

FOREWORD

The idea to hold a conference on rule of law reform in Iraq and Afghanistan and the challenges each country faced as it prepared to consolidate legal change in the second decade of the 21st century came together in the fall of the 2009. It took one year to organize the program and speakers and then another year to produce this conference volume. Over that two year period, history making events in the Middle East and North Africa have put discussions about legal change in the Muslim majority countries in a new light, even as those same events have shifted the international rule of law community's attention from Iraq and Afghanistan to Egypt, Tunisia and Libya. There were many compelling reasons to bring together academics, policy makers, military rule of law specialists, and practitioners who played various roles in advising on and implementing the constitutional, administrative, procedural and theoretical changes that shaped both legal process and culture in Iraq and Afghanistan as they liberalized, but as the Arab Spring moved into the Arab Autumn, the need to understand how legal reform shapes and is shaped by society and politics has become even more profound.

Panelists invited to attend the Conference on Rule of Law in Iraq and Afghanistan: Challenges for the Coming Decade were asked to examine both the opportunities for rule of law reform and the concomitant challenges. While both countries had passed new constitutions, Afghanistan in 2004 and Iraq in 2005, promulgated new codes and built or rebuilt legal institutions, there were still many, many issues to be addressed. Some of the challenges were structural in nature: each country faced a shortage of trained legal professionals, insufficient oversight mechanisms, and lack of awareness about law and rights. But even to the lay observer, the challenges went well beyond capacity building needs. How would legal culture and traditional adjudication mechanisms shape and be shaped by the reforms initiated following the military interventions in the early 2000s? What was the role of Islam in the Iraqi and Afghan legal system? What specific constitutional challenges could each country expect to face in the next decade? And, which people or institutions might emerge as the keepers of the legal conscience in these new polities?

Given the role of the international community in advising and guiding rule of law reform in both countries, the decision was made to canvass broadly for participants to the conference. Penn Law was

incredibly fortunate to bring in military experts, experts from the region and participants Iraqi and Afghan advocates for legal reform, rule of law practitioners, and academic analysts to provide insight into the issues. We are fortunate that a core group of the panelists submitted papers or otherwise participated in this conference volume.

While many issues were discussed at the conference, several main themes emerged. The panelists who focused on Iraq zeroed in on questions of federal versus local authority. There were differing opinions on how rigid or accommodating the Iraqi constitution was when it came to offering guidance for jurisdictional conflicts and the panelists often circled back to the challenges of a potentially assertive Kurdish region (and the impact of increased decentralization for similarly inclined regions). The panelists noted increased administrative legal activity at the local and provincial levels in Iraq, while warning that the passage of additional laws and regulations did not necessarily equate to increased rule of law.

The Afghanistan panels raised more existential questions those on Iraq, especially with regard to the prospect of consolidating any kind of political and legal system overhaul that had been ostensible goal when the first Loya Jirga was convened in 2003. The most prominent challenges to rule of law in Afghanistan as articulated by the panelists lay in: 1) finding viable accommodation between traditional and customary legal norms and processes and formal legal mechanisms that had been established or reestablished following the overthrow of the Taliban, and; 2) fostering suitable security conditions to allow local political and legal institutions to function.

Other key issues covered at the symposium included the role of the military in fostering rule of law in post-conflict (or peri-conflict) Iraq and Afghanistan. As Generals Ayres and Tucker conceded in their presentations, the legal branch of the military (the Judge Advocate General's corps) was handed the rule of law portfolio shortly after reconstruction efforts began simply by virtue of the fact that they were lawyers. In course, they developed protocols and expertise that focused primarily on law and order competencies, which raised important questions about rule of law sequencing and successful legal development. As constitutional frameworks and legislative and regulatory processes were being worked out by legal experts and academics, the military's rule of law programs were supporting more grassroots legal reforms - training judges and building functioning courts, introducing forensic evidence gathering techniques, and building and operating policing and prison functions. Following operations in Iraq and Afghanistan, the US military now has significant

capacity in rule of law and post-stability operations – capacity it had not built up before the wars. How will that shape US military engagement in other theaters going forward?

This symposium volume offers an excellent summation of some of the views represented at the conference and while its publication marks a closure of one sort, it is important to point out that this undertaking has opened up Penn Law to many interesting ideas and opportunities to shape our future engagement in the region.

Only two months after we hosted this symposium, the first demonstrations of the Arab Spring took place. In the year after we gathered to discuss the needs and challenges for a democratic Iraq and Afghanistan, it became clear that many other countries, notably Tunisia, Egypt and then Libya would also be engaged in massive legal construction projects aimed at securing the rule of law, protecting minority rights, reconciling shariah principles with constitutional rights, promoting fundamental freedoms and enshrining fair and participatory governance structures, including elections. The September 2010 conference on Iraq and Afghanistan instructs us that these things are far from easy. And, yet, even with all of the challenges, millions of other Middle East residents risked their livelihoods and lives to seek them out. Penn Law's Journal of International Law convened an excellent forum in November 2011 to examine the prospects for democracy in the Middle East, whose symposium volume might be considered a part 2 with this volume as part 1.

Contemporary analysis of the Arab Spring has not emphasized connections between legal reform and democratization efforts in Iraq and Afghanistan in the 2000s with the unfolding of events in North Africa in the spring and summer of 2011. It remains to be seen how historical analyses link these events. Similarly, the future prospects for rule of law in Iraq, Afghanistan and the rest of the Middle East are by no means clear. Nevertheless, the articles in this symposium volume lay out key issues that contemporary actors are wrestling with and that historians will also need to take into account when they make sense of the paths that were taken as Iraq and Afghanistan wrestled with building the rule of law.

In conclusion, Penn Law hosted the September 2010 Conference on "Building the Rule of Law in Iraq and Afghanistan: Challenges for the Coming of Decade" in an effort to educate our community about the legal development lessons and needs facing two countries whose fates have altered the course of history in the opening years of the 21st century. Our education has started, but it is by no means complete.

This volume allows us to reach a broad audience to reflect on the issues raised at the symposium that promise to resonate in Iraq and Afghanistan as well as in other parts of the world for many years to come. Penn Law is grateful to the ACE Rule of Law Fund, especially Robert Cusumano and Kathryn Schneider, for their generous intellectual and financial support of the conference. And I am grateful to the participants and contributors to the conference, and the editors-in-chief of the *Journals of International Law* and *Law and Social Change* at the University of Pennsylvania for their diligence in producing this symposium volume.

Amy E. Gadsden, Ph.D.
Associate Dean for International Affairs
University of Pennsylvania Law School