



Afghan Elections and the Rule of Law

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Speaking Notes to Group of 78

May 25, 2004

In October of 2002 I was asked by Jean Pierre Kingsley, the Chief Electoral Officer of Canada, if I would be interested in heading a mission to Afghanistan to assist the UN in elections preparation. Of course I was interested. The previous year, I had completed my Masters of International Law program at the University of Ottawa and I saw Afghanistan as the best opportunity to test some of my theories centered on governance and the rule of law.

In 1998, I had spent some 7 months in Bosnia Herzegovina as Deputy Chairman of the Provisional Election Commission. I had been disappointed, during my stay, to find that the level of expertise in post conflict institution building had been very low, that the international community was operating on a catch as catch can basis, with weak planning and coordination.

I accepted to work on election preparation in Afghanistan because I had followed the events in the Post Sept 11th period and was encouraged to find that a promising Afghan leader, Hamid Karzai, had emerged. The support he was getting from the Americans and the rest of the international community gave me hope. Karzai particularly impressed me with his insistence that his first priority was establishing a national army. My reaction undoubtedly was influenced by my having, as Minister of Defence, analysed the relevance of the military to good governance.

I had come to the conclusion that no rule of law state could function without the availability of the use of force; that the government must have a monopoly over that use, conditional on the military at all times being under civilian control. That reality applied to Afghanistan in spades: its troubles over the centuries were largely due to power being dispersed through the use of force by ethnic and religious warlords in the regions and in Kabul itself.

The Bonn Accord, signed in December of 2001, had ended 23 years of conflict and set the road map to democracy. Its terms were purportedly guaranteed by the international community and provided for the establishment of an interim administration under Karzai, the adoption of a new constitution, reform of the judicial framework, development of a viable public administration and ultimately, the holding of elections, all by June of 2004.

I had my reservations about the timetable but I still felt there was a chance to advance the various dossiers sufficiently to maintain the international community's interest.

I was excited at the prospect of being in Afghanistan, actively engaged in a process that would establish, in a green field, a functioning rule of law system of governance, tested in its viability by democratically held elections.

I landed in Kabul, the Afghan capital on January 16th, 2003. It was my 10th electoral mission. I had experienced the electoral process in many poor countries including Haiti, Mozambique, Mali, Zambia, Cameroon and Pakistan. Afghanistan appeared more impoverished than any other I had seen, except Haiti. During my 8 month stay, I had occasion to visit other regions of the country including the southern city of Kandahar, the seat of the expelled Taliban and the Northern city of Mazar-i-Sharif, the Northern Alliance headquarters during the final stages of the liberation conflict. They were poor as well. Afghanistan as seen from the air presented a stark, dry landscape with vegetation limited to river valleys, few in number and mountain depressions, able to retain moisture. Brown was the dominating colour. Water evidently was in very short supply.

Kabul itself sits on an elevated plateau, some 6,000 feet above sea level, surrounded by brown mountains, denuded of vegetation. All public buildings of any beauty or value in the capital had been destroyed by the warlords after the departure of the Russians in 1989. The remnants of protracted conflict were evident everywhere. The population, although living in unacceptable conditions, were already demonstrating marvelous resilience and determination. The relief felt following the departure of the Taliban was palpable and their gratitude to the new interveners was expressed at every opportunity.

Afghans followed developments closely but were mystified by the concepts of human rights, democracy and the rule of law. Theirs is still a tribal, ethnic and Islamic society with few central, structured, institutions of governance. The ongoing love and respect for their King, Zair Shah, even though he has no official role nor function, exemplifies the immense importance accorded personal leadership by Afghans. Public order, such as it exists, would appear to be assured by structures emanating from traditional tribal sources, and from compliance with the direction given by Islamic and ethnic leadership.

While there are mechanisms for the settlement of competing interests, these are *internal* to a recognized collectivity. Conflicts as *between* collectivities often are settled through the use of force. Within the urban context, accommodation, dictated by necessity, is the rule. City traffic is the best example. There are now thousands of cars plying the streets and avenues of Kabul and the few highways of Afghanistan. There are very few traffic lights and they are ignored. Cars advance by occupying such opening in the road, on either side of an assumed median, as may be available in the driver's chosen direction. The more aggressive drivers are the more successful. Yet there are few accidents.

Police are increasingly present to regulate the process and will mediate, on the spot, any traffic mishap, most often to the satisfaction of the parties who know that there is no other forum to settle their differences.

Leadership, as shown by the phenomenon of the surviving Shah, is a key factor within Afghan society. Each collectivity, whether an extended family, a clan, a tribe, an ethnic or religious community, a political entity such as a village or a city, needs a visible, identifiable leader. That leader, as a person, is the center of power for that community. Power is thus personalized as opposed to being institutionalized as it is in Canada. To give you an example: I was most interested in political parties and how they functioned in Afghanistan. I visited as many as I could. With most, I was invited to meet the leader. The belief was that such a meeting should satisfy my requirements. There was surprise when I made inquiries about lists of membership, constitutional documents, organizational charts, funding sources etc. Not once, was any document produced, for the simple reason that they did not exist. The only exception was the Communist Party and their documents were confidential for historical reasons.

On one occasion a Party did show me a list. I was taken to a side room by a senior Party official. The highly secret list was that of the armed commanders who could be called upon from time to time to apply the required force to achieve the desired political ends. The Party official thought that I would be mightily impressed with their party's consequent political power. I might add that the allegiance of all those commanders owed a great deal to the perceived personal power wielded by the party leader.

Although my role, in Afghanistan was to assist in election preparation, I felt strongly that the country could not proceed to hold elections unless it had put in place sufficient elements of a functioning rule of law system of governance to assure an acceptable level of security. In my view elections are the negotiation of a social contract between the governed and those to whom power is to be entrusted. You can't negotiate such a contract under duress. Security is a prerequisite for the campaign and for the actual vote. Too often, in previous missions, I had witnessed premature elections detrimental to institution building. The underlying belief in those cases was that if the international community could organize and hold elections, democratization would be accomplished by that very fact. It followed that the soonest elections could be held, the earliest everyone could go home.

Such an attitude works against the best interest of the host country. First efforts need to be directed to establishing a secure environment through the use of the military, the police and the rule of law. We tend to forget that in our societies, democracy followed the rule of law by some centuries. Democracy could not have functioned without the preexistence of rule of law institutions including the police, the judiciary and indeed, the military.

Therefore, when I assumed my responsibilities in Afghanistan, I felt an obligation to follow not only the elections preparation process but the ongoing effort by the Afghans to rebuild their country and its system of governance with the assistance of UNAMA (the United Nations Assistance Mission in Afghanistan). I therefore met with decision makers and influential observers within the national and the international frameworks, including the former King, Zair Shah, President Karzai, senior members of the Afghan government, governors of various regions of the country, war lords and local commanders, Afghan

women's groups, American and European Commission representatives, political parties, religious sects, tribal leaders, journalists, in short as many as would see us.

My purpose was to ascertain the state of play and to offer whatever help might be required. What soon became obvious was that the holding of elections as scheduled for June of 2004 was going to be very difficult. A review of the Bonn Accord was enlightening. It readily identified the issues to be addressed to create a viable state, but it failed to recognize the complexity of the defined process and the time required. Consequently, it provided a highly unrealistic schedule.

The view generally held by the interested parties with whom I discussed these issues was that the Accord's architects had been overly influenced by an American requirement to finalize the process in time for the Presidential elections of November of 2004. Successful elections in June of that year would put an elected Karzai in the Presidency and permit the Americans to return home well before November.

The Bonn process had an initial success in the holding of a Loya Jirga, or an assembly of notables in June of 2002, 6 months after Bonn to confirm Karzai as the interim leader, within the set schedule. However it encountered difficulty with other stages of the Bonn Process including getting a functioning Judicial Reform Commission and a Public Service Commission as anticipated by Bonn. In fact the Judicial Reform Commission had to be recast and is still a failure. There is no judicial capacity, in Afghanistan to enforce a workable rule of law. As for the building of an effective public administration, efforts are scattered, uncoordinated and under funded with no evidence of any strategy being followed.

As required by Bonn, a constitutional commission was put in place to produce a draft constitution. Internal and petty wrangling between its members delayed its work. The body was subsequently enlarged and charged with public consultation. The purpose was to have an adopted constitution in the fall of 2003 so that the preparation for elections could start early in 2004.

A new constitution has now been adopted. But the whole constitutional process was flawed. It was rushed, the consultation process was for show as was the Constitutional Loya Jirga adopting the document.

A workable constitution needs to set down the structures for the effective exercise of power by the state. And if the power structure in existence prior to the constitution being adopted is not desirable, it must be changed, such changes being reflected in the constitution. That was not done. Power is exercised now as it was before the adoption of the constitution. And I am not aware of any intention by the power brokers, the so-called war lords, to accept the new constitutional order.

Elections are seen, by President Karzai, and the Americans, as a means of somehow legitimating the paper constitutional order. It won't happen. Security forces are needed to effect the required changes in how power is exercised today in Afghanistan, so as to

ensure compliance with the constitutional order. There are insufficient forces available, either national or international to do so. And there is no visible political will to increase the numbers.

If those exercising power do not respect the constitution, the constitution is not worth the paper it is written on. Elections by themselves will not suffice to make things right. On the contrary, they will hinder progress towards the rule of law. A working constitutional order is essential to the rule of law.

A constitution that is ineffective in setting down how power is to be exercised and by whom, will not be respected. That was the experience in Afghanistan in each of the 8 previous attempts at implementing a new constitution. If a constitution is not respected, there is no rule of law. There is but the rule of force.

Power abhors a vacuum and the lack of a military presence under the direction of Karzai and his government anywhere in Afghanistan including in Kabul tends to create such a vacuum. In Kabul the International Security Assistance Force under NATO command provides Karzai with a viable security apparatus. It supports within Kabul the government's development of a system of governance including a paper constitution. Outside Kabul, the power vacuum has been filled by war lords, sometimes with American Coalition Forces support. They rule by the gun and have developed their own way of running things, using whatever instruments are effective in controlling the population and providing their brand of security, for a price.

Some war lords, strategically located close to border points, able to control bridges and roads, collect duties and spend those revenues as they see fit, to build loyalties, private armies or for their private comfort and sometimes, with considerable fanfare, for public purposes. They may even send a few millions to the Karzai treasury, when sufficiently pressed. Others are engaged in growing poppy or protecting farmers growing the stuff. Poppy culture exarcebates, in many ways the political dilemma facing Karzai.

The National Army, at 7,000, has reached one tenth of its intended strength and is losing soldiers to desertion or to casualties as it attempts to establish order in various regions of the country.

I do sound negative and I regret that. When I left Canada for Kabul, I expected that the situation in Afghanistan had been studied and that a realistic, well funded, plan of action was in place. What I discovered was an absence of planning and a shortage of resources in nearly all areas related to governance, including the holding of elections. Only the military and the United Nations and various NGOs in their humanitarian relief activities, including refugees, showed their expertise and professionalism.

After 9/11, security and political imperatives brought the Americans to Afghanistan. They took 1 month to prepare their invasion. They didn't think about the post conflict period. Once there, after the defeat of the Taliban, they didn't know what to do nor how

to do it. But then, neither did the United Nations and other interested members of the International Community, including Canada.

I will go further: there is *still* no capacity anywhere including in the United Nations, to plan an effective, comprehensive strategic approach to post conflict nation building. Afghanistan is the living proof. Haiti is even more recent evidence. It is as though there was no understanding of the rule of law, what it is and what institutions are required to make it function. As Afghanistan is proving now, and Iraq will soon demonstrate, without the rule of law you cannot hope to establish a working system of governance, much less a viable democracy. Holding elections just won't do it.