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The Rule of Law, Democracy and the Legal Profession in the Afghan Context: Challenges and Opportunities*

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Introduction[1]

This paper will consider democracy, the rule of law and the role of the legal profession in the context of an Islamic nation in transition from conflict: Afghanistan, where the re-establishment of the rule of law was a fundamental pillar of the 2001 Bonn Accord. The legal profession operating in the Afghan context not only supports the rule of law and promotes democratic principles, but must mediate the challenges that arise between and through these concepts.

In Afghanistan the very concepts of 'law' and 'democracy' are unclear and contested. The justice system is based on Islamic principles, international standards, a civil law that is the product of centuries of foreign invasion, and on Afghan legal tradition. It is administered in courts where lawyers traditionally had no automatic right of appearance and where many participants were frequently corrupt. The process of democratic elections for the Afghan Parliament has been widely criticised and Parliament itself does not fit comfortably into a tradition where dispute settlement and rule identification are arrived at consensually at the local or family level rather than nationally by prescription.

For concepts such as the rule of law and substantive democracy to reconcile conflicts between the ideals of 'law' and 'democracy', the concepts themselves need to be reasonably clear. The balance struck between them is also moderated by value systems, including religion, and is influenced by the standard of legal education. All of these present challenges in Afghanistan.

Afghanistan is a land-locked country, surrounded by Pakistan, Iran, China and the former Soviet republics of Uzbekistan, Tajikistan and Turkmenistan. This strategic location made it a crossroad for civilisation and a battlefield between competing global powers.[2] It has an estimated population of approximately 31 million (there has never been a census) comprised of many ethnic groups, the most significant being Pashtun, Tajik, Hazara and Uzbek. While these groups have distinct languages, they have coexisted in this region for centuries, creating a 'multi-cultural fusion'.[3]

Armed conflict has resulted in extensive damage to economic, political, legal and social infrastructure. Trade in illicit drugs represents over half of the country's GDP.[4] War has prevented many from gaining even basic educational qualifications.

The Bonn Agreement of December 2001 followed the collapse (at least in Kabul) of the Taliban regime. It was signed by anti-Taliban groups that neither represented nor consulted the people of Afghanistan,[5] but who had helped defeat the Taliban and were brought under the umbrella of the new government. It did provide a framework for the creation of a 'broad-based, multi-ethnic and fully representative' government by 2004. It was under the justice pillar of the Bonn Agreement that the creation of an Afghan Bar Association was justified. However, the opportunity to rebuild Afghanistan created a potential that was not fully realised as warlords occupied key positions in government, corruption became endemic and the 'war on terror' sapped the energy and resources that might otherwise be deployed in rebuilding. Justice was viewed as a luxury that could be sacrificed to stability.[6]

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1 [**Editor's note:** all URLs in footnotes last accessed on 1 October 2013.]

2 See David Loyn: *Butcher and Bolt: Two Hundred Years of Foreign Engagement in Afghanistan* (London: Hutchinson, 2008).

3 Ali Wardak, 'Building a Post-War Justice System in Afghanistan' (2004) 41 Crime, Law and Social Change 319, 321.

4 *Afghanistan Opium Survey 2007,* UNODC, see www.unodc.org/pdf/research/AFG07_ExSum_web.pdf.

5 According to Wardak, at n 3 above, these were 'Northern Alliance warlords, pro-Zahir Shah (former King of Afghanistan) technocrats/ intellectuals, and two other small Afghan groups that were mainly based in Pakistan and Iran', 322.

6 See Human Rights Watch: *Selling Justice Short: Why Accountability Matters for Peace,* 2009, Chapter 5.

Democracy and the rule of law – often at loggerheads – were compromised and were therefore not able to deliver the conditions of stability needed for reconstruction. One example of this occurred in March 2009, when the Afghan Parliament passed the Shia Family Law. This appears to legalise marital rape by negating the need for the wife's consent to sexual relations and requires the husband's consent for the wife to venture outside the home. It applies to the 15 per cent of the Afghan population who are Shia Muslim. The law was widely condemned internationally. President Karzai's opponents have suggested that he backed the law as a sop to powerful Shia religious parties before the presidential elections held in the same year. The Afghan Constitution enshrines sexual equality and Afghanistan is a party to the UN Convention on the Elimination of All Forms of Discrimination against Women, without reservation. Yet Article 3 of the Constitution permits nothing contrary to the beliefs and provisions of Islam, which conservatives argue must take precedence over all other laws. A month after the law was passed, a group of 200 Afghan women braved an enraged mob to protest against this law. Afghanistan is a party to the International Covenant on Civil and Political Rights, which guarantees freedom of expression. The protesting women had to be rescued by police from a hail of stones and abuse.[7]

Yet for many Afghans – probably the majority – the fact that the Shia Family Law, the demonstration against it and the hostile reactions of both sides, are considered to be such a major issue in overseas countries is met with incredulity. For them, whatever the secular law says does not really matter. Women will be oppressed, or not, regardless of the law, which many consider to be an irrelevance. Add to this the fact that the government is facing massive difficulties in delivering services, the justice sector is hobbled by a lack of facilities, and both are permeated by corruption,[8] means that the people, especially those outside Kabul, also prefer security to legislation. The Taliban emerged in the chaos of the civil war in 1994 as a militia force pledged to restore law and order, and the rough justice of the Taliban is still perceived to be quick, predictable and free, and thus is a credible alternative for many.

Whether a growing and increasingly organised legal profession in Afghanistan can make a difference to such attitudes is crucial to the rule of law and a functioning democracy. The tangle of democracy, politics, legislation, cultural values and international norms represents the challenge within which the legal profession must work in the Afghan context.

What is democracy in Afghanistan?

There is a tendency among 'Western' commentators to use the word democracy synonymously with 'liberal democracy'.[9] There is also a tendency to assume it is a fixed end-state, although some observers see it as a changeable continuum characterised by the breadth of political inclusion, equality between citizens, protection against arbitrary action, and mutually binding consultations.[10]

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7 *The Times*, 16 April 2009, 31.

8 See *Corruption in Afghanistan: Bribery as Reported by Victims* (UNODC, January 2010), which reports that in 2009 Afghan citizens paid approximately US$2.5bn in bribes, equivalent to 23 per cent of the country's GDP. This included bribes to judges, prosecutors and members of parliament. The international donors' conference in Tokyo in July 2012 pledged US$16bn for economic development in Afghanistan in the next four years, but for the first time made it a condition that the Afghan Government reduce corruption before receiving all of the money (Global Edition of *The New York Times*, 9 July 2012, 5). Whether this will be effective remains to be seen.

9 See Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997), Foreign Affairs (www.foreignaffairs.com/articles/53577/fareed-zakaria/the-rise-of-illiberal-democracy).

10 Charles Tilley, *Democracy* (Cambridge: Cambridge University Press 2007).

After the fall of the Taliban regime in 2001, Afghanistan has seen the re-establishment of a presidential system of government, a bicameral parliament, provincial councils and an electoral cycle has been put in place. Democracy as a type of *political institution* – a form of group decision-making through elected representatives – is not new in Afghanistan. There have been attempts since the 1920s, with the parliament established under Amanullah Khan, to 'modernise' Afghan politics.[11] Parliaments operated in the 1960s under the 1964 Constitution, leading Larson to comment that: '… it is wholly incorrect to assume that the so-called Bonn Process took place against a blank slate, and many of the institutions that have emerged during the formation of post-Taliban Afghanistan are in fact continuations or developments of much earlier versions'.[12] However, parliamentary democracy is not a traditional process in Afghanistan for deciding community issues. While decisions are traditionally reached by consensus, this is done through a structure of male hierarchy refracted through the tenets of Islam, rather than through an open vote of all adults after robust exchanges of opinion. The rhetoric of democratisation has been used since 2001 to underpin state-building initiatives. While there is movement towards the equal weighting of personal opinions, entrenched values (both religious and secular) hobble respect for the equal worth of all citizens' beliefs.

The electoral system itself, while extensive, is widely condemned as endemically corrupt.[13] The existing power-holders have frequently maintained their positions of advantage, and the influence of non-privileged groups is yet to be fully manifested.[14] Indeed, the National Stability and Reconciliation Law passed by Parliament in 2007 provides a blanket pardon for war crimes and human rights abuses that took place before 2001. Democratisation in Afghanistan does not mean that the playing field is level. Moreover, the model of a centralised democracy pursued by the Karzai government, despite some devolution to local authorities, is not only a departure from tradition with which some Afghans (especially in the provinces) feel uncomfortable, but also is weakened through a lack of national capacity and by its questionable legitimacy.

Democracy as a *value* is similarly constricted. Respect for hierarchy is more common in Afghanistan than mutual respect and open-mindedness. Protection for dissenters is not encouraged. If democracy is to mean more than merely majority rule, liberties and freedoms must be protected and free discussion and fair comment guaranteed in practice rather than only on paper. Amartya Sen has argued[15] that democracy can enrich the lives of citizens as a political freedom (to allow the exercise of civil and political rights), as well as an instrumental value in enhancing the hearing that people may get in expressing claims to political attention (including claims to economic needs) and also has a constructive importance in that public discussion actually helps to form social values and priorities. This does not mean universality of agreement or action, but at least the recognition of the usefulness of considering

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11 Anna Larson, 'Deconstructing "Democracy" in Afghanistan', Afghan Research and Evaluation Unit, Synthesis Paper Series, May 2011 (www.areu.org.af/Uploads/EditionPdfs/1110E-Deconstructing%20Democracy%20in%20Afghanistan%20SP%202010.pdf).

12 *Ibid*, 9.

13 William Maley, 'The Rule of Law and the Weight of Politics', Chapter 5 in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge: Cambridge University Press 2011).

14 A report by Human Rights Watch points out that the Loya Jirga (Grand Council) set up by the Bonn Agreement to choose an interim government had a selection process which explicitly called for the exclusion of delegates who had engaged in human rights abuses, war crimes, looting or the drug trade (Procedures, Art 14(4)), as well as anyone with links to terrorist organisations. However, the Special Independent Commission for the Convening of the Loya Jirga was unable either to monitor or enforce the prohibition. The cooperation of warlords was seen as crucial to the success of the Loya Jirga and also with the war on terror. Alleged war criminals in many areas were able to manipulate the process of delegate selection, and even select themselves. This short-term compromise for stability has become entrenched in Afghanistan's political dynamics. See note 6 above, 36–39.

15 Amartya Sen, 'Democracy as a Universal Value' (1999) Journal of Democracy 10.3, 3–17.

different points of view,[16] and it opens the way to acknowledge, and eventually appreciate and value, the heterogeneity *within* each culture.[17] However, 'democracy' is a term that many Afghans equate with a perception of unlimited social freedom in the West and thus for many it has negative connotations of immorality and secularism.[18] These include attitudes towards modesty, women's behaviour, marriage, family practices and the acceptance of conversion from one religion to another.

The push for democratisation is thus seen as coming from outside. This prompts many to desire nationally implemented social controls to restrict unlimited freedom – a political system combined with Islamic principles.[19] This can be exploited by fundamentalists who brand democratisation itself as anti-Islamist.[20] It has not been helped by the rhetoric of former US administrations to promote democracy abroad through regime change.

Democracy must include the right of less-privileged groups to publicly voice their opinions and attempt to influence others to support policies that they consider just; but it should also buttress freedoms with responsibility and accountability. Some Islamic scholars have argued that there is an overlap between Islam and democracy, leaving space for human decision-making.[21] It does not have to be a contest between God and the people for sovereignty. But the disappointment felt by many Afghans at the inefficiency in the formal representative processes and the underperformance of elected representatives to deliver services,[22] together with its inability to provide stability and security, makes many doubt its efficacy.

Nevertheless, when many complain that 'rich people are above the law'[23] as corruption is endemic and notorious, the implication is that the rule of law is nevertheless perceived as something that is needed. Afghans want not only a political system, but also for it to deliver social goods in a fair manner. For democracy to deliver 'freedom' in a fair and transparent system – in which all citizens have basic rights and equal opportunities, but within an 'Islamic framework' – the framework needs to be clearly defined in a way that is devoid of extremism.

Can Afghan law contribute to the resolution of this challenge?

Afghan law

The formal justice system of Afghanistan has been influenced by the values, ideologies and politics of its various governments since its emergence as a politically organised society: Western legal thought, radical Marxism and moderate and radical Islam. However, the customary legal system remains significant and, in the provinces, is predominant.

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16 *Ibid*,12.

17 *Ibid*, 15.

18 See the seminal empirical study of Anna Larson, 'Toward an Afghan Democracy? Exploring Perceptions of Democratisation in Afghanistan', Afghan Research and Evaluation Unit, Discussion Paper, September 2009 (www.cipe.org/publications/detail/toward-afghan-democracy-exploring-perceptions-democratization-afghanistan).

19 *Ibid*, 10.

20 See note 11 above, 12.

21 Khaled Abou El Fadl, 'Islam and the Challenge of Democracy' in El Fadl, Waldron, Esposito, Feldman et al, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press 2004) 9. This is contrary to the view that a state cannot be Islamic and democratic – for example Samuel P Huntington, 'Democracy's Third Wave' in Diamond and Plattner (eds), *The Global Resurgence of Democracy* (Baltimore: Johns Hopkins University Press 1993).

22 See note 18 above, 27.

23 *Ibid*, 14.

The framework of the *formal court structure*, envisaged initially in Afghanistan's 1964 Constitution and now in the 2004 Constitution, consists of a Supreme Court, High Court of Appeal, Provincial Courts, lower Primary Courts and now includes specialised courts such as the Juvenile and Family Courts, Public Security Court, Commercial Court and the Counter-Narcotics Court. Under the 2004 Constitution, the judiciary is 'an independent organ of the state' whose organisation and authority 'shall be regulated by law'.[24] The Supreme Court is the highest judicial organ and can 'at the request of the Government, or courts, review laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law'.[25] The rule of law is further guaranteed by Article 122 which states 'no law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ'.

This theoretically extensive structure does not operate across the whole country. Not all provinces have courts, and all courts, in both the capital and the provinces, suffer from chronic lack of resources and under-trained staff. Moreover, it has been argued that the strong presidential system adopted under the 2004 Constitution has in fact exacerbated the weakness of judicial institutions, with President Karzai using the Supreme Court to block Parliament's efforts to override presidential vetoes and assert its powers.[26] The Court has been used to settle political disputes, weakening its perceived independence. Until recently, none of the judges of the Supreme Court knew any law other than Sharia.

With respect to *substantive law,* there have been extensive legal Codes, such as the 1975 Afghan Civil Code and the 1976 Criminal Codes. These have needed modification. There are also recent laws such as the Private Investment Law 2005, Law of Banking 2003, Mass Media Law 2006 and the Environment Law 2005. These Codes, both new and amended, have met with mixed success, depending on how well they fit with the Afghan context.[27] It is thus instructive to also consider the key influences on the current justice system of Afghanistan. The most significant of these are Islamic Law (Sharia) and customary law.

As the great majority of people in Afghanistan are Muslim, Islamic teachings permeate all spheres of life. This fact cannot be over-emphasised.[28] Sharia in Arabic means 'the path to follow' and can be synonymous with legislation and legality. The primary sources of Sharia are the Qur'an (the holy book of Islam) and the Sunnah (the statements and deeds of the Prophet Mohammed). However, as these lay down general principles rather than legal rules, the role of Islam in the law is not uniform. Baderin attributes the misconception that Islamic law is wholly divine and immutable to a confusion of the sources and methods of Islamic law.[29] Religious scholars' law (fiqh – meaning 'understanding')

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24 Article 116. This regulation is now found in the new Law on the Organization and Jurisdiction of the Courts (1384/02/31 of 21/05/2005). All laws are now available electronically at www.moj.gov.af/en.

25 Article 121.

26 Nick Grono, 'Rule of Law and the Justice System in Afghanistan' (presentation by Deputy President of the International Crisis Group at the Foreign and Commonwealth Office, London, 26 April 2011, see www.crisisgroup.org/en/publication-type/speeches/2011/rule-of-law-and-the-justice-system-in-afghanistan.aspx.

27 For example, a rewriting of the Criminal Code under the auspices of the Italian Government and based on an Italian template was not successful.

28 During a stakeholders' conference organised by the International Bar Association's Human Rights Institute (IBAHRI) in Kabul in 2005 and attended by the author, the daily session began and ended with a prayer. What was significant was that everyone in the conference hotel, including the hotel staff who were not participants in the conference, reverently and sincerely participated in the prayer. It would be rare for a similar reaction to be observed in a Western country.

29 Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press 2003) 33.

is the work of jurists interpreting and applying Sharia and has many schools.[30] While Sharia may be immutable, fiqh may change according to time and circumstances.[31] The predominant school of religious law in Afghanistan is Hanafi fiqh, which is generally considered to be the least inflexible school, taking a purposive rather than a literal interpretation of the Qur'an.

Positive (secular) ruler's law is known as *siyasa*. The coexistence of Islamic jurisprudence and the continuously expanding body of secular law in Afghanistan means that the two can intersect and overlap, although secular law is expected to be in harmony with Sharia and the Afghan Constitution itself provides that 'no law can be contrary to the beliefs and provisions of the sacred religion of Islam'.[32] As Afghanistan's relationships with the world increased during the 1950s and 60s, the rulers began to modernise the justice system, adopting a model closely resembling that of Egypt, resulting in the relative secularisation of criminal law, commercial law and general civil law.[33] Two faculties to teach law were opened at Kabul University: the Faculty of Islamic Law and the Faculty of Law and Political Science. They still exist today, representing separate models of legal legitimacy.

The attempted introduction of a Soviet-style judicial system by the Afghan Marxist government after the 1978 military coup failed, as this was at odds with Islam and with Afghan traditions.[34] The mujahideen government of the 1990s created an Islamic state with Sharia as its basis and the Taliban regime (1996–2001), according to Wardak, 'imposed an even more regressive version of Sharia much of which reflected their ignorance of Sharia as well as of a system of justice'.[35]

The periods of intense conflict and breakdown of effective central government with economic chaos have had a consequence, which Lau describes as 'splitting of the legal system into an official law and an unofficial law'.[36] This was exacerbated by the long delays and corruption endemic in the official system. Even during periods of relative stability when statutory laws could be publicised beyond urban centres, they were rarely applied and did not offer an accurate representation of the de facto legal system.[37] This has been a product of both the practical realities as well as a long tradition of settling certain disputes within the private sphere of the extended family or within tribal or local jirgas.

This divergence was tacitly acknowledged by the Bonn Accord in 2001, which stated that its aims would include 'rebuilding the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions'. Thus, customary law remains a key component of the Afghan legal system. As approximately 80 per cent of the population lives in rural areas, and as the role of central government and its institutions have always had limited effect there, customary methods of dispute settlement retain a prominence. 'Private' disputes (including

30 *Ibid*, 37–39.

31 Baderin comments: '[Sharia] broadly covers the moral, legal, social and spiritual aspects of the Muslims' life, while fiqh mostly covers the legal or juridical aspects of the [Sharia] as distinguished from the moral.' *Ibid*, 34.

32 Constitution of Afghanistan 2004, Article 3.

33 See Wardak, note 3 above, 324–5.

34 *Ibid*, 325.

35 *Ibid*.

36 Martin Lau, 'An Introduction to Afghanistan's Legal System' in E Cotran & M Lau (eds), *Yearbook of Islamic and Middle Eastern Law* Vol 8 2002 (Leiden: Brill 2002) 27.

37 This has been exploited by the Taliban, who appoint local 'judges' to hear disputes, both civil and criminal. In one alleged case, a robber shot dead his victim. The Taliban mobilised local patrols and caught him within two hours. He was hauled before a Taliban judge, confessed to the crime, and was hanged two days later. In another alleged dispute, between two neighbours over land, one of the disputants had made weekly trips to the local court for four years and spent US$5,000 in bribes in order to get the matter resolved. A Taliban judge decided the issue within two weeks. The land was shared between the disputants and they were warned that if the dispute arose again, the Taliban would beat them up (*The Times,* 23 January 2011, 28).

domestic violence, divorce, inheritance and marriage) are frequently settled within the extended family. 'Public' disputes are resolved at local or tribal level, traditionally by a jirga made up of men recognised as having local authority and competence.

The jirga is often preferred to formal justice because it is comprised of people known to and respected by the disputants. Its decisions are made according to accepted local values. Disputes are settled expeditiously and usually without cost. Formal justice can be slow, corrupt and incomprehensible to an illiterate person who is unable to write out an application to a court and is not able to read, much less understand the law. However, problems with both the process and outcomes of traditional justice are endemic. Both in a jirga and in a family-settled dispute, males dominate and remedies may be contrary to Afghan state laws (sanctioning vengeance) or contrary to fundamental human rights (marriage of a woman – or girl – from the offender's tribe to the victim's close relative).[38]

The new Constitution, approved by Loya Jirga in 2004, contains the repugnancy clause mentioned above,[39] which is more rigorous than the requirement of adhering to 'the basic principles' of Islam, which was the wording of the corresponding Article in the 1964 Constitution. It also provides for the application of Hanafi fiqh, where no provision of the Constitution or other laws covers a matter before the Courts, although it adds that this is to be applied 'in a way that attains justice in the best manner'.[40] In recognition of certain 'historic, cultural and social realities',[41] Article 131 states that in personal matters affecting Shi'ites, Shia jurisprudence shall be applied, while in the case of followers of other sects, the relevant laws of that sect shall apply. To this (formalistic) extent, the Shia Family Law mentioned above in the Introduction was constitutional.

In addition to imposing certain progressive duties on the state in respect of furthering particular economic, cultural and social goals,[42] Chapter 2[43] of the Constitution – entitled 'Fundamental Rights and Duties of Citizens' – contains a full complement of civil and political rights as well as a right to free education and medical care. Perhaps most importantly, Article 22 states that 'Any kind of discrimination and distinction between citizens of Afghanistan, shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.' Immediate questions arise regarding the practical application of this Article within Afghanistan's traditional tribal culture and traditions. This guarantee (along with many of the others in this Chapter) is likely to remain highly aspirational for some time, as the women's demonstration and the reaction to it, described above, indicate. This is regardless of the fact that Afghanistan is a party to the principal human rights treaties.[44]

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38 See E Harper, E Wojkowska and J Cunningham, 'Enhancing Legal Empowerment through Engagement with Customary Justice Systems', Chapter 9 in Erica Harper (ed), *Working with Customary Justice Systems: Post-Conflict and Fragile States* (Rome: International Development Law Organization 2011).

39 Article 3: 'No law shall contravene the tenets and provisions of the sacred religion of Islam'.

40 Article 130.

41 Preamble to the Constitution of the Islamic Republic of Afghanistan.

42 See Articles 13–17.

43 Articles 22–59.

44 International Convention on the Elimination of All Forms of Racial Discrimination (acceded 1983); International Covenant on Economic, Social and Cultural Rights (acceded 1983); International Covenant on Civil and Political Rights (acceded 1983); Convention on the Elimination of All Forms of Discrimination Against Women (signed 1980, ratified 2003 without reservation); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 1985, ratified 1987 without recognising the competence of the Committee Against Torture under Article 20 or the arbitration procedures in Article 30); Convention on the Rights of the Child (signed 1990, ratified 1994 with the reservation that Afghanistan would not adhere to anything contrary to Sharia or local legislation; it is a party to both Optional Protocols).

The hallmark of the legal system remains the significant divergence between the de jure legal position and de facto realities and the two have only begun to converge very slowly. Against the background of the persistent Taliban and Al-Qaeda insurgency, the fragmented nature of political authority in the country and the limited writ of President Karzai, progress rebuilding the justice system was described by the Afghanistan Human Development Report 2007 as 'very patchy and modest'.[45] Leaders widely thought to be responsible for some of the worst atrocities committed during the conflict years were among those who signed the Bonn Agreement and subsequently took up leadership positions at central, provincial and district level.

This is compounded by the underlying social situation in the country which, after decades of conflict, according to all relevant indicators, is among the poorest, least-developed countries outside sub-Saharan Africa. In the justice system, this equates to an absence of essential resources such as: the insufficient number of qualified judges and practitioners; a lack of professional resources (essential statutes, regulations, judicial decisions and the like); a lack of security at courts; and a shortage of court buildings. All of this further detracts from the legitimacy of a court system also plagued by rampant corruption and explains the estimated 80 per cent of legal claims addressed informally through traditional jirgas, which citizens generally consider to be faster, fairer and more comprehensible, affordable and accessible, and less corrupt.[46]

International and domestic governmental efforts to rebuild the legal system and re-establish the rule of law are ongoing. For example, in July 2007, states attending the Rome Conference on the Rule of Law in Afghanistan reached a consensus on the need for a justice programme in Afghanistan and development of a monitoring and evaluation system for the justice sector. While Afghanistan undoubtedly benefits from international technical support and funding, it is increasingly recognised that in order to ensure the practical effect of initiatives, decisions must be grounded in Afghan institutions and realities, be widely understood and enjoy popular support.[47]

It is in this context that the establishment of Afghanistan's first bar association, the Afghan Independent Bar Association (AIBA), on 30 July 2008 should be seen. Established after five years of concerted effort by the IBAHRI, together with regional, national and international stakeholders, the AIBA has been given a statutory footing and, with its roots in civil society, it is hoped will act as a necessary counterpoint to the government and the courts in the delivery of justice and the rule of law.

Afghan lawyers and the AIBA

A detailed history of the formation of the AIBA and the trials and tribulations of its first five years of operation are beyond the scope of this paper.[48] Instead, it will concentrate on some aspects that illustrate the assumptions we lawyers from stable and developed countries make when we consider the challenges that arise within and between the concepts of law and democracy.

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45 Centre for Policy and Human Development: *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition*, see http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name,3408,en.html, 82.

46 *Ibid*, Chapter 5.

47 See S Schmeidl, 'Engaging Traditional Justice Mechanisms in Afghanistan', Chapter 9 in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge: Cambridge University Press 2011).

48 The author is attempting to complete a book discussing this, provisionally entitled: *Counting Slowly from One to One Million: Establishing the Afghan Bar Association*.

Consensus on the concepts

A properly functioning bar association is essential to the maintenance of a well-educated, ethical and regulated legal profession. However, in Afghanistan the very concept of a bar association was unknown. As most trained lawyers worked for the government, in the Ministry of Justice or for the Attorney-General and related entities, there was a Lawyers Union. This functioned like a trade union, dealing with issues such as rates of pay and leave entitlements. There were relatively few properly qualified lawyers in private practice – and many unqualified people passing themselves off as lawyers. There was a lawyers' licensing procedure, administered by the Ministry of Justice, but as the licence provided neither benefit nor protection for the lawyer, and guaranteed no right of appearance before the courts (where they existed), few lawyers bothered to register. It was simply an expense that produced no tangible advantage and it was, moreover, difficult to obtain as the applicant needed to go to Kabul for several days, making the rounds of government departments to obtain the necessary documents.[49] This was a particular burden for lawyers living in the provinces. And there was no system to pursue the non-payers.

In order to gain the recognition from lawyers, and other stakeholders, that a bar association would be worthwhile, the IBAHRI ran a seminar in Kabul in 2005 to discuss this issue. After formal addresses from the Minister of Justice, international experts and the author (who spoke about bar associations operating in other Islamic countries), the participants were broken up into 12 discussion groups. Each group was allocated specific aspects to discuss, including: whether there should be a bar association; who should be members; whether it should set admission requirements and procedures; whether it should have disciplinary powers; and whether membership should be compulsory in order to practise law. The groups then reported back to the plenary meeting and a consensus view was established.

This simple form of procedural democracy produced some astonishing results, which were reported in an IBA Position Paper[50] and distributed to stakeholders.

There was a strong view that a bar association was necessary, and that it should be independent. The question of independence is discussed further below, but it was clear that the participants wanted to distance themselves from the government. Indeed, the very name they eventually adopted for the new organisation – the Afghan Independent Bar Association – reinforces this view.

The consensus was that the bar association should be instrumental in setting up professional standards, and that the focal point of these should be the benefit to the client and to the community. Ethical standards should be part of legal practice and should be devised within an Islamic framework. A Disciplinary Board (which was later named the Monitoring Board) should deal with breaches of these principles. The bar association should also protect the interests of its members, but it was agreed the best way to promote this was to encourage lawyers to provide the very best services to their clients.

It was also agreed that the procedure for licensing lawyers, seen as unfair and unnecessarily complex, should be autonomously administered by the bar association or, at least, the bar association should

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49 For example, a certification that there was no outstanding tax liability.

50 International Bar Association Position Paper: *Establishing an Independent Bar Association in Afghanistan* (unpublished, IBA, 2005). The findings reported in the Position Paper were the basis of a monograph: *Benchmarking Bar Associations: A Guide for Bar Associations and Law Societies in Developing Countries* (Open Society Initiative for Southern Africa and the International Bar Association, 2009).

play a significant role in the process. The bar association should also organise continuing legal education, which was seen as essential. It was also agreed that there should be gender balance of the people undertaking this training.

Law reform was also seen as an area where the bar association should have a major input. In addition, the provision of legal aid was agreed to be an important objective and pro bono work should be reasonably required from bar association members. This issue is also discussed in more detail below, but it is significant to note here that the by-laws of the association expressly include an obligation of conducting three cases pro bono each year as a condition for re-registration. This is an astonishing concession in a poverty-stricken country where the lawyers are not rich.

The consensus was that membership of the bar association should be compulsory, and should include all lawyers practising in Afghanistan, with the exception of prosecutors and judges as, in a civil law system, their concerns are different from those of other lawyers. It was also felt that the association should be a single, national body, creating a cohesive legal profession unified by common objectives and responsibilities. This consensus went beyond considerations of geography. Aware of the misogyny commonplace in Afghanistan, the IBAHRI team had suggested a bifurcated structure for the bar, with a men's association and a women's association, under the umbrella of a national body, to reduce the situation of women members being overborne by the men. This suggestion was unanimously and strongly rejected by the female participants at the seminar, who were adamant that they did not want to be marginalised but accepted into the mainstream organisation. As it transpired, the bar's by-laws expressly provide that of the two Vice-Presidents of the association, at least one must be a woman, and there is a stipulation that of the 15 members of the AIBA's Leadership Council, at least three must be women.[51]

Thus, a basic form of democracy engendered significant steps towards justice and the rule of law – at least potentially. With respect to finances and sustainability, it was conceded that, despite the strong desire for independence, the association would initially have to seek financial and technical support from international institutions, and that practical realities would necessitate an incremental approach to clear and agreed structures for governance and accountability.

Language and the concepts

In addition to obtaining consensus on the desirability, or necessity, of a bar association, a further challenge in Afghanistan was the languages through which legal concepts would find expression. Afghanistan has two official languages, Pashto and Dari, although a significant percentage of the population speaks other languages, such as Uzbek and Turkmen. As a result of its turbulent recent history, a general lack of legal reference materials hampered the development of the rule of law. Moreover, a lack of reference materials specifically in Dari or Pashto meant that Afghanistan's lawyers and judges were, and still largely are, without legal materials in their own language.[52]

When the establishment of a bar association was being mooted in Afghanistan, there was no term to accurately label the concept. While substantive concepts such as 'warrant' and 'subpoena' may be

51 Afghan Independent Bar Association By-Laws, Article 9(2). This is similar to Article 83 of the 2004 Constitution, which reserves two seats from each province in Parliament for women.

52 In 2009, a *Glossary of Dari and Pashto Legal Terminology* was published by USAID.

susceptible to a reasonably functional translation, concepts such as 'rule of law' and 'bar association' are not. As mentioned above, there was a 'Lawyers Union', but this did not perform the functions of a bar association. Attempts at translating the term 'bar association' rendered the English equivalent of 'association of criminal lawyers'. This was precisely because at that time, Afghan lawyers in private practice were predominantly criminal lawyers, the banking and commercial sectors having been almost obliterated during hostilities. The term eventually agreed upon was *anjuman wakala*. But this was only after the concept of a bar association had been sufficiently discussed and a consensus on its general nature had been achieved before the label was applied. In a developed and well-established legal system, it is usually the other way around, especially for fundamental concepts.

The impact that the law and legal practitioners might have in society is impeded, and may be completely obstructed, when reasonable and effective communication is impossible.

Adequate legal education

On paper, Afghanistan's laws are improving. The 2004 Constitution guarantees human rights, freedom of religion and equal protection for all, including women. These mean nothing unless there is a well-educated legal profession. Afghanistan's formal legal education is located in Kabul, where the University has Faculties of Civil Law and Sharia Law. There is no such formal legal education in the provinces. However, the issue is more pervasive than simply geographical reach. The author's observation is that teaching methodology relies on formal lecturing and rote learning. Students are not taught to analyse, criticise or solve problems, let alone be innovative or creative with the law. This risks creating an intellectually stagnant profession that is incapable of fully and effectively using the law to address the pressing divergence of needs in a post-conflict country. The impact of law on nascent democratic processes, for example by using the General Comments of the UN Human Rights Committee relating to Article 25 of the International Covenant on Civil and Political Rights to make a legal argument for genuine electoral reform,[53] will never happen if this situation persists. Programmes both within and outside Afghanistan have been implemented in an attempt to redress this situation, with respect to teaching methodology, curriculum development and production of legal materials.[54] But there is a long way to go.

Postgraduate practical legal training is also a challenge. A National Legal Training Centre has been established, which is designed to run the practical postgraduate training for lawyers and judges (the 'Stage' course). However, there is only one Centre, in Kabul, for the whole country. It is only resourced to take a few hundred students at a time, and as these include trainee judges, the number of lawyers being trained remains small. The course is nine months long. Successful completion of the course is compulsory in order to obtain an unconditional practising certificate. This means that there is a large and growing backlog of lawyers waiting to be admitted to, and complete, the course. The AIBA has tried to alleviate this problem by establishing an oral and written exam, of a temporary nature, to certify a qualified admission to practise, on condition that applicants undertake the Stage in the future. However, considering the waiting list, and the fact that the Stage is only available as

53 General Comment No 25, CCPR/C/21/Rev.1/Add.7, 12 July 1996. Paragraph 1 of the general Comment indicates that, 'the Covenant requires States … to ensure that citizens have an effective opportunity to enjoy the rights it protects'.

54 For example, USAID Afghanistan's Legal Education Unit (http://afghanistan.usaid.gov/en/USAID/Article/2077/Legal_Education_Unit), Stanford University's Afghan Legal Education Project (http://alep.stanford.edu) and the Max Planck Institute (www.mpil.de/en/pub/service/globaler_wissenstransfer/afghanistan_project/publications/max_planck_manuals_on_the_law.cfm).

full-time study, lawyers (who, in Afghanistan, are generally not well-off) are very reluctant to follow through with the promise. There have been discussions about creating 'mini-Stage' courses, especially in the provinces. This dilemma will mean that the majority of the legal profession in Afghanistan will be practising on a conditional and qualified basis, which will undermine the authority of the profession and adversely impact on the rule of law.

Continuing legal education (CLE) also presents challenges. Many foreign NGOs have been undertaking CLE courses, to varying levels of success. The situation is unregulated and chaotic. It has not been helped by the AIBA which, through its Education Committee, has insisted, without any authority to do so, that all CLE courses be approved by it. NGO rivalry has meant that this request has been less than politely declined. The IBAHRI is at the moment conducting a national survey of lawyers to ascertain what precisely has been taught, and to whom, and whether the participants felt that the courses were worthwhile. This will help to identify the areas of need, upon which a structured programme might be based. Without adequate CLE, the already precariously educated legal profession will become progressively more out of touch with legal developments, and the rule of law will suffer.

Successes wrapped in challenges

The Monitoring Board

Under the AIBA's by-laws, the Monitoring Board acts as a disciplinary panel. It hears complaints about lawyers from members of the public, and also lawyer-to-lawyer complaints. Its members are elected by popular vote at the AIBA's General Assembly (Annual General Meeting), which is good democracy (these elections are honest and transparent),[55] but can cause problems when the five members elected to the Board live and work in different provinces, especially when these are outside Kabul. The first Monitoring Board met usually with only two members attending meetings because of this problem. The present Monitoring Board has four of the five members present in Kabul or nearby, the result of good luck more than anything else.

The Board meets weekly. Complaints can be made in writing or in person. It is not merely for show: in 2012 it struck off two lawyers. It also gives written warnings and counselling to errant members. It sometimes takes direct action: one lawyer who used to be a judge advertised himself to potential clients as being a judge; a member of the Monitoring Board took paint and a brush and blacked out the word 'judge' on his noticeboard.

However, the Board suffers from lack of resources, particularly regarding complaints from the provinces, which usually go unexamined. There is also a jurisdictional (and ego) clash between the Monitoring Board and the Leadership Council (the AIBA's executive body) over which one actually has the power to discipline members. The Board has no set of written procedures and there are no statistics on the complaints and their outcome – merely a pile of files in a cabinet.

55 The author has twice observed these elections. A system of secret ballot is used, with members selecting their preferences from a list of candidates. The ballots are placed into sealed Perspex boxes, which are in full view at all times. At the end of voting, the boxes are opened in front of everyone and the choice on each ballot paper is read out aloud and a results board compiled in full view.

Pro bono work and legal aid

The requirement that all lawyers undertake three cases pro bono each year is an outstanding concession from the legal profession to civil society. However, the Afghan Supreme Court began to stymie this programme by insisting that these cases, on its direction, be devoted to in absentia cases. Accused persons frequently do not appear in court and the judges wanted to expedite hearings by having the absent accused person represented by a lawyer. The problem, however, is that often the accused is a wealthy person who is merely ignoring the authority of the court. This was not what the pro bono scheme was meant to address. The AIBA reluctantly complained about this. They did not want to appear to be too adamant because they were concerned that the Supreme Court has the authority to close down the AIBA. The author can find no justification for this assumption in any relevant Afghan legislation or in the AIBA's by-laws. It is another manifestation of the detrimental effects of poor education and subservience to hierarchy. The matter was only resolved when the World Bank made a grant to the Supreme Court to assist in case management, thus obviating the need to use pro bono lawyers for cases in absentia. The issue was displaced rather than a principle agreed upon and the problem of the interaction between the Supreme Court and the elected representatives of the lawyers was not resolved.

Another challenge is presented by another clash of jurisdiction and egos: whether it is the AIBA or the Legal Aid Department of the Ministry of Justice that has the power to allocate lawyers to pro bono cases. The AIBA contends that its independence is impugned if the Ministry makes this decision. The Ministry says that the Constitution provides that it must provide legal aid and select the lawyers to do so.[56] It also argues that there are Legal Aid offices throughout the country, whereas the AIBA only has a principal office in Kabul and a handful of small regional offices, and that the Ministry should select the lawyers for pro bono work where the AIBA could not do so. Each side is failing to concede the other's point. The methodology of rote learning in law school does not help a person to resolve such issues. The IBAHRI is attempting to mediate a compromise.

Defending controversial cases

The principle that a lawyer's independence and professional duty means that he/she should not be personally associated with, or regarded as endorsing, a client's actions has not found popular recognition in Afghanistan, even within the legal profession itself. This is especially so with cases involving charges of apostasy. Lawyers defending such cases are frequently called apostates themselves, and colleagues and relatives routinely attempt to persuade a lawyer to cease representation in such cases. Defence attorneys taking these cases have received death threats, pressure and condemnation from within the justice sector and the public at large.[57] This attitude extends to some of the AIBA leadership, which means that the Bar is hampered in protecting its members' professional interests as it should. Independence, so keenly contested in other areas, wilts in the glare of cultural and religious precepts.

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56 The Advocates' Law 2007 provides in Article 3 that the Ministry is obliged to provide legal aid for indigent persons but that the procedures for the operation of this will be determined under a separate Regulation. The latter, to the best of the author's knowledge, has not been promulgated.

57 A report of one such example appeared in *The Times*: 'Afghan to hang for being Christian', 6 February 2011, 1.

Counter Narcotics Court

In 2010, the AIBA organised a strike of lawyers appearing before the Counter Narcotics Court. This court is part of the Counter-Narcotics Justice Centre, which was set up (with US$11m of US and British funding) to handle every aspect of the investigation, detention and prosecution of major drug crimes (and circumvent the 'standard' justice system). Lawyers were complaining that they were being harassed by guards who accompanied them into interview rooms and given no privacy with clients. Judges also did not automatically recognise a right of appearance before the court by lawyers (which is still not unusual in many Afghan courts). It was discovered that defence attorneys were being treated differently from judges and prosecutors because the latter had been screened, polygraphed and issued badges for access to the facility, while the defence attorneys had not.

A screening mechanism and the introduction for all AIBA attorneys of an identity photocard were introduced. Specialised training of lawyers appearing before the court was also arranged, to raise the standards of advocacy. However, much more still needs to be done, as anecdotal evidence suggests that lawyers often fail to address the court or demand that evidence or witnesses be produced. Rather, they tend to talk to prosecutors about minimising sentencing, rather than actually advocating on behalf of a client.[58]

Most defendants are unrepresented. The statistical evidence corroborates the anecdotal. The conviction rate in the court for the Persian calendar year March 2011 to March 2012 was 97.5 per cent. Unlike many other Afghan courts, there is no corruption or malfeasance. But the playing field is not level here because of lack of defence training and also because the influence of high-level drug-traffickers is such that they can avoid being brought to trial in the first place (usually by bribing the police). The court handles approximately 800 cases per year. Most of the accused are convicted. But there are only three high-level detainees.[59]

Conclusion

> 'Afghanistan's justice system has been shaped by a fundamental divide between proponents of secular state law and Islamic jurisprudence. It has been constrained by cultural fissures between the urbanised centre and rural periphery. Throughout much of its modern history, Afghanistan's political leaders have exploited these divides to enhance their political power and to diminish avenues of access to power for potential rivals.'[60]

The rule of law and democracy establish and maintain the checks and balances within a state that are necessary to foster social justice. But, this is predicated on an assumption that democracy is a substantive value rather than merely the rule of the majority, and that the rule of law is applicable to everyone rather than merely rule manipulation for personal advantage.

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58 One report, from July 2012, is of a 29-year-old Iranian arrested while crossing the border with 28kg of opium in his car. He said that a friend had asked him to take some bags of rice across the border and he had never inspected the packages. His trial lasted 40 minutes, with the judge discussing the facts with the prosecutor, and the defence attorney putting the defendant's explanation together with a plea for leniency. No evidence was introduced, no witnesses were called and the defendant himself was not called to give evidence. The court adjourned for 15 minutes, after which the defendant was found guilty and sentenced to 17 years in prison. Joshua Hersh, 'Afghanistan's US-Funded Counter-Narcotics Tribunal Convicts Nearly All Defendants, Records Show' see www.huffingtonpost.com/2012/06/09/afghanistan-counter-narcotics-tribunal_n_1580855.html.

59 *Ibid.*

60 *Reforming Afghanistan's Broken Judiciary*, International Crisis Group, Asia Report No195, 17 November 2010, 4.

Problems arise when there are disagreements as to both the nature and value of democracy. Problems also arise when, within the political and legal systems, a socio-cultural rift between the secular and the religious cannot be bridged, and when the institutions of the law are chronically under-resourced so that they cannot properly function. Citizens cannot reasonably rely on the state to protect them from systemic abuses when the abusers are frequently the elected members of the government itself.

Challenging vested interests is a political as well as a legal exercise – but a legal challenge to those vested interests cannot be effective when the fundamentals of the legal system are weak. Acceptance of this, and commitment to changing it, cannot occur when expediency is preferred to principle, when there is a culture of impunity, and when international actors rely on alliances of convenience.

It has been argued that the current political model in Afghanistan, with power centralised in Kabul, is too radical a departure where a centralised state does not have a long tradition and, moreover, has limited capacity and a tainted legitimacy.[61] It has been argued that Afghanistan requires a more inclusive, flexible and decentralised political arrangement.[62] However, this inclusivity must be based on human rights and the rule of law, not simply on tradition. Impunity and corruption (Afghanistan is regarded as the fourth-most corrupt country in the world after Somalia, North Korea and Burma (Myanmar))[63] must be addressed and eliminated. The fledgling democratic institutions and the deficient legal system must be improved.

The lawyers of Afghanistan, through their bar association, have shown that they have vision and can be fair-minded. The AIBA, which has only been in existence for five years, has made tremendous strides. But the issues of consensus, communication, education and resources, together with traditional values, occlude the way to a society in which there is more justice.

This is not to say that there has been no progress in Afghanistan in the last decade. One significant achievement has been in the (re)introduction of education for girls. Although contested by fundamentalists and still not universally available, this is a harbinger of improvements for women, which include the opening of the first women's driving school.[64] There are beginning to be cases in courts where prison sentences are handed down to relatives who punish women and girls for dishonouring the family.[65] But major systemic problems remain, generated by tradition, reinforced by law, and tolerated by Parliament.[66] Although equality for women is 'guaranteed' by the Constitution so that forced marriages are illegal, choice of one's spouse (for either men or women) is rare and rape victims are charged with adultery and frequently marry their attacker in order to save their (and their family's) 'honour'. The persistence of tradition outweighs the fragility of new legislation. Some

61 S Biddle, F Christia and JA Thier, 'Defining Success in Afghanistan' (2010) Foreign Affairs (http://offiziere.ch/wp-content/uploads/Defining-Success-in-Afghanistan.pdf).

62 *Ibid.*

63 Transparency International: *Corruption Perceptions Index 2011* (http://cpi.transparency.org/cpi2011).

64 Being able to drive is a major step towards personal freedom and control of a woman's life in a country where most women will not interact with men who are not relatives. Allowing women to drive is opposed by conservatives, and banned in other Muslim countries such as Saudi Arabia. In 2011, Kabul issued 312 driving licences to women. 'Afghan Woman Pushes for Rights from Behind the Wheel', *Afghanistan Times* 17 May 2012, 2.

65 In July 2012, a court upheld prison sentences of ten years each for three in-laws who tortured a woman and kept her in a windowless cellar for months after she refused to have sex with the man she was forced to marry when she was aged 13: www.nytimes.com/2012/08/12/world/asia/wed-and-tortured-at-13-afghan-girl-finds-rare-justice.html.

66 See Human Rights Watch: *I Had to Run Away: The Imprisonment of Women and Girls for Moral Crimes in Afghanistan* (March, 2012).

women have used the system to beat the system,[67] but this type of victory is rare. A contributing factor to this dilemma is the low number of female attorneys in Afghanistan. Female victims are often too ashamed to tell male defence lawyers and prosecutors the full facts of their cases, which might have mitigated the verdicts passed on them.

Public confidence in both the political and legal systems is needed. This requires acceptance of the belief that an elected legislature cannot pass any laws it likes regardless of the consequences. Such a belief is itself mediated by values honed through religion and education. In a post-conflict scenario, the rule of law may be integral to peace-building, but it will not be effective unless integrated into the social and political context. Law, democracy and justice must be concepts accepted by the populace rather than only by the peace-builders, no matter how well-intentioned the latter may be.[68] The rule of law needs to be a way of interacting rather than merely used as an appliance. The situation in Afghanistan has been criticised as dealing with little more than technocratic interventions in the court system, when what is needed is to 'develop a more nuanced, sophisticated understanding of the rule of law as a state of affairs in which people feel it makes sense for them to act within the law'.[69] Until this is attempted, law and democracy will not be robust. Instead, a culture of subservience to power will persist.

One facilitator in the process of transition (although by no means the only one) can be an independent bar association, enhancing the capacity and expertise of the legal profession, educating and empowering it to advance not only the interests of the profession, but also human rights and the rule of law in civil society, especially for marginalised groups. This independence can assist in the confrontation of executive actions detrimental to the rule of law, especially when corruption is endemic. A bar association can be integral to a legal aid system and can help restore the confidence of civil society in the law by adhering to a code of professional ethics. However, as has been described above, a bar association, being comprised of human beings, can be subjected to, and its work influenced by, prevailing social pressures.

The rule of law is itself ultimately a political ideal. If it is to be a means to an end defining a function rather than only a status,[70] an understanding of the context in which the rule of law is used (as distinct from a formal understanding of what it means) is required. Chesterman warns of the role that the rule of law sometimes plays as a Trojan horse to import other political goals.[71]

Particularly in the context of a post-conflict country where well-intentioned foreign entities scramble to re-establish justice, there is a risk that the rule of law may in fact become a 'disingenuous ideological tool'.[72] The rule of law and democracy are a means to an end, rather than ends in

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67 For example, 19-year-old Gulnaz was raped in her home after her attacker bound her hands and feet and covered her mouth to stop her screaming. She and the man were jailed for adultery. She was freed by presidential pardon after an international outcry. She agreed to marry her attacker after a meeting in the prison, just prior to her release, with the Attorney-General and the Minister of Justice. Her lawyer was excluded from the meeting. However, she demanded *badal* – one of the rapist's daughters had to marry Gulnaz's brother, to act as collateral against further abuse. (*The Times*, 2 December 2011, 41). Gulnaz then made the traditional demand of a dowry, setting the price at US$22,000 (*The Times*, 5 December 2011). Presumably, if the man's family cannot raise this (which is a huge amount in Afghanistan), the marriage will not take place.

68 See Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman (Eds), *Peacebuilding and Rule of Law in Africa: Just Peace?* (London: Routledge 2011).

69 Whit Mason, *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge: Cambridge University Press 2011), 3.

70 See Simon Chesterman, 'An International Rule of Law?' 2008 New York University School of Law Public Law and Legal Theory Working Papers, Paper No 70.

71 *Ibid*, 38.

72 *Ibid*.

themselves. The local context must always be borne in mind if they are to be truly effective rather than the imposition of an ideology. One factor contributing to such a development can be an independent local bar association that guides and protects lawyers, and so ultimately serves the needs of civil society. The AIBA is striving hard, against the odds, towards this goal.

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