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Building the Rule of Law in Afghanistan: The Importance of Legal Education

Geoffrey Swenson & Eli Sugerman*

The 'rule of law' remains an elusive commodity in Afghanistan. Securing a stable Afghanistan underpinned by the rule of law has proven exceedingly difficult despite widespread consensus in the international community regarding its fundamental importance. There is broad recognition that structural flaws in the Afghan justice system and legal profession undermine access to justice and democratic governance. Lawyers are indispensable to consolidating the rule of law; they draft laws, administer justice, shape government policy, and inculcate respect for individual rights. Yet, nobody, including the Afghan government, knows how lawyers practice in Afghanistan. Even less has been written about the process of educating Afghan lawyers even though a country's system of legal education has an undeniable impact on its legal system. Lawyers' education, especially in developing or transitional countries like Afghanistan, impacts how they 'practice their profession, both in private and government roles.' Legal education also promotes scholarship and practical expertise among a diverse range of government officials. Legal education is, thus, essential to the rule of law. This article provides an overview of the Afghan legal education by weaving together the scant existing literature and complementing it with several interviews with Afghan law professors to illuminate important historical and recent trends. It also begins to gather the baseline information urgently needed to better inform international efforts to promote the rule of law through assistance to the Afghan legal education system.

INTRODUCTION

The 'rule of law' remains an elusive commodity in Afghanistan. Securing a stable Afghanistan underpinned by the rule of law has proven exceedingly difficult despite widespread consensus in the international community regarding its fundamental importance. There is broad recognition that structural flaws in the Afghan justice

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system and legal profession undermine access to justice and democratic governance.¹

The rule of law is increasingly viewed not only as a palliative to extremism and violent conflict, but rather a desirable end, in and of itself. Despite pervasive support for the concept of the rule of law, there has been much debate about its precise contours.² Nevertheless, Afghanistan fails to satisfy even a minimalist definition of the rule of law due to rampant violence, corruption, and lawlessness.³ It falls into the most extreme category of state-building that requires 'constructing institutions from scratch.'⁴

The extensive judicial system that functioned briefly in large cities in the late 1970s exists no longer 'following 23 years of warfare and oppression.'⁵ As Frances Fukuyama notes, '[e]stablishing a rule of law involves extensive construction not just of laws but also of courts, judges, a bar, and enforcement mechanisms across the entire country.'⁶ This is no easy task given the pluralism and ambiguity that permeate the Afghan legal system.⁷ Afghanistan's culture, multi-ethnic population, and long history shape its legal system, as does the country's rich social tapestry – segmented along tribal and clan lines. Afghanistan's legal system has historically applied two sources of law: customary, tribal law and Islamic or *Shari'a* law (the population is 99 percent Muslim).⁸ Its current legal system blends these traditions

¹ Nadjma Yassari and Mohammad Hamid Saboory, 'Sharia and National Law in Afghanistan', in Jan Michiel Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 2010, p. 273 at pp. 313-314.

² Erik G. Jensen, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses', in Erik G. Jensen and Thomas C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* 2003; Rachel Kleinfeld, 'Competing Definitions of the Rule of Law: Implications for Practitioners', *Carnegie Paper* 55, 2005; Brian Tamanaha, 'A Concise Guide to the Rule of Law', St. John's University School of Law: Legal Research Paper Series No. 07-0082, 2007, <http://ssrn.com/abstract=1012051> (accessed April 20, 2009).

³ For an overview of the very limited progress and daunting challenges facing Rule of Law promotion efforts in Afghanistan, see Jake Sherman, 'Afghanistan: Nationally Led Statebuilding', in Charles T. Call and Vanessa Wyeth (eds.), *Building States to Build Peace* 2008, p. 303. See also Patrick McAuslan, 'Land and Power in Afghanistan: In Pursuit of Law and Justice?', in Amanda Perry-Kessaris (ed.), *Law in the Pursuit of Development: Principles into Practice?* 2010, p. 269, for a compelling case study regarding land rights in Afghanistan.

⁴ Thomas Carothers, *Aiding Democracy Abroad; The Learning Curve* 1999, at p. 159.

⁵ Max Plank Institute for Comparative Public Law and International Law, *Fair Trial Workshops in Afghanistan 2005-2008: Comprehensive Report* 2008, at p. 3.

⁶ Frances Fukuyama, *State-Building: Governance and World Order in the 21st Century* 2004, at p. 59.

⁷ See, generally Astri Suhrke and Kaja Borchgrevink, 'Negotiating Justice Sector Reform in Afghanistan', in: 51 *Crime, Law, and Social Change* (2008), pp. 211-230.

⁸ Bruce Etling, *Legal Authorities in the Afghan Legal System (1964-1979)* 2003, at p. 2, <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf> (accessed June 6, 2010).

through a constitutional system governed by civil codes. Lawyers are indispensable to consolidating the rule of law; they draft laws, administer justice, shape government policy, and inculcate respect for individual rights. Yet, nobody, including the Afghan government, knows how lawyers practice in Afghanistan. Even less has been written about the process of educating Afghan lawyers even though a country's system of legal education has an undeniable impact on its legal system.⁹ Lawyers' education, especially in developing or transitional countries like Afghanistan, impacts how they practice their profession, both in private and government roles.¹⁰ Legal education also promotes scholarship and practical expertise among a diverse range of government officials.¹¹ Legal education is, thus, essential to the rule of law.¹² This startling lack of information about the Afghan legal profession and legal education is not a new phenomenon. A prominent 1965 report stressed the importance of determining: '(1) jobs to be filled, (2) the skills required in them, (3) the personnel presently available and (4) the skills possessed by such personnel.'¹³ Their common sense recommendations are as salient today as they were almost 35 years ago. The lack of trained attorneys and legal professionals constitutes a significant obstacle to institutionalizing the rule of law – but one commonly ignored by the international community.¹⁴ Yet, 'strengthening fundamental legal education', Professor Jon Eddy explains, 'could assist considerably in advancing the formal rule of law' in Afghanistan.¹⁵

This article provides an overview, admittedly incomplete, of the Afghan legal education by weaving together the scant existing literature and complementing it with several interviews with Afghan law professors to illuminate important historical and recent trends. It also begins to gather the baseline information urgently needed to better inform international efforts to promote the rule of law through assistance to the Afghan legal education system.

⁹ Ronald A. Brand, 'The Export of Legal Education: Its Promise and Impact in Transition Economies', in Ronald A. Brand and D. Wes Rist (eds.), *The Export of Legal Education: Its Promise and Impact in Transition Economies* 2009, p. 1 at p. 1.

¹⁰ Brand, 'The Export of Legal Education', at p. 2.

¹¹ Veronica Taylor, 'Legal Education as Development', in Stacy Steele and Kathryn Taylor (eds.), *Legal Education in Asia: Globalization, Change, and Contexts* 2010, at p. 217. See also Rodger Burridge, 'Six Propositions for Legal Education in Local and Global Development', in: 55 *Journal of Legal Education* (2005), p. 495 at pp. 495-502.

¹² Brand, 'The Export of Legal Education', at p. 2.

¹³ Walter V. Schaeffer and Delmar Karlen, 'Report on Judicial Administration in Afghanistan', 1965, at pp. 9-10.

¹⁴ Suhrke and Borchgrevink, 'Negotiating Justice Sector Reform in Afghanistan', at pp. 219-220.

¹⁵ Jon Eddy, 'Rule of Law in Afghanistan', in: 17.2 *Journal of International Cooperation Studies* (2009), p. 1 at p. 20.

LEGAL EDUCATION IN AFGHANISTAN

Until recently, the bulk of legal reform and rule of law programs focused on mid-career re-training of judges, prosecutors, and defense attorneys. Little attention or resources were dedicated to training Afghanistan's next generation of lawyers – those who would actually shape implementation of the new legal system enshrined in the 2004 Constitution. Legal education merits close scrutiny because lawyers form the vanguard of spreading rule of law concepts throughout society and the basic norms, ideals, and concepts that define the rule of law are inculcated early in a lawyer's career.

History of legal education in Afghanistan

Historically, legal education offered in Afghanistan *was* religious training in *Shari'a* or Islamic law. For centuries, *madrasas* provided secondary level schooling in Islamic law and graduates became judges. Education in *Shari'a* law remained the singular and mandatory qualification for entry into the judiciary until the early 1940s.¹⁶

In the late nineteenth century, the movement towards more standardized legal training began with the first judges' manual containing 136 rules on proper court procedures, deliberative processes, and judicial ethics.¹⁷ Afghanistan started developing a formal, state-sponsored legal education system by creating a School of Administrators in the 1920s to train administrative and judicial personnel. The School, however, failed to produce enough qualified legal professionals to carry out major legal reforms.¹⁸

Afghanistan's current system of legal education dates to 1938, when Kabul University created the Law Academy. The Academy offered a three-year course of study. It changed its name to the Faculty of Law and Political Science (FLPS) in 1939.¹⁹ A Faculty of Islamic Law was not created until 1952.²⁰ The two separate, mutually exclusive faculties mirrored Afghanistan's system of dual laws (civil codes and *Shari'a* law).

As noted in M.G. Weinbaum's seminal article, throughout the 1970s, students within Kabul University's Faculty of Law and Political Sciences (FLPS) pursued a

¹⁶ Mohammad Hashim Kamali, *Law in Afghanistan: A Study of Constitutions, Matrimonial Law, and the Judiciary* 1985, at p. 207.

¹⁷ Alexander Benard et al., *An Introduction to the Laws of Afghanistan* 2008, at p. 8.

¹⁸ Kamali, *Law in Afghanistan*, at p. 207.

¹⁹ Mohammad Haroon Mutasem, Vice Dean, Faculty of Law and Political Sciences, Kabul University, personal interview, 4 April 2009.

²⁰ Mohammad Din Gran, Dean, Faculty of *Shari'a*, Kabul University, personal interview, 26 March 2008.

four-year undergraduate curriculum.²¹ The first two years covered subjects ranging from history, contract law, public finance, Islamic studies, to the Pashto language. The second two years were more specialized. Students in the public law and diplomacy section generally focused on public policy and management and went to work in government ministries. Judicial section graduates usually joined the judiciary or prosecutor's office. Because its primary focus was on political science, FLPS graduates lacked the prerequisite understanding of Islamic law to serve as judges in courts of general jurisdiction.

The FLPS faced resource scarcity from its creation. It had few Persian language textbooks, no textbooks on Afghanistan's laws, and a small collection of European materials. Nonetheless, the FLPS increased enrollment from 197 students in 1956 to approximately 550 students in the early 1970s. The Faculty typically hired one or two of its top students annually as junior instructors. Subsequent foreign schooling, however, was often a prerequisite to promotion.

Kabul University's Faculty of Islamic Studies likewise offered a four-year undergraduate course. Roughly half of its students studied jurisprudence and law and the other, general Islamic Studies. The *Shari'a* faculty benefited from a sizeable Arabic legal text collection, but failed to train students for legal practice because of an excessive emphasis on abstract principles rather than practical skills. While former *madrassa* teachers initially staffed Kabul University's *Shari'a* Faculty, by 1975, all permanent instructors held a degree from the faculty. As with the FLPS, foreign education became a prerequisite to promotion. By the 1970s, the majority of *Shari'a* professors held a master's degree from Al-Azhar University in Cairo. The faculty had fewer than a hundred students before 1965, but grew steadily until the early 1970s when enrollment topped three hundred students.

The post-1965 increase in *Shari'a* students was mainly due to the creation of a separate Women's Institute of Islamic Studies at Kabul University. By 1969, female students accounted for one-third of enrollment in the *Shari'a* Faculty. This proportion dropped to 15 percent in 1970s or about 50 students per class. The percentage of female students in the FLPS dropped from 15 percent in late 1960s to 10 percent in 1970s. Throughout the 1960s and 1970s, prominent female legal figures were exceedingly rare; namely one female High Central Court of Appeals judge and two female law professors.

Legal education at Kabul University reflected Afghanistan's pluralistic legal system, but failed to prepare its students to practice in it. FLPS graduates knew Afghanistan's codes, but little *Shari'a* law; *Shari'a* students knew Islamic law but

²¹ M.G. Weinbaum, 'Legal Elites in Afghan Society', in: 12 *International Journal of Middle East Studies* (1979), p. 39. Weinbaum's article is the seminal work on legal education in Afghanistan's pre-Soviet period. This article draws on his work unless otherwise noted when addressing legal education in that era.

little about the civil codes. FLPS offered four Islamic law courses and the *Shari'a* Faculty taught three civil law courses. Throughout the 1970s, only two FLPS faculty members had advanced *Shari'a* training. No *Shari'a* faculty, except one former Dean, had a legal degree in any other subject. The two faculties did not interact professionally or socially and dual appointments were nonexistent.

A national competitive exam determined admission to both faculties and full tuition provided by the State. Legal education emphasized rote memorization of laws with little focus on legal analysis, legal drafting, and legal interpretation. Highly theoretical and deductive lectures were the norm. Few opportunities to practice problem-solving, legal reasoning or other practical skills existed. The near absolute lack of educational materials on Afghan legal problems and cases meant that instruction varied greatly. Thus, even basic substantive law concepts were not systematically imparted to students. Legal education did little to develop the legal sector or adequately prepare students to practice law.²²

Such deficiencies led in 1968 to the creation of the Judicial Training Program (the *Stage*) to ensure judges had a sufficient schooling in both civil codes and the *Shari'a*.²³ Senior judges and administrators served as instructors to supplement recent law school graduates' education. Prospective judges FLPS graduates gained in-depth training in the *Shari'a*; *Shari'a* students received a heavy dose of Afghan statutory law and western legal traditions. *Stage* participants could observe court sessions and participate in moot court training.

One year of proper legal training, however, proved insufficient to overcome serious shortcomings in legal education. The Training Program did initiate, however, a sustained effort diversify the recruitment of judges and attract those with higher education. Both the 1964 Constitution and 1967 Law on Judicial Authority and Organization promoted hiring university graduates and individuals knowledgeable about both *Shari'a* and civil codes into the judiciary.²⁴ New judges with university-level educations began to replace existing judges entire legal education was from a *madrassa*. In the late 1960s and early 1970s, there were plans to merge Kabul University's two law faculties but they never materialized.

Current system of legal education in Afghanistan

The Ministry of Higher Education (MOHE)

It is difficult to overstate the challenges facing Afghanistan's universities and law faculties, including meager funds, unusable facilities, minimal reference materials,

²²Lawrence Church, 'Law and the Future in Afghanistan', in: 3 *Law Asia* (1972), p. 457 at p. 458.

²³Kamali, *Law in Afghanistan*, at p. 207.

²⁴Kamali, *Law in Afghanistan*, at p. 207.

and poorly trained faculty.²⁵ The MOHE bureaucracy, responsible for all public higher education institutions, exacerbates these challenges. Law faculties, have 'little to no autonomy and are subject to rigid administrative regulations and rules.'²⁶ All teaching and administrative staff are government employees, so their hiring, promotion, and pay, are greatly complicated by civil service grades and academic ranks.

The MOHE strictly controls hiring and promotion. Professors are normally graduates of that university or Kabul University. There are six levels of university (law) professors: *Pohyalai*, *Pohanyar*, *Pohanmal*, *Pohandoy*, *Pohanwal*, and *Pohand*. A *Pohyalai*, or junior lecturer teaches for a one to six year probationary period under the mentorship of a senior professor before becoming a permanent faculty member. *Pohand* is the senior most rank given to expert professors with twenty or more years of teaching experience.²⁷ Any undergraduate law graduate can apply to become a *Pohyalai*. Applicants must have excelled academically, passed an entrance exam, and presented a scholarly paper at an academic conference. They generally teach a class session so that senior department staff can evaluate their teaching ability. Holders of an master's degree or LL.M. may apply to become a *Pohanyar* and those with a doctorate may be a candidate for *Pohanmal*. It normally takes one year to be approved for the professorship sought. Further promotion requires a law professor must teach for three years and publish a legal thesis or book.

A successful applicant may not be hired without law faculty, university council, and MOHE approval. This multistage process requires near consensus among numerous professors and officials at each step. Not surprisingly, the process is overly political and permits meddling by various government and legal actors. For example, professors from regional law schools express concern that their appointments are micromanaged by Kabul University because the MOHE will not approve any new appointments in the provinces without Kabul University's approval.²⁸ The pay scale for law professors directly tracks seniority; the starting salary for a *Pohyalai* is approximately USD 360 per month and increases to USD 800 per month for a *Pohand*.²⁹ MOHE regulations require all professors to teach full-time and hold no other jobs (despite their meager salaries). Professors at Kabul University regularly receive exemptions from the MOHE and supplement their income

²⁵ World Bank, *Afghanistan: Country Summary of Higher Education* 2009, at pp. 1-2, http://siteresources.worldbank.org/EDUCATION/Resources/278200-1121703274255/1439264-1193249163062/Afghanistan_CountrySummary.pdf (accessed June 6, 2010).

²⁶ World Bank, *Afghanistan*, at pp. 1-2.

²⁷ Mutasem, personal interview.

²⁸ Hamayon Hamed, Faculty of Law and Political Sciences, Abu Rayhan Al-Biruni University, personal interview, 10 March 2009.

²⁹ Mutasem, personal interview.

with advisory positions with NGOs and international organizations that typically pay USD 2,000 or more per month for highly qualified local legal staff.³⁰ International actors' higher salaries substantially distort the legal market by providing strong incentives for the most qualified lawyers to leave government service or academia.

MOHE regulations also stifle changes to existing law school curricula. Any change, including matters as minimal as a new textbook, must first be proposed to the Academic Council of the Law Faculty. If approved, the proposed change is forwarded to the Academic Council of the University. The MOHE's Department of Academic Affairs must then give final approval.³¹ Textbook approval and other key aspects of legal education are commonly politicized in a manner that stunts legal education reform. The MOHE reportedly issued a new regulation in 2008-2009 that sets the minimum age for an author of an approved textbook at forty years.³² This regulation ensures that potentially lucrative contracts with international rule of law projects to develop new, standardized textbooks for all Afghan law faculties are reserved for senior faculty. This regulation effectively sidelines the small, but growing cadre of young Afghan law professors with overseas graduate training and who have been exposed to more interactive teaching methods.

CURRENT STATE OF LEGAL EDUCATION

Neither of Afghanistan's two types of law faculties adequately prepares graduates to practice law. Legal education remains bifurcated between Faculties of Law and Political Science and *Shari'a* Law. Thirty years of neglect has left law faculties with professors with little knowledge of core legal subjects or understanding about how the law actually operates. Few legal educators have formal training in teaching, graduate law degrees, or foreign legal training. Institutions remain devastated by a legacy of conflict. During the Taliban regime, much of the legal education infrastructure and nearly all materials in Kabul University's law library were destroyed (including the only copies of many laws).³³ Legal education remains overly formalistic, lacks up-to-date teaching materials, and prepares graduates ill-suited to address the profound challenges facing Afghanistan's nascent constitutional order.³⁴ Afghanistan's six Faculties of Law and Political Science (Kabul University, Balkh

³⁰ Faridon Mohammad Soroush, Faculty of Law and Political Sciences, Herat University, personal interview, 9 March 2009.

³¹ Mutasem, personal interview.

³² Mutasem, personal interview.

³³ Christopher P.M. Waters, 'Reconceptualizing Legal Education After War', in: 101 *American Journal of International Law* (2007), p. 382 at p. 386.

³⁴ Rome Conference on the Rule of Law in Afghanistan, Panel on Higher Education and Professional Training, Discussion Paper, 2007.

University, Herat University, Al-Biruni University, Nangarhar University, and Kandahar University) offer a four-year course of study with two tracks: 1) Judicial and Legal Sciences; and, 2) Political and Administrative Sciences. Classes mix political science, public administration, law, and other subjects. FLPS students generally study introduction to Islamic law, law, political science, sociology and administrative sciences, contemporary history, international organizations, Islamic culture, foreign language, general constitutional law, principles of economics, computers, history of political thought, current world legal systems, general criminal law, principles of civil law, and Islamic legal culture. Classes mostly convey archaic, technical information. Pedagogy consists almost exclusively of formal lecturing and memorization. There is little student engagement and a concomitant critical lack of development of legal research, analysis, and reasoning skills.³⁵ *Shari'a* law faculties have recently expanded at Kabul University, Balkh University, Herat University, Nangarhar University, Al-Biruni University, Kandahar University, Kunduz University, Khost University, and Takhar University. *Shari'a* students pursue a four-year course that covers topics as diverse as their FLPS peers.³⁶ The *Shari'a* curriculum includes classes on: Islamic law; commentary of Islamic perception; history of Islamic law, jurisprudence; introduction to law; Islamic belief; Arabic grammar; logic, introduction to economics; Hadith of Islamic perception; Prophet's behavior; basic law, contemporary history; commentary of Holy Qurans perception; Islamic financial organization; history of religion; comparative jurisprudence; criminology; international private law; criminal procedure; history of Islamic civilization; obligation law; rhetoric; inheritance; the Holy Quran; administrative law, forensic medicine; labor law; Islamic governmental organization; real estate law; general criminal law; criminal private law; commercial law; international law; general principle of jurisprudence; knowledge of Hadith; civil and commercial procedure; Tafsir; introduction to philosophy; pedagogy; and mysticism and legal decision methods. Classes are outdated, overly theoretical, and too reliant upon lecture and rote memorization. *Shari'a* students, like FLPS students, lack opportunities to develop much-needed legal research, analysis, and reasoning skills.

In 2008, an effort was launched to standardize legal education and coordinate post-graduate training.³⁷ Faculties of Law and Political Science and *Shari'a* Law from throughout Afghanistan committed in January 2008 to develop a binding, shared 'common core curriculum.'³⁸ Professors agreed upon 11 core subjects:

³⁵ Livingston Armytage, 'Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War', in: 67 *Heidelberg Journal of International Law* (2007), p. 185 at p. 192.

³⁶ Armytage, 'Justice in Afghanistan', at p. 192.

³⁷ Rome Conference, Panel on Higher Education, Discussion Paper, at p. 3.

³⁸ Max Plank Institute, *Support to the Judicial Stage of the Supreme Court of the Islamic Republic of Afghanistan (2006-2008): Intermediate Report 2008*, at p. 5.

1) Introduction to Law; 2) Constitutional Law; 3) Human Rights; 4) Principles of *fiqh*; 5) Criminal Law; 6) Criminal Procedure; 7) Civil Law/Civil Code; 8) Civil Procedure; 9) Commercial Law; 10) Commercial Procedure; and, 11) Professional Responsibility and Ethics for Lawyers.³⁹ A new textbook on each subject was to be drafted by a committee of senior professors for use nationwide. The new MOHE regulation mentioned above was reportedly enacted to ensure that senior professors draft these textbooks.

Progress in instituting the shared, core curriculum slowed in 2009 when Kabul University's *Shari'a* Law Faculty reportedly denied ever having agreed to the scheme. This is but the latest example of the historically acrimonious relations between Afghanistan's two types of law schools. Some current tensions between the two faculties and among different universities stem from perceptions of Kabul University being privileged above regional universities. Proposals to reform the Faculties of Law and Political Science have also stalled. While the US government actively encouraged the merger of the two Faculties in 2004-2005 and secured initial agreement from all relevant actors, the merger never materialized in subsequent years.⁴⁰ It remains unclear if it is politically feasible or desirable to separate law from political science.

KABUL UNIVERSITY

Kabul University remains Afghanistan's preeminent center of legal education. As of April 2009, the Kabul University Faculty of Law and Political Science had 34 professors led by a dean and vice-dean. It has four departments each led by a senior professor (*Pohand*): criminal law, civil law, public law, and international relations. Seventeen members of the faculty hold undergraduate degrees, 13 master's degrees, and four, doctorates. Each professor teaches between one and four classes.⁴¹

The first two years in the FLPS is general study. In the third year, students elect between two branches: Judicial and Legal Sciences and Political and Administrative Sciences. Despite their radically different names, the branches significantly overlap; only six subjects are unique to each branch. Classes rely heavily upon highly theoretical lectures with little in-class discussion, practical examples or problem-solving. Most professors base grades exclusively on final examinations. Kabul University lacks a law clinic, but does benefit from a new moot court room.

³⁹ National Conference on Afghan Universities Law and Sharia Faculties' Core Curriculum and Quality Legal Education, Key Conclusions, 5 January 2008, www.afghanistantranslation.com/TrainingMaterials/KeyConclusionsOfTheNationalConference.doc (accessed April 20, 2009).

⁴⁰ Zalmay Khalilzad, former US Special Presidential Envoy and Ambassador to Afghanistan, personal interview, 11 June 2010.

⁴¹ Mutasem, personal interview.

The Kabul University FLPS currently has 1,441 students, who attend its two sessions (day and evening). The day session features 170 female and 733 male students; the evening session has 29 female and 509 male students. The average age of the day students is 22 and that of evening students, 25. Evening students are typically older because they often work during the day to help support their families. Many students reportedly receive assistance from their professors to find jobs following graduation.⁴² The Kabul University FLPS shares a building with three other faculties. It has eight classrooms, constant electricity most days, and a computer lab with twenty computers with Internet access. Its library contains many Farsi, English, French, and Arabic legal texts. No class is shared with Kabul University's Faculty of *Shari'a* Law. The Kabul University *Shari'a* Faculty is led by a Dean, who oversees its 38 faculty members in 3 different sections: Islamic jurisprudence, Philosophy, and the Women's section. It has roughly 525 students, but plans to expand to 700 students in the coming years, half of which it believes will be women.⁴³

Regional universities

Law schools are increasingly common fixtures in major population centers outside Kabul. Removed from the political forces swirling in Kabul and strict MOHE oversight, regional law schools, including Herat, Balkh, and Nangarhar, are more quickly adapting their curriculum and teaching methods to address Afghanistan's urgent needs. Such law schools tend to have younger faculty more willing to innovate outside the confines of Kabul University's rigid traditions.

Herat University (in Western Afghanistan) offers one particularly striking example. Founded in 1987 with one faculty (literature), by 2002, Herat had seven faculties, including a Faculty of Law and Political Science. Herat's FLPS answered the demand of local high school students interested in law but, who because of financial, security, and space issues, could not secure admission to Kabul University. In 2002, then-Governor Ismail Khan, secured the government's permission to establish Herat University's FLPS. The Herat FLPS initially encountered difficulty hiring professors; five lecturers taught its first class of 102 students.⁴⁴ A dean, vice-dean, and two department chairs for public law and private law currently lead the Herat FLPS. It has 15 professors, 4 of which are female. Five professors hold master's degrees and the remainder have undergraduate degrees in law. Each professor teaches between two and four courses to ensure that all required courses are offered. In 2005, Herat was the first university in Afghanistan to introduce the credit system. Law students must take 64 credits over 4 years to graduate.

⁴² Mutasem, personal interview.

⁴³ Gran, personal interview.

⁴⁴ Soroush, personal interview.

The Herat FLPS has 271 students as of 2008, including 35 percent women. A particularly notable feature of Herat University, beyond the high rate of female enrollment, is the collegial relationship between its 2 law faculties. Herat's *Shari'a* Faculty with its 28-30 professors and 600 students (one quarter of which are female) teaches classes on Islamic law to FLPS students; the *Shari'a* law students study secular topics from FLPS professors. Professors from the two faculties also share a computer lab as well Afghanistan's only legal clinic, which opened in October 2008. The clinic enrolls five students from each faculty (ten total) and is taught by professors from both faculties. It focuses on street law, civil legal advice and criminal defense advocacy. Clinic students regularly meet with court officials, assist practicing attorneys, and observe court proceedings. Herat FLPS classes average 70-80 students each. Lack of space and facilities forces the university to stagger courses by class year between the day and evening sessions. The FLPS presently meets in a private apartment building where eight small bedrooms have been converted into classrooms. A new campus was to be completed in 2010 with at least two modern classrooms featuring DVD players, projectors, and other modern technology. Abu Rayhan Al-Biruni University, named after the famous 11th century Persian scientist, was established outside of Kabul in the late 1990s. Its FLPS has 14 professors and 250 students (only 10 are female). Its *Shari'a* Faculty has a slightly smaller faculty (10-12), but an equal number of students. The Al-Biruni FLPS is led by a dean; the position of vice-dean is presently vacant. Four professors hold master's degrees – two from Russia and one each from Pakistan and China. Each professor teaches two or three subjects. Most of its professors live in Kabul and commute to campus as necessary.

The FLPS and *Shari'a* faculties occasionally exchange of professors to teach subjects in the other faculty. Relations between the faculties are somewhat strained. Both law faculties face the additional challenge of low female enrollment. Transportation constraints, such as societal norms that prohibit females unaccompanied by a male family member from riding with other men and limited accommodations for women, are reportedly to blame. Al-Biruni cannot hire any new faculty or staff because of MOHE budget constraints.

THE INDEPENDENT NATIONAL LEGAL TRAINING CENTER (INLTC) AND THE JUDICIAL STAGE

In 2004, the Ministry of Justice, Attorney General's Office, Supreme Court, MOHE, and governments of Italy and the United States signed a Memorandum of Understanding to create an INLTC in Kabul to provide advanced legal training to judges, prosecutors, defense attorneys, and other lawyers to build a more robust

legal profession.⁴⁵ Housed in a newly-constructed building on Kabul University's campus, it is replete with new computers and other technological trappings. However, it sat empty for the first two years (2004-2006) and 'assumes, rather than strengthens, undergraduate legal education' and thereby calls into question the effectiveness of justice sector reform in Afghanistan without 'a strong, uniform basic legal education.'⁴⁶ In 2008, the Supreme Court retracted its agreement to joint training of judges (with other legal professionals) and insisted on a separate program.

The INLTC houses the judicial *Stage*, a one-year training course required for those entering the judiciary. In reality, less than half of judges have completed the *Stage* training and most judges appointed under the Taliban and current government have not received such training.⁴⁷ The Judicial *Stage* consists of eight months of class-based, theoretical instruction followed by a comprehensive examination with the remaining four months dedicated to practical training. A regulation Supreme Court regulation requires the *Stage* to teach: the Holy Qur'an and Hadiths; Judicial Terminology; The Constitution; Law of Organization and Jurisdiction of Courts; Civil Code; Criminal Code; Criminal Procedure Code; Criminal Investigation Code; Civil Procedure Code; and Commercial and Commercial Procedure Code. Topics are currently taught on a trimester schedule supported NGOs and international development organizations that coordinate with the Judicial Administration and the Supreme Court.

Afghanistan has approximately 1,600 judges appointed under radically different regimes. Fewer than 4 percent are female and their average age is 45 years old.⁴⁸ Under the Law on the Organization and Jurisdiction of the Courts (2005), the Supreme Court appoints judges. Every judge must '[h]old a bachelor's (B.A.) degree from any faculties of law or *Shari'a* or hold a diploma on Religious Studies from an officially recognized center or equivalent.'⁴⁹ *Madrassa* graduates can hold judicial office even though their legal skills are generally limited to ritualistic knowledge of religious texts without systematic education in either religious or secular law. Despite the law's clear education stipulations, nearly one quarter of Afghan judges fail to satisfy it.⁵⁰ Even if a judge meets the law's basic requirements, he is often unprepared to decide cases because nearly all lack actual knowledge of both *Shari'a* and civil codes.

⁴⁵ Rome Conference, Panel on Higher Education, Discussion Paper, at p. 8.

⁴⁶ Veronica Taylor, 'Legal Education as Development', at p. 224.

⁴⁷ Max Planck Institute, *Support to the Judicial Stage*, at p. 6.

⁴⁸ Max Planck Institute, *Support to the Judicial Stage*, at p. 4.

⁴⁹ Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan 2005, Art. 58(1)(3).

⁵⁰ Max Planck Institute, *Support to the Judicial Stage*, at p. 5.

Other legal education initiatives

Recognizing the crucial role education can play in exacerbating or mitigating conflict, there are a handful of donor supported legal education programs.⁵¹ The US Agency for International Development (USAID) undertook several legal education initiatives under its Afghanistan Rule of Law Project (AROLP) although not until the project's later years (AROLP ran from 2003 to 2009).⁵² Relevant work includes constructing moot court facilities at Kabul University and new classrooms at six law and *Shari'a* faculties at provincial universities; establishing Afghanistan's first law library; and organizing study tours for law professors to India and the USA.⁵³ AROLP attempted widespread curriculum reform as described in Section II(b)(ii), but achieved minimal success. A handful of new textbooks and syllabi were produced (for example on Family Law), but it remains unclear to what extent they are being utilized by Afghan universities. The AROLP's successor, the Afghanistan Rule of Law Stabilization Program, which began in 2010 and runs through 2012, emphasizes the fundamental importance of 'higher quality legal education through additional training of law school instructors 'in interactive teaching methodologies', and further progress towards a core legal curriculum.⁵⁴ It is too early, however, to evaluate the program's impact since it is less than a year. The International Development Law Organization (IDLO) has actively supported legal education reform in Afghanistan since 2001. IDLO – along with the Max Plank Institute – took the lead on INLTC judicial training (see Section II(b)(v)). This includes providing 'legal education and practical skills training to over 1500 legal professionals judges, prosecutors, defense lawyers, members of parliament, civil servants and law professors', which IDLO estimates to constitute 'more than half of the legal professionals' in Afghanistan.⁵⁵ IDLO also prepared over 400 candidates for the judiciary entrance examination by providing 180 hours of training – equivalent to one semester of law school. IDLO also coordinated an international committee of prominent professors and experts to revise and develop

⁵¹ Jeaniene Spink, 'Education and Politics in Afghanistan: The Importance of an Education System in Peacebuilding and Reconstruction', in: *2 Journal of Peace Education* (2005), p. 195; Alan Smith, 'Education in the Twenty-First Century: Conflict, Reconstruction, and Reconciliation', in: *35 Compare* (2005), p. 373.

⁵² US Agency for International Development, *Afghanistan Rule of Law Project*, <http://afghanistan.usaid.gov/en/Activity.85.aspx> (accessed November 15, 2010).

⁵³ US Agency for International Development, *Afghanistan's First Full-Service Law Library Opened*, <http://afghanistan.usaid.gov/en/Article.386.aspx> (accessed November 15, 2010).

⁵⁴ US Agency for International Development, *Fact Sheet: Rule of Law Program (Formal/Informal)*, <http://afghanistan.usaid.gov/en/Activity.182.aspx> (accessed November 15, 2010).

⁵⁵ International Development Law Organization, 'Evaluation Report for IDLO Italian Funded Projects (2005-2008) for Legal and Judicial Reform in Afghanistan', at p. 23 <http://www.idlo.int/DOCNews/277DOC1.pdf> (accessed November 15, 2010).

basic legal texts for Afghanistan's law schools; provided skills training for provincial legal professionals; and trained law professors and judges on library skills and legal research methodologies.

In late 2010, the MOHE, Kabul University, and the Max Planck Institute formalized an agreement supporting the creation of an LLM program consistent with international standards. The first such program in Afghanistan's long history. With assistance from the Max Planck Institute, the two-year, full-time program will be administered by Kabul Universities's FLPS starting in March 2011. The LLM program focuses on international and comparative legal studies with both a taught and thesis component. The program plans to involve instruction in both English and Dari and draw on the expertise of international and Afghan instructors. The LLM program expects to enroll approximately 20 to 25 graduates from Afghan Law and Political Science Faculties and Shari'a Faculties who have passed entrance examinations in law and English language.⁵⁶ This planned expansion of advanced legal studies opportunities within Afghanistan certainly marks a promising development, but, as with other new initiatives, the ultimate impact of the program remains to be seen.

The University of Washington's Afghan Legal Educators Project is among the most established and respected. It delivers customized study programs covering English; modern civil, criminal and commercial law; comparative customary law and comparative *Shari'a* law to current Afghan law professors and emerging legal educators. The project targets major law faculties in Afghanistan, including the FLPS and *Shari'a* faculties of Kabul, Balkh, Herat, Nangahar, and Al-Biruni universities. Participants study in Afghanistan and at the Asia Law Center of the University of Washington Law School in Seattle. Since 2005, more than forty Afghan legal educators and Deans have participated in the project, including nine women. Four of the participants have either completed or substantially completed the Asian and Comparative LL.M. degree at the University of Washington, and another six to eight will be LL.M. candidates in 2009-2010. The Department of State's Bureau of International Narcotics and Law Enforcement Affairs funds this project.⁵⁷

In 2008, Stanford Law School launched its Afghanistan Legal Education Project (ALEP) to develop innovative legal curricula for Afghan universities. Its main partner institution is the American University of Afghanistan (AUAF), which offers an English language undergraduate education to its students. AUAF introduced

⁵⁶Max Planck Institute, 'Lecturers in Legal Subjects, Legal English and English as a Foreign Language', http://www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project.cfm (accessed January 3, 2011).

⁵⁷Asia Law Center, University of Washington, 'Afghan Legal Educators Program', <http://www.law.washington.edu/Asianlaw/> (accessed April 20, 2009).

its first law class in fall 2008. The class draws heavily upon on *An Introduction to the Laws of Afghanistan*, a textbook drafted by the ALEP and based on Afghanistan's 2004 Constitution and current legal codes. It was the first textbook written on the post-2004 legal system and incorporates interactive learning methods to teach legal reasoning, analysis, and advocacy skills. The ALEP also developed courses and materials on Afghan criminal and commercial law that were taught at AUAF during the 2009-2010 academic year. ALEP plans to translate its materials into Dari and Pashto and disseminate them throughout Afghanistan.⁵⁸

CONCLUSION

Not surprisingly, decades of brutal conflict have taken an immense toll on the legal education system. Additional resources from the government and international donors can contribute much to a more effective legal education system vital to democratic government and the rule of law. Yet, it is equally striking that many of the biggest issues relate to the all too common issues of academic infighting within and between departments and attempts to assert excessive bureaucratic control by government agencies. These problems are very real, but are also able to be addressed without international assistance and provide tangible benefits to Afghan students.

Given the massive challenges facing state-building efforts Afghanistan it is sometimes difficult not to feel hopeless about the country's future. No doubt, much difficult work is required against a harsh backdrop of corruption, lawlessness, and pervasive insecurity. It is important to not have unrealistic expectations. There is no doubt the process will, at best, move in fits of starts over years if not decades. Yet, 'it would be a tragic and lasting mistake for judicial reformers to assume (either explicitly or implicitly) that Afghanistan's 'lack of the rule of law' or 'chronic warlordism' is a problem somehow built into Islamic law or Afghan cultures.'⁵⁹ Past opportunities to establish a stable Afghanistan are gone forever, but Afghans and the international community have an obligation to collaborate to make new opportunities for positive change regardless of the very real difficulties intrinsic to the reconstruction project. The Afghan people deserve as much.

Lawyers are indispensable to consolidating the rule of law; they draft laws, administer justice, shape government policy, inculcate respect for individual rights, among many other crucial tasks. Yet, no one, not even the responsible government

⁵⁸ Afghanistan Legal Education Project, *Winter 2010 Quarterly Report*, 2010, <http://www.afghanistanlegaleducation.com/pubs/ALEP-Winter-2010-Quarterly-Report.pdf> (accessed June 8, 2010).

⁵⁹ Faiz Ahmed, 'Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code', in: *29 Hastings International and Comparative Law Review* (2005), p. 93 at p. 129.

ministries, knows how many lawyers in are actually practicing in Afghanistan. And even less scholarship exists on how Afghan lawyers were educated, what they actually do, or the broader operation of the legal profession. While the court system and the judges have been the subject of renewed scholarly interest since the fall of the Taliban, massive gaps remain in understanding the full contours of the legal profession and legal education. This paper offers a useful snapshot of legal education in Afghanistan. Much more systematic work is needed to truly understand how legal practitioners should be more effectively educated to promote the rule of law.
