

The Case for the Defence

Duncan Campbell talks to the British and American lawyers introducing legal aid to post-Taliban Afghanistan

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After tea and biscuits, the shackled defendant is brought in by a guard bearing a Kalashnikov. The senior judge, one of three, sits at a desk at one end of the room, flanked by sofas. The evidence is read out by the prosecution, people wander in and out and, after a brief discussion, the judges make up their minds and deliver their verdict and sentence. A typical day in a criminal court in Afghanistan.

“The whole trial for something like murder can be over in 45 minutes,” says British barrister Noel Casey, who has just returned from Kabul. “What was most noticeable was how informal it was. People would drift in and out of the room and it didn’t have any of the gravity that you normally associate with a trial. It was like sitting in a lounge.”

The football stadium in Kabul may no longer be used for public executions but someone accused of murder can still be tried and sentenced in less than an hour, with no legal representation. Now a group of western lawyers, including British barristers, are hoping to change the nature of Afghan justice with a pioneering system of legal aid for defendants.

The project, Legal Aid Afghanistan (LAA), has been organised by the International Legal Foundation (ILF), a New York-based group, which had its first experience of trying to create a legal aid system in a post war environment in Rwanda in 1997. Now they are hoping to help the Afghan criminal justice system codify its existing laws and introduce legal aid defenders throughout the system.

Casey, a criminal law barrister with chambers in Red Lion Court in London, was one of a team of ILF lawyers from the west acting as mentors and advisers to a team of nine Afghan lawyers. “It has to be seen as part of a wider project trying to establish a functioning criminal justice system,” says Casey who, before he was called to the bar, had jobs in commerce, teaching and music journalism in France, Italy and Britain. “The project sees itself as trying to re-establish the rule of law.”

The organisation has already found itself defending three Americans in what would be a bizarre case in any country: two former US servicemen and a New York cameraman accused of kidnapping and violently interrogating eight Afghans in a bid to discover the whereabouts of Osama bin Laden. The trio, Jack Idema, Brent Bennett and cameraman Eddie Caraballo, were

arrested last July and jailed for between six and eight years after a brief trial. Their lawyers, who included two LAA attorneys, argued that they had not been able to present their cases properly, an argument that will form the basis of their forthcoming appeal.

Idema, a volatile character with a fraud conviction in the US who dresses in military gear and dark glasses, claimed he was acting with the authority of the Pentagon and angrily presented his case to the media. American officials have distanced themselves from him and have made it clear that they have no intention of intervening in the Afghan justice system. The three men are anxious to get out of jail as soon as possible. Last December, there was a shoot-out at the Pul-e-Charkhi jail where they are being held in which four inmates and four guards were killed. The three Americans believe they were targets.

Cases involving locals are not quite so spectacular. One defendant had asked a driver to deliver 15 bags of peas to an address in Kabul but the driver suspected that one bag contained opium and reported it to the police. Another, who was accused of gambling after being found with three sets of dice and two packs of cards during a police raid, claimed he just happened to be in the house by chance. A third was accused of kidnapping boys from a bus stop and taking them over the border into Peshawar in Pakistan.

“Property disputes are often the cause of violence,” says Casey. One of his cases, an attempted murder, resulted from a row over land. He also helped with the defence of a man who shot his wife with a Kalashnikov, and claimed that he had pulled the trigger by mistake.

Legal Aid Afghanistan has its origins in Peshawar back in 2000. The idea was to work with the many Afghan refugees living there so they could adapt their criminal justice system to international standards when they eventually returned home. For many, the return came sooner than expected with the overthrow of the Taliban government in 2001. Now the aim is two-fold: to codify the existing legal system and to introduce the concept of defence lawyers into the criminal justice system.

The project is funded mainly by the billionaire George Soros's Open Society Institute with assistance from the Canadian and German governments and the US Agency for International Development, USAID. Under the scheme, western lawyers visit for two months at a time, working free of charge, with their accommodation paid for by the foundation.

“We think that criminal defence is the engine of justice reconstruction,” says Natalie Rea, a New York public defender and founder of the project. There have been few problems recruiting lawyers from the west despite security concerns. “Basically, it seems lawyers in America and Britain are quite bored so they are ready for an adventure. We get great people and so we are able to select the best.” One of the fundamental principles, she maintains, is that they must take into account the cultural realities of Afghanistan with its long history of traditional laws.

For Casey, one of the main aims is to promote the notion that an accused should have access to a trained defender. There was an existing defence system, but it consisted mainly of people based outside the courts who were available for hire to write out statements for defendants in what is a

largely illiterate country. Barristers in London operated in a similar sort of way 200 years ago, he points out.

The current project is one of two aimed at bringing representation to defendants in Afghanistan. A German group, Medica Mondiale, represents women defendants, including those charged with adultery. While such defendants no longer face public stoning as a punishment, men and women who have sex outside marriage are still liable to prosecution and jail terms. Even unmarried young people having consensual sex can face prosecution.

The Afghan lawyers in the team are all handsomely paid by local standards so the project attracts the highest-quality lawyers. One is a woman who was a juvenile court judge in Taliban times, while two are former prosecutors. Despite the risks for western lawyers operating in the country - three UN workers were kidnapped at the end of last year - Casey says he would be happy to return to the country.

Judges and prosecutors throughout Afghanistan have been receptive to the scheme. Judges say the presence of defence lawyers helps to establish the credibility of the criminal justice system at a time when parts of the country are still unsafe or subject to the control of warlords.

“On the whole, the judges are fair,” says Casey. “If there is no evidence, they will acquit.” But locals expressed incredulity at the notion of a jury system with people plucked from the general public to pass judgment. “They said, ‘Aren’t you undermining the authority of the judge?’”

The death penalty remains although it will be employed much less frequently and jail sentences handed out by the three-judge panel are on a par with those in British cases. Both prosecution and defence can appeal against a trial verdict.

The old public executions are in the past, however. One Kabul hotelier, a professional athlete, recalls having to wait until executions were finished in the national stadium before he could carry on his training. A boxer friend, he said, would run circuits of the stadium undeterred by bodies hanging from the goalposts at each end.

Because of the problems faced by an impoverished country recovering from 25 years of war, trials are rarely straightforward.

Without an effective national communications and transport system, it is impossible to line up witnesses for a western-style trial. “The police will take the statements and the prosecution will read them out,” says Casey. What the new defence lawyers will try to ensure is that defendants have an opportunity to challenge the statements made against them. One of the main issues they face is trying to make sure that hearsay evidence and evidence obtained by illegal searches or following illegal detention are excluded.

The eventual aim of the project is to establish an independent agency of public defenders in Afghanistan. To this end, the ILF has been working with the minister of justice and the Afghan judicial commission. There is one group, however, who will not be able to call on ILF lawyers to

plead their case - the many detainees, more than 2,000 in total, who have been held without charge for interrogation by the US authorities at Bagram air base.