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POSITION PAPER: GEORGE WASHINGTON UNIVERSITY
AFGHAN LEGAL TRAINING PROGRAM

USAID has indicated an intention to terminate its funding for the George Washington University Afghan Legal Training Program. Such training is extremely important to Afghanistan's development. This paper sets forth the background, showing the needs the legal training program is designed to meet.

Court System

For the purpose of this paper we can say that Afghanistan has two separate legal systems, the Shariat (Islamic law system) and the statutory system. Each has its separate law, courts, and education.

The Shariat system relates chiefly to general matters of individual relationships, such as marriage, contracts, inheritance and general criminal law, and is based on the Hanafi School of Islamic Jurisprudence. In most material respects, this law has not changed since the tenth century. It is administered in more than 200 primary courts located throughout Afghanistan in almost every small town above the smallest village. Appeal from these courts goes to provincial courts located in the capitals of each of the nation's provinces. Appeals from the provincial courts go to the Tamiz High Court in Kabul.

I have reviewed cases decided in these courts and an actual cross section reflects a case involving an attempt by a wealthy landowner to aquire a poor neighboring widow's few acres because there were no land records showing her ownership; an illiterate husband's attempt to prove his marriage when his wife ran off with a provincial governor; and the criminal trial of a man accused of murder. The clear fact is that the vast bulk of the cases handled by these courts are the everyday problems of everyday people. In Afghanistan that means primarily the poor.

The statutory court system relates chiefly to governmental and commercial problems. For example, there are commercial, traffic and civil service statutes, administered through a separate system of courts. These courts are located chiefly in Kabul and have their own system of intermediate courts of appeal. This statutory system is linked to the Shariat system only by being subject to the same judicial administration and by sending appeals to the Tamiz High Court. Also, statutory law is prohibited from conflicting with Islamic law, so many of the codes are basically codifications of Islamic law.

Typical cases in the statutory courts include the case of a vagrant child (juvenile court), a policeman trying to shake down a small shopkeeper (police court), and ordinary business contract cases (commercial court). While a few of the cases in this system involve disputes among the privileged, the majority deal with everyday problems of the people.

Legal Education

Typically, the judges in the two court systems are differently educated. There are two faculties (schools) of law at Kabul University, the Faculty of Shariat Law and the Faculty of Law and Political Science. Graduates of the first frequently go directly to be judges in the Shariat courts and graduates of the second frequently go directly to be judges in the statutory courts. A substantial number of judges have not gone to law school at all but are simply graduates of Islamic high schools (madrassas) where they studied Islamic law.

Public prosecutors, court administrators and Department of Justice administrators are also graduates of the two law faculties. Unlike in America, the two faculties of law are undergraduate schools. Thus, the graduates have, at best, the equivalent of an American bachelor's degree. There is no post graduate legal education in Afghanistan such as the American law school.

Recently my duties have led me to review the educational backgrounds of a public prosecutor (Faculty of Law and Political Science) and a judge (Faculty of Shariat Law). The subjects they studied are instructive. The number of years of study is in parenthesis.

Faculty of Law and Political Science
(four year curriculum)

General Islamic Law (3)
Economics (2)
Introduction to Law (1)
Pushto (1)
Sociology (1)
Constitutional Law (2)
Political History (2)
Torts (1)
Political Theory (1)
Statistics (1)
History of Contemporary Afghanistan (1)
Comparative Constitutional Law (1)
Private International Law (1)
Criminal Procedure (2)
Labor Law (1)
Commercial Law (1)
Company Law (1)
Administrative Law (1)
Private Law (1)
Criminal Law (1)
Islamic Criminal Law (1)
Comparative Criminal Law (1)
Civil Procedure (1)
Comparative Civil Law (1)
Accounting (1)
Property (1)

While the titles of the courses indicate a broad legal education, the courses are taught almost entirely from political science and comparative law viewpoints. In almost no course is Afghan law taught directly. For example, criminal procedure includes British, French and German (but not Afghan) criminal procedure. Islamic law covers the general Islamic law as administered in Egypt and Saudi Arabia, but not Afghanistan. Torts covers the western tort law, but not Islamic tort law. Similar comments could be made about the courses in civil, private and company law. In a major curriculum modification, the Faculty introduced for the first time this year a single course on Afghan law covering the structure of the Afghan legal system.

The curriculum of the Faculty of Shariat Law is quite different. A typical course of study there is as follows:

Faculty of Shariat Law
(four year course)

Islamic Law (4)
Principles of Islamic Law (2)
Civil Law (4)
Logic (4)
Arabic (4)
English (2)
Commentary of Holy Koran (4)
Mohammed's Narrations (4)
Inheritance (1)
Magazine of Islamic Law (1)
History of Islamic Law (2)
Etymology (4)

While the graduate has a good backgound in Hanafi law he knows nothing of the modern law of Afghanistan. Nowhere has the student touched on legislation in any form, modern Afghan statutes, or modern procedural or substantive law. Moreover, the slant of the teaching is as much toward the religious applications of law as it is toward the more secular applications.

Both the Shariat graduate and his brother from the Faculty of Law and Political Science have learned chiefly by rote, copying and memorizing facts from professor's lectures with only the barest minimum of texts and without access to library facilities. The law school libraries are traditionally open only to faculty members. In short the graduates of neither law faculty are trained to practice or effectively apply the law in Afghanistan.

Effect on the Legal System

The deficiencies in legal education have a serious effect on the modernization of Afghanistan. Legislation written by persons not educated in drafting do not work, and several codes are now prematurely under revision. The legal underpinning of the banking system is woefully inadequate and Afghanistan will be totally unable to marshal the resources of its private citizens for development unless the banking law is radically

changed by persons having a sufficiant educational background to make such changes. Such high priority items as land reform, water law and equal rights will not work unless the court system works. It is the courts that will be called on to enforce the rights established by these reforms.

The most important effect of the educational deficiencies is the direct impact on the people through the administration of justice. A hypothetical case will illustrate the problems. A rural farmer is accused of stealing a prize goat from his wealthy neighbor. The prosecutor, a graduate of the Faculty of Law and Political Science, never studied Afghan criminal law or legal drafting, and had only survey courses in Shariat law.

The case comes before a judge who graduated from the school of Shariat law, and who never studied any statutes in school. Both the judge and the prosecutor are supposed to apply the Afghan criminal procedure code, which neither of them have studied. The judge finds reasons under Shariat law not covered by the code to refuse evidence from a witness and to deny the penalty requested by the prosecutor. This is not understood by the prosecutor, whose knowledge of Shariat law is limited to the short survey courses. The judge can not document his position because he does not have a library available to refer to. Moreover, when the judge writes his opinion he does not cite precedent, which is a concept foreign to him. Nor does his opinion explain his reasoning because he has never been exposed to legal reasoning, having been taught by rote, or to legal drafting. This creates, to put it mildly, dissatisfaction on the part of the victim of the crime and the prosecutor. So the prosecutor appeals the case.

Meanwhile, the defendant, without the benefit of counsel (the nearest private attorney lives more than 100 miles away), is relying upon the education, training, fairness and ability of the prosecutor and judge to give him justice. Justice has hardly been served and he also appeals. In addition, if he is not in jail he gets on a bus and comes to Kabul to

petition the Ministry of Justice, in person, for justice.

At Darulamon Palace where the Ministry of Justice sits, he joins scores of other petitioners from all over Afghanistan, complaining about the administration of justice. These people from the provinces, men and women, dressed in their native clothes crowding the halls of Darulamon Palace illustrate the fact that there are serious problems in the administration of justice.

Twice, three times if local rumor is to be credited, in the last two months men from the provinces went so far as to light themselves on fire to call attention to their problems. I witnessed the first of these incidents. While these particular problems did not arise out of a specific malfunctioning of the legal system, it appears clear to me that at least the burning that I witnessed might not have occured if Afghanistan's legal system as a whole were so structured as to give prompt, effective justice to the people of Afghanistan.

In the midst of this overall situation, the chief administrator of the judiciary, who for years has been struggling with the problems of legal education, judicial reform and petitions to administrators outside of the judicial system (extra-judicial appeals) is being told by representatives of the American Government that one of his basic reforms, the education of the members of the Afghan judiciary in legal technology at George Washington University, will not be funded by USAID because, to simplify the reasons to their core, the program's benefits are too indirect, do not help the poor, and help only a small wealthy elite.

Afghanistan already has the basic physical legal structure needed for the country. There is a court system with an actual court located in every populous center of any size. Each province has its court of appeals and there are specialized courts for most major technical problems. There are two law faculties and a heirarchy of legal administrators. Prosecutors are actually present in every subprovince in the

country. But the lack of adequately trained personnel makes the system seriously ineffective.

For example, the Afghan judiciary is extremely concerned with the problem of extra-judicial appeals to the Ministry of Justice, as described above. Therefore, a committee was set up to study the problem. In essence the committee reported that these appeals were improper, time waisting and harmful, but that so long as the level of judicial competence was as it is - "illiterates from the provinces" (a committee member's term), the people needed a safety valve to enable them to get a measure of justice that the courts were not providing. As a result, except for some streamlining of procedure, the system was not substantially changed.

As further illustration of the problem consider a proposed substantive reform like the introduction into Afghanistan of cooperative associations, wherein people band together in a legal entity to help themselves. Under the present legal system such innovative institutions could not function meaningfully. Even if experts draft a sound cooperatives law and Afghan legal experts are specially trained, the personnel of the legal system as a whole are not equipped to handle the novel and complex questions that will arise in the implementation of the new law. Questions of the standing of the cooperative to sue or be sued as an entity, interpretation of the cooperative statute, and rights of individuals against an entity of the state are foreign to the education and training of the majority of primary court judges and practicing lawyers in Afghanistan.

Scope of Reform

Heretofore the need for educational reforms in the legal system has not gone unnoticed either by the Judiciary or the Ministry of Justice. An early key reform was the formation in 1969 of a Judicial Training Program. Each year twenty-five newly appointed judges enter a one-year training course

designed to give the trainee both a theoretical and practical background to being a judge. Courses are given in the Afghan statutory law and in general legal theory. Observations of actual court cases and practical drafting are undertaken. A similar program is under consideration for public prosecutors.

A central judicial law library was just opened for legal research this month and for the first time a system of case reporting for Afghan cases is being implemented.

Seminars to upgrade the educational level of existing judges are being held. Subjects have included a ten day session on writing judicial decisions and enforcement of statutory provisions for the thirty-two presidents of the provincial courts; a week-long seminar of all commercial judges and trainees on subjects such as pretrial conferences; and a seminar for judges on the enforcement of the traffic code.

As indicated above by the introduction this year of a new course in the Faculty of Law and Political Science, the curriculum and approach of the two law schools are gradually changing.

Each of these reforms, however, has a fatal flaw. The administrators, reformers and teachers are themselves products of the system. They also have never been adequately trained. Even knowing that changes are needed, they do not have the educational background to bring the changes about. It becomes an endless circle. The undereducated try to educate the uneducated.

The George Washington University Program

It was to break this vicious circle that Afghanistan and USAID implemented the George Washington University Afghan Legal Training Program. It was anticipated that each June for not less than five years, and longer if possible, eight to twelve Afghan prosecutors, judges and law professors were to go to George Washington Law School for an eighteen-month

program to teach modern legal techniques. Emphasis according to the USAID contract is:

> to improve the competence of Afghan legal personnel so that they may operate more effectively within their present jurisprudence and administer their legal and governmental institutions ... The aim is not to Americanize the Afghan legal system ... to train Afghans to become American lawyers ... to offer them some insight into comparative legal systems, elements of which can be adapted to the Afghan system.

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There ... at George Washington they receive an introductory course in such matters as the case system and legal reasoning, take the regular law school courses in civil procedure and criminal law and procedure, and take special seminars in criminal procedure, modernization of the law of the Near and Middle East, legislative drafting and legal writing. Each of the seminars places an emphasis on Afghan needs. Toward the end of their course, each of the trainees also receives practical experience in a modern legal system by working on actual legal aid cases and related projects.

Perhaps even more important, merely by being at an American law school competing with American students, the trainees get exposure to such elementary techniques as using a library and reading law texts (the majority of existing primary court judges have never once in their career used a law library to research a legal problem), working overtime and subjecting their work to critical review.

The George Washington Program and Afghan Needs

In my view, the basic problem with Afghan justice is primarily one of quality and technique, not of structure or substance. Moreover, those problems of structure and substance (e.g. extra-judicial appeals, and multiple appeals, antiquated land registration and water laws, lack of a legal substructure for banking and cooperatives, etc.,) which I have identified can not be adequately solved until problems

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of quality and technique are solved or at least on the way toward solution.

When they return from George Washington, the trainees will teach at the two faculties of law and in the Judicial Training Program. They will also work as judicial administrators, prosecutors, and judges. Hopefully, by introducing a sufficient number of well trained persons into the legal system, the legal educational level of Afghanistan will improve significantly and people within the country will be able to identify and correct problems. Those voices advocating much needed training reforms will find receptive ears and capable reformers within the system.

In particular, those who are assigned teaching positions will be able to undertake curriculum reforms. Those returned trainees who are assigned to make substantive reforms such as drafting new codes will be better able to understand the workings of legislation. Those who are assigned to be judges in the provinces will better understand the legal problems of the poor. But even more important, there should be a multiplier effect. The teachers will pass on techniques to their students and court administrators and appellate court judges will be able to identify and correct inadequate work by trial judges and prosecutors.

To end this program, now, before even the first group of trainees returns to Afghanistan, will be largely to throw away the money already spent on the program. The relatively small number of participants returning will be dispersed among the two law faculties, the public prosecutor's office, the judicial administration office (which supervises the Judicial Training Program) and the judiciary itself. Only by having a substantial number of similarly trained people at the various levels of the legal system who can interact with each other, understand and support each other when modern legal concepts are used will the program result in a massive change to a system that has roots more than a thousand years old.

A dozen or a score of trainees is not enough. Each additional trainee returning will have a multiplying effect. By supporting and complementing each other's efforts, fifty returned trainees will be much more than twice as effective as twenty-five. In fact, to reach its maximum effectiveness the program should be extended to twenty participants annually for a minimum of ten years.

Finally, by terminating this program, USAID will be ignoring the problems of Afghan nation building. Admittedly, this program will not reform the judicial system in three to five years. But hopefully with a massive influx of well trained personnel in the next five years, the next generation of Afghans, rich and poor, will have a materially better chance of receiving justice in the courts.

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