



The Afghan Supreme Court trainers who helped Sage's team train civilian and military judges.

RULE OF LAW DEVELOPMENT IN AFGHANISTAN

A BRIEF REPORT

BY JUDGE (RET.) LARRY SAGE

Salaam Alaikum!

This report briefly describes a few experiences, along with the lessons learned, in the implementation of the Rule of Law (ROL) mission in Afghanistan. This brief report is based upon two 15-month civilian ROL contractor tours in Afghanistan (Kabul, Herat and Jalalabad). The first included my service as Justice Advisor to the prior Afghan Attorney General, Dr. Abdul Jabar Sabit, the Attorney General's Office (AGO) saranwals (prosecutors) and as liaison to the U.S. military. The second tour included advising the Ministry of Defense (MoD) Chief of Legal, MoD Chief Appellate Judge and the MoD Deputy Minister for Parliamentary Affairs.

Situation:

Afghanistan is a country with centuries of invasions in its past: three Anglo-Afghan wars, provincial areas that both successfully resisted Alexander the Great and delayed Muslim encroachment for centuries and a defeat of Soviet forces wherein 1 million Afghans were killed and more than 5 million fled the country, the majority of whom have yet to return. Afghanistan has had more than 30 years of continuous warfare¹ and just four of its provinces produce approximately 92 percent of the world's heroin. With a new constitution (introduced in 2004) and a national 70 percent illiteracy rate, it is a challenge to assist in implementing international standards to Afghan ROL.

The Afghan (Afghani is not an Afghan individual; rather, it is the name of their money) brings with him an identity, loyalty and decision-making cultural history wherein communal and public aspects take precedence over individual and private aspects.

These aspects range from the most important of family/lineage (Khannawada or Khel), to village/region (Deh or Qarriya), to tribe (Qawmm), then to ethnicity/nation (Watam) and finally to the least important aspect of self (Khood).²

The legal/justice system in Afghanistan has three component parts: traditional (customary) law; Sharia law and state (formal) law. Customary law is currently applied as a means of dispute resolution and collective reconciliation through an informal justice system. Sharia is the legal framework within which the current Afghan public and private aspects of life are regulated: politics, economics, banking, business, contracts, family, sexuality, hygiene and social issues. The state law is based upon the French Civil Code, via Egypt and Turkey.

Mission:

Unlike in Iraq, Afghan ROL mission element responsibilities were originally divided between numerous foreign nations. As some of those nations ran out of money, their ROL elements were redistributed to other countries that would continue to fund them. The justice system (ROL) coordination was originally assumed by Italy. Its activities relied heavily upon training courses and instituting a National Legal Training Center. Originally, Canada provided training courses; Germany provided judicial training; the Norwegian Refugee Council worked land disputes of displaced persons and returnees; the United Nations Development Program provided technical experience in ministries and construction; the United Nations Assistance Mission Afghanistan played the major development coordinating role; the U.S. Department of Justice (USDOJ) supported the new narcotics court and vertical prosecution of larger narcotic cases; multinational military JAG officers served as advisors to the Ministry of the Interior (MoI-police) and the Ministry of Defense (MoD-army), including judicial and anti-corruption areas; and the U.S. Office of Security Cooperation-Afghanistan initially coordinated police training. Other nations addressed various justice sector elements; e.g., defense counsels, bar associations and legal education.

Execution:

While exercising compound familiarization strolls, I located secure Military (MoI-police) Primary Courts and observed them at both the MoI Kabul Headquarters and the MoI Compound. The jurisdiction of these Military Primary Courts encompasses all criminal charges against Afghan police officers only. The narcotics court was constructed on a secure, guarded compound and we observed both narcotics primary and appellate court trials. During both tours, it was observed that some foreign ROL advisors/mentors did not



Prior to initial U.S. departure for Afghanistan, Sage spent 11 days in training. Subjects included everything from law, culture and religion to knife fighting, shooting and high risk driving. On the range in Afghanistan, team members had to re-familiarize themselves with all of the different weapons their escort 'shooter' team members utilized. "Everywhere I went on my first tour (USDOS/INL)," Sage writes, "I was expected to take up the weapon if any of my shooter team that went down (was wounded or killed) and protect the team. The weapons were from all over the world."

understand the Afghan military court system which, being soviet-based, meant jurisdiction over MoI-police (national, uniformed and border) and National Directorate of Security personnel only. The MoD/ANA (Afghan National Army) court system, with jurisdiction over all army personnel up to the rank of colonel, was made separate by law. Though the narcotics court has jurisdiction commencing with larger weights of drugs (e.g., 2 kilos for heroin), the majority of their convictions, if not virtually all of them, are against couriers (mules) and not drug lords.

Criminal trials were predominantly reviews of written reports, statements and investigation/lab results presented to a panel of two to three judges. These included defendant statements and little or no oral testimony was received, though defendants were present and asked if they had any further statements to render. Occasionally, I witnessed Norwegian and Danish defense lawyers advising/mentoring defense attorneys. In the provinces, I observed some trials conducted without saranwals (prosecutors) present and even a few with no defense attorneys present. The official court file,

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documents tied together with yarn, was presented by saranwals, reviewed by the primary court before trial, returned to the saranwal and utilized in the appellate courts. Victims have limited legal rights to initiate criminal prosecutions and both sides may appeal any judgment and/or sentence.

Small but unique aspects of the Afghan law were important in EUPOL training and explained existing conduct and attitudes observed in their Afghan police mentees. Unique legal aspects included: the legal requirement for Afghan police to turn over a custodial defendant and all investigation reports to the AGO saranwals within 72 hours of custody initiation; further police investigation, after 72 custodial hours, cannot be conducted absent AGO saranwal request, direction or supervision.

Another Soviet justice system aspect in Afghan law, which we were able to successfully utilize, was the placement of an AGO saranwal in every governmental department. This AGO saranwal was to ensure that government officials were following the constitution and actually performing their constitutional duty. The AGO saranwal assigned to the Ministry of Prisons was teamed with the NGO justice advisors and correctional/law enforcement officers assisting the Afghans with implementation of a new prison inmate records system. Many inmates were held beyond their court-sentenced release dates due to poor record keeping and/or because their families had not paid for their release. One phrase commonly utilized to describe the Afghan justice system, including among judges, police, prosecutors and corrections officers, was "...Whoever has the body (prisoner) has access to the money." Implementation of a new records system, with AGO saranwal participation, resulted in the release of well over 20 Pol-i-charki prison inmates held beyond their court sentence terms.

"I think the day you start building the war plan is the day you start beginning the postwar plan."³ Why is it different for Rule of Law and corruption planning?

When I initially landed at Kabul International Airport (KIA, if you can believe it!) in 2007, I paid a uniformed Afghan (MoI) police officer \$10 to be allowed to pick up my luggage off the turnstile he was "working." I would not have been allowed to pick my luggage up without the payment of the "Bakhshish" or "Shirini." The level of corruption within the police was rampant and saranwals and police did not trust each other.

Initially, the international ROL mission began without fully coordinated and serious anti-corruption (AC) efforts. Little international AC coordination existed and the Attorney General had no dedicated AC team, no AC training nor any inter-ministry AC coordination. National banking laws (FINTRACA)



Sage and other members of the team lecture saranwals (prosecutors with the Afghan Attorney General's Office) on prosecutorial ethics.



It wasn't all about law; Sage took some time out to try introducing the local kids to baseball.

assisted in identifying potentially criminal transactions, funds from criminal activities, illegal source funds or funds that qualify for prosecution and/or seizure/forfeiture actions. We are talking about hundreds of millions of dollars. Little financial corruption prosecution occurs and NATO's AC efforts currently consist of a new task force initiated in October 2009.

The ROL mission in Afghanistan needs additional international coordination and accountability.

Unlike in the Balkans, there is no Lord Paddy Ashdown or any other single person overseeing ROL program element implementation or progress accountability. And, without accountability in ROL development, including enforcement and personnel replacement actions where deemed necessary, corruption and waste will continue to rule. One result was the consensus that a two-year Afghan police training program wasted millions and millions of dollars without achieving the intended results.

“I had always argued the importance of continuity. I had always mourned the precious time that was wasted, the mistakes that were remade, when humanitarian workers or diplomats or military men rotated out after a few months or a year, just when they were beginning to catch on. Afghanistan, I thought, was starving for continuity.”⁴

Continuity efforts must also reflect progress in program elements and overall program development design leading to sustainability. “Sustainability” is that action which allows for transition of complete ROL responsibility to Afghans. Sustainability is also applicable to Afghan national security forces (army and police) and their capabilities, such that the Afghans can execute their complete security mission with their own security forces. Sustainability must be required, measured, constantly improved and become the cornerstone of all ROL/justice programs.

Initially, one of our self-generated sustainability initiatives was to train our AGO Afghan Legal Consultants (ALCs) with a weeklong “Train-the-Trainer” course: a faculty instructor qualification course. During the second tour, I was asked to be the guest speaker for a “Train-the-Trainer” class graduation of senior MoI police officers. It was an exciting event, as I discovered that the MoI Afghan instructor had originally been a student in our training course years earlier – a course conducted by our ALCs. The instructor hugged me and thanked me again for the trainer course curriculum and for providing his qualification course with Afghan instructors speaking Dari.

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Another lesson learned is that exit briefs containing lessons learned, what worked and didn't work, along with suggestions for future mission program improvements and/or new implementations, should be provided by all departing expatriates. This includes military personnel who serve tours of six months or one year and all overseas civilians, internationals, contractors and UN personnel who, unlike their military counterparts, spend multiple years in country, averaging between two and three years.⁵



Sage and other mentor/advisors to the Afghan Ministry of Defense. Left to right: Col. Thomas Umberg, Judge Larry Sage, Col. Jay Haden.

Logistics:

We lived in fully guarded safe house compounds. During one tour, the house had individual bedrooms, dining facilities and a gym in the basement. We traveled in fully armored vehicles with helmets and vests and were escorted by a shooter/security team. On my second tour, we lived with roommates for eight months and our dining and gym facilities were on the military compound.

In the next decade, the entire Afghan National Budget will not become large enough to even support and maintain the level of security forces we are currently training! Therefore, it will require a generation or more to train Afghans how to pay, collect and manage taxes and budgets, or foreign mineral sales will need to increase drastically.

Command & Control:

Command/supervisory efforts or consolidated responsibilities are needed to overcome the "turf," "ownership" and "careerism" attitudes prevalent in the multination, expatriate humanitarian worker community. As an example of "turf," I was tasked to provide training/instruction for more than a dozen Afghan judges who would be in attendance at one of our provincial AGO training programs. The Afghan



Sage with the team's essential interpreters and translators.

judges, including the illiterate ones, were so willing to get ROL training that they would make heroic sacrifices to gain the training and instruction.⁶ As a matter of professional courtesy, I contacted the NGO assigned judicial training and inquired if they had an ongoing national judicial training program or curriculum which they might wish me to continue or if there were specific legal topics they might wish me to present in order to support/augment their judicial training program. Their first statement to me was "...You can't teach judges."⁷

Command/supervisory efforts are needed to compel sustainability. In my tours, I discovered numerous internationals who were mentoring, advising, assisting and even instructing courses to Afghans (via Afghan Dari and Pashto interpreters) dozens of times, over and over, at salaries far above those earned in their native countries. When I inquired why they hadn't trained Afghan instructors to present their future courses (sustainability), the common reply was that they preferred a few years of job security at the elevated hazardous duty/danger pay salary levels; i.e., "humanitarian careerism."

Conclusion:

This report addresses only a few experiences. We reached many significant milestones, witnessed important events and accomplished many efforts. Multiple friendships with Afghans were developed for life. Within the justice sectors (military and civilian), we found corruption and waste among the judges and prosecutors to be significant; within the military logistics to be substantial; and within the Afghan police to be total.

Rule of Law in Afghanistan is a noble and worthy mission, less than nobly executed. ROL, if correctly designed, coordinated and implemented – including corruption prosecution and major anti-corruption vetting, training and accountability – can work in Afghanistan.

Some observations, upon which I conclude that Afghan ROL can succeed, include: In Afghanistan, unlike a great many other Islamic nations, Shi'a and Sunni Muslims don't kill each other; they even marry each other. Secondly, I have advised in an office of Afghan military officers wherein one general fought with the mujahideen against the Afghan and soviet armies and another was an Afghan army colonel who fought against the mujahideen (an Islamic guerilla fighter). Indeed, these two soldiers may have fought against each other in the same battle, yet, they work together today. Finally, there is the youth of Afghanistan. The young Afghan lawyers and the members of Parliament, the women and men (especially the women), are energetic, dedicated, educated and worthy. I caution, however, that two observed issues must be addressed equally and successfully – security and corruption. If we do not fix corruption in Afghanistan then all Afghan ROL efforts and funding are for naught.

Tashakor. Khuda Hafiz!* ■

*Thank you. God bless!



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Merit and Expert Infantryman's Badge and an inductee to the Army OCS Hall of Fame. Sage also formerly served as the American Bar Association Judicial Division's Judicial Outreach Liaison (National Highway Traffic Safety Administration) and on the executive committee for the National Conference of Specialized Court Judges.

1 *Afghan Smart Book*, TRADOC Culture Center (Dec 2009).

2 *Supra*

3 Jay Garner

4 *The Punishment of Virtue: Inside Afghanistan After the Taliban*, Sarah Chayes (2006).

5 In tour one, I provided an exit brief on my own initiative; the second tour requested an employee survey only.

6 *Judge Walks Eight Days for Rule of Law Training*, USAID Afghanistan Bulletin (Dec 2008)

7 Qualifications: Municipal Court Judge (ret); subsequently commissioned 'Senior Municipal Judge,' Nevada Supreme Court; Masters of Judicial Studies Degree (Trial Judges Major) and adjunct faculty, National Judicial College (since '98).