CUSTOMARY JUSTICE SYSTEMS AND RULE OF LAW REFORM

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"Forsake your village, but not its ancient usages."[1]
—Pashto proverb

Introduction

A young U.S. rule of law (ROL) judge advocate (JA) and his Department of State counterpart are partnered with a local judiciary in Afghanistan, seeking to improve its justice system. They are discussing a murder trial with the criminal court's chief judge in which the defendant was acquitted. The judge tells them that he informed the family of the deceased to take the matter to the local tribe for further redress, as they are unhappy with the outcome. The attorneys are torn: they respect the culture and its capacity for alternative dispute resolution, but feel this may undermine the government's legitimacy and the very rule of law they are attempting to enable. The judge further explains that the court is overwhelmed by the current caseload and that the judge would like the attorneys to encourage tribal dispute resolution in some cases to alleviate prison overcrowding and trial backlog at least until the judicial system is more robust.

This scenario is important, as today's service members who are engaged in stability and counterinsurgency operations must be much more than soldiers but must also "facilitate establishing local governance and the rule of law"[2] in support of not only the host nation but international bodies and even other U.S. agencies.[3] While building rule of law is one of counterinsurgency's main objectives, the focus is often on creating sustainable, "civilian-controlled . . . police, court, and penal institutions."[4] However, these institutions are frequently inaccessible, impractical, or malfunctioning for a large majority of the populace while customary justice systems (CJS) can provide an effective alternative,

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1 S.S. THOBURN, BANNU OR OUR AFGHAN FRONTIER 259 (1876).

2 U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY foreword (Dec. 2006) [hereinafter FM 3-24].

3 *Id.* at D-8.

4 *Id.*

albeit with potential dangers. For the purposes of this article, CJS refers to those dispute resolution mechanisms outside the formal justice system, including traditional, tribal, religious, indigenous, and informal systems. However, they sometimes possess an official connection to a state by recognition or regulation.[5]

While each is different, "[c]ommon characteristics of [CJS include]

- The problem is viewed as relating to the whole community as a group—there is a strong consideration for the collective interests at stake in disputes;
- Decisions are based on a process of consultation;
- There is an emphasis on reconciliation and restoring social harmony;
- Arbitrators are appointed from within the community on the basis of status or lineage;
- There is often a high degree of public participation;
- The rules of evidence and procedure are flexible;
- There is no professional legal representation;
- The process is voluntary, and the decision is based on agreement;
- They have a high level of acceptance and legitimacy;
- There is no distinction between criminal and civil cases, informal justice systems often deal with both;
- Often there is no separation between [CJS] and local governance structures—a person who exercises judiciary authority through [a CJS] may also have executive authority over the same property or territory; and
- Enforcement of decisions is secured through social pressure".[6]

This article examines how U.S. rule of law practitioners should, if at all, engage active CJS in post- or in-conflict societies when the host nation does not formally advance their use. I argue that even when not formally recognized by the host nation, to effectively advance the rule of law as a whole, practitioners must be well versed in pluralistic legal

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[5] EWA WOJKOWSKA, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE 9 (Dec. 2006), *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf.

[6] *Id.* at 16.

traditions and their models, avoid haphazard engagement of CJS, and embrace them as part of the environment. I also contend that this approach is consistent with U.S. policy, Rachel Kleinfeld's second-generation rule of law reform, various social-science theories, and the spirit of current military doctrine. Such an approach is also required from a strategic perspective, as joint design methodology requires commanders and staff to understand the whole of the environment in order to define the problem.

This article considers U.S. policy and U.S. military doctrine and guides, as well as current social-science work pertaining to rule of law and development. In addition, it explains some of CJS risks and benefits, and legal pluralism's potentials and perverse incentives. With this background, I contend that reformers should embrace CJS as part of the social environment while remaining wary of haphazard engagement even in situations when the host nation does not actively advance the informal system. Rule of law efforts in Afghanistan are used as a case-study to help provide a framework of analysis. Finally, this article provides practical, but not nation–specific, considerations for those who find themselves delving into the CJS arena.

Literature Review

While there is no consensus on how to define rule of law, the U.S. Army captures the idea as follows: "Established rule of law refers to the condition in which all individuals and institutions, public and private, and the state itself are accountable to the law. Perceived inequalities in the administration of the law, and real or apparent injustices, trigger instability."[7]

Although this definition allows for the promotion and engagement of innumerable types of justice systems, attorneys at the heart of rule of law efforts often use an institutional, first generational approach. This helps countries build formalized institutions: constructing courthouses,

[7] U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-07, STABILITY para. 25 (Aug. 2012) [hereinafter ADP 3-07]. An earlier version of this publication previously defined rule of law as "a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles." U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1–40 (Oct. 2008) [hereinafter FM 3-07].

drafting regulations, training legal personnel, supporting judiciaries, promoting bar associations, and providing international exchanges.[8] Unfortunately, such an approach creates a structural problem that prevents reformers from adequately addressing the failures of, and opportunities to improve, the system since they are mentally and perhaps financially committed to formal institutions.[9] First-generation approaches therefore "limit the conceptual space for treating rule-of-law reform as a cultural or political problem" despite the fact many problems are located "in the broader relationships between the state and society."[10] Thus, most current rule of law efforts worldwide give CJS little attention despite accounting for approximately 80% of justice rendered in many developing nations.[11]

Contrary to the first-generational, institution-based approach, Rachel Kleinfeld advances an ends-based approach to rule of law, "which allows reformers to focus on the goals that led them to undertake rule of law reform in the first place."[12] This approach recognizes that rule of law is formed by "power and culture, not laws and institutions."[13] She proposes the following dynamic ends to help define rule of law:

- Governments are subject to laws and must follow pre-established and legally accepted procedures to create new laws.
- Citizens are equal before the law.
- Judicial and governmental decisions are regularized: They are not subject to the whims of individuals, or the influence of corruption.
- *All citizens have access to effective and efficient dispute-solving mechanisms regardless of their financial means.*

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[8] RACHEL KLEINFELD, ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM 8 (2012) (citing Stephen Golub, *A House Without a Foundation*, *in* PROMOTING THE RULE OF LAW ABROAD IN SEARCH OF KNOWLEDGE 105, 108–09 (Thomas Carothers ed., 2006)).

[9] *Id.* at 9, 10.

[10] *Id.* at 9.

[11] Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, *in* 3 HAGUE J. ON RULE L. 3, 4 (2011) (citing Laure-Helene Piron, *Time to Learn, Time to Act, in Africa*, *in* PROMOTING THE RULE OF LAW ABROAD IN SEARCH OF KNOWLEDGE, *supra* note 9, at 275, 291).

[12] KLEINFELD, *supra* note 8, at 13.

[13] *Id.* at 15.

- Human rights are protected by law and its implementation.
- *Law and order are prevalent.*[14]

While the U.S. Army definition is inconsistent with a second-generation, ends-based definition of rule of law, Kleinfeld's thesis that "the rule of law is not about a set of institutions[, but] it is about achieving a set of ends that determine the relationship between a state and its society" and that helps focus reform efforts in the appropriate direction.[15] An effective way to do so is through indirect work, from the bottom up, through legitimate local actors who share a vision of reform in line with the donors.[16] In other words, allowing a society to change and the populace to hold their government accountable from within.[17] Likewise, her definition is less prescriptive and more wholly encompasses alternative systems by striving for a system in which "all citizens have access to effective and efficient *dispute-solving mechanisms* regardless of their financial means."[18]

Similarly, Matteo Tondini succinctly describes the two methods of viewing the relationship between law and society. The first, "autocratic conception of law," is a top-down approach in which the powerful imposes law on their society.[19] Conversely, in the "sociologic" approach, he argues, "law simply emerges from the society as a consequence of people's lives."[20] Although focused on customary justice, Deborah H. Isser also recognizes how a focus solely on state systems can lead to "perverse results," especially when "combined with an utter lack of appreciation of the social context of justice."[21] She therefore offers alternative approaches in line with second generation thinking, taking into account "the broader and more complex social, historical, and political context where they occur."[22]

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[14] *Id.* at 14–15 (emphasis added).
[15] *Id.* at 212.
[16] *Id.* at 112–21.
[17] *Id.* at 214.
[18] *Id.* at 14, 15 (emphasis added).
[19] MATTEO TONDINI, STATEBUILDING AND JUSTICE REFORM: POST CONFLICT RECONSTRUCTION IN AFGHANISTAN 1 (2010).
[20] *Id.*
[21] Deborah H. Isser, *Introduction: Shifting Assumptions from Abstract Ideals to Messy Realities*, *in* CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES 1, 1 (Deborah H. Isser ed., 2011) [hereinafter CUSTOMARY JUSTICE].
[22] *Id.* at 2.

These emerging approaches could be viewed as contrary to reconstruction-and-development's crucial principle of ownership. Researchers Clark Gibson, Krister Andersson, Elinor Ostrom and Sujai Shivakumar stress the need for recipient ownership throughout development to help prevent motivational and informational problems, appropriately align incentives, and effectively use local knowledge and institutions.[23] Ultimately, recipient ownership results in greater responsibility and accountability of a project.[24]

Likewise, the U.S. Agency for Intentional Development and the U.S. military recognize that host nations, not donors, should "own[]" or drive development priorities for realization of sustainable systems.[25] However, while a host nation may own a development program, such as a rule of law program, it may not have adequate knowledge of the challenges faced by its targeted populace.[26] Likewise, it may "lack the legitimacy to assume full ownership for peaceful governing processes."[27] Therefore, we should look not solely to the government but also to the people as beneficiaries for not only development but also ownership. While this entails intense analysis of how the population addresses collective-action problems, it may result in more sustainable outcomes.[28]

Nevertheless, a gap remains on how rule-of-law practitioners should, if at all, engage CJS when the host nation—the ostensible "owner"—does not support their advancement. The *Rule of Law Handbook, A Practitioners Guide for Judge Advocates* advances the argument that "despite the fact that they are often viewed as 'local level' issues, the [Judge Advocate (JA)] ROL practitioner must understand that incorporating customary justice systems in the ROL line of operation will require a 'high level' acceptance, not only from the JA's own chain of command, but also from the host nation within which they are working."[29] While this guide is concise and practical—although the contents are not "official positions, policies, or decisions of the United

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[23] CLARK C. GIBSON ET AL., THE SAMARITAN'S DILEMMA: THE POLITICAL ECONOMY OF DEVELOPMENT AID 226 (2009).
[24] *Id*.
[25] ADP 3-07, *supra* note 7, para. 1-36.
[26] GIBSON ET AL., *supra* note 23, at 227.
[27] FM 3-07, *supra* note 7, at C-4.
[28] GIBSON ET AL., *supra* note 23, at 232.
[29] CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, RULE OF LAW HANDBOOK, A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 107 (2011) [hereinafter ROL HANDBOOK].

States Government,"[30]—it is too restrictive of a definition in that it requires host nation acceptance. This is especially true when one realizes that the incorporation of CJS into rule of law efforts does not necessarily require CJS's advancement. Likewise, there are times when active engagement may be appropriate. This is more apparent when one considers the host-nation as more than merely the current government, but a heterogeneous entity that includes the populace, and rule-of-law as more than institutions but "a relationship between a state and its society."[31]

I therefore argue that although not explicitly stated, an ends-based approach to rule of law demands reformers recognize the capacity of CJS even when not promoted by the host-nation at the highest levels. While approval from a practitioner's chain-of-command and interagency coordination is certainly required, the requirement for a host nation's explicit approval should be qualified. Although U.S. strategy, policy and doctrine do not explicitly elevate this notion, they are consistent with this approach. I further advance that to effectively improve rule of law efforts as a whole, practitioners must become well versed in legal pluralism in which "multiple legal forms coexist"[32] and which avoids haphazard CJS engagement and embraces those plural legal forms as part of the environment.

CJS Risks

Despite the overwhelming number of individuals who rely on CJS to provide stability and resolve disputes in their communities, donor and host nations alike are often hesitant to engage CJS, for valid reasons. Even the most ardent supporters of CJS must appreciate its risks if they are to address those risks as a real part of the justice environment. Although some CJS have connections to the formal justice system, most CJS lack accountability on various levels. For instance, such systems normally lack appellate review, and because there is no state-sponsored enforcement mechanism, it is only community pressure that ensures that decisions are carried out. Likewise, the decision maker often lacks formal dispute resolution education and may assume the position based on religious education, lineage, or age. His decisions may therefore

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[30] *Id.* preface.
[31] KLEINFELD, *supra* note 8, at 15.
[32] Tamanaha, *supra* note 11, at 2.

reflect his personal biases, or even be influenced by bribes.[33] Some decision makers are influenced by power brokers, resolving issues in favor of those with more influence. This can exacerbate problems for the disadvantaged in a society.[34]

Because CJS are community based, many lack the ability to address disputes beyond the local area. This becomes especially problematic when the issue at hand extends outside the community and another community is also involved. Similarly, complicated issues, such as disputes with the government or large-scale crime, are outside most CJS' capacity.[35]

Perhaps the most often noted and troublesome issue arising from CJS is that of human rights violations. Such systems, in both form and result, are often inconsistent with American values and that their embrace may have an unintended political component. For instance, because CJS are often found in male dominated societies in which the good of the community regularly trumps individualism, women are normally at a particular disadvantage.[36] Indeed CJS resolutions viewed as meeting a communal good may include honor killings and forced, sometimes underage, marriages.[37] Although less abhorrent, respondents of both genders are often unrepresented and sometimes not given the opportunity to present evidence.[38]

Also frightening is the reality that some CJS are administered by enemies of the state. Engaging them could create the appearance that the donor nation unwittingly supports their activities despite the fact those enemies may settle disputes, filling a legal vacuum.[39] In either case, a savvy enemy can exploit engagement by a host or donor nation to their advantage.

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[33] WOJKOWSKA, *supra* note 5, at 22.
[34] *Id.* at 20.
[35] *Id.* at 23.
[36] *Id.* at 21.
[37] Thomas Barfield et al., *The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan, in* CUSTOMARY JUSTICE, *supra* note 21.
[38] WOJKOWSKA, *supra* note 5, at 23.
[39] David J. Kilcullen, *Deiokes and the Taliban: Local Governance, Bottom-up State Formation and the Rule of Law in Counter-Insurgency, in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 35, 45 (Whit Mason ed., 2011).

Deborah Isser succinctly groups these concerns over support to CJS into two categories. First, some see CJS, and their characteristics, as so far removed from those persons' notions of rule of law that CJS should be disregarded and ultimately dismantled.[40] Others appreciate CJS' abilities and yet believe that because donor nations are so detached from CJS, donors are unable to effectively engage these mechanisms or that outsiders are only able to advance systems with which they are familiar.[41] However serious the risks, host and donor nations should put equal effort into analyzing CJS' benefits and seeking ways to address CJS as a real part of the justice environment. Recognition of CJS' risks should not result in donor nations outright discounting their benefits, nor donors paralysis in engagement.

CJS Benefits

Although CJS are not without fault, they also possess tremendous advantages, sometimes underappreciated by the host or partner nation. Perhaps most importantly, they are normally viewed as legitimate, as they reflect the community's culture while regulating societal behavior to maintain stability. In other words, they are not top-down driven, and can thus survive unrest when formal systems may falter or fail.[42] Therefore, because they do not depend on the government, they are often able to endure even when a nation is in conflict.

CJS are less intimidating and more accessible than formal process; they require no special training or skills to access and are procedurally simple. Likewise, they are normally free of charge and physically available to those in rural areas unlike formal systems, which normally require fees and are often only found in a developing nation's cities.[43] These factors allow CJS to provide swift justice, a valued commodity in almost every society.[44]

Additionally, CJS can complement a state's formal system, alleviating burden to a docket that is often backlogged, and help limit correctional overcrowding. In so doing, they can aid the nation as a

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[40] Deborah H. Isser, *Conclusion: Understanding and Engaging Customary Justice Systems*, *in* CUSTOMARY JUSTICE, *supra* note 21, at 325, 341.
[41] *Id*.
[42] WOJKOWSKA, *supra* note 5, at 18.
[43] *Id.* at 19.
[44] *Id.* at 17.

whole, as they often provide a forum for reconciliation, often a much needed commodity in a post- or in-conflict state.[45] Importantly, where there is some, even unofficial, connection to the formal system, CJS can help indirectly link the local populace to the government, potentially improving its legitimacy.[46] They also provide a legal safety-net, with their ability to endure future strife within the nation.

Host and donor nations, and their rule of law practitioners, must consider these risks and benefits in depth and in conjunction with their own policies and vision of the future. Ideally, we do so not only using an official host nation narrative but also with an appreciation of the social and local dimension of rule of law to effectively build a strategy in line with our policy and doctrine.

CJS engagement: U.S. Strategy, Policy and Doctrine

"The government can't protect you in the desert." Iraqi Proverb[47]

The United States recently recognized the importance of CJS, both at home and abroad through its support of the United Nations Declaration on the Rights of Indigenous Peoples. Although not legally binding, and primarily discussed in the United States regarding Native American rights, the U.S. endorsement recognizes non-state institutions. In particular, Article 11 of the Declaration reads:

> States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their *laws, traditions and customs*.[48]

Similarly, Article 34 reads:

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[45] *Id.*
[46] Isser, *supra* note 21, at 326.
[47] Patricio Asfura-Heim, *Tribal Customary Law and Legal Pluralism in al Anbar, Iraq*, *in* CUSTOMARY JUSTICE, *supra* note 21, at 239, 250.
[48] G.A. Res 61/295, at 5, A/RES/61/295 (Oct. 2, 2007) (emphasis added).

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, *juridical systems or customs*, in accordance with international human rights standards. [49]

Although the United States did not initially support the Declaration when adopted in 2007, its endorsement in 2010[50] provides insight into the nation's evolving views on CJS, which is helpful to practitioners. It not only highlights CJS' importance but also reminds us that while CJS may seem foreign and difficult to engage, we need not look far to find indigenous systems in our own nation.

Our National Security Strategy (NSS) arguably leaves room for engagement of CJS as well. While it explicitly lists rule of law and human rights as legitimate interests, it recognizes that we "can more effectively forge consensus to tackle shared challenges when working with governments that reflect the will and respect the rights of their people, rather than just the narrow interests of those in power."[51] Because human-rights violations are perhaps the most contentious issue for both donor and partner nations when considering CJS engagement, these interests may prima facie discourage CJS' advancement, especially when the host nation does not support CJS. Yet, in post- and in-conflict societies lacking good governance, security strategies must shift to appropriately fit the society's needs.[52] While I argue CJS should never be discounted, CJS engagement is even more important when host nation government capacity is lacking or viewed as illegitimate. Not only do CJS have the potential to fill a justice vacuum, through engagement with CJS, they also represent an opportunity to slowly address societal practices that are inconsistent with international human-rights law. Relying solely on formal institutions will not address root societal problems, such as human rights abuse.[53]

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[49] *Id.* at 9 (emphasis added).

[50] Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), *available at* http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm.

[51] NATIONAL SECURITY STRATEGY 37 (2010) [hereinafter NSS], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[52] *Id.* at 26–27.

[53] Isser, *supra* note 21, at 342.

It is also arguable that as reformers, U.S. actors are discriminatory if they fail to engage CJS as the integral part of host-nation society that they are, as CJS represent the society that we wish to improve.[54] Likewise, honest introspection and analysis demonstrates that a lack of accountability exists in many formal systems as well, and often within the nation practitioners are working to assist.[55] While rule of law practitioners' engagement of CJS may create tension between the donor nation and a host nation that does not recognize their validity, the NSS mandates assurance that fragile democracies meet the needs of their people. Working with not only political leaders but also the populace helps strengthen institutions, such as a rule of law "that respond to the needs and preferences of their citizens."[56]

The 2010 Quadrennial Diplomacy and Development Review echoes the importance for rule of law reform in fragile states, as well as the importance of host-nation ownership. However, it also demands tailored approaches, with efforts committed primarily to projects that are sustainable without continued donor assistance.[57] At the same time, it recognizes that "[t[o be effective in the 21st century, American diplomacy must extend far beyond the traditional constituencies and engage new actors, with particular focus on civil society. We cannot ***partner*** with a country if its people are against us."[58] Accordingly, engaging the populace is necessary, which arguably implies that local ownership is of utmost importance for long-term success. We can therefore conclude that engaging CJS is an appropriate component of ROL operations.

Recent conflicts involving the United States have shown that the U.S. military is implicitly part of rule of law reform.[59] Doctrine reflects this mission and addresses rule of law, as well as the importance of ownership in Field Manual (FM) 3-07, *Stability Operations*, Army Doctrine Publication 3-07, *Stability*, and FM 3-24, *Counterinsurgency*. While FM 3-07 states "ownership implies relying on the host nation to establish and drive the development priorities," it also indicates that the

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[54] WOJKOWSKA, *supra* note 5, at 13.
[55] Barfield et al., *supra* note 37, at 182.
[56] NSS, *supra* note 51, at 38.
[57] U.S. DEP'T OF STATE, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 154 (2010), *available at* http://www.state.gov/documents/organization/153108.pdf.
[58] *Id.* at viii (emphasis added).
[59] KLEINFELD, *supra* note 8, at 24.

"host nation leads this unified effort with support from external donor organizations." [60] At its core, however, "ownership begins with and is focused on the people. It is founded on community involvement. This is fundamental to success, since the host-nation government may not exist or may lack the legitimacy to assume full ownership for peaceful governing processes."[61]

Therefore, while advancement of programs not in line with the host nation's desired end-state are often misguided, failing to engage civil society - including its informal institutions, such as CJS - is also ill-advised. Opportunities exist to advance projects, such as human rights promotion, as well as to learn in detail, through narratives, the societal importance of retribution, reconciliation, and other legal attributes. Attentiveness to these "ethically constitutive stories" is important, not only to truly understand a people, but their systems, politics, and ultimately their future.[62]

Even if the CJS is not formally advanced or otherwise connected to the government, by understanding that system, rule of law practitioners can still help better adapt the formal rule of law system to best reflect the society. This is consistent with the second-generation notion that "rule of law is best seen as a relationship between a state and its society."[63] Conversely, by focusing merely on institutions, "the United States implicitly limits its tool kit for catalyzing change."[64]

This approach is also consistent with FM 3-24, *Counterinsurgency*. While ultimate host-nation ownership remains an underlying theme, there is also the recognition that:

> In periods of extreme unrest and insurgency, [host nation (HN)] legal structures—courts, prosecutors, defense assistance, and prisons—may cease to exist or function at any level. Under these conditions, counterinsurgents may need to undertake a significant role in the reconstruction of the HN judicial system in order to establish legal procedures and systems to deal with

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[60] FM 3-07, *supra* note 7, at C-4.
[61] *Id*.
[62] ROGERS M. SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 15 (2003).
[63] KLEINFELD, *supra* note 8, at 15.
[64] *Id.* at 11.

> captured insurgents and common criminals. During judicial reconstruction, counterinsurgents can expect to be involved in providing sustainment and security support. They can also expect to provide legal support and advice to the HN judicial entities.[65]

Therefore, a policy requiring host-nation approval to incorporate CJS into rule of law efforts should be qualified. There are times when an intervening nation may find CJS are the most capable, legitimate entity to fill a justice vacuum created by unrest, especially during the initial and middle stages of a counterinsurgency.[66] As the maturation of counterinsurgency requires different approaches, it may also call for different levels of host-nation ownership.

In some cases, CJS may be the instrument of power "to reduce the support for an insurgency,"[67] as it could provide stability and an alternative to insurgent influence over the populace. This is especially important in a developing nation with a fledgling government, as "counter-insurgency techniques mirror the character of the state that uses them."[68] If the government's character or identity has yet to be established, adopting a bottom-up approach using characteristics of societal institutions, such as CJS might build legitimacy among the populace.

While the section on customary justice in the *Rule of Law Handbook* grows with nearly every publication, indicating recognition of CJS importance, it requires buy-in from the host and donor nation prior to engagement.[69] The authors should be commended, as this is seemingly the only publication with guidance on how to address such an issue. Although the recommendation is generally sound, and extensive coordination between coalition partners, agencies and the host nation is essential, U.S. military doctrine recognizes there are exceptions to this general principle. Field Manual 3-24 reads "attaining that (rule of law) end state is *usually* the province of [host nation] authorities, international and intergovernmental organizations, the Department of State, and other U.S. Government agencies, with support from U.S. forces in some

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[65] FM 3-24, *supra* note 2, at D-3; U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 13-62 (May 2014) [hereinafter FM 3-24].
[66] *Id*. at 13-67.
[67] *Id.* at 13-66.
[68] Kilcullen, *supra* note 39, at 42.
[69] ROL HANDBOOK, *supra* note 29, at 107.

cases."[70] This is not to discount the need for coordinated efforts; their importance cannot be overstated. However, there are times, when after thorough evaluation, engaging CJS is necessary even when not officially advanced by the host nation.

This notion is captured in FM 3-24's explanation of a key rule of law principle that "a government that derives its powers from the governed and competently manages, coordinates, and sustains collective security, as well as political, social and economic development. This includes local, regional, and national government."[71] When the government's reach is restricted, local CJS may be the only form of stability or system of representation communities may have. Failing to acknowledge their ability may allow the enemy to exploit an otherwise ungoverned area. Therefore, CJS recognition is not fundamentally contrary to enabling rule of law. In fact, it can assist the state and ultimately build government legitimacy even when not officially supported by the host nation.

For example, although Iraq had not officially incorporated CJS into its legal system, U.S. detainee releases in Iraq were often facilitated by tribal guarantors, who helped reintegrate them into society.[72] This not only encouraged a local rule of law but began to link the central government with remote areas.[73] Likewise, during the surge, Coalition Forces engaged and empowered tribal leaders to help establish security, and encouraged them to support the new Iraqi government. In some cases, this resulted in tribes capturing insurgents and delivering them to the official justice system, thereby advancing rule of law efforts.[74]

This sort of approach is consistent with the military's principle of ownership, as "effective rule of law . . . complements efforts to build security. It accounts for the customs, culture, and ethnicity of the local populace."[75] This attains the goal of ownership, which "begins with and is focused on the people. It is founded on community involvement."[76] Because "building host-nation or community ownership is a delicate and time-consuming process," it will not only take on a different flavor based

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[70] FM 3-24, *supra* note 65, at 13-61 (emphasis added).
[71] *Id.*
[72] Asfura-Heim, *supra* note 47, at 239, 271.
[73] *Id.* at 241.
[74] *Id.* at 275.
[75] FM 3-07, *supra* note 7, at 1-43.
[76] *Id*. at C-4.

on the operating environment, but it will also evolve.[77]

Even if CJS is not embraced as a stakeholder in the future of a host nation, at a minimum, joint operational design methodology demands we understand the environment.[78] Any system that attempts to provide order in a given area of operations must be appreciated, as people seek safety and security.[79] Joint doctrine also requires commanders and staff to define the problem.

> Defining the problem extends beyond analyzing interactions and relationships in the operational environment . . . . It identifies areas of tension and competition—as well as opportunities and challenges—that commanders must address to transform current conditions to achieve the desired end state. Tension is the resistance or friction among and between actors. The commander and staff identify the tension by analyzing the context of the relevant actors' tendencies, potentials, and the operational environment.[80]

In operational environments with CJS, such tension, competition, opportunity and challenge are likely to exist—with each other, with the formal government, or both. While CJS may or may not be envisioned as part of the desired end state, military practitioners must be attentive to their existence and address them when building a strategic plan.

Therefore, while national strategy, policy, guidance and doctrine do not specifically address this issue, those authorities are consistent with the thesis that CJS cannot be ignored. At best, disregarding CJS results in uninformed decisions. And at worst, it risks missing potential opportunities to assist a nation in flux.

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[77] *Id.* at C-5.
[78] JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING, at III-8 (2011) [hereinafter JP 5-0].
[79] Kilcullen, *supra* note 39, at 41.
[80] JP 5-0, *supra* note 78, at III-12.

Scholars from various disciplines including sociology, economics, and political science also support such engagement. Clark Gibson, Krister Anderson, Elinor Ostrom and Sujai Shivakumar effectively address the pitfalls of development, and they provide a framework to assist those involved in development aid while recognizing that ownership is the key to sustainable growth.[81] They also recognize partner-and-recipient institutions are often at fault for development efforts' failure to thrive, and they provide descriptions of the collective action problems that are prone to arise at various levels.[82] They challenge us to conduct institutional analysis on the action arena to best assess ability for true growth as well as perverse incentives that may be lurking in the environment.[83]

In every situation, detailed knowledge of the problem is desired. Therefore, along with other reformers, rule of law practitioners should ask, "what rules or norms have been used in this cultural tradition in the past that may be the source of modern rules that resonate with beneficiaries as fair and can be understood easily?"[84] The CJS are an important source of this information. This approach demands engagement with CJS to ensure even formal rule of law efforts are not misguided because they are disrespectful to tradition or culture, or are otherwise ineffective for the environment at hand.

In other words, reformers must be politically astute and not always indiscriminately accept one narrative as representative of the entire host nation even if the narrative is provided by the government. A "logics" approach may help reformers who are striving to better assess the many actors and their multicentric practices.[85] This method of social analysis[86] helps "characterize and critically explain the existence, maintenance, and transformation of concrete practices."[87] The approach thus allows reformers to more clearly view narratives using three different lenses: social, political and fantasmatic. The first, social logics, "characterize practices by setting out the rules, norms, and self-understandings

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[81] GIBSON ET AL., *supra* note 23, at 5.
[82] *Id*.
[83] *Id*. at 5–6.
[84] *Id.* at 46.
[85] Jason Glynos, *Ideological Fantasy at Work: Toward a Psychoanalytic Contribution to Critical Political Economy* 5 (Ideology in Discourse Analysis, Working Paper Series No. 23, 2008).
[86] *Id.* at 4.
[87] *Id*.

informing the practice" (the what) while political logics "account for the historical emergence and formation of a practice by focusing on the conflicts and contestations surrounding its constitution" (the how) and "fantasmatic logics help account for the way subjects are gripped by a practice" (the why).[88] Thus, actors have a more concrete method to help view a society from various perspectives and hopefully understand narratives with multiple layers.

Applying this type of analysis to rule of law reform one might find, for instance, a government's social logic may describe a formal judicial system. At the same time, opposing political logics may depict governance that includes formal institutions at odds with, or at least occupying the same jurisdiction as, informal ones. While all are important, political logics can "emphasize the dynamic process by which political frontiers are constructed, stabilized, strengthened, or weakened and disarticulated,"[89] allowing for a more clear vision or strategy for change. Likewise, fantasmatic logics can help reformers recognize why actors may be seemingly enslaved to a particular, established practice, unwilling to gravitate away from their norm,[90] whether it be from those in the formal institutions, CJS participants who view the government as illegitimate, or even reformers with an unhealthy hesitation towards non-Western views.

Practitioners must also recognize that obstacles abound with host-nation institutions. Perverse incentives hamper partner nations' decision making, especially those with weak institutions.[91] Often, proffered top-down "solutions" fail to truly address the needs of the majority of the populace, or the true beneficiaries. Instead, they favor the elite and focused aid around development at higher levels, ultimately failing to reach the masses.[92] Matters are exacerbated in nations with poor institutions who "may use their authority against those who are trying to create productive opportunities for themselves and others."[93] This can result from motivational and informational problems.[94] In other words, the host-nation policy makers' assessment may be flawed due to perverse

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[88] *Id.* at 5.
[89] *Id.*
[90] *Id*.
[91] GIBSON ET AL., *supra* note 23, at 49.
[92] *Id.* at 51.
[93] SUJA SHIVAKUMAR, THE CONSTITUTION OF DEVELOPMENT: CRAFTING CAPABILITIES FOR SELF-GOVERNANCE 37 (2005).
[94] GIBSON ET AL., *supra* note 23, at 54–57.

incentives or corruption, aggravated by their own fragile state. The donor must seek ways to overcome this issue; ignoring players in the environment, such as CJS, when conducting rule of law reform will only hinder information needed to best address the situation. This compounds the problem, as "perverse incentives thrive in the absence of information."[95]

Likewise, while direct rule's "scope and penetration" may provide a central government with "income, revenue and power," it is not without its pitfalls.[96] For instance, traditional leaders can become threatened and disrupt attempts at nation building if not incorporated into the state's future. The government must then deal not only with the financial burden of building and maintaining functioning institutions but also with potential upheaval from community leaders.[97] Although indirect rule, which arguably may incorporate local justice systems, is not without fault, in societies that place great emphasis on the group as opposed to the individual, an indirect system may be more effective as group solidarity can facilitate order, loyalty and control.[98] While no formula exists to precisely determine optimal institutions for a given society, we should recognize that failing to work with and within the *current* environment will likely result in perverse outcomes and often additional unrest in the future.[99]

Perhaps the most important development lesson gleaned from this research is to place beneficiaries at the forefront. This requires one to first determine the true beneficiaries, some of whom may be removed from official governmental relationships, as their sense of ownership is important. Therefore, "supporting research on indigenous institutions, norms and local knowledge systems (also) provides essential understanding for helping to build contemporary institutions on the healthy roots of earlier normative systems used to solve collective action problems. This requires, as well, that donors rethink their own role."[100] In the rule of law arena, this demands engagement with CJS, as they are

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[95] *Id.* at 230.

[96] Michael Hecter & Nika Kabiri, *Attaining Social Order in Iraq*, *in* ORDER CONFLICT AND VIOLENCE 43, 47 (Stathis N. Kalyvas et al. eds., 2008).

[97] *Id.*

[98] *Id.* at 49.

[99] Jack L. Snyder & Leslie Vinjamuri, *Preconditions of International Normative Change: Implications for Order and Violence*, *in* ORDER, CONFLICT, AND VIOLENCE, *supra* note 96, at 378, 393.

[100] GIBSON ET AL., *supra* note 23, at 232.

indigenous institutions and often the justice norm, and they serve as a local knowledge system.

Donors must recognize, however, that their very presence alters the environment to varying extents.[101] This can be, but is not necessarily, problematic for development. The application of complexity theory to social science, and by extension development, recognizes the world as becoming, or "consisting of multiple temporal systems, many of which interact, each with its own degree of agency—is a world in which changes in some systems periodically make a difference to the efficacy and direction of others."[102] This notion of emergent causality recognizes a "condition is affected by external forces that infect, invade, or infuse it and by activation within itself of previously untapped capacities of self-organization," and "[s]ometimes the initial trigger comes from outside, spurring a new response of self-organization inside that succeeds or fails. Often the two processes interact in an intimate way."[103] Therefore, although we should not be naive to the fact that our presence alters the environment, it can also serve as a catalyst for opportunity.

Consequently, while practitioners may feel disillusioned by their ability to facilitate rapid change using bottom-up reform, they should not be disheartened, as "they have leverage—money, media attention, diplomatic pressure, the ability to bring together like-minded reformers in different countries to share ideas."[104] However, this possibility of emergent change is limited by a failure to engage. Applying this theory to rule of law programs demonstrates the potential of CJS to effect change in a positive manner for the society as a whole.

Although there are significant risks, when we realize "local level institutions may be operating effectively already," we disregard their value at our own peril.[105] Nevertheless, navigating this seemingly unfamiliar world presents its own challenges to practitioners and policy makers alike. While apprehension of the unknown is understandable, an attempt to appreciate and approach the realm of CJS in a foreign society is required for effective rule of law advancement.

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[101] Hector & Kibiri, *supra* note 96, at 58.
[102] WILLIAM E. CONNOLLY, A WORLD OF BECOMING 27 (2011).
[103] *Id.* at 171.
[104] KLEINFELD, *supra* note 8, at 32.
[105] GIBSON ET AL., *supra* note 23, at 38.

Understanding Legal Pluralism's Potentials and Perverse Incentives

Given the abundance of CJS in many post- or in-conflict nations, engaging in the rule of law arena requires an understanding of legal pluralism. While many practitioners view rule of law through a Western lens, we must recognize that developing nations often operate in a state of legal pluralism, or in a "context in which multiple legal forms coexist."[106] In other words, legal pluralism is a fact we must embrace; rule of law efforts take place in nations that lack basic or effective rule of law institutions but often possess other non-state methods of dispute resolution.[107] These multiple systems, which can exist in one "jurisdiction," may overlap and have positive or negative effects on one another.[108] Customary systems, among other types of systems, are recognized as one of the categories of law that can exist in a social arena.[109] Therefore, practitioners and scholars should address CJS as part of rule of law reform efforts in a pluralistic society.

Although practitioners may initially feel overwhelmed or a sense of distaste when forced to navigate or intervene in a legalistically plural society, it may help to remember that historically such societies were the norm, not the exception.[110] Likewise, we need not look far to find evidence of private institutions securing the general populace at

> gated communities, universities, places of public entertainment (theme parks, concerts, sporting events), public facilities (libraries, schools), shopping malls, corporate headquarters, many small businesses, and even public streets (neighborhood watch). Privately owned and run (for profit) penitentiaries are handling an increasing number of prisoners. Many private organisations [sic] and institutions promulgate rules that apply to their own activities and to others within their purview. In situations of dispute, many parties chose (or are required) to bypass state court systems seen as

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[106] Tamanaha, *supra* note 11, at 2.
[107] *Id.* at 2–3.
[108] *Id.* at 9.
[109] Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 397, 397 (2008).
[110] *Id.*

> inefficient, unreliable, too costly or too public, resorting instead to arbitration or private courts.[111]

However, understanding that legal pluralism exists in a given society is not enough, nor is the next step of recognizing the fact that informal systems should not be ignored. Careful analysis of an individual system is also required. This includes appreciating a given CJS's norms in relation to its cultural and historic context, recognizing the realities, capacity and limitations of the actors in the environment, and the relationship between the formal and CJS.[112] While proper analysis of each of these factors is crucial to evaluating a nation's current and potential future legal landscape, given the focus of this paper, the often complex interaction between systems is of most interest as it is likely the most unfamiliar.

Brian Tamanaha describes multiple ways in which a formal system may interact with a competing system. [113] First, a government may remain neutral towards several informal systems.[114] Similarly, the state may recognize the strongest competing system.[115] The others may be intentionally or unintentionally ignored.[116]

Another option for interaction is a state's condemnation of a system or practice while at the same time place not prohibiting it. [117] This can occur for various reasons ranging from an inability to efficiently act, to sympathy.[118] Likewise, the state may endorse an outside institution but provide no efforts to advance it, and possibly covertly repress it.[119]

Next, a government may "absorb" another system through explicit recognition, such as through acknowledgment of arbitration decisions as binding. This approach has several functions. It provides the state some control over competing systems, reaps the benefits the other has to offer, and avoids some conflict with a powerful unofficial system.[120] A

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111 *Id.* at 386–87.
112 Isser, *supra* note 21, at 327.
113 Tamanaha, *supra* note 109, at 403–04.
114 *Id*.
115 *Id*.
116 *Id*.
117 *Id.*
118 *Id*.
119 *Id*.
120 *Id.* at 404.

multitude of hybrids are also possible; the government may codify or regulate CJS norms and systems, or other similar incorporation.[121] Similarly, state recognition coupled with financial or coercive support to customary systems is another method of incorporation.[122]

Finally, the state may make efforts to suppress and eliminate competing systems. Some scholars label this abolition.[123] However, this course of action is incredibly difficult to achieve, especially when the alternative enjoys deep societal roots.[124]

Multiple lessons are gleaned when one recognizes these and various other state and CJS interactions may occur. At the most basic level, we are sensitized to the idea that CJS and formal systems may co-exist, and in multiple frameworks.[125] We are thus better able to accept, explore, and engage multiple systems in a given jurisdiction.[126] Reformers are also able to recognize that "like any other system of law, (CJS) is not just a set of rules but a deeply contextual and socially embedded regulatory system."[127] They may compete both with the government and with each other[128] adding to instability.

Practitioners and policy makers are also able to better discern what incentives may drive a government to approach a CJS in a particular manner, thus providing a more informed, nuanced approach to rule of law efforts. Models of how these systems can interact provide options, rationales, and warnings of potential pitfalls for those advising governments in transition. However, given the multitude of potential hybrids, any proposed "solution" will be unique, as "power and culture, not laws and institutions form the roots of a rule-of-law state."[129] Likewise, whatever approach is taken will be grounded in the "messy

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[121] WOJKOWSKA, *supra* note 5, at 28. *See also* Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (2005); *Briefing: Non-State Justice and Security Systems*, DEP'T FOR INT'L DEV., May 2004, http://www.gsdrc.org/docs/open/ssaj101.pdf.
[122] Tamanaha, *supra* note 109, at 404.
[123] WOJKOWSKA, *supra* note 5, at 25.
[124] Tamanaha, *supra* note 109, at 404.
[125] Tamanaha, *supra* note 11, at 7.
[126] *Id.* at 14–15.
[127] Isser, *supra* note 21, at 327.
[128] Tamanaha, *supra* note 11, at 8.
[129] KLEINFELD, *supra* note 8, at 15.

realities that constitute the post-conflict justice landscape"[130] and will continue to affect reform efforts.

Embrace as Part of the Social Environment

Representative of a society and with overlap and relationships to the state, CJS must be acknowledged as part of this messy social and political environment. While modifying governmental "legal institutions may be a poor means to have an impact on problems that are actually societal or cultural,"[131] I argue CJS may have the ability to make real impact, as they reflect a community's culture while regulating societal behavior to maintain stability. Kleinfeld advances the theory that "one of the most effective methods for affecting the power structure is by supporting civil society" such as NGOs, business, religious groups, etc.[132] I would add that CJS also possess the impetus to "change their own societies, from the inside, with local knowledge and local legitimacy."[133] Like other parts of civil society, they will also "last long after outside reformers leave"[134] and therefore should be seen as a part of the environment.

Because every social arena is different, so too is every CJS. Therefore, rule of law assessments must expand beyond analyzing formal institutions, codified laws and legislation and take a more sociological approach. In other words, "we need to examine the justice landscape as the population sees and acts in it."[135] This approach should be inclusive, recognizing not only the state's official perception and behavior but that of the general public's, including minority groups. This may help prevent even those reformers sensitive to CJS from attempting to apply a model that simply does not fit the environment.

Taking this approach will inform practitioners and policy makers on the population's needs, desires, and vision for the future while likely adding respect for the reformers themselves, and a sense of legitimacy over their efforts. It would not be surprising to see this approach "lead to a greater focus on nontraditional and informal methods of dispute

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[130] Isser, *supra* note 21, at 326.
[131] KLEINFELD, *supra* note 8, at 10.
[132] *Id.* at 214.
[133] *Id.*
[134] *Id.*
[135] Isser, *supra* note 21, at 341.

resolution that are used, rather than formal systems that are less frequented."[136] At the same time, this approach does not have to be to the detriment of improving formal institutions.[137] As discussed above, there are as many models, and as many hybrids, as there are societies. Likewise, it may merely alter a timeline to appropriately match the nation's current desires and capacity, allowing time for appropriate bottom-up growth. As Patricio Asfura-Heim observes, the "co-option of certain tribal customary law principles may help reestablish the legitimacy of the state by providing culturally appropriate venues for reconciliation between sectarian factions and by helping reintegrate former combatants. . . . Over time, the creation of linkages with the state system could be used to reduce human rights abuses associated with tribal customs."[138]

The discussion of an approach tailored for Iraq highlights the principle that "reform strategies need to be grounded in current—and realistic—expectations of institutional capacities and social realities."[139] This requires embracing a second generation approach and a willingness to recognize CJS as part of the rule-of-law landscape possessing capabilities likely not found elsewhere. It demands patience and the acceptance of incremental gains, "recognizing the complex and interrelated processes of social change and political and economic development required to reach the ideal."[140] Ultimately this method responsibly addresses rule of law as a whole, not just as formal institutions available to a few. It is also more responsive to the citizenry, as it addresses societal needs, ultimately advancing the state situation in the long-term and possibly better linking the populace to a form of government.[141]

Embracing CJS as part of the social landscape is beneficial, even if the intent is to avoid their advancement or inclusion as part of a rule of law effort. For instance, in a conflict, "understanding the basic tenets of tribal customs, alliance building, and customary dispute resolution"[142] allows military forces to better navigate the environment, connect with the population, address grievances in a culturally appropriate manner,

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136 KLEINFELD, *supra* note 8, at 219.
137 Asfura-Heim, *supra* note 47, at 241.
138 *Id.*
139 Isser, *supra* note 21, at 347.
140 *Id.*
141 *Id.* at 361.
142 Asfura-Heim, *supra* note 47, at 275.

and possibly partner with local leaders.[143] Where CJS exist, they must be considered as part of the human terrain, crucial to understanding the populace, the enemy, and their sentiments and motivations. Without such appreciation, commanders' situational awareness is severely limited.

On the other hand, commanders' ability to appreciate and possess some understanding of customary systems can help highlight complex relationships between the enemy and the general population, as well as determine who truly may be irreconcilable.[144] It may assist in understanding when and how solatia or condolence payments are culturally appropriate[145] and how to determine land-ownership issues in nations lacking official documentation.[146] Likewise, where formal rule of law institutions are deficient and policy allows, forces savvy to the CJS may consider releasing detainees to the local leader who is then responsible for the individual's future behavior.[147]

Avoiding Haphazard Engagement

Reformers who find it wise to directly engage CJS must still be wary of haphazard engagement. As with the formal system, benevolent outside assistance or engagement with CJS can also have perverse outcomes. This is not to dismiss interventions with uncertain results but to reflect upon them "periodically to improve the chance that they do not pose more dangers or losses than the maxims they seek to correct."[148]

For instance, although the practice of ba'ad, or the exchange of a woman to another tribe as part of a settlement is offensive to many in Western societies, we cannot fail to recognize that it is more than just abusive; it serves a social function.[149] It is a "form of compensation and a means of establishing a bond between the families."[150] This is not to suggest an acceptance of these or other violations of basic human rights

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143 *Id.*
144 *Id.* at 276.
145 *Id.* at 278.
146 Major Michael C. Evans, *Influencing the Center of Gravity in Counterinsurgency Operations: Contingency Leasing in Afghanistan*, ARMY LAW., Feb. 2012, at 28.
147 Asfura-Heim, *supra* note 47, at 279.
148 CONNOLLY, *supra* note 102, at 165.
149 Isser, *supra* note 21, at 334.
150 *Id*.

standards but to understand their place in a given society, and how to best approach them in places where the emphasis is on the good of the community, as opposed to the individual.[151] Demanding and attempting to enforce immediate change to such a practice is not only likely to fail, but if successful, it can create a vacuum of remedies in the dispute-resolution mechanism.

There are also times when placing too much reliance on CJS can be dangerous. Intense, rapid changes to a society, such as that which often occurs during and post conflict, can tax CJS capacity. For instance, technological advances make it difficult for laypersons to identify violent criminals, and population influxes stress communities' ability to provide effective CJS.[152] Therefore, a CJS' capacity must be evaluated in its given state to avoid unintended consequences; there is no blanket answer. For example, in some interventions, CJS may well be more capable of handling even serious cases than the formal system after a conflict although it may be in conflict with the formal system's policy.[153]

In an attempt to mitigate such dangers and avoid haphazard engagement, viewing "both customary and formal justice systems as parts of a larger organic justice landscape in which different rule systems interact"[154] can help provide options for assistance. A transitional strategy that allows flexibility to meet current challenges may be the best approach in some situations. For instance, an option for parties to agree to take even serious cases, such as rape or murder, to a CJS may allow justice and rule of law to be served, even while formal institutions advance. Nevertheless, such potential policies must be evaluated and tailored to meet the situation at hand.[155]

Some scholars, even those in favor of CJS, highlight that a hazard for both the donor and host nation is that CJS engagement has the "potential for destroying the very good it is trying to recognize."[156] That is, they are flexible and represent the values of the society, and are technically voluntary and strive for acceptable solutions that represent the best

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[151] *Id.*
[152] *Id.* at 332, 333.
[153] *Id.* at 333.
[154] *Id.* at 336.
[155] Stephen C. Lubkemann, Deborah H. Isser & Philip A.Z. Banks III, *Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia*, *in* CUSTOMARY JUSTICE, *supra* note 21, at 229, 230.
[156] Barfield et al., *supra* note 37, at 188, 189.

interest of the community as a whole. Imposing stringent rules or close connections to the state or donor nation may disrupt the system and negate its benefits as the addition of an agency or mandate alters the landscape, even if the change is imperceptible to the outside eye. Again, looking to the beneficiary's needs and desires for the future is essential, as is recognizing the potential for unintended consequences if practitioners are to engage CJS responsibly.[157]

Yet another possible unintended consequence of CJS engagement comes from the enemy's hands in an in-conflict society. In some counterinsurgencies, the enemy sets up shadow governments, including their own courts, to translate "local dispute resolution and mediation into local rule of law, and thus into political power."[158] The enemy may be better able to provide a semblance of justice than the state and, sometimes, even address civil concerns and perform administrative duties, such as issuing identification.[159]

Because even legitimate local leaders can be influenced by the enemy, practitioners may inadvertently and unknowingly engage a CJS on the periphery. While there may be benefit in such engagement, it should be calculated. When it is not, a savvy enemy can exploit that activity in various ways. Insurgents may target traditional leaders attempting to bolster CJS, as their activity is counter-productive to the enemy's.[160] Similarly, a sophisticated narrative can highlight mishaps, indicate that outside forces are actually working against the host-nation government, or argue that outside influence is not assistance but interference with their culture, religion or society, etc.

Therefore, rule of law practitioners who engage CJS must be cautious and avoid haphazard engagement, as the most well-intentioned assistance with CJS can also have unintended consequences. In other words, it is not a panacea. While scholarly research helps practitioners better understand the complexity of CJS within an environment, it is difficult to envision without a case study. Such analysis of a rule of law effort allows concrete examples of the challenges and benefits practitioners and the populace can both face.

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157 *Id.*
158 Kilcullen, *supra* note 39, at 45.
159 *Id.*
160 Barfield et al., *supra* note 37, at 172.

Afghanistan

> *[T]he strengthening of traditional dispute resolution at the local level is one of the most efficient and effective ways to achieve the kind of security and stability that can enable transition of responsibility to the Afghan government and its forces, and protect our own core national security interests.*[161]
>
> —Brigadier General Mark Martins

Rule of law efforts in Afghanistan provide a worthy case study in the role of CJS in a developing nation's environment. While societies' varying and nuanced intricacies prevent any single intervention from being used as a template in other locations, the Afghanistan experience may help practitioners and policy makers alike reflect on ways to better approach the next challenge.

As discussed, a more appropriate approach to rule of law development requires analyzing a given CJS's norms in relation to its cultural and historic context, recognizing the realities, capacity and limitations of the actors in the environment, and the relationship between the formal justice system and CJS.[162] This will allow practitioners to see "customary and formal justice systems as parts of a larger organic justice landscape in which different rule systems interact."[163] Likewise, second-generation reform advances the theory that "the rule of law is not about a set of institutions[, but] it is about achieving a set of ends that determine the relationship between a state and its society" and helps focus reform efforts in the appropriate direction.[164] In other words, effective rule of law reform requires work from the bottom-up; practitioners should strive to allow, or possibly nudge, a society to change, and the populace to hold their government accountable from within.[165]

In the case of Afghanistan, where historical and cultural context is so important, judicial history must first be unraveled to effectively intervene in the rule of law arena. Afghanistan's legal history is "rich and

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[161] Brigadier General Mark Martins, *Rule of Law in Iraq and Afghanistan?*, Remarks at Harvard Law School, HARV. NAT'L SEC. J. (Apr. 18 2011), http://harvardnsj.org/2011/04/rule-of-law-in-iraq-and-afghanistan/.
[162] Isser, *supra* note 21, at 327–28.
[163] *Id.* at 336.
[164] KLEINFELD, *supra* note 8, at 212.
[165] *Id.* at 214.

layered,"[166] and over the ages, a significant portion of Afghanistan's populace was essentially untouched by government. Geographical separation created a high state of local autonomy even once communication and road networks improved.[167] Prior to 1923, when its first constitution was written, the law of the land was a mix of sharia and pashtunwali, with dispute resolution conducted by shuras and jirgas rather than formal government institutions.[168] Thus, both religious and social influences have historically significant importance, of varying degrees depending on location, within the country.[169]

These traditional influences continued after the 1923 constitution, and they discouraged meaningful change; efforts to bring rule of law to rural areas were met with disdain, and those efforts were seen as an "arbitrary imposition of authority."[170] In part, this is what helped the system keep an "indigenous character, never coming entirely under the European legal influence."[171] For example, because Sharia does not allow attorneys to represent criminal defendants, the bar remained small even after 1925 when the monarchy promulgated a criminal code and the government began training Islamic judges.[172] Such codification began "undermining their authority at the tribal and village level" and ultimately traditional leaders "pushed the quasi-constitutional monarchy to its downfall in 1929."[173]

A new constitution recognizing Islam as the official state religion, and a requirement that decisions respect Sharia was adopted in 1931.[174] In 1964, the constitution was again revised, softening this religious stance somewhat, and while Sharia principles still applied, strict conformity to Sharia was not required as statutory law became more prevalent.[175] Nevertheless, conflict between the two continued; societal

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166 Susanne Schmeidl, *Engaging Traditional Justice Mechanisms in Afghanistan: State-Building Opportunity or Dangerous Liaison*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 149 (Whit Mason, ed. 2011)
167 Barfield et al., *supra* note 37, at 163.
168 TONDINI, *supra* note 19, at 31.
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.* at 31–32.
173 *Id.* at 35.
174 *Id.*
175 *Id.*

discord prevented a more secular judiciary despite the efforts of educated elites.[176]

In 1973, King Zahir Shah was replaced in a coup by Prime Minister Mohammad Daoud, who was not assisted by the tribes.[177] As a result, the division between progressive elites and the more traditional population grew even further. The new administration intended its 1977 constitution to balance the Sharia and secular law, but Daoud was overthrown before its implementation.[178] In 1980, under communist influence, the constitution eliminated both sharia and Islam as the state religion.[179] While women's rights grew dramatically, including in the justice sector, the population remained unhappy with the new system, and the 1987 constitution reintroduced Islamic principles.[180]

By 1992, the Afghan justice system was again unstable, with little court access. In response, the populace relied upon sharia and customary law to maintain order. By 1996, the Taliban's rise brought a harsh version of sharia to the forefront, but gave people the option of choosing between the local or state system to resolve disputes.[181] The 1964 Constitution was reinstated, with the addition of newly formed Hoqooq offices, which were intended to mediate civil disputes.[182] They attempted to resolve cases of first impression referred to them by the community, using "statutory/religious law and informal dispute resolution mechanisms."[183] If the issue was not resolved, it could be sent to a formal court.[184] However, the criminal law arena suffered greatly, with the Lawyers' Association, which once boasted 5,000 members, closed (and was not reopened until November 2001).[185]

Despite changes to the leadership, code, constitution, and practice, the formal court structure actually remained fairly stable through these regime changes. There was a "bi-partition of national courts, which were divided into general courts, including the Supreme Court, the Court of

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176 *Id.* at 36.
177 *Id.* at 36–37.
178 *Id.*
179 *Id* at 39.
180 *Id.* at 36–37.
181 *Id*.
182 *Id.* at 43.
183 Isser, *supra* note 21, at 327.
184 *Id.* at 39.
185 *Id.* at 38.

Cassation, the High Central Court of Appeal, provincial courts and primary (district courts) and specialized courts, consisting of juvenile courts, labour courts, and other specialized courts established by the Supreme Court in case of need".[186]

Such detailed history may not be readily available at the start of an intervention. Even now, after nearly thirteen years of intervention, few hard statistics exist to support detailed analysis of Afghanistan's judicial history.[187] However, responsible rule of law practitioners and policy makers must attempt to glean as much background as possible about the host-nation's judicial past. Without it, understanding the present, let alone envisioning a future, will be uninformed and haphazard at best. Likewise, it is even more important when hard data is lacking to appreciate such history in light of the social context and recognize the realities, capacity, and limitations of the actors in the environment.[188]

In 2001, although the Bonn Agreement had been signed, the applicable law was unclear to many citizens, attorneys and even judges. Tensions between institutions did not help matters, nor did early attempts at rule of law reform, which lacked a coordinated, strategic vision among donor nations and the Afghan government.[189]

Reflecting on these historical and recent accounts, one recognizes that even as formal rule of law grew and morphed, because the majority of the populace did not have access to the justice system, the informal system remained strong. The state of almost constant unrest within the nation exacerbated this situation, and CJS filled the vacuum left by the lack of governance. Even those with access to the formal system distrusted it and often viewed it as illegitimate.[190]

To further complicate matters, various types of CJS exist within Afghanistan. While ethnic groups possess similar CJS traditions, all are somewhat different as they represent the community and its culture, with some more willing to interact with state authorities when available.[191] One can also not cleanly separate the state and CJS: judges from the formal system routinely seek the advice of mullahs or local elders on

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[186] *Id.* at 39.
[187] *Id.* at 43.
[188] *Id.* at 327.
[189] Barfield et al., *supra* note 37, at 180–81.
[190] *Id.* at 160.
[191] *Id.* at 169.

Sharia, district governors held significant power in dispute resolution, and the civil mediation Hoqooqs functioned in something of a middle ground, making decisions on cases only referred by the district governor.[192]

From the Western point of view, CJS in Afghanistan has significant weaknesses. Almost universally, Afghan CJS suffer from human rights abuses, and given its voluntary nature, actors can sometimes chose to ignore the system or its decision.[193] Similarly, disputes affecting larger interests than those contained within a CJS sphere of influence can frustrate the system.[194]

Given its history, one should not be surprised to find the current formal Afghan justice system in a similar state. Courts still lack legitimacy with the populace, and it is estimated that 80% to 90% of disputes are handled by CJS—some cases referred to the informal system by formal-system officials.[195] This historical lack of legitimacy causes the formal system, even with assistance, to face an uphill battle, especially when Afghans have a long-standing distaste for government intervention into personal matters.[196] Such distrust remains pervasive and enduring, despite Taliban influence, and "a shortage of local resources resulting from years of warfare, drought, and the influence of armed political groups," hindering CJS.[197] Even in light of these challenges, the populace remains committed to their local system with its emphasis on "community reconciliation."[198] Understanding such an "ethically constitutive story"[199] as one of many pieces of Afghan politics could have allowed a more inclusive and perhaps effective approach to rule of law at the outset.

However, "since 2001, international efforts to reform Afghanistan's justice sector and establish the rule of law in the country have, until

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[192] Mette Lindorf Nielsen, *From Practice to Policy and Back: Emerging Lessons from Working with Community-Based Justice Mechanisms in Helmand, Afghanistan*, *in* PERSPECTIVES ON INVOLVING NON-STATE AND CUSTOMARY ACTORS IN JUSTICE AND SECURITY REFORM 162 (Peter Albrecht, Helene Maria Kyed, Deborah Isser and Erica Harper eds., 2011).
[193] Barfield et al., *supra* note 37, at 179.
[194] *Id.*
[195] *Id.* at 160–61.
[196] *Id.* at 182.
[197] *Id.* at 172.
[198] *Id.*
[199] SMITH, *supra* note 62, at 15.

recently, focused almost entirely on strengthening state institutions, including the Supreme Court, the Ministry of Justice, and the Attorney General's Office (among others)."[200] For much of the intervention, a first generation, "courts, cops and corrections" approach was the norm. Unfortunately, these efforts were largely unsuccessful.[201] While there is no single reason for the lack of success, "insufficient donor attention," "poor coordination," and "Afghans' unfamiliarity with, or resistance to, state justice institutions generally" are cited as contributing factors.[202] At a minimum, the last factor could have been predicted given the historical and social context of Afghanistan.

While the U.S. Institute of Peace began research on Afghan CJS in 2002, active support did not begin until 2006 with the initiation of select Commissions on Conflict Mediation (CCMs) to resolve issues referred by Provincial Governors.[203] During this time, it became abundantly clear that the formal system's capacity was severely lacking.[204] By 2008, the Afghan National Justice Sector Strategy and National Development Strategy required "the government to adopt a policy on the Afghan state's relations with nonstate dispute resolution councils" in part to "harness the strengths offered by community-led dispute resolution . . . ."[205]

In 2009 the United States became actively involved, with efforts designed to connect CJS and the formal system and build district councils with the ability to resolve community issues.[206] Both military and civilian international leaders recognized that CJS engagement was required to provide rule of law, at least in the near-future; the state system was not adequately developed to support the populace's needs.[207] By mid-2010, one of the four pillars of the Department of State's Rule of

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[200] NOAH COBURN & JOHN DEMPSEY, INFORMAL DISPUTE RESOLUTION IN AFGHANISTAN 2 (Aug. 2010), *available at* http://www.usip.org/publications/informal-dispute-resolution-in-afghanistan.

[201] *Id.*

[202] *Id.*

[203] U.S. AGENCY FOR INT'L DEV., AFGHANISTAN RULE OF LAW STABILIZATION PROGRAM (INFORMAL COMPONENT) ASSESSMENT FINAL REPORT 13, 27–44 (2011) [hereinafter FINAL REPORT], *available at* http://pdf.usaid.gov/pdf_docs/PDACT372.pdf.

[204] LIANA SUN WYLER & KENNETH KATZMAN, AFGHANISTAN: US RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 16 (2010) [hereinafter AFGHANISTAN: US RULE OF LAW AND JUSTICE SECTOR ASSISTANCE], *available at* http://www.fas.org/sgp/crs/row/R41484.pdf.

[205] COBURN & DEMPSEY, *supra* note 200, at 4.

[206] FINAL REPORT, *supra* note 203, at 13.

[207] COBURN & DEMPSEY, *supra* note 200, at 5.

Law Strategy was to "provide security and space for traditional justice systems to re-emerge organically in areas cleared of the Taliban and engage closely at the grassroots level to ensure dispute resolution needs in the local communities are being met."[208] This recognition of CJS was of significant importance, as a national survey in Afghanistan in the same year reported a *decrease* in formal-system use and in *increase* in CJS despite previous efforts to the contrary.[209]

Spring 2010 brought the development of USAID's Rule of Law Stabilization (Informal Component) (RSL-I)[210] program with its goal "to help decrease instability and neutralize anti-GIRoA [Government of the Islamic Republic of Afghanistan] influence in targeted areas in Afghanistan's southern and eastern regions through strengthening the ability of Community-Based Dispute Resolution (CBDR) processes to resolve disputes and raise the population's awareness of the law and legal rights."[211]

Specifically, "RSL-I objectives are:

- Strengthen the ability of CBDR processes to resolve disputes and provide justice in order to provide functional alternatives to Taliban courts and formal justice mechanisms that are currently ineffective.
- Raise the populations' awareness of their constitutional and legal rights.
- Improve central and sub-national capacity to reform and foster legitimate and reliable delivery of 'traditional' justice to build confidence in the government and neutralize anti-GIRoA influence.
- Support recognized community leadership structures to reinforce traditional stabilizing systems.
- Encourage gender equality and reduce the prevalence of human rights abuses during CBDR processes that resolve disputes and provide justice.

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[208] WYLER & KATZMAN, *supra* note 204, at 19.
[209] *Id.* at 13.
[210] FINAL REPORT, *supra* note 203, at 15.
[211] *Id.* at 5.

- Map CBDR structures in order to determine linkages between CBDR and GIRoA and strengthen those linkages.

The priorities of RLS-I are to:

- Increase women's access to and participation in dispute resolution;
- Establish and support communication networks of community elders that reinforce traditionally stabilizing leadership structures;
- Facilitate opportunities for community leadership to increase their understanding and access to CBDR;
- Create linkages between the state justice sector and CBDR;
- Provide targeted populations with information concerning their constitutional and legal rights and CBDR processes;
- Increase citizens' access to criminal defense services."[212]

Various strategies have been implemented in an attempt to meet these goals.[213] First, respected Afghans such as professors and mullahs provide training for village elders on topics pertinent to local CJS, and at the same time, those now-trained elders network with peers, exchanging and socializing the ideas that were shared with them.[214] Perhaps surprisingly, feedback from participants was overwhelmingly positive.[215]

Second, in an attempt to overcome the Western bias against CJS due to its often discriminatory nature, conversations regarding women's roles in dispute resolution are encouraged. While female participation in CJS is often low, it varies greatly in Afghanistan, and the idea of improved

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[212] *Id.* at 13–14.

[213] While various rule of law programs overlap, the United States has the lead in CJS in Afghanistan, with funding from the State Department, Bureau of International Narcotics and Law Enforcement Affairs and USAID. *Id.* at 13. Likewise, DoD's Rule of Law Field Force (ROLFF), supports Rule of Law efforts "in otherwise non-permissive areas of Afghanistan." WYLER & KATZMAN, *supra* note 204, at 23.

[214] FINAL REPORT, *supra* note 203, at 13.

[215] *Id.* at 20–22.

equality is socialized by example to other areas, with the hope rights are improved.[216]

Third, "the project is helping to promote the practice of preparing a written record of the [Alternative Dispute Resolution] decision and registering it with the respective State authority whether huqooq for civil, family court or judge. As well, the Tribal Elders keep a copy and a copy of the decision is given to disputants."[217] While some dislike state involvement in CJS, many take the opposite stance, appreciating the legitimacy and recognition it obtained.[218] It appears the program, despite varying perceptions, "strengthened and standardized the interface between the informal and formal justice sectors. . . ."[219]

Finally, Community Cultural Centers (CCCs) were developed to serve as a "change agents" and "legal information centers."[220] While they initially focused on the formal system, they now also address the informal system. However, it appears this component of the effort has not been overly fruitful.[221]

While results from the RLS-I program after approximately one year were tentative, overall they appear positive. Those findings range from the political and security based ("CBDR can quickly 'fill a justice gap' in a recently pacified area and thereby prevent Taliban justice from regaining a foothold") to the social ("communities in targeted areas have embraced the project's objectives and activities") and even include incremental human rights gains ("CBDR can provide concrete opportunities for female empowerment, but significant challenges remain.").[222]

This evolution to include CJS in the U.S. rule of law strategy in Afghanistan is not without controversy. While some view it as essential to the counterinsurgency (COIN) strategy, with the International Security Assistance Force (ISAF) turning to tribal elders for detainee release advice and encouraging state and local leaders to corroborate on

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[216] *Id.* at 23, 24.
[217] *Id*.
[218] *Id.* at 22, 23.
[219] *Id.* at 22.
[220] *Id.* at 24.
[221] *Id.* at 25.
[222] *Id.* at 57.

decisions,[223] others in the international arena, including donors, are fearful of human rights abuses.[224] There are also concerns that "increased attention to the nonstate justice system could divert much-needed resources away from assistance to the state courts and other state institutions of justice" and that it may be constitutionally prohibited as the Afghan Constitution prevents cases from being jurisdictionally excluded from a court.[225] Therefore, "the importance in Afghanistan of customary justice mechanisms is increasingly widely recognized, although their part in an overall ROL strategy is still under debate."[226] However, adopting a broad, ends-based, second generation approach can help focus reforms "desired by the local population" which in turn will likely lead to a greater focus on nontraditional and informal methods of dispute resolution that are used, rather than formal systems that are less frequented.[227]

These recent efforts are admittedly "one of the first times a donor project has focused entirely on supporting the organic development of the informal or justice sector in Afghanistan."[228] However, hindsight indicates that the inclusion of CJS from the beginning of operations when even conceptualizing rule of law efforts in Afghanistan likely would have been helpful. The history, both pre- and post-2001, indicate that although difficult to navigate, rule of law efforts cannot ignore CJS in their planning even if it is merely to make a well-informed decision not to engage. Although not appropriate in every intervention, it must be carefully researched, analyzed, and considered if policy makers advocate effective rule of law reform from the bottom-up, allowing a society to change and the populace to hold their government accountable from within.[229]

While likely a good rule of thumb, a complete prohibition on CJS engagement when the host nation—the ostensible "owner"—does not support their advancement is short-sighted. As displayed by Afghanistan's long and short term history, the true beneficiaries (the population) may possess better insight into the future of the justice

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[223] COBURN &DEMPSEY, *supra* note 200, at 5.
[224] WYLER & KATZMAN, *supra* note 204, at 18–19.
[225] COBURN & DEMPSEY, *supra* note 200, at 6.
[226] ROL HANDBOOK, *supra* note 29, at 83.
[227] KLEINFELD, *supra* note 8, at 219.
[228] FINAL REPORT, *supra* note 203, at 5.
[229] KLEINFELD, *supra* note 8, at 214.

system.[230] As demonstrated, this notion is not in conflict with current military doctrine,[231] and it can actually help link the populace to the government.[232] Likewise, the United States has precedent for such intervention prior to explicit host-nation approval from the perhaps unintended use of such a system to serve our claims process[233] to the overt development of Commissions on Conflict Mediation in 2006.[234]

Practical Considerations

Once the decision is made to include CJS in a rule of law effort, engaging an unfamiliar CJS can be a daunting task. However, some practical considerations and recommendations are captured for others in the arena. Embracing Kleinfeld's second-generation method of thought,[235] and the need for an understanding of legal pluralism,[236] specific area research is implicitly necessary if we are to avoid haphazard engagement.

The first, and perhaps most obvious, course of action is the need for extensive research. Time-constrained environments coupled with the minimal amount of rule of law funding dedicated to research can discourage the practitioner.[237] However, appropriate research can be invaluable. It should focus on the populace as the true beneficiaries[238] and take into account their narratives even if data is lacking. Those truly interested in reform should also look outside their regular sphere of influence; scholars should engage with practitioners and vice-versa, and seek perspectives from fields outside their own.[239] As seen with the Afghanistan case study, most states' judicial history is rich, and it can lend insight to future rule of law reform.

Research, however, is only fruitful if projects are adapted to the specific circumstances in which they are carried out. Like the political

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[230] Barfield et al., *supra* note 37, at 181.
[231] FM 3-24, *supra* note 65, at 13-66.
[232] FINAL REPORT, *supra* note 203, at 22.
[233] Evans, *supra* note 146, at 28.
[234] FINAL REPORT, *supra* note 203, at 13.
[235] KLEINFELD, *supra* note 8, at 9.
[236] Tamanaha, *supra* note 11, at 2.
[237] Isser, *supra* note 21, at 343–44.
[238] KLEINFELD, *supra* note 8, at 219.
[239] Isser, *supra* note 21, at 344; KLEINFELD, *supra* note 8, at 220.

and social, the justice landscape is ever-changing based on actors' and institutions' capabilities and capacities.[240] Therefore, while another intervention's success should be considered, it should not serve as a template; local dynamics are always at play and have real effects.[241] For instance, the use of a guarantor program similar to that used in Iraq may or may not be beneficial to another area.[242] Reformers should expect hybrids, both of pluralistic models of state and CJS relationships and their linkages, as well as prior successful interventions.[243]

The use of local national intermediaries often appears the most beneficial manner to engage foreign CJS. Not only do they provide access to current information and narratives, but as seen in Afghanistan, foreigners can sometimes be viewed with suspicion, and a grass-roots appearance is likely more "cost effective and increases the likelihood of making lasting changes."[244] However, while situation dependent, incremental changes can result in significant advancement in the long run. For instance, in an attempt to make CJS decisions "more transparent, sustainable, and predictable, recording and archiving cases can assist greatly.[245] This is more likely to happen, however, if "voices for change within communities" are used, as opposed to foreign interveners directly.[246] Such voices are also more likely to serve as human rights advocates, as they understand the social purposes of offensive practices and may be able to explore other alternatives more efficiently.[247]

The simple act of encouraging communication can also pay dividends. Discussion between state and CJS authorities can resolve jurisdiction issues, educate each other and possibly reduce tensions.[248] At the same time, attempting to force change through re-education instead of allowing it to emerge with the benefit of education can be met with disdain by CJS leaders. CJS possess the ability to change, but because they reflect the community, change is often understandably

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[240] COBURN & DEMPSEY, *supra* note 200, at 12–13.
[241] JOHN DEMPSEY & NOAH COBURN, TRADITIONAL DISPUTE RESOLUTION AND STABILITY IN AFGHANISTAN 5, 10 (Feb. 2010), *available at* http://www.usip.org/publications/traditional-dispute-resolution-and-stability-in-afghanistan.
[242] Isser, *supra* note 21, at 362.
[243] *Id.*
[244] COBURN & DEMPSEY, *supra* note 200, at 19.
[245] *Id.* at 15.
[246] Isser, *supra* note 21, at 355.
[247] *Id.* at 353–55.
[248] COBURN & DEMPSEY, *supra* note 200, at 16.

slow. Therefore, goals should be realistic and incremental.[249] Similarly, opportunities for CJS leaders to engage with each other can prove fruitful for facilitating the exchange of ideas.[250]

It is also crucial that relationships are built and evaluated between the donor nation and trusted agents in the community to ensure as situations change and develop, aid is appropriately disseminated even at the lowest level.[251] Given the reality of local dynamics, reformers must recognize the potential for perverse incentives to form in the CJS arena as well. For instance, salaries, buildings, and other "financial rewards" have the potential to "undermine the very aspects of traditional justice that make it legitimate."[252]

Finally, practitioners have a responsibility to each other. Too often, interventions and their outcomes are not captured or shared for others to evaluate.[253] When it is, it does not always reflect the "political, social, and economic variables that underlie the policies and determine their impact."[254] Scholarly thought by academics and practitioners alike is required to improve our chances of successful rule of law intervention.

Conclusion

While thoughts on rule of law reform are progressing and more nuanced approaches advanced, there is still resistance to, and fear of, the unfamiliar. This is especially true when the host nation does not explicitly advance CJS despite a history of an effective informal system. Ideally, all reforms would have the backing of the populace, political leadership, and those working in the justice system.[255] A second generation ends-based approach that sees rule of law as "a relationship between a state and a society"[256] leaves room for those instances when the government does not implicitly support CJS. I argue when using an ends-based approach to rule of law, practitioners cannot ignore CJS even

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[249] Isser, *supra* note 21, at 347.
[250] FINAL REPORT, *supra* note 203, at 21, 22.
[251] DEMPSEY & COBURN, *supra* note 241, at 4.
[252] COBURN & DEMPSEY, *supra* note 200, at 5.
[253] Isser, *supra* note 21, at 364.
[254] *Id.* at 365.
[255] Matteo Tondini, *From Neo-Colonialism to a 'Light-Footprint Approach': Restoring Justice Systems*, 15 INT'L PEACEKEEPING 237, 241 (2008).
[256] KLEINFELD, *supra* note 8, at 15.

when not formally recognized by the host nation. United States policy, military doctrine, and social science theories are either consistent with this notion or explicitly support this approach.

However, adoption of such a method requires reformers to become well versed in pluralistic legal traditions and their models, embrace them as part of the environment, and avoid haphazard engagement. Most likely, socializing this change will require effort from more than just practitioners in the field. While there is a call for emphasis on foreign and comparative law, this focuses on the need for education in host nation criminal law and procedure[257] and does not entirely capture CJS, which accounts for the overwhelming majority of justice rendered in many developing nations.[258] An educational focus on legal pluralism may better serve practitioners who do not know where they may next find themselves operating.

Similarly, while U.S. policy and military doctrine are consistent with the thesis that policy makers cannot ignore CJS even when such systems are not formally recognized by the host nation, specific doctrinal changes to encompass informal mechanisms and this particular issue are appropriate. Likewise, as practitioners continue to navigate rich and pluralistic legal environments, they owe it to each other to document their successes and failures.[259] Doing so may not only assist current peers but also future generations who may struggle to find information on a nation's judicial history and assess future policies or interventions.

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[257] Captain Ronald T.P. Alcala, *Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development*, ARMY LAW., Mar. 2011, at 5, 5.
[258] Tamanaha, *supra* note 11, at 4.
[259] Isser, *supra* note 21, at 364.