Rule of Law in Afghanistan: The Intrusion of Reality

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I. Introduction

Rule of Law is a notoriously ill-defined concept.[1] Formalist conceptions stress procedural regularity and equality before the law, approximating the *Rechtsstaat* of 19th century German legal theory.[2] Appalled by Nazi legality, more recent articulations often emphasize an irreducible quantum of political and/or human rights.[3] Hayekian neo-liberals tout the rule of law as the foundation of all capitalist progress.[4]

Operating from these often widely variant bases of support, the Rule of Law has been stressed as an important catalyst of development,[5] or even as a constituent element of development itself.[6] Today it forms an important component of all manner of development assistance programs, including bilateral and multilateral or international programs, both public and private.

Since the ouster of the Taliban regime in Afghanistan at the end of 2001, impressive amounts of money have been spent in the effort to " restore " or " develop " Afghanistan,[7] and substantial sums have been devoted directly to rule of law efforts.[8] Yet by any definition, Afghanistan stands far removed from a rule of law. Violence reigns throughout much of the country; in areas where the government does control activity, corruption and lawless behavior abound. A government minister authorizes an armed attack on a former aide, only to have his own house put under armed siege (but he is not arrested or prosecuted).[9] Provincial governors refuse to give up posts, threatening their replacements with death if they travel to the region.

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This short paper explores, in the context of US efforts, the disconnect between Rule of Law discourse and the actualities of the Afghan context. There are many difficulties to be confronted in Afghanistan, but theory *does* matter. With a clear vision, " success " might nonetheless prove elusive. With inarticulate, discordant and conflicted aims, it might be better to do nothing.

II. Mythologies and Stereotypes

American rule of law thinking is often clouded by two mythologies embedded in American popular self-conceptions. Occasionally articulated, these strands of thought more frequently lie below the surface, coloring the American outlook and assessment of situations. I refer to these two mythologies as the Myth of 1945 and The Myth of 1776.

The Myth of 1945 arises from the self-congratulatory view that Americans put on post-War developments in the former hostile states of Germany and Japan. Against the backdrop of the failed Versailles Treaty and post-1918 developments, American planners opted following World War II for a reconstruction and re-industrialization of the vanquished nations. No doubt this was a good thing, as a contrary American view might have had tragic consequences, stifling recovery and contributing to privation and disorder.

But in subsequent American interpretation, America " created " the conditions of democracy and growth in Japan and Germany. There are, as is often the case with mythologies, elements of truth in this assessment. But notably absent from the narrative are the efforts and contributions of Germans and Japanese. It is as if there were no pre-War, pre-militarist democratic elements in either country. Rapid and extraordinary growth in both countries occurring in the period 1870-1930 is overlooked. The presence in both countries of a highly-literate well-educated population, as well as the presence of effective governmental bureaucracies, are all cast to the side. Post-War Germans and Japanese are seen as blessed with the presence of American occupation and advisors.

The Myth of 1776 refers to America's emergence as a revolutionary nation and child of the Enlightenment. It combines the universalism of Enlightenment rationalist thought with the anti-colonial stance of the rebellious American colonies. And it has

profound results: that Americans easily tend to see *American* values as *universal* values (they are, after all, "just the product of reason"), and that Americans have great difficulty regarding themselves as a colonial (or imperial) power. As recently as 1945, American anti-colonialism divided Americans sharply from British allies who wished a post-1945 return to the *status quo ante* of the British Empire.[10] Today, when American power has replaced British power in many quarters of the world, it renders many Americans incapable of seeing themselves as others see them: an expansionist, hegemonic replacement of the *Pax Britannia*.

These twin mythologies would, standing alone, pose substantial challenges in working closely with local authorities in Afghanistan, and in many other non-Western countries.[11]

But they do not stand alone. In Afghanistan, and potentially in other Muslim countries, they operate in symbiosis with a combination of stereotype and ignorance regarding Islamic legal theory and practice. Taken together, the American mythologies and the lack of nuanced understanding of Islamic law can have unfortunate results.

III. False Paradigms

American rule of law orthodoxy is robust. It is rarely content with purely formalist articulations of rule of law theory. Rather, it moves to include broad substantive requirements for rule of law. For convenience, these can be broken into three major streams, although neither practitioners nor theorists maintain any rigid consistency.

1. Hayek, North and the Rule of Law as economic infrastructure

A major strain of American rule of law thinking focuses on law as the infrastructure for market economic activity, and denotes a Rule of Law state as one which implements regularized, empowering legal norms (contract, property, and such elaborations as corporations law and secured finance). Minimum regulation of private activity undertaken in accordance with the enabling norms is advocated. This strain of thinking predominated in the rule of law revival that was fueled by the breakup of the former Soviet Union and its empire of satellite states in the late 1980s.[12] Although

associated with Francis Fukuyama and like-minded neo-conservatives,[13] it is worth noting that the advent of the Clinton administration did not produce substantial revamping of American technical legal assistance. Throughout the 1990s, first in Russia and former Soviet republics and satellites, the United States promoted rule of law principally in the Hayekian mode of capitalist infrastructure. Strengthened by the work of North and other institutional economists, this mode of thinking dominated not only US thinking, but also the work of the World Bank and IMF.[14]

Needless to say, this stream of rule of law thinking had the full support of the Republican Bush Administration. In Baghdad, with uncertain electricity, reduced oil production and looting and violence in the streets, priority was given to passage of a capital markets law. In Afghanistan, economic laws, not yet translated into Dari, were pushed forward. In a sense, this style of technical assistance builds on the Myth of 1945. Since the Myth of 1945 largely ignores the contributions of Germans and Japanese, this style of legal assistance overlooks the divergence between the German situation and the Afghan situation. Or between the Czech situation and the Afghan situation. Afghanistan, unlike either Germany or the Czech Republic, lacks an educated populace. Its literacy rates are among the lowest in the world. Afghanistan, unlike those countries, lacks any history of a strong and effective central government. It is the stark divergence of Afghanistan from post-World War or post-Cold War situations that make the Myth of 1945 a particularly misleading guide for action in Afghanistan.

And there is another difference, perhaps even more critical than the foregoing. In both Germany and the Czech Republic, the effort to bring a new legal order to the country occurred against the backdrop of a failed ideology and regime. It was evident to the vast majority of Germans in 1945 that Nazism had been a disaster. Reeling from the effects of an adventurous military government, the Japanese people surprised the outside world with a fervent adoption of non-violence and pacifism. In 1990, Communism had brought years of gray stagnation to Czechoslovakia, in vivid contrast to countries to the west. Local populations were prepared to accept, even to welcome, change.

American efforts to support “ legal reform ” in Afghanistan, and in a number of other Muslim countries, proceed as if the local populations were equally ready to embrace change, and as if the new doctrines and institutions were being inserted into

a vacuum.

But this is far from the case in many Islamic societies, and notably far from the case in Afghanistan.

2. Rule of Law as democratic governance

A second powerful strand of American rule of law orthodoxy focuses on political and civil rights, and separation of powers (including most particularly a powerful and independent judiciary with powers of judicial review) to secure those rights. This conception of rule of law draws heavily on the classic theories of Locke and Montesquieu, which in turn formed the intellectual backdrop to the formation of the American state. Seeing these values and institutions as rooted in reason, Americans assert them to be universal, and see America only as a particularly successful application of them.[15]

3. Rule of Law as the embodiment of universal standards of human rights

Finally, American technical legal assistance projects often stress 'fundamental human rights', which are again assumed to be universal, and taken as embodied in various international declarations such as the Universal Declaration of Human Rights. USAID, for example, in developing its "Rule of Law Strategy" embeds this in a requirement of fairness: "Fairness—Fairness consists of four sub-elements: equal application of the law; procedural fairness; *protection of human rights* and civil liberties; and access to justice. These sub-elements are key to empowering the poor and disadvantaged, including women [emphasis added]."[16] It is notable that within its strategy statement, USAID shifts seamlessly back and forth between 'neutral' procedural aspects of rule of law, and much more contentious substantive aspects: this is typical of American, and much non-American, rule of law discourse.

IV. Harsh Realities

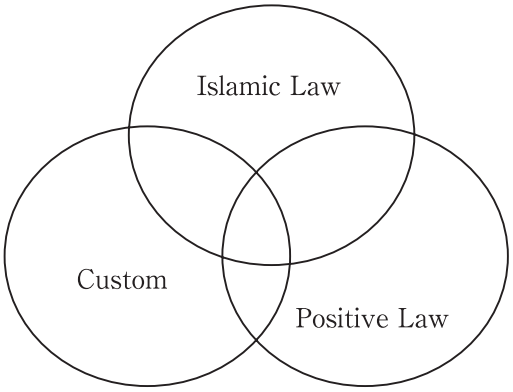
America approaches technical legal assistance in Afghanistan through the prism of its twin mythologies, a simplified and stereotypical view of 'Islam', and schooled in the foregoing paradigms. Reality in Afghanistan is somewhat different.

1. Afghanistan in a broad view

Afghanistan has never had a strong central state. This was true long prior to the clashes and disorder of the past 30 years. Even when at peace, the central state exercised only a light touch outside of Kabul and major populated areas.[17]

The traditionally light hand of the state meant that meager state law intruded only marginally in the life of many Afghans. In the absence of effective, central bureaucratic rule under norms of positive law, the daily life of the people was shaped largely by Islam and by local custom—not necessarily in that order.[18]

Thus the Afghan legal system might be seen as a set of overlapping circles of authority and legitimacy:



Competing Legitimacies

In fact, this diagram does not do justice to the complexity and ambiguity of the Afghan situation. The picture above suggests three sources of legitimacy, but indicates some clear areas of authority for each source, complicated by bordering areas of potential overlap. In Afghanistan, the domain of no area is well defined, and to a degree, each source of legitimacy makes an exclusive claim, leaving boundaries between custom, Islam and positive law fluid and ill-defined. Thus in almost any area, rival claims by positive law, Islamic principles and custom may be asserted. Furthermore, *within* each of these sources of legitimacy, confusion also exists.

Take as an example the positive law enacted by state authorities in Kabul. To

begin with, Afghanistan has had four constitutions since the Constitution of 1964, supporting a wide variety of legal regimes. Important laws pre-date most or all of these constitutions.[19] Many additional laws were promulgated during the ' transitional ' period prior to enactment of the 2004 Constitution, and the assumption of office by the officials provided for by that constitution. Particularly under the pressure of outside donors, new laws have been enacted in ' necessary ' areas; however, in few cases has there been an attempt to reconcile or coordinate those laws with prior law. An example of the confusion, and lack of coordination with local conditions (and usually therefore also with other laws continuing in force), is provided by the well-known and controversial case of the Criminal Procedure Code. Adopted as an Interim Measure during the Transition Period, the Code was drafted by an Italian expert who formerly headed the UNODC, with assistance and input from US consultants. Afghans were effectively shut out of the process.[20] Although some provisions do set forth general rules respecting the continued validity of prior legislation,[21] little or no attempt has as yet been made to rationalize the resulting legal thicket.

One might think that this is NOT an issue as respects Islamic law. Westerners might particularly think this, since a predominant Western stereotype of Islamic law is that it is archaic and unchanging. The 2004 Constitution does include several relevant provisions that address the role and proper sources of Islamic law in Afghanistan: Afghanistan is an Islamic Republic,[22] in which all law is in some sense subordinated to Islamic values;[23] and, within Afghanistan, the Hanafi school of jurisprudence receives precedence.[24]

But these provisions are rudimentary. They state rules at a level of generality that can and does belie considerable confusion in actual application. When considering the influence of Islam on the Afghan legal system, what is it that must be considered? Is it, in fact, simply the jurisprudence of the major classic Islamic schools—thus the choice of the Hanafi jurisprudence in Article 130? Article 130 speaks of Hanafi jurisprudence filling gaps not covered by the Constitution and the laws, while Article 3 provides that law must not contravene the tenets and provisions of Islam. What is the room for maneuver between those two provisions? Alongside of the path of Shari å, what scope is afforded to a temporal ruler to adopt additional ' regulation ' for the welfare of the community, so long as not contrary to fundamental precepts and policies

of Shari å? Does there remain an ability to practice ' ijtihad ', allowing further development of doctrine, or is that foreclosed by the ' closing of the gates '? On all of these topics, there exists in the contemporary world of Islam a broad spectrum of views and vigorous (even violent) debate and disagreement.[25] Within Afghanistan, scholars have largely been cut off from this broader ferment until recently, and most debate and discussion remains highly politicized, rather than grounded in Islamic philosophy and jurisprudence. Capacities to address these issues remain at a low level. My point here is not to pick winners and losers in these debates—it is merely to point out that vigorous debate and widely divergent views persist *within* Islam.

Well then, what of custom? Alas, here too a quest for certainty may fail. One consequence of the disorder and dislocation that has now characterized Afghanistan for a long period is the weakening of tribal and customary structures. Warlords, who exercise power through force rather than legitimacy, may preempt or replace tribal elders. Customary structures do continue to exist, as do practices that are accepted by local populace as ' customary ', but the situation is far from offering the settled practice that might exist in a more stable environment.[26]

Now to this degree of disorder *within* each potential source of norms must be added the confusion introduced by the presence of all three sources, in an un-reconciled and un-coordinated state. *In theory*, Afghans often point to a supposedly well-established hierarchy (the above-cited provisions of the 2004 Constitution, together with references in the Commercial Code and Civil Code to the role of custom). *In practice*, this hierarchy breaks down on further investigation.

Consider the following situation. Article 3 of the Constitution, as noted, precludes laws that contravene the tenets of Islam. Various articles of both the Civil Code and Commercial Code clearly provide for loans with interest. It is widely thought that Islamic law precludes interest, under application of the doctrines surrounding *riba*.

Are interest-bearing loans enforceable in an Afghan court? I put this question to a number of Afghan professors and students, drawn from both faculties of law and political science and faculties of Islamic law.[27] The responses received are interesting.

Professors from the faculties of law and political science were largely dismissive of the question. In their view, the civil and commercial code provisions spoke for themselves. Islamic law was " irrelevant " and " not suited to modern times and

international conditions ". Questioned about possible application of Article 3, they replied they did not think it applied—but admitted to making this statement without any knowledge or analysis as to whether *riba* concepts were ' fundamental ' to Islam.

To my surprise, professors from the Shari å faculties were equally undisturbed. Their responses went roughly as follows: the Commercial Code and Civil Code were drafted taking Shari å principles into consideration; therefore, anything permitted by the Commercial Code or Civil Code was Shari å-compliant. I asked if Shari å law allowed enforcement of loans at interest. Of course not, they responded. Then wasn t there at least a question which must be asked under Article 3 of the Constitution—to wit, whether enforcing loans at interest in accordance with the codes might run afoul of the contrary Shari å rules. Answer: no, " because the Codes had been drafted with Shari å principles taken into consideration. "

I thought this a confusing state of affairs. So I asked the professors whether an interest-bearing loan would in fact be enforced in court. " Probably not, " was the response. " It is against Islam. " Having had these discussions in the morning with professors, I had no idea what to expect during later afternoon class sessions with students.

In fact, when I asked about the enforceability of the interest-bearing loan, I received immediate objections from a number of students. The Code could not be correct, they thought, because Islam disfavored interest under the *riba* prohibition; therefore it was likely that the code provisions would be unenforceable under Article 3 of the Constitution. Others thought this less clear. It was true, they said, that Islam proscribed *riba*. But Article 3 did not subject Afghanistan to all rules of Islamic law; rather, it left parliament free to enact positive law, so long as the positive law norms did not fundamentally contravene Islamic tenets. More analysis and investigation would be required, they thought, to know for certain how the case would properly be decided. Seemingly, the students were able to come to these questions with open minds and a spirit of inquiry. The professors ' minds had become closed over the course of their experiences in Afghanistan s violent turmoil.

Different Islamic societies are presently approaching the resolution of *riba* doctrine and Western financial practices in a variety of ways. In some societies, the principal approach has been through introduction of Islamic banking and financial

practices: creating financial institutions and transactional patterns that are deemed to conform to Shari å principles. In other jurisdictions, state law fully empowers Western practice. Often both systems exist side-by-side. Justification for parallel systems might be developed under doctrines of siyasa-Shari å, the ability of the temporal ruler to provide ' regulations ' not deemed fundamentally antithetical to Islamic values (at least with respect to non-Muslims present within a predominantly Muslim territory).[28]

Again, certainly from the outside, there is no clear *right* answer. But there is clearly an *issue*, and a persistent denial of this issue would simply seem to prolong unresolved tensions within the legal system.

2. Primary norms/secondary rules

The very first element of nearly any definition of rule of law is the presence of clear rules. Without clear rules, there can be no question of equal application of rules. Without clear rules, there can be no question of subjecting the state to rules. *A fortiori*, more robust substantive conceptions of rule of law presuppose this minimum prerequisite. Yet in Afghanistan, this very first requirement is not met. No yardstick exists to measure the competing claims of divergent primary norms. In Hartian terms, secondary rules of recognition are not known or agreed in Afghanistan.[29]

This is the general situation in Afghanistan. Let us now consider some specific recent cases, and further investigate how these particular cases shed light on the conflicting aims, and sometimes dysfunctional results, of aid efforts.

Pluralism is a fact of modern life, as communication and transportation have intermixed populations that in an earlier time might have lived a homogenous existence. In many respects, we have come to see the benefits of pluralism, valuing diversity and urging tolerance and non-discrimination. But how well pluralism operates in a given territory may have much to do with the clarity of Hartian ' rules of recognition. '

Where competing primary norms exist within a given territory, the clarity of the secondary rules that order and make clear their relative application in variant situations may spell the difference between a diverse and tolerant society that is reasonably-ordered and predictable as opposed to the legal chaos that threatens failed states caught in turbulent social and economic change. Aggressive implementation of

substantive Rule of Law paradigms, usually championed by outside forces taking sides in unresolved internal conflicts, can threaten the development and improvement of secondary rules of recognition, weakening the fabric of the legal system.

Consider the recently proposed Shiite Personal Status Law. This law was brought forward in conformity with Article 131 of the 2004 Constitution, which allows for a separate personal status law for the Shiite population of Afghanistan; both the constitutional provision and the law represent an accommodation of the country's Shiite minority, a group that had been vigorously repressed by the Taliban government.

Passage of the law was greeted with international outrage, however. It was denounced by the UN, by various NGOs, and proclaimed "abhorrent" by President Obama. Among the provisions singled out for particular criticism were articles that required wives to have permission to leave the house, and granted husbands the right to sexual intercourse every four days unless the wife was ill. The latter provision was equated with "legalized spousal rape."

There are several aspects of the criticism of the Shiite Personal Status Law that deserve reflection from a rule of law perspective. What is quite clear is that the law is being subjected to criticism from an idealized perspective. The measuring stick is provided by "universal norms".[30] Additionally, in the extensive coverage of the act, little attention was given to such issues as: how does the Shiite law diverge from Sunni norms, or how does the Shiite law compare to actual practice in the Shiite community?

Pressure quickly started to build in the donor community to "fix" the Shiite Personal Status Law. But what would this fix involve? For instance, would the law be improved by making it *less congruent* with actual marital customs? No doubt there is a clear deviance of the primary norms that Afghans are implementing from the desires and expectations of the *international* community. But it is not clear that the norms deviate from expectations of the *local* community. To the extent that clear rules of recognition require legitimacy, it can be argued that the legitimacy of the (Kabul-based) positive law is *not* promoted by making it more discordant with competing sources of legitimacy.

Reaction suggests that the international community believes that the situation must be altered to implement a Rule of Law. In fact, this is a conflict of fundamental

values, as implemented in primary norms. Assuming for the moment that it is a proper and desirable goal to shift Afghan values, is it really likely that the most effective way to do this, in the midst of a fragile situation and a history of a weak central state, is to impose legal rules at variance with the views of the local populace? The law is a blunt instrument of social change, and Rule of Law theory often ascribes a power to it, and a neglect of alternatives, that are troubling. Pushing for the externally preferred primary norm, without first moving social opinion on the issue, can actually undermine efforts to strengthen coherent secondary rules of recognition in Afghanistan.

3. An independent judiciary

Case 1: Blasphemy

Last year, a young journalism student in Balkh province (Kambakhsh) was charged with blasphemy, and initially sentenced to death—a sentence later commuted to twenty years imprisonment on appeal, and affirmed by the Afghan Supreme Court.[31] The actions constituting blasphemy consisted largely of downloading some material from the internet concerning women's status in Islam—material that was held to be critical of Islam.[32]

It does not appear that a charge was made under any provision of the Criminal Code. Rather, the student was found guilty utilizing Art. 130 of the 2004 Constitution:

> **Article 130**
>
> In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws.
>
> If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.

Reportedly, this Article is frequently invoked by the Afghan Supreme Court and other Afghan courts to deal with ' un-Islamic ' behavior. In effect, it allows the courts to ' supplement ' the Constitution and laws at will, if a justification for extension can be found in Shari'a sources.

Needless to say, the above interpretation is not the only possible interpretation of Article 130, and it is an interpretation that raises a number of questions. To those steeped in other legal traditions, its application in the above case appears a

contradiction of the basic maxim *Nulla poena sine lege*—no punishment without law. The absence of a defined crime in the Penal Code is seen as intentional, and there is no "gap" to fill. From the apparent perspective of the Afghan courts, the case violates neither the letter nor the spirit of *Nulla poena sine lege*: God's law, known (or available) to all, proscribes the behavior, and if the positive law provisions fail to penalize such behavior, clearly that is a gap that should be filled.[33]

Case 2: Apostasy

A few years ago a divorce was taking place in Kabul, and is often the case, the divorce got messy. But the wife had a secret weapon. To her knowledge, her husband Abdul Rahman had converted to Christianity years prior, while working for a Christian aid organization assisting Afghan refugees in Pakistan. So she brought this information to the attention of the prosecutor, seeking a charge of apostasy—potentially carrying a capital sentence. The US government became involved at the level of Secretary of State Condoleeza Rice. Eventually (and prior to any resolution of the case within the Afghan system) the convert was spirited out of the country to Italy.

Neither of these cases represent a good advertisement of Afghan justice to the outside world; both provoked strong commentary and actions. What is awkward about these cases is the practical dilemma that they pose for Rule of Law proponents. A cornerstone of American rule of law orthodoxy is the need for 'a strong and independent judiciary.' Of course, a strong and independent judiciary, if also ignorant or corrupt, is capable of making spectacularly bad decisions. To the extent that such a judiciary is in place, and is strengthened or rewarded by donors (new facilities, new equipment, 'study tours' abroad), there is an entrenchment of bad actors. Many Afghans see present government, certainly including the judiciary, as corrupt. Aid and assistance, in the face of this corruption, simply strengthens the perception that government is above the law—the anti-thesis of one cornerstone of fundamental rule of law theory. In the Kambakhsh case, 'modernizing' Afghans see donors rewarding an incompetent and corrupt judiciary; less progressive Afghans see the decisions as fundamentally correct, and resent foreign intrusion into the judicial process.

The Abdul Rahman case again illustrates the embryonic state of secondary rules

of recognition in the present Afghan context. The issue of Abdul Rahman's apostasy grew out of a civil case; apparently it was referred to the prosecutor (who presumably had no direct involvement in the civil case). It does not appear that Abdul Rahman was charged under an apostasy provision of positive law (the Penal Code); had he been so charged, there would appear to be a constitutional issue, since the 2004 Constitution guarantees freedom of religion, and adherence to the UN Declaration of Human Rights. Classic Shari'a law does forbid and punish apostasy, but Article 3 does not state that Afghanistan adopts Shari'a law (which might arguably make most of the positive law aspects of the system superfluous); rather, it states that any positive law enactment must withstand the test of compliance with the "tenets and provisions of the holy religion of Islam". The test would appear to arise only if a law is invoked: in form the provision is a standard of review, not an enactment. Of course, Abdul Rahman would be chargeable under the Afghan Supreme Court's interpretation of Article 130, just as Kambakhsh was so charged.

In its outrage over the outcome of cases like Kambakhsh and Abdul Rahman, the international community targets the primary norm that is applied in the case (or perhaps, the primary norms that are ignored in the case). But the criticism proceeds on the basis that there is a correct set of primary norms to apply. The difficulty lies in the fact that this preference is rooted chiefly in the moral preferences of the international community.

But rule of law is often asserted to consist of addressing issues in a legal rather than political manner. The internal contradiction is seen most clearly in the Abdul Rahman case. Purportedly, rule of law requires an independent judiciary, that applies in an even-handed manner rules of law (all of this is *procedural*, thus far). To do so requires good secondary rules of recognition in the system.

In the Abdul Rahman case, with contested rules of recognition in play, the Afghan system prepares to apply a primary norm discordant with Western values (and with robust Western *substantive* content of rule of law orthodoxy). And the Western reaction is: forget about judicial independence, get the defendant to Italy! The demonstrated conduct of the foreign community is that Rule of Law does *not* matter; conformity to the political and moral expectations of the foreign community *do* matter. It is hard to believe that this lesson strengthens the climate for Rule of Law in

Afghanistan.

4. " Customary justice "

Foreign donors are chastened by their experiences with the Afghan formal justice sector. It is widely seen as corrupt and inefficient. Afghans vote with their feet: upwards of 80% of disputes in Afghanistan are said to be referred to or resolved by customary tribunals or mediators. Seeing this preference for customary dispute resolution, it is suggested that a reallocation of donor resources would be appropriate. Customary dispute resolution should be strengthened. Perhaps training programs can be fashioned to introduce modern concepts into the customary tribunals. In this manner they might be more prepared to deal with anti-money laundering and investment disputes.

A few years ago, a young woman was confronted by a group of young men. The young men stripped her naked, not otherwise molesting her. The background to this was familial. Members of the woman's family had, in the view of the family to which the young men belonged, offended the family's dignity (the exact nature of this pre-existing wrong was not made known to me). Since all this took place in a small town, the young men were easily identified and apprehended. However, after some consideration, the prosecutor decided not to charge the men in the formal court system. Instead, he referred it to a *jirga*, that is, a council of elders. After further due consideration, the *jirga* delivered its decision. The family of the young men needed to make compensation for the wrong to the young woman's family. The *jirga* directed that two young women be given to the young woman's family by the family of the young men.

This is an example of *baad*, a custom practiced among the Pashtun tribes of southern and southeastern Afghanistan (and perhaps elsewhere).[34] From an international perspective, it is a shocking violation of individual human rights. The prosecutor was trained in the law; he knew the provisions of the Penal Code, and he asserted that he definitely could have obtained a conviction. Why then had he not proceeded?

His answer caused me great consternation. " What would be the point? ", he asked. " It simply would have ruined the young men's lives. And it would have solved

nothing.” As a Westerner, I naturally thought that punishment was due to the young men, and that if it ruined their lives, they had only themselves to blame. But over time, I have come to realize how differently this case might be viewed by some Afghans.

A first point of distinction is that for many Afghans, the foregoing case involves not individuals, but families. Family A is done wrong by Family B. As a result, action is taken to shame Family B. Here the action was the stripping of a young woman. In a sense, *it had nothing to do with the woman as an individual*. She was simply a means of getting at her family. Similarly, to an Afghan sensibility, the young men were simply agents of *their* family. While I immediately thought of their individual responsibility, for many Afghans the responsible “ party ” was the family unit. And the *jirga* required the offending family to make compensation. But how can one get past the fact that the “ compensation ” consisted of “ transfer ” of two young women? As an American, I cannot get past that fact. But we are in Afghanistan, and many Afghans can get past that fact. The women are bound by a web of rules grounded in family, clan and tribe, giving scant attention to individuals.

The final justification offered by the prosecutor for his action was quite pragmatic. “ If I had prosecuted, and those young men had been imprisoned, ” he said, “ then their family would never have let matters rest. There would have been a killing for sure. ” I was reminded of this in a recent conversation with one of the most progressive young faculty members at the Kabul Shari å Faculty. He had recently helped resolve a dispute in his home province. A family feud has simmered over two decades, with more than 30 deaths in the two family groups. He succeeded in organizing a jirga, to put an end to the killing. The ruling of the tribunal: an exchange of two women between the groups. At least for the moment, the killing has ceased. There is no question, from an outside standpoint, that in these outcomes the human rights of the women bound over are given no attention. Yet there is also no escape from the fact that murder also deprives its victim of human rights—and these procedures are tolerated for the purpose of reducing the homicide rate.

A look at “ customary justice ” indicates the wide gulf between conditions in Afghanistan and those that obtain in most of the rest of the world today. Non-Afghans almost universally react with horror to the case of the stripped woman. The “ primary

norms" employed by the jirga are shocking to us—we identify the outcome simply as "wrong" or "ignorant"—as it clearly appears to much of the world. But it does not represent "deviant" behavior in Afghanistan. While many Afghans (particularly those urbanized and westernized Afghans who predominate in interactions with the outside world) find this abhorrent, significant portions of Afghan society do not.

As noted at the outset, donors in Afghanistan see the corruption and inefficiency of the formal Afghan court system, and note the strong preference of the population to resolve matters (even, as the foregoing case indicates, criminal matters) by resort to traditional authorities and customary rules. In some cases, calls are made to co-opt the customary justice system: to regularize procedures in jirgas, or to educate the customary authorities in the law. What is overlooked is the possibility that the customary tribunals are accepted exactly because they apply primary norms that are close to the sensibility of the people. In short, the *jirga* may have authority because it applies *baad* to resolve cases, which accords with the expectations of the populace. If it applied discordant rules generated in Kabul, it is not clear how its authority would be viewed.

Foreign insistence upon a primary norm more in keeping with our standards may result in more tension within present Afghan society, and may complicate the process of pacification, and the slow process of evolving agreed secondary norms delineating boundaries between formal, customary and Islamic justice.

All Western conceptions of rule of law are firmly rooted in the strong post-Enlightenment individualism of the West, and this is markedly so in American conceptions. This characteristic has often drawn criticism, notably from Asian commentators. In the West, we see the world as intermediated between the State and the Individual; but in Afghan society (drawing heavily on values widely dispersed in Muslim societies), much is intermediated between family and community. The individual exists only as a weak unit within the family; the State floats as a weak overseer over community. If meaningful work is to be done in reducing capricious and violent behavior in Afghanistan, it seems likely these differences between Afghan and Western realities must be taken into account.

V. Engaging Afghanistan on its own terms

My thesis is simple: external rule of law efforts in Afghanistan will fail, and in fact do harm rather than good, to the extent that they continue to fail to engage meaningfully with the actual values and practices of Afghans. Many of these actual values and practices are repugnant to non-Afghans. And without doubt, they are repugnant to some Afghans as well. But greater restraint and humility is required by the outside world in allowing Afghans to construct their own future.

What can the harsh realities of the current Afghan legal system detailed above tell us about US (and often by analogy, many other) donor efforts in Afghanistan? Specifically, what can they suggest about what is, and what isn't, effective in advancing the international community's agenda in Afghanistan and accommodating Afghan values with those more broadly shared outside Afghanistan?

First, I would suggest that rule of law aid should adopt substantially more modest aims. This suggestion ties directly with the distinction noted above between Hartian primary and secondary norms.

There are a number of USAID efforts undertaken to date that seem prosaic, but in fact are quite useful. For instance, USAID's AROLP project has provided significant assistance to Afghan courts in seeking to develop a docket management system. It should not be expected that this produces an immediate improvement in the substance of justice. But it represents a modest first step in gaining some degree of *information*, let alone management control, over the formal judiciary.

Perhaps an even more striking example is AROLP's highly successful ALE (Afghan Legal English) program. This program, offered to hundreds of Afghan law and Shari'a professors and students, has as its first objective simply to improve participant's level of English ability. At the higher level of achievement, this is opening opportunities for study abroad (not only in the US) to many legal professionals previously confined within the restricted world of Dari/Pashto materials. At lower levels, it is still providing access to the outside world to persons whose world for three decades has been tightly closed in.

At a more advanced level, the US Department of State, through its Bureau of International Narcotics and Law Enforcement, has provided support to law and Shari'a faculties at five Afghan universities. The nature of this support varies, but it is all

focused on enriching the experiences and widening the perspectives of professors on these faculties. In some cases, the training may consist of an LLM program; in other cases, specialized programs of study may be devised. In all cases, the effort is to stimulate analysis and provide comparative perspectives, rather than to transmit Western content *per se*.

What all of these programs have in common is that they address rule of law issues indirectly, at the formal level, and usually with an emphasis upon improving ability to evaluate and develop secondary rules. What they also have in common is that they are indirect, do not product immediate results, and are hard to measure. In the real aid world of metrics and home-constituency satisfaction, programs like these seem pedestrian or diffuse: they are not sufficiently *grand* to satisfy taxpayer expenditure. But in the real world of Afghanistan, these are exactly the kind of elementary programs that are a prerequisite for development of any rule of law that would in time satisfy international tastes.

Programs that skip over these fundamental steps are not likely to produce change, and may produce conflict. Consider some other aid efforts, measured by the above yardstick.

For instance, substantial sums of money have been spent on various forms of physical asset support for the justice sector: new courthouses, projected new prisons, vehicles, filing cabinets, and computers. Such expenditures should be evaluated very realistically by their actual contribution to *formal* rule of law. In some cases, like the docketing system praised above (which operates on a manual, not computer, basis), the expenditures may make sense. More often, they may simply replace a bad judge in a poor courthouse with a bad judge in a nice courthouse. If made, such expenditures might better be justified as an employment public works measure than as a rule of law measure. To the extent that such expenditures are seen as rewarding bad officials (and they often are), they may actually detract from the credibility of the donors and the struggling legitimacy of the government.

Training efforts for incompetent and corrupt officials are particularly problematic. It is simply not the case that all officials can be improved, if they "just receive the necessary training." Further training of the Afghan Supreme Court is not going to change the outcome in the Kambakhsh case, because that decision is not rooted, as

some would like to believe, in a lack of training or intelligence.

A very concrete example of the difficulties in this area can be provided by efforts to encourage development of better teaching materials in the Afghan law and Shari'a faculties—a project approached at different times by AROLP, INL and IDLO. Present materials are non-existent, or consist principally in copies of lecture notes, or some materials available from Iran in Dari. Improvement in this area, by strengthening fundamental legal education, could assist considerably in advancing the formal rule of law.

However, the effort to produce better materials is tricky. Older faculty lack the incentives, energy and sometimes ability to produce the texts. Younger faculty, and fresh graduates, starting to benefit from more advanced training, might be able make progress. But this threatens the senior faculty, who use their political positions to block efforts that would allow the younger ambitious faculty to progress. Aid in this situation, unless very carefully directed and jealously guarded, simply becomes a fund that will further entrench non-productive elements of the system.

My second observation, offered in concert and as a partial consequence of my first suggestion, is that rule of law donors must, accordingly, adopt a substantially more patient attitude toward the evolution of the Afghan legal system. As part of this, donors must show a greater willingness to relinquish control where primary norms are concerned. It will take the Afghan legal system some time, under the best of circumstances, to achieve a measure of formal legality, *whatever* its substance.

Just as impatient investment in failed and corrupt institutions impedes, rather than advances, the rule of law, so also an attempt to jump directly to preferred (by the international community) primary norms disrupts the already chaotic landscape of Afghan secondary norms. As noted, pluralism can exist constructively as diversity and tolerance if respective domains are understood and respected. But pluralism without a measure of secondary rules is simply chaos, and this largely defines Afghanistan today.

There are some hopeful signs in this respect. We have discussed above the heated reaction of the international community to the Shiite Personal Status Law. Within donor circles, there were some strong calls for an immediate, and harsh, reaction to the law's introduction. However, the very experienced head of AROLP took a more constructive approach, and engaged an experienced Islamic law scholar with

substantial experience in Afghanistan to review the law. On this basis, it was possible to respond to the law not on the basis of international norms, but thoughtfully within the Afghan context.

This type of effort to engage Afghanistan on its own terms is badly needed. The necessary skill sets include command of Dari or Pashto, Arabic, knowledge of Islamic law, and comparative law experience. Unfortunately, all donors face serious resource constraints in this regard: external personnel with such skills exist in very small numbers if at all. In time, the void will be filled with a re-developed cadre of Afghan scholars. At present, the expertise is available from neither the Afghan nor the international side in sufficient quantity. But these are the skills needed for a theoretical reconstruction of the Afghan legal system. And this is not mere formalism. In the continuing absence of some coherent theoretic structure that can in time gain a wider legitimacy, Afghan law will remain simply Afghan politics. Likely bloody.

Notes

1 See, for variant taxonomies, Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory, Cambridge, 2004, and Rachel Kleinfeld, " Competing Definitions of the Rule of Law " in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie, 2006.

2 This conception has substantial overlap with the theories of Max Weber, denoting " bureaucracy " as the hallmark of modern government. See M. Weber, Economy and Society, University of California Press, 1978, pp. 217-226, 956-1005, and the Weberian influence in law and development thinking remains strong.

3 Notably including post-War Germans, as the Basic Law of the Federal Republic of Germany decisively affirms substantive, inalienable (" unantastbar ") rights as opposed to embodying neutral formalism. Grundgesetz fuer die Bundesrepublik Deutschland (1949) Arts. 1-19, and see discussion in Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, 2004 at pp. 108-9.

4 See Hayek's classic work, originally published in 1944: F. A. Hayek, The Road to Serfdom, University of Chicago Press, 1994.

5 See, by way of example, World Bank thinking at http://go.worldbank.org/9OTC3P5070, or USAID views expressed at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/.

6 Cf. Amartya Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999. While ' freedom ' is the leitmotif for Sen, law (or ' rights ') buttress this freedom.

7 Oxfam puts total US reconstruction assistance in the fiscal years 2002-2006 at $31 billion, and states that US aid accounts for over one-half of total aid. Oxfam, Smart Development in Practice, Field Report from Afghanistan, available at http://www.oxfamamerica.org/publications/field-report-from-afghanistan/. However, a complete and accurate picture is hard to obtain. Military aid in FY 2008 was more than twenty times greater than USAID funding; significant amounts of development aid are interwoven with Provincial Reconstruction Teams (PRTs), tied tightly to the military.

8 USAID requested a fresh tender for its " Afghanistan Rule of Law Project " in 2008; the contract, not yet awarded as of June 30, 2009, was in the vicinity of $45 million over a 5-year term. This project is only one of a number of US Rule of Law Projects; for instance the State Department's Bureau of International Narcotics and Law Enforcement runs a larger program, largely directed at police, prosecutors and corrections, but also including a small component directed at Legal Education for which I serve as Program Manager.

9 See report available at http://www.eurasianet.org/departments/insight/articles/pp030408.shtml .

10 See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of*

Human Rights, Random House, New York, 2001 at p. 6.

11 See David Mednicoff, " Middle East Dilemmas ", in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie, Washington, D.C., 2006.

12 See David Trubek's discussion of the ' project of markets ' in David M. Trubek, " The ' Rule of Law ' in Development Assistance ", at pp. 84-85 in David M. Trubek & Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal*, Cambridge, 2006.

13 Francis Fukuyama, *The End of History and the Last Man*, Simon & Shuster, New York, 1992.

14 North's work provided timely and substantial intellectual support for the Hayekian stream, notably with his 1990 publication: Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge, 1990.

15 See the self-assured statement of USAID: " Checks and balances—Rule of Law depends on a separation of governmental powers. " in USAID's strategy statement, accessible at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/.

16 USAID's strategy statement, accessible at http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/.

17 Barnett R. Rubin, *The Fragmentation of Afghanistan, 2nd ed.*, Yale University Press, 2002, esp. pp. 19-21.

18 Astri Suhrke & Kaja Borchgrevink, " Negotiating Justice Sector Reform in Afghanistan ", in *Crime, Law & Social Change* Vol. 52, no. 2 (October 2008), p. 211.

19 The Commercial Code dates to 1955, the Civil Code dates to 1977.

20 See Astri Suhrke & Kaja Borchgrevink, " Negotiating Justice Sector Reform in Afghanistan ", in *Crime, Law & Social Change* Vol. 52, no. 2 (October 2008), p. 213. Anecdotal evidence abounds of similar measures in other fields.

21 For instance, interim decrees promulgated during the Transitional Period were to be referred to the initial session of the National Assembly, but remain in force unless annulled by the National Assembly. The Constitution of Afghanistan, 2004, Art. 161.

22 The Constitution of Afghanistan, 2004, Art. 1.

23 " No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan. " The Constitution of Afghanistan, 2004, Art. 3

24 If there is no provision in the Constitution or other laws about the case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner. " The Constitution of Afghanistan, 2004, Art. 130 cl. 2. For the Shiite minority, there is a constitutional offer of separate law governing personal status. The Constitution of Afghanistan, 2004, Art. 131. We shall have more to say about this issue presently, see text at section IV.2 below.

25 This literature lies well beyond the bounds of this paper, but some introduction into this complex area may be found in Mohammad Hashim Kamali, Shari åh Law: An Introduction, Oxford, 2008, as well as in Kamali's other writings, and the prolific publications of Wael B. Hallaq. A thoughtful treatment of the Egyptian counterpart to Article 3 of the Afghan Constitution is found in Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari å into Egyptian Constitutional Law*, Brill, 2006.

26 For examples of displacement of traditional authority by warlords, or cooption or alliance reducing the legitimacy of traditional authority, see the report of the International Legal Foundation, *The Customary Laws of Afghanistan*, 2004, accessible at http://www.theilf.org/reports/ .

27 In 2008, I taught in Kabul a course titled The Relation of Commercial Law to Economic Development. The course was taught in three sections: one section to a group of professors from law and Shari å faculties from Kabul, Balkh and Herat Universities, and the other two sections to students from the same faculties. Funding for this course was provided by USAID's AROLP (Afghanistan Rule of Law Project).

28 See Mohammad Hashim Kamali, *Shari åh Law: An Introduction*, Oxford, 2008, at pp. 225-245. I do not mean to imply that Professor Kamali is endorsing western banking as Shari å compliant, or that others would come to this conclusion by developing the concept of siyasa-Shari å. Instead, I want to draw attention, as Kamali does, to the unfortunate polarity between a rigidly Islamic state (co-opted by very conservative strains of Islam) and a wholly secular state. Kamali performs the valuable service of encouraging exploration of intermediate states.

29 Hart defines ' secondary rules of recognition ' as the rules which are " accepted and used for the identification of primary rules of obligation " H. L. A. Hart, *The Concept of Law*, Oxford, 1961, p. 97.

‘ Primary rules ’ require human beings to do or abstain from certain actions, secondary rules provide for means of creating, modifying and extinguishing primary rules, or in various ways determine the incidence or control the operation of primary rules. Id. at pp. 78-79. See generally H. L. A. Hart, *The Concept of Law*, Oxford, 1961, esp. pp. 77-120. I am indebted to Professor Yuka Kaneko for causing me to consider more deeply the relation between Hart $ positivism and practical imperfections in rule of law technical assistance programs.

30 At the outset, it is useful to introduce an element of reality into the international outrage. Under the law of most common law jurisdictions, it was long regarded as questionable whether a man could rape his wife. Not until 1991 did the English House of Lords decisively rule that marriage did not constitute a defense to a rape charge against the husband. *R v R* [1992] 1 AC 599. A recent casebook on American criminal law concludes that a majority of American states continue to provide at least a partial defense to a rape charge if the victim is the wife. Thus these norms are only recently established as a *formal* matter in many countries. Statistics on domestic violence would also suggest that the formal law is not a necessary indicator of actual behavior in the West or elsewhere. Numerous UN and NGO reports document common practice in many countries of wife-beating for refusal to have sex, or alleged housekeeping deficiencies. Thus, while the Afghan situation may be deplorable, its deviance from international aspiration appears to exceed its deviance from international practice.

31 For background information on this case, see http://www.nytimes.com/2008/10/22/world/asia/22afghan.html?_r=1&scp=1&sq=Kambakhsh&st=nyt and other articles searchable in the New York Times on-line archives under “ Kambakhsh ”.

32 Much American criticism directed at cases similar to Kambakhsh is *substantive*: it assumes that to punish someone for dishonoring Islam (by way of example, disrespect to the Prophet or the Koran) *cannot* be punished without violating fundamental human freedoms—no matter how clear the law or how regular the procedures employed. A measure of self-evaluation is again useful: Americans for many years debated (and still remain divided) about the permissibility of punishing desecration of the American flag. Most other societies have similar taboos. Again, a combination of cultural antipathies and emphasis on primary norms can undermine or complicate useful rule of law work at more basic levels of clarity and procedural regularity.

33 I present here a bare outline of the case, and solely from one perspective. The case appears to have involved numerous procedural irregularities at both trial and on appeal. There are also many political cross-currents in the case, and endless speculation about political motivations of all players.

34 See International Legal Foundation, *The Customary Laws of Afghanistan*, 2004, accessible at http://www.theilf.org/reports/ .