

RULE OF LAW IN AFGHANISTAN – A NEW KIND OF “ALL DELIBERATE SPEED”

BY JUDGE LARRY SAGE AND GARY HENGSTLER

If the strife-torn nation of Afghanistan is to emerge from centuries of isolation, its ability to develop a legal system that merits the confidence of the world will be a determining factor.

That is a big “if,” however. The difficulties of the war effort pale in comparison to the difficulties of establishing the rule of law in a nation where seven out of 10 are illiterate. Add to that a culture that often sees bribery and corruption as a way of life and the necessity of hoarding as a means of simple survival, and the problem is magnified ten-fold.

Nevertheless, civilian contractors assisting in the formation of the new Islamic Republic of Afghanistan are educating legal leaders as rapidly as possible in order to lay the foundation for a legitimate judicial system. The task is daunting because many aspects of the rule of law in Afghanistan are as unique as the extraordinarily lengthy history of conflict here.

One unique aspect of the Afghan Rule of Law is its piecemeal formation. The Afghans wrote and adopted their constitution in 2004, with the help of many international non-governmental organizations (NGOs). While a group of NGOs worked with the Afghans developing their constitution, other NGOs simultaneously assisted with writing the Afghan criminal code – without reading the constitution.

Another unique aspect of the Afghan rule of law is the contrast between new, young Afghan lawyers and the older lawyers who are already part of the legal system. The new lawyers graduate from the reconstituted university, with a bachelor’s degree from the Faculty of Law or the Faculty of Sharia Law. The young lawyers then practice law in a system populated by older, senior attorneys who are not formally trained lawyers. Many are illiterate, reading neither Dari nor Pashto. In addition, the Afghan culture traditionally gives much greater weight and respect to older persons. Fortunately, all Afghan attorneys interviewed for employment describe an intense desire to serve their country and to make it better. All would like to pursue an advanced law degree in a foreign nation, but have stressed that they would return to help better their families and country.

The lack of basic infrastructure is another unique challenge for the Afghan legal system, causing many legally mandated time requirements to be unreasonably short. The lack of security, paved roads, cell phone coverage, public transportation and the unreliability of electricity service puts a tremendous amount of pressure on the police, for example, who are required to turn over a custodial detainee, along with all complete investigation reports and files, to the Saranwal (prosecutor) within 72 hours of arrest.

The difficulties of operating in a legal system with a lack of basic benefits is perhaps best illustrated by the plight of one Afghan primary court judge, who sought judicial training to improve his skills. To attend the training sessions, he had to walk for eight days, each way.

While corruption continues to be a problem in Afghanistan, it is inaccurate and unfair to issue a blanket indictment against all government units or regional areas. Unfortunately, we have concluded that the Afghan Justice Sector Program elements (judges, attorney general’s office prosecutors, Ministry of the Interior police) contain corruption as a rule, with the lack of corruption being the exception.

The chief reason for corruption in the legal sector appears to be low salaries. This issue is being partially addressed by the implementation of civil service requirements, required for an increase in salaries funded by the World Bank. The original salary of a Kabul-based Saranwal in 2007, for example, was \$85 U.S., per month, but it cost \$150 U.S., per month for a single prosecutor to live in Kabul at that time. World Bank assistance will soon raise the salary of a Saranwal to \$450 per month. Hopefully, this will be above the going rate for corruption.

Finally, the current international push in Afghanistan is to create a criminal justice system rooted in the constitution through statutory law. The approach to the civil justice system, however, leans heavily toward Sharia Law. Since this is the Islamic Republic of Afghanistan and the nation of the Afghan people, not the international community, we on the outside have to tread carefully to avoid imposing our system or values on the Afghans.

The United States, through the work and sacrifices of its specialist contractors (some of whom have been killed in the line of duty), is making progress in bringing improvements and needed stability to Afghanistan. This progress, however, is slow and difficult to observe, given our impatient nature and penchant for instant gratification. Both the justice (rule of law) and security sectors must be developed in Afghanistan for any sustainable, transparent and worthy nation building to occur. We and the honest Afghan leaders know where we need to go, and everyone has a great desire to get there.

The situation in Afghanistan today is reminiscent of the aftermath of *Brown v. Board of Education*, when our nation struggled to implement desegregation with “all deliberate speed.” Afghanistan is introducing a new legal system at a pace designed to (1) permit the people to grow comfortable with the changes and (2) be consistent with the government’s ability to administer the new system. This is the Afghan version of “all deliberate speed.” **NL**

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