Lessons from Afghanistan:
Some Suggested Ethical Imperatives for Rule of Law Programs

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I. INTRODUCTION

Rule of Law is a high-minded term. For the last twenty-five years, it has enjoyed a prominent place in technical legal assistance programs.1 The Rule of Law is championed by the United Nations,2 the international financial institutions,3 national governments,4 and multitudinous non-governmental organizations.5 Notwithstanding—and perhaps facilitating—this wide-spread acceptance, there are substantial disagreements about the content of the concept.6 The thinnest versions of Rule of Law are largely formal, and can resemble Fuller’s internal morality of law.7 At the other

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1. Rule of Law promotion received a significant boost from the demise of the Soviet Union, and the conversion of former Soviet states and satellites from command to market economies. See Thomas Carothers, The Rule of Law Revival, FOREIGN AFFAIRS, Mar.-Apr. 1998, at 100-01. At the same time, other forces—notably human rights activists—were driving a wider Rule of Law agenda throughout the world. David M. Trubek, The “Rule of Law” in Development Assistance: Past, Present, and Future, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 84 (David M. Trubek and Alvaro Santos eds., 2006).


extreme, conceptions include commitments to many specific substantive rights and to democratic governance.\textsuperscript{8} In practice, much Rule of Law activity proceeds with little attention to the niceties of definition, and purports to promote both formal and substantive elements of Rule of Law.\textsuperscript{9}

For the past decade, I have been involved in assisting Rule of Law efforts in Afghanistan. From this experience, I wish to postulate certain ethical imperatives that arise in implementing Rule of Law ideals across such a large cultural divide.\textsuperscript{10} Rule of Law is quite often conducted against a backdrop of “global best practices,” “universal human rights,” and other phrases susceptible to an interpretation that a single model meets all needs.\textsuperscript{11} True, donors frequently stress the “need for local ownership,” and that reforms work best “bottom up.”\textsuperscript{12} But while this countervailing rhetoric is prominent in discussion, actual practice usually proceeds on a top-down basis.

Nearly everything about the donor metaphor is distortive. It starts with the supposition of a gift, which is rarely, if ever, an accurate portrayal of “donor” motivations. It fits nicely with a conception that the donor has a “good” of some sort, which is deliverable to the recipient. The donor

\begin{itemize}
\item \textsuperscript{8} Tamanaha, \textit{supra} note 6.
\item \textsuperscript{9} Typically with little or no recognition that in a given setting, the promotion of a substantive norm embedded in a robust substantive version of rule of law may conflict with formal adherence to rule of law which is being vigorously promoted (often by the same actor) at the same time. USAID’s Rule of Law strategy statement shifts seamlessly back and forth between “neutral” procedural concerns and substantive requirements. See Jon Eddy, \textit{Rule of Law in Afghanistan: The Intrusion of Reality}, 17 No. 2 J. INT’L COOPERATION STUDIES 1, 5, fn. 16. At a theoretic level, it is easy to conflate these requirements, if one believes that both are necessary for the attainment of a realized Rule of Law. In the operational world of imperfect systems, which is to say, the state in which all human institutions exist, conflict between the two aspects are frequent. For instance, present constitutional arrangements in a state may call for application of a rule that denies a substantive human right. To implement the human right in derogation of the statute may violate the present constitutional order of the state; to follow the presently prescribed constitutional order will fail to protect the human right. The need for recognition and awareness of such conflicts, and the concomitant need to prioritize and strategize efforts when such conflicts are present, are a central theme of this paper.
\item \textsuperscript{10} By a “large cultural divide,” I mean the type of gap that separates liberal societies such as America, Western Europe, several states of East Asia, most of Latin America, and increasingly much of the rest of the world, from nonliberal states as referenced (and subjected to a partial taxonomy) in JOHN RAWLS, \textit{THE LAW OF PEOPLES} 4 (Cambridge 1999).
\item \textsuperscript{11} Eddy, \textit{supra} note 9, at 5. In 2003, while serving as Resident Legal Advisor to the Ministry of Justice and Human Rights in Jakarta, I was contacted by a representative of a major US consulting firm preparing a bid for a Rule of Law project in Indonesia. The representative explained that he had never been to Indonesia before, and that I had been recommended as a source of information. We agreed to meet in the executive lounge of one of Jakarta’s major Western hotels. We talked about some of the impediments to change, the difficulties posed by corruption and low capacity, and complications of the political environment. After a bit, he remarked: “Got it. It’s just like Bulgaria.” Well, yes—except that Indonesia is in SE Asia, not SE Europe; 85% Muslim instead of predominantly Eastern Orthodox; an archipelago of 17,000 islands, instead of a contiguous land mass; a tropical climate instead of a temperate climate . . . Otherwise, just the same. This process of abstracting up to a level of generality where things can be said to be ‘just the same’ is recurrent in both Rule of Law theory and practice.
\item \textsuperscript{12} Eddy, \textit{supra} note 9, at 17.
\end{itemize}
metaphor denies agency, or the need for any action or involvement, on the part of the recipient.

A better paradigm might be a standard business transaction. Transactional business lawyers do not approach a transaction with a view that one side is “giving” something to the other. Nor do they assume that parties to the transaction have coincident objectives or values. Rather, with an assumption that the parties may have divergent motivations, objectives, and values, they seek to determine whether there are areas in which the parties can cooperate on terms that promote the (overall) divergent interests of each. Although the parties do not generally pursue coincident objectives—and may not pursue specific agreed objectives for the same reasons—there is nevertheless a bounded area for alignment of interests. Bringing terminology more in line with reality might also promote greater strategic and tactical clarity—and certainly would be less disingenuous.

Let us take it as given that most Rule of Law activity involves interference by “outsiders” in the affairs of another country. Care is often taken to downplay this potentially troublesome fact. Politics are recast as “governance;” donors stress “local ownership.” Global best practices are offered as scientifically grounded technocratic norms, devoid of political content. But minimal scrutiny makes clear that, in practice, Rule of Law promotion nearly always involves efforts by outside actors and organizations to secure changes—often contentious changes—inside another country. That such efforts are also nearly always undertaken in alliance with domestic collaborators makes the efforts more, not less, political. This paper further assumes that Rule of Law “interventions” will continue. What then are the constraints that should shape or limit such activities?

In part, such concerns may simply go to the efficacy of Rule of Law efforts. But in keeping with the theme of the Carhart Memorial Lectures, this paper also seeks to address the ethical dimension of Rule of Law practice. It does so from the perspective of a practitioner, that is, someone who has been charged with promoting the Rule of Law in a variety of circumstances and in a variety of locales over quite a span of time.

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13. See Carothers, supra note 1, at 99.
14. See id. at 104.
15. This paper, in concept, was originally delivered as the Carhart Memorial Lecture at Ohio Northern University’s Pettit College of Law on April 12, 2013.
16. Inter alia, as a young academic employed by the SAILER program in Ethiopia, 1970-73; as an intermittent consultant to USAID and AusAID projects in Indonesia, 1994-2008; as a consultant to the US Department of Commerce in the Arab Gulf region, 2005-2008; and as Director of a legal education project in Afghanistan since 2005. The SAILER programs were part of an initiative of the International Legal Center, funded by the Ford Foundation, that were a specific focus of the critique of Law and Development conducted in Trubek and Galanter’s influential article of 1974: see David M.
When Rule of Law projects are conducted across large cultural divides, the potential lack of coincident values and assumptions adds a difficult new dimension.\textsuperscript{17} A subset of such projects consists of Rule of Law activities conducted in failed states, or near-failed states.\textsuperscript{18} As an example, Rule of Law has been identified as a strong component of the international effort in Afghanistan.\textsuperscript{19} In these settings, the added tension and complexity added by a wide cultural divide between the locality and American culture is compounded by deep fractures within the local society.\textsuperscript{20} “Taking sides” in such situations may “feel good,” and may promote, at least in the short run, measurable gains in things the international community likes to measure. But taking sides is just that: it may increase, rather than diminish, divisions. In some circumstances, it may also place in sharp juxtaposition the demands of formal justice (which is being promoted) with the demands of substantive justice (which is also being promoted). Short-term measurable results may come at the cost of long-term goals, because the present actions that would (eventually) support and yield the desired, long-term outcomes are at odds with the present actions that generate desired, short-term results.\textsuperscript{21} Such calculations are complex and uncertain. Like medical practitioners, Rule of

\textsuperscript{17} The eminent comparative law scholar John Henry Merryman identified this issue decades ago:

The American lawyer who engages in social engineering within his own society (i.e. in “domestic law and development”) operates within a familiar environment, employing generally valid but unstated premises that are part of his natural “feel” for the culture. Consciously or unconsciously he is restricted by his own background to a range of proposals that shared experience tells him have a reasonable prospect of succeeding without disproportionate social costs. See id.


\textsuperscript{19} United States civilian funding for Afghan Rule of Law Assistance peaked in FY 2010 at $411 million. Ali Wardak, State and Non-State Justice Systems in Afghanistan: The Need for Synergy, 32 U. Pa. J. Int’l L. 1305, 1309 (2012). This excludes Rule of Law activity by the US military (which had a Joint Task Force for this purpose), as well as spending by other countries, international organizations, and NGOs.

\textsuperscript{20} See Eddy, supra note 9, at 17.

Law practitioners would do well to heed the over-arching injunction: “First, do no harm;” yet, many factors impel us to take action.

Difficult strategic and tactical decisions must be made both in formulating and in implementing projects in conflict and post-conflict zones. Although these decisions bear on the immediate efficacy in achieving donor goals, they also have consequences beyond those immediate goals: for instance, they may improve or decrease the cohesiveness of an internally conflicted society. From the perspective of a Western actor, such decisions may have a perceived moral component: when does pressure on local actors reach the point of imposition, and when does accommodation represent an intolerable abandonment of core values? These are not easy questions, and it is important that we approach them clear-sightedely. My thesis is simple: when Rule of Law intervention is attempted across large cultural divides, the lack of common assumptions implicitly dictates certain ethical constraints. I wish to formulate those restraints as imposed by adherence to four virtues: patience, respectfulfulness, self-awareness and humility. I will first analyse several attempted or proposed initiatives to improve Afghan legal education, to see how

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22. Commonly attributed as part of the ancient Hippocratic Oath of classic Greek physicians; in fact, the injunction, although it may be derived from the contents of the oath is not explicitly contained in it. See the National Library of Medicine, http://www.nlm.nih.gov/hmd/greek/greek_oath.html Visited on Sept. 16, 2013. Cf. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?—BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 315 (Cambridge 2006).

23. Not least, domestic constituencies in donor countries, and, to the extent not included in the foregoing, national security concerns of donor countries.

24. There are minimally two distinct moral perspectives that may be offered. First, there is the question of the discrepancy itself between two practices: is at least one ‘right conduct’ and the other not? This is widely posed as the conflict between the ‘universalist’ position (all humans share core values) and the ‘relativist’ position (each society self-determines values). This juxtaposition hardly does justice to the elaborations that have been developed by adherents to one or another of these broadly-defined ends of the spectrum. A considerable number of thinkers question strongly that such a dichotomy exists, or that a discussion framed from such perspectives is at all helpful. For a thoughtful discussion of these issues, see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 106-18 (3rd ed. Ithaca 2013). Second, if one assumes a universalist position, there is a question of the extent to which this creates a right to intervene (including forcefully) against the rights violator. See STROMSETH ET AL., supra note 22, at 310-16. For an exposition by writers who seem reasonably comfortable with ‘a new imperialism’ (their term). Although the authors note the ‘irony’ of imposing Rule of Law through use of superior force, the tone of the book seeks rather comfortable with the efforts of such a ‘new imperialism’ (again, their words). See id. at 1-17, 310-316. This paper does not directly address the first of these issues (although it might be read as a defense of relativism for reasons of ‘instrumental efficacy’—that is, talking relativism is a better route to implementing universal values; cf. DONNELLY, supra note 24, at 112; alternatively, it can be read within the context of STROMSETH ET AL., supra note 22, at 314-27, as an elaboration of their injunction to do no harm).

25. Ethical here is used in its narrower sense—conforming to the standards of conduct set by a profession—rather than as a synonym for moral. At a number of points in this paper, I will assume for argument’s sake that certain Afghan practices are morally wrong, and then seek to investigate whether there are certain ethical considerations that should inform how Rule of Law projects react to those practices.
adherence to these virtues might sharpen understanding.\textsuperscript{26} And then I will turn to consider a number of “tough cases” that have arisen in the Afghan legal system, again asking what adherence to these four virtues could contribute to our understanding and response to such situations.\textsuperscript{27}

II. THE AFGHAN SETTING

Both the Afghan legal system and Afghan legal education may seem strange to Americans on first encounter. The legal system can fairly be characterized as deeply pluralistic.\textsuperscript{28} Within the formal system, a written constitution exists, as do a parliament, an executive, and a judiciary.\textsuperscript{29} The formal state bureaucracy works fitfully, however; clear implementation of state policy is inhibited both by low capacity\textsuperscript{30} and high levels of corruption.\textsuperscript{31} Furthermore, the actual influence of the state in establishing norms is unclear, due to the presence of other sources of legitimacy.\textsuperscript{32}

One initial additional source of legitimacy, and indeed under the Constitution the foundational source of legitimacy, is Islam.\textsuperscript{33} Article Three of the present 2004 Constitution, providing that no law shall “contravene the tenets and provisions of the holy religion of Islam,” might be interpreted to provide only a standard of review for legislation duly enacted by

\begin{itemize}
\item \textsuperscript{26} See infra Part III (patience) and Part IV (respectfulness).
\item \textsuperscript{27} See infra Part V (self-awareness).
\item \textsuperscript{28} See Eddy, supra note 9, at 6-8.
\item \textsuperscript{30} The general literacy rate in Afghanistan is 28.1\% (the rate is sharply skewed by gender: male: 43.1\%; female: 12.6\%). CIA, Afghanistan: People and Society, in THE WORLD FACTBOOK (2013), https://www.cia.gov/library/publications/the-world-factbook/geos/af.html. In the Afghan National Police (ANP), the rate among recruits is 14\%. This has been identified as a ‘top challenge’ facing the US-led NATO police training program, as it complicates implementation of policy, record keeping, and any number of standard bureaucratic functions, even something as simple as accountability for personal weapons. See Edwin Mora, U.S. Working to Raise Literacy of Afghan Forces to 3rd Grade Level Before 2014 Turnover, CNS News, May 31, 2011, http://cnsnews.com/news/article/us-working-raised-literacy-afghan-forces-3rd-grade-level-2014-turnover (last visited on Sept. 16, 2013) (specifically the comments of Dr. Jack Kem, deputy to the training mission commander).
\item \textsuperscript{31} With a score of 8 on the 0-100 scale employed by Transparency International’s Corruption Perception Index (2012), Afghanistan tied with North Korea and Somalia for the distinction of being the most corrupt nation rated. Transparency International, Corruption Percentage Index, http://cpi.transparency.org/cpi2012/results/ (last visited on Sept. 16, 2013).
\item \textsuperscript{32} Eddy, supra note 9, at 6.
\item \textsuperscript{33} 2004 Constitution, art.1. “Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.” id., at Art. 2: “The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan . . . .”; id., at Art. 3: “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”
\end{itemize}
parliament.\textsuperscript{34} However, Afghan officials\textsuperscript{35} have consistently gone beyond the formally enacted positive law of Afghanistan to find legal norms grounded solely in Islamic law.\textsuperscript{36} Notably, this is done through an interpretation of Article 130 of the Constitution.\textsuperscript{37} Proper interpretation and application of Articles 3 and 130 remain highly contested in Afghanistan today; this may be viewed as adding to legal uncertainty, although the heavily shari’a-influenced Supreme Court has maintained a consistent view.\textsuperscript{38}

Another major influence on Afghan justice is custom. A majority of legal disputes in Afghanistan are settled before customary tribunals, in accordance with customary norms.\textsuperscript{39} Mullahs, the local religious figures, often figure prominently in this process.\textsuperscript{40} The norms that these leaders and tribunals apply are typically drawn from custom, which is presumed to be consistent with Islamic law. In fact, it frequently is not, and when it is not, it is almost invariably considerably more conservative, and at odds with both Western norms and Islamic law.\textsuperscript{41}

\textsuperscript{34} 2004 Constitution, art. 3. Such laws will henceforth be referred to as the “formal” or “positive” law of Afghanistan.

\textsuperscript{35} Including both courts and prosecutors, as will be developed more fully, see infra cases discussed in text accompanying notes 106-44.

\textsuperscript{36} See infra text accompanying notes 121-44.

\textsuperscript{37} 2004 Constitution, art. 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.

\textit{Id.} (Emphasis added). Hanafi jurisprudence is one of the four major ‘schools’ if Sunni Islamic jurisprudence, and the school prevalent among Sunni Afghans. Hanafi himself was Afghan, born a short distance north of Kabul in present-day Parwan province.

\textsuperscript{38} As applied by the Supreme Court in a number of cases, Article 130 allows the court to “fill a gap” in positive law when positive law has not enacted a norm endorsed by Shari’a law. Notably, such crimes as apostasy or blasphemy, if not included as offenses under the Afghan Penal Code, may nonetheless be punished as courts ‘fill the gap’ in the Penal Code by applying Hanafi jurisprudence.

\textsuperscript{39} A common statement is that eighty percent of disputes are settled in the “informal justice sector.” Such figures are difficult to pin down, for both theoretical and practical reasons. To begin with, a great deal depends on the definition of a dispute, since that forms the denominator of the fraction. And, to what extent is “state involvement” required to move a dispute inside the formal sector? Statistics of all kinds are hard to come by in Afghanistan, not least because seventy-five to eighty percent of the population continues to live in rural, often hard to reach areas. This fact alone makes an eighty percent figure intuitively plausible, since the government’s reach into rural areas is weak. But even in urban areas, customary justice continues to function. See generally Noah Coburn and John Dempsey, \textit{Informal Dispute Resolution in Afghanistan}, \textit{United States Institute of Peace Special Report}, August 2010, http://www.usip.org/files/resources/sr247_0.pdf; as to percentages and their accuracy, see id. n.4.

\textsuperscript{40} Suhrke & Borchgrevik, supra note 21, at 226.

\textsuperscript{41} Critics of the informal justice sector include professors at the Kabul Shari’a faculty, who both critique customary justice as lacking sophisticated knowledge of Islamic law, and resent the fact that unpleasant decisions of customary tribunals are inevitably described (and derided) in the international
Legal education takes place in Afghanistan in a variety of venues. At the university level, education partially reflects the systemic pluralism. Major universities maintain a Faculty of Law and Political Science. Additionally, a university may have a Faculty of Islamic Law—a “Shari’a Faculty.” A number of universities have both faculties, although some, newer universities have only one of the two faculties at present.

Following completion of their studies, graduates of these faculties have a number of career options. Traditionally, the judiciary drew heavily from the graduates of the Kabul and Nangarhar Shari’a Faculties; the Supreme Court, to this day, maintains both heavy representation of, and close ties to, the Kabul Shari’a Faculty. However, career judges must first complete additional “Stage” training. Entrance to the training is competitive and requires passage of an examination. Thereafter, a training course leads to entry-level qualification as a judge. Judicial stage training is not restricted to shari’a faculty graduates—graduates of the various faculties of Law and

42. See Sahrke & Borghgrevik, supra note 21, at 212.
46. Remarkably, however, virtually no attention is given to customary law in either the Shari’a or Law and Political Science curriculum. Despite the high proportion of disputes that are settled before customary tribunals in accordance with customary norms. In an important sense, graduates of both faculties therefore remain removed from justice as it is experienced by ‘justice consumers’ in Afghanistan. No opinion is offered as to whether this is in fact markedly different from the United States.
47. See Geoffrey Swenson & Eli Sugerman, Building the Rule of Law in Afghanistan: The Importance of Legal Education, 3 HAGUE J. ON THE RULE OF LAW 130, 134 (2011) (graduates of the Kabul University Faculty of Law and Political Sciences worked in public ministries, the judiciary, or a prosecutor’s office).
50. Swenson & Sugerman, supra note 47, at 141-42.
52. Swenson & Sugerman, supra note 47, at 141-42.
Political Science may take the qualifying examination, and so also may graduates of madrassah. 

Afghan law faculties are closer to certain European models of legal training than to American ones. Law is an undergraduate degree, as it is in much of the world. Moreover, the faculties are faculties of law and political science. In the traditional curriculum (presently undergoing a prolonged period of study and restructuring), substantial course coverage has been afforded to public administration and diplomacy; the primary career tracks for graduates have been as state prosecutors and as foreign service personnel. The Attorney General’s Office also conducts stage training. Strictly speaking, Shari’a graduates may apply for stage training as a prosecutor, and Law and Political Science graduates may apply for stage training in the separately administered Judicial Stage course. Finally, graduates of either faculty may apply to become members of the Afghan Independent Bar Association, the organization of private practitioners.

When Rule of Law reformers surveyed Afghan legal education in the early post-Taliban years, they discerned many opportunities to provide assistance. On the physical level, facilities were destroyed or in disrepair. Many faculty members at Kabul University had been killed or displaced in the years of fighting. Beyond these immediate issues, the lack of well-trained instructional personnel with advanced degrees, the absence of reliable teaching materials, an obsolete curriculum and the strange and unclear allocation of responsibilities between the law and shari’a faculties all caught attention. In short order, all would be addressed by multiple donor agencies. We will now turn to consider some of the donor approaches taken, and examine what those efforts can teach us about the virtues of patience, respectfulness, self-awareness, and humility.

III. THE VIRTUE OF PATIENCE

A. Faculty Opportunities for Advanced Education

The need for patience can be underscored by what is considered to be one of the very first needs identified by donors: opportunities for advanced graduate education for existing faculty members. By necessity, such

53. Id. at 134-35.
55. See Swenson & Sugerman, supra note 47, at 134.
56. Id.
57. Id. at 137-38.
58. Id. at 134.
59. Id. at 141-42.
60. See Swenson & Sugerman, supra note 47, at 137.
training would need to take place outside Afghanistan. The Legal Education Support Program—Afghanistan (LESPA) and its predecessor, the University of Washington’s Afghan Legal Educators Program (ALEP) were created to meet this need. LESPA, together with ALEP, is now entering its tenth year of operation. LESPA prepares Afghan faculty members (and recent graduates who are selected to join faculties), offering scholarships for LL.M. (and now Ph.D.) training in the United States. It is a long-range program designed to build a cadre of personnel who will take responsibility for improving the Afghan legal education system in the coming generation.

But since this training takes place in an American university, it presupposes a high level of English language competency. Ten years following the fall of the Taliban, such competence is becoming more common, at least in Kabul and a few other major cities. But at the outset of the program, there were effectively no English speakers among the Kabul or other major university faculties. Yet the initial program design assumed that professors would be able to come to the United States with minimal additional language preparation and enter graduate study. English language ability has continued to play an unfortunate and inordinate limiting role in access to advanced training; however, English language training is both expensive and sounds unimpressive to those who fund programs. Above all, if English language training is a pre-requisite to further training, the only short-term results that can be reported are

61. I serve as Program Director for LESPA, and previously served as Program Manager (from inception) and then Program Director (since January 2010) of ALEP. LESPA is implemented by the University of Washington School of Law under a 5-year grant from the United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs (INL) extending through 2017. It is a successor to ALEP, similarly implemented and funded under an initial 3-year grant (subsequently extended and renewed), commencing in late 2004. Stanford University’s School of Law also administers a program in support of Afghan legal education, also known as ALEP, which focuses primarily on the American University in Afghanistan located in Kabul. All references in this article to ALEP refer to the University of Washington program.


63. Id.

64. See id.

65. See id.

66. My first visit to the Kabul University faculties occurred in late December 2004. At the Sharia faculty, all discussions were carried on with a translator, and there were no candidates who spoke English. In May, 2005, I returned with an ESL (English as a Second Language) instructor, and conducted interviews and administered English proficiency tests. At Kabul University’s Law faculty, there were two instructors with a 12th and 10th grade level of English, and one with a 3rd grade level. No others had competency at a testable level.

67. See University of Washington School of Law Legal Education Support Program, supra note 62.
improvement in English language levels, whereas donors are focused far downstream on impacts to the justice system.

Donors live in a world where a number of factors militate unrelentingly against patience. LESPA, like many Rule of Law activities, is supported by a national government—in this instance the US Department of State.68 Planning for these programs is driven heavily by government budgeting practices. Typically, this makes it difficult to formulate strategies over a long period of time. Additionally, while the United States Agency for International Development (“USAID”)—as an example—sets general priorities and themes in Washington, D.C., local embassies play a major role in the way those priorities are translated into actual programs or projects in-country. In addition to budget constraints, shifting embassy personnel can make it difficult to execute a multi-year strategy.69 When planning must be short-term, pressure for immediate results becomes intense. When unrealistic short-term impacts are not achieved, a sense (often accurate) grows that money is being wasted, and programs are ineffective. To combat charges of waste, pressure grows for “metrics” to ensure that programs are effective. In concept, metrics are an excellent idea. In practice, devising the proper metrics can be extremely difficult. And often the problem of establishing a realistic timeframe remains unaddressed.

When LESPA and its predecessor program were first funded in 2004, the desired impact was to be an eventual improvement in the quality of justice in Afghanistan.70 Donors had been conducting a great number of training programs for existing justice sector personnel. But the results of the training programs were less than satisfying. Many persons received training, but this did not always translate directly to better job performance, and also not to “better justice.” And, it was clear that such programs were


69. In conflict zones, turnover sometimes is especially high, although such postings also draw some personnel who make repetitive commitments. In our first five years of activity in Afghanistan, we worked with more than five successive embassy contacts. When President Obama empowered Richard Holbrooke as his Special Representative for Afghanistan and Pakistan, Holbrooke reviewed activities in Afghanistan. Dissatisfied with results, he reacted by reducing all Rule of Law contracts to one-year contracts, with an option for an additional year renewal. This greatly complicated the planning for contractors who were implementing programs, led to instability and unpredictability of programming, and greatly tarnished the credibility of those programs with Afghans. The University of Washington’s programs, which continued to operate on a stable funding platform during this period, benefited by comparison, due to greater ability to formulate and execute multi-year commitments.

70. See University of Washington School of Law Legal Education Support Program, supra note
not sustainable: that is, at some point training and education for a better justice system would need to be conducted by Afghans.

ALEP, the predecessor to LESPA, was formulated as a partial response to the stop-gap nature of existing training programs. It thus did represent “long-term planning.” But on the other hand, it, too, was susceptible to inevitable pressures for reasonably prompt, measurable results. In its original formulation, the program was funded for three years with a goal of providing LL.M. education in the United States to twenty Afghan law professors. A logical metric for this goal would seem to be “LL.M. degrees conferred,” measured at three years from inception of the program. Presumably some milestones along the way could also be measured: number of candidates identified and selected; LL.M. candidates enrolled in a degree program; and the like. These measurements could be taken on a shorter timeframe.

In early 2005, however, there were not twenty Afghan law faculty members who spoke English. As a practical matter, no Afghan law professors could receive LL.M. degrees in the United States until a group of English-speaking professors was developed. And, to complicate matters, no good English instruction existed in Kabul in early 2005. The first activity of ALEP thus became hiring an English language instructor to conduct classes for the professors in Kabul. Eighteen months into the program, a total of eighteen professors had been selected to travel to the United States for advanced English training; after twenty-seven months, four professors remained studying in the United States. Three would complete LL.M. studies within the original three-year term of the grant, fifteen percent of the originally envisaged number.

What I describe here is not a failed program; rather, the description is that of a program that is now regarded as one of the most successful and widely-respected Rule of Law initiatives in Afghanistan. But it was not at

71. At this point, it might reasonably be asked: why not teach the professors in a language they already understood? The full answer to this question would take some time, but even a brief consideration sheds light on the implicit realities of Rule of Law assistance programs. Generally speaking, the following languages would be readily available to Afghans: Dari (to all); Pashto (to some); and Arabic (to Shari’a professors). Few foreign professors would be available to instruct in any of these languages, other than Arabic speakers, drawn primarily from the Middle East, or Farsi (a cognate language to Dari) speakers, from Iran. The likelihood of US funding for this instruction would be nil. A fuller answer would consider what objectives, other than absorption of legal doctrine, were being sought through enrollment in US LL.M programs. For spirited advocacy of the benefits of US LL.M programs to Rule of Law promotion and the introduction of legal reforms into countries, see generally, Ronald A. Brand & D. Wes Rist, eds., THE EXPORT OF LEGAL EDUCATION—ITS PROMISE AND IMPACT IN TRANSITION COUNTRIES, Surrey: Ashgate (2009).

72. Numerous store front language schools did exist at that time, usually staffed by one or more Afghans who had been refugees in Pakistan, and had returned to Kabul with street English. None were close to the standard necessary to prepare candidates for graduate study in the United States.

73. See Swenson & Shugerman, supra note 47, at 144.
first. In jest, I sometimes say that the reason ALEP became successful is because it was so small that it escaped scrutiny during its early, “failing” years. But there is an element of truth in this. How can one defend a program that was to produce twenty LL.M.s, but only produced three within the grant period?74

ALEP/LESPA adapted flexibly and creatively to the actual circumstances encountered, and learned from errors. It moved from a program that produced three LL.M.s in five years, to a program that produces five LL.M.s per year. Many factors contributed to this change, and they each reaffirm the value of patience:

1. **Trust and confidence.** In Kabul in late 2004, many Afghans still lived in the moment. In a world of great uncertainty, investment in the future—including personal investment of time in self-improvement—is not a rational policy. Calculating return on investment requires an investment horizon. For many Afghans, that did not exist in late 2004. Equally, the landscape was littered with broken promises.75 As candidates traveled to the United States, as persons progressed in the program on the basis of merit and accomplishment, and particularly as the first LL.M.s returned to

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74. A partial answer may be found in the theories of the noted development economist, Albert O. Hirschman. Hirschman describes a railway tunnel project, originally thought to be accomplished easily, for a cost of $2 million. In fact, almost nothing went as planned, and the eventual cost was $20 million. Without doubt, had the actual difficulty been known, the project would not have been attempted. On the other hand, when accomplished, the project also produced benefits well beyond anything imagined. Hirschman more generally postulated that we regularly act with a delusion of certainty, and only act because we are so deluded. What is required is not actual certainty, which will not be obtained, but creativity and flexibility to adjust to actual circumstances as they become evident. See Malcolm Gladwell, *The Gift of Doubt: Albert O. Hirschman and the power of failure*, THE NEW YORKER, June 24, 2013 at 74 (reviewing a biography of Hirschman).

75. My very first visit to an Afghan faculty was to the Kabul Shari’a Faculty in late December, 2004. I met with the Acting Dean and a few professors, and was cordially received. We met for about 45 minutes over tea, during which I described the ALEP program, and our plans to offer scholarships to qualified professors. After hearing me out, the Acting Dean thanked me again for making the long trip to Kabul and for visiting the faculty. “We have so many visitors,” he said. “But we never see them again.” English language instruction for interested professors commenced in July, 2005, with about 40 participants from the Kabul Law and Political Science and Kabul Shari’a faculties. When I visited again in February, 2006 to assess progress, it was clear that none of the candidates yet had English at a level necessary for LLM study; it was also clear that we would soon need to apply for visas for travel to the United States. The remaining active candidates were now below 20, and these were about to resign themselves to the futility of further study. To counter this, I announced that we would apply for visas for all candidates who were still actively studying, and those who were most successful in the United States would be allowed to continue on into the LLM program. Flatly stated, this was making it up as we went along. For starters, we did not believe that more than half of the candidates would be able to obtain visas; when all did, it was immediately clear that budget would not support all going forward. A process of competitive attrition therefore began immediately upon arrival in the United States. Although this was stressful for the candidates, it also produced high motivation; equally, such a ruthless meritocracy was a new concept for many, who had assumed that in the end candidates would be selected on the basis of politics and connections.
Afghanistan, an entirely new set of expectations was slowly created surrounding the program and the opportunities it presented.

2. Establishment of competent English language instruction. As noted, competent English language instruction did not exist in Kabul in late 2004. To a present-day visitor to Kabul, less than ten years later, this seems inconceivable, but the entire city has been transformed during that period. Nowhere is this more evident than among the young, educated elite. Not only do manifold opportunities for English language study now exist, the motivation for English language study now exists, and the rationality of self-improvement has returned. Taken together, this means that many of the brightest Law and Shari’a graduates now direct themselves towards obtaining a high level of English, and obtaining a foreign LL.M. Needless to say, it is easier to educate motivated, already partially self-educated students.

3. Establishment of an alumni network. Equally, LL.M. graduates, upon returning to Afghanistan, now function as an informal network. They collaborate on improvements in curriculum, teaching methodologies, and the introduction of clinical education. They attract strong, progressive students as followers, and they recruit such students for foreign scholarships.

None of these factors could be “compressed;” each had to evolve over time. But all now interact to multiply dramatically the efficiency and impact of the program. Patience as a virtue is inextricably linked with sequencing and prioritization in program design. Pressures for immediate results militate in favor of “doing all things at once;” in fact, this may ensure the very wastefulness that is later decried.

The tension that exists between the virtue of patience and the realities of donor accountability displays itself most clearly in the thorny arena of “metrics.” When spending on Rule of Law initiatives in Afghanistan exceeded half of a billion dollars, it was to be expected that there would be great pressure to show that such sums were being well spent. But how is this to be done? Quite clearly, a great deal depends on what is measured,

76. See ALEP Press Release, supra note 68.
77. Id.
78. See id.
79. See supra Part III.A.
80. See Tamanaha, supra note 6, at 237-38.
and when it is measured. Increasingly, the emphasis is placed on moving beyond measuring outputs and outcomes to also measuring observable impacts.82

Time constraints intertwine with metrics, and with donor priorities and constituencies. It could be asked: why not train the professors in a language they already understand? The two obvious choices would be instruction in Dari (Farsi) or Arabic (for Shari’a faculty professors). On that model, the United States would fund LL.M. study in Iran, Saudi Arabia, or Egypt.83 Such programming is probably not attractive on Capitol Hill.84

In the alternative, the problem could be addressed squarely, and a program in English language could be constructed. Note that this would quickly solve the metric problem: it would be easy to measure the number of professors receiving language instruction, and to track their progress. But learning English, while easily measurable, is very distant from the desired impact on the justice sector.

There is a perfectly discernible progression here: from learning English (approximately two years), to completing an LL.M. (one year), to returning to Afghanistan a better teacher (almost immediately), to graduating better educated professionals from Afghan faculties (almost immediately), finally (perhaps), to improved performance in the justice sector (five years(?)). But even if the linkages are taken as inexorable, the time frame for measurement would not be less than a decade. For reasons already stated, this does not meet donor needs for upstream accountability.85 Additionally, if good

82. These terms are not susceptible to exact definitions, and a given datum might under circumstances, be defined as one or another of the above. For instance, for some purposes, the number of professors completing English classes might be an output; access to foreign training might be an outcome; and increased numbers of professors with advanced degrees might be an impact; however, for other purposes, the number of professors receiving advanced degrees might be an output; improved teaching might be an outcome; and increased numbers of graduates successfully completing stage examinations might be an impact. In other words, considerable flexibility exists in defining these measurement points, and concomitantly, a good deal of thought is required to design proper metrics.


84. This is referred to as the problem of donor constituencies. That is, donors may have certain goals (e.g., improve the educational level of Afghan professors). But when programs are constructed to meet those goals, the programs also have to withstand scrutiny by constituencies in the donor country. And those constituencies may either restrict actions that would more easily promote the specific goal (as in, educating professors in Iran, where no language barrier exists), or require actions to be taken, or taken in a certain form, that impedes achievement of the specific goal (for instance, by requiring all travel to be taken on US-flag airlines, driving up program costs). Of course, in the first example, it may also be that the explicit goal (an LL.M. degree) has a number of implicit collateral goals: immersion in US culture; exposure to the US legal system, gaining comfort with unfamiliar teaching methodologies, etc. These collateral goals may only be met by certain LL.M programs, or in certain countries. “LL.M.” may be a short-hand for a larger and broader set of objectives that are not fully articulated. On the utility of LL.M. graduates in promoting legal reforms within their home countries on return, see Brand & Rist, supra note 71.

85. See supra notes 79-84.
metrics for measuring justice sector improvement were developed, when (after not less than 10 years) one wished to measure the effectiveness of the program in improving the justice sector, it would be necessary to isolate those improvements (or the degree of improvement) that were due to the program from those improvements (or degree of improvement) due to other factors (of which there would likely be many).

B. Revising Curricula and Developing Teaching Materials

Two further deficiencies that donors quickly and correctly identified were the absence of teaching materials, and a moribund curriculum. However, addressing these issues thoughtfully would require patience, as, again, serious issues of sequencing of efforts exist. Donors, however, were still under pressure to show prompt results. As I will argue, the pressure for prompt results in these instances actually leads quite predictably to bad results, and will again demonstrate the importance of the virtue of patience.86 In both cases, pressure for prompt results meant acting with existing Afghan resources, and accepting the present Afghan power structure. Patience would have allowed for the development of new intellectual resources, and concomitant growth of alternative power structures. Instead, donors were usually co-opted by present “players,” who often turned offered assistance to their own needs, rather than to institutional improvement.87 Avoiding such situations requires that one gain a clear understanding of existing institutions and power structures; this too requires time, and, therefore, patience. Unless great care is taken, well-intentioned assistance can become not only futile, but may actually contribute to the entrenchment of bad practices or bad power structures.

Curriculum reform provides a possible example of the manner in which donor intention may be subverted, when it is not coupled with reliable knowledge of relevant power structures. Consider the matter of a “national curriculum.” A national curriculum promotes a standard curriculum, which is seen as a means of quality assurance. But standardization is a weak proxy for quality. It also comes at a cost: the stifling of innovation. Actual effects of standardization cannot be predicted without a good deal of knowledge of who will set the standards, and how the standards will be adhered to.

Standardization can be made to sound good, and a plausible narrative can be developed that stresses the Ministry of Higher Education “stepping up to the task” and demanding modernization and quality from the universities. But realities may not track this narrative. Although there are

86. See supra Part II.B.
87. This process is exacerbated by the problem of donor competition, which is discussed more fully below. See infra notes 169-72 and accompanying text.
weak “outlying” universities, there are also universities outside Kabul that harbor strong ambitions and employ innovative professors. Standardization can equally represent a means by which both the Ministry of Higher Education and each of the Kabul faculties respectively seek to assert control and dominance over other universities.

The Kabul faculties (often particularly the Kabul Faculty of Law and Political Science) both by history and proximity enjoy an advantage by virtue of their ability to influence the Ministry of Higher Education; they also play a key role in the selection and advancement of faculty at other universities. Under present circumstances, pressing a national curriculum thus becomes another mode of empowering the Kabul faculties vis-à-vis other universities. Yet in the last decade, the stronger universities outside Kabul, notably Balkh University in Mazar-e-sharif and Herat University in western Afghanistan, have been leaders in innovation. This positive role is very much threatened by standardization through a national curriculum.

Finally, in the matter of teaching materials, power structures between and within faculties again play an important role in shaping the actual effect of donor initiatives. Yet again, we start with a proposal which superficially has great appeal. There is little doubt that teaching materials throughout the law and sharia faculties were quite inadequate. Most instruction consisted of doctrinal lectures. Few written materials, in any form, existed in the immediate post-Taliban years.

However, in order to maximize the chances of success, the donor desire to introduce materials had to be implemented through the existing faculty power structures. Utilizing these structures, senior professors appropriated the donor “contracts” to produce the materials. Having secured the contracts, the senior professors then largely down-streamed actual production to junior faculty, over whom they exercised considerable control. And, regrettably, at neither the senior nor the junior level did sufficient expertise exist to produce quality materials.

“Textbook production” presents a vivid illustration of the importance of sequencing in devising technical legal assistance programs; it also vividly illustrates the divergent incentives that frequently exist between donors,

88. It should not be assumed that a standardized curriculum guarantees quality at the weaker universities; quality in those universities appears to be much more influenced by faculty resources, class size, and the like than by curriculum.
90. Superficial appeal is extremely important in terms of the upstream reporting obligations of Rule of Law implementors, and indeed, the further upstream reporting requirements of the donor agencies, such as USAID.
implementors and recipients, and the distortions introduced by these variant incentive schemes.

Donors place implementors under stringent reporting requirements to produce measurable results in short time frames. Textbook production satisfies all these needs. The textbook itself is a tangible, measurable deliverable. It can be “demanded” to suit programming schedules. Perhaps best of all, since the textbook is delivered in a language that is inaccessible to donors and others further upstream, there is limited ability to actually assess quality. An aggressive schedule for the production of “new” teaching materials allows an implementor to construct a rosy narrative of modernization and the improvement of legal education.

The difficulty lies in the fact that textbook production is demanded before the academics who could produce them have been trained. As noted earlier, a large number of Kabul University’s faculty were killed or fled into exile. The senior professors who remain in the faculties are by no means stupid; however, unless educated prior to 1980 they frequently have received poor education, they are spread very thin by acceptance of outside duties, and they have often acquired the bad habits necessary to survive through harrowing and corrupt times. Optimistically, a very small number of this group will ever turn or return to productive scholarship. Realistically, production of new teaching materials must be placed in the hands of a younger generation. Yet that generation is only now emerging. Their first work will not and should not be textbooks: it should be work of narrower scope. These are inconvenient truths for donors and implementors alike. In their desire to achieve measurable, and relatively immediate, results, donor/implementor incentives shape a program that drives legal education backward, rather than forward.

Building a cadre of new instructors; reviewing and implementing a modern, up-to-date curriculum; and developing a platform of reliable teaching materials: these are all laudable objectives. Each is worthy of donor support. Patience is a virtue, however. If these initiatives are undertaken with patience, with an eye to first acquiring knowledge of the local terrain and then critically appraising sequencing of efforts over sensible time frames, donor resources can contribute to significant results. A lack of patience, which is driven by pressures to demonstrate quick, measurable results, can render efforts counterproductive.

IV. THE VIRTUE OF RESPECTFULNESS

A. Dual Track Legal Education

To a newcomer to Afghanistan, the existence of “dual” law schools may seem unusual. For instance, based on the traditional career paths, it is likely that a prosecutor trained in one of the law faculties would find himself arguing a case before judges who had been trained in the shari’a faculties. Prior to 2005, some efforts were made to encourage a consolidation of the two faculties. These efforts made little progress, however, and were rather quickly abandoned. The abandonment was pragmatic: donors clearly saw that such a consolidation was not likely to occur anytime soon. It resulted from a recognized inability to effect change, not from a serious reappraisal of the analysis that had once supported the donor policy.

Donor criticisms of the “dual system” frequently started with references to the wastefulness of the system, often linking this inefficiency with the fact that Afghanistan was a poor country with limited resources. This has a superficial appeal. However, it runs exactly counter to the donors’ assumption that Afghanistan needed significant numbers of newly trained personnel. No one urged the Afghan government at that time to limit the number of students admitted to the law or shari’a faculties. In fact, during the same period of time, plans continued to develop for new universities, which would increase the number of law and shari’a faculties. Neither was there overt mention of reducing the number of professors. In short (although the discussions never really progressed to this level of detailed implementation), the assumption seemed to be that the same number of students would be instructed by the same number of professors (although perhaps not by the same professors), but within one faculty.

Shari’a faculty did not see the donor initiative as eliminating waste. They suspected, rather, that the initiative was designed to eliminate the...
shari’a faculties, or to reduce them to a marginal role. In one variant proposal, the shari’a faculty would continue to exist as a faculty of theology, perhaps of comparative religion. 94 The more “religiously minded” students might opt for this faculty, but they now would not graduate ready to enter government service in the justice sector. The “heavy lifting” of preparing fresh cadres of judges, governmental officials, and private practitioners 95 would be allocated to the law faculties, presumably under the leadership of the pre-existing law faculty leadership structures. Thus it is not difficult to see grounds for shari’a faculty resistance.96

A possible interpretation is that donors pressing the fusion strategy lacked an understanding of the internal Afghan political dynamic. It is also possible that the dynamic was understood, but the significant reduction of the shari’a faculties’ influence was viewed as a desirable goal in itself. It is likely that both interpretations are partially correct. Without any doubt, many donors did not fully understand or appreciate the role the shari’a faculties played, and also underestimated the power and influence of the faculties, particularly the Kabul Shari’a Faculty.97 The relative roles of the faculties of law and political science and the faculties of Islamic law, the respective roles of the Kabul faculties in each case, and the power structure within the individual faculties (but most particularly the Kabul faculties) underline the importance of detailed local knowledge in implementing policy.

94. In a meeting in Kabul in 2006, Ashraf Ghani, then serving as Chancellor of Kabul University, outlined a reorganization plan in which portions of the Shari’a Faculty would be joined to the Law Faculty. The Law Faculty would lose its political science component, which would emerge as a new Faculty of Public Administration. The rump Shari’a Faculty would focus on theology, with a comparative bent. How far these discussions ever proceeding inside Kabul University is not clear; Ghani’s active tenure at the University was short, as he turned to other concerns. Notes of meeting with Ashraf Ghani, Kabul University (February, 2006).

95. It must be borne in mind that Afghanistan remained somewhat ‘frozen in time’ during its years of conflict. As new social arrangements started to re-assert themselves post-Taliban, the private bar remained at first in an embryonic state. With the commercial development of Kabul, in particular, this is now starting to change.

96. Whatever merits the ‘fusion strategy’ might have had if carried out in a thoughtful way, discussion of this strategy proceeded with a primary focus on Kabul University, the oldest and most prestigious of the Afghan Universities, but also a university where law-shari’a relations are strained.

97. Seven of the nine judges of the Afghan Supreme Court are shari’a graduates, and these include the immediate past Dean of the Kabul Shari’a faculty; the faculty is effectively ‘represented’ in the Wolesi Jirga (lower house of Parliament) by Abdul Rashid Sayaf, a member of the faculty and major Muhajadin leader; and the faculty has a larger number of PhDs on its faculty than does the Kabul Faculty of Law and Political Science.
Lacking detailed local knowledge, policies are likely to be implemented in a manner that leads to quite different results from those intended.\textsuperscript{98} For instance, one goal of United States policy in Afghanistan has been, broadly, to improve the lot of women, and, specifically, to increase the number of women with meaningful roles in the justice sector, most certainly including the judiciary.\textsuperscript{99} It might be thought that the strength and conservatism of the shari’a faculties pose an obstacle to this. And to some extent this is true.\textsuperscript{100} But it is also true that the majority of the student body in the Kabul Faculty of Islamic Law has been female in recent years.\textsuperscript{101} Additionally, in recent years top candidates completing the judicial stage entrance examination have included recent female graduates of the Kabul and Herat Shari’a faculties.\textsuperscript{102} Thus, at present, a clear and consistent route for females into the Afghan judiciary—a major goal of Western donors—passes through those faculties.\textsuperscript{103}

What does this have to do with respectfulness? In this case, as is often so, respectfulness is intimately connected with patience and taking the time to understand Afghan realities, constituencies, and power relationships. In many cases,\textsuperscript{104} Westerners supported the fusion policy, without yet understanding the situation. Proponents of fusion, frequently located in the faculties of Law and Political Science who hoped to gain from this policy, were happy to provide information about the worthlessness of their competitors in the faculties of Islamic Law. Gaining reliable, direct

\textsuperscript{98} See Scholtes, supra note 91, at 1114.
\textsuperscript{100} For instance, although at one time the Kabul Shari’a faculty allowed mixed-gender teams to compete in the Jessup International Moot Court competition, more recently it introduced a restriction on female participation. Additionally, the faculties do not allow females to study fikr (the heart of classic Islamic jurisprudence). This is justified on the basis of ‘weak Arabic,’ but this is a fig leaf.
\textsuperscript{101} Information provided by former Dean Mohammad Gran of the Kabul Shari’a faculty, and Professors Mohammad Salim Salim and Lutforahman Saeed. While the author has not inspected faculty enrollment records, the information provided is consistent with direct observations during site visits to the faculty.
\textsuperscript{102} In the roughly top 10% of successful 2013 candidates (25), four were women, two each from the Kabul and Herat Sharia faculties. Information concerning stage results appears on the Supreme Court website: http://supremecourt.gov.af/Content/files/resul%20of(3)(1).pdf (in Dari—an English translation by Hashmat Khalil Nadirpoor, LESPA Legal Advisor, is on file with the author).
\textsuperscript{103} There are a number of other aspects of the shari’a faculties that are poorly understood. For instance, in addition to providing shari’a training, faculty members teach a course in Islamic Civilization required in all Afghan universities (roughly analogous to the Western Civilization course once widely required in American universities); they also train the teachers who will teach equivalent courses in secondary education. Thus the impact of the faculties of Islamic Law reaches well beyond the Afghan judiciary.
\textsuperscript{104} I include myself as initially among those who could be so charged.
information about the shari’a faculties was difficult in 2004. English competency levels were low,\(^\text{105}\) equally, the cultural divide between the Westerners and the law faculties was narrower than the cultural (and usually linguistic) gap with the shari’a faculties. So much of the “knowledge” about shari’a faculties was originally provided by competitors hostile to those faculties.\(^\text{106}\)

All these factors readily contributed to a view that shari’a faculties were “stuck in the past,” “intransigent,” “had nothing to contribute to a modern Afghanistan,” and the like. A respectful attitude required us to obtain a better understanding of the various roles the faculties played, as well as of the constituencies with which they were linked. We might still have encountered resistance, and we might have correctly identified it with self-interest. Yet with a clearer understanding of those interests and constituencies would have come the ability to better construct initiatives which met donor objectives, and which could have been implemented with some likelihood of success and minimal collateral damage.

**B. Baad—The Custom of Exchanging Women in Settlement of Debt**

A case lying far afield from legal education may illustrate how hard it can be to maintain a respectful attitude, and at the same time, the clarity that such an attitude may promote.

In 2006, an Afghan prosecutor related to me a case he had recently handled. A young woman had been accosted by some young men. They stripped her naked, but did not otherwise physically molest her. The motivation for this act was perceived prior wrongs by the girl’s family to the boys’ family. The intent was to bring shame to the girl’s family; although the girl was the person acted upon, in a certain sense the act was not aimed at her.\(^\text{107}\) This occurred within a relatively closed community, and the police did not have difficulty apprehending the young men. The case was duly brought to the prosecutor.

After careful consideration, the prosecutor declined to prosecute the case in the formal court system. Instead, he referred it to local elders. To settle the dispute, the *Jirga* directed that two young women from the same extended family as the men be “delivered” to the family of the young girl.

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105. As noted earlier, English levels were low throughout both law and shari’a faculties, but in the law faculties there were a small number of professors and students with some conversational English, making those faculties considerably more accessible.

106. This situation was also intensified because the faculties most accessible to donors were the Kabul faculties, where relations between the two faculties are particularly poor.

107. Phrasing the issue in this way is distasteful; however, in military settings, we are quite familiar with the concept of “collateral damage”—damage that could never be justified directly, but is accepted as “incidental” to permissible damage.
This was in accordance with the custom of *baad,* which is known to be practiced in Afghanistan as a traditional means of dispute settlement.

The prosecutor who related this to me seemed intelligent and able, yet was most matter-of-fact in his description. Although I was aware of the practice of *baad,* I was astonished by the prosecutor’s conduct. So I asked him to explain. Did he have sufficient evidence that he could make a case? Would it have been possible to obtain a conviction? The prosecutor was confident on both points—the young men could have been convicted and imprisoned. Why, then, did he not proceed? “Well,” he said, “what would be the point? It just would have ruined those young men’s lives.” That conversation shocked me at the time, and haunted me for some time thereafter.

The concept of individual guilt is a bedrock of Western law, and of the Western conception of Rule of Law. When a person “ruins his life” by committing a crime, that is the unfortunate result of an act freely chosen. Certainly it would be bizarre to suggest that in order to avoid harm to a perpetrator, an innocent third party should be sacrificed.

But consider a social fabric in which duties within the extended family trump the rules of positive law announced in far-off Kabul. Within that world, notions of individual responsibility become distorted. From the prosecutor’s view, although a wrong had been committed, it was a familial wrong. If indeed some individual were responsible, it might be the patriarch, and not the young men. In the Afghan context, the families, not the individuals, were the relevant units. It is widely accepted that the process of modernization entails a loosening of traditional familial social structures, and an increased recognition of individual agency. But Afghanistan, at least outside urban areas, is not far along in this process. And a legal structure that assumes that society has already reached the “modern” end-state does not appear rational.

If we subject *baad* to analysis under Western concepts familiar to us—concepts of both fundamental criminal justice and also of human rights—we can only be horrified. But if we seek to intervene against the practice within

108. It is also embodied in the formal Afghan legal system. See 2004 Constitution, art. 26 (“Crime is a personal act. Investigation, arrest and detention of an accused as well as penalty execution shall not incriminate another person.”). In the argument that follows, see infra Part IV.B, I suggest that while it is part of the formal legal system, Westerners should take more seriously the approach of the informal system, which focuses less on punishment of wrong-doer, and more on maintenance of social order. If bad aspects of this system are to be eliminated, reforms will have to at the same time take account of positive aspects of the informal system, rather than simply assuming, contrary to evidence, that the positive aspects are equally present in the formal system.

109. See *Mathews v. United States,* 485 U.S. 58, 72, 108 S. Ct. 883, 891, 99 L. Ed. 2d 54 (1988) (Scalia, J., concurring in the judgment) (“Criminal trials . . . are the means by which we affix our most serious judgments of individual guilt or innocence.”).
the terms of that Western analysis, we do so on a basis that makes little sense except to westernized Afghans who already accept that analysis. So it is that I have chosen to discuss baad in connection with the virtue of respectfulness, because baad is rarely treated with respect. Rather, in listening to such a horrific tale as the strip-shaming incident, we are filled with loathing and disgust, and imagine this practice would only be carried out by ignorant persons.110 This visceral reaction to the outcome cuts short our needed analysis of the practice. We wish to eradicate it immediately. In our society, the young men would be punished with imprisonment.111 Surely this is the correct, “modern” result.

But, as the prosecutor discerned, imprisoning the young men, while it might have satisfied our notions of criminal justice, would not have addressed the tear in the Afghan social fabric. Indeed, it would have worsened it. As I pushed him to explain his actions, he pointed out that if the young men had been imprisoned, inevitably their family would have sought retribution. This was avoided by baad, which placed both families under communal pressure to desist. The Kabul government has nothing on offer that equals the normative force of this communal verdict. While we see it as a verdict on the fate of the two women, the Afghans see it as a communal injunction against the two families.

I want to be very clear about what I am and what I am not saying. We may agree that baad is a disgusting practice and a gross violation of the rights of the women involved. But it serves an important societal function for some Afghan communities. To assume that substituting a Western justice system will perform the same function is just that: an assumption. It may be that in time Afghan society will have evolved to one where the modulation between individual and family is quite different, and where a Western justice system with its primacy of individual responsibility will “do the trick.” If, however, we wish in the present to combat baad, and minimize its usage, we will need both a more robust and a more nuanced approach.

110. Political correctness dictates that the elders should not be termed backward, but this is the prevalent stereotype.
111. See, e.g., Ohio Rev. Code Ann. § 2905.01 (West)

(A) No person, by force, threat, or deception... by any means, shall... restrain the liberty of the other person, for any of the following purposes: (1) To hold for ransom, or as a shield or hostage; (2) To facilitate the commission of any felony or flight thereafter; (3) To terrorize, or to inflict serious physical harm on the victim or another... .

Id.
V. THE VIRTUE OF SELF-AWARENESS

In engaging in dialogue or other transactions across a deep cultural divide, self-awareness is a particularly helpful virtue. I wish to address two different aspects of self-awareness: (1) self-awareness as a tool that can improve our analysis of an unfamiliar situation; and (2) self-awareness as a guide to ameliorating certain distortive pressures that may impede efficient implementation of interventions.

A. Understanding strange situations

In analyzing and evaluating strange situations, we face several problems. The first of these is what I will call the “apples-to-apples” comparative fallacy. We observe a strange behavior, and we seek to evaluate and understand it by comparing it directly to what we see as the “same” situation or behavior in our own experience, which, however, we are accustomed to handling in an entirely different way. It is a very short step from this vantage point to the conclusion that the familiar way is the correct way, and that the “strange” way must be remedied. Drawing again on our own familiar experiences, the most likely remedy that most immediately suggests itself to us is to change the strange behavior to approximate our own as nearly as possible. Sometimes, however, an apples-to-oranges comparison may be more instructive. We may see that while a distant cultural order treats apples quite differently, its treatment is not so distant from our treatment of oranges. Ultimately, of course, apples are NOT oranges, and it will be necessary to consider the differences. But in the process, we may have gained some self-awareness that will enable us to both analyze and respond to “difference” in a more constructive way.

Parviz Kambaksh, a student in northern Afghanistan, was charged in 2007 with blasphemy, a crime which is not referenced directly in the Afghan Penal Code, but which is a crime under Islamic law.

112. See infra Part V.A.
113. See infra Part V.B.
114. By strange, I mean situations that are outside our usual bounds of experience and comfort.
116. See id.
117. See id.
118. See id.
119. See id.
120. “Islamic crime” refers to both Hudud offenses and Tazeeri offenses, which are however treated differently under the Afghan Penal Code, see infra note 168. However classical doctrine may classify apostasy and blasphemy (that is, as more serious Hudud crimes, which the Afghan Penal Code prescribes shall be punished in accordance with Hanafi jurisprudence, or as less serious Tazeeri offenses,
allegedly downloaded and distributed certain materials from the internet, which reputedly treated the position of women under Islam in a disrespectful manner. After summary proceedings, Kambaksh was sentenced to death. Later, on appeal, Kambaksh’s sentence was reduced to 20 years imprisonment. International reaction was extremely negative, and the Afghan government in time acceded to pressure from the international community. Kambaksh currently lives in Canada.

Kambaksh’s case is troublesome to Americans\(^{121}\) on several levels. The modern American legal tradition has been pre-occupied with both supporting broad freedom of expression, and restricting state promotion of religion or burdens upon free exercise of religion.\(^{122}\) In the Kambaksh case, both these threads intertwine, with an outcome that is wildly at variance from American expectations. In an apples-to-apples comparison, almost nothing can be said in defense of the Kambaksh outcome—\(\textit{clearly} \) this result must be changed, whether this requires better education of prosecutors and judges, new prosecutors and judges, or significant substantive changes to the Afghan legal structure. Minimally, from an American perspective, three bedrock principles of legality have been violated:\(^{123}\) Kambaksh has been prosecuted for an “undefined” crime;\(^{124}\) his freedom of expression has been violated;\(^{125}\) and the state has intervened in support of a particular religious understanding.\(^{126}\) That Kambaksh received a capital sentence underscores the result, but a sentence requiring six months imprisonment would equally raise each of the foregoing issues.

\section*{1. Prosecution for an undefined crime.}

Nearly any conception of Rule of Law embodies the concept that criminal conduct must be defined in advance.\(^{127}\) \textit{Nulla poena, sine lege} is at

\begin{itemize}
\item which are regulated by the Afghan Penal Code), discussions with multiple Afghan shari’a trained professors has yielded no clear consensus as to proper classification. Obviously properly classifying such offenses under Islamic law is necessary to properly implement the positive law of the Afghan Penal Code.
\item Not Americans alone, but I will restrict myself to an American viewpoint for purposes of retaining a bounded perspective, and isolating the discussion on cultural distance.
\item There were also significant procedural deficiencies in the case (perhaps sufficient to warrant dismissal in many systems), but I leave those aside as peripheral to the core argument being presented here.
\item U.S. CONST. art. I, § 10, cl.1; \textit{see also} U.S. CONST. amends. V, XIV.
\item See, \textit{e.g.}, U.S. CONST. amends. I, XIV.
\item See U.S. CONST. amend. I, § 1. (”Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”).
\item See Scholtes, \textit{supra} note 91, at 1096 (“Rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws
\end{itemize}
least as deeply entrenched in civil law thinking as in the common law, and has been taken into even the thinnest, most formalistic conceptions of Rule of Law. It is also enshrined in the current Afghan constitution. It is also included in the Afghan Penal Code, but this is a somewhat more complex issue, as will be discussed below.

As already noted, Afghanistan is quintessentially pluralistic legal territory. Within Afghan territory, three sources of normative rules compete: rules emanating from the Kabul government; rules derived from classic Islamic sources; and customary rules observed in local communities. The Afghan Constitution of 2004 contains not one but a number of provisions that purport to define the relationship between these difference sources; however, that Constitution is still in the early stages of implementation, and remains subject to various contested interpretations. All three sources continue to exercise quite independent effects.

External efforts to promote the Rule of Law in Afghanistan must be viewed against this existing backdrop. The influential legal positivist H.L.A. Hart conceives of a legal system as resulting from a union of “primary” and “secondary” rules. A principal sub-species of Hartian secondary rules are so-called “rules of recognition”: these consist of the

that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.”); see also U.S. Const. amend. VI.


129. See id.

130. 2004 Afghan Constitution, art. 27.

No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense. No one shall be pursued, arrested, or detained without due process of law. No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense.

Id. The principle also is a fundamental principle of the Afghan Penal Code, but the implications of this are not necessarily what a casual Western observer might think, see infra text accompanying notes 153-55.

131. See Afghan Penal Code, Ch. 1 Art. 2 (1976).

132. See generally H.L.A. Hart, THE CONCEPT OF LAW (1961); see esp. ch. V at p. 91. Hart introduces his explanation of primary and secondary rules as follows:

we have already seen . . . the need, if we are to do justice to the complexity of a legal system, to discriminate between two different though related types [of rules]. Under rules of the one type, which may well be considered as the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.

Id. at p. 78-79.
rules that allow us to recognize what norms are legal norms. Under Hartian analysis, Afghanistan cannot at present have an effective legal system, because it lacks consensus on “secondary” rules.

The lack of Afghan clarity on this matter does not result from an absence of guidance. Rather, it is the product of a plethora of conflicting guidance, and a lack of consensus on how that guidance should be interpreted and prioritized. Thus, the Afghan Constitution proclaims that Afghanistan is an Islamic Republic, that the sacred religion of Islam is the religion of the Islamic Republic of Afghanistan, and that no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan. The placement of these three provisions as the first three articles of the constitution certainly suggests a degree of primacy and affords a Supreme Court predominantly composed of shari’a-trained judges considerable latitude to introduce Islamic law into Afghan law as applied in state courts.

There is, however, an additional provision, which has been broadly interpreted in Afghan courts. Article 130, located in the provisions of the constitution dealing with the judiciary, states:

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.

It is under this provision that the Supreme Court has derived its authority to apply Islamic law to punish offenses when the positive law of Afghanistan is silent.

Needless to say, the Supreme Court’s prevailing interpretation of the “Islamic” provisions of the Afghan Constitution is not the only possible interpretation. Nor are the Islamic provisions of the constitution the only

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133. Id. at 92. For instance, in the United States, the acceptance that a measure which is passed by a majority of both houses of Congress, and duly signed by the President, has status as primary rule (in the specific form of a federal statute). Hart regards rules of recognition as the simplest form of secondary rules; in his analysis they are joined by rules of change (for altering primary rules) and rules of adjudication (by which certain individuals or institutions are empowered to ‘make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.” Id. at 94; see general explication at 92-95.

134. 2004 Constitution, art. 1.

135. 2004 Constitution, art. 2.

136. 2004 Constitution, art. 3.

137. 2004 Constitution, art. 130 (emphasis added).

138. The court decision in Kambaksh interpreting and applying Art. 130 is not publicly available. I have discussed the case on a number of occasions with both Kambaksh’ defense counsel, and others, not connected with the defense, who have obtained access to the opinion.
provisions with potential applicability. For instance, Article 27 incorporates into Afghan law the *nulla poena sine lege* principle. As noted, Article 34 protects freedom of expression. Article 7 commits the Afghan state to observe the Universal Declaration of Human Rights. Within classic Islamic thought, an entire field of study is denoted “siyasa shari’a” (roughly, “shari’a consistent policy,”) and is devoted to the exploration of the authority, within Islamic law, of the temporal ruler to enact “additional regulation” consistent with shari’a principles.

The Afghan Supreme Court has viewed the absence of a defined crime of blasphemy in the Afghan Penal Code as a “gap,” that can properly be filled under Article 130. An alternative interpretation might be to view Article 3 as only providing authority for review of actually enacted legislation; might be to view the absence of blasphemy as intended, rather than a gap; and might be to view Articles 27 and 34 as creating a strong presumption that the Afghan state could not (or at least *had not*) criminalized Kambaksh’ conduct. For purposes of the present argument, it is not important which of these views is correct or more persuasive. Arguments of this kind are the daily grist of constitutional interpretation, not just in Afghanistan, but equally throughout Europe, Asia, and the Americas.

These fundamental interpretive questions, many of which go to the proper construction of Afghanistan’s “rules of recognition,” are logically precedent to questions of whether rules are followed, or the appropriate content of the rules is applied. In focusing immediately on the result, and by assuming a result that is in derogation of the defendant’s assumed free speech rights, foreign reaction quickly skips over the methodical analysis which lies at the core of Rule of Law. Rule of Law promoters who pursue this “shortcut to the correct result” are practicing politics, not law. Secondary rules are necessary to any legal system; these are the rules that, short of violence and bloodshed, allow the determination of which primary rules are given effect.

139. See Constitution, art. 27.
140. Constitution, art. 34.
141. 2004 Constitution, art. 7.
143. See Eddy, supra note 9, at 12-13.
144. As I have argued elsewhere, until Afghans (with or in spite of the assistance of Rule of Law promoters) sort out these basic issues, Afghan law will remain largely Afghan politics. *Id.* at 21. The political level of ‘legal’ discourse can be discerned from the positions held by representatives of the Kabul law and Shari’a faculties. From the law faculty (presumably the home of Western positivism), one hears that Art. 3 of the 2004 Constitution is meaningless, and can simply be ignored; from the shari’a faculty, one hears that “Islamic Law provides for every contingency, even for traffic lights and traffic regulation”—raising the question of why one should bother with the redundancy of a legislature.
2. Violation of freedom of expression.

If an American views the Kambaksh case in comparison to a hypothetical American case “on all fours,” no doubt the case seems extraordinary. Undoubtedly, many Americans are influenced in part by what is viewed as the “illiberal” aspect of Islam. Yet it takes little imagination to alter the facts to make the case more accessible to our understanding. Although the United States in recent times has had an expansive view of expression, our view was not always so broad. As recently as 1989, four justices of the United States Supreme Court felt strongly that burning the American flag was not constitutionally protected free expression; moreover, the strength of protection of expression has by no means always been so strong, or so certain of application in times of national crisis. Finally, even within the bounds of permissive American doctrine, “hate speech” has continued to provide room for heated debate. In summary, while “content-based” restrictions have a checkered past in American jurisprudence, neither the concept nor the practice has been invariably condemned.

If Kambaksh is seen as a violation of a “universal human right” to self-expression, without question this puts a strong American gloss on “universal” values. Germany, presently safely thought to be a stable, liberal democracy, places content limitations on political speech: with a painful Nazi history, the balance has been struck at a different place than in contemporary America. Similarly, the United Nations Convention on


146. For an expansive view of expression, see Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011); but see Abrams v. United States, 250 U.S. 616, 618 (1919) for a more restrictive view.

147. See Texas v. Johnson, 491 U.S. 397, 436-37 (1989) (Rehnquist, C.J., dissenting; Stevens, J., dissenting). The flag-burning analogy, and the difficulty that some will have in applying it to a discussion of religion, might be viewed as some measure of just how secular a society America is. Justice Stevens, in particular, uses words to describe the singular importance of the flag as a symbol of values that might be echoed by many Afghans in explaining the unique importance of Islam in legitimating the Afghan state. See id. (Stevens, J., dissenting).

148. See, e.g., Schenck v. United States, 249 U.S. 47 (1919) (upholding Espionage Act of 1917, enacted during World War I) and Dennis v. United States, 341 U.S. 494 (1951) (upholding Smith Act conviction during the McCarty era); as a First Amendment scholar has noted (commenting on dissents in Espionage Act and Smith Act cases): “One of the oddities of First Amendment law is that often the dissenting opinions have proved more important than the majority.” Daniel J. Farber, THE FIRST AMENDMENT 12 (2nd ed. 2003).

149. See generally id. at 103-125.

150. DONNELLY, supra note 24, at 112.

151. See generally Yulia A. Timofeeva, Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany, 12 J. TRANSNAT’L L. & POL’Y 253 (2003).
Civil and Political Rights, while protecting freedom of expression, also clearly recognizes limits.\textsuperscript{152}

3. State support of specific religious understanding.

A broad attack on Kambaksh as violative of religious neutrality blatantly disregards the fact that Afghanistan is an avowedly Islamic Republic. An attack on these grounds is really not an attack on the correctness of the Kambaksh decision, it is an attack on the “correctness” of the Afghan polity.

Kambaksh, taken in its totality, likely does represent a serious miscarriage of justice. But discerning exactly wherein justice lies is quite important. It is far too facile to simply seize upon his arrest for expressing unpopular religious views, assuming that such a conviction could never be upheld in a Rule of Law state. In the arguments above, I have tried to suggest that, on closer examination, that is simply not the case. If one assumes that the correct Afghan rule of recognition imports blasphemy into Afghan law as an Islamic crime, Kambaksh is being punished for a very well-known crime, not for a crime that is at all undefined. If one further assumes that a state may, under some circumstances, limit the content of speech to preserve civil order, Afghanistan has done in another form what both the United States in former times and Germany in present times have done. If one accepts the fact that Afghanistan, while not a theocratic state is certainly not a religion-neutral, secular state, that argument fades away as well.

What then remains as grounds for critique? In fact, quite a bit. Although there could be an Afghan consensus on Rules of Recognition, no such consensus exists at present. The emergence of such a consensus is not promoted by the refusal of the Afghan Supreme Court to openly publish its reasons for decision in such cases as Kambaksh. But neither is it promoted by the view of some Westernized positivists that Article 3 of the constitution can be ignored, simply because they find it inconvenient.\textsuperscript{153}

At the outset, we set aside consideration of the procedural aspects of the Kambaksh case, in order to allow a discussion of the substantive arguments to which it has been subjected. But procedures exist in law exactly to prevent miscarriages of justice by arbitrary and randomized application of


\textsuperscript{153} In numerous discussions with Western-oriented professors from law faculties, the position has been taken that Article 3 can simply be ignored. It is of course a strange position for a positivist to take. See my account of discussions about the validity of interest-bearing loans in Afghanistan, and whether such loans are unenforceable under Islamic doctrine pertaining to riba. Eddy, \textit{supra} note 9, at 8-10.
substantive rules that might be justified if properly applied. Procedural irregularities abounded in the Kambaksh case, as did suggestions that the case was, from start to finish, merely a political exercise. A response to the case that honed more sharply the procedural objections has the advantage of “value neutrality”—it is exactly value neutrality that is painfully lacking in present thoughout Afghan justice. Viewing the case in a broader context allows more clever choices about strategies that might actually achieve a change in outcomes in such cases. Outrage, based upon a form of legal Orientalism, is not a helpful guide to Rule of Law assistance; it is more likely to create barriers to dialogue.

B. Distortions: Conflicting Donor Goals, Domestic Constituencies, and Donor Competition

Another aspect of self-awareness consists of sensitivity to some common factors that can complicate the clear planning and implementation of Rule of Law strategy. In this section, three such factors will be considered: 1) multiple but conflicting donor goals that suggest divergent courses of action; 2) pressures imposed by the donor’s domestic constituencies; and 3) competition between donor programs.

Conflicting donor goals. Donors enter jurisdictions with more than one goal. For instance, one goal of Rule of Law assistance in Afghanistan is the promotion of an independent judiciary. Another is development and implementation of fair and orderly procedures. Yet another is promotion of human rights. In the desired theoretic end-state, all of these goals have been realized, and they each support one another. But in the imperfect environment of present-day Afghanistan, no such synergies exist. In a harmony of dysfunctionality, cases routinely present multiple deficiencies: the prosecutor has been improperly influenced, procedural safeguards have been disregarded, and the substantive rights of the defendant are abused.

157. Id.
158. Id.
All three of the identified donor goals are, thus, implicated in the case. That does not mean that all can necessarily be combatted at the same time. Even if, as much development literature maintains, “all good things go together,” this does not translate to meaning that all goals can always be pursued at the same time.\textsuperscript{159}

\textit{Domestic constituencies.} Donor programs are often strongly shaped and influenced by donor-country constituencies. Yet in the process of promotion, programs acquire an apparent autonomy that minimizes the domestic basis for their support. Human rights are usually introduced into Rule of Law programs as “universal human rights” or “international best practices.”\textsuperscript{160} As noted above, these phrases have a clean, technical, relatively non-political ring to them.\textsuperscript{161} If resistance is encountered in the host country, \textit{that resistance} might be regarded as “political.”\textsuperscript{162} But while host-country resistance is demarcated as “political,” the norms which the donor is promoting are “universal”—thus, by definition, non-political.\textsuperscript{163} In reality, the content that informs these universal norms—as delivered by the donor’s implementor—is heavily influenced by the donor country’s domestic constituencies.\textsuperscript{164} Politics is at work at both ends of the relationship: in the donor country, where government is subjected to constituent pressures, and in the host country, where the program typically represents an intervention on one side (or at least from a particular viewpoint) in a contested local issue.\textsuperscript{165} I am not asserting that there is anything wrong with this state of affairs; what I am asserting is that both efficacy and ethical considerations require that the situation be acknowledged, and that actions be taken with self-awareness of the constraints that domestic constituencies impose.

Another Afghan case of some prominence may illustrate issues both of conflicting donor goals and the influence of donor constituencies. In 2006, a young Afghan couple was in the midst of a nasty divorce dispute, which included disagreements about child custody.\textsuperscript{166} At some point, the wife told prosecutors that her husband (Abdul Rahman) had secretly converted to Christianity.\textsuperscript{167} Under Islamic law, conversion falls within the crime of

\begin{itemize}
\item \textsuperscript{159} Thomas Carothers, \textit{Civil Society}. 117 FOREIGN POLICY 18, 24 (1999).
\item \textsuperscript{160} See Eddy, \textit{supra} note 9, at 5.
\item \textsuperscript{161} \textit{supra} Part I.
\item \textsuperscript{162} See Eddy, \textit{supra} note 9, at 18 - 23.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 19.
\item \textsuperscript{165} \textit{Id.} at 18-23.
\item \textsuperscript{166} Afghan convert arrives in Italy for asylum, http://www.cnn.com/2006/WORLD/asiapcf/03/29/christian.convert/ (Mar. 29, 2006).
\item \textsuperscript{167} \textit{Id.}
\end{itemize}
apostasy, potentially punishable by death. Prosecutors initially indicated that the husband would, in fact, be charged with apostasy, and face a death sentence if convicted. Both the international community in Kabul and the international press quickly picked up on Abdul Rahman, provoking outrage among the high officials of donor countries. Before any resolution of the case within the Afghan system, the defendant was spirited out of the country to refuge in Italy.

The role and influence of donor constituencies is evident in Abdul Rahman. Offensive to many groups, it was particularly offensive to Christian groups, who, in 2006, had a sympathetic audience in the top leadership of both the United States and Great Britain. With the Karzai government still finding its footing, it was only a matter of time before the case was dealt with to the satisfaction of the external governments.

The role of conflicting goals in Abdul Rahman is perhaps a bit more subtle, but arguably more important. A hallmark of most American Rule of Law strategy is the promotion of an independent judiciary. Yet it is hard to

168. “Apostasy” is not defined as a crime under the Afghan Penal Code; in this respect the Abdul Rahman case presents a number of the same issues regarding “secondary rules” that have been discussed above with reference to Kambaksh. However, in addition to constitutional arguments about the proper application of Arts. 3 and 130 of the 2004 Constitution, there are also clear issues posed by the Afghan Penal Code itself. Article 1 of the Afghan Penal Code states as follows: “This Law regulates the ‘Tazeeri’ crime and penalties. Those committing crimes of ‘Hodod,’ ‘Qassass’ and ‘Diat’ shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).” If apostasy is a ‘Hodod’ (or ‘hudud’) offense—an offense against God—then by its terms the Afghan penal code states it to be subject to Islamic law. (I lack the expertise to know whether apostasy is properly so classified: it is so classified by the classic Western Islamic scholar, N.J. Coulson, A HISTORY OF ISLAMIC LAW 124 (Edinburgh 1964), but there may be divergent views, which I am not competent to judge). Although under Islamic law the crime of apostasy may be punishable by death, whether such a sentence is required in all cases is less clear. At the time of the Abdul Rahman case I was in Kabul, conducting a seminar with a number of young professors at the Kabul Shari’a faculty. Both as a matter of curiosity and as a class exercise, I asked them to research and report back to me whether a death sentence was required in the event of Abdul Rahman’s apostasy. While all of participants acknowledged that this was a possible outcome, they also provided a number of arguments and theories under which the punishment would be much less, the charge would be improper, or leniency in sentence was possible or likely. An implicit discount may be given for desire to portray the Islamic law in a good Western light, but the arguments were not trivial. It should also be noted that, since apostasy is prosecuted as an Islamic crime, Islamic procedure and rules of evidence are also applicable. In Afghanistan, at least under some understandings, some crimes may exist only as an Islamic offense, while other crimes in Afghanistan may exist as both Islamic Takzir offenses which are also within the province of the Afghan Penal Code. A prosecutor may opt to prosecute under the ‘Penal Code offense’—although in theory the case could also be tried as an Islamic offense—in order to bring the case squarely within more advantageous procedural and evidentiary rules of the ‘formal’ system. The existence of this tactical practice among prosecutors indicates well the depth of pluralism present in the contemporary Afghan legal system.

170. Id.
171. Id.
imagine a more intrusive presence in the Afghan judicial process than the heavy-handed donor reaction to this case. Exactly those powers that support the development of Rule of Law (and an independent judiciary) in Afghanistan intervened forcefully in an Afghan case, in order to ensure a substantive result that they felt would be proper. Surely the message that this delivered was not a message of judicial independence; rather clearly, the independence of the judicial process was subjected to the political considerations of foreign powers. What lesson should Afghans take from this? Should they heed American doctrine, or American practice? In what is already a pronounced cross-cultural setting, everything militates in favor of this lesson learned through practice: evidently in America, as in Afghanistan, politics trumps law. If you are charged with a crime, the important thing is to have important friends. These lessons are decidedly unproductive for the promotion of Rule of Law. This is a clear case of a set of immediate goals (securing Afghan compliance with rights standards recognized elsewhere) that run sharply against the patience required to promote another, longer-term goal: a strong and independent Afghan prosecutorial and judicial function.

The counter argument is that immediate and forceful intervention was the only available action: otherwise a severe miscarriage of justice was bound to occur, and an innocent young man would have been put to death. The impatience of intervention leaves us with no way to test this proposition; the Afghan process was cut short at an early stage, when the defendant had not yet been tried. It is clear, however, that this intervention precluded the opportunity of self-corrective actions within the Afghan system. For instance, as proceedings were still pending, the prosecutor began to express doubts about the mental competence of the defendant.173 His public musings might be viewed in the nature of a trial balloon. After all, the prosecutor reasoned, the defendant was an Afghan and had been born in a Muslim society. Under these circumstances, what kind of person could abandon Islam? Clearly there were questions of mental competency. And Islamic law, like Western systems, does not countenance the trial and punishment of a mentally incompetent person.174 Q.E.D., it might be necessary to release this poor fool.

Donor competition. Yet another factor distorting donor program formulation and implementation is competition among donors.175 Competition takes a number of distinct forms. First, there is simply overlap

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175. And their implementors, as many donors implement their programs through contractors or grantees.
and confusion between programs. This occurs within governments (for instance, between different agencies of the US Government, or even within the same agency), but certainly also between governments. A certain amount of this is inevitable (and occurs equally within governments when a government operates domestically). The problem is well-known, and efforts exist to try to ameliorate the problem.176

Today, however, there are a multitude of participants in programs that address Rule of Law issues. There are, to begin with, national governments, sometimes acting through multiple agencies. Certainly there are also international organizations, such as the UN and its agencies, International Financial Institutions (“the IFIs”), and other international bodies. Equally, there are major foundations, and specialized NGOs. Taylor aptly summarizes the situation as a “Rule of Law Bazaar.”177

On the donor side, it would be naïve to assume that all intervenors pursue a common agenda, or even share common values or objectives or a common definition of the Rule of Law. They typically do share a need to report results, whether to a national parliament, a foundation board, or the donors’ membership. The lack of shared objectives, together with the need of each to show results for its objective, can put them at cross-purposes. If one donor does not wish to engage, another may be readily available. The multiplicity of actors and objectives also seriously complicates the ability of any single donor, even a very large and dominant one such as the United States government in Afghanistan, from controlling message or dialogue. Despite coordination efforts, at the level of implementation there is no consistent strategy from the donor side.178

VI. CODA: PATIENCE, RESPECTFULNESS, SELF-AWARENESS, AND THE VIRTUE OF HUMILITY

Humility may be represented as a “capstone” virtue: it arises from and builds upon attention to the foundational virtues of patience, respectfulness,
and self-awareness. As a demonstration of the virtue of humility, let us consider a controversial piece of Afghan legislation: the Shi’a Personal Status Law.\textsuperscript{179} This will, in fact, provide ample opportunity to appraise the role of all of the “virtues” of good Rule of Law assistance which are advocated in this article.

A majority of Afghans, and in particular nearly all of Afghanistan’s most numerous ethnic group—the Pashtuns—are Sunni Muslims.\textsuperscript{180} A significant minority of Afghans are Shiite.\textsuperscript{181} Additionally, as Pashtuns are overwhelmingly Sunni, the Hazaras are largely Shiite.\textsuperscript{182} During the years of civil war and Taliban rule, these religious and ethnic cleavages played out through repeated atrocities.\textsuperscript{183}

As the 2004 Afghan Constitution was debated and devised, a provision was added as a “sweetener” to the Hazara leadership: in matters of personal status, such as marriage and inheritance, the state would recognize and apply Shiite legal principles. This pledge, an incentive for the Hazara to join in the post-Bonn reconciliation process, was embodied in the new Afghan constitution:

\begin{quote}
The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect.\textsuperscript{184}
\end{quote}

For some time, this pledge languished. But in the run-up to the 2009 presidential election, it again became politically advantageous to move the issue forward.\textsuperscript{185} As the content of the proposed legislation was more thoroughly scrutinized, reaction became intense. The reaction included both vigorous domestic Afghan opposition and also exceedingly unfavorable reviews in the international press.\textsuperscript{186}


\textsuperscript{181} See id. at 2-5.

\textsuperscript{182} Id.

\textsuperscript{183} Id.

\textsuperscript{184} 2004 Constitution, art. 131.


Take as a given that from an international perspective, the norms associated with the Shi’a Personal Property Law are retrograde and enshrine behaviors and attitudes that it would be desirable (again from an international perspective) to change.\footnote{This is an assumption which allows one to remain agnostic on the oft-mooted ‘cultural relativism’ critique of ‘universal’ human rights. Without deciding whether Hazara have moral autonomy to arrive at norms at variance with much of the international community, this assumption assumes that they may possess the power to do so, and investigates how one might approach them so as to lead them not to exercise that power.} On the basis of that assumption, we can review responses to the legislation, and seek to determine possible courses for Rule of Law intervention. My conclusion will be that while Rule of Law intervenors must and should take account of politics, the efficacy of their efforts requires them to take broad, rather than narrow, views of such situations, and allow Afghan actors to play out controversies to their end. More robust interventions, while attractive, are likely to be counter-productive.

RESPECTFULNESS

In 2001, the parties to the Bonn Agreement commenced a flawed reconciliation process, which continued through the adoption of the 2004 Constitution, and which survives, still quite imperfectly, to this day.\footnote{See Steven Erlanger, \textit{A Nation Challenged: Negotiations; Talks In Bonn End With Deal On Leadership For Afghans}, http://www.nytimes.com/2001/12/05/world/nation-challenged-negotiations-talks-bonn-end-with-deal-leadership-for-afghans.html (Dec. 5, 2001).} This process was intended to bring a close to more than twenty-five years of increasing turmoil and repression. Understandably, some very ugly bargains were made in the process. Warlords who were responsible for savage atrocities serve in parliament, with no consequences for their previous conduct. None of this is attractive, but no one can, in fact, accurately gauge and assess the relative costs of making, or not making, many of these likely undesirable bargains.\footnote{Americans might be particularly expected to understand this point, having founded a nation on a proposition of 3/5 representational personhood (and no vote) for slaves, leaving the underlying issue to be resolved 75 years later in a violent and bloody conflict.} One such bargain was affording the Hazara a distinct personal status law.\footnote{Sven Gunnar Simonsen, \textit{Ethnicising Afghanistan?: Inclusion and Exclusion in Post-Bonn Institution Building}, 25 \textit{Third World Quarterly} 707, 711-12 (2004).} Of course, this does not preclude all commentary upon, or criticism of the substance of the law that was the result of these compromises. It does recommend that such criticism be as thoughtful, specific, and measured as possible.\footnote{In this respect, the USAID AROLP project deserves high marks for its balanced response. In the midst of a media fury, AROLP contacted scholars, prepared a careful evaluation of the law, and worked quietly to seek improvements.}
SELF-AWARENESS

An aspect of self-awareness relates to patience: historical sense. The arc of women’s progress in the West has moved rather rapidly in historical terms. It is not necessary to retreat far into the past to find practices that are now denounced with vigor, as though they had never existed so close to home. It is useful to remember that the marital rape for which the Shi’a law was castigated was only eliminated in the United Kingdom a little over twenty years ago.\(^{192}\) Returning to Kambaksh, lese majeste was, similarly, a criminal act in France until 2013.\(^{193}\)

Another aspect of self-awareness is an appreciation of one’s own faults. As noted elsewhere, the Shi’a Personal Status Law was subjected to criticism against idealized international standards.\(^{194}\) It was not appraised against actual conditions, in either Shia communities or elsewhere, nor was it appraised against existing law (the nearest comparison at hand would have been Hanafi jurisprudence, otherwise followed in Afghanistan).

PATIENCE

In the end, we return to patience. Afghanistan is undergoing rapid change, even at the same time as old behaviors, clearly “unacceptable” in the eyes of much of the rest of the world, linger. Much more change will occur as capacities are built, and as the roughest conditions from the decades of struggle recede. But, to some degree, this change is generational. Pushing the force of change beyond a certain pace, or engaging in ways that deepen divisions, can retard, rather than advance, change. There is an ethical component here: if divisions are increased, or forces of reaction strengthened by the ability to play off the “foreign meddlers,” it is not the foreign meddlers, but the Afghan people who pay the price. Establishing a strategy and effective tactics to reach desired goals is not a science of introducing global best practices: it is a difficult question of judgment that needs to be approached with patience and humility.

HUMILITY

I came to humility the hard way: I was humbled. In the “first wave” of Law and Development, I was deeply engaged in creating Ethiopia’s first law school. It became, with a decade’s work, a fine law school. Yet three years later, one of my colleagues was dead by assassination, another was heading the special tribunal trying crimes against the people, and perhaps


\(^{194}\) See, e.g.,
the finest student I ever had was serving as Foreign Minister for the murderous Mengistu regime. Everything that I had devoted myself to professionally for three years was swept aside by a revolution, and searchingly critiqued in David Trubek and Marc Galanter’s well-known article.195 Perhaps the case against the efforts of those times was put most forcefully by the eminent comparative law scholar, John Henry Merryman:

These characteristics: unfamiliarity with the target culture and society (including the legal system), innocence of theory, artificially privileged access to power, and relative immunity to consequences have been typical of many law and development proposals and programs for the third world. Put another way, we were probably incompetent to propose or execute third world law and development action, we were encouraged (by our own self-image, by the foreign assistance psychology and by third-world conditions) to do so, and we did not suffer the consequences of having done so.196

Rule of Law was resurrected with the dissolution of the Soviet Empire, and for more than a decade rose to prominence in a decidedly triumphalist atmosphere. During that period, a whole legion of Rule of Law warriors were trained in Eastern Europe and the Balkans; self-estrangement did not appear to be an issue. The re-chastening of Law and Development/Rule of Law began in the latter days of Iraq, and has continued apace in Afghanistan. If present re-appraisals were to lead to the same wholesale retreat from the field that occurred post-Trubek, that would be unfortunate. Law and Development and Rule of Law, while still plagued by many of the same issues that the 1970s literature identified, do have a useful role to play. What is needed is a sense of humility, informed by patience, respectfulness, and self-awareness. Intervention has to be acknowledged for what it is: outside political intervention. But, particularly in today’s world, there are myriad ways in which societies intervene in each other’s affairs. The budget (and likely the impact) of the Disney Corporation may dwarf the budget of a human rights organization, but the messages that Disney sends through its multiple platforms nevertheless cross borders as easily or even more easily than the message of the human rights organization. In fearfulness of “political intervention,” we should not deny agency to the Afghan people themselves, who are quite capable of making decisions among the various entrees on the menu.

Rather than retreating from interventions, we should focus more on patient, long-term strategies that allow for the sensible sequencing of

195. See generally Trubek & Galanter, supra note 16.
196. Merryman, supra note 16, at 481.
efforts. Rather than spending $45 billion in three years, donors need to find ways to spend $3 billion for 15 years. This runs at cross-current with every present mechanism of technical assistance delivery. It falls totally outside budget-planning cycles; it requires a serious re-thinking of approaches to metrics and performance evaluation. It does, however, align with the generational nature of change, most particularly in heavily conflicted settings. A realignment of this kind would lower costs and improve results, as course corrections could be made before large sums were spent pointlessly. Incidentally, it would be a more ethical way to approach Rule of Law interventions.