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Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan

Nusrat Choudhury†

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INTRODUCTION

The recent drafting and ratification of the Constitution of the Islamic Republic of Afghanistan in 2003 and 2004 sparked contentious debates over the compatibility of democratic governance, Islam, and Islamic law in Afghanistan as well as the impact of these institutions on women’s rights. Many women’s rights advocates struggled to secure the inclusion of constitutional provisions promoting sex and gender equality and reserving over twenty percent of all seats in the Afghan Parliament for women. While they succeeded in this regard, advocates have since expressed concern that the impact of these provisions will be undermined by existing interpretations of Islamic law that treat women differently—and less favorably—than men. They

1. Muslims believe Islamic law to be divine law setting forth individuals’ duties to God and their fellow human beings, based on human interpretation of Islam’s foundational sources. In Sunni Islam, the Qur’an, Sunna (practice of the Prophet Muhammad), ijma (consensus of the community), and qiyas (reasoning by analogy) constitute the primary sources of law. See generally MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 16-116, 228-305 (3d ed. 2003); BERNARD WEISS, THE SEARCH FOR GOD’S LAW 151-258 (1992). Shi’i Islam shares the Qur’an and ijma as principal sources, but substitutes aql (reason) for qiyas and expands the concept of Sunna to include the practice of the Shi’i Imams in addition to that of the Prophet Muhammad. See HOSSEIN MODARRESI TABATABA’I, AN INTRODUCTION TO SHI’I LAW 2 (1984). Islamic law is manifested in these sources (shari’a) or formulated in them (fiqh). One scholar has explained the distinction as follows:

   The law embodied in the sources is shari’a proper—God’s divine law. Islam’s legal sources articulate that law in general, principled terms. The law derived from the sources is fiqh—the human attempt to understand and articulate God’s divine law with respect to particular circumstances of individual and social life. As one Islamic law scholar puts it, “[fiqh (literally “discernment”) is a human attempt at knowing the Shari’a, the divinely ordained ‘path’ which only God knows perfectly. The word Shari’a shines more brightly and is seen more reverentially than fiqh.” Modern writers often conflate fiqh and shari’a, referring to both as “Islamic law,” and a similar problem runs through Islamic texts, where a derivative of shari’a is often used to mean a static body of fiqh.


3. Article 83 of the 2004 Constitution of Afghanistan provides that at least two female delegates must be elected from each province to the Wolesi Jirga (Council of People), the lower house of the national legislature. CONST. OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (2004), art. 83, cl. 6, available at http://www.jemb.org/eng/Legal%20Framework/Legislation%20of%20Reference/Constitution/Constitution%20(English).pdf. Article 84 requires that one-half of all presidential appointees to the Meshrano Jirga (Council of Elders), the upper house of the national legislature, must be women. Id. art. 84. As a result, the constitution reserves twenty-five percent of the seats in the Wolesi Jirga and almost seventeen percent of the seats in the Meshrano Jirga for women. The constitution, however, does not address women’s representation in lower levels of government. Indeed, women remain “excluded from formal bodies of local governance,” drawing criticism from observers who call for the institution of quotas for women in provincial and district councils. DENIZ KANDIYOTI, THE POLITICS OF GENDER AND RECONSTRUCTION IN AFGHANISTAN 27 (2005), available at http://www.unrisd.org/unrisd/website/document.ms0f/03050BE40DA5B871CC125704400534A7A?OpenDocument; Niaz A. Shah, The Constitution of Afghanistan and Women’s Rights, 13 FEMINIST LEGAL STUD. 239, 249 (2005).

point to the potential tension between Article 22 of the constitution, which explicitly states that “[a]ny kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man or woman, have equal rights and duties before the law,”5 and Article 3, which mandates that “no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”6 and empowers the unelected jurists on Afghanistan’s Supreme Court to strike legislation for incompatibility with the latter provision.7 While the constitution falls short of requiring Islamic law to form the basis of all legislation in Afghanistan,8 it opens the possibility that a judiciary long-dominated by hard-line Islamist jurists will use its power to subvert gains for women’s rights won in the battlefield of the Afghan Parliament.9

The fear that judicial review in the name of Islam will thwart progress towards women’s rights is not unfounded. The Taliban used extreme interpretations of Islamic law to close girls’ schools, prohibit women from working outside the home almost entirely, require women to travel accompanied by a male relative, mandate that women wear the burqa in public places, and stone to death women convicted of adultery.10 Memories of the Taliban’s “gender apartheid” justified under the guise of Islam remain

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5. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 22.
6. Id. art. 3.
7. The 2004 Constitution of Afghanistan established judicial review in Article 121, which provides, “At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.” Id. art. 121.
8. Other constitutions arguably afford Islamic law an even larger role in governance than the 2004 Constitution of Afghanistan. For example, the Constitution of Egypt provides that “the principles of the Islamic Shari’a are the main source of legislation.” AL-DUSTR [Egyptian Constitution], reprinted in AL-MUHAMAH [The Legal Profession], Dec. 1971, pt. 1, art. 2, translated in Kristen A. Stilt, Islamic Law and the Making and Remaking of the Iraqi Legal System, 36 GEO. WASH. INT’L L. REV. 695, 723 (2004) (emphasis added); see also Rabb, supra note 1, at 33-41 (presenting “three models of institutional relations between . . . government and [Islamic] jurists with respect to Islamic legal interpretation” created by constitutions incorporating Islam).
9. Hannibal Travis, Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq, 3 NW. U. J. INT’L HUM. RTS. 4, 84 (2005) (“[W]hile [women] may be ensured a say in parliament, their ability to pass laws improving women’s plight in their country will be strictly limited by a veto power the constitution grants to radical fundamentalists in the Afghan judiciary.”). These fears form part of a larger apprehension that a Supreme Court dominated by political Islamists could become “an unaccountable body controlling the legislature, executive branch and electoral system on the pretext of protecting Islam,” in a manner reminiscent of the Council of Guardians in Iran. J. Alexander Thier, Attacking Democracy from the Bench, N.Y. TIMES, Jan. 26, 2004, at A23.
understandably vivid in the minds of domestic and international women’s rights advocates alike. One observer recently commented,

It remains to be seen how the constitutional protection of women’s rights will compete with the fundamentalist interpretations of Islamic law enforced in many parts of Afghanistan, which allow for girls to be sold into marriage, give fathers and brothers control over female members of the family, and punish women harshly for adultery and prostitution.

Another commentator expressed similar reservations about the impact of parallel provisions proclaiming gender equality and incorporating Islamic law in the 2005 Constitution of Iraq. Katha Pollitt recently asked in The Nation, “How can women be equal before Islamic law, according to which they are unequal?” In response to her own question, she recounted the parade of Islamic law horrors that, she claims, currently afflict women in Iran and promise to confront women in Iraq, where Islamic law occupies a place in the new constitution.

If Iraq turns out to resemble Iran . . . women have a lot to look forward to: being married off at the age of 9, being a co-wife, having unequal rights to divorce and child custody, inheriting half as much as their brothers, having their testimony in court counted as half that of men, winning a rape conviction only if the crime was witnessed by four male Muslims, being imprisoned and flogged for premarital sex, being executed for adultery, needing mandatory permission from husband or father to work, study or travel.

Pollitt’s critique is well-intentioned, for it focuses on promoting the rights of women in countries featuring Islamic law. It is grounded, however, upon two central assumptions: first, that what is understood as required by “Islamic law”


15. Id.
indeed reflects Islamic legal precepts rather than customary law or social norms; and second, that formal Islamic law provisions are definitive and closed to contestation. Starting from these assumptions, Pollitt concludes that the constitutional incorporation of Islamic law will necessarily curtail women’s rights.

Pollitt’s conclusion that a constitutional status for Islam will hurt rather than help women, and that conclusion’s concomitant assumptions, merits critique. As Islamic scholars have long recognized and Western observers have more recently appreciated, Islam and Islamic law are not uniform, but open to a vast spectrum of interpretations. Islam is a system of beliefs based upon two principal sources: the Qur’an, which is believed to be the word of God as revealed to the Prophet Muhammad; and the Sunna, which consists of the Prophet’s practices. “The Qur’an is the foundation of Islamic Law. The sunnah . . . is used as a secondary source for further clarification and guidance.” Rather than dictating any single meaning, these sources have spurred divergent and multiple understandings. Jurists have used the Islamic legal doctrine of ijtihad, the “exercis[e] [of] independent juristic reasoning,” to derive from the Qur’an and Sunna a wide-ranging set of legal determinations known as “Islamic law.”

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20. Different schools of Islamic law and even different jurists of the same school vary in their derivation of Islamic legal precepts from the Qur’an and Sunna. Abdullahi Ahmed An-Na’im, Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry, 3 HARV. HUM. RTS. J. 13, 19 (1990). Divergent and conflicting views are accepted as valid and legitimate. Id. at 19-20. Islamic law therefore is not uniform or set forth in any single code, but “constitutes several schools of jurisprudential thought that are considered equally orthodox and authoritative.” El Fadl, supra note 17. As a result, one scholar has argued that “Islamic law does not aim at uniformity.” A. A. Oba, Islamic Law as Customary Law: The Changing Perspective in Nigeria, 51 INT’L & COMP. L.Q. 817, 821 (2002). Today, the four main Sunni schools of law are the Hanbali, Shafi’i,
Muslims in countries as varied as Iran, Morocco, and Malaysia are utilizing this heterogeneity to advocate interpretations of Islamic law that accommodate or actively promote women’s rights. In some states, their interpretations have actually influenced lawmaking, as demonstrated by the exemplary reform in 2004 of the Mudawana, the Moroccan Family Code, which raised the legal age of marriage for both men and women to eighteen, granted both spouses status as legal heads of the family, and placed severe procedural constraints on men’s ability to engage in polygamy. Moreover, as a pragmatic matter, the

Maliki, and Hanafi. The two main Shi‘i schools are the J’afari (or Ithna Ashari) and the Zaydi. El Fadl, supra note 17. See generally Roy Parviz Mottahedeh, Introduction to MUHAMMAD BAQIR AS-SADR, LESSONS IN ISLAMIC JURISPRUDENCE 4-17 (Roy Parviz Mottahedeh trans., 2003). In Afghanistan, the Sunni population primarily follows the Hanafi school, while the Shi‘i population predominantly follows the Ja‘fari school. El Fadl, supra note 17, app. A at 13. For an overview of the development of Islamic law, see Rabb, supra note 1, app. 1.

21. Examples of transnational and domestic advocacy promoting women’s rights through implementation or reform of Islamic law abound. Women Living Under Muslim Laws (WLUML) is a transnational group that provides activists throughout the Muslim world with information on progressive Islamic law for use in local women’s rights advocacy. About Women Living Under Muslim Laws, available at http://www.wluml.org/english/about.shtml (last visited Feb. 27, 2007); see also Madhavi Sunder, Piercing the Veil, 112 YALE L.J. 1399, 1434-43 (2003) (detailing WLUML’s efforts to assist Muslim women from diverse countries in exchanging their own understandings of Islam that promote their human rights). In Malaysia, Sisters in Islam (SIS) has actively challenged the Parti Islam se-Malaysia’s extremist interpretations of Islam by articulating Islamic law interpretations that would abolish polygamy, grant women relatively liberal rights to divorce and maintenance, and include women as qadis (judges) in the syariah (Islamic) court system, which administers personal and family law. See Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia from Sisters in Islam to Gov’t of Malay. (Jan. 4, 1997), available at http://www.sistersinislam.org.my/memo/040197.htm; Memorandum on Reform of the Islamic Family Laws on Polygamy from Sisters in Islam & Ass’n of Women Lawyers to Tun Dr. Mahathir bin Mohamad, Prime Minister, Malay. (Dec. 11, 1996), available at http://www.sistersinislam.org.my/memo/111296.htm; Nik Noriani Nik Badli Shah, Women as Judges (Sisters in Islam), available at http://www.sistersinislam.org.my/womenjudgescPartl.doc (last visited Feb. 27, 2007). Domestic advocates have also argued from Islamic criminal law to promote women’s rights. In a well-publicized case, Nigerian women’s rights advocates successfully defended Amina Lawal from a sentence of death by stoning for adultery by arguing that her trial and sentence violated Islamic law in an appeal within the Islamic court system, rather than through removal to secular court. Vanessa von Struensee, Stoning, Shari’a, and Human Rights Law in Nigeria, 11 WM. & MARY J. WOMEN & L. 405, 405-10 (2005).


Fatima Sadiqi has highlighted the contribution of both liberal and Islamic feminists’ “involvement in Islamic feminist discourse” to the passage of the 2004 reforms. Sadiqi, supra, at 36. The election of thirty-five women to parliament in 2002 under the quota system for women’s representation in elections and the unity of female parliamentarians of all shades of the Islamic-secular spectrum around demands for women’s civil rights “accelerated the process of law reforms,” including the reform of the Moroccan
condemnation of Islam and Islamic law as inherently inimical to women’s rights fails to serve the interests of women in countries where purely secular arguments for women’s rights are easily discounted as “Western” constructions and where, for better or worse, Islam and Islamic law are a part of democratic governance and legal structure. In recent decades, many of these progressive voices have been those of Muslim women. Throughout the Muslim world, women activists—so-called “Islamic feminists”—have emerged to promote the political, economic, and social empowerment of women by reinterpreting the original sources of Islamic law, the Qur’an and hadith (the recorded Sunna of the Prophet Muhammad), to develop, disseminate, and deploy egalitarian interpretations of Islamic law. Women like the members of Sisters in Islam in Malaysia, the members of Baobab for Women’s Human Rights in Nigeria, and the contributors to Zanan Family Code. Id. at 37-38. The 2004 reforms were thus the result, in part, of a concerted attempt to harmonize women’s demands for their rights with Islamic law.


24. “Islamic feminism” has been defined as “a feminist discourse and practice articulated within an Islamic paradigm,” which emerged in various locations throughout the world during the 1990s. Margot Badran, *Islamic Feminism: What’s in a Name?*, AL-AHRAM WKLY. ONLINE, Jan. 17-23, 2002, http://weekly.ahram.org.eg/2002/569/cul.htm. The term has been used to describe women from a multitude of countries who use diverse interpretive methodologies and strategies to promote women’s empowerment through interpretation and reinterpretation of Islamic law, and through an emphasis on the Islamic values of equality, justice, compassion, and autonomy. For example, in Iran, contributors to the women’s magazine Zanan actively encourage women to engage in the reinterpretation of current Islamic law precepts to realize women’s rights. Shahla Shirkat, the editor-in-chief of Zanan, told Azadeh Kian, Radical legal changes are needed to solve women’s problems. Many articles of the civil code are based on the Shari’a, which must, therefore, be reinterpreted. Moreover, women should be involved in this undertaking. Our understanding of religion varies in each historical period, and religious interpretations should account for factors of time and space . . . . Azadeh Kian, *Women and Politics in Post-Islamist Iran: The Gender Conscious Drive to Change*, 24 BRIT. J. MIDDLE E. STUD. 75, 91 (1997). Notably, Islamic feminism also encompasses calls for the empowerment of women by modernist male scholars of Islamic law and jurisprudence such as those writing in the pages of the popular Iranian magazine Zan-i Ruz. Id. at 93.


Some scholars, however, have questioned the possibility of Islamic feminism. See, e.g., Shahrzad Mojab, *The Politics of Theorizing ‘Islamic Feminism’: Implications for International Feminist Movements*, WOMEN LIVING UNDER MUSLIM LAWS DOSSIER 23/24, at 64, 71 (2001), available at http://www.wluml.org/english/pubs/pdf/dossier23-24/D23-24.pdf (“The positing of an Islamic feminist consciousness . . . is . . . questionable.”). But see Valentine M. Moghadam, *Islamic Feminism and Its Discontents: Toward a Resolution of the Debate*, 27 SIGNS 1135, 1165 (2002) (“[F]eminists should be defined by their praxis rather than by a strict ideology, and if a feminist politics is shaped by its specific historical, political and cultural contexts, then it should be possible to identify Islamic feminism as one feminism among many.”).
and Zan-i-Ruz magazines in Iran have urged women to actively engage Islamic law. Through their own interpretation of original sources and reinterpretation of orthodox provisions, they have concluded that Islamic law permits women to serve as judges and the chief executives of states, establishes equal rights for women and men to initiate divorce, and strictly controls or even prohibits polygamy. While Islamic feminists have not been consistently successful at influencing legislation or judicial interpretation, they have contributed to progressive reforms of Islamic law that expanded women’s formal rights and have sought to enhance their ability to exercise these rights in countries as diverse as Morocco, Malaysia, and Iran. Their efforts and successes problematize the assumptions underlying Pollitt’s critique, namely that what is claimed to be required by Islamic law reflects Islamic legal precepts rather than

25. See supra note 21 (discussing Sisters in Islam); supra note 24 (discussing Zanan and Zan-i-Ruz); see also Herstory of BAOBAB for Women’s Human Rights, http://www.baobabwomen.org/history.htm (last visited Feb. 25, 2007).

26. Badli Shah, supra note 21. In 1992, Zanan issued a series of articles in which it argued that the exclusion of women from the judiciary was not justified by the principal Islamic texts, nor supported by any uniform opinion of religious authorities. Kian, supra note 24, at 92. Another magazine, Farzaneh, agreed with this position the following year. Id.

27. Contrary to the directive of the Ayatollah Khomeini and Article 115 of the Constitution of the Islamic Republic of Iran, Iranian women have argued that Islam permits women to serve as the country’s leader. Haleh Afshar, Women and Politics in Iran, 12 EUR. J. DEV. RES. 188, 197-98 (2000). Faizeh Rafsanjani, one of ten women elected to the Majlis (Iranian Parliament) in 1996, argued publicly that a woman may run for and hold the position of President of the Islamic Republic of Iran. Kian, supra note 24, at 75, 86.


30. In Morocco, King Muhammad VI grounded the legitimacy of the 2004 Moroccan Family Code, which introduced reforms to promote women’s rights and gender equality, in the Qur’an, the words of the Prophet Muhammad, and the King’s role as Amir al Mussinin, Commander of the Faithful. Moroccan Family Code, supra note 22, at pmbl. paras. 27-28; Laura A. Weingartner, Comment: Family Law & Reform in Morocco—The Mudawana: Modernist Islam and Women’s Rights in the Code of Personal Status, 82 U. DET. MERCY L. REV. 687, 699, 708 (2005). In Malaysia, federal authorities adopted the 1984 Islamic Family Law Enactment for the Federal Territories, “one of the most enlightened laws among Muslim countries,” by choosing reforms from among the four Sunni Islamic schools of jurisprudence. Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia, supra note 21. This law permits women to petition a court for annulment of a marriage on twelve different grounds, grants them compensation if their husbands unjustly divorce them, and entitles them to a portion of jointly acquired marital assets upon divorce. Id. Iran witnessed the 1992 Amendments to Divorce Law, which limited men’s right to unilaterally divorce their wives (talaq). This reform was justified by the argument that “Islam placed marriage in the highest regard,” and it granted women post-divorce maintenance, orjat al-mesl, in a provision drafted by women who interpreted this legal right from Islamic texts. Arzoo Osanloo, At the Juncture of Islam and Republic: Socio-legal Constructions of Women’s Rights in Iran 178 (August 2000) (unpublished Ph.D. dissertation, Stanford University) (on file with Lillian Goldman Law Library, Yale Law School); see also PARVIN PAIDAR, WOMEN AND THE POLITICAL PROCESS IN TWENTIETH-CENTURY IRAN 293 (1995) (discussing a bill introduced in 1989 that proposed to limit men’s unilateral divorce rights). One scholar has suggested that the 1992 reforms represent a “feminist[,] interpretation of shari’a divorce provisions.” Ziba Mir-Hosseini, Stretching the Limits: A Feminist Reading of the Shari’a in Post-Khomeini Iran, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 285, 286 (Mai Yamani ed., 1990).
customary law or social norms, and that formal Islamic law provisions are fixed and uncontested.

The debates surrounding the 2004 Constitution of Afghanistan and the explosion of Islamic feminism around the world thus raise an important question about the future of women's rights advocacy in Afghanistan. This Comment rejects Pollitt's conclusion that the incorporation of Islam in Afghanistan's new constitution will necessarily or definitively result in the curtailment of women's rights. It suggests instead that the impact of the 2004 Constitution of Afghanistan is fundamentally an empirical question, one that requires an understanding of the text of the document as well as the context in which it is implemented—a context characterized by contestation over the interpretation and enforcement of Islamic law, a judiciary and legal system with distinctive features, an unstable and degrading security situation, and women's low socio-economic status. A consideration of these factors suggests that the new constitution provides Afghan women a stage from which they may advocate to empower women through strategies grounded in Islam, a stage that is vastly expanded from the narrow space available under the Taliban or earlier governments, even as it remains limited by contemporary political, institutional, and social constraints.

Part I describes the contestation over Islamic law in Afghanistan through one example of Islamic feminist advocacy: the drafting and promotion of the Afghan Women's Bill of Rights. This Part demonstrates that a number of women in Afghanistan seek to secure women's political, economic, and social empowerment through Islamically-grounded advocacy both out of sincere belief and for pragmatic reasons. These women believe that Islam grants more rights than they are currently able to exercise. Many also find that framing secular demands in the language and idioms of Islam is necessary for political legitimacy in the socio-political context of Afghanistan. Whether their purpose is sincere, strategic, or both, these advocates use Islam as their starting point for improving the status and rights of women in Afghanistan. The substance of their demands and the language they employ challenge assumptions by both Muslims and non-Muslims that current constraints on women's rights are accurately understood as "Islamic," and that Islamic law itself is determinate and hostile to promoting women's rights or opportunities.

Part II analyzes the ways in which the 2004 Constitution of Afghanistan simultaneously empowers and constrains advocates' abilities to promote women's rights using arguments grounded in Islam. The constitution sets forth several important substantive rights for Afghan women and reinforces the state's obligation to uphold its international commitments, including commitments to human rights conventions setting forth women's rights. Moreover, by reserving seats for women in the Afghan Parliament, the constitution may increase the possibility that laws favoring women's rights will
be proposed, debated, and passed by the legislature. Nevertheless, it potentially restricts women's space and ability to engage in such advocacy by empowering the Supreme Court to review laws for compatibility with the "tenets and provisions of the holy religion of Islam in Afghanistan." While Islamic feminists may encourage judges to adopt more feminist interpretations of Islamic law, this approach may or may not succeed depending on who is sitting on the Supreme Court. This analysis of the competing provisions of Afghanistan's new constitution reveals that it is impossible to conclude whether the document on the whole benefits or harms women without a more contextualized inquiry.

Finally, Part III explores the legal and extra-legal barriers that further limit the possibility that Islamic feminist advocacy will enact concrete change through the passage and implementation of laws in Afghanistan. These constraints include structural characteristics of the Afghan legal system, such as the politicization and gender-bias of the judiciary, the weakness of the formal legal system, and the lack of clarity surrounding applicable law. Other extra-legal constraints include the pervasive lack of security in Afghanistan and women's low socio-economic status. While the 2004 Constitution of Afghanistan opens up spaces for legal reform grounded in Islam to promote women's rights, these challenges hamper the institution of such reforms and their ability to enable women to exercise their rights on the ground.

By examining the contestation of Islamic law by Islamic feminists in Afghanistan, looking closely at the 2004 Constitution of Afghanistan, and exploring existing legal and extra-legal constraints on the promotion of women's rights through law, this Comment offers a contextualized approach to analyzing the impact of Islam and constitutionalism on women's rights in one

31. There is an expansive literature on the potential impact of reservations for women on electoral lists or in national legislatures on women's equality in political representation as well as policy development and implementation. See Charles S. Maier & Jytte Klausen, Introduction: New Perspectives on the Use of Parity Mandates and Quotas To Guarantee Equality Between Men and Women, in HAS LIBERALISM FAILED WOMEN?: ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 3, 10-12 (Jytte Klausen & Charles S. Maier eds., 2001) (discussing the consequences of parity measures and quotas for women on gender inequality in politics and other spheres) [hereinafter HAS LIBERALISM FAILED WOMEN?]; Jane Mansbridge, The Descriptive Political Representation of Gender: An Anti-Essentialist Argument, in HAS LIBERALISM FAILED WOMEN?, supra, at 19, 21-29, 33 (arguing for measures to produce women's political representation commensurate with their proportion of the population on the grounds that it enhances democracy by addressing the "[c]ommunicative distrust between men and women," the "uncrystallized interests" of women as a group, and "[w]omen's historically subordinate political status"); Pipa Norris, Breaking the Barriers: Positive Discrimination Policies for Women, in HAS LIBERALISM FAILED WOMEN?, supra, at 89, 102-07 (describing the impact of quotas for women in internal party candidate lists on women's representation in national parliamentary politics in the United Kingdom). For a discussion of the policy impact of reservations for women in local government, see Raghavendra Chattopadhyay & Esther Duflo, Women as Policy Makers: Evidence from a Randomized Policy Experiment in India, 72 ECONOMETRICA 1409, 1427-34, 1440 (2004) (finding that the constitutional reservation of positions for women on local councils in India "has important effects on policy decisions at the local level").

32. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 3; see also id. art. 21 (discussing judicial review of laws for compliance with the constitution).
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country. It reveals that there is good reason to reject the central assumptions underlying Pollitt’s critique—that what is often characterized as “Islamic law” reflects Islamic legal precepts rather than customary law or social norms, and that formal Islamic law precepts are definitive and closed to dispute. It also challenges observers like Pollitt who conclude without much inquiry that reference to Islam or Islamic law in the constitutions of predominantly Muslim countries will necessarily harm women. While Islamic feminists in Afghanistan face significant constraints that must be acknowledged and addressed, they may nevertheless use their country’s new constitution as a springboard to promote women’s rights.

I. SHAPING THE CONTOURS OF ISLAMIC LAW: ISLAMIC FEMINISM AND THE AFGHAN WOMEN’S BILL OF RIGHTS

Muslim women throughout the world challenge constraints upon their rights, opportunities, and freedoms by contesting proffered interpretations of Islamic law as man-made products, rather than the unchanging word of God. They seek to redefine the “tenets and provisions” of Islamic law as a basis for promoting reforms to improve women’s lives. Their advocacy within the framework of Islam is often the result of sincere belief or strategic considerations, either singly or in some combination.

Many Muslim women engaging in Islamic feminist advocacy sincerely believe that Islam affords women, at least, greater rights than they are able to exercise in practice and, at best, equal rights with men. Lina Abirafeh, the former Country Director of Women-for-Women International, indicates that “Afghan women feel strongly that Islam, more than any other religion, guarantees equal rights to men and women.”

The Max Planck Institute reported, however, that seventy percent of men and eighty to eighty-five percent of women interviewed in field research in Afghanistan were unaware of the rights afforded to women in Islam.

Advocates such as Fatima Galiani, director of Afghanistan’s Red Crescent and a trained Islamic lawyer who participated in the constitutional Loya Jirga, suggest that the general lack of education as to Islamic law and women’s rights may contribute to women’s disempowerment. Galiani recently stated in an interview that in her opinion, it is not Islam itself, but the fact that most Muslim women do not know what Islam is, or what the rights of women within it are, that “has created the best opportunity for men to abuse this situation and enforce male-oriented


34. MAX PLANCK INST., FAMILY STRUCTURES AND FAMILY LAW IN AFGHANISTAN: A REPORT ON THE FACT-FINDING MISSION TO AFGHANISTAN 16 (2005), http://www.mpipriv-hh.mpg.de/deutsch/Forschung/LaufendeProjekte/Afghanistan/MPI-Report_Family.pdf [hereinafter MPI REPORT].
Some women seek to redress this problem by implementing what they believe are women's rights under Islam, rights that are more expansive than those currently available to women on the ground. Abirafeh observes that Afghan women "want to search for answers in the Koran, or through other practicing Muslims. And they want to know more about Islam and the rights that it affords them." It should be no surprise then that many demands by Afghan women are founded upon sincere conviction in Islamic moral and ethical principles and a concomitant desire to institute Islamic law.

Strategic concerns are similarly central to the choice of many Muslim women to set forth their demands for rights via references to Islamic rights and duties. Decades of conflict involving foreign forces have made Afghans skeptical of international interventions. As a result, Islam has been a unifying force, providing "continuity and predictability." In this context, "[n]umerous female Afghan members of NGOs and government believe that the best and only way to progress women's rights is to work within the framework of Islam . . . ." During the constitution-making process, for example, advocates were sensitive to the need to ensure that women's rights claims were "not . . . perceived as imposed by foreign interests." This concern has not dissipated since the adoption of the 2004 Constitution of Afghanistan. One scholar reported that during her interviews with female candidates for Afghanistan’s first direct parliamentary elections in September 2005, the women went to great lengths to stress that they were devout Muslims. She also indicated that "[a] few men admitted—but never on the record—that they viewed an Islamic discourse as the only foolproof and strategic means to build support for women’s rights in Afghanistan." In a country where decades of invasion and war have generated widespread and deep-seated suspicion of foreigners and foreign ideas, advocates may decide to frame calls for women’s rights in the context of Islam as a strategic move to gain legitimacy for women's rights amongst a mainstream Muslim population and to prevent backlash.

36. Abirafeh, supra note 33.
37. Drumbl, supra note 11, at 353.
38. Id.
41. Leela Jacinto, Abandoning the Wardrobe and Reclaiming Religion in the Discourse on Afghan Women’s Islamic Rights, 32 SIGNS 9, 10 (2006).
42. Id.
Several features common to the heterogeneous calls for change from Islamic feminists are apparent in the 2003 *Afghan Women's Bill of Rights*. On September 5, 2003, forty-five ethnically diverse women from across Afghanistan met in Kandahar at the third annual conference of Women for Afghan Women to demand that the new constitution incorporate explicit safeguards for women. Dismayed by the lack of protections for women in the draft constitution, the group formulated an *Afghan Women’s Bill of Rights*, a document that contains twenty-one specific demands to elevate women’s status; promote their participation in economic, civic, and public life; and improve their material well-being. These demands included calls for a right to mandatory education through secondary school for all girls and women, protection and security for women, freedom of speech, equal pay for equal work, the right to participate fully and at the highest levels in economic and commercial life, and equal representation in the government. Women distributed the *Afghan Women’s Bill of Rights* throughout the country to gather support for these specific constitutional rights for women and presented the document to President Hamid Karzai, the Constitutional Commission, and the Minister of Women’s Affairs, Habiba Sarabi. Despite promises by President Karzai and members of the constitutional drafting commission, their efforts were unrewarded; not a single provision of the *Afghan Women’s Bill of Rights* was included in the constitution, which remains largely gender-neutral.

From its first sentence, the *Afghan Women’s Bill of Rights* is grounded in its authors’ identities as Muslim women. The drafters explicitly identify themselves and the group on behalf of whom they write in the opening line of the document: “[W]e, the Afghan Muslim participants in the conference, ‘Women and the Constitution: Kandahar 2003’... make the following...”

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44. *Id.* The conference, entitled “Women and the Constitution: Kandahar 2003,” was held in “the former Taliban stronghold of Kandahar” and involved both “educated and under-educated” female leaders in the “women’s and human rights” movement in Afghanistan. *Id.* The participants debated and unanimously assented to each provision included in the *Afghan Women’s Bill of Rights*. *Id.*
45. *Id.*
46. *Id.*; Sultan, *supra* note 4.
47. President Karzai and members of the Constitutional Commission promised the advocates that all of the provisions of the *Afghan Women’s Bill of Rights* would be included in the constitution, except for Article 14, which sought to set the legal age for marriage at eighteen for both women and men. Laura Grenfell, *The Participation of Afghan Women in the Reconstruction Process*, 12 HUM. RTS. BRIEF, Fall 2004, at 22, 23. However, the resulting 2004 Constitution of Afghanistan did not incorporate the gender-specific provisions of the *Afghan Women’s Bill of Rights*. The document mentions “woman” or “women” three times: in Article 22’s equality provision, Article 44’s provision for the creation of a “balanced education for women,” and Article 53’s provision for financial aid for women without “caretakers.” *CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004)* arts. 22, 44, 53. It mentions “mother” once in Article 54, which calls for the adoption of “necessary measures” in order “to attain the physical and spiritual health of the family, especially of the child and mother.” *Id.* art. 54.
demands on behalf of the women of Afghanistan." 48 By presenting their Afghan and Islamic credentials early in the document, the drafters made an important strategic move. While framing their demands within the Western template of a bill of rights, 49 these women established from the very beginning that they are not Western interlopers, but indigenous Afghans and sincere adherents of Islam who are legitimate and adequate representatives of the women of Afghanistan. The deliberateness of their strategic choice is illustrated by the fact that the demands in the Afghan Women's Bill of Rights are not explicitly linked to rights or principles drawn from Islam, save one exception. By prefacing what may be considered largely "secular" demands with an introduction that clearly states that they are made by and for Muslim women, the Afghan Women's Bill of Rights demonstrates that advocates assign strategic importance to framing demands for women's rights in the context of Islam. 50

The drafters' choices also suggest that their motivation to promote change within an Islamic framework went beyond strategic considerations to encompass sincere conviction. They explicitly framed one demand in the document within the context of Islam: the call to enable Afghan women to exercise their "[r]ights to marry and divorce according to Islam." 51 Rights to marry and divorce are fundamental to women's ability to operate as autonomous human beings, particularly insofar as they permit women to escape coerced marriages and domestic abuse, and to choose their marital partners. The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) directs states to ensure that women exercise the same rights to marry and divorce as men. 52 Domestic and international observers have documented the ways in which women's ability to choose their spouses and initiate divorce are routinely denied in Afghanistan, resulting in serious human rights abuses. 53

48. AFGHAN WOMEN'S BILL OF RIGHTS, supra note 43. The writers of the Afghan Women's Bill of Rights also carefully documented their geographic diversity, drawing from Kabul, Mazar-e-Sharif, Kandahar, Herat, Wardak, Jousjan, Badakhshan, Samangan, Farah, Logar, Gardez, Kapisa, Uruzgan, Paktia, Helmand, Baghlan, and Sar-e-Pul.
50. Fifteen of the sixteen concrete demands set forth in the Afghan Women's Bill of Rights are presented without any reference to Islam. The top four demands promote women's socio-economic rights, including their entitlement to education, health services, and support for those whose husbands have disappeared. AFGHAN WOMEN'S BILL OF RIGHTS, supra note 43.
51. Id. art. 7 (emphasis added).
52. Article 16 of CEDAW provides that "State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women" that women exercise the same rights as men to enter into marriage; consent to marriage; freely choose a spouse; dissolve a marriage; own, acquire, and administer property; and parent their children. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, art. 16, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].
53. WOMEN STILL UNDER ATTACK, supra note 39, at 12-17 (discussing the phenomenon in Afghanistan of forced marriage, including child marriage, which "by definition constitute[s] forced
In contrast to CEDAW, Islamic law grants women and men different rights to marriage and divorce. The ways in which these rights differ by gender varies among the schools of law in both Sunni and Shi‘i Islam. Thus, in demanding rights to marriage and divorce according to Islam rather than the simpler formulation of “equal” rights to marriage and divorce, the drafters of the *Afghan Women’s Bill of Rights* send several messages.

First, and most fundamentally, they communicate the perception that a gap exists between Afghan women’s *actual* abilities to marry and divorce and the rights that Islamic law affords them. For example, in Afghanistan, ninety percent of the population are adherents of Sunni Islam and follow the *Hanafi* school of law, which grants women fewer grounds for dissolving or leaving a marriage than do other Sunni schools of law. *Hanafi* jurisprudence does permit women to terminate a marriage through *khul* (mutual consent) and by petitioning a court for *faskh* (judicial order of annulment) and/or *tafriq* (judicial marriage, as a child cannot be considered to have consented freely”). Revolutionary Ass’n of the Women of Afghanistan, http://www.rawa.org/reports3.html#Exc (last visited Feb. 3, 2007) (summarizing article from The News dated Nov. 11, 1995, reporting hanging of a widow for refusing to marry her deceased husband’s cousin).

54. For a description of the six main schools of Sunni and Shi‘i law, see *supra* note 20. Both Sunni and Shi‘i schools recognize four general types of divorce: (1) unilateral divorce initiated by the husband (*talaq*), (2) divorce by mutual consent (*khul* or *mubara‘a*), (3) delegated divorce initiated by the wife as per a stipulation in the marriage contract (*tawfid*), and (4) judicial dissolution of marriage through annulment (*faskh*) and separation (*tafriq*). JOHN L. ESPOSITO WITH NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 28 (2d ed. 2001) (classifying divorce into given categories); MOHAMMAD HASHIM KAMALI, ISLAMIC LAW IN MALAYSIA: ISSUES AND DEVELOPMENTS 74-85 (2000) (describing *talaq*, *khul*, *mubara‘a*, and *tafriq*); ZIBA MIR-HOSSEINI, MARRIAGE ON TRIAL: A STUDY OF ISLAMIC FAMILY LAW 36-41 (1993). The schools of law differ in the divorce and marriage rights they grant to men and women. See generally Intisar Rabb, Procedures of Divorce and Remarriage in Classical Islamic Law 2-7 (Jan. 12, 2006) (unpublished manuscript, on file with author) [hereinafter Rabb, Procedures of Divorce and Remarriage].

Classical Islamic law provides the husband with the right to begin a divorce. THE QUR’AN 65:1-2 (Abdullah Yusuf Ali trans., 2003); see also LALEH BAKHTIAR, ENCYCLOPEDIA OF ISLAMIC LAW: A COMPRENDIUM OF THE MAJOR SCHOOLS 504-06 (1996); Rabb, Procedures of Divorce and Remarriage, *supra*, at 3 & n.8 (citing MUHAMMAD JAWĀD MAGHNIYYA, FIQH AL-IMAM JA‘FAR AL-ŠĀDIQ 6:9-10 (2003) (Shi‘i treatise on Islamic laws)). It also permits women two means of commencing a divorce. First, in Sunni Islam, the husband could “delegate [his] right to his wife, to be used at will and at her discretion.” Rabb, Procedures of Divorce and Remarriage, *supra*, at 3 & n.10 (citing IBN QUDAMA, MUWAFFAQ AL-DIN, MUGHNI, 10:381 (‘Abd Allāh b. Muḥsin al-Turkī ed., 1986) (Sunni Islamic law compendium)). However, this “divorce-by-proxy” was not valid in classical Shi‘i jurisprudence. BAKHTIAR, *supra*, at 503. “Second, the woman could pursue a type of divorce in exchange for consideration, in which the wife remits her dowry or a part thereof in exchange for marital dissolution.” Rabb, Procedures of Divorce and Remarriage, *supra*, at 3. This type of divorce is known as “*khul*” (divorce in return for consideration) or *mubahā‘a* (divorce by mutual agreement).” *Id.* at 3 n.11 (citing MAGHNIYYA, *supra*, at 6:17-25); see also BAKHTIAR, *supra*, at 544.

55. Abirafēh, *supra* note 33 (estimating that Afghanistan’s population is roughly ninety percent Sunni and ten percent Shi‘i); Lama Abu-Odeh, Modernizing Muslim Family Law: The Case of Egypt, 37 VAND. J. TRANSNAT’L L. 1043, 1124 & n.362 (2002) (describing *Hanafi* jurisprudence as providing few means by which a woman may seek to terminate her marriage); El Fadl, *supra* note 17, app. A at 13 (explaining that most Sunnis in Afghanistan follow the *Hanafi* school of law).
order of separation). The Hanafi grounds for judicial divorce are limited in number and difficult to prove:

A court may dissolve a marriage only if: (1) the marriage is irregular; (2) a person who has the option to dissolve the marriage exercises it; (3) the parties are prohibited from marriage by fosterage; (4) the marriage was contracted by non-Muslims who subsequently adopt Islam (or vice versa); (5) a husband is unable to consummate the marriage; or (6) he is missing.

This sixth ground is particularly important in Afghanistan, where decades of conflict have resulted in the deaths and disappearance of many men. Indeed, the Afghan Women’s Bill of Rights includes a separate demand for “[r]eduction of the time before women can remarry after their husbands have disappeared, and mandatory government support of women during that time.” While this demand does not specifically mention Islam, it alludes to the fact that the waiting periods imposed on women prior to their ability to remarry after spousal disappearance may be based on understandings of Islamic or customary law. Reports from the field indicate that due to the hostility of family members and officials in the formal justice system or to their own lack of knowledge about their rights under Islamic law, women may be prevented from accessing judicial divorce even when their husbands have been missing for some time. Permitting women access to faskh and tafriq is a far more incremental step than declaring that women have the same right to divorce as men. Yet, the realization of even the relatively narrow Hanafi grounds for faskh and tafriq would vastly improve women’s access to divorce in Afghanistan.

Second, the call for Afghan women’s right to marry and divorce under Islam may also display a belief in the possibility of using principles of Islamic law to promote reform more expansive than the mere implementation of existing Hanafi provisions. Other schools of Islamic law permit women to invoke grounds for a court-ordered divorce or annulment unavailable to them under Hanafi law. For example, the Maliki school of Sunni Islam permits a

56. According to the doctrine of tafriq, a court or religious authority may terminate a marriage on two grounds: (1) “at the request of one party based on certain grounds (such as marital discord, harm or non-maintenance),” or (2) “without a request by either party out of regard for Islamic legal requirements for the validity of a marriage, as in the case when a woman is not eligible for marriage because of some legal impediment.” Rabb, Procedures of Divorce and Remarriage, supra note 54, at 3 & n.11 (citing QUDAMA, supra note 54, at 11:237-38; MAGHNIYYA, supra note 54, at 6:37, 50-54; BAKHTIAR, supra note 54, at 539-42).

57. ESPOSITO, supra note 54, at 35.

58. AFGHAN WOMEN’S BILL OF RIGHTS, supra note 43, art. 4.

59. See MPI REPORT, supra note 34, at 6 (describing how one woman’s in-laws sought to prevent her from divorcing her husband, who was missing for seven years, by warning the Department of Women’s Affairs not to intervene in her case). It is generally difficult for an Afghan woman to secure a court-ordered annulment or divorce from her husband. When she does succeed, government officials may thwart the order, particularly in cases of abuse. See WOMEN STILL UNDER ATTACK, supra note 39, at 14-15.

60. MPI REPORT, supra note 34, at 10, 16.
woman to seek faskh and tafriq if: (1) her husband is cruel to her, (2) he refuses or is not able to financially support her, (3) he has abandoned her, or (4) he suffers from a serious medical condition that might harm her. Most importantly, tafriq divorce under the Maliki school permits women to escape marriages considered abusive by many standards. While the Hanafi school is dominant among Sunnis in Afghanistan, the implementation of the Maliki understanding of faskh and tafriq in Afghanistan may be justified under the doctrines of takhayyur (selection of rules from different schools of law) and talfiq (synthesis of principles from different schools of law). The evocation of takhayyur and talfiq in expanding the grounds by which women may seek judicial annulment of their marriages or divorces is far from a radical concept. Schools of Islamic law all recognize each others’ authority, and significant borrowing between schools has taken place throughout the Muslim world, including in Afghanistan itself with the promulgation of the Afghan Civil Code of 1977. Organizations such as Women Living Under Muslim Laws facilitate such legal borrowing in countries implementing Islamic law by disseminating

61. ESPOSITO, supra note 54, at 35.
63. Modern reformers of Islamic personal status laws, including divorce laws, have liberally drawn upon both takhayyur and talfiq. Hallaq, supra note 62, at 257. One scholar has labeled takhayyur “one of the modernists’ favorite tools,” and noted that through this doctrine “modern legislators in Sunni countries have even resorted to Shi’i law in order to supplement their civil codes where Sunni law was deemed insufficient for their needs.” Id. Similarly, reformers have used talfiq to “combine[] . . . several elements pertaining to a single issue from more than one source.” Id. For example, Morocco has borrowed extensively from all four Sunni schools of thought as well as Shi’i schools in constructing the Moroccan Family Code. ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 178-81 (Abdullahi A. An-Na’im ed., 2002). The Moroccan Family Code allows a man to rescind his initiation of a divorce under certain circumstances, but only if he secures his wife’s agreement and confirmation by a judge and two witnesses. Moroccan Family Code, supra note 22, art. 124. While Morocco primarily follows the Maliki school of Sunni Islam, the necessity of two witnesses was adopted from Shi’i law and has origins in the Qur’ans text. Rabb, supra note 1, at 55. “This is an instance of borrowing from another school that seems to have no Maliki basis but is explicit in the Qu’ran.” Id. Similarly, although Islamic law in Malaysia is grounded upon the Shafi’i school of Sunni Islam, the country passed in 1984 the Islamic Family Law Enactment for the Federal Territories, which provides women the right to judicial divorce upon twelve conditions largely drawn from the Maliki school of law. Islamic Family Law (Federal Territory) Act 1984, No. 303, § 52 (1984) (Malay); KAMALI, supra note 54, at 95-96; Memorandum on Reform of the Islamic Family Laws and the Administration of Justice in the Syariah System in Malaysia, supra note 21. This borrowing was justified through a doctrine related to takhayyur and talfiq, known in Bahasa Melayu as al-siyasa al-syariyya, which recognizes the right of a state to enact legislation by choosing from among the four Sunni Islamic schools of jurisprudence that best furthers the interest of the community on matters where there is no specific text in the Qur’an or Sunna (as recorded in the hadith). Zainah Anwar, The Struggle for Women’s Rights Within the Religious Framework: The Experience of Sisters in Islam, in MODERN MALAYSIA IN THE GLOBAL ECONOMY: POLITICAL AND SOCIAL CHANGE INTO THE 21ST CENTURY 178, 183 (Colin Barlow ed., 2001).
64. MPI REPORT, supra note 34, at 8.
information about progressive developments in one country to activists in other countries.\textsuperscript{65}

The 2004 Constitution of Afghanistan privileges Hanafi jurisprudence but does not bar this legal borrowing. Article 130 provides, “[i]f there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.”\textsuperscript{66} Hanafi jurisprudence therefore serves to fill the gap when there is no statute or constitutional provision on point, as established in Afghanistan’s earlier constitution of 1964.\textsuperscript{67} Similarly, the 2004 Constitution of Afghanistan requires courts to apply the applicable Shi‘i school of law in cases involving personal law when no statute or constitutional provision is on point.\textsuperscript{68} The assignment of Hanafi jurisprudence, or the relevant Shi‘i school in cases concerning Afghan Shi‘i Muslims, to a gap-filling role does not prohibit, and actually creates room for, the passage of “other laws”—that is, statutory laws—based on precepts or lines of reasoning drawn from minority positions within Hanafi law or from other schools. If granted their demand for full constitutional rights to marry and divorce under Islam, Afghan women may forcefully argue for the reform of Afghan divorce law to incorporate Maliki law’s more expansive grounds for women to seek a judicial order of annulment or divorce, as compared with the more constrained options of Hanafi law or the applicable school of Shi‘i Islam. They may also advocate for the enforcement of these laws so that women may actually exercise their rights in courts.\textsuperscript{69}

Third, the drafters of the Afghan Women's Bill of Rights may also have called for women’s rights to marry and divorce under Islam as a strategic move. Afghanistan’s past has witnessed moments in which radical change with

\textsuperscript{65} See Sunder, supra note 21, at 1435.
\textsuperscript{66} CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004) art. 130 (emphasis added).
\textsuperscript{67} See CHRIS JOHNSON ET AL., AFGHANISTAN’S POLITICAL AND CONSTITUTIONAL DEVELOPMENT 26 (2003), available at http://www.odi.org.uk/hpg/papers/evaluations/afghanfid.pdf. The 1964 Constitution of Afghanistan provided that whenever no provision exists in the Constitution or the laws for a case under consideration, the court shall, by following the basic principles of the Hanafi jurisprudence of the shariaat of Islam and within the provisions set forth in this constitution, render a decision that in their opinion secures justice in the best possible way. CONST. OF AFG. (1964), art. 102, available at http://www.afghan-web.com/history/const/const1964.html. But see CONST. OF AFG. (1923), art. 2 (as amended Jan. 28, 1925), available at http://www.afghan-web.com/history/const/const1923.html (providing that “the religion of Afghanistan is the sacred religion of Islam” and “its official religious rite is the sublime Hanifite rite”).
\textsuperscript{68} CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 131.
\textsuperscript{69} Such a project is complicated by the fact that the co-existence of three legal systems in Afghanistan—customary law, Islamic law, and statutory law codified in the Afghan Civil Code of 1977—has generated significant confusion as to the Afghan law on divorce that is currently in force. See infra Subsection III.A.3. While some family law regulations of the civil code are actually based on the Maliki school, in practice, judges consider “uncodified classical hanafi law . . . the main source of law, superior to any statutory law.” MPI REPORT, supra note 34, at 8. This judicial nullification may subvert civil code reforms that seek to institute progressive formulations of Islamic law. See infra Subsection III.A.3.
respect to women’s rights has prompted prolonged backlash. Dr. Sima Samar, a female Deputy of the 2002 Emergency Loya Jirga, was charged with blasphemy and with “speaking out against [Islamic] law,” and received death threats due to her vocal participation on the council.\textsuperscript{70} More recently, the Afghan Supreme Court accused 2004 presidential candidate Abdul Latif Pedram of blasphemy for questioning the practice of polygamy and suggesting that women and men may have “an equal right to divorce.”\textsuperscript{71} It also tried to bar him from the race.\textsuperscript{72} Amnesty International reports that in reaction to this denunciation, female vice-presidential candidate Nilobar Mubarez stated, “We shouldn’t provoke. When society is ready to ask the question that Pedram asks, the women will ask it by themselves.”\textsuperscript{73} The fear of backlash has prompted many to advocate a slow, incrementalist approach that works “within the framework of Islam” as the “best and only way” to further women’s rights in Afghanistan.\textsuperscript{74} Rather than promoting dramatic change that will engender backlash, the incremental achievement of even gender-differentiated rights to marriage and divorce under Islam may significantly improve women’s status.

Even in the face of intense obstacles, Afghan women have already engaged in advocacy promoting women’s rights by calling for reforms grounded in Islam and Islamic law. Part II suggests ways in which the 2004 Constitution of Afghanistan expands and constrains their efforts.

II. THE 2004 CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN—CREATING SPACES FOR ISLAMIC FEMINISM

The inclusion of references to Islam in the 2004 Constitution of Afghanistan is not a new or particularly surprising phenomenon given the religion’s central position in the constitutions created by the country’s previous governments: monarchic/secular, communist, Mujahideen, and Taliban.\textsuperscript{75}

\begin{thebibliography}{99}
\bibitem{72} Isobel Coleman & Swanee Hunt, \textit{Afghanistan Should Make Room for Its Female Leaders}, CHRISTIAN SCI. MONITOR, Apr. 4, 2006 (referring to an unnamed presidential candidate who “question[ed] whether polygamy is in keeping with the spirit of Islam”).
\bibitem{73} WOMEN STILL UNDER ATTACK, supra note 39 (citing James Rupert, \textit{Eve of Afghanistan Elections}, NEWSDAY, Oct. 8, 2004). Amnesty found that Mubarez’s statement “exemplifies the cautious and precarious atmosphere under which the issue of advancing women’s rights is currently debated.” \textit{Id}.
\bibitem{74} WOMEN STILL UNDER ATTACK, supra note 39.
\end{thebibliography}
Rather than formally adopting Islamic law, the current constitution establishes Afghanistan as an Islamic Republic (Article 1),\textsuperscript{76} recognizes Islam as the state religion (Article 2),\textsuperscript{77} and prohibits the enactment of any law repugnant to the injunctions of Islam and the values of the constitution (Article 3).\textsuperscript{78}

The constitution also includes provisions explicitly and implicitly promoting women's rights. For example, Article 53 promises state support for "women without caretakers," those who lack financial support from a male guardian or husband.\textsuperscript{79} This provision has special significance for the many women who have lost breadwinning husbands, fathers, or brothers in the decades of conflict that have consumed the country and who lack access to viable economic opportunities due to discrimination or to Afghanistan's dismal economic situation. Article 33 is a gender-neutral provision that grants women an equal right to political participation, stating that "[t]he citizens of Afghanistan have the right to elect and be elected. The conditions of exercising this right shall be stipulated by law."\textsuperscript{80} Finally, Article 54 sets forth protections for women as mothers:

Family is the fundamental pillar of the society and shall be protected by the state. To attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam, the state shall adopt necessary measures.\textsuperscript{81}

This provision may be used to improve the position of women who are treated less favorably because of social taboos and customary practices that are justified in the name of Islam, but not found within its contours. These practices include forced marriage (which encompasses child marriage), preference for sons, and dowry.\textsuperscript{82} While these rights fall far short of the

\textsuperscript{76} "Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state."\textsuperscript{77} "The sacred religion of Islam shall be the religion of the Islamic Republic of Afghanistan."\textsuperscript{78} "Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state."\textsuperscript{79} "The state shall guarantee the rights of retirees, and shall render necessary aid to the elderly, women without caretakers, disabled and handicapped as well as poor needy orphans in accordance with the provisions of the law."\textsuperscript{80} "As a guarantee of the rights of the returned to the country, and the defense of public health and the prevention of disabilities, the state shall adopt certain measures of social welfare, as well as the protection of women as mothers."\textsuperscript{81} United Nations Office of the High Commissioner for Human Rights, Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No. 23, available at http://www.ohchr.org/EN/HRBodies/UP/Issues/HTP/docs/fs23.htm. Child marriage is considered a type of
expansive vision for Afghan women set forth in the *Afghan Women's Bill of Rights*, advocates operating within secular and Islamic idioms may call upon these provisions to press for legislation or funding that will help enable women to exercise their rights in these areas.

Most importantly, women's rights advocates, domestic and international, fought hard for Article 22, the 2004 Constitution of Afghanistan's equality provision, which declares that "[a]ny kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law." Article 149 of the constitution, which outlines the scope of permissible constitutional amendments, protects the equality provision by stating that any amendment to the "fundamental rights of the people shall be permitted only to improve them." The constitution itself does not define "discrimination" or "distinction." Other constitutional provisions nevertheless suggest how the judiciary may interpret these terms in the context of Article 22. Of particular importance is Article 7, which provides that "The United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights shall be respected." By requiring the government to comply with the international treaties to which Afghanistan is a party, this provision opens the door to arguments that the judiciary should interpret the terms "discrimination" and "distinction" to carry the meanings they hold, contested as these meanings may be, in international human rights treaties to which Afghanistan is a party. More generally, this provision empowers women's rights advocates to urge the government to comply with its obligations under treaties that safeguard women's rights, including CEDAW, which the country ratified without any reservation, and the International Covenant for Economic, Social, and Cultural Rights (ICESCR).

This explicit tie between the 2004 Constitution of Afghanistan and the international human rights instruments ratified by the country widens the playing field for both secular and Islamic calls for women's rights. For

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83. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 22.
84. *Id.* art. 149.
85. *Id.* art. 7.
example, secular advocates like RAWA may call on parliament to pass legislation expanding a woman’s right to divorce under the government’s Article 7 obligation to implement Afghanistan’s international commitment to CEDAW. Similarly, advocates grounding their activism in Islam may urge the parliament or judges to expand women’s rights to divorce on the basis that Article 7 supports the replacement of current conceptions of Islamic law in Afghanistan regarding women’s access to divorce with more progressive formulations, thereby promoting both the compatibility of laws with Islamic “beliefs and provisions” (Article 3) and Afghanistan’s implementation of its international obligations. Article 7 may, therefore, assist Islamic feminists in their efforts to supplant Islamic law as conceived (or misconceived) by hardline political Islamists with their own interpretations. For example, given the existence of two different conceptions of the grounds for women to seek judicial annulment and divorce in Hanafi and Maliki jurisprudence—one that is closer to CEDAW’s promise to afford women and men the same rights to divorce and one that is farther away—Article 7 may help Islamic feminists pass laws and influence judicial interpretation to supplant the latter understanding with the former, in the name of promoting Afghanistan’s constitutionally required compliance with its international obligations.

Not only does the constitution provide language and provisions for Islamic feminists to use in their advocacy for legal reform, the 2004 Constitution of Afghanistan also reserves for women twenty-five percent of the seats in the Wolesi Jirga, the lower house of the national legislature, and requires the president to appoint women to seventeen percent of the positions in the Meshrano Jirga, the upper house. Feminist advocates may seek to run for office themselves or promote other women who share their goal of enacting legislative reform to promote women’s rights. Once in power, female parliamentarians may seek to pass legislation advancing women’s rights and block the passage of detrimental laws or constitutional amendments. The latter tactic may be necessary, for example, in the event that the Taliban or other political Islamists regain control of Afghanistan and seek to amend constitutional provisions advancing women’s rights and status, such as those providing state support for “women without caretakers” and protecting the health of mothers. The constitution’s equality provision is arguably guarded by Article 149’s requirement that provisions promoting the “fundamental rights of the people” may be amended “only to improve them.” With the exception of Article 3, however, other constitutional provisions may be amended “with due respect to new experiences and requirements of the time,” leaving vulnerable constitutional safeguards for women that fall short of setting forth fundamental

88. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), arts. 83-84; see also KANDIYOTI, supra note 3 (discussing constitutional reservation of seats for women in both houses of the Afghanistan national legislature).
In either circumstance, an amendment “shall become effective with the proposal of the President and approval of the majority of National Assembly members.” That constitutional amendments may be effected through a simple majority vote further underscores the potential impact of reserving seats for women in the national legislature on the realization of women’s rights through legal reform. Nevertheless, even the institution of gender-based quotas in the national legislature cannot be lauded as a simple success. There is an expansive literature questioning the effect of reservations for women in national government on the passage of legislation, policy development and implementation, government legitimacy, and the participation of women in governance. As the literature suggests, the mere presence of women in the Afghan Parliament may not lead to a simple or direct increase in legislative reform promoting women’s rights. Not all women will seek to pass such legislation or to block legislation or constitutional amendments harming women’s rights, particularly in light of ethnic and religious divisions between women and the factionalism rampant in Afghan politics. The *Los Angeles Times* recently reported that “[e]ven among the 68 women in [Afghanistan’s] parliament, U.S. and United Nations officials estimate that half have militia ties, and can be counted on to keep quiet and vote as they are told.” Of course, there are others, like Zahera Sharif, a female member of parliament (MP) elected in 2005, who told the *Los Angeles Times* that she ran for office out of a desire to help women in her district by “‘taking all the women with [her]’ on her way forward.” Without a critical mass of women, however, even

89. Article 149 prohibits the amendment of Article 3’s requirement that “[n]o law shall contravene the tenets and provisions of the holy religion of Islam . . . .” CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), arts. 3, 149.
90. Id. art. 149.
91. See supra note 31.
92. Deniz Kandiyoti counsels that “[g]iven the factious nature of politics in Afghanistan, there is little a priori ground for making simplistic assumptions about women’s primary commitment to subscribing to a common agenda.” KANDIYOTI, supra note 3, at 22. The proceedings of the Constitutional Loya Jirga, where 100 of the 502 delegates were women, provide a case in point. LAURYN OATES & ISABELL SOLON HELAL, AT THE CROSSROADS OF CONFLICT AND DEMOCRACY: WOMEN AND AFGHANISTAN’S CONSTITUTIONAL LOYA JIRGA 26 (2004). There, “[a] majority of the female delegates . . . were affiliated with violent, conservative factions and voted in line with their demands, dividing women in accordance with ethnic, religious and factional identities, rather than under their shared identity as women.” Id. at 28. Some women affiliated with factions went so far as to intimidate other female delegates. Id. In this context, women who sought to promote the inclusion of constitutional protections for women’s rights were left to “work[] individually, isolated from each other and restricted in the impact they could make.” Id. While the experience of the Constitutional Loya Jirga is not determinative of future dynamics in the Afghan Parliament, it does suggest that promoting women’s rights in the national legislature may remain challenging, even after the institution of quotas for female representation.
94. Id.
those who seek to advocate for women's rights may face difficulty promoting minority positions.  

In 2005, Afghanistan's new parliament was formed with the country's first direct election, in which female MPs exceeded the seats set aside for women in the Wolesi Jirga. At least some of these women, like Sharif, will seek to use their position to promote women's rights. In theory, women (and men) in the Afghan Parliament who endeavor to improve the situation of Afghan women may point to constitutional provisions not just to secure the passage and implementation of specific pieces of legislation to promote women's rights, but also to secure needed funding and resources to enable women to exercise these rights on the ground.

Despite these positive signs, the institution of judicial review by the 2004 Constitution of Afghanistan serves as a check on the potential impact of women as legislators in the new Afghanistan. As discussed, Article 3 mandates that "no law shall contravene the tenets and provisions of the holy religion of Islam." Article 121 of the constitution grants the Supreme Court the power of judicial review to strike legislation for incompatibility with this provision. The 2004 Constitution of Afghanistan is conspicuously silent on what constitutes "tenets" or "provisions of the holy religion of Islam." This omission is particularly problematic in light of the wide-ranging and often contradictory discourse on Islamic interpretation and the ever-present threat of a conservative Islamist upsurge led by remnants of the Taliban power structure.

95. Jane Mansbridge has argued that representatives of subordinate groups need the support of "a critical mass to become willing to enunciate minority positions" and "to convince others—particularly members of dominant groups—that the perspectives or insights they are advancing are widely shared, genuinely felt and deeply held within their group." Mansbridge, supra note 31, at 24.


97. The potential of electoral reservations for women in national government to improve conditions for Afghan women extends beyond the possibility that female MPs will vote on constitutional amendments, legislation, or appropriations with this goal in mind. They may also use their positions to advocate for women on the ground. For example, Zahera Sharif has sought to improve girls' education in her district both by personally persuading educated women to work as teachers for girls and by convincing families to permit their daughters to attend school. Rubin, supra note 93. In the future, both female MPs like Sharif and male MPs who support women's rights may seek to enhance these on the ground efforts with calls for legislative measures like increased funding for girls' education in parliament.

98. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 3.

99. Article 121 of the constitution provides, "At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law." Id. art. 121.

While the 2004 Constitution of Afghanistan offers important tools for Islamic feminists to use in their advocacy for women's rights, it presents potential checks, in the form of vague provisions and the institution of judicial review, on their capacity to enact change. The constitution is therefore a limited step in the right direction: It expands Afghan women's ability to advocate for their rights from the extremely narrow spaces available in immediately preceding regimes even as it limits the breadth of that expansion. Moving beyond a textual analysis of the constitution itself, however, is critically necessary to achieve a better understanding of the capability of Islamic feminist advocacy to secure improvements not only in the formal law, but in women's lives. An examination of the legal and extra-legal constraints on their efforts provides a more nuanced and contextualized understanding of Islamic feminism's capacity to advance women's rights and status in present-day Afghanistan.

III. CONSTRAINTS ON ISLAMIC FEMINISM IN AFGHANISTAN

An early reminder that serious obstacles confront Islamic feminist advocacy was the failure of President Karzai and members of the constitutional drafting commission to follow through on their promise to include the demands of the *Afghan Women's Bill of Rights* in the 2004 Constitution of Afghanistan. Constraints both inside and outside of the law threaten the potential of Islamic feminism to improve women's opportunities in Afghanistan. These constraints bolster the possibility that judicial review by unelected jurists will be used to curb advances for women won by Islamic feminists in the Afghan Parliament even when undertaken within the framework of Islam. They also threaten to undermine the impact of successful change of the formal law—either through legislative means or influence on judicial interpretation—on women's lives. Three categories of constraints—structural deficiencies in the Afghan judiciary, the pervasive lack of security in Afghanistan, and women's low socio-economic status—merit exploration for their potential to restrict the advancement of women's rights through Islamic legal reform. This Part briefly addresses each of these obstacles in turn.

A. Structural Deficiencies of the Judiciary

Key characteristics of Afghanistan's judicial system may confine the efforts and impact of those who seek to advance women's rights through reform of Islamic law. Three main structural deficiencies include the politicization and gender-bias of the judiciary, the weakness of the formal legal system, and the lack of clarity surrounding applicable law.
1. Politicization and Gender-Bias of the Judiciary

Mawlavi Fazl Hadi Shinwari, Afghanistan’s first Chief Justice under the current internationally-backed regime of Hamid Karzai, started the country’s Supreme Court off on a noticeably reactionary and politicized path. Only ten days after the close of the Constitutional Loya Jirga, the new Supreme Court made a troubling and controversial decision when it declared as “un-Islamic” the first broadcast of a female vocalist on Afghan state television in twelve years. The Supreme Court denounced the performance despite the fact that pop star Salma covered her hair with a headscarf while singing.

While Article 121 of the Constitution of Afghanistan permits the Supreme Court to engage in the review and interpretation of laws, legislative decrees, and international treaties “[a]t the request of the Government or courts,” the Court made this decision without any case before it and based on no existing law or referral of the issue by the government. The Supreme Court’s Deputy Chief Justice Fazl Ahmad Manawi offered an explanation for the decision that alludes to the Court’s bias: “We are opposed to women singing and dancing as a whole . . . . [A]nd it has to be stopped.”

With this decision, the new Supreme Court of Afghanistan set a precedent for exceeding the constitutional limitations on its own power. That it did so is no surprise in light of the leadership of the Court and the institutional path on which it has embarked. Chief Justice Shinwari was initially appointed by former President Burhanuddin Rabbani in 2001, and then reappointed by current President Hamid Karzai. Shinwari has introduced or exacerbated numerous institutional problems in the Afghan judiciary. The position of Chief Justice is particularly powerful: Besides heading the Supreme Court, he oversees the exercise of the Supreme Court’s authority to appoint lower court judges with the approval of the President.


4. Woman Singer Angers Afghan Judges, BBC NEWS, Jan. 14, 2004, http://news.bbc.co.uk/2/hi/south_asia/3396283.stm. Shinwari has also attempted to ban “anti-Islamic” news organizations for other supposed offenses, including featuring women news anchors. Jacinto, supra note 41, at 11 n.2. President Karzai has failed to support the media with any consistent policy. Id. News organizations have instead sought protection in Article 34 of the Constitution, which provides that “[f]reedom of expression shall be inviolable,” and that “[e]very Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this Constitution.” CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 34.


Constrained Spaces for Islamic Feminism

Islamist militia leader Abdur Rasool Sayyaf,\(^{107}\) Shinwari represents one of the most reactionary political figures in Afghanistan on the issue of women’s rights. He has drawn sharp critiques from domestic and international human rights advocates for his declaration that “equality of sexes” should not be a part of Afghanistan’s constitution.\(^{108}\) To further his aims, Chief Justice Shinwari oversaw the appointment of likeminded conservatives to all levels of the judiciary.\(^{109}\) Most of these appointees lack professional judicial experience and secular legal training, and have been trained only in classical Islamic law, if at all.\(^{110}\) Both the Supreme Court and the Ministry of Justice have drawn criticism for their dominance by religious conservatives and political Islamists without education in secular law.\(^{111}\) Shinwari also created the Religious Edict Council in the Supreme Court, an institution of dubious constitutionality, to enforce Article 3,\(^{112}\) and by 2003, oversaw appointment of 137 judges to the Supreme Court, which is to consist of only nine members under the current constitution.\(^{113}\)

Under Shinwari’s leadership, the Supreme Court sided consistently with conservatives, dashing the hopes of reformers and threatening the rights of women. In the process, it also overstepped its own constitutional boundaries and Afghan law. The Supreme Court sought to ban co-education not through a valid exercise of its Article 121 power to conduct judicial review or issue advisory opinions responsive to government requests, but by labeling it “un-Islamic.”\(^{114}\) It similarly flouted Afghan civil law by upholding child

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112. Sadat, \textit{supra} note 111, at 50; Thier, \textit{supra} note 9.
113. CONST. OF THE ISLAMIC REPUBLIC OF AFG. (2004), art. 117 (establishing a Supreme Court of nine justices, each serving staggered terms of no longer than ten years); AMNESTY INT’L, AFGHANISTAN: RE-ESTABLISHING THE RULE OF LAW 12 (2003), \textit{http://web.amnesty.org/library/pdf/ASA110212003ENGLISH/SFile/ASA1102103.pdf} (reporting that in 2003, 137 judges had been appointed to the Supreme Court). At the time of Amnesty International’s report, the then-in-force 1964 Constitution of Afghanistan also permitted a Supreme Court of only nine justices. 1964 AFGHAN CONST. art. 105, \textit{available at} \textit{http://www.afghan-web.com/history/const/const1964.html}. It is unclear if the extra 128 justices on the Supreme Court have been dismissed since the ratification of the 2004 Constitution.
114. Thier, \textit{supra} note 101, at 7 n.10.
marriages, despite the requirement that girls may not be legally married before the age of fifteen. The politicization and corruption of the judiciary under Shinwari’s leadership, and its domination by religious conservatives, have prompted observers to call upon President Karzai to dismiss the entire Supreme Court and reappoint “respected and experienced Afghan jurists” representing a greater diversity of views—a power granted to Karzai by the 2004 Constitution, but which he has chosen not to exercise.

The bias of the post-Taliban Supreme Court against women’s rights reflects not only the recent appointment of conservatives like Shinwari, but long-standing, structural problems. Afghanistan notably lacks a strong recent history of female judging. Shortly after coming to power, the Taliban almost completely banned women from working outside the home and dismissed all female judges. While women judges do serve in Afghanistan’s lower courts and women currently head both the Family and Juvenile Courts, statistics on women on the Afghan bench paint a dismal picture. According to an estimate provided by the Afghan Women Judges Association, women constitute a mere three and a half percent of the judiciary. Female judges are infrequently found outside of Kabul and are largely “confined to lower levels.” Not a single woman has secured a position at the judiciary’s highest level, the Scholar Council of the Supreme Court. A 2003 Amnesty International report revealed that the biases of many male judges pose a primary obstacle to increasing women’s representation on the bench.

115. Coleman & Hunt, supra note 72, at 9 (reporting that the Supreme Court “upheld the marriage of a 9-year-old girl”); UN Special Rapporteur Report on Afghanistan, supra note 110, ¶ 26 (reporting that Chief Justice Shinwari “condemn[ed] child marriage as being against Islam and Afghan laws and tradition,” while nevertheless refusing to rule on the validity of an eight-year-old girl’s marriage until she reached the age of fifteen).


120. Id. While the 1976 Afghan Code of Civil Procedure sets forth that every district in Afghanistan shall have a specific family court, only one family court in Kabul has been established. MPI REPORT, supra note 34, at 5.

121. In April 2006, UNIFEM reported, “[t]he Afghan Women Judges Association . . . estimates that of roughly 2,000 sitting judges in Afghanistan, between 65 and 70 are female,” figures that correspond to approximately 3.5% of the judiciary. UNIFEM, supra note 119. While this percentage is a slight increase from Amnesty International’s 2003 report that women composed 1.3% of the judiciary, it remains unimpressive. AMNESTY INT’L, supra note 113.


123. UNIFEM, supra note 119.

124. Id.

125. AMNESTY INT’L, supra note 113, at 12-16.
interviews, some judges "expressed a lack of concern for, and even resistance to, the greater inclusion of women in the judiciary;" others commented that "more women in the judiciary . . . would only be appropriate . . . in the family and juvenile courts;" and "many senior judges expressed outright opposition to increasing the number of women judges." Chief Justice Shinwari indicated that his clear priority was to address male unemployment before "turn[ing] our attention to women." Women's exclusion from Islamic education and positions of religious authority contributes to such bias. According to the United Nations Development Fund for Women (UNIFEM), an Amnesty International report found that:

[A] main reason for women's exclusion from the Supreme Court lay in a popular belief among legislators that women were not as well trained in religious matters as men. Many male judges are often former or practicing religious leaders, and since women are not allowed to participate in Islam as mullahs or religious authorities, they are often considered less qualified as judges.

A 2004 Amnesty International report also indicates that even when women achieve positions on the bench, they are often relegated to the work of judicial clerks rather than the task of judging cases. The marginalization of women in the judiciary undermines the possibility that female judges who interpret Islamic and Afghan law to grant women more expansive rights than those envisioned by many of their male counterparts will exercise significant influence.

While many male judges are biased against women, it is important to note that such bias varies between individual judges and throughout the country, as does its force as a constraint on the abilities of Islamic feminists to institute positive change. For example, an Appeals Court Judge in Kandahar, the former seat of Taliban power, stated in 2004: "Women are the property of men from the waist down." In contrast, Deputy Chief Justice Manawi indicated in an interview with Amnesty International that "forced marriage is a crime in statutory and Shariah law." Gender bias amongst the judiciary and other law enforcement officials may also vary along regional lines. Amnesty International reports that, based on its "limited research," officials in "the northern, western, and central parts of Afghanistan" hold broader understandings of women's rights than those in the southern and eastern parts of the country.

126. Id. at 14-15.
127. Id. at 15.
128. UNIFEM, supra note 119.
129. AMNESTY INT'L, supra note 122, at 1.
130. WOMEN STILL UNDER ATTACK, supra note 39, at 25.
131. Id. at 26.
132. Id.
Rights Watch has similarly documented that the enforcement of rights is extremely diverse across the country.\footnote{133. HUMAN RIGHTS WATCH, "KILLING YOU IS A VERY EASY THING FOR US": HUMAN RIGHTS ABUSES IN SOUTHEAST AFGHANISTAN 75 (2003), available at http://hrw.org/reports/2003/afghanistan0703/ (describing variation in women's security and mobility in different provinces). Rights violations occur more often in Kandahar, Jalalabad, and more rural areas than in Kabul. Id.}

There may be reason for hope that the politicization and gender-bias of the Afghan judiciary will change in the future. President Karzai's May 2006 Supreme Court nominations were the first to be subject to parliament's scrutiny since the institution of the new administration.\footnote{134. Coleman & Hunt, supra note 72, at 9.} While parliament overlooked Karzai's failure to propose a single woman for the Supreme Court,\footnote{135. Id.} it at least firmly rejected his nomination of Mawlavi Fazl Hadi Shinwari for a renewed tenure as Chief Justice. Instead, parliament approved the President's second nominee, Abdul Salam Hazimi, in July 2006.\footnote{136. Joe Shaulis, Afghan Parliament Approves Second Karzai Nominee for Chief Justice, JURIST, July 31, 2006, available at http://jurist.law.pitt.edu/paperchase/2006/07/afghan-parliament-approves-second.php.} Hazimi has distinguished credentials amongst Islamic jurists as a graduate of Al-Azhar University in Egypt, "the Sunni Muslim world's highest seat of learning."

Unlike his predecessor, however, he has also studied in the United States\footnote{137. Rahim Faiez, Afghan Lawmakers Approve Chief Justice, S.F. CHRON., July 31, 2006, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/07/31/international/i043071D90.DTL.} and is considered a "moderate technocrat."\footnote{138. Id.} Moreover, Hazimi and the other recent appointments to the Supreme Court have no known ties to political Islamists. Observers may hope that the appointment of far more moderate jurists to the Supreme Court will mitigate the politicization and gender-bias of the judiciary under Shinwari and leave more room for feminists and others who advocate for the appointment to the bench of more women and judges—whether male or female—who are sympathetic towards women's rights.

2. Multiple Legal Regimes and the Limited Reach of Formal Legal Rules

While the 2004 Constitution of Afghanistan introduced tools for Islamic feminists to use in advocacy to improve women's formal rights through legislative change at the national level, this strategy for improving women's status is inherently limited by the relatively weak hold of formal, national legal institutions in Afghanistan. Commentators have long noted that Afghanistan's legal system is not uniform.\footnote{139. Amin Tarzi, Afghanistan: New Supreme Court Could Mark Genuine Departure, RADIO FREE EUR./RADIO LIBERTY, Aug. 11, 2006, http://www.rferl.org/featuresarticle/2006/08/9d8df381-b4fe-442f-a02b-e78c8ad3e850.html.} Instead, the country features three competing...
legal institutions—the customary legal system, Islamic law, and state legal codes—that have varied in strength and prevalence across time and geographic region. While central authorities have attempted to institute statutory and Islamic laws through formal judicial institutions throughout Afghanistan's history, current accounts describe the formal justice system as relatively weak even in urban centers where the central government is strongest. In the rural areas that hold approximately seventy-five percent of the population and where functioning courts, police, and other formal legal institutions are virtually nonexistent, the formal judicial system is seen as remote, elitist, illegitimate, bankrupt, costly, and slow. Because of this, Islamic feminist advocacy for national legislation and reform of the composition and interpretive methodology of the national judiciary may have a limited ability to concretely improve women's lives. As one scholar has noted, "Afghanistan’s official law, i.e., the formal legal system established under the provisions of a constitution, does not represent the de facto norms that govern the lives of the majority of the population."

In the face of recent decades of conflict and the collapse of the formal legal system, the informal system has further solidified its position in Afghanistan. The informal system is grounded in Afghan customary law, distinguishable from both Islamic and statutory law as "the means by which local communities resolve disputes in the absence of (or in opposition to) state or religious authority." Reports estimate that Afghans resolve the vast majority of civil

141. The development of parallel formal and informal judicial systems first originated in the 1880s when Mir Abdur Rahman sought to create a "coherent, defined legal system" based on the Hanafi school of Islamic jurisprudence as part of his state-building campaign. THOMAS BARFIELD, NEAMAT NOJUMI, & J. ALEXANDER THIER, THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN 18 (2006), available at http://www.usip.org/ruleoflaw/projects/clash_two_goods.pdf [hereinafter CLASH OF TWO GOODS].

142. Id. at 20. Martin Lau, a scholar of Afghan law, notes that "[w]ithout exception every single survey of Afghanistan’s legal system . . . observed, and frequently lamented, the fact that Afghanistan’s statutory laws and regulations existed, for all practical purposes, on paper only.” MARTIN LAU, INT’L COMM’N OF JURISTS, AFGHANISTAN’S LEGAL SYSTEM AND ITS COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS STANDARDS 7 (2003).

143. CLASH OF TWO GOODS, supra note 141, at 2.

144. Id., supra note 142.

145. Almost three decades of disorder, civil war, and invasion in Afghanistan have thrown the already precarious balance between customary law, Islamic law and statutory law into “complete disarray.” CLASH OF TWO GOODS, supra note 141, at 2.

146. Id. at 6. “Customary law . . . is based on a common cultural and ethical code that generates binding rules on its members. Communities use this code to resolve disputes, evaluate actions for praise or blame, and impose sanctions against violators of local accepted norms.” Id. A source of significant confusion is the relationship between Islamic and customary law. The two are not one and the same, despite the evocation of Islam by authorities in customary law systems. In Afghanistan, customary law has been "highly localized" and administered by respected community members or leaders who lack any formal training. Id. at 12-13. In contrast, Islamic law has been considered "universally applicable to all times and places," its precepts articulated and administered by professional qadis (judges) trained in classical Hanafi law. Id. at 12. Islamic religious authorities in Afghanistan have looked down on customary law practices and have attempted to supplant them with Islamic interpretations requiring religious authorities’ involvement in dispute resolution. Id.
and criminal disputes in informal customary-law institutions, which are considered more rapid and cost-effective than formal institutions.\textsuperscript{147} While customary legal systems in Afghanistan vary widely by geographic region and along ethnic and religious lines,\textsuperscript{148} they share the goal of eschewing the punishment of perpetrators for the restoration of harmony through equitable settlements reached by a \textit{jirga} or \textit{shura} (council) with the assistance of respected community members or elders as "fact finders and decision-makers."\textsuperscript{149} The Pashtunwali code of Afghanistan's dominant Pashtun ethnic group prevails in the southern and eastern region of the country.\textsuperscript{150} It propounds a restorative approach to conflicts, providing "compensation for the wrong done and social reconciliation" through the transfer of money, goods, services, animals, or women from the family of the wrong-doer to the family of the abused.\textsuperscript{151} For example, the customary law of the Ahmed Zai Pashtun tribe prescribes, as a typical remedy for the crime of "intentional murder without abuse or torture," the forced marriage of two virgin girls from the perpetrator's family to a relative of the victim.\textsuperscript{152} In this way, customary law actually harms women. While not all customary law systems promote the exchange of women as a restorative measure,\textsuperscript{153} the co-existence of formal and informal legal institutions and the dominance of unreformed customary forms of dispute resolution threaten to limit the potential of national legislation or judicial reforms to impact women's daily lives.

Thus, even if the formal Afghan judiciary was not politicized or dominated by religiously conservative and gender-biased male judges, the weak reach of

\textsuperscript{147} UN Special Rapporteur Report on Afghanistan, supra note 110, ¶ 53 (noting that 80% of disputes are resolved informally); CLASH OF TWO GOODS, supra note 141, at 3 (80-90%); Coleman & Hunt, supra note 72 (85%). Most Afghans would not consider using a government court for dispute resolution. THOMAS BARFIELD, U.S. INST. OF PEACE, INFORMAL DISPUTE RESOLUTION AND THE FORMAL LEGAL SYSTEM IN CONTEMPORARY NORTHERN AFGHANISTAN 1 (Draft Apr. 21, 2006), available at http://www.usip.org/ruleoflaw/projects/barfield_report.pdf ("The courts and judges are widely disliked and avoided by most residents as a way to resolve disputes. People complain that the courts are too slow, expensive, and corrupt."). One survey found that "only 16% of Afghans would go to a government court to resolve their disputes." CLASH OF TWO GOODS, supra note 141, at 3 n.4 (citing ASIA FOUND., AFGHANISTAN N 2006: A SURVEY OF THE AFGHAN PEOPLE (2006)).

\textsuperscript{148} Afghanistan is characterized by a high degree of ethnic diversity. It is home to Pashtuns (40-45% of the population), Tajiks (30%), Hazara (15%), Uzbek (8%), and Turkmen (3%). CLASH OF TWO GOODS, supra note 141, at 5. Many of these larger ethnic groups also feature considerable internal diversity. \textit{Id.} Both between and within ethnic groups, there is a considerable range in the formality and systemization of dispute resolution systems. \textit{Id.}

\textsuperscript{149} Id. at 6-7. For a detailed account of the various customary legal institutions in Afghanistan, see INT'L LEGAL FOUND., THE CUSTOMARY LAWS OF AFGHANISTAN (2004), available at http://www.usip.org/ruleoflaw/projects/ilf_customary_law_afghanistan.pdf.

\textsuperscript{150} CLASH OF TWO GOODS, supra note 141, at 7. The Pashtunwali is "an oral tradition that consists of general principles and practices (tsali) that are applied to specific cases." \textit{Id.}

\textsuperscript{151} Id. at 8; Drumbl, supra note 11, at 384.

\textsuperscript{152} Drumbl, supra note 11, at 384.

\textsuperscript{153} In a 2006 study of customary legal institutions in Northern Afghanistan, Thomas Barfield noted that there was "universal condemnation of bad (exchange of women in marriage as compensation)" and "a strong move to condemn and prohibit all forms of forced marriage as in violation of [Islamic] law and hence un-Islamic." BARFIELD, supra note 147, at 11.
the formal system would promise to mitigate the impact of national advocacy grounded in religious discourse. In other words, reform of Islamic law will not automatically translate into reform of localized customary law or its implementation, without specific advocacy aimed at transforming customary legal institutions themselves. The latter project will not be easy in light of the fact that Afghan women’s exclusion from the formal judicial system is surpassed only by their exclusion from positions of authority within informal customary law institutions that largely shun women’s participation.  

Nevertheless, some Islamic feminists have specifically targeted the existence of multiple legal regimes and the limited reach of formal legal rules as sites for advocacy, arguing for the differentiation of patriarchal customary law norms from Islamic law. At a conference called the Islamic Awareness Program, women in Afghanistan invited male religious scholars to reconsider their understanding of the rights afforded to women under Islam. Indeed, legal hybridity does not itself restrict women’s ability to advocate for their rights through the interpretation of Islamic law. The co-existence of multiple legal regimes and the limited reach of formal law may create the opportunity for Islamic feminists to proffer their own interpretations by preventing the dominance of any single norm. Within the context of normative competition, women may find spaces to articulate and advance progressive understandings of Islamic law that contest classical formulations or customary laws that curtail women’s rights. This project lies at the heart of Islamic feminism. However, the following Subsection suggests that within the context of a largely gender-biased judiciary, pervasive insecurity, and women’s low socio-economic status, the confusion resulting from legal hybridity in Afghanistan seriously constrains the potential of Islamic feminism.

3. Ambiguity Regarding the Law

The co-existence of regimes of customary, Islamic, and statutory law has combined with decades of statelessness, lack of education, and poor judicial training to foster considerable confusion as to the law that is currently in force.
in Afghanistan. Ordinary citizens are largely unaware of the sources of law or the rights they afford. This problem is particularly acute with respect to the rights of women and their legal status. Legal ambiguity thereby acts as another potential constraint on the efforts of Islamic feminist advocates to use the law as a vehicle to promote women’s rights. A primary example of this confusion is the uncertain status of detained women in Afghanistan. During his June 2002 visit to Afghanistan, scholar Martin Lau observed that approximately thirty women were held in a Kabul jail. Based on information provided by the Law Section of the Ministry of Women’s Affairs, Lau reported that the majority of these women were detained for “crimes” that have no foundation in Afghan criminal law or Islamic law, such as “refusing to live with their [abusive] husbands, refusing to marry a husband chosen by their parents, or for having run away from either the parental or the matrimonial home.” Uncertain of their rights and without advocates to fight for their release, women often remain in jail under such false pretenses. Lau remarked that, shockingly, not only did detained women have little information about their legal rights, but even the attorneys at the Ministry of Women’s Affairs lacked knowledge about women’s rights and the lawfulness of their imprisonment.

Confusion surrounding the applicable law undermines the impact of even existing laws that seek to advance women’s rights. In 1977, Afghanistan passed a civil law that introduced significant reforms of family law by revising provisions of Hanafi jurisprudence in force at the time. The Afghan Civil Code of 1977 permits women to choose their spouses, mandates state registration of all marriages, requires girls to reach the age of fifteen before marriage, and raises the age of consent for marriage to sixteen for girls and eighteen for boys. The Civil Code also reforms classical Hanafi divorce law by ceasing to recognize a man’s pronouncement of talaq (unilateral divorce) while intoxicated. While the law does not outlaw polygamy, in order for a man to enter a second marriage, he must prove that it will not cause injustice to any wife, that he can provide materially for all wives, and that he has a lawful reason for taking an additional wife, such as the first wife’s serious illness or barrenness. Failure to prove these conditions provides the grounds for a

158. MPI REPORT, supra note 34, at 10 (“It can be estimated that 90% of the population have only a very vague idea of what the concept of law implies or what the sources of law are.”).
159. LAU, supra note 142, at 25.
160. Id.; see also KANDYOTI, supra note 3, at 25. The UN Special Rapporteur on Violence Against Women, Yakin Ertürk, similarly observed during her 2005 visit that most women in Afghanistan’s prisons were “detained on charges related to sexual offences, such as adultery, illicit sexual intercourse or prostitution” or for offenses like “running away from home” [which are] clearly not . . . offence[s] under criminal or Islamic law.” UN Special Rapporteur Report on Afghanistan, supra note 110, ¶ 41.
161. LAU, supra note 142, at 25.
162. Id. at 24. The Afghan Civil Code of 1977 differentiates between the minimum age required for girls to marry and the “legal capacity” to marry. Id.
163. Id.
164. Id. at 24-25.
court’s refusal to register the marriage.\textsuperscript{165} Significantly, the 1977 Afghan Civil Code permits a woman to seek judicial divorce if her husband fails to make such a showing,\textsuperscript{166} thereby expanding the traditional grounds for \textit{tafriq} divorce in \textit{Hanafi} law. It also allows a woman to include a clause in her marriage contract granting her the option to initiate divorce if her husband attempts to take a second wife, whether or not he fulfills the statutory conditions.\textsuperscript{167} Finally, the Code expands the grounds for judicial divorce from those permitted in classical \textit{Hanafi} law to include the husband’s affliction with an “incurable disease,” his failure to financially support his wife, and his absence or imprisonment under certain conditions.\textsuperscript{168}

Despite the existence of the Afghan Civil Code of 1977, identifying the current family law (or any law, for that matter) in force in Afghanistan is a difficult task, particularly since the country has seen six different governments or ruling coalitions since 1964, each of which led to the promulgation of a new constitution or new basic laws for the country.\textsuperscript{169} The impact of frequent regime change has been exacerbated by nearly three decades of civil and political conflict, which together have caused the “withering away” of the Afghan Civil Code of 1977 and the reintroduction of “largely unreformed \textit{Hanafi} family law and customary law into the sphere of family law.”\textsuperscript{170} Inadequate resources and lack of training for Afghan judges also compound this problem. During the course of over two decades of conflict and Taliban rule, most statutes were destroyed or lost.\textsuperscript{171} As of 2003, judges, lawyers, and educational institutions all lacked “access to applicable statutes and associated legal materials.”\textsuperscript{172} Despite a report that copies of Afghanistan’s principal legal codes were disseminated throughout the country by various NGOs,\textsuperscript{173} the UN Special Rapporteur on Violence Against Women observed in 2005 that many

\begin{footnotesize}
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\item Id. at 25.
\item Id.
\item Id. This type of divorce is reminiscent of \textit{tawfid} (divorce by stipulation), but more expansive since a woman may include such a clause in her marriage contract absent her husband’s delegation of his right to divorce. For a definition of \textit{tawfid} and discussion of delegated divorce, see sources cited \textit{supra} note 54 (setting forth classical Islamic divorce law).
\item LAU, \textit{supra} note 142, at 25.
\item CLASH OF TWO GOODS, \textit{supra} note 141, at 19. In other words, “the corpus of statutory laws presents itself in layers, each layer representing particular periods of governance.” LAU, \textit{supra} note 142, at 9. Since the promulgation of the 1964 Constitution of Afghanistan, the country has witnessed the proposal of six constitutions, of which five were ratified. CLASH OF TWO GOODS, \textit{supra} note 141, at 19. While the Taliban did not develop a constitution after they assumed power, they sought to “implement[] Shari’a law” through a “series of repressive decrees.” INT’L CRISIS GROUP, AFGHANISTAN: WOMEN AND RECONSTRUCTION (Mar. 14, 2003), http://www.crisisgroup.org/library/documents/report_archive/A400919.14032003.pdf; see \textit{supra} note 75. Each of these regimes engaged in significant lawmaking, and the task of determining which law remains in force and should be applied is both political and controversial. LAU, \textit{supra} note 142, at 20.
\item LAU, \textit{supra} note 142, at 25.
\item Id. at 4.
\item Id.
\item MPI REPORT, \textit{supra} note 34, at 8.
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judges "have no knowledge of the official legal system and no access to collections of laws or official gazettes . . .\".\textsuperscript{174}

Confused by the competing statutory, Islamic, and customary laws, deficient in training or education as to secular law, lacking access to legal texts, and lacking even a general awareness of the formal legal system, many judges in the formal sector apply their own conceptions of the law to disputes rather than applying the law on the books.\textsuperscript{175} According to a 2005 report by the Max Planck Institute, judges of the high courts and members of local jirgas (assemblies) report that the sources of family law in Afghanistan include customary law, Islamic law, and the Afghan Civil Code of 1977.\textsuperscript{176} While most of the family-law regulations of the Civil Code are based on the Hanafi school of law, significant portions of the Code departed from this school of law by adopting provisions from Maliki jurisprudence, such as those expanding the grounds for female-initiated divorce detailed above.\textsuperscript{177} However, in practice, judges and jirga members report that "uncodified classical hanafi law is considered the main source of law."\textsuperscript{178} Thus, even if more progressive interpretations of Islamic law are incorporated within the civil code from other schools of Islamic law through the application of doctrines such as ta\textsuperscript{fi}q and takhayyur, or from a revisiting of the Qur'an and Sunna, Afghan judges and jirga members on the ground may bypass these revised laws to implement stricter Hanafi interpretations.\textsuperscript{179}

This practice of judicial discretion in the face of the statutory code is particularly harmful to women in the realm of divorce. Not only have judges nullified divorce rights for women drawn from Maliki law and incorporated in the Afghan Civil Code of 1977 by simply applying Hanafi law, they have even denied rights granted to women under Hanafi law itself. For example, the Afghan Civil Code of 1977 permits women to seek a judicial separation in certain limited circumstances, such as those permissible under the classical Hanafi conception of ta\textsuperscript{fi}q.\textsuperscript{180} Reports indicate that in practice, however,

\textsuperscript{174} UN Special Rapporteur Report on Afghanistan, \textit{supra} note 110. In his 2003 study of legal institutions in Afghanistan, Lau discovered that "[n]ot a single court visited . . . in either Kabul or Mazar-e-Sharif had access to or a collection of Afghanistan's main statutory laws. Even the Ministry of Justice and the University of Kabul do not hold complete sets of Afghanistan's statutory laws and regulations." \textit{Lau, supra} note 142, at 7. International groups have sought to assist Afghan authorities in rectifying this problem, including by collecting, reprinting, and providing copies to the Ministry of Justice. \textit{Id.}

\textsuperscript{175} \textit{CLASH OF TWO GOODS, supra} note 141, at 20.

\textsuperscript{176} \textit{MPI REPORT, supra} note 34, at 8.

\textsuperscript{177} \textit{Id.} The Hanafi school of Islamic law gained authority "as the basis for judicial decision-making" in 1885 when Amir Abdur Rahman adopted the Asas al-quzat (Fundamentals for Judges) as a "code of procedure and ethics." \textit{CLASH OF TWO GOODS, supra} note 141.

\textsuperscript{178} \textit{MPI REPORT, supra} note 34, at 8.

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Lau, supra} note 142, at 25. One such circumstance permitted by classical Hanafi law and the 1977 Afghan Civil Code is when a woman's husband is missing. \textit{Id.}
judges do not apply the Code. The head of the provincial court of Kunduz reported that there is no such thing as a “divorce” for women and that women have only the right to “separation” whereas men have the right to divorce even without a reason. Legal ambiguity in Afghanistan is exacerbated by the Supreme Court’s recruitment of judges from madrasas (religious schools), where judges are instructed in Islamic law but not statutory law, and from judges’ lack of understanding of the formal justice system or secular law due both to their skewed training and to the unavailability of legal texts. Together, these forces permit judges “to apply what they perceive as sharia over the secular law,” even if the latter may have been specifically instituted to promote women’s rights. In addition, even when interpreting Islamic law, judges often differ in their understanding from religious leaders and others working within customary law institutions, undermining even the consistent application of Islamic laws that are beneficial to women. Despite the constitutional provision that permits the default application of Hanafi law only in the narrow segment of cases in which no statutory law applies, in practice, judges apply Hanafi law to a far wider range of issues.

The politicization and gender bias of the judiciary, the weakness of the formal legal system, and the lack of clarity surrounding applicable law threaten to counteract the transformative potential of Islamic feminists to reform Islamic law through the passage of legislation in the Afghan Parliament. These structural features of the Afghan judiciary permit unelected judges to apply their own conceptions of Hanafi law even when Hanafi provisions have been superseded by statute or when these conceptions fail to accurately capture Hanafi law itself. Structural characteristics of the Afghan judicial system may therefore limit the capacity and impact of those who seek to advance women’s rights through changes in Islamic law.

B. Insecurity

As the Afghan women stated at the conference where women wrote the Afghan Women’s Bill of Rights, “the law and the constitution are one thing on paper, and practices around the country . . . are quite another.” Even if advocates for women’s rights institute legal reforms in parliament, and progressive members of the judiciary do not strike them for violating Article 3
of the constitution, what impact will such laws have in improving women's lives in a country where the state has almost no authority and public space remains extremely dangerous?  

The creation of spaces to help women promote their own rights is premised upon the existence of a basic level of physical security about which Afghan women can currently only dream. Without this basic security, any Islamic feminist activism in Afghanistan is circumscribed by the places where women can travel and the social space they may occupy in their dissent against prevailing gender hierarchies. Unfortunately, insecurity is not only endemic, but increasing in parts of Afghanistan such as the south.  

It has been identified as "the overwhelming challenge characterizing all aspects of daily life for Afghan women," and is indelibly linked to the perpetuation of violence against women. After her 2005 visit to Afghanistan, the UN Special Rapporteur on Violence Against Women reported that "violence against women remains dramatic in its intensity, in both public and private spheres of life." Women running for and serving in parliament have been attacked and threatened. Reports indicate that honor killings of women and female self-immolation have increased, and that women and girls continue to experience trafficking, forced prostitution, kidnapping, rape, and assault. Female aid workers have been specifically targeted for murder and rape. Violence against women also persists in the form of forced marriage, including child marriage and domestic abuse. Hostile law enforcement authorities exacerbate
women's experience of violence and insecurity by disregarding complaints, refusing protection, preventing access to divorce, and failing to redress harms. As a result, Afghan women's groups have identified personal security as the most pressing issue facing Afghan women in this decade.

Most troubling to the cause of Islamic feminism is the concerted attack on women's rights advocates by the Taliban and other forces. In September 2006, Safiye Amajan, a trailblazer for Pashtun women's rights and the head of the Kandahar province Department of Women's Affairs (DoWA), was murdered by Taliban gunmen outside of her home. Her killing was not an isolated incident. Death threats have been made against the female heads of the DoWA in at least nine Afghan provinces. DoWA leaders have received threats through telephone calls, nighttime postings in public places, and hand-delivered messages to their workplaces. Amnesty International reports that female human rights defenders "face threats, acid attacks and fear of reprisals against their families." One women's rights activist wrote in a letter to Amnesty International,

What really threatens women in Kandahar province these days is their overall security and safety while outdoors; safety amid terrorist threats from the extremist and regrouped Taliban and the ongoing fighting between government forces and militants in the region. For this reason, women do not dare come out of their homes and send their girls to schools. She also reported that there were recent terrorist killings by the Taliban "to stop women from coming out of their houses to work for their livelihood." As a result of threatening phone calls, this particular activist was forced to keep a low profile. Lacking adequate protection from a weak government, female women's rights advocates are left to protect themselves. The security situation is further complicated by the fact that providing government security to women serving in the DoWA, or arranging for meetings between DoWA and women's

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195. WOMEN STILL UNDER ATTACK, supra note 39, at 29; UN Special Rapporteur Report on Afghanistan, supra note 110, ¶ 50.
196. Riphenburg, supra note 70, at 189.
199. Id.
200. WOMEN STILL UNDER ATTACK, supra note 39, at 27.
201. Amnesty Int'l, supra note 198.
202. Id.
203. Id.
groups to take place in secured government buildings, may actually attract more attention and further endanger the lives of women's rights activists.  

There is widespread consensus among domestic and international women's rights advocates that the Afghan government cannot promote women's rights without improving security throughout the country. To achieve this goal, human rights organizations have called upon the international community and the United States to expand their security forces and to specifically provide security for female members of parliament, girls seeking to attend school, and women escaping violence. In the meantime, observers must realistically assess the potential effectiveness of Islamic feminist advocacy as a means of promoting women's rights in present day Afghanistan by acknowledging the significant constraints posed by the security situation on women's ability to exercise and promote their rights.

C. Limited Socio-Economic Development

No formal study has established a causal relationship between socio-economic indicators and women's participation in Islamic feminism. However, unlike women in states such as Iran and Malaysia, which have witnessed an astonishing flurry of Islamic feminist activity, Afghan women have sustained serious blows to their health, education, and well-being in recent years. While Iranian and Malaysian women boast high rates of literacy, decades of conflict have resulted not only in widespread female illiteracy in Afghanistan, 

204. Id.

205. AFGHAN WOMEN AND GIRLS FIVE YEARS ON, supra note 96, at 10; Benazeer Roshan, The More Things Change, the More They Stay the Same: The Plight of Afghan Women Two Years After the Overthrow of the Taliban, 19 BERKELEY WOMEN'S L.J. 270, 282 (2004); Human Rights Watch, supra note 188.

206. The adult female literacy rate, defined as "[t]he percentage of people ages 15 and older who can, with understanding, both read and write a short, simple statement related to their everyday life," is seventy percent in Iran and eighty-five percent in Malaysia. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006, BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS 364 tbl. 24 (2006), available at http://hdr.undp.org/hdr2006/pdfs/report/ HDR_2006_Tables.pdf. Morocco, another country where Islamic feminists have experienced notable successes, has an adult literacy rate of forty percent, far lower than the rate in Iran or Malaysia. UNITED NATIONS DEV. PROGRAMME, supra, at 365 tbl. 24. Yet the rates of all three countries considerably exceed that of Afghanistan, estimated by Afghanistan's first National Human Development Report to be fourteen percent. UNITED NATIONS DEV. PROGRAMME, AFGHANISTAN NATIONAL HUMAN DEVELOPMENT REPORT: SECURITY WITH A HUMAN FACE 14 (2004), available at http://www.undp.org.af/nhdr_04/pdfs/statistical%20indicators%20template.pdf (drawing upon 2003 reports to estimate the adult female literacy rate); see also Bay Fang, School's Out: Afghan Girls Are Losing the Ground They Recently Gained, MS. MAG., Fall 2006, available at http://www.msmagazine.com/fall2006/schoolsout.asp (estimating the current female illiteracy rate to be eighty percent or higher). While figures should be compared with caution due to differences in data collection across countries and the difficulty of gathering data in the conflict situation of Afghanistan, the reports suggest that Iran, Malaysia, and Morocco do have far higher rates of adult female literacy than Afghanistan. Together, these statistics suggest that while no particular rate is determinative, female literacy may be one factor that in certain contexts promotes women's ability to engage in Islamic feminism.
but also serious difficulties in implementing female education, a pronounced deterioration in women's health, and a deep and persistent lack of economic opportunities for women. A recent report issued by the United Nations Research Institute for Social Development noted, "[h]uman development indicators such as levels of education, life expectancy, maternal and infant mortality, and access to education and health services place the women of Afghanistan among the most disadvantaged in the world. It will take years of sustained investment in infrastructure and services to ameliorate this situation."\textsuperscript{207} Afghan girls' and women's relative illiteracy, limited access to education, and economic dependence may prevent them from seizing the spaces available in the post-Taliban order to challenge dominant interpretations of Islam and Islamic law that subvert their rights.

The potential of women's limited socio-economic development to constrain their ability to engage in Islamic feminist advocacy is aptly illustrated by the state of female education in Afghanistan. Central to Islamic feminism is the concept of \textit{ijtihad}, the process by which an individual uses her "interpretation and independent reasoning" to understand the Qur'an and Sunna and apply their teachings to life circumstances.\textsuperscript{208} As Azizah al-Hibri has explained, "Each individual has direct access to the Qur'an and hadith [the recorded Sunna of the Prophet] and is in principle entitled to engage in \textit{ijtihad}, so long as she has the requisite knowledge."\textsuperscript{209} Leela Jacinto warns that "[w]omen's access to secular and religious education is critical for the potential success of feminist \textit{ijtihad}."\textsuperscript{210} Her claim is persuasive. Women and girls' capacity to confront understandings of Islam and Islamic law that are contrary to their own interests and desires is premised on their ability to engage with Islamic sources, to articulate their interpretations in the common language of Islamic discourse, and to persuade others, particularly male leaders, including family members, \textit{mullahs} (religious clerics), tribal leaders, judges, and legislators.

Since the fall of the Taliban, women and girls' prospects for education have expanded. While the Taliban banned female education,\textsuperscript{211} women and girls currently face no formal barriers to attending school. In 2002, Afghan girls began re-enrolling in primary schools and Afghan women sat for university entrance exams, ending the Taliban's prohibition of women's higher

\textsuperscript{207} KANDIYOTI, supra note 3, at 32.
\textsuperscript{208} Jacinto, supra note 41, at 12.
\textsuperscript{210} Jacinto, supra note 41, at 12.
\textsuperscript{211} Drumbl, supra note 11, at 354-55 ("Under the Taliban's regime of sexual apartheid... [s]chools for girls older than eight years of age were closed."); UN Special Rapporteur Report on Afghanistan, supra note 110, ¶7.
education. These developments suggest improved possibilities for Islamic feminist *ijtihad* in Afghanistan.

The reality on the ground, however, is not uniformly positive. Current estimates hold that eighty percent or more of Afghanistan’s female population is illiterate, and Afghan girls and young women face serious obstacles to accessing education. Although exact estimates are difficult to calculate, most sources approximate that about one-third of Afghanistan’s districts do not even have schools for girls. Human Rights Watch and other observers have highlighted the danger that confronts girls who try to attend school. While estimates remain rough, the number of children in school has risen from about 774,000 children in 2001 to approximately 5.2 million (a little over half of all children) in 2006. Nevertheless, the pervasive lack of security in Afghanistan noted above, and the rise of violent attacks and threats that are specifically directed against girls who seek to attend school by armed opposition groups (including Taliban, Taliban allies, and Pashtun warlord Gulbuddin Hekmatyar’s Hezb-e Islami), have rolled back progress. One primary school teacher reported to Human Rights Watch that while walking toward school, she and her students found a letter that said, in Pashto:

To all girls’ students [sic] and school teachers, teaching in girls’ schools! We warn you to stop going to school, as it is a center made by Americans. Any one who wants to go to school will be blown up. To avoid such death, we warn you not to go to school.

As a result of insecurity and targeted attacks on female education, boys in primary school outnumber girls two to one throughout Afghanistan; in the southern provinces, girls’ underrepresentation is even more acute, with boys outnumbering girls six to one. Without access to education—religious or secular—girls and young women in Afghanistan face an uphill battle in securing skills that would empower them to challenge their exclusion from

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212. Riphenburg, *supra* note 70, at 199.
216. Id. at 7 nn.1-2 (citing World Bank gender statistics and Afghan Ministry of Education reports); see also Coursen-Neff, *supra* note 214 (citing World Bank estimates); UN Special Rapporteur Report on Afghanistan, *supra* note 110, ¶ 18 (reporting that as of 2006, “four million children have enrolled in school since the fall of the Taliban”).
217. AFGHAN WOMEN AND GIRLS FIVE YEARS ON, *supra* note 96, at 7. Human Rights Watch found Taliban, Taliban allies, and Hekmatyar’s followers to have instigated a large number of the attacks on schools and teachers that it investigated. LESSONS IN TERROR, *supra* note 215, at 32-34; Human Rights Watch, *supra* note 214.
218. LESSONS IN TERROR, *supra* note 215, at 66.
formal and informal institutions of power through the interpretation and reinterpretation of Islam.

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A nuanced and realistic appraisal of the possibilities for women to engage in Islamic feminist advocacy under Afghanistan’s new constitutional order, and more importantly, the potential for such advocacy to improve Afghan women’s lives, requires a deeper understanding of the constraints posed by the Afghan context. Three overarching constraints—the structural deficiencies of the Afghan judiciary, the pervasive lack of security in the country, and the low socio-economic status of Afghan women—seriously limit the capacity of women to exploit opportunities created by the 2004 Constitution of Afghanistan and by Islamic jurisprudence to advance women’s rights through legal reform grounded in Islam. These constraints strengthen the hand of unelected jurists who resist adopting understandings of Islamic and Afghan law that encompass women’s rights and seek to curb formal legal advances for women secured by Islamic feminists in the Afghan Parliament. They also limit the impact of even successful reforms of the formal law to concretely better the lives of women on the ground. These challenges, however, are not peculiar to Afghanistan. Indeed, they confront many countries plagued by longstanding conflict and struggling with low levels of socio-economic development. Moreover, even as these factors serve as constraints, women in Afghanistan have used them to identify places for further advocacy, as in the case of calls for the inclusion of more women in the judiciary and efforts to highlight the disjuncture between Islamic law and customary law practices identified as harmful to women.

CONCLUSION

The impact of Islam and constitutionalism on women’s rights is a pressing question in today’s era of increased attention to democracy and constitution-making in the Muslim world. This Comment challenges observers, both Muslim and non-Muslim, domestic and international, who conclude that the incorporation of Islam into constitutions will necessarily or definitively harm women, before they consider the legal, political, and social landscape of the

country in question. It argues for a contextualized inquiry and seeks to evaluate the impact of the 2004 Constitution of Afghanistan on advocacy for women’s rights through such an approach.

Part I of this Comment demonstrated that Islamic feminism exists in Afghanistan for good reason. Many Afghan Muslim women are sincere adherents of Islam who believe that the rights afforded to them by their religion currently elude them in their daily lives. They also acknowledge that the project of promoting women’s rights must occur within an Islamic framework to avoid unleashing backlash and to gain legitimacy in the eyes of a mainstream Muslim population. For these reasons, many Muslim women in Afghanistan view reform through Islam and Islamic law as a strategy that both resonates with their sensibilities and holds greater transformative potential than methods divorced from Islam. Part II highlighted the competing provisions of the 2004 Constitution of Afghanistan that may assist or curb this Islamic feminist effort. The constitution offers an equality provision, space for legal borrowing from alternative schools of Islamic law, support for the enforcement of the country’s international obligations, and a quota for women’s representation in the Afghan Parliament. Islamic feminists may use these tools to encourage the passage of progressive legislation, the implementation of existing promises, and the adoption of judicial interpretations of Islamic law that promote women’s rights. The constitution also introduces judicial review to keep legislation in line with undefined Islamic “beliefs and provisions,” placing significant power into the hands of an unelected judiciary. Based on an analysis of its text alone, however, it is impossible to determine whether the 2004 Constitution of Afghanistan, on the whole, helps or harms Afghan women.

Part III sought to provide a nuanced and contextualized inquiry to reach a deeper understanding of the answer to this question by exploring the legal and extra-legal constraints on women’s ability to use legal reform to advance their rights in Afghanistan. These constraints are considerable. The structural characteristics of the Afghan legal system—the politicization and gender-bias of the judiciary, the weakness of the formal legal system, and the lack of clarity surrounding applicable law—render judicial review a serious threat to enactment and enforcement of women’s rights legislation. They also suggest the existence of serious institutional barriers to persuading judges to adopt understandings of Islamic and Afghan law that encompass women’s rights. Pervasive insecurity and women’s low socio-economic status also harm women’s abilities to engage in Islamic feminism and mitigate the potential of formal legal reform to improve the status of women. These constraints suggest that while the 2004 Constitution of Afghanistan provides vitally important tools for Afghan Islamic feminists, these advocates will nevertheless continue to face formidable challenges.
While legal reform in Afghanistan may have a limited impact in improving women's lives, law remains a vital avenue for change, one more means by which women may use their own voices to advocate for their rights. The 2004 Constitution of Afghanistan did not deliver to women the demands made in the Afghan Women's Bill of Rights. Yet the constitution has created a space—albeit a constrained one—in which Afghan women may advance their status by using the language and idioms of Islam to contest proffered interpretations of Islamic law or customary law that curtail their rights and opportunities. In doing so, women issue calls for change in a register that resonates with them, one that they have determined carries legitimacy in their own country. The acknowledgement that constraints—political, institutional, social and legal—confine their effort does not highlight the futility of Islamic feminism in Afghanistan or lead to the wholesale conclusion that the constitutional incorporation of Islam will inevitably cause further oppression of women. Rather, this acknowledgement suggests that it is important to set realistic goals, address obstacles confronting Islamic feminism, and provide external support in a manner identified by indigenous advocates themselves. It does more service to Afghan women to understand that, despite considerable barriers, Afghan Islamic feminists may exploit the spaces afforded by their constitution and religion to further women's rights. Appreciating their capacity to do so acknowledges their convictions, their pragmatism, and their agency. Most importantly, it recognizes that Afghan women themselves are best able to devise the paths for improving their own lives.