership have resorted to torturing and executing thousands to maintain power. Should Iraq follow the lead of its larger neighbor, a similar drama may play out for decades to come, as it has in many other theocracies known to history.

Iraqi Women Face Intensified Discrimination

Although like the Taliban, Saddam Hussein’s government implemented extremely brutal policies against women, it also had a better record on women’s equality in some respects than some of its Arab neighbors. The Iraqi Ba’ath party started out as a more secular, forward-looking party towards women, and by 2002 Iraqi women could exercise more control over their mode of dress, education, employment, and entertainment than in neighboring countries such as Saudi Arabia, Iran, or Kuwait. Iraqi women made up 38% of Iraq’s doctors, enrolled in primary school 50% more often than Saudi women, and worked as teachers and professors 50% more often than Saudi women. But after suffering a crisis of legitimacy after the Gulf War in 1991, Saddam’s regime turned to violent anti-woman policies in an effort to build support for the regime among religious and tribal conservatives. Iraq amended its Penal Code to exempt men who murder female family members in the name of family honor, after which Iraqi men murdered over 4,000 female relatives. Under the pretext of ending prostitution, pro-government paramilitary Fedayeen killed over 200 women tied to the political opposition. Women suffered along with many other Iraqis as a result of the war to oust Saddam. A breakdown of law and order after the fall of Iraq’s government resulted in the rapes of hundreds of Iraqi women. Violent deaths of men, women and children tripled. Young girls are being sold into slavery. Many women are too afraid even to leave their homes, let alone participate actively in developing a secular government that respects the equal rights of its citizens.

Women’s minimal representation in the post-Saddam Hussein Iraqi government has proved inadequate to protect their interests. Although women make up more than 50% of Iraq’s population, the Bush administration gave them only two out of 25 seats on the IGC, less than 10% of the available seats. Despite many trained Iraqi women lawyers, only 15 out of the thousands of people given judgeships by the CPA were women. Not one of the Iraqi lawyers hand-picked by the U.S. to draft a new constitution was a woman, a record of total exclusion that was all the more surprising because Afghanistan, with a far worse record on women’s participation in public life, had many women involved in its constitutional drafting process.

Iraqi women judges and lawyers have decried the increased influence of religious fundamentalists on the IGC and other Iraqi institutions. They expressed outrage when the IGC announced reforms to Iraqi family law that would refuse women the right to divorce in most cases and automatically deny mothers custody of children who reached the age of religious
They objected that the new laws would “allow anyone who calls himself a cleric to open an Islamic court in his house and decide about who can marry and divorce and have rights.”

“This will send us home and shut the door, just like what happened to women in Afghanistan,” one Kurdish woman lawyer declared.

Even a member of the IGC recognized “that the law of the tyrant Saddam was more modern than this new law.”

Although even more extreme laws have been enforced in Afghanistan, Iraqi women have enjoyed more educational and professional opportunities than in many other large Arab or Muslim countries, and have not yet become accustomed to the levels of violence and disrespect inflicted upon Afghan women. Eventually their protests prompted the CPA to drop the law reform plan.

With the passage of the TAL and the commencement of a constitutional drafting process expected to be dominated by the Ayatollahs and their private armies, Iraqi women may be out of the frying pan, and into the fire. Although the TAL guarantees women equal rights before the law and a non-binding goal of 25 percent of seats in the Iraqi legislature, these provisions may be meaningless if, under Article 7 of the TAL, Ayatollah Sistani and other Iraqi fundamentalists get to exercise veto power over Iraq’s laws and legal system in the name of the “tenets of Islam.”

Among the Taliban-like laws Ayatollah Sistani would like to see implemented are bans on: women showing their faces or most parts of their bodies in public; girls or women who are virgins getting married without their father’s or grandfather’s permission; wives leaving their houses without their husband’s permission; men and women dating or having a conversation in a private place; and even simple entertainments such as music, dancing, and chess. He would permit a father or grandfather to arrange the marriages of his children before puberty, and even before the age of nine.

While the Kurdish parties that have controlled northern Iraq since 1991 are promoted in the U.S. media as a more moderate alternative to the Shia religious parties, their policies towards women have also been extremely harsh. The Kurdish region they led passed a law allowing men to kill their wives for disobedience, an offer that an estimated 550 men accepted between 1991 and 1994.

An Iraqi women’s rights activist blamed the Kurdish nationalist parties for complicity in more than 8,000 “honor killings” of women since they gained control over northern Iraq. Like the Afghan warlords after the Taliban, the policies of these leaders may perpetuate the oppression of women.

Iraqi Christians Flee Fundamentalist Atrocities

A key difference between Iraq and Afghanistan is that the former has a large population – estimated at one to two million persons – of Christians, including the Assyrians, the indigenous population of Iraq. Since the fall of Saddam Hussein’s regime, the one million Christian Assyrians in Iraq have suffered continued tyranny, garbed in religious fervor rather than Ba’ath Arab nationalism.

Ayatollah Sistani’s legal rulings dictate that Jews and Christians are unclean, and consistent with this “unclean” status, Iraqi fundamentalists have subjected their Christian countrymen to postwar reprisals worthy of Germany just before Kristallnacht: Iraqi Christians are being murdered in the dozens, several of their number are kidnapped and raped each week, and many of their large businesses have been looted and burned. Schoolteachers employed by the Iraqi state are preaching religion in class and forcing Christian girls to wear veils. Armed bands of religious fanatics “roam the streets..., exacting their brand of what they call God’s law.” Conditions are so bad that a few even recall Saddam’s old regime as being preferable. Over 45,000 Iraqi Christians who survived Saddam have fled Iraq since the war.
¶119 While many Iraqi Christians hoped that the 2005 election would guarantee them proportional representation in the Iraqi National Assembly that will draft a permanent constitution, hundreds of thousands of Christian voters were denied the right to vote because their designated polling centers never opened on election day, or had no ballots. Voter turnout was only 17% in and around the Mosul area in Nineveh province, the Assyrian Christian homeland. ‘Quite a significant number of Christians in the Mosul area were denied ballot boxes and ballots,’ the Iraqi deputy prime minister admitted. The result is that Christians will be underrepresented in the constitutional drafting process.

CONCLUSION

¶120 Referring to the liberation of Afghanistan and Iraq from dictatorship, President George W. Bush declared, “No President has ever done more for human rights than I have.” President Bush has stated that the American invasions of Afghanistan and Iraq have freed these countries from their long histories of oppression, established or nearly established democratic rule, and liberated women to participate equally in politics and society.

¶121 Although both nations are as close to democracy and respect for individual rights as they have been in many years, the elevation of Iranian-style theocrats to many of their key leadership positions remains a serious obstacle along the path to the promised freedom. The political reality in Afghanistan and Iraq is too often that austere U.S.-backed fundamentalists control thousands of armed militiamen with tenuous allegiance to the central government, and exploit these private armies to distort the legal and political development of their countries towards theocracy. These militia commanders and their allies have wantonly violated the human rights of women and religious and ethnic minorities. Despite their many abuses, no comprehensive effort to disarm these private armies is underway, or perhaps even possible, in either country.

¶122 A more complex understanding of the history of Afghanistan and Iraq, both before and after the intervention of the U.S.-led coalitions, is critical to assessing the impact of the Bush doctrine on human rights and respect for international law. An appreciation of the atrocities of the Taliban and Saddam Hussein is indispensable to such an assessment. At the same time, the influence bestowed upon fundamentalist warlords and their allies in Afghanistan has resulted in the continuing oppression of the Afghan people, and challenges the Bush administration’s simple narrative of a liberation from the Taliban resulting in equal rights for women and democracy for all. Likewise, the central role of fundamentalist politicians and militia leaders in post-Saddam Iraq should temper the triumphal attitude that followed the capture of Baghdad.

¶123 Considering the mounting human and financial cost of U.S. military operations, which could probably save tens of millions of lives per year if devoted to international health care spending, more thorough study of human rights justifications for U.S. military interventions is critical. The historical record of U.S. “liberation” of other countries, while impressive, is mixed. German-occupied Europe, Japan, South Korea, and Bosnia have all enjoyed remarkable advances in human rights, democratic governance, women’s rights, and economic growth since the U.S. and its allies toppled or repelled dictatorial regimes. But American colonization, military occupation and political intervention have failed to produce lasting freedom in many Third World countries more similarly situated to Iraq and Afghanistan. A number of countries have actually experienced worsening human rights situations and even genocide, sometimes with the direct involvement of the U.S. military, since the U.S. intervened in their internal affairs. Compared to these current and former American political protégés, the cause of women’s equality has fared better in many respects in several other Third World countries that have not
experienced American military occupation or political control. In light of the poor results of many prominent interventions in the Third World, the Bush administration’s optimistic projections for its reconstruction efforts appear to be premature at best, and warrant more careful scrutiny given their large and rising costs in terms of loss of life and economic devastation.

When the fundamentalist policies of many post-Taliban Afghan warlords or Iraqi religious parties are raised as objections to U.S. support for these forces, the typical response is to compare these U.S. allies favorably to the Taliban or Saddam Hussein. But many Afghans and Iraqis may wonder why the practices of Afghan warlords and Iraqi fundamentalists are not instead compared unfavorably to international human rights standards or even to the existing practices of neighboring countries such as present-day Lebanon or Tajikistan, where discrimination against women and religious minorities is less often practiced. For them, the right question is not whether Afghan warlords are better than the Taliban or the Ayatollahs better than Saddam Hussein, but whether the future Afghan and Iraqi governments will be so much better that regime change will have justified the death and maiming of thousands of civilians in the invasion and occupation of their lands. The answer will only be revealed after several decades have passed, and the fate of U.S.-imposed “Islamic democracy” is known to history.

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4 See, e.g., Karen DeYoung, Allies Are Cautious On “Bush Doctrine,” WASH. POST, Oct. 16, 2001, at A01; Robin Wright, Iraq Occupation Erodes Bush Doctrine, WASH. POST, June 28, 2004, at A01. Although the Bush doctrine has thus far been employed only against Afghanistan and Iraq, 15 out of the 19 hijackers on September 11 were from Saudi Arabia, and their Afghan-based organization, al Qaeda, has been funded to the tune of $500 million by Saudi Arabia, not Iraq. See Robert Baer, The Fall of the House of Saud, THE ATLANTIC MONTHLY, May 2003, available at http://toi.missouri.edu/evolvingissues/fallhouseofsaud.html.
10 See AHMED RASHID, TALIBAN 83, 95 (2000); United Nations High Commissioner for Refugees (UNHCR),
Update of the Situation in Afghanistan and International Protection Considerations, 4, ¶ 3 (July 2003), at http://www.proasyl.de/texte/mappe/2003/80/2.pdf. Traditionally, civil and criminal disputes in southern and eastern Afghanistan were settled either pursuant to the Sharia or the Pashtun way, the latter involving submission of the dispute to a jirga of tribal elders who could order the money, property, or even family members (especially virgin girls) of the offender to be handed over to the victim as “blood money.” See The Customary Laws of Afghanistan THE INTERNATIONAL LEGAL FOUNDATION 4-8 (2002), at http://www.theilf.org/ILF_cust_law_afgh_10-15.doc.

“Generally, girls are preferred to money, because when the girls are wedded to the victim’s family, kinship and blood sharing will transform the severe enmity into friendship.” Id. at 11 (emphasis omitted).


13 Loya Jirga (or Great Council in the Pashto language) is an institution that has served in Afghan history as a mechanism for involving the Afghan people in decisions of great historic significance by calling an assembly of tribal elders and national leaders to reach an accord. See G. Rauf Roashan, Loya Jirga: One of the Last Political Tools for Bringing Peace to Afghanistan, INSTITUTE FOR AFGHAN STUDIES (July 30, 2001), at http://www.institute-for-afghan-studies.org/AFGHAN%20CONFICT/LOYA%20JIRGA/LoyaJirgaLastToolDrRoashan.htm.


15 See VOEGELSANG, supra note 8, at 279.

16 See Masouda Gizabi, Testimony to the Congressional Human Rights Caucus on the Post Taleban Era: Human Rights and the Role of Women in Afghanistan (Dec. 18, 2001), available at http://antons.house.gov/HoR/CA12/Human+Rights+Caucus/Briefing+Testimonials/Testimony+from+Masouda+Gizabi.htm (“Towards the end of nineteenth century, about 62% of [the Hazara] people were massacred. The survivors were sold into slavery and expelled out of the country.”)); Mir Hekmatullah Sadat, Afghan History: Kite Flying, Kite Running and Kite Banning, LEMAR AFTaab AFGHANMAGAZINE.COM, June 2004, at http://www.afghanmagazine.com/2004_06/articles/hsadat.shtml (“In 1891 …, Amir Abdur Rahman continued the policy of offering Sunnis and tribesmen the title of ‘ghazi’ (infidel killer) for his conquest of Hazarajat. The result was the destruction of the Hazara tribal system, annexation of Hazara personal property and land, and the enslavement of Hazaras to be sold in the Kabul bazaar. What ensued was the massive migration of Hazaras to Quetta and Mashad, currently in Pakistan and Iran, respectively.”).

17 See Afg. Const. of 1923, art. 10.

18 See id., art. 26, 28.

19 See id., art. 2.

20 Id., art. 68.


23 AFG. CONST. OF 1923, art. 2, 5. The 1923 Constitution and all other Afghan constitutions discussed in this article are available at the website of the U.N. Assistance Mission in Afghanistan (UNAMA), http://www.unama.afg.org/docs/Constitution.

24 Id., art. 72.

25 Id., art. 21.


30 See RASHID, supra note 10, at 83.

31 See Nawabi, supra note 12, at 8.
32 LOUIS DUPREE, AFGHANISTAN 46 (1973), cited in Nawabi, supra note 12, at 8.
33 See RASHID, supra note 10, at 84.
34 EWANS, supra note 8, at 93.
35 See id. at 94.
36 See id.
37 See id.
38 See id. Jews and Hindus, moreover, would be forced to wear distinctive clothing and pay a special tax. See AFG. CONST. OF 1923, art. 2.
39 EWANS, supra note 8, at 94.
40 See AFG. CONST. OF 1923, art. 24, as amended January 28, 1925.
41 VOGELSANG, supra note 8, at 280.
42 See id. at 281.
43 See id.
44 See id. at 281-82; Ahmed-Ghosh, supra note 12, at 5; AFGHANISTAN COUNTRY STUDY AND GOVERNMENT PUBLICATIONS 45-46 (Richard F. Nyrop & Donald M. Seekins, eds., 1986).
45 See, e.g., EWANS, supra note 8, at 96-98; Edgar O’Ballance, Afghan Wars: Battles in a Hostile Land 75 (2002).
46 See EWANS, supra note 8, at 96.
48 See VOGELSANG, supra note 8, at 285.
49 See EWANS, supra note 8, at 101.
50 See VOGELSANG, supra note 8, at 285.
51 See id.
52 See id.
53 See EWANS, supra note 8, at 101.
56 He was shot to death while visiting a school in Kabul. See EWANS, supra note 8, at 103.
57 See VOGELSANG, supra note 8, at 288.
58 See id. at 288-89; POULLADA & POULLADA, supra note 47, at 163-66.
59 Daoud helped broker agreements for the Soviet Union and its satellites to supply Afghanistan with advanced Soviet military training and weaponry, including tanks, helicopters, and fighter-bombers. See EWANS, supra note 8, at 109-10; BLOOD, supra note 54, available at http://countrystudies.us/afghanistan/26.htm; AFGHANISTAN COUNTRY STUDY AND GOVERNMENT PUBLICATIONS, supra note 44; U.S. Department of State, Country Fact Sheet: Afghanistan, DEPARTMENT OF STATE DISPATCH NO. 23 (June 6, 1994) ($1 billion in Soviet aid starting in 1954). Among other projects, the Soviet Union built an international airport for Kabul, roads connecting Afghanistan’s three major cities with each other and with the Soviet Union, a tunnel at 11,000 feet through 1.7 miles of the towering Hindu Kush mountains that divide Kabul from the north of Afghanistan, paved streets for Kabul, and a number of grain silos. See EWANS, supra note 8, at 112-13.
60 The U.S. oversaw the construction of an international airport in Kandahar and developed Afghanistan’s national airline Ariana; led the building of roads from Kabul to Kandahar and from Afghanistan to Iran and Pakistan, then both friendly with the United States; and provided educational assistance. See EWANS, supra note 8, at 114-15. President Eisenhower also visited Kabul to proclaim American friendship. See id.
61 See id. at 115.
62 See EWANS, supra note 8, at 115.
64 See VOGELSANG, supra note 8, at 293.
65 The heresy charge was leveled on the theory that King Zahir Shah ruled Afghanistan by divine right, a notion later incorporated into Afghanistan’s 1964 constitution. See EWANS, supra note 8, at 115; AFG. CONST. OF 1964, Art. 15.
66 See KAKAR, supra note 63, at Introduction.
67 See EWANS, supra note 8, at 115.
68 See id. at 117-120.

See AFG. CONST. OF 1964, art. 69. Compare id. art. 9(8), with id. art. 9(7), and id. art. 9(10).

See id. art. 9.

See id. arts. 43-44. The constitution filled the remaining one-third of the Afghan Senate by having local provincial councils each elect one of their members to serve three-year terms in that body. See id. art. 44.

Cf. EWANS, supra note 8, at 120 (1964 constitution expressed “clear preference for a secular legal system”).

See Afg. const. of 1964, art. 2.

Id. art. 64 (emphasis added). Compare AFG. CONST. OF 1923, art. 72.

AFG. CONST. OF 1923, art. 5.

AFG. CONST. OF 1964, art. 15 (emphasis added).


AFG. CONST. OF 1923, art. 21.

AFG. CONST. OF 1964, art. 69.


The Sound of the Sixties, supra note 71.

Compare AFG. CONST. OF 1964, art. 25, with AFG. CONST. OF 1923, art. 16. See also VOGELSANG, supra note 8, at 279 (1923 constitution interpreted as giving women equal rights).

See AFG. CONST. OF 1964, arts. 25-6, 29-32, 34, 37.

The Sound of the Sixties, supra note 71.

See VOGELSANG, supra note 8, at 296.


See EWANS, supra note 8, at 122-23.

See id. at 121.

See VOGELSANG, supra note 8, at 296.

See EWANS, supra note 8, at 122-24.

See id. at 123-24.

See VOGELSANG, supra note 8, at 297.

See EWANS, supra note 8, at 123.


See VOGELSANG, supra note 8, at 292.

See id.

See id. at 298. Most of Afghanistan’s judges were trained at Al-Azhar University. See Barnett R. Rubin, The Fragmentation of Afghanistan, FOREIGN AFFAIRS, 1989, at 150.

See VOGELSANG, supra note 8, at 298.

See KAKAR, supra note 63, at 2.4.

See id. at B, “Niazi.”

See id. at B, “Rabbani,” & “Sayyaf”; VOGELSANG, supra note 8, at 298.

See Irwin, supra note 99.


See John F. Burns, Afghans: Now They Blame America, N.Y. TIMES MAGAZINE, Feb. 4, 1990, at 6-22 (“As a
Kabul student leader during the early 1970’s, [Hekmatyar] had dispatched followers to throw vials of acid into the faces of women students who refused to wear veils.”). In the Afghan context, such attacks can be a fate worse then death, due to the importance of finding a husband for financial support. Cf. Lisa M. Taylor, Saving Face: Acid Attack Laws After the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, 29 GA. J. INT’L & COMP. L. 395, 400 n.25 (2001).

See id.

Compare EWANS, supra note 8, at 126 (stating, “100,000 people – some say more – died”), with Burns, supra note 110 (stating that 500,000 Afghans died of starvation in the winter of 1971).

See VOGELSANG, supra note 8, at 299.


See KAKAR, supra note 63, at 3.9-3.12.

See VOGELSANG, supra note 8, at 300.

See id.


See EWANS, supra note 8, at 131.

See VOGELSANG, supra note 8, at 300.

See id. at 301.

Article 2, which in all previous Afghan constitutions had proclaimed Islam the sacred religion of Afghanistan, now called for “the exercise of power by the people, the majority of whom consists of farmers, workers, the enlightened people and the youth.” AFG. CONST. OF 1977, art. 2. Another provision called for land reform, see id., art. 14, five percent of the landowners then owning 45% of all arable land, and some 400 families owning about 20,000 villages. See RAJA ANWAR, THE TRAGEDY OF AFGHANISTAN 130 (1988). The constitution decreed state ownership for Afghan banks, insurers, large industries, oil and other mineral resources, and communications and transport hubs. See AFG. CONST. OF 1977, art. 13; VOGELSANG, supra note 8, at 301.

See AFG. CONST. OF 1977, art. 64.

See id. art. 99.

See id. art. 27.

See id. art. 21.

See VOGELSANG, supra note 8, at 301.

See id. at 303-4.

Burns, supra note 110. See also Barry Kramer, Out of Isolation: Afghanistan Is Pushing Toward the 20th Century With Bold Spending Plan, but Tribesman Resist, W ALL ST. J., Sept. 2, 1977, at 22 (“Afghanistan is plagued by poverty, 90% illiteracy, 50% infant mortality rate and socio[cial] and econ[omic] backwardness”).

See VOGELSANG, supra note 8, at 304.

See id.

See id. His deputies were the other two leading Afghan communists, Babrak Karmal and Hafiz Allah Amin.

See id.


See id. at 306.

See id.

See id. at 304; Ewans, supra note 8, at 139.

See VOGELSANG, supra note 8, at 306-7.

See id. at 306.

EWANS, supra note 8, at 143.
143 See id.
144 See PHILLIP C. WILCOX, STRIKING TERROR: AMERICA'S NEW WAR 80 (Robert B. Silvers & Barbara Epstein eds., 2002); COOLEY, supra note 114 at 13, 19-22
145 WILCOX, supra note 146, at 80; COOLEY, supra note 114 at 13, 19-22. The Defense Department believed at the time that “there was value in keeping the Afghan insurgency going, ‘sucking the Soviets into a Vietnamese quagmire.’” ROBERT GATES, FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR 145 (1997). The Soviet leadership believed that the CIA was fomenting fundamentalist opposition with the purpose of replacing U.S. bases lost in Iran after the 1979 revolution. See COOLEY, supra note 114, at 13-19
146 EWANS, supra note 8, at 146-48; BLOOD, supra note 54. The Soviet Union claimed that it had been invited into Afghanistan by the besieged Taraki regime pursuant to a mutual defense treaty, but historians tend to reject these claims, citing a lack of evidence. See, e.g., KAKAR, supra note 63, at Chapter 2. Although Taraki, the initial leader of the Afghan communist government, had signed a military assistance treaty with the Soviets, and pleaded with them for both “men and weapons” after the revolt in Heart, he was dead by the time of the invasion. See id. While it is undisputed that Taraki’s rival Karmal welcomed the Soviet invasion, historians deny that he had the authority to invite the Soviets in because he was not even living in Afghanistan at the time. See id.
147 See EWANS, supra note 8, at 146-48
148 See VOGELSANG, supra note 8, at 321.
149 See id. at 309; KAKAR, supra note 75, at Chapter 2.
150 See VOGELSANG, supra note 8, at 309.
151 See id.
152 See, e.g., BLOOD, supra note 54; KAKAR, supra note 63, at Chapter 3.
156 See Moghadam, supra note 154.
158 See Moghadam, supra note 154.
159 See id.
160 Soon after the Soviet invasion began, the U.S. coordinated an international campaign of support for the anti-communist jihad that had been waged from the fundamentalists’ safe haven in Pakistan for several years prior to the Soviet intervention. Pakistan agreed to set up training camps for Afghan and foreign fighters, Saudi Arabia to contribute large sums of cash, and Egypt to bequeath their stocks of Soviet-made assault rifles. See COOLEY, supra note 114, at 15-16, 59, 65-69, 100, 95, 108-110. The mujahideen eventually received over $10 billion, almost $5 billion from the U.S. and $3 billion from Saudi Arabia. See RASHID, supra note 10, at 18; SAMUEL P. HUNTINGTON, THE Clash OF Civilizations and THE REMAKING OF THE WORLD ORDER at 247 (1998).
161 HUNTINGTON, supra note 160, at 247. The Reagan administration awarded one-third of the CIA’s financial aid to the mujahideen and powerful anti-aircraft Stinger missiles to Hekmatyar’s faction, which used this support to gain even more influence among Afghans. See Ahmed Rashid, Afghan Designs; Geneva Accord on Afghanistan, THE NATION, May 21, 1988, at 700; Richard Ehrlich, Afghan Rebels at Each Others’ Throats, TORONTO STAR, Jan. 31, 1988, at H3; Arney, supra note 120.
162 Barry Shlachter, Most-Disciplined Afghan Rebel Faction Seeks Strict Islamic State, ASSOCIATED PRESS, Jan. 1, 1982. At the time, Hekmatyar was on “good terms” with the regime of Ayatollah Khomeini in Iran. Id.
166 Grand Council to Begin Historic Work, supra note 165, at A4. The Arab-Afghans had “very good relations” with both Sayyaf and Hekmatyar according to Ahmed Shah Massoud, who was later killed on the orders of the most famous one of them, bin Laden. RASHID, supra note 10, at viii, 132-33.
168 Id. at 55, 66, 125, 145; Vincent Cannistraro, A STRIKE AGAINST TERRORISM - AND OURSELVES?, BOSTON GLOBE, Aug. 23, 1998, at E1 (“At 18, [bin Laden] joined Abd’al Rauf Sayyaf, an Afghan tribal leader who was trained in Saudi Arabia by the Wahabis.”). Sayyaf has even been described as a “mentor” to bin Laden. MARY ANNE WEAVER, PAKISTAN: IN THE SHADOW OF JIHAD AND AFGHANISTAN 191, 201, 222, 269 (2002).
170 RASHID, supra note 10, at 129.
171 See id. at 13. See also HUNTINGTON, supra note 160, at 247 (putting number at 25,000).
172 RASHID, supra note 10, at 130.
177 See Burns, supra note 175; Watson & Barry, supra note 176, at 32. See also Pilon, supra note 176.
178 HUNTINGTON, supra note 160, at 247.
179 See EWANS, supra note 8, at 160-61; Arney, supra note 120.
180 See Afghan Women Face Future of Backwardness, S.F. CHRON., June 1, 1989, at A22.
181 Id.
182 See id.
184 See EWANS, supra note 8, at 167-68
187 See id., art. 38.
188 See id., art. 39-60.
189 See VOGELSANG, supra note 8, at 319.
191 See EWANS, supra note 8, at 168-69.
192 See Burns, supra note 175.
193 See id.
194 See EWANS, supra note 8, at 171-72; VOGELSANG, supra note 8, at 322-23.
196 See id., art. 20, 25, 27; EWANS, supra note 8, at 175.
197 See AFG. CONST. OF 1990, art. 75, 81.
198 See id., art. 75, 122-24.
200 See VOGELSANG, supra note 8, at 323-24.
201 See Burns, supra note 175.
the Pakistani security services, who trained the Taliban and provided it with thousands of Pakistani troops, 12,000

The Taliban owed much of their military sophistication and the speed of its success to highly trained professionals in

praised the Taliban to Congress and argued publicly as late as 1996 that there was “nothing objectionable” about

(recounting statement to this effect by the Prime Minister of Pakistan to the BBC). The U.S. State Department

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the Taliban as a vehicle for promoting fundamentalist ideals.

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1992, at A4 (Rabbani government “forced women to wear veils”).

laws banning alcohol and requiring that women be veiled. Both of these new crimes were punishable by floggings,

 rule of the Rapists

Mariam Rawi,

of Human Rights Abuse


http://www.guardian.co.uk/waronterror/story/0,1361,595529,00.html.

http://www.guardian.co.uk/comment/story/0,3604,1146134,00.html.


http://www.guardian.co.uk/comment/story/0,3604,1146134,00.html.


See id.


U.S. Department of State, Country Fact Sheet: Afghanistan, DEPARTMENT OF STATE DISPATCH No. 23 (June 6, 1994).

Griffin, supra note 207; CHRISTINA LAMB, THE SEWING CIRCLES OF HERAT 20 (2002). See also Grand
Council to Begin Historic Work, supra note 165, at A4; Loya Jirga Defuses Battle of Good and Evil, DEUTSCHE
PRESSE-AGENTUR, June 12, 2002 (“Backed by hundreds of Arab recruits,” Sayyaf “spearheaded a vicious campaign
against the country’s Shia Hazara minority.”).


Id. at 21.

See BURKE, supra note 167, at 66, 125, 145.

See U.S. Department of State, supra note 210; EWANS, supra note 8, at 179.

U.S. Department of State, supra note 210. See also Dan Chapman, Many Afghans Haunted by Northern
Alliance’s Past, THE ATLANTA JOURNAL-CONSTITUTION, Nov. 12, 2001, at 8A.

See EWANS, supra note 8, at 186.


RASHID, supra note 10, at 25. See also id. at 115.

Statement of Mr. Hamid Karzai, The Taliban: Engagement or Confrontation?, Hearing Before the Committee

See RASHID, supra note 10, at 23.

See id. at 46, 158-59, 166, 176-177. See also Howard Schneider, Saudi Missteps Helped Bin Laden Gain
the Taliban as a vehicle for promoting fundamentalist ideals. See RASHID, supra note 10, at 197-206, 211.

The U.S. reportedly funded Pakistani military training of the Taliban. See EWANS, supra note 8, at 225
(recounting statement to this effect by the Prime Minister of Pakistan to the BBC). The U.S. State Department
praised the Taliban to Congress and argued publicly as late as 1996 that there was “nothing objectionable” about
their fundamentalist policies. MAGNUS & NABY, supra note 165, at 184; see RASHID, supra note 10, at 158-59, 166.
The Taliban owed much of their military sophistication and the speed of its success to highly trained professionals in
the Pakistani security services, who trained the Taliban and provided it with thousands of Pakistani troops, 12,000

See EWANS, supra note 8, at 184. The Pakistani Interior Minister even called the Taliban “our boys” and boasted that he was responsible for their victory in Kandahar. See RASHID, supra note 10, at 27-29. 252

See VOGELSANG, supra note 8, at 327; RASHID, supra note 10, at 33. 253

RASHID, supra note 10, at 39. 259

See id. at 48. 254

See O’BALLANCE, supra note 45, at 243. 255

See id. at 52-53. 256

See RASHID, supra note 10, at 51. 257

See UNHCR, supra note 10, ¶6 at 5. 258

See RASHID, supra note 10, at 74-6. 259

See id. at 58-60, 72-74; O’BALLANCE, supra note 45, at 244. The Pakistanis approved a budget of $5 million for this operation, and the Saudis contributed as well. See RASHID, supra note 10, at 72, 138. 260

See id. at 76; Giziabi, supra note 16. 261


See RASHID, supra note 10, at 76. 263

See id. at ix-x. 264

RASHID, supra note 10, at 43. 265

Id. at 107. 266

See id. at 106. 267

See id. at 51, 85. 268


See SAUDI ARABIA CONST., art. 1, 5-8, available at http://www.the-saudi.net/saudi-arabia/saudi-constitution.htm. 270


See COLL, supra note 249, at 341-42. 272

See id. at 297, 613. 273

See id. at 29, 105, 115, 218-19; LAMB, supra note 218, at 283. 274

See RASHID, supra note 10, at xii, 219. 275

See, e.g., id. at 15-18. 276

See, e.g., id. at 17. 277

See RASHID, supra note 10, at 93; EWANS, supra note 8, at 184, 187. 278

See Pamela Constable, Far From Prosperity: The Taliban Is Gone, But Drought and Corruptin Have Hit Hard, WASHINGTON POST Feb. 17, 2004, at C1. See also LAMB, supra note 218, at 10-11. 279

Thousands of Taliban conscripts and troops died in battles for one northern city, Mazar-i-Sharif, many being roasted in metal containers in the desert into which they were packed. See RASHID, supra note 10, at 59, 63. 280

of men have been taken prisoner, arbitrarily detained, tortured, and many killed and disappeared.”).

See RASHID, supra note 10, at 106, 110, 218.

See id. at 29; LAMB, supra note 218, at 81.


See LAMB, supra note 218, at 30-31, 162. Even before the Taliban took power, more than 90% of girls and 60% of boys in Afghanistan were illiterate. See RASHID, supra note 10, at 107.


See Schneider, supra note 229, at A01.


See UNHCR, supra note 10, ¶ 19, at 10.

See The Sound of the Sixties, supra note 71 (“Conservative elements led by Abdul Rasul Sayyaf, a warlord who
destroyed much of western Kabul in the early 1990s (though he still teaches religion at Kabul University), insisted that the provisional administration be designated as ‘Islamic’.”


286 Rashid, supra note 161.


289 See RASHID, supra note 10, at 83, 131.


291 Id.

292 Loya Jirga Defuses Battle of Good and Evil, DEUTSCHE PRESSE-Agentur, June 12, 2002.

293 Saudi Arabia’s “most senior Islamic cleric” has publicly warned: “‘Allowing women to mix with men is the root of every evil and catastrophe.”’ Robin Gedye, Unveiled Women Are Root of All Evil, Says Saudi Cleric, DAILY TELEGRAPH (U.K.), Jan. 22, 2004.

294 Sifton, supra note 290.

295 See id.


298 See Paisley Dodds, Afghan Women Jailed for Disobedience, ASSOCIATED PRESS, July 30, 2002.

299 See id.


301 Seymour Hersh, The Other War, THE NEW YORKER, Apr. 12, 2004.


304 Dexter Filkins & Barry Bearak, A Tribe Is Prey to Vengeance After Taliban’s Fall in North, N.Y. TIMES, Mar. 7, 2002.

305 See Human Rights Watch, supra note 302.


307 See Hersh, supra note 301.

308 See, e.g., UNHCR, supra note 10, ¶ 48 at 21 (reporting that soldiers loyal to Ismail Khan “have regularly committed acts of violence and intimidation against persons and groups perceived to oppose his rule. His armed forces and agents have made explicit threats to, arrested, harassed, and beaten members of nascent political, civic, media, professional, and cultural groups.”).


See id.


Afghan President Karzai Declares State Based on Islamic Principles, DEUTSCHE PRESE-Agentur, June 17, 2002.

Id.


Nanji, supra note 5, at A9.


See Nanji, supra note 5, at A9. Women are literally relegated to the back of the bus under these segregationist policies. See also Belquis Ahmadi, *Reality Gap in Afghanistan*, WASH. POST, July 8, 2002, at A17. Ms. Ahmadi describes the situation on buses, the only form of transit for most Afghan women (whose families can hardly afford automobiles on incomes of less than $200 per year), as even worse than under the Taliban, when women were forced into separate buses but “at least had seats on those buses.” Id.


See Nanji, supra note 5, at A9; International Crisis Group, supra note 316, at 16.


See id.

See UNAMA, supra note 332.


See Bonn Agreement, supra note 331.

See UNAMA, supra note 332.


See Synovitz, supra note 321.

Id.

BENARD & HACHIGIAN, supra note 80, at 4.


Id., art. 3.

Id., art. 130.

Id., arts. 45, 63, 119.

AFG. CONSTITUTION OF 1964, art. 64.


(DRAFT) AFG. CONST. OF 2003, art. 84.


(DRAFT) AFG. CONSTITUTION OF 2003, supra note 345, Arts. 22, 33, 35-36, 43, 50, 52.

Sultan & Travis, supra note 352.


See AFG. CONST. OF 2004, art. 82-84.

Such protections were proposed by a Gender and Law Working Group, which was headed by the Minister for Women’s Affairs and includes two members of the Supreme Court, four other judges, two members of the Afghan Independent Human Rights Commission, two members of the Judicial Reform Commission, representatives of the Attorney General’s Office and Ministry of Foreign Affairs, professors of law and Sharia at Kabul University, and

See id. at 25-33.

See id. at 27.


Oates & Helal, supra note 362, at 32.


See supra note 370.

/news/2002/01/25/ixnewstop.html..

The Turkish genocide against 1.5 million Armenian Christians and hundreds of thousands of Assyrian and Greek Christians had “holy war” aspects associated with fundamentalist Islam. See PETER BALAKIAN, THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA’S RESPONSE 339 (2003); CHALDEAN VICTIMS OF THE Turks, THE TIMES (U.K.), Nov. 22, 1919, at 11 (250,000 Assyrians died due to Turkish persecutions and famine).


See AFG. CONST. OF 2004, supra note 359, Art. 35.


See Reporters Sans Frontieres, supra note 395.

AFG. CONST. OF 2004, art. 2.

Spillius, supra note 370.


See id.

Spillius, supra note 370.


AFG. CONST. OF 2004, art. 64(18).

See Goering, supra note 405.

Spillius, supra note 370.

+%22provided+with+all+the+means+of+work+and+earning+and+making+a+life%22&hl=en.


415  See, e.g., Colin Powell Holds Press Conference, CNN.COM (CNN television broadcast, Nov. 19, 2001), transcript available at http://www.cnn.com/TRANSCRIPTS/0111/19/se.03.html (“Now, in recent days, as the curtain has been lifted, we have seen on television the joyous pictures of liberated Afghans, of women throwing off their burqas…. “); Larry King Live: Interview with Heather Merecer and Dayna Curry; Interview with Sen. Carl Levin and Sen. John Warner (CNN television broadcast, Nov. 27, 2001), transcript available at http://www.cnn.com/TRANSCRIPTS/0111/27/kl.00.html (similar).

416  See Halima Kazem, In Afghanistan, Laura Bush Focuses on Roles of Women, CHRISTIAN SCI. MONITOR, Mar. 31, 2005, at 7 (quoting Afghan woman about her continuing fear of traveling outside of Kabul without wearing her burqa’); Jon Sawyer, Most Afghan Warlords Ignore Calls to Disarm Before Elections, ST. LOUIS POST-DISPATCH, June 13, 2004 (“The great majority [of Afghan women] still wear the pale blue, full-body covering known as the burqa.”); Ellen Goodman, ‘Liberated’ But Not Free, WASH. POST, Sept. 6, 2003, at A19 (“Outside the cities, modern women no longer wear the burqas by fiat; they wear them because of fear. In places where warlords rule the roads and Islamic clerics rule the courts, little has changed.”).

417  See Benard, supra note 413; Nanji, supra note 5, at A9.

418  Benard, supra note 413.

419  See Nanji, supra note 5, at A9.


421  See Nanji, supra note 5, at A9.

422  Id.


425  See id.

426  Id.


432  See Id.


434  See Amnesty International, supra note 427; Human Rights Watch, supra note 310; Kerokhel, supra note 424.
437 Id.
439 U.S. Department of State, supra note 456, at “Denied Education and Health Care.”
441 Id., art. 1.
443 Id., Art. 16(2).
444 Amnesty International, supra note 342.
448 See Amnesty International, supra note 420, at 40.
449 See id.
450 See id., at 46-47.
453 In particular, women’s illiteracy, lack of power, and distrust of costly and time-consuming divorce proceedings ultimately in the hands of fundamentalist judges, make successful applications for divorce very unlikely. Cf. Hossain & Turner, supra note 452, at 15-24.
455 See AFG. CONST. OF 2004, art. 7 (“The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.”).
456 See id. art. 3 (“no law can be contrary to the beliefs and provisions of Islam”).
457 Among other differences, the ferocity of the Iraqi insurgents is unmatched by the Taliban’s remnants and sympathizers, whether due to the Afghan people’s doleful memories of Taliban rule, the decision of the U.S. to allow local warlords to more or less have their way outside of Kabul, or pure exhaustion after 25 years of nearly uninterrupted war since 1978. See Associated Press, U.S. Death Toll in Afghanistan Hits 100, THE HOLLAND SENTINEL, Jan. 13, 2004, available at http://www.hollandsentinel.com/stories/011304/new_011304037.shtml.
the Threat from Iraq?


http://www.foreignaffairs.org/19990501faessay979/john-mueller-karl-mueller/sanctions-of-mass-

Mueller, 2004,

2002,

themselves caused more deaths than all the weapons of mass destruction ever used in the course of human history.

weapons development program, even though Iraq had destroyed its banned weapons in 1991, and the sanctions

after the end of the Gulf War, their basis shifting to eliminating Iraq's chemical and biological weapons and nuclear

Health System Close to Collapse, Says WHO Director-General

http://www.unicef.org/newsline/99pr29.htm. Iraqi national income plunged to 1940s levels and the health care

http://www.commondreams.org/view/2002/08/18-02.htm; Patrick E. Tyler,

http://www.foxnews.com/story/0,2933,73292,00.html; Joost R. Hiltermann,

http://www.hrw.org/campaigns/iraq/iraqmines1212.htm; Associated Press,

http://www.foxnews.com/story/0,2933,105856,00.html.

http://www.foxnews.com/story/0,2933,105856,00.html.

http://www.commondreams.org/view/2002/08/18-02.htm; Joost R. Hiltermann,


461 See CHRIS COOK, THE FACTS ON FILE: WORLD POLITICAL ALMANAC 296 (3d. ed. 1995) (400,000 Iraqis died in

Iraq-iraq war); Robert L. Maginnis, Outside View: The Morality of U.S. Policy, INSIGHT ON THE NEWS, Sept. 2,


462 See HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS § 2 (1993), at


http://www.independent-media.tv/item.cfm?fmedia_id=228&fcategory_desc=Under%20Reported; Robert Novak,

Following Iraq's Bioweapons Trail

http://www.foxnews.com/story/0,2933,105856,00.html; Patrick E. Tyler,

http://www.foxnews.com/story/0,2933,373292,00.html; Patrick E. Tyler, Officers Say U.S. Aided Iraq in War Despite


http://www.foxnews.com/story/0,2933,105856,00.html.


http://www.who.int/archives/inf-


469 See U.N. Children’s Fund, Iraq Surveys Show “Humanitarian Emergency” (Aug. 12, 1999), at

http://www.unicef.org/newsline/99pr29.htm. Iraqi national income plunged to 1940s levels and the health care

system virtually collapsed. See U.N. Children’s Fund, supra note 466, at 16-17; World Health Organization, Iraqi Health System Close to Collapse, Says WHO Director-General (Feb. 27, 1997), at http://www.who.int/archives/inf-

pr-1997/en/pr97-16.html. The sanctions, originally imposed to press Iraq to leave Kuwait, were continued long

after the end of the Gulf War, their basis shifting to eliminating Iraq’s chemical and biological weapons and nuclear

weapons development program, even though Iraq had destroyed its banned weapons in 1991, and the sanctions

themselves caused more deaths than all the weapons of mass destruction ever used in the course of human history.


2002, available at http://www.harpers.org/CoolWar.html; Final Report: Iraq Had No WMDs, USA TODAY, Oct. 6,


http://www.foreignaffairs.org/19990501faessay979/john-mueller-karl-mueller/sanctions-of-mass-

destruction.html?mode=print.

470 See President Bush's Address to the United Nations, CNN.COM, Sept. 12, 2002, at


471 See, e.g., Nicholas Kristof, The Man with No Ear, N.Y. TIMES, June 27, 2003, available at

Constitution to apply their religious laws if they depart from the tenets of Islam, a clear example of discrimination. See reference to Islam, proclaiming it to be the “religion of the State” but not requiring all laws to conform to its tenets. http://freedomhouse.org/religion/news/bn2003/bn -2003-11-09.htm?article_id=170.


See Dexter Filkins, Kurds Advancing to Reclaim Land in Northern Iraq, N.Y. TIMES, June 20, 2004 (100,000 Arabs displaced from their homes in northern Iraq alone since the war); Iraq: New Housing Project for Displaced People, U.N. IRIN, June 8, 2004, at http://www.irinnews.org/report.asp?ReportID=41465&SelectRegion=Iraq_Crisis&SelectCountry=IRAQ (50,000 people displaced due to fighting in Fallujah alone).


The Iraqi constitution in effect at the time of the 2003 war was adopted in 1970, and contained only one reference to Islam, proclaiming it to be the “religion of the State” but not requiring all laws to conform to its tenets. See IRAQ CONST. OF 1970, Art. 4. Even the 1925 constitution only contemplated that Islamic law govern Muslims and that Jews and Christians exercise jurisdiction over themselves in such matters. See IRAQ CONST. OF 1925, Art. 77-80, available at http://www.mallat.com/iraq%20const%201925.htm. The TAL does not allow Christians or Jews to apply their religious laws if they depart from the tenets of Islam, a clear example of discrimination. See Law of Administration for the State of Iraq for the Transitional Period, Art. 7, supra note 485; Bruce Fein, Flawed Interim Constitution, WASH. TIMES, Mar. 23, 2004, available at http://www.washtimes.com/commentary/20040322-082831-2551r.htm.

See Fein, supra note 487.


492 See Daragahi, supra note 491; Jeffrey, supra note 490.

493 See Jeffrey, supra note 490.


496 See id.; Daniszewski, supra note 3, at A1.

497 See Michael Jansen, Shia Clerics Insist on the Adoption of Islamic Law, IRISH TIMES, Feb. 7, 2005, at 11.


499 For example, the theocratic regime in Iran has executed thousands of political opponents, razed villages belonging to religious and ethnic minorities such as the Kurds, and practiced widespread torture. See, e.g., U.S. Department of State, Country Reports on Human Rights Practices for 2000: Iran (Feb. 23, 2001), at www.state.gov/g/drl/rls/hrrpt/2000/nea/786.htm; Amnesty International, Iran: Executions of Prisoners Continue Unabated (1992), at http://www.amnestyusa.org/countries/iran/document.do?id=7D4EA7D35E816F03802569A600602B9A (“Between July 1988 and January 1989 alone Amnesty International recorded more than 2,500 political prisoners who were executed….”).


506 See Gettleman, supra note 478.


510 Constable, supra note 483.

511 Id.
Afghan Ministry of Defence estimates that there are still more than 100,000 illegally armed gunmen, most loyal to warlords or local tribal chiefs, who also need to be disarmed. See Swanse Hunt & Cristina Posa, Where Are the Women in the New Iraq?, BOSTON GLOBE, June 22, 2004, available at http://www.commodreams.org/views04/0622-02.htm.


For example, life expectancy in Bosnia increased by about 15 years after an international coalition intervened in 1995 against the civil war and genocide that were ongoing in that country. See U.S. Bureau of the Census, International Data Base (2004), available at http://www.census.gov/ipc/www/idbprint.html.


For example, women tend to be better off, and more equal to men, in literacy, employment opportunities, and/or life expectancy and access to medical care, in Tajikistan and Uzbekistan than in Iran or Afghanistan; in Tunisia, Lebanon, or Jordan than in Saudi Arabia; in Mexico, Venezuela or Brazil than in Guatemala, el Salvador, or Nicaragua; in Jamaica than in Haiti; in Malaysia than in Indonesia or the Philippines; and in Kenya or Tanzania than in the Congo. See, e.g., U.N. Development Programme, Human Development Indicators 2004, at Tables 24-27, at http://hdr.undp.org/statistics/data/index_indicators.cfm; Save the Children, State of the World’s Mothers 2004, at 32-36, at http://www.savethechildren.org/mothers/report_2004/images/pdf/Index_Rank_pp28_36.pdf.

Defenders of the view that the West should accept the religious extremism and medieval customs to which their allies in Afghanistan and Iraq cling frequently cite cultural sensitivities, but this is disingenuous, as these sensitivities have proved to be no barrier to implementing the other priorities of the U.S. government, only those relating to protecting the human rights of women and religious minorities. See, e.g., Torture Policy (cont’d), WASH. POST, June 21, 2004, at A18 (U.S. commander in Iraq approved policy of forcing nudity on detainees).
Iraqis seem to be ambivalent at best about whether the war was morally justified. See, e.g., Cesar G. Soriano & Steven Komarow, Poll: Iraqis Out of Patience, USA TODAY, Apr. 29, 2004 (“In the multiethic Baghdad area … only 13% of the people now say the invasion of Iraq was morally justifiable.”); Poll: Iraqis Conflicted About War, Its Impact, CNN.COM, Apr. 28, 2004, at http://www.cnn.com/2004/WORLD/meast/04/28/iraq.poll (“Thirty-three percent of [3,444 Iraqis asked in a CNN/USA Today/Gallup Poll] said the war had done more good than harm, while 46 percent said it had done more harm than good.”); Steven Komarow, New Era Is Blessing for Some, Curse for Others, USA TODAY, June 29, 2004, available at http://www.usatoday.com/news/world/2004-06-28-iraq-future_x.htm (“A recent poll showed the majority of Iraqis said the U.S.-led coalition was wrong to invade their country, but they welcome democracy”).