

Liberty and the Rule of Law Are Universal Values

Keynote Address at the Stefan A. Riesenfeld Symposium

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Thank you, Chad and Niki, for your kind introduction. Long before attending Boalt Hall, Chad Dorr was the tip of the international law spear serving as an U.S. Navy helicopter pilot. His various missions, including flying in Operation Southern Watch and delivering humanitarian relief to famine-plagued Somalia for Operation Restore Hope, were the result of United Nations Security Council resolutions that gave hope and comfort to victims of tyranny and oppression. Niki Nabavi Nouri, your work in Geneva for a Non-governmental Organization dedicated to promoting human rights has prepared you well for your career as an international lawyer.

It is very special for me to return to Boalt Hall. I knew Stefan Riesenfeld and had the good fortune to be one of his students. He was a great man and a remarkable scholar of the law. I am both honored and humbled to be associated with his legacy and to have been asked by the *Berkeley Journal of International Law* to speak here today. Professor Riesenfeld's impact on Boalt Hall continues through the scholarship and teaching of Professors David Caron and Richard Buxbaum, both past recipients of the Stefan A. Riesenfeld Memorial Award.

I have been privileged to work with several of our panelists, including Dean Hiram Chodosh and Professor Michael Newton, in rule of law and justice sector reform projects both in government and in the private sector. The reputations of our other panelists are well-established. Given what I know of your contributions in the field of international law, it is somewhat awkward for me to be at the podium to receive this prestigious award and not in the audience, honoring any of you. I accept it on behalf of the men and women who are working so hard to establish the rule of law on the front lines in Afghanistan – American JAG officers, diplomats, DOJ lawyers and volunteers as well as our Afghan colleagues who serve as prosecutors, judges and defense lawyers.

Today’s symposium has been excellent and I have learned much from the presentations and discussions. It is also late in the day and I stand between you and down time and dinner, so I will endeavor to keep my remarks brief.

Whether our work was assisting in justice sector reform in Afghanistan, advising governments on humanitarian law obligations in fighting insurgents and pirates in Africa, or resolving State claims against Iraq following the first Gulf War, our goal has remained the same: to promote the rule of law and liberty in States that have not enjoyed such blessings as a result of what Winston Churchill called “the two gaunt marauders—war and tyranny.”¹ I know that in some academic or political circles, phrases such as the “rule of law” or “blessings of liberty” are sometimes derisively considered to be “Western constructs.” I submit that based on my

¹ Winston Churchill, *The Sinews of Peace*, in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 945 (William Safire, ed., updated and expanded ed. 2004) [hereinafter *LEND ME YOUR EARS*].

experience, such principles are the bedrock upon which sustainable justice sector reform initiatives in post-conflict states are built anywhere in the world.

In his July 17, 2003, address to a joint session of Congress, Prime Minister Tony Blair, a fellow lawyer, made an eloquent case for this idea:

There is a myth that though we love freedom, others don't, that our attachment to freedom is a product of our culture; that freedom, democracy, human rights, the rule of law are American values or Western values; that Afghan women were content under the lash of the Taliban; that Saddam was somehow beloved by his people; that Milosevic was Serbia's savior. . . . [O]urs are not Western values.

They are the universal values of the human spirit. And anywhere, anytime, ordinary people are given the chance to choose, the choice is the same: freedom, not tyranny; democracy, not dictatorship; the rule of law, not the rule of the secret police.²

As we engage in justice sector reform efforts based on the rule of law and liberty, it is critical that we do not accept the myth that what we are promoting amounts to some type of Western cultural imperialism. Unfortunately, it is possible for even dedicated lawyers to fall into that trap. Let me illustrate the point with some lessons that I have learned in working with the Department of State, federal judiciary, academia and the private bar in a unique partnership that was developed to promote the rule of law in Afghanistan.

² 149 Cong. Rec. 18,596 (2003) (address by the Right Honorable Tony Blair, Prime Minister of the United Kingdom of Great Britain and Northern Ireland, to a joint session of Congress).

Secretary of State Condoleezza Rice launched the Public-Private Partnership for Justice Reform in Afghanistan in December of 2007. I was asked to serve as the Private Sector Co-Chairman. One of our colleagues here today, Dean Hiram Chodosh, was among the founding members of the Partnership's Executive Committee. Secretary Rice's goal for the Partnership was to marshal the expertise of American lawyers, law school professors and judges to assist Afghan lawyers to "build and reform democratic and independent institutions in their country."³ We wanted a Partnership that would focus on low cost/high impact projects that would fill in gaps in U.S. rule of law aid to the country. To that end, among other initiatives, we have held several training sessions in the United States for Afghan prosecutors, women judges and defense lawyers.

During one of the training sessions for Afghan defense lawyers last year, the State Department hosted a roundtable event, so that the staff of the then-AfPak Envoy, the late-Ambassador Richard Holbrooke, could discuss rule of law issues with the visiting delegation. During the meeting, one of our Foreign Service Officers made a statement about how she felt it was important for America to respect Afghan culture and that the U.S. should begin to channel rule of law funds to the informal justice sector, specifically to the *shuras* and *jirgas*, or 'tribal councils.'

Several of the Afghan women lawyers were visibly upset and one spoke up. This Afghan lawyer explained in no uncertain terms that women are not allowed to participate in

³ Condoleezza Rice, Secretary, U.S. Department of State, Remarks on Public-Private Partnership for Justice Reform in Afghanistan (Dec. 13, 2007), *available at* <http://2001-2009.state.gov/secretary/rm/2007/12/97464.htm>.

jirgas. They are not allowed to defend themselves. Women lawyers are not permitted to represent clients in the proceedings. Female witnesses are prohibited from testifying. At best, a woman facing a civil claim or criminal charge in a *jirga* can have a male relative speak on her behalf while she waits outside. This Afghan lawyer made it clear that Afghan women and many Afghan men did not like the *jirgas* for the reason that women were denied their most basic rights under that system.

Clearly, this brave woman, who had won the right to attend law school and practice her profession as the result of the Coalition liberating Afghanistan from the Taliban, was surprised that an American colleague would suggest that the *jirga* system was best for Afghans. I do not blame the Foreign Service Officer who made the comment. We are faced with difficult circumstances in Afghanistan. We need to speed the transition there and are looking for ways to encourage greater responsibility in self governance by the Afghans. Though well-intentioned, she had bought into the myth described by Tony Blair that Afghans do not want the same basic human rights that we take for granted. We must be sensitive to local cultures and traditions when working overseas, especially in post-conflict states where tensions can run high. Such sensitivity or even humility, however, should not lead us to abandon the core principles that underlie the rule of law and our duty as lawyers when assisting others to build institutions of justice.

In 2009, we hosted a group of Afghan women judges, prosecutors and defense lawyers for a training program in Southern California. To give the Afghans a break from their studies, we arranged for a Sunday outing to the Getty Museum and the Santa Monica Pier. We assumed that our guests would be pleased to receive a private tour of the famous Getty Villa and its

world-class collection of Greek and Roman sculptures and art. We did not foresee how they might react when confronted with realistic portrayals of the ancients in all their glory. Our guests were polite but they did all they could to avert their eyes from the nakedness all around them.

Things seemed to go downhill at our next stop. There is perhaps no venue this side of the bar in Star Wars that is more interesting than the Santa Monica Pier. When we arrived, there was a Code Pink protest against the war in Afghanistan underway and scores of white crosses with the names of fallen soldiers and Marines had been planted on the beach. On the other side of the Pier, beach volleyball games were in full swing. The demographically diverse crowd on the Pier was dressed for a hot day at the beach. Our Afghan colleagues pulled their scarves around their cheeks and tightened their shawls around their shoulders. They were anxious and were clearly concerned about what was in store at the chaotic Pier.

Fortunately, we passed a soft-serve ice cream stand. The ladies had never tasted ice cream and eyed the line. A colleague of mine, Judge Stephen Larson jumped into action and bought twenty chocolate-dipped vanilla cones for our guests. They were thrilled and began to relax. Emboldened, several of the lawyers pointed to the Ferris wheel, others asked for hot dogs, and some learned that carnival food and carnival rides do not always mix well.

On the way home, these Afghan lawyers could not stop talking about the day. The topic was not the “firsts” at the Pier or the art at the Getty. What amazed these women was that so many diverse people could mingle in a small public area—engage in protests, sports, shopping and recreation—and do so in a peaceful fashion. They commented on the fact that they did not

see any police presence. Similarly, the fact that a collection of priceless art could be maintained at the Getty without tanks protecting it was an eye opener. Far from our creating a politically incorrect incident, the day had taught the Afghans, on a profound level, that the rule of law, when ingrained in a culture, is precious. They saw the blessings of liberty on that Sunday in Santa Monica in a way that we could not have conveyed in a court or class room.

While our core principles should not change when we engage in justice sector reform efforts abroad, we do need to be respectful of how other societies and cultures implement them. As a lawyer in private practice, I handle cases in many jurisdictions. I can tell you that practicing in Cook County's trial courts is very different than arguing a case in the Ninth Circuit Court of Appeals. The frenetic Chicago trial courts seem to be a world away from the quiet, solemn federal circuit court houses in Pasadena or over in San Francisco. Nevertheless, American justice is dispensed fairly in both locals.

Similarly, justice can be fairly dispensed in humble circumstances even in post-conflict states. Several years ago, Judge Larson, Ambassador Pierre Prosper and I were asked to observe the proceedings of an *Inkiko Gacaca*, or Grass Court, in a small village north of Kigali in Rwanda. As all of you know, Rwanda experienced a horrific genocide in 1994 when nearly one million people were slaughtered in 100 days. The international community responded by creating a special criminal tribunal in Arusha. That court deals with high-level genocidiers. The Rwandans were left to deal with the rank and file killers and their aiders and abettors. For the lower-level culprits, a system of village courts was instituted. The number of defendants going through the system was staggering, estimates ranged as high as 100,000 people. The only way to dispense justice in a timely fashion was to do so through an informal system.

The *Inkiko Gacaca* we attended was one of four courts in session on a large soccer field that day. The local judges, elected by their fellow villagers, had received some training but were not lawyers. They sat at wooden tables facing the accused and the prosecutor. Villagers and witnesses sat or stood on the grass to watch the trials. Herders with their cattle would wander through the field from time to time causing the courts to take short recesses as the cows passed through.

I will briefly describe what we saw in the case and, since you have exams approaching, I will issue spot for you, using familiar American legal terminology. At the outset of the case, the prosecutor read the charges. *Notice*. The defendant, a former teacher, spoke up that he was the wrong guy and was not present in the village when the alleged crime occurred. He pointed the finger at his successor. *Classic Alibi Defense*. The prosecutor, in turn, handed the court a list of teachers assigned to the village during the relevant time that contained the defendant's name. *Impeachment*. The defendant asked where the list came from and disputed whether it was the original record from the school. *Objection, Foundation; Best Evidence Rule*. A witness testified that he had heard from another person that the defendant was in the village when the alleged offense took place. The defendant asked why the person who claimed that the defendant was in the village the day of the offense was not present to be questioned at trial. *Objection, Hearsay*. The defendant voluntarily told his side of the story. *Testified on own behalf*. Those attending the trial were then allowed to ask questions of the prosecutor, defendant and court. *Juror questions allowed by some courts in U.S.* The judges decided to deliberate and announce their ruling at later time. *Took the matter under submission*. If found guilty, the defendant would likely be

sentenced to some form of community service to improve the lives of the people hurt by the genocide. *Victim compensation.*

In light of the emotional nature of the charges and the location of the proceeding, the decorum with which the judges, prosecutor, accused and audience conducted themselves was admirable. The fact that the process was designed not just to punish offenders but to reconcile communities clearly had something to do with the attitude of the participants. (In fact, reconciliation is a principle that we could incorporate further in our proceedings.) There was a majesty in that grass court that I would equate with any court in which I have practiced. To be certain, it was not derived from the physical infrastructure of the facilities. It emanated from the simple fact that the court followed the principles of fairness that underlie the concept we refer to as the rule of law. Although the rules, environment and culture of the court were unfamiliar to us, we were comfortable in that court as lawyers because the principles of justice being implemented were very familiar to us.

These experiences and others like them have convinced me that rule of law and liberty are universal values—desired by Afghans, Rwandans, Iraqis and others as much as we desire them in America, the UK or the West. Those of us who work in the field seek to establish fair justice sectors in post-conflict states because it is the compassionate and right thing to do for our global neighbors. But there is another reason to be engaged in this cause: our national interests depend upon such work. The spread of freedom is our best defense against tyranny and war.

We are all familiar with Thomas Freidman’s argument that no two countries with McDonald’s restaurants within their borders have ever been in a war *since* gaining a

McDonald's.⁴ Putting Russia's invasion of Georgia aside, the premise that countries advanced enough to support McDonald's restaurants have too much at stake economically to go to war, is really a statement about the rule of law. Having a McDonald's restaurant means a nation's legal framework respects contracts, protects intellectual property and proscribes crime, so that business can operate. In other words, at least some modicum of the rule of law exists in the nations where McDonald's operates.

It is not just economists and lawyers who recognize the positive national security implications arising from the firm establishment of the rule of law in a nation. I was in Kabul in January and was briefed on the progress of the surge. The battlefield news was good. Our soldiers, sailors, airmen, Marines and coast guardsmen are clearing the Taliban from entire provinces. Roads that had previously gone unused are now humming with commerce even in Helmand and Kandahar. But General Petraeus identified in his war plans "ineffective governance and the unwillingness to pursue political inclusion by the Afghan government" (read: rule of law) as being strategic risks to ISAF's ability to win the war.⁵ Accordingly, it is General Petraeus who is one of the biggest proponents of justice sector reform and rule of law programs in Afghanistan. He needs to be able to "handoff" newly-liberated areas to an Afghan police force, Attorney General's office, judiciary and defense bar, which are fair and can deal with crime, terrorism, family law and commercial disputes in a civil, not military, framework.

⁴ See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, at ix (rev. ed. 2000).

⁵ Int'l Sec. & Assistance Force, *Unclassified Briefing, Operation Plan (OPLAN) 38302* (rev. 5), at 14 (Jan. 8, 2011) (copy on file with the author).

Unfortunately, as we know, the news is not so good on this front and we continue our efforts to bolster the justice sector and fight corruption in Afghanistan.

I have spoken at some length today about my belief that the rule of law and the blessings of liberty are rights that all men and women deserve. As we work to assist those people around the world who are seeking to rebuild, strengthen and reform their justice sectors, we should be careful to promote the rule of law and liberty with humility. Judge Learned Hand wrote, “the spirit of liberty is the spirit which is not too sure it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias.”⁶ I believe that Judge Hand’s counsel, which, in essence, is a plea for modesty in the application of the law, is particularly suited to our international work as we rightly dare to proclaim universal values and norms to the world.

Thank you.

⁶ Judge Learned Hand, Spirit of Liberty (May 21, 1944), *in* LEND ME YOUR EARS, *supra* note 1, at 73.