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# Comparative Law and State-Building: The “Organic Minimalist” Approach to Legal Reconstruction

DAN E. STIGALL\*

*Comparative law is an ‘ecole de vérité’ which extends and enriches the supply of solutions and offers the scholar of critical capacity the opportunity of finding the ‘better solution’ for his time and place.*<sup>1</sup>

## I. INTRODUCTION

Jean Brissaud, a legal historian, compared society to a biological organism when discussing the legal history of his native France.<sup>2</sup> Similarly, legal systems are like living beings. Legal systems possess specific, individualized organs, each of which serves its own function and upon which the whole relies in order to live and survive.<sup>3</sup> In that regard, legal reconstruction of weakened states, an integral part of modern state-building, is like major surgery. Only by studying the unique characteristics of the organism upon which one operates can one properly make decisions and avert catastrophe. In law, as in biology, organisms and institutions quickly reject unnatural transplants. Therefore, the study of comparative law is critical for proper decision-making in state-building. Only when international actors consider policies

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1. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 15 (Tony Weir trans., Oxford University Press 3d rev. ed. 1998) (1977).

2. See JEAN BRISSAUD, A HISTORY OF FRENCH PUBLIC LAW 3-5 (James W. Garner trans., Beard Books 2001) (1915). *But see* B.C. SMITH, UNDERSTANDING THIRD WORLD POLITICS: THEORIES OF POLITICAL CHANGE AND DEVELOPMENT 71 (2d. ed. 2003) (expressing distaste for biological analogies).

3. See BRISSAUD, *supra* note 2, at 3.

from a comparative legal perspective, can they effectively rehabilitate weakened states in a manner that is both meaningful and lasting.

This article examines various approaches to the legal reconstruction of weakened or failed governments. Critical to this survey is an understanding of prevalent legal paradigms that will confront international actors engaged in state-building. Ultimately, this article advocates an “organic minimalist” approach to legal reconstruction—an approach aimed at efficiently focusing resources in a way that empowers the organic legal system of the target nation without undermining the legitimacy of the judiciary and other government institutions.<sup>4</sup>

## II. BACKGROUND

During the Cold War, world powers began to see former colonies and newly independent nations as sources of competition.<sup>5</sup> By assisting these fledgling nations, the United States and the Soviet Union sought to establish strategic footholds in various areas of the world and gain greater influence in the developing world through a strategy of outbidding, outspending, and peer displacement.<sup>6</sup> The idea of assisting and developing weakened states was one aspect of a broader foreign policy aimed at achieving international dominance and eliminating a peer competitor. With the onset of Vietnam, world powers realized that the task of assisting and developing states was critical to providing security in post-conflict settings.<sup>7</sup> However, the political and social

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4. This approach shares many of the same ideals as the “cultural” approach to development. See HOWARD J. WIARDA, *POLITICAL DEVELOPMENT IN EMERGING NATIONS: IS THERE STILL A THIRD WORLD?*, at 52 (David Tatom ed., 2004):

The cultural approach, of course, favored development but argued that scholars and policymakers needed to pay far more attention to the distinct cultures and histories of the non-Western countries and areas involved. . . . Each country or culture filtered development through its own culturally derived values, institutions, and ways of doing things, accepting *some* practices and institutions from the West but always doing things their own way. Or else they worked out fusions and blends of imported and local or indigenous ways and institutions.

*Id.*

5. See David Ekbladh, *From Consensus to Crisis: The Postwar Career of Nation-Building in U.S. Foreign Relations*, in *NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ* 19, 21 (Francis Fukuyama ed., 2006).

6. *Id.*

7. *Id.* at 28 (“Counterinsurgency tactics that came into vogue as the conflict accelerated in the early 1960s saw coordinated development activity as integral to the overall project of pacifying a conflict zone.”).

repercussions of that conflict, as it did with so many other things, fundamentally changed the way in which international development was perceived and enthusiasm for such endeavors temporarily waned.

After the end of the Cold War, however, the United States increased the frequency and intensity of international development efforts.<sup>8</sup> The Cold War left a swath of weak and failed states stretching across the globe.<sup>9</sup> The problems caused by such weakened governments and the desire to mitigate those problems motivated world powers to take on a variety of state-building missions.<sup>10</sup> In countries such as Somalia, Bosnia, and Kosovo, leaders of the international community expended resources in an attempt to shore up those weakened governments, thereby mitigating the indirect threat posed by transnational problems.<sup>11</sup> Furthermore, after the murderous attacks of September 11, 2001, the world became acutely aware that such nations were also active breeding grounds for terrorist organizations.<sup>12</sup> Accordingly, reconstruction and development have again become more than mere humanitarian endeavors; they have resurfaced as activities perceived as vital for the maintenance of national security. This is particularly true for the United States, which as the sole superpower and a symbol of Western democracy, stands as a principal target for anti-Western terrorists. Commentators note that “[i]t now seems clear that nation-building is the inescapable responsibility of the world’s only superpower. Once that recognition is more widely accepted, there is much the United States can do to better prepare itself to lead such missions.”<sup>13</sup>

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8. Francis Fukuyama, *Nation Building and the Failure of Institutional Memory*, Introduction to NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ 19, 21 (Francis Fukuyama ed., 2006) [hereinafter Fukuyama, *Introduction*].

9. *Id.*

10. *Id.* (noting that weak or failed states have historically produced refugees, human rights abuses, inter- and intrastate wars, drug and human trafficking, and other inherently transnational problems).

11. See generally JAMES DOBBINS ET AL., AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ, at xxvii (2003) (describing efforts by organizations such as NATO, the United Nations, and the United States in providing assistance to troubled nations).

12. Fukuyama, *Introduction*, *supra* note 8 (“And after September 11, 2001, it became clear that weak or failed states could sponsor terrorism that threatened the core security interests of the world’s sole superpower, the United States.”).

13. DOBBINS ET AL., *supra* note 11, at xxix.

An integral part of state-building involves the successful reconstruction and development of essential governmental institutions as well as legal institutions.<sup>14</sup> In this regard, it is imperative that the reconstruction of legal institutions and legal systems be based on a workable paradigm that best suits the needs, interests, history, and culture of the country being developed.

### III. STATE-BUILDING AND LEGAL RECONSTRUCTION

Development theory scholars note an important distinction between nation-building and state-building—terms which are used interchangeably but refer to distinct concepts. Nation-building is the process of constructing a new political order with a shared identity and a community of shared values.<sup>15</sup> State-building, in contrast, refers to the process of constructing (or reconstructing) state political institutions or promoting economic development.<sup>16</sup> The former, though not impossible, is difficult and rarely achieved.<sup>17</sup> The latter, however, has been historically easier to accomplish.<sup>18</sup>

Within the context of state-building, scholars differentiate between *reconstruction* and *development*: “Reconstruction refers to the restoration of war-torn or damaged societies to their pre-conflict situation. Development, however, refers to the creation of new institutions and the promotion of sustained economic growth, events that transform the society open-endedly into something it

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14. See Fukuyama, *Introduction*, *supra* note 8, at 6-7 (“[I]t is only the ability to create and maintain self-sustaining indigenous institutions that permits outside powers to formulate an exit strategy.”).

15. Fukuyama, *Introduction*, *supra* note 8, at 3 (noting that Europeans criticize Americans in using the term nation-building when actually referring to state-building).

16. *Id.*

17. *Id.*

18. See generally DOBBINS ET AL., *supra* note 11 (documenting the success of the United States in nation-building interests in Germany, Japan, Somalia, Haiti, Bosnia, Kosovo, and Afghanistan). See also WIARDA, *supra* note 4, at 109 (“Almost no one knows how to do it. In the United States we talk enthusiastically of ‘nation-building’—a happy, optimistic phrase but one that almost no one knows how to accomplish, certainly not the U.S. Defense Department or the State Department, or the U.S. Agency for International Development (AID), or the United Nations—although all of these may contribute.”); Ash Ü. Bâli, *Justice Under the Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 436 (2005) (“At its most ambitious, external nation-building seeks to replace existing local institutions with new ones, often designed by foreign experts and imposed from above. The ambition and breadth of such projects, frequently undertaken in the name of such laudable goals as democratization and liberalization, lie at the root of their failure.”).

has not been previously.”<sup>19</sup> International actors have shown themselves capable of accomplishing reconstruction, while development has proven problematic and difficult to effect.<sup>20</sup>

The concepts of legal reconstruction and legal development relate specifically to the restoration or creation of legal institutions of weakened or war-torn states.<sup>21</sup> Just as roads, schools, and economic institutions must be rebuilt to foster functional states, so must the legal institutions which serve to resolve disputes, punish the criminal, and uphold the rule of law. Such judicial reconstruction benefits local populations by sparing them from the victimization and instability that accompanies anarchy. The environment of security also benefits the entity or entities facilitating post-conflict reconstruction by curbing violent crime and attacks.<sup>22</sup> Further, in post-conflict scenarios, legal reconstruction is a critical element of post-intervention strategies designed to quell ethnic retaliation such as revenge killings or “reverse ethnic cleansing.”<sup>23</sup> The task can also serve to address the root causes of conflict through the establishment or restoration of the rule of law.<sup>24</sup>

Although international development has a long history,<sup>25</sup> legal reconstruction is a relatively recent phenomenon. Carsten Stahn, Associate Legal Advisor to the International Criminal Court, noted that the need to develop a targeted strategy to restore the rule of law in post-conflict societies first became evident in the 1990s.<sup>26</sup> Since that realization, legal reconstruction has played an integral role in post-conflict crisis management. Today, in the

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19. Fukuyama, *Introduction*, *supra* note 8, at 4-5 (italics omitted).

20. *Id.* at 5.

21. See Fukuyama, *Introduction*, *supra* note 8 at 4-5.

22. Francis Fukuyama, *Guidelines for Future Nation-Builders in Nation Building and the Failure of Institutional Memory*, in NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ, *supra* note 8, at 315 [hereinafter Fukuyama, *Guidelines*].

23. See Carsten Stahn, *Justice Under Transitional Administration: Contours and Critique of a Paradigm*, 27 HOUS. J. INT'L L. 311, 315 (2005).

24. *Id.*

25. See Minxin Pei et al., *Building Nations: The American Experience*, in NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ, *supra* note 8, at 64-65 (noting that out of 200 American military interventions since 1900, seventeen (roughly 8 percent) have been attempts at nation-building through the promotion or imposition of democratic institutions desired by American policymakers).

26. See Stahn, *supra* note 23, at 313-14.

discourse surrounding the conflict in Iraq, it is often cited as a key part (or “strategic pillar”) of the United States’ plan for victory.<sup>27</sup>

#### IV. CHARACTERISTICS OF WEAKENED STATES

Before discussing the various approaches to legal reconstruction, it is prudent to outline some common characteristics of weakened states so that one can better understand the unique challenges of such blighted legal and political environments. There are numerous terms for such states: poor nations, third world countries, underdeveloped countries, developing countries, *et cetera*. Whatever the name, it is only by clearly understanding the challenges posed by such states that one may choose the best approach to legal reconstruction.<sup>28</sup> Beneath the broad rubric of weakened states reside legal systems of seemingly infinite diversity. The legal traditions in such states are as diverse as their reasons for underdevelopment.<sup>29</sup> Therefore,

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27. See generally Nat'l Sec. Council, National Strategy for Victory in Iraq, App., Strategic Pillar Six (Nov. 2005), [http://www.whitehouse.gov/infocus/iraq/iraq\\_strategy\\_nov2005.html](http://www.whitehouse.gov/infocus/iraq/iraq_strategy_nov2005.html). A “strategic objective” is:

[An] Iraq [which] reforms its legal system and develops institutions capable of addressing threats to public order. Iraq’s government operates consistent with internationally recognized standards for civil rights and the rule of law. . . . [T]he ‘rule of law’ as a concept denotes a government of laws, and not men. It is a concept that was born in Iraq, thousands of years ago, and also eviscerated there, over the past three decades, by Saddam Hussein. Iraq is now trying to reclaim its proud history. It is working to overcome the effects of tyranny by building a legal system that instills confidence in a new government, ensures that every person accused of a crime receives due process – including fair, public, and transparent trials – and a prison system that complies fully with international standards. The steps taken thus far include establishment of an independent judiciary, creation of the Central Criminal Court of Iraq and the Iraq Higher Tribunal, renovation and reconstruction of courthouses throughout Iraq, establishment of a reformed Iraq Correctional Service, and construction of modern civilian prison facilities.

*Id.*

28. See SMITH, *supra* note 2, at 108 (“The nature of the state—the institutions through which legitimate power (political authority) is enforced—is central to the study of politics in any country.”).

29. The establishment of peaceful, democratic politics is obstructed by civil war in Afghanistan, Burundi and Sudan, political assassination in Mexico, ethnic conflict and separatism in Rwanda, Somalia, Sri Lanka and Liberia, religious fundamentalism in Egypt and Algeria, bankrupt absolutism in Zaire and El Salvador, and the West’s willingness to sell arms to any regime, no matter how repressive. The threat of economic crisis hangs over the fledgling democracies of Brazil, Malawi, Nepal, Uganda, Angola and Mozambique. Communal violence persistently mars India’s democratic record. Many Third World countries are faced with accumulations of such factors, and some combine them with severe

searching for true substantive legal similarities between all countries so labeled is unavailing. However, in spite of the contrast in legal cultures, certain characteristics of such states create tragic commonality.

As a group, weakened states tend to be poor and weak in almost every respect. Such states are economically, socially, and politically underdeveloped.<sup>30</sup> They lack infrastructure and viable institutions.<sup>31</sup> This multidimensional underdevelopment serves to perpetuate their predicament.<sup>32</sup> For instance, in many politically unstable countries, where investments are not protected by the rule of law or a functioning judicial system, it is difficult to attract foreign aid, and generate the investment necessary to break out of economic underdevelopment.<sup>33</sup> Without foreign aid or investment, these countries have difficulties developing economically.<sup>34</sup> If they do not develop, they cannot maintain a system in which investments are protected by the rule of law and a functioning judicial system.<sup>35</sup> The result of this cycle is poverty and underdevelopment leading to the collapse of the state.<sup>36</sup> As noted above, it is in such an environment that terrorist organizations tend to incubate.<sup>37</sup>

A common characteristic of underdeveloped or weakened states is the presence of an overdeveloped bureaucracy. Although bureaucracies have a positive and important role in any government, unless kept under control, their unrestricted growth is especially damaging to underdeveloped or weakened countries.<sup>38</sup> A bloated public sector adversely affects development at all levels.<sup>39</sup> Ineffective administration increases with the size and power of the

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ecological problems.

*Id.* at 275.

30. WIARDA, *supra* note 4, at 22-23.

31. *Id.* at 23.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.* at 23-24.

37. *See id.* at 22-24; *see also* ANONYMOUS, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR 74-78 (2004).

38. *See* FRED W. RIGGS, ADMINISTRATION IN DEVELOPING COUNTRIES: THE THEORY OF PRISMATIC SOCIETY 126 (1964) (“[T]oo rapid expansion of the bureaucracy when the political system lags behind tends to inhibit the development of effective politics[;] . . . separate political institutions have a better chance to grow if bureaucratic institutions are relatively weak.”).

39. *See generally* RIGGS, *supra* note 38.

bureaucracy.<sup>40</sup> Bureaucracy in an underdeveloped nation is like kudzu<sup>41</sup>—initially intended for a positive purpose, it now only grows for its own sake and sucks substance and power from more important institutions around it. An overdeveloped bureaucracy also weakens the judiciary.<sup>42</sup>

Another defining aspect of many weakened states—and a direct result of institutional weakness—is pervasive crime.<sup>43</sup> Crime rates in some developing countries have reached levels much higher than many of the worst neighborhoods in the United States.<sup>44</sup> Such crime prohibits development by discouraging investment.<sup>45</sup> As the United States has learned in Iraq, crime also hinders development by increasing security costs, retarding reconstruction efforts, and posing physical danger to troops engaged in the process of rebuilding.<sup>46</sup> As a result of this reality, international actors in post-conflict scenarios now systematically engage in the reconstruction and development of domestic justice systems.<sup>47</sup>

Understanding the characteristics of weakened states is critical to state-builders operating in the developing world. By taking into account the unique challenges they face and impediments to development, appropriate choices can be made regarding how funds should be allocated, how institutions should be restored or developed, and how various issues should be prioritized. In the context of legal reconstruction, an

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40. *Id.*

41. See Wikipedia, Kudzu, <http://en.wikipedia.org/wiki/Kudzu> (last visited Aug. 29, 2006) (noting that though farmers in the South were encouraged to plant kudzu to reduce soil erosion, and Franklin D. Roosevelt's Civilian Conservation Corps planted it widely for many years, kudzu was soon recognized as a pest weed by the United States Department of Agriculture and now costs around \$500 million annually in lost cropland and control costs. "Kudzu is sometimes referred to as "the plant that ate the South," a reference to how kudzu's explosive growth has been most prolific in the southeastern United States due to nearly ideal growing conditions. Significant sums of money and effort are spent each growing season to prevent kudzu from taking over roads, bridges, power lines, and local vegetation.") The analogy to bureaucracies in underdeveloped countries is an apt one.

42. See SMITH, *supra* note 2, at 162 ("The judicial system, lacking popular support, can be exploited by the bureaucracy to assist its abuse of power.")

43. See WIARDA, *supra* note 4, at 107.

44. *Id.*

45. *Id.*

46. See generally James Glanz, *Insurgents Wage Precise Attacks on Baghdad Fuel*, N.Y. TIMES, Feb. 21, 2005, at A10.

47. See Stahn, *supra* note 23, at 313.

understanding of such issues can inform decisions made regarding the rebuilding and development of legal institutions.

## V. AN OVERVIEW OF PREVALENT LEGAL PARADIGMS

Jean-Jacques Rousseau noted in the eighteenth century, “As an architect, before erecting a large edifice, examines and tests the soil in order to see whether it can support the weight, so a wise lawgiver does not begin by drawing up laws that are good in themselves, but considers first whether the people for whom he designs them are fit to endure them.”<sup>48</sup> Applying that sage advice in a modern context, international actors seeking to reconstruct the legal system of a particular country should work to understand the culture and basic principles of that nation’s legal system before undertaking such projects to avoid wasting resources or further damaging the target nation’s legal infrastructure through poorly planned or ill-fated undertakings.<sup>49</sup>

Generally, nations adhere to one of three basic legal paradigms: civil law, common law, or a variant of the Islamic legal tradition.<sup>50</sup> Though there is often a blending of various aspects of these paradigms in a single country’s legal system, normally one style is dominant enough to determine the state’s legal identity. These legal systems are closely identified with their procedural methods: civil law is noted for its inquisitorial procedure, common law is noted for its adversarial procedure, and the Islamic tradition possesses a unique procedural method that is based on religious considerations and centered around the *qadi*.

### A. *The Inquisitorial Model*

Countries that adhere to the continental civil law system generally adopt an inquisitorial legal procedure.<sup>51</sup> The inquisitorial

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48. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MANKIND* 46 (Lester G. Crocker ed., Washington Square Press 1967) (1762).

49. See generally Herbert Jacob, *Introduction to COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 1, 1-15 (1996); see also Doris Marie Provine, *Courts in the Political Process in France*, in *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE*, *supra*, 177, 207.

50. See MATTHEW LIPPMAN, SEAN MCCONVILLE & MORDECHAI YERUSHALMI, *ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION* 1 (1988) (“Common law, civil law, and Islamic law are the three principal contemporary legal traditions, embracing the legal activities and philosophies of the majority of nations.”).

51. See Provine, *supra* note 49, at 207.

model is judge-centered. During the investigation of an alleged crime, a special judge is placed in charge of the investigation, compiles evidence, and reports to the court that will hear the case.<sup>52</sup>

Trials in such systems are less complex, less technical, and less reliant upon lawyers than those in adversarial systems.<sup>53</sup> Even so, this does not mean that lawyers have no role in the process, only that their role is secondary—monitoring the proceedings to ensure fairness for their clients and only occasionally injecting themselves into the process.<sup>54</sup> At an inquisitorial trial, the judge dominates the process, asking or approving all questions posed to witnesses.<sup>55</sup> Lawyers do not interrupt the interrogation, nor do they cross-examine the witnesses.<sup>56</sup> The judge in such a system is characterized as an “examiner-in-chief.”<sup>57</sup>

The most celebrated (and most replicated) example of the inquisitorial legal system is that of France. There, once a crime has been committed, the suspect is brought in for an initial period of questioning referred to as *garde a vue*.<sup>58</sup> Until recently, authorities could hold a suspect for up to 24 hours under *garde a vue* without a formal charge, without revealing that he or she is the primary suspect, or advising the suspect of his or her right to remain silent.<sup>59</sup> Though suspects had the right to remain silent, authorities were only required to advise them of that right during judicial interrogations—not police interrogations.<sup>60</sup> Suspects did (and still do), however, have the right to withdraw any pretrial confession.<sup>61</sup> In 2000, France passed a law requiring that suspects be advised of their rights during *garde a vue*, including their right to remain

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52. See *id.* at 209.

53. See generally *id.* at 209, 213; see also Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 457 (1997).

54. See Provine, *supra* note 49, at 213.

55. See *id.*

56. See generally *id.*

57. See Smith, *supra* note 53, at 458.

58. See ERIKA FAIRCHILD & HARRY R. DAMMER, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 147 (2d ed. 2001).

59. *Id.*

60. *Id.*

61. *Id.*

silent.<sup>62</sup> However, exercise of that right may still give rise to an adverse inference of guilt.<sup>63</sup>

During the pretrial investigation, the accused has the right to an attorney and the right to remain silent.<sup>64</sup> The judicial investigator or examining magistrate, known as the *juge d'instruction*, works with police to gather facts, interview witnesses, and question the accused.<sup>65</sup> After the investigation, the *juge d'instruction* forwards his or her findings to the Indicting Chamber of the Court of Appeals. This body, in turn, determines whether or not the evidence adduced warrants a trial.<sup>66</sup> Although juries may hear cases in the courts of assize, which hear the most serious criminal cases, most civil law countries that employ the inquisitorial model do not have jury trials.<sup>67</sup>

The criminal processes of most other civil law countries operate similarly to the process outlined above. Nevertheless, many countries, such as Italy and Germany, have eliminated the position of the examining magistrate in the pretrial investigation and created a role for the prosecutor to prepare the government's case.<sup>68</sup>

One of the most characteristic features of the civil law system is that of codification.<sup>69</sup> Though the existence of a code is not absolutely necessary in a civil law system, uncodified jurisdictions exist as an exception to the general rule of codification.<sup>70</sup> Civil law codes differ markedly from similarly named compilations of law in common law countries in that civil law codes are complete and systematic, expressing a common cultural view of the law.<sup>71</sup> Over

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62. See Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 595 (2001).

63. See FAIRCHILD & DAMMER, *supra* note 58, at 149.

64. See *id.* at 147-48.

65. *Id.*

66. *Id.*

67. *Id.* at 149.

68. *Id.* at 150.

69. See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 26-33 (Stanford Univ. Press 2d ed. 1985) (1969).

70. *Id.* at 26.

71. An entirely different set of ideals and assumptions is associated with the California Civil Code, or with the Uniform Commercial Code as adopted in any American jurisdiction. Even though such codes may look very much like a French or German code, they are not based on the same ideology, and they do not express anything like the same cultural reality. Where such codes exist, they make no pretense of completeness.

the past few centuries, this view of codification has spread across the globe along with the civil law tradition:

Like the work of the Glossators and Commentators, which was received together with the *Corpus Juris Civilis* in Europe, the ideas of European publicists and scholars of the eighteenth and nineteenth centuries have been adopted, together with the form of European codification, in the civil law nations of Latin America, Asia, and Africa.<sup>72</sup>

One of the most distinguishing features of the civil law system is its hierarchy of legal sources.<sup>73</sup> "According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity that may guide the court in reaching a decision in the absence of legislation and custom."<sup>74</sup> Thus, the primary basis of law in civil law countries is legislation and not prior decisions of the courts (as in the common law tradition). The effect of this is that the concept of *stare decisis* is foreign to civil law. Civil law courts will not rely on a single case as rationale for a particular decision. Rather, civil law courts will look for a string of consistent, unbroken opinions that form a steady line of reasoning. This is referred to as *jurisprudence constante*.<sup>75</sup>

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*See id.* at 32.

72. *Id.* at 32-33.

73. Unquestionably, the most striking difference between the civil and common systems of law is to be found in the psychological attitudes of the judiciary toward legislation. The difference in attitude mirrors the differences that distinguish common and civil law lawyers in terms of the question of where a lawyer will, in the first instance, look for the source of law. In common law jurisdictions, judges tend to construe statutes narrowly and, at times, even ignore them as of inferior force. In contrast, in civil law jurisdictions, judges, like lawyers, begin their reasoning process by looking to the applicable codification which, through techniques like analogical reasoning, are regarded as capable of covering any conceivable situation that may arise.

*See* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons From the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 201 (2000).

74. LA. CIV. CODE ANN. art. 1(b) (1999).

75. *See* BARRY NICHOLAS, *FRENCH LAW OF CONTRACT* 15 (1982) (articulating the distinction between the strict English rule of *stare decisis* and French rule of precedent involving the deference only to a harmonious *series* of decisions); *see also* A. L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 42 (1934) (explaining the nature and the importance of the distinction between *stare decisis* and the *jurisprudence constante*).

Aside from France, the civil law/inquisitorial model prevails in the majority of countries across the globe, such as Germany, Italy, Spain, Turkmenistan, Senegal, Rwanda, and Benin.<sup>76</sup> It is also the legal model upon which the Iraqi legal system is based.<sup>77</sup> Though there are differences in practice and procedure, the criminal procedure of most Socialist countries is also derived from the criminal procedure of civil law countries and shares many of its basic characteristics.<sup>78</sup>

### B. *The Adversarial Model*

Countries that adhere to the common law tradition have generally adopted the adversarial model of legal procedure.<sup>79</sup> In contrast to the inquisitorial model, the adversarial model is much more attorney-centered. The role of the judge is passive, while attorneys face off as adversaries.<sup>80</sup> The parties have the sole responsibility of investigating the circumstances of their case and presenting to the fact-finder that information they deem relevant.<sup>81</sup> The role of the judge is frequently characterized as that of an umpire or, as one commentator has described it, a hostage to the tactics of the attorneys before them.<sup>82</sup> The United States and England are the most prominent examples of this model of legal procedure.

The adversarial procedure resembles a type of competition in which the passive, neutral judge exists only to decide whether each side played by the rules and then declare the victor.<sup>83</sup> In the event that the proceeding is a jury trial, the judge ensures the fairness of the contest and the jury decides the winner.<sup>84</sup> Procedural advantages favor the accused, who has the right to remain silent, the right to an attorney, the right to a trial by jury, and the right to confront his or her accusers.<sup>85</sup> The right to remain silent is central to the adversarial system and, in large part, shapes the proceeding

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76. See FAIRCHILD & DAMMER, *supra* note 58, app. D at 357-59.

77. *See id.*

78. *Id.* at 151.

79. See Herbert Jacob, *Courts and Politics in the United States*, in COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE, *supra* note 49, at 16, 23.

80. *See id.*

81. *Id.* at 24.

82. *See id.*; see also FAIRCHILD & DAMMER, *supra* note 58, at 140.

83. See FAIRCHILD & DAMMER, *supra* note 58, at 140-41.

84. *Id.* at 141.

85. *Id.*

by forcing the government to prove the guilt of the accused without the accused's cooperation.<sup>86</sup>

In the United States, before being questioned by the police, a person taken into custody generally must be informed of his or her right to remain silent and right to an attorney.<sup>87</sup> Moreover, during trial, a prosecutor may not comment unfavorably on the exercise of the right to remain silent.<sup>88</sup> In contemporary England, on the other hand, adverse inferences of guilt may be inferred from an accused's silence, an aspect which gives suspects motivation to cooperate with interrogators.<sup>89</sup> Furthermore, an accused can be denied access to a lawyer in England for up to 36 hours, or in certain cases such as those involving terrorism, up to 48 hours.<sup>90</sup>

The common law/adversarial model prevails most famously in the United States and England, but also in nations such as Malawi, Nepal, and Zambia.<sup>91</sup> Though not as prevalent as the civil law system, it certainly qualifies as one of the world's major legal traditions.

### C. *The Islamic Legal Tradition*

The Islamic legal tradition diverges from both the inquisitorial system and the adversarial system in that it is extremely judge-oriented—but the judge is passive in many respects. In fact, Islamic legal tradition is so oriented around the judge (or *qadi*) that this legal system is referred to occasionally as “*qadi* justice.”<sup>92</sup> It is a distinct form of procedure in which justice is dispensed by an Islamic judge.<sup>93</sup> The *qadi* derives his authority from the Qur'an and proceeds in accordance with the legal tradition of one of the various schools of Islam.<sup>94</sup> Thus, states adhering to

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86. *See id.* at 143.

87. *Id.*

88. *Id.*

89. Since passage of the Criminal Justice and Public Order Act of 1994, the status of the right to remain silent in England has been altered. Previously, the accused could not be required to incriminate him- or herself, and silence could not be taken to infer guilt. But since passage of the act, it is possible for guilt to be inferred by silence, and so there is pressure on the accused to waive the right to silence when being questioned by police.

FAIRCHILD & DAMMER, *supra* note 58, at 143.

90. *Id.* at 142.

91. *Id.* app. D, at 357-59.

92. *Id.* at 159 (quoting Max Weber as referring to Islamic law as “*quadi* justice”).

93. *Id.*

94. *Id.*

Islamic legal tradition will turn to individual Islamic legal traditions and the Qur’an to define their procedure.<sup>95</sup> Although this may lead to a hierarchy of courts and formalized procedure, the rights of the accused are generally regarded as secondary to the need for justice and community welfare.<sup>96</sup>

Although Joseph Schacht argued that there really is “no general concept of penal law” in Islam,<sup>97</sup> scholars note that there are separate categories of offenses which roughly correspond to what Western legal systems consider to be criminal law: Qur’anic crimes (*hudūd*), offenses against the person (*qisās or jināyāt*), and the discretionary power of state authorities to punish sinful behavior and acts that endanger the security of the state or infringe upon public order (*ta’zīr and siyāsa*).<sup>98</sup>

What may have inspired Schacht’s view of Islamic penal law is the fact that public prosecution does not exist in the purely Islamic legal system—at least not as the Western jurist knows it. A claimant is required before any redress can be given. Although this gives rise to Schacht’s view that all actions in Islamic law are, in essence, private ones,<sup>99</sup> it is best conceptualized outside of the public/private dichotomy of Western legal thought and within the context of Islam. In that regard, all actions are essentially religious concerns.<sup>100</sup>

As the Islamic legal tradition has no equivalent to a public prosecutor, a claimant is necessary in order for the Islamic legal system to take action or give redress.<sup>101</sup> Parties seeking justice may come before the *qadi* for a large range of issues because the *qadi* has vast jurisdictional competence.<sup>102</sup> The *qadi* will generally not

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95. See *id.* at 159-60.

96. *Id.* at 159.

97. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 187 (Clarendon Press 1982) (1964).

98. See Rudolph Peters, *Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi*, 4 ISLAMIC L. & SOC’Y 70, 71 (1997).

99. See SCHACHT, *supra* note 97, at 113 (“None of the modern systematic distinctions, between private and ‘public’ law, or between civil and penal law, or between substantive and adjective law, exists within the religious law of Islam; there is even no clear separation of worship, ethics, and law proper.”).

100. See LIPPMAN ET AL., *supra* note 50, at 2 (“Islamic law is a system based upon ‘Gods commands . . . having an existence independent of society imposed upon society from above.’ The law’s religious derivation and purposes are the basis of its authority, in contrast to European legal systems which derive their standing from an association with the state and its political processes.”).

101. See SCHACHT, *supra* note 97, at 189.

102. In fact, the competence of the *kadi* is limited by the rule that he cannot give

seek out actions.<sup>103</sup> Instead, parties must come to the *qadi* to find the resolution to a dispute.<sup>104</sup> However, there are examples in Ottoman Egypt, in cases involving *ta'zīr* offenses, of the *qadi* acting as an examining magistrate, presenting a report of the facts to administrative authorities who would then prosecute the suspect.<sup>105</sup> Further, once seized of a matter, the *qadi* could investigate the veracity of witnesses<sup>106</sup> or even send minions to apprehend accused wrongdoers.<sup>107</sup>

A *qadi* may authorize a variety of harsh punishments, from lashes and amputations to stoning and crucifixion.<sup>108</sup> Aggrieved parties may also request payment of blood-money or even permission to retaliate—an eye for an eye.<sup>109</sup> This draconian approach to justice, which is most extreme in fundamentalist countries, is a source of criticism by human rights advocates, and, for many citizens of the developing world, an enduring source of the traditional Islamic legal system's appeal.<sup>110</sup> The promise of law and order, irresistible to those without the security of an effective government, has ushered in hard-line Islamic governments in countries such as Afghanistan, and, most recently, Somalia. For a brief period of time, an Islamic faction called the Islamic Courts

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judgment against an absent party (*ghā'ib*) who is not represented by a deputy. The *qadi* cannot give judgment in favour of his near relatives. On the other hand, his competence extends beyond the judicial office, and includes the control of property of the missing person, the orphan, the foundling, and the person with restricted capacity to dispose, of found objects, pious foundations, and estates of inheritance. His power to dispose goes further than that of the guardian, even than that of the father; he may, for instance, lend the money of an orphan. His approval validates acts of unauthorized agency in these fields.

*Id.* at 188.

103. *Id.* at 190.

104. *Id.* at 188.

105. See Peters, *supra* note 98.

106. See WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 86 (2005) (noting that certain individuals were employed by every Islamic court to inquire into the integrity of potential witnesses and report back to the *qadi* on what they had learned of the potential witness's character).

107. See *Id.* (noting that the courts of the eighth century also included assistants whose duty it was to locate and apprehend defendants and witnesses).

108. See SCHACHT, *supra* note 97, at 175-76.

109. *Id.* at 183-86.

110. Illustrating this dichotomy, on the same day that the *New York Times* reported on the negative effect of Islam on Indonesian women, it also reported on the stoning ordered by a popular militant Islamist movement that has recently taken governmental control in Somalia. See Jane Perlez, *Spread of Islamic Law in Indonesia Takes Toll on Women*, N.Y. TIMES, June 27, 2006 at A1; Reuters, *Islamists in Somalia Say They Plan to Execute 5 Rapists by Stoning*, N.Y. TIMES, June 27, 2006 at 9.

Union swept across lawless Somalia and imposed a fundamentalist variant of Islamic law.<sup>111</sup>

Variants of the Islamic legal tradition prevail in many Middle Eastern countries, such as Saudi Arabia, Pakistan, Qatar, and the United Arab Emirates.<sup>112</sup> Many Middle Eastern countries, however, adopted civil law systems based on the French model.<sup>113</sup>

Thus, different countries have very different perceptions of law and the proper functioning of a legal system. Depending on the circumstance, what may seem like a good idea in the familiar legal system of the international actor imposing change may be a terrible idea in the legal context of rebuilding the nation. Whether the question is of the role of the judge, the presence of the prosecutor, or the extent of a legal right, one must take into consideration a country’s legal culture in a holistic sense—understanding the complete system before tampering with a part of it. Accordingly, international actors seeking to effect legal reconstruction must take a comparative approach to legal reconstruction, making legally appropriate choices when instituting reform.

## VI. DAMAŠKA’S DIFFERENTIATION

As discussed more fully below, understanding and focusing resources on empowering organic legal systems has numerous

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111. Fredrick Nzwili, *Leadership Profile: Somalia’s Islamic Courts Union*, TERRORISM FOCUS (The Jamestown Found., Washington, DC), June 13, 2006, at 5, available at <http://www.jamestown.org/terrorism/news/article.php?articleid=2370028>.

112. See FAIRCHILD & DAMMER, *supra* note 58, app. D, at 357-59.

113. These former British colonies notwithstanding, reception in the Arab Middle East is essentially one of civil laws. A distinction can be drawn here between countries under direct French-or civil law-based traditions, and countries where domination was British, but where the civil law tradition was nonetheless preferred. For the former, the French impact can be described as massive and wholesale. For the latter, there were more nuances in the introduction of French-style codes. There, the amalgamation of several traditions, including the *shari’a*s, offers a richer and more complex legal picture. The difference, however, is more of degree than in nature. The group of countries belonging to the category under direct French influence includes three states in the Maghreb—Morocco, Algeria and Tunisia—and Lebanon and Syria in the Levant. Under civil law *lato sensu*, it also includes Libya, which was under Italian domination, and Mauritania and the Western Sahara, which fell under Spanish rule. The second category of countries, which were essentially under British sway, but which “received” the civil law, include Iraq, Jordan, and Palestine-Israel.

Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209, 278-79 (2004).

advantages. Therefore, international actors engaging in state-building should understand the different legal paradigms (such as those described above) so that they may better allocate resources and preserve the legitimacy of institutions being rebuilt. Even so, occasions may arise in which the organic legal system is nonexistent or so hopelessly violative of human rights and international norms that the complex task of legal *development* must be undertaken. In such cases, state-builders should still refrain from reflexively altering the legal system of the occupied state merely to bring them into accord with their own juridical conceptions. Rather, international actors should carefully analyze the culture, circumstances and needs of the state in question and, based on those findings, construct the most suitable legal order. In that regard, the comparative analysis posited by Mirjan R. Damaška is instructive.

Mirjan R. Damaška, Professor of Foreign and Comparative Law at the Yale Law School, argues that criminal systems should be divided into two different frameworks: a conflict-solving model and a policy-implementing model.<sup>114</sup> In Damaška's analysis, these frameworks are more or less suitable, depending on the aims of the state. Damaška describes a reactive state, which only desires to provide a supporting framework within which its citizens are free to pursue their respective goals, and the activist state which, in contrast, takes a more direct role in shaping society.<sup>115</sup>

#### A. *The Reactive State and the Conflict-Solving Proceeding*

As defined by Damaška, governmental minimalism is a characteristic of the reactive state.<sup>116</sup> Governmental goals are limited to protecting social order and providing a forum for the resolution of disputes that cannot first be settled by the citizenry.<sup>117</sup> The state does not impose a certain view of social or moral good on its citizens, and only exists as a passive entity under which a

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114. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 88 (1986).

115. *Id.* at 73, 80.

116. The task of the reactive state is limited to providing a supporting framework within which its citizens pursue their chosen goals. Its instruments must set free spontaneous forces of self-management. The state contemplates no notion of separate interest apart from social and individual (private) interests: there are no inherent state problems, only social and individual problems.

*Id.* at 73.

117. *Id.*

plurality of diverse groups may operate.<sup>118</sup> The reactive state, as a general rule, only interferes when requested.<sup>119</sup>

The law under such a system considers private agreements among citizens paramount.<sup>120</sup> State law exists only as a model and, being subsidiary in nature, it can be modified or displaced by agreement.<sup>121</sup> However, citizens who cannot arrive at an individual agreement have to be content to have their arrangement governed by the state’s model solution.<sup>122</sup>

Because one of the few governmental objectives of the reactive state is to facilitate resolution of disputes, the legal process in such a system is important.<sup>123</sup> Legal disputes tend to take on the form of a contest between parties in which the state apparatus takes a passive, mediating role.<sup>124</sup>

The reactive state emphasizes the sovereignty of the individual over the government’s interest in shaping the social order.<sup>125</sup> Thus, its legal process takes the form of a contest between parties to a dispute.<sup>126</sup> The state takes on the role of a conflict solver in the dispute and serves as an umpire in the contest.<sup>127</sup> The parties, on the other hand, are vested with a large degree of control over the proceedings.<sup>128</sup> Parties decide when to begin an action, determine whether or not the action should be withdrawn, and shape the nature and content of the legal arguments advanced.<sup>129</sup> Moreover, parties are tasked with the obligation of adducing proof at these proceedings because the reactive state is far too passive to engage in an official investigation.<sup>130</sup> The decision-maker in such a system is impartial and operates as a judicial *tabula rasa* upon which the parties to the dispute inscribe facts.<sup>131</sup>

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118. DAMAŠKA, *supra* note 114, at 75.

119. *Id.* at 73.

120. *Id.* at 75.

121. *Id.* at 76.

122. *Id.*

123. *See id.* at 77.

124. *See id.* at 77-78.

125. DAMAŠKA, *supra* note 114, at 104.

126. *Id.* at 79.

127. *See id.* at 79-80.

128. *Id.* at 104.

129. *Id.* at 109-11.

130. DAMAŠKA, *supra* note 114, at 111.

131. *Id.* at 137-38.

Another characteristic of the conflict-solving paradigm is a reluctance to extend legal standing to parties not personally involved in the dispute.<sup>132</sup> Accordingly, a general stake in the procedural outcome of a dispute is inadequate to confer standing.<sup>133</sup> This comports with the reactive state's passive philosophy—only solve disputes that arise between individual parties and do not expand litigation to remedy a broader problem.<sup>134</sup> Litigation, therefore, takes on a decidedly personal scope.<sup>135</sup>

### *B. The Activist State and the Policy-Implementing Paradigm*

The activist state does not assume a minimalist role, but, in contrast, espouses a certain definition of social good and seeks to shape society to conform to its demands.<sup>136</sup> Such a government places a strong emphasis on a shared sense of citizenship, harmony, and cooperation.<sup>137</sup> Moreover, the law in an activist state emanates from the sovereign rather than from private agreements.<sup>138</sup> Law is more formative than in the reactive state—a tool by which the state accomplishes its desired social results.<sup>139</sup>

As a result of the characteristics of an activist state, legal proceedings focus less on resolution of private disputes and tend to take on the form of an inquest.<sup>140</sup> This is because legal proceedings in an activist state must be structured so as to permit a search for the best policy response to the event under consideration—not merely to resolve a conflict.<sup>141</sup>

According to Damaška, the legal process of an activist state organizes around the central idea of an official inquiry and devotes

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132. DAMAŠKA, *supra* note 114, at 116.

133. *Id.*

134. *Id.* at 117.

135. *See id.* 116-17.

136. *Id.* at 80.

137. Such a state does more than adopt a few propulsive policies and welfare programs. It espouses or strives toward a comprehensive theory of the good life and tries to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens. All spheres of social life, even matters that take place *in pianissimo*, can at least be evaluated in terms of state policy and shaped to its demands.

*Id.*

138. DAMAŠKA, *supra* note 114, at 82.

139. *Id.*

140. *Id.* at 87.

141. *Id.*

itself to the implementation of state policy.<sup>142</sup> Emphasizing the sovereignty of the state over that of the individual, the state can commence a legal action even where an aggrieved individual fails or neglects to do so.<sup>143</sup> The activist state can even initiate a proceeding without an underlying dispute between parties.<sup>144</sup> The state retains control over when to commence and withdraw legal actions.<sup>145</sup> Therefore, legal proceedings in an activist state resemble less a clash of adverse parties and more an inquiry conducted by the state to determine the truth of a matter and decide the best policy or outcome.<sup>146</sup> Parties have a duty to cooperate with this inquiry but are never afforded control over the proceeding.<sup>147</sup> In fact, parties can be forced to cooperate in such proceedings to assist the state in deciding the outcome.<sup>148</sup> The decision-maker must not necessarily be impartial, but must be just in its decisions.<sup>149</sup> As the proceeding does not revolve around two different sides of an argument, favoring one side is less important.<sup>150</sup> What is most important is coming to the best result and implementing state policy.<sup>151</sup>

Whether a Conflict-Solving or a Policy-Implementing legal system is more desirable depends on the needs of the country under construction. In making such determination, international actors should take into consideration the unique characteristics of weakened states, including the exorbitant crime rates, multifaceted impoverishment, and lack of security.<sup>152</sup> Given the needs of the country in question, it may well be that the most critical need for a government is to implement policies designed to counter a specific threat or effect a desired result.

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142. DAMAŠKA, *supra* note 114, at 87.

143. *Id.* at 84.

144. *Id.*

145. *Id.*

146. *Id.* at 87.

147. *Id.*

148. DAMAŠKA, *supra* note 114, at 87.

149. *Id.* at 86.

150. *Id.* at 85-86.

151. *Id.* at 87.

152. *See supra* notes 28-47, and accompanying text.

## VII. THE ADVANTAGE OF ORGANIC LEGAL SYSTEMS

The wholesale re-creation of a legal system is a task of extraordinary complexity.<sup>153</sup> In the context of state-building, not only must one successfully create a legal system that is theoretically functional, but one must then teach this system to a country of lawyers, judges, and legal personnel that have, up to that point in their legal existence, conceived of law and legal practice differently. Accordingly, the most successful programs to restore the rule of law in weakened or failed states have been those rooted in the traditions of the local citizenry.<sup>154</sup> This is true not only because pre-existing organic legal systems often have the advantage of being tested through years of legal practice, but also because organic institutions are more likely to be perceived as legitimate.<sup>155</sup> Historical evidence from the colonial period indicates that maintaining and empowering the organic legal institutions encourages stability by preserving governmental legitimacy.<sup>156</sup> A legitimacy deficit can lead to rejection, which can quickly lead to failure. As Ash Ü. Bâli notes:

The better model for a more robust nation-building project would be indigenous ownership of both institutional design and implementation along with external logistical support. For new state institutions to be stable and durable, they must be the product of local political bargains commanding sufficient

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153. See Eugene R. Fidell, et al., *Military Commission Law*, ARMY LAW., Dec. 2005, at 47 (noting that establishing any legal system from scratch is more difficult than creators anticipate, as revisions create unforeseen internal inconsistencies and inevitable procedural gaps).

154. See Marcia Coyle, *Toward an Iraqi Legal System*, NAT'L L.J., Apr. 25, 2003, at A6 (quoting Paul van Zyl, director for country programs at the International Center for Transitional Justice, as saying that the most successful programs to bring the rule of law to former dictatorships have been rooted in or "owned" by the local citizenry).

155. See SMITH, *supra* note 2, at 36-37.

156. Britain's need for political control and the maintenance of stability was consistent with the preservation of indigenous practices. In many parts of West Africa, for example, with the exception of inhuman punishments for criminal offences defined according to local customary law, existing customs and laws were left intact. It was far easier to keep a population quiescent when it was partly governed by its own institutions, laws, and customs, although ultimately subject to the local representatives of the British Crown. A hierarchy of colonial officials extended from the Secretary of State for the Colonies at the apex down to district commissioners in charge of large populations and supervising the exercise of customary law by indigenous judges and law-makers regarded as legitimate by the local population.

*Id.*

consensus to bolster their perceived legitimacy.<sup>157</sup>

Another consideration for international actors effecting legal reconstruction is the regime of international legal rules governing occupation.<sup>158</sup> Article 43 of the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land requires that an occupying power "re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."<sup>159</sup> In his Commentary on the Geneva Convention, Jean S. Pictet expressly notes that this language means that an occupying power may not alter the legal system of the occupied state merely to bring it into accord with the occupier's own jurisprudential conceptions.<sup>160</sup>

Therefore, there are practical and legal reasons for choosing to empower the organic legal systems of weakened or failed states rather than creating new systems altogether or unnaturally altering them to conform to more familiar legal institutions. Accordingly, the first course of action for international actors seeking to effect legal reconstruction should be to undertake a study of that organic legal system, learn how the target nation perceives the law, and then determine how it can be empowered so that order, stability, and the rule of law can be restored.

#### VIII. THE ADVANTAGE OF MINIMALISM

Leading scholars on the subject of state-building have advocated designing operations with a "light footprint."<sup>161</sup> Francis Fukuyama notes that such a model builds early local ownership and is more sustainable by foreign donors and taxpayers.<sup>162</sup> Such considerations are important because state-building is an enormously expensive endeavor. In the 1940s, the Marshall Plan

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157. Băli, *supra* note 18, at 438-39 ("Prevailing in a military battle against a weak state with limited defensive capacities is scarcely a qualification for the job of nation-building.").

158. See THE HAGUE CONVENTIONS OF 1899 (II) AND 1907 (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND art. 43 (James Brown Scott ed., 1915).

159. *See id.*

160. See JEAN S. PICTET, COMMENTAIRE: IV LA CONVENTION DE GENEVE RELATIVE A LA PROTECTION DES PERSONNES CIVILES EN TEMPS DE GUERRE 360 (Comite International de Croix Rouge, 1956).

161. See Fukuyama, *Guidelines*, *supra* note 22, at 242-43.

162. *See id.*

for Europe cost over \$13 billion.<sup>163</sup> Today, the state-building effort in Iraq costs the United States government, on average, \$4.5 billion per month.<sup>164</sup> Given that such operations are likely to recur and be funded by the same taxpayers, it is important that they be politically sustainable on both ends. By focusing on a minimalist approach to state-building, maximizing the impact of assets on the ground and avoiding redundant institutions, international actors can preserve the legitimacy of the government being restored in a way that maintains domestic political support.

By advocating a minimalist approach to state-building, this article does not imply that state-building endeavors should necessarily employ a small number of troops—only that international actors should seek to maximize organic resources and use no more external manpower than necessary. Personnel who could be perceived as outsiders should be used as sparingly as the mission will allow. It is important to note that state-building often requires large numbers of troops to secure the peace so that development can begin. Those troops must then remain and maintain the peace while development continues.<sup>165</sup> However, the footprint should be as light as possible in order to accomplish the desired objective of development.

Military personnel are not the only actors involved in state-building. Nongovernmental Organizations (NGOs) are often key players and no less subject to the demands of a minimalist approach. An overabundance of NGOs can just as easily be perceived as a kind of occupation.<sup>166</sup> It can also serve to inflate prices in the target country to a damaging degree and undermine

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163. See MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952*, at 337 (Louis Galambos & Robert Gallman eds., 1989).

164. See Johanna Mendelson Forman, *Striking Out in Baghdad: How Postconflict Reconstruction Went Awry*, in *NATION BUILDING: BEYOND AFGHANISTAN AND IRAQ*, *supra* note 8, at 196, 196.

165. See *id.* at 196-99.

166. By mid-2003, no fewer than two thousand national and international NGOs were operating in Afghanistan, mainly in the fields of poverty reduction, education, and health. Most viewed the civil administration as intrusive and bumbling. They therefore preferred to distance themselves from the government at both the national and local levels. As the number of NGO workers killed in the line of duty grew, the gap of understanding between NGOs and the government became an alarming chasm.

S. Frederick Starr, *Sovereignty and Legitimacy in Afghan Nation-Building*, in *NATION BUILDING: BEYOND AFGHANISTAN AND IRAQ*, *supra* note 8, at 107, 116.

the legitimacy of local government and institutions.<sup>167</sup> S. Frederick Starr notes:

At a meeting in Kabul in April 2004, shortly after the Berlin donor’s conference, Ramazan Bashar Dost, Afghan minister of planning, declared that it would do more harm than good if aid money were given directly to NGOs rather than channeled through the government. In November 2004, he put it more bluntly: ‘I have yet to see a NGO that has spent 80% of its money for the Afghans.’ Strong words, but solidly grounded in reality. Donors were blind to the extent to which the work of the NGOs undermined local administrators in the public’s mind. Worse, they were blind to the Afghan’s view that the delivery of services at the local level was one of the two prime tests of the government’s legitimacy.<sup>168</sup>

Therefore, while NGOs and other such entities are helpful, they should be subject to the same minimalist analysis—not viewed as a *per se* benefit, but a potential benefit that could become a liability if not economically allocated.

Minimalism also counsels that organic institutions be empowered and revitalized, rather than new entities and institutions be created from whole cloth. This not only avoids a legitimacy deficit and fosters greater security, it decreases the cost of state-building by focusing resources on established entities—rather than requiring that institutions be rebuilt from scratch. In addition, it decreases the “footprint” of the occupier by using local nationals already engaged in and familiar with the functioning of that organic institution.

Another advantage of this approach is that of rapidity. Empowering an existing institution (such as a criminal court) is a quicker and shorter process than that of creating a new court, educating the employees, funding the project, etc. For instance, the Coalition Provisional Authority (CPA) was able to get Iraqi courts functional in a matter of months,<sup>169</sup> but after years of effort has not been able to create a legitimate, functional mechanism capable of addressing the property concerns of displaced Iraqis.<sup>170</sup> In an

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167. *See id.*

168. *See id.* at 117.

169. *See* L. Paul Bremer, Coalition Provisional Authority Administrator, Opening Remarks at Press Conference (Oct. 9, 2003) (transcript available at [http://www.cpa-iraq.org/transcripts/20031009\\_Oct-09Bremerpresscon.htm](http://www.cpa-iraq.org/transcripts/20031009_Oct-09Bremerpresscon.htm)).

170. *See* Dan E. Stigall, *Courts, Confidence, and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims*

environment in which security needs to be quickly established, and in which the lack thereof is measured by a body count, the advantage of rapidity cannot be overstated.

Further, as discussed above, one of the factors that impede development in weakened states is the existence of an overdeveloped bureaucracy.<sup>171</sup> Creating additional commissions, tribunals, and councils, when the already-existing organic institutions (if properly empowered) could handle the task, only exacerbates that problem. Therefore, international actors engaged in legal reconstruction should eschew such superfluous bureaucracy-building and focus their efforts on rebuilding organic institutions.

## IX. IRAQ: A CASE STUDY

The current state-building operation in Iraq is the most ambitious and extensive in modern history. Never before have so many U.S. resources been devoted to the rehabilitation of a foreign government. Part of that reconstructive effort has required a familiarization with the Iraqi legal system – a legal system that had, until recently, been largely ignored by the Western world. A review of this legal system reveals that the legal system of Iraq, though influenced by elements of the Islamic legal tradition, is based on the continental civil law system.<sup>172</sup> Therefore, in discussing the basic criminal and civil structure of the Iraqi legal system, the reader will note several similarities with the French system discussed above.

### A. Iraqi Criminal Law

Since the 1970s, criminal procedure in Iraq has been ostensibly governed by the Iraqi Law on Criminal Proceedings.<sup>173</sup>

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*Commission (IPCC)*, ARMY LAW., Mar. 2005, at 28 [hereinafter Stigall, *Courts, Confidence, and Claims Commissions*]; see also Edward Wong, *Kurds Are Flocking to Kirkuk, Laying Claim to Land and Oil*, N.Y. TIMES, Dec. 29, 2005, at A12 (noting that Kurdish Iraqis who were to find recourse in the Iraqi Property Claims Commission are now taking matters into their own hands).

171. RIGGS, *supra* note 38, at 74.

172. See Mallat, *supra* note 113, at 209.

173. See Law on Criminal Proceedings with Amendments, No. 23 of 1971, Decree No. 230 (1971) (Iraq), available at [http://www.law.case.edu/saddamtrial/documents/Iraqi\\_Criminal\\_Procedure\\_Code.pdf](http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf) [hereinafter Law on Criminal Proceedings].

174. John C. Williamson, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT'L & COMP. L. 229, 240 (2004).

Although the Ba’athist regime flouted the rule of law,<sup>174</sup> it was and remains the law governing criminal procedure in Iraq.

According to Iraqi law, once a crime has been committed, it can be initially investigated by any number of government officials which are designated as “investigating officers” by the Iraqi Law on Criminal Proceedings.<sup>175</sup> Those officials include police officers, mayors of villages, railway stationmasters, train conductors, heads of government, and other public servants.<sup>176</sup> These investigating officers investigate alleged crimes, collect evidence, and then submit all collected evidence to the examining magistrate.<sup>177</sup> Any investigating officer may obtain the assistance of the police,<sup>178</sup> but his task ends once the examining magistrate or a representative of the Public Prosecutor’s Office arrives.<sup>179</sup> The statements of the accused should be recorded along with a statement of evidence in favor of the accused.<sup>180</sup>

The examining magistrate or investigator must question the accused within 24 hours of his arrival, after proving his identity to the accused and informing the accused of the offense of which he is suspected.<sup>181</sup> The accused has the right to make his statement to the examining magistrate at any time after listening to the statements of any witness, or request that certain witnesses be summoned for discussion of the facts.<sup>182</sup> He also has the right to refuse to answer any question posed.<sup>183</sup> The accused is not to be placed under oath unless giving a statement as a witness for other defendants.<sup>184</sup>

Although Saddam Hussein’s government routinely ignored such provisions, Iraqi law prohibits the use of torture or unduly coercive tactics to obtain a confession.<sup>185</sup> Further, if a confession is

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175. Law on Criminal Proceedings, *supra* note 173, bk. 2, pt. 2, ch. 1, para. 39.

176. *Id.*

177. *Id.* para. 41.

178. *Id.* para. 45.

179. *Id.* para. 46.

180. *Id.* ch. 5, para. 123.

181. *Id.*

182. Law on Criminal Proceedings, *supra* note 173, bk. 2, pt. 2, ch. 1, para. 124.

183. *Id.* para. 126.

184. *Id.*

185. *Id.* para. 127 (“The use of any illegal method to influence the accused and extract a confession is not permitted. Mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal methods.”).

obtained, certain provisions exist to ensure its voluntariness, such as a requirement that the examining magistrate read it back to the accused, and a requirement that the recorded statement be signed.<sup>186</sup> If the accused wishes to write his statement in his own hand, the examining magistrate must allow him to do so.<sup>187</sup>

If, after the investigation, the examining magistrate finds no evidence of a crime or that there is no action punishable by law, he issues a decision rejecting the case and closing the file.<sup>188</sup> If, however, he does find sufficient evidence of a crime, he transfers the evidence and the accused to the appropriate court.<sup>189</sup> The court then, upon receipt of the case file, sets a date for trial and must notify parties of that date.<sup>190</sup> The trial takes place with all parties in attendance<sup>191</sup> and the proceedings are open unless closed by the court for reasons of security or decency.<sup>192</sup>

In the event that the crime is a felony, it is referred to the Court of Felony and a lawyer is appointed for the accused if he or she does not already have one.<sup>193</sup> That lawyer must prepare the defense for the accused and represent him or her at trial or face a monetary penalty.<sup>194</sup>

At trial, witnesses are sworn and interrogated by the judge.<sup>195</sup> The witness gives his or her testimony orally and may be interrupted during its delivery.<sup>196</sup> While the court may ask any questions it deems necessary to clarify the facts, the public prosecutor, or the complainant, may only discuss testimony and request clarifications through the court.<sup>197</sup> As in the English and French systems, the court may ask the defendant questions at trial and a refusal to answer may lead to adverse inferences of guilt.<sup>198</sup>

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186. Law on Criminal Proceedings, *supra* note 173, bk. 2, pt. 2, ch. 1, para. 128.

187. *Id.*

188. *Id.* para. 130.

189. *Id.*

190. Law on Criminal Proceedings, *supra* note 173, bk. 3, pt. 2, para. 130.

191. *Id.* para. 147.

192. *Id.* pt. 3, para. 152.

193. *Id.* pt. 2, para. 144.

194. *Id.*

195. Law on Criminal Proceedings, *supra* note 173, bk. 3, pt. 3, para. 168.

196. *Id.*

197. *Id.*

198. *Id.* para. 179.

### B. Iraqi Civil Law

The Iraqi civil law system is also modeled after the French system—and is characterized by a civil code that has been lauded as one of Iraq’s greatest legal achievements.<sup>199</sup> The Iraqi Code’s initial articles are strikingly similar to many other civil codes based on the French model. The first article of the Iraqi Civil Code states that “legislative provisions shall apply to all matters covering these provisions in letter trend and content.”<sup>200</sup> Article 2 states that “[i]n the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage.”<sup>201</sup> Furthermore, in the absence of custom and usage, courts shall rule in accordance with the principles of the Islamic Shari’a which are most consistent with the provisions of the Iraqi Civil Code, though courts are not bound by any specific school of thought.<sup>202</sup> Otherwise, the Iraqi Code states that courts are to rule “in accordance with the laws of equity.”<sup>203</sup>

These provisions reflect a decidedly civilian hierarchy of legal sources: government legislation and custom are primary and everything else is secondary. “Though the Iraqi Civil Code makes a cultural bow to [the Islamic legal tradition] by including such principles as secondary sources of legislation, the positive law of the civil code is clearly dominant.”<sup>204</sup>

### C. Post-Ba’athist Legal Reconstruction

Immediately after the fall of the Ba’athist regime, Coalition personnel met with senior members of the Iraqi Ministry of Justice to determine the needs of the judiciary so that it could be rebuilt.<sup>205</sup> The Coalition allocated resources to the judiciary based upon what the domestic legal institutions indicated as their most pressing needs.<sup>206</sup> The U.S. Department of Justice then dispatched teams of legal professionals throughout Iraq to further assess the needs of

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199. See Dan E. Stigall, *From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code*, 65 LA. L. REV. 131, 132 (2005) [hereinafter Stigall, *From Baton Rouge to Baghdad*].

200. See Law No. 40 of 1951: The Civil Code, reprinted in BUSINESS LAWS OF IRAQ – VOLUME III (Nicola H. Karam trans., 10th ed. 1990).

201. Civil Code art. 1, § 2 (Iraq).

202. *Id.*

203. *Id.*

204. See Stigall, *From Baton Rouge to Baghdad*, *supra* note 199, at 132.

205. See Williamson, *supra* note 174, at 234-35.

206. *Id.* at 235.

national courts so that resources could be allocated to respond to other perceived shortcomings.<sup>207</sup> The Coalition proceeded to engage in a legal construction project that would see brilliant successes accompanied by some miserable failures. A glimpse into the Coalition's reconstructive efforts in areas of Iraqi criminal and civil law reveals hits and misses that are instructive for those seeking to engage in legal reconstruction in the future.

### 1. Reconstruction of Iraqi Criminal Law

As the Coalition engaged the local judiciary and assessed the status of Iraqi courts, the CPA implemented CPA Memorandum Number 7, which modified Iraq's penal code.<sup>208</sup> Among those reforms were the suspension of capital punishment, torture, and the institution of checks on certain articles of the penal code that were used as tools of oppression by the Ba'athist regime, such as the crime of insulting the president of Iraq and other political crimes.<sup>209</sup> These minor alterations did not fundamentally alter the fabric of the criminal justice system in Iraq, but served to remove its most unfair and oppressive elements. Such modifications, though important, were minor as they did not disrupt the ordinary functioning of the organic criminal justice system nor did they change its basic design.

This approach to legal reconstruction—focusing allocation of resources based on the needs of domestic courts while minimizing modifications—is the best approach. The best way to determine what needs to be fixed is to ask the lawyers and judges who work within the walls of the domestic courts. By suspending the most problematic and unfair provisions of the penal code, the justice system could begin its work without a cloud of suspicion. By taking this approach, the Coalition empowered the organic legal system. However, not all of the CPA's reforms were so acceptable or well-considered.

As noted above, Iraq's criminal justice system is based on the French model.<sup>210</sup> Within two months, the Coalition implemented CPA Memorandum Number 3, which modified Iraq's criminal

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207. *Id.*

208. See L. Paul Bremer, Administrator, Coalition Provisional Authority Memorandum No. 7, Penal Code (June 10, 2003) [hereinafter CPA Memo. No. 7].

209. *Id.* §§ 1-2.

210. See FAIRCHILD & DAMMER, *supra* note 58, at 358.

procedure.<sup>211</sup> John C. Williamson, who served as the Senior Advisor to the Iraqi Ministry of Justice in Baghdad during the initial phase of the occupation, noted:

[W]e provided certain protections for defendants that had been absent in the Iraqi criminal justice system. Foremost among these was the right to defense counsel from the outset of judicial proceedings. . . . Arrested subjects were given the right to remain silent in the face of questioning and a requirement was instituted that they be advised of their rights when facing criminal charges.<sup>212</sup>

In fact, CPA modifications granted Iraqis the absolute right to remain silent beginning from the time they are arrested by any law enforcement officer.<sup>213</sup> CPA modifications also changed Iraqi law so that no adverse inference can be drawn from the exercise of that right.<sup>214</sup>

It is not quite accurate to say that such elements were previously missing from the Iraqi criminal justice system. The Iraqi Law on Criminal Proceeding forbids the use of torture<sup>215</sup> and states that the examining magistrate or investigator is required to question the accused within twenty-four hours of his arrival on the scene and only after informing the accused of the crime of which he is suspected.<sup>216</sup> Paragraph 126 already gave accused Iraqi citizens the right to remain silent when being questioned by the examining magistrate and indicated that, when being questioned, the accused was not to be placed under oath.<sup>217</sup> These laws had already been in place but were merely ignored by the Ba’athist regime.<sup>218</sup>

The CPA initiatives, however, required that a *Miranda*-like warning be given to an accused Iraqi and that his silence could not be used against him as it can be in the criminal law systems of numerous Western democracies.<sup>219</sup> In this regard, it is worth noting that the CPA reforms gave greater protections to detained Iraqis

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211. See L. Paul Bremer, Administrator, Coalition Provisional Authority Memorandum No. 3, Criminal Procedures (June 18, 2003) [hereinafter CPA Memo. No. 3].

212. Williamson, *supra* note 174, at 239.

213. CPA Memo. No. 3, *supra* note 211, §§ 4, 6.

214. *Id.* § 4(c)(i).

215. Law on Criminal Proceedings, *supra* note 173, bk. 2, pt. 2, ch. 5, para. 127.

216. *Id.* para. 123.

217. *Id.* para. 126.

218. See Williamson, *supra* note 174, at 240.

219. *Id.*; see also *Miranda v. Arizona*, 384 U.S. 436 (1966).

than those to which English and French citizens are entitled.<sup>220</sup> This level of protection was not previously available in Iraq because such protections are not as emphasized in the inquisitorial system as they are in the adversarial system.<sup>221</sup>

While the lack of an American-style privilege against self-incrimination makes the Iraqi criminal system different from that of its occupier, it does not make the system less sophisticated or less humane. It is worth noting that a full privilege against self-incrimination (as it is understood today) is a relatively recent phenomenon in the Anglo-American criminal justice system, arising only in the nineteenth century.<sup>222</sup> The original intent of the privilege, as embodied in the U.S. Constitution, was not to afford criminal defendants a right to refuse to respond to incriminating questions, but simply to prohibit improper methods of interrogation, such as torture.<sup>223</sup> Its current articulation seems to be based largely on a historical misconception.<sup>224</sup> Contemporary

220. *See id.* at 239.

221. *See id.*

222. *See* Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 145, 171 (1997) (“The development of the modern privilege against self-incrimination resulted from developments made clear by *R. v. Garbett*, decided in 1847.”). *See also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 181, 197 (1997):

[T]he transformation of the privilege into a right of criminal defendants to remain silent occurred only during the nineteenth century. Lawyerization of the trial contributed to a changed ideology of criminal procedure – one in which the dignity of the defendants lay not in their ability to tell stories fully but rather in their ability to remain passive, to proclaim to the prosecutor, ‘Thou sayest,’ and to force the state to shoulder the entire load. As defendants participated less in the proceedings that determined their fate, they were seen more as objects or as targets of the coercive forces of the state.

*Id.*

223. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 184-85 (1997).

224. More than the adaptation of old doctrines to new functions, the history of the privilege against self-incrimination seems to reveal the tyranny of slogans. Shorthand phrases have taken on lives of their own. These phrases have eclipsed the goals of the doctrines that they purported to describe and even the texts that embodied those doctrines. . . . They have drifted from condemning interrogation under oath without evidentiary justification to condemning torture and all interrogation of suspects under oath. The officials then have drifted to a judgment that the framers of all the earlier doctrines unquestionably would have disapproved: that it is unfair to expect defendants on trial and people arrested on probable cause to participate actively in the criminal process by telling what they know.

scholars have questioned its logic even in the context of the developed world:

The virtues of an “accusatorial” system in which defendants are privileged to remain passive are far from obvious. The person who knows the most about the guilt or innocence of a criminal defendant is ordinarily the defendant himself. Unless expecting him to respond to inquiry is immoral or inhuman (contrary to Greenawalt’s view of ordinary morality), renouncing all claim to his evidence is costly and foolish.<sup>225</sup>

Even if the goal of fortifying the scope of the privilege against self-incrimination is laudable and desirable in more stable societies, it is questionable in the context of post-conflict reconstruction. This is because, in such settings, there is a need for security that unnecessarily strong protections tend to undermine by increasing the difficulty of criminal prosecutions and evidence-gathering.<sup>226</sup> The need for security and policy-implementation in such a chaotic environment requires a more activist posture, emphasizing the need for security and order in the nascent state over the individual rights of its restless citizens. Further, historical evidence tends to show that in certain circumstances, increased prosecutorial burdens can lead to a reliance on the use of torture to attain proof.<sup>227</sup> The strong need to obtain evidence (or

*Id.* at 200-01 (internal citations omitted).

225. *See id.* at 183-84.

226. *See generally* Douglas Jehl & David Johnston, *Within C.I.A., Growing Fears of Prosecution*, N.Y. TIMES, Feb. 27, 2005, at 1 (discussing how the C.I.A. has used “coercive techniques” in interrogations).

227. Until the criminal ordinance of 1670, the absence of a complete proof in a criminal case meant that, in theory, no conviction was possible and that, in practice, no capital conviction was possible. As a result, whether confession was understood to provide a complete or proximate proof, torture provided a central position in the judicial system, providing capital convictions that would otherwise have been unattainable.

*See* LISA SILVERMAN, *TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE* 44 (2001). *See also* JULIUS R. RUFF, *VIOLENCE IN EARLY MODERN EUROPE* 93 (2001):

Indeed, the law of proof in the Roman-canon tradition of jurisprudence was the root of torture in our period. Proof of guilt for conviction in capital crimes had to rest on either the testimony of two eye witnesses to the offense, or the confession of the accused. Conviction was impossible without such proofs; the law precluded courts from weighing circumstantial evidence and ruling on the basis of such proof. Thus, when judges lacked two eyewitnesses to an offense, but still possessed substantial proof of guilt, they required a confession to convict the defendant.

*Id.*

retribution) in post-conflict settings makes resorting to torture even more seductive.<sup>228</sup> Unfortunately, it seems that this is a reflex from which neither occupiers nor the occupied are completely immune.<sup>229</sup>

Obviously, there are a number of factors which lead to such treatment which are completely divorced from the increased burden in criminal prosecutions. However, faced with such obstacles, the overwhelming need for control of unstable societies in post-conflict situations (and the criminal element that persists therein) may well result in the complete rejection of a legal method deemed ineffective and the adoption of extralegal tactics which are hoped to provide results. Likewise, the absence of an effective criminal justice system in which wrongdoers actually receive their just deserts might prompt others to take the law into their own hands to carry out acts of retribution. This resort to torture or other forms of violence as a means to an end is not uncharacteristic of human behavior. As Nietzsche is quoted as saying, "All morality is nothing more than an expression of expediency."<sup>230</sup>

Given the fact that an American-style "full" privilege against self-incrimination is not required in order to have a fair and humane criminal justice system, is not considered a universal human right, and is not a part of the organic Iraqi legal system, it would have been best to refrain from this needless tinkering and reserve to the nascent Iraqi judiciary the power to question the suspected wrongdoer and draw adverse inferences from his or her silence. Even if such powers are undesirable in the context of a peaceful, developed society, the needs of a post-conflict society and its strong governmental interest in containing chaos warrant an approach that is less *laissez-faire* and more akin to Damaška's Activist State and Policy-Implementing paradigm.

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228. And with Iraq's legacy of brutal politics, limited oversight by the country's weak courts, and general support of torture and execution by millions of Iraqis—frustrated and angered by an insurgency that kills many more civilians than soldiers—severe abuses were almost inevitable. The apparent pattern of torture in Iraq also leaves the US in a political bind.

See generally Dan Murphy, *Iraqi Torture Practices Could Be More Widespread: Revelations this Week that Iraq's Interior Ministry Abused Detainees in a Secret Prison May Be Just the Beginning*, CHRISTIAN SCIENCE MONITOR, Nov. 17, 2005, at 12.

229. See Eric Schmitt & Thom Shanker, *U.S., Citing Abuse In Iraqi Prisons, Holds Detainees*, N.Y. TIMES, Dec. 25, 2005, at 1; Jehl, *supra* note 226.

230. See DANIEL P. MANNIX, THE HISTORY OF TORTURE 13 (2003).

It would have been far better to simply note the rights and protections that Iraqi citizens did have under their system, when properly functioning, and to focus on ensuring that those rights and protections were actually provided. It would have been better to limit the immediate goal of Iraqi legal reconstruction to ensuring that the organic legal system functioned fairly and properly. Different rights and different protections can gradually be introduced as security in the post-conflict environment improves and as (or if) the people of that society demand them. When moving from tyranny to the protections offered by the world’s greatest democracy, it is sometimes best to take small steps.

## 2. Reconstruction of Iraqi Civil Law

In all of its memoranda, regulations, and orders, the CPA wisely left the Iraqi Civil Code largely untouched.<sup>231</sup> This was an excellent decision as the Iraqi Civil Code is one of the best of its kind in the Middle East and is more than adequate for the task of regulating civil matters between Iraqi citizens.<sup>232</sup> Rather than engage in unnecessary tinkering with a cornerstone of Iraqi legal culture, the CPA prioritized the needs of the judiciary and allocated resources accordingly. In a short time, Ambassador L. Paul Bremer, former director of the Coalition Provisional Authority, was able to proclaim the results, noting as early as October 9, 2003 that, “Six months ago there were no functioning courts in Iraq. Today nearly all of Iraq’s 400 courts are functioning. Today, for the first time in over a generation, the Iraqi judiciary is fully independent.”<sup>233</sup>

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231. The Iraqi Civil Code, as amended, is still in force. The Law of Administration for the State of Iraq for the Transitional Period, the document governing the Coalitional Provisional Government, provides that “[e]xcept as otherwise provided in this Law, the Laws in force in Iraq on 30 June 2004 shall remain in effect unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law.” The Law of Administration for the State of Iraq for the Transitional period, art. 26 (Mar. 8, 2004); E-mail from M. Lawrence, Iraqi International Law Group, to Scott J. Borrowman (Dec. 11, 2004, 03:53 MST) (on file with author).

See Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib – Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371, 422 n.310 (2005).

232. See Stigall, *From Baton Rouge to Baghdad*, *supra* note 199, at 152.

233. Bremer, *supra* note 169.

The coalition enjoyed successes in the reconstruction of Iraqi civil law<sup>234</sup> but it also made mistakes. One example was the creation of the Iraqi Property Claims Commission (IPCC). After the fall of the Ba'athist regime, the coalition quickly realized that there were a large number of displaced persons and land disputes that were going to be a cause of ethnic tension.<sup>235</sup> There was a desire to ease post-occupation instability and to quell violence caused by ethnic tensions and an otherwise offended polity.<sup>236</sup> However, rather than simply empower the civil courts, where property disputes are normally litigated, the decision was made to create a new commission that would operate by its own rules rather than the provisions of the Iraqi Civil Code.<sup>237</sup> On January 14, 2004, the CPA promulgated a regulation to establish a commission "for the purpose of collecting and resolving real property claims and to promulgate procedures for promptly resolving such claims in a fair and judicious manner."<sup>238</sup> A new entity, therefore, was to be created to govern a set of problems for which an organic entity already existed.

The results of this endeavor were predictable. The IPCC had enormous difficulty starting its work and its rules and procedures were poorly drafted, with critical gaps and glaring omissions.<sup>239</sup> However, its failings were not merely in the inadequacy of its substantive rules, but also in its ability to operate.<sup>240</sup> By September 2004, months after the dissolution of the CPA, the situation had not improved.<sup>241</sup> *Agence-France Press* reported: "Iraq's property claims commission for disputed land in oil-rich northern Iraq has

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234. See generally Stigall, *From Baton Rouge to Baghdad*, *supra* note 199, at 132 (explaining that the Iraqi Civil Code retains a great deal of the structure of a traditional civil law jurisdiction, thereby retaining the advantage of being connected with a majority of the world's legal traditions and centuries of legal development).

235. See generally L. Paul Bremer, Administrator, Coalition Provisional Authority Regulation No. 8, Delegation of Authority Regarding an Iraq Property Claims Commission, (Jan. 14, 2004) [hereinafter CPA Reg. No. 8] ("[L]arge numbers of people from different ethnic and religious backgrounds in Iraq have been uprooted and forced to move from their properties to serve political objectives of the Ba'athist regime.").

236. See *id.*

237. See *id.*

238. See *id.*

239. Stigall, *Courts, Confidence, and Claims Commissions*, *supra* note 170, at 34.

240. *Id.*

241. See Jennie Matthew, *Iraqi Property Commission Failing, 167,400 Displaced Persons Since March: US, AGENCE FRANCE-PRESSE*, Sept. 3, 2004, <http://www.reliefweb.int/rw/rwb.nsf/A11DocsByUNID/679980ae6343d55849256f040021bdec>.

failed to process a single claim, despite more than 167,400 Kurds re-settling in dozens of refugee camps since March alone.<sup>242</sup>

Another unfortunate side-effect of the IPCC’s creation was that Iraqi Civil Courts were deprived of an enormous part of their natural jurisdiction and, perhaps, their best chance in the aftermath of the war to show that they were a neutral, effective, and legitimate institution that can be a force for good in Iraqi society. The coalition made the same mistake in Iraq as NGOs did in Afghanistan by failing to see that the provision of basic services is the role of government and, when the government looks incapable of doing its job, governmental legitimacy is undermined.<sup>243</sup>

Though it did eventually begin to adjudicate property claims, the legitimacy deficit encountered by this entity was too great to overcome. In late December 2005, the *New York Times* reported that displaced Iraqi Kurds were not seeking recourse in the Iraqi Property Claims Commission, but had instead started taking matters into their own hands.<sup>244</sup> Thus, the ill-fated IPCC led to a breakdown in civil order and undermined faith in governmental institutions. Its failure was an expensive one.<sup>245</sup>

In March 2006, a new law came into force, replacing the IPCC with a new entity called the Commission for Resolution of Real Property Disputes (CRRPD).<sup>246</sup> The better course of action would have been to remit the tasks and jurisdiction of the IPCC to the Iraqi civil courts. Instead, once again, rather than empower organic institutions, the decision was made to create yet another bureaucracy. This new entity, the CRRPD, is to operate according to new regulations and procedures which are still being drafted as of the time of the writing of this article.<sup>247</sup> Preliminary indications,

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242. See *id.*

243. See Starr, *supra* note 166, at 117.

244. See Wong, *supra* note 170.

245. See Human Rights Watch, *Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq*, at 70, HRW Index No. E1604, Aug. 3, 2004 [hereinafter *Claims in Conflict*] (“[T]he Iraq Supplemental bill approved by the U.S. Congress for the post-war reconstruction program provided for \$35 million for property-related compensation claims, of which \$5 million was earmarked for administration costs.”).

246. See Internal Displacement Monitoring Centre, *Iraq: Sectarian Violence, Military Operations Spark New Displacement, as Humanitarian Access Deteriorates*, May 23, 2006, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/5FF5134F8672E698C125717700492CAC/\\$file/Iraq%20Overview%2023%20May%202006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/5FF5134F8672E698C125717700492CAC/$file/Iraq%20Overview%2023%20May%202006.pdf) [hereinafter *Iraq: Sectarian Violence*].

247. See generally Int’l Org. for Migration, *Ongoing Improvements for the Iraqi Property Claims Process*, at 7, Mar.-Apr. 2006, <http://www.iom-iraq.net/newsletters/>

however, are that certain changes will be made, such as including new provisions allowing “good faith secondary occupants a right to compensation from the government if the property they currently live in is restituted to the original owner.”<sup>248</sup> Further, “compensation amounts will now be calculated with reference to the value of the property on the date on which the claim was filed rather than the date of the wrongful taking by the former regime, a change which will often result in higher levels of compensation.”<sup>249</sup> Most promisingly, there are some indications that the new rules will at least reference the Iraqi Civil Code—which is a small step in the right direction.<sup>250</sup> It is hoped that this new bureaucracy will avoid the fate of the IPCC by striving to operate in accordance with the legal regime already in place and working closely with local courts to provide redress.

The scuttling of the IPCC demonstrates the enormous waste of time and money that can result when sufficient attention is not given to organic legal systems. Two years of valuable time and resources were wasted.<sup>251</sup> The errors of the IPCC demonstrate the value of the organic minimalist approach to legal reconstruction. By simply studying Iraqi civil law, recognizing the law’s ability to properly address property disputes, and empowering civil courts,

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IOM\_Iraq\_Newsletter\_marApr06\_English.pdf [hereinafter *Ongoing Improvements*] (“In the months of March and April, IOM shared with the CRRPD a list of proposed laws, regulations and guidelines for the CRRPD’s consideration in implementation of the new statute which governs the Commissions work. In addition, the claims application procedure has changed, requiring updating of information and training for staff.”).

248. See *Iraq: Sectarian Violence*, *supra* note 246, at 16.

249. See *id.*

250. The new organization’s website references Iraqi Civil Code articles when defining and explaining property and property rights. See Commission for Resolution of Real Property Disputes (CRRPD), Introduction, [www.crrpd.org](http://www.crrpd.org) (last visited Dec. 28, 2006).

251. One principal concern with the commission has been the delays in provision of compensation. As of 30 April 2006, the commission had received over 132,000 claims and adjudicated on fewer than 22,000 (IOM, 17 May 2006). Some compensation has been paid, yet delays are reported in payments and the amounts are insufficient (UNAMI, 29 March 2006; IRIN, 24 May 2005; BBC, 25 April 2005). The commission has faced challenges in carrying out its mandate, including technical and operational obstacles, and threats of violence. In central and northern Iraq, local authorities have in some cases bypassed the commission and allocated land to returnees, but because this has been done on an ad hoc basis there is concern that it could create further tensions and problems in the restitution of property and land to displaced people (IOM/UNOPS, September 2005).

See *Iraq: Sectarian Violence*, *supra* note 246.

millions of dollars and an immeasurable wealth of legitimacy could have been saved.

#### X. WITHIN THE MINIMALIST CONTEXT, FINDING THE RIGHT PERSON FOR THE JOB

No discussion of legal reconstruction would be complete without at least some discussion of which entity is best suited for the task. The task of rebuilding broken states is vastly complex and is best accomplished by a plurality of actors working in concert. In the early days of development, this was the way in which nation-building was conducted.<sup>252</sup> However, in spite of the continued importance of non-state actors such as NGOs and volunteer organizations, recent events in Iraq have demonstrated that such broad participation is not necessarily guaranteed.<sup>253</sup> Further, as discussed above, an abundance of uncontrolled participants can have adverse consequences such as undermining governmental legitimacy and creating a greater perception of occupation.<sup>254</sup>

In the burgeoning literature regarding state-building in weakened states, there is a trend for commentators to lament the increasingly important role of the military in reconstruction and

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252. After World War II, nation-building was not performed solely through government action but also through the use of the abilities of NGOs and international institutions. From the 1940s on, the U.S. government understood that private and international bodies, and particularly private voluntary organizations, have the knowledge, resources, and commitment to carry out many tasks that are vital to all stages of nation-building.

See generally Ekbladh, *supra* note 5, at 36.

253. The ready return of the term *nation-building* to the international lexicon following wars in Afghanistan and Iraq is a sign of the concept's endurance. However, its reappearance has not meant a reconstruction of the structures, assumptions, and relationships that drove nation-building efforts during the Cold War. In part, this failure is a reflection of the development community's continuing wariness of large-scale programs. In the struggle by the United States to build a new and viable state in Iraq after the demolition of the Hussein regime in 2003, many specialists and policymakers maintain an overt hostility to the idea of state planning and control. Even among recent converts to nation-building in the Bush administration and the Coalition Provisional Authority, reflexive references remained for the need for privatization in the reconstruction. A blunt American policy in Iraq has also served to alienate many nonstate institutions whose forerunners were regular participants during the Cold War. As a result, capable organizations have given Iraq a wide berth. Although private contractors have been quick to jump into the Iraq project, they represent only one side of the diverse selection of institutions involved in nation-building's earlier variations.

See generally *id.*

254. See Starr, *supra* note 166, at 116.

development.<sup>255</sup> In *Time* magazine, Joe Klein proposed a different approach to post-conflict reconstruction by creating an alternative to the military: "Call them Extreme Peacekeepers of the Freedom Corps or whatever, but seek out the sort of people who aren't normally inclined to join the military—idealistic young college students who hope to become doctors, lawyers, politicians or engineers and are eager to do something noble (and burnish their résumés) by serving their country."<sup>256</sup> Such an argument not only ignores the necessity of military forces in most state-building efforts, but also neglects the reality of the modern military and the personnel deployed into hostile environments in support of military missions.

Military assets are the preferred choice for the task of state-building for many reasons. One reason is that their presence is a generally indispensable element of any state-building operation. After several decades of mixed results in such endeavors, commentators now note that state-building generally requires the presence of military forces to provide security and perform essential administrative functions.<sup>257</sup> Another reason that military personnel are the preferred choice for the task is the modern military's diverse and robust contingent of professionals. The armed forces of the United States regularly deploy, not only with skilled infantrymen and other "combat arms" soldiers, but with a host of trained professionals such as physicians, lawyers (Judge Advocates), and engineers—all of whom are uniformed service members. These trained professionals bring their unique talents and capabilities with the deployed force to enrich its capabilities and service the needs of commanders and troops. Specifically in the legal realm, the armed forces possess a corps of educated,

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255. See Bâli, *supra* note 18, at 438 ("Prevailing in a military battle against a weak state with limited defensive capacities is scarcely a qualification for the job of nation-building.").

256. Joe Klein, *It's Time for Extreme Peace Keeping*, *TIME*, Nov. 24, 2003, at 25.

257. The deployment of large numbers of U.S. ground troops is the second criterion of nation building. As the case of Guatemala in 1954 demonstrates, a regime change may occasionally be accomplished without the deployment of U.S. military forces. But nation-building generally requires the long-term commitment of ground forces, which are used either to depose the regime targeted by the United States or to maintain a regime that it favors. In many cases, U.S. ground troops are needed not only to fight hostile forces in target countries, but also to perform essential administrative functions, such as establishing law and order.

See, e.g., Pei et al, *supra* note 25, at 65.

trained, and skilled attorneys who regularly practice law within the United States and abroad.<sup>258</sup> These Judge Advocates are also trained soldiers who deploy and operate in difficult and hostile environments.<sup>259</sup> They are able to operate in post-conflict states and assist in rebuilding or developing legal infrastructure. A review of recent state-building endeavors proves their worth and efficacy.<sup>260</sup>

Delegating the primary responsibility of legal reconstruction to the Judge Advocates, whose presence is already required in post-conflict settings, economizes the assets already in use while achieving a unity of command which is unattainable with nongovernmental entities. Thus, they are not only suitable for the job of legal reconstruction, but they are, in many ways, ideal.

## XI. CONCLUSION

Since September 11, 2001, and the realization that weakened states can serve to incubate terrorist organizations, the star of state-building has been in the ascendant. Once scorned, the costly practice of rebuilding underdeveloped countries has resurfaced as an important part of the effort to eradicate terrorism and to ensure the continued security of Western democracies. The United States, in particular, has recently undertaken massive state-building projects in Afghanistan and Iraq and it is foreseeable that there will be more to come as new terrorist organizations emerge and old ones flee to environments more conducive to their aims. Legal reconstruction in such weakened states is critical to establishing

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258. See generally FREDERIC BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001).

259. Versatility of the [JAG] Corps' personnel enhances the versatility afforded by the [JAG] Corps to the Army. As operations are increasingly executed by joint and interagency task forces and, in combined environments, judge advocates are likely to deploy as part of a composite legal support section. Because of the composite, complex nature of modern operations, judge advocates supporting combat support or combat service support units may be as likely to deploy as those assigned to combat units. Such was the case in Haiti, Somalia, and Rwanda. Soldier-lawyers must be physically fit and mentally prepared to deploy whether they are assigned to the Pentagon or to a division.

See Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 38 (1996).

260. See, e.g., Richard Whitaker, *Legal Operations in Northern Iraq: The 101st Airborne Division, Office of the Staff Judge Advocate*, 13 THE PUBLIC LAWYER 10, 15 (2005) ("By the time the 101<sup>st</sup> Airborne Division returned to the United States in February of 2004, over 40 civil and criminal courts were open in AO North and hearing upward of 50 cases each day.").

post-conflict security and essential government functions. Given the heavy cost of such operations—a cost measured in blood as much as treasure—it is imperative that those seeking to rebuild weakened states establish order and effective institutions quickly, efficiently, and enduringly.

The organic minimalist approach to legal reconstruction counsels that those seeking to effect lasting and effective legal reconstruction of weakened states concentrate on empowering organic legal institutions through a focused, intelligent allocation of resources based on an understanding of the target nation's legal tradition. Therefore, such operations should begin with a thorough study of that nation's legal system so that proper legal choices can be made and disruption (or disaster) can be averted. Rather than attempt to recast the target legal system in the occupier's own image, the legal system of the target nation should be allowed to function in its intended manner. Redundant bureaucracy-building and paternalistic practices that foster dependency should be eschewed. The tasks involved with legal reconstruction should be carried out by those whose presence is already required, thus minimizing the footprint of the occupier. An analysis of legal reconstruction efforts in Iraq shows the Coalition's greatest successes were achieved when adhering to these precepts.

The aim of organic minimalism is not drastic reform but, rather, accelerated rehabilitation and institutionalization. Its desire is not to change the face of a nation's legal system, but only to help it to its feet so that it again functions in its intended manner. Solutions to legal problems, therefore, should not be reflexively found in the repertoire of a familiar legal system, but in the *ecole de vérité* of comparative law. Only through such an approach can state-building ever function as an effective and sustainable strategy in the war on terror. As Francis Fukuyama has noted, “[I]t is only the ability to create and maintain self-sustaining indigenous institutions that permits outside powers to formulate an exit strategy.”<sup>261</sup>

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261. Fukuyama, *Guidelines*, *supra* note 22, at 6-7.