

# **REFORMING AFGHANISTAN'S BROKEN JUDICIARY**

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## REFORMING AFGHANISTAN'S BROKEN JUDICIARY

### EXECUTIVE SUMMARY AND RECOMMENDATIONS

Afghanistan's justice system is in a catastrophic state of disrepair. Despite repeated pledges over the last nine years, the majority of Afghans still have little or no access to judicial institutions. Lack of justice has destabilised the country and judicial institutions have withered to near non-existence. Many courts are inoperable and those that do function are understaffed. Insecurity, lack of proper training and low salaries have driven many judges and prosecutors from their jobs. Those who remain are highly susceptible to corruption. Indeed, there is very little that is systematic about the legal system, and there is little evidence that the Afghan government has the resources or political will to tackle the challenge. The public, consequently, has no confidence in the formal justice sector amid an atmosphere of impunity. A growing majority of Afghans have been forced to accept the rough justice of Taliban and criminal powerbrokers in areas of the country that lie beyond government control.

To reverse these trends, the Afghan government and international community must prioritise the rule of law as the primary pillar of a vigorous counter-insurgency strategy that privileges the protection of rights equally alongside the protection of life. Restoration of judicial institutions must be at the front and centre of the strategy aimed at stabilising the country. The Afghan government must do more to ensure that judges, prosecutors and defence attorneys understand enough about the law to ensure its fair application. Reinvigoration of the legal review process and the adoption of a more dynamic, coordinated approach to justice sector reform are critical to changing the system. Justice is at the core of peace in Afghanistan and international engagement must hew to the fundamental goal of restoring the balance of powers in government and confronting governmental abuses, past and present. Urgent action is also needed to realign international assistance to strengthen support for legal education, case management, data collection and legal aid.

Legal institutions and legal elites have been deeply affected by the political paroxysms of more than three decades of conflict. The judiciary has been scarred by a legacy of political interference by both Afghan powerbrokers and external actors. Judicial independence has, as a result, been one of the main casualties of Afghanistan's protracted

war. The courts, for years, have suffered manipulation from an executive branch that has abused the law to fortify its position in the ongoing tussles between the secular and religious, the centre and periphery, the rich and poor. The Afghan government's historic inability and persistent unwillingness to resolve conflicts between state codes, Islamic law and customary justice embedded in the legal culture have further destabilised the country. The critical leverage provided to fundamentalists in the constitution has concurrently had a deep impact on the evolution of legal institutions.

The strong presidential system adopted under the 2004 constitution has only exacerbated the weakness of judicial institutions. The lack of a clearly defined arbiter of the constitution has undercut the authority of the Supreme Court and transformed the court into a puppet of President Hamid Karzai. Given the wide range of powers granted the president and lack of checks and balances in the system, it is unrealistic to expect change will come from his quarter. The international community, meanwhile, has done little to create incentives for political restraint and accountability within the executive. The National Assembly must, therefore, consider its options for triggering constitutional review either through convening a constitutional Loya Jirga, or grand assembly, or through the adoption of a constitutional amendment requiring the initiation of a full-scale review of the founding document by 2014.

Friction between various stakeholders over the priority and content of rule of law reforms is blocking progress. There is a strong need to improve the legal review process by building capacity at the ministry of justice, with combined input from Afghan officials and expert international advisers. At the local level, the government and international community must deliver on the promise made at the 2007 rule of law conference in Rome to support better coordination between primary courts in the provinces and districts and high courts in Kabul.

Dysfunction at the provincial level has long been a hallmark of a system unable to resolve tensions between its highly centralised organisation and the diffusion of the population across difficult and often inaccessible terrain. Over the years, the Afghan government and the interna-

tional community have endeavoured to resolve this problem, most notably through the introduction of regional trainings for Afghan judges and prosecutors. This is not enough. After nearly a decade of financial pledges and promises, neither the government nor the international community have a full picture of the demand for legal services at the provincial and district level. Province-by-province assessments of the courts, attorney general's office and ministry of justice, including a focused look at caseloads, settlement and conviction rates, shortages in personnel, materiel and infrastructure should be regularly conducted and made available to the public. Developing a concrete, dynamic understanding of deficits in the system is the first step toward crafting an effective strategy for reform.

In its desperation to find quick fix solutions, the international community, and the U.S. in particular, has begun to look to the informal justice sector as a means to an undefined end. This is problematic for a number of reasons. While it is true that the use of traditional Afghan jirgas and shuras to resolve disputes, particularly in rural areas, is so widespread that it cannot be ignored, the current government is a long way from having the capacity to integrate the decisions of such councils into the formal system. Their multiplicity, the plurality of customs and the erosion of the social order during years of violent conflict have degraded the positive influence and real authority of such jirgas. Moreover, the exclusion of women from these informal judicial councils poses serious problems for the state's constitutional obligation to defend the principle of equality under the law.

International involvement in this sphere will do little to enhance rule of law in the near term and it may, indeed, sow more confusion over the state's legal authority and the real objectives of coalition partners. The task of monitoring and evaluating such councils has meanwhile fallen to a private U.S. contractor with an uneven track record in implementing rule of law programs in this and other countries. Outsourcing a task as delicate as monitoring the complex politics of tribal justice to a contractor with limited knowledge of the region is to nobody's benefit.

The U.S. and its NATO allies must also acknowledge that stabilisation will depend as much on the legitimacy of state authority and re-establishment of the rule of law as it will on rebuilding Afghanistan's police and military. To restore its legitimacy, the Afghan government will have to work much harder to eliminate corruption, ensure fair trial standards and curtail arbitrary detentions. Extrajudicial actions by the U.S. and its coalition partners against Afghan citizens have also distorted the justice system and are fuelling the insurgency. U.S. and NATO actions must conform to national and international laws, including an end to arbitrary detentions. There should be no expectation that Afghan officials and institutions will realign the

justice system to conform to international norms until U.S. and NATO allies adjust their own policies and practices.

## **RECOMMENDATIONS**

### **To the Government of Afghanistan:**

1. Initiate a serious, comprehensive review of the constitution with a view to expanding political participation, enhancing greater balance between the judiciary, legislature and executive and clarifying the roles of the courts and attorney general.
2. Prioritise investment in improving training for legal professionals – including defence attorneys – by revising training curriculum to add a more substantial focus on the role of defence counsel, constitutional law, criminal procedure, ethics and international law.
3. Give greater support to merit-based appointment processes for senior positions within the judiciary such as the attorney general, Supreme Court chief justice and justice minister by articulating and adhering to requirements for standards of professionalism, educational qualifications and term limits.
4. Improve the legal review process by:
  - a) increasing staffing in the justice ministry's legal drafting department, providing intensive training for current staff and hiring more legal interpreters/translators skilled in Pashto, Dari and English; and
  - b) adopting a time-sensitive strategy for the review and enactment of crucial laws such as the criminal procedure and penal codes.
5. Adopt legislation to protect the judiciary from outside interference, ensuring the security of judicial staff and witnesses and that additionally outlines enforceable punishment for those implicated in the obstruction of justice.
6. Conduct province-by-province assessments of the courts, attorney general's office and ministry of justice with a focus on caseloads, appeal, settlement and conviction rates, and gaps in personnel, security, technology and infrastructure.
7. Adopt and implement a strategy for strengthening the defence bar and ensuring legal aid for the indigent.
8. Clarify criteria for corruption investigations and harmonise policy on pursuing sensitive cases involving high-level officials; and abolish the High Office of Oversight and reinvest resources allocated for anti-corruption across institutions, such as the attorney general's office, ministry of interior, ministry of justice and the Supreme Court.

**To the Attorney General's Office, Supreme Court and Ministry of Justice:**

9. Develop institutional rule of law coordination by:
  - a) establishing an inter-agency commission for rule of law policy and justice programs; and
  - b) clarifying institutional lines of authority with special emphasis on enforcement and coordination mechanisms for criminal investigation, due process and detention.
10. Conduct an assessment of the Supreme Court's administrative capacity with a view to realigning personnel management more broadly across judicial institutions.
11. Bring criminal procedure and penal codes in line with international standards of due process.
12. Institute pending pay-and-rank reform measures for prosecutors and other judicial staff.

**To the International Community, especially the U.S. and NATO Partners:**

13. Relocate rule of law support at the centre of the counter-insurgency strategy by:
  - a) realigning financial assistance to reflect greater balance between spending on building up national security forces and supporting judicial reform with a view to strengthening institutions in the formal justice sector;
  - b) limiting the use of private contractors to implement rule of law programs and committing to a long-term strategy of local capacity building by relying on Afghan and international NGOs with proven track records for programming support; and
  - c) immediately discontinuing funding for foreign-directed programming in the informal justice sector that attempts to create artificial links with the formal justice sector while clearly differentiating support for the Afghan state to craft its own policy on dispute resolution mechanisms.
14. Support judicial reform by assisting the government in:
  - a) implementing more dynamic personnel recruitment programs and improving training of justice sector staff, with an emphasis on support for translation, publication, record keeping and case management skills;
  - b) funding and devising a strategy for implementing regular assessments of the justice sector and disseminating the results publicly;

- c) providing greater numbers of civilian advisers to regional judicial institutions for longer periods and ensuring that advisers have a proven background in the law;
  - d) improving infrastructure, to include construction of judicial centres, prisons and secure accommodation for senior judicial staff;
  - e) providing funding in support of a stronger national defence bar and providing legal aid for the indigent; and
  - f) directing funding toward cross-institutional pay-and-rank reform, prioritising implementation of proposed salary increases for prosecutors and generating financial support for a public defenders' office.
15. Eliminate distortions created in the justice system by secret detentions, extrajudicial proceedings and excessive use of force by bringing U.S./NATO detention practices and policies in line with international standards.

**Kabul/Brussels, 17 November 2010**

## REFORMING AFGHANISTAN'S BROKEN JUDICIARY

### I. INTRODUCTION

Afghanistan's legal system is broken. Judiciary institutions are dysfunctional, lacking basic capacity and starved of resources.<sup>1</sup> Legal institutions are overburdened with cases while the majority of judges, prosecutors and judicial staff have had little or no training. Most acquired their positions through political connections and generally lack the education required to perform their duties.<sup>2</sup> In many parts of the country, judges and prosecutors rarely, if ever, show up to work. Courts are either non-existent or are in disrepair. The majority of Afghans view justice institutions as the most corrupt in the country.<sup>3</sup> Marginalised by poverty, battered by corruption and lacking access to justice, many living in areas beyond government reach feel their only recourse for political and legal redress is the Taliban. Festered grievances at the local level are reinforced by injustice, entrenching a culture of impunity that has become a key driver of the insurgency.

Weak rule of law has had a decisively destabilising effect. Afghanistan is now ranked as the second most corrupt country in the world.<sup>4</sup> Kabul's failure to properly enforce

laws and adopt rigorous regulation has impeded economic development, slowing the pace of reconstruction, discouraging foreign investment and sharply curtailing the government's ability to pull the country out of the mire of poverty it has been stuck in for decades.<sup>5</sup> The confusing patchwork of laws adopted over three decades of conflict combined with a multi-layered system of jurisprudence that contains elements of secular, Sharia and customary or traditional tribal law has confounded investors and challenged international legal standards.<sup>6</sup> Commercial arbitration generally takes place in a legal vacuum, if it takes place at all, leaving the settlement of property and land disputes to the whims of a system seized with endemic corruption.

The international community has paid much lip service to the importance of the rule of law but resource allocation has been miserly, funding plans unrealistic and implementation weak. Italy was initially charged with leading reform of the judiciary under the "lead nation" framework, but it lacked the resources to fill the massive gaps in the system on its own.<sup>7</sup> With the Afghan government estimating in the early years of international engagement a \$600 million shortfall in funding to rebuild the justice sector over twelve years,<sup>8</sup> the burden on any single country would have been near impossible to meet. Yet, the international community did not recognise this problem

<sup>1</sup>For earlier Crisis Group analysis of Afghanistan's judiciary see Crisis Group Asia Report N°45, *Afghanistan: Judicial Reform and Transitional Justice*, 28 January 2003.

<sup>2</sup>"Strategy of the Supreme Court with Focus on Prioritisation", Supreme Court of Afghanistan, 2007, p. 3.

<sup>3</sup>According to the July 2010 National Corruption Survey conducted by Integrity Watch Afghanistan, the amount of bribes paid by Afghans to government officials has more than doubled in the last three years to an estimated \$1 billion. One in seven Afghans surveyed reported paying bribes to government officials with the majority of respondents reporting that they perceive justice and security institutions to be the most corrupt. An estimated 32 per cent perceived the ministry of justice as being among the top most corrupt. Similarly, an Asia Foundation 2009 survey of Afghan citizens found that only about half the respondents agreed that state courts were fair and trusted; 48 per cent said state courts were corrupt compared to other dispute resolution mechanisms; 51 per cent of those who said they had contact with the court system said they had encountered some form of corruption. "Afghanistan in 2009: A Survey of the Afghan People", The Asia Foundation, October 2009, p. 89.

<sup>4</sup>Transparency International ranked Afghanistan 179th out of 180 countries in its 2009 Corruption Perceptions Index, second

only to Somalia. In TI's 2010 Annual Corruption Perception Index, Afghanistan once again had the second worst ranking. [www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/cpi\\_2010\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/cpi_2010_table); [www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

<sup>5</sup>"Fighting Corruption in Afghanistan: Summaries of Vulnerabilities to Corruption Assessments", World Bank, May 2009, p. 2.

<sup>6</sup>"2010 Investment Climate Statement-Afghanistan", Bureau of Economic, Energy and Business Affairs, U.S. Department of State, Washington DC, May 2010.

<sup>7</sup>The "lead nation" approach to reconstruction was developed during a series of international conferences on Afghanistan in 2002, including the International Conference on Reconstruction Assistance to Afghanistan in Tokyo on 22 January, at which Italy assumed responsibility for supporting judicial reform.

<sup>8</sup>"Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan", Ministry of Justice, Kabul, May 2005, p. 6.

early on; and to date only a fraction of the funding needed for the justice sector has been allocated.<sup>9</sup>

Italy was initially allowed to stumble forward despite a paucity of expertise and resources and a failure to secure buy-in from Afghans.<sup>10</sup> Several Afghan lawyers pointed to Italy's role in crafting the Interim Criminal Procedure Code for Courts as one of the international community's most egregious failures to accommodate and incorporate Afghan concerns.<sup>11</sup> Since a call for vigorous change at the 2007 Rome conference on rule of law in Afghanistan, legal reform continues to move at a glacial pace. It took nearly three years, for instance, to review and revise the criminal procedure code. Courts, meanwhile, have been operating under an outdated penal code that is 34 years old. The international community's recent shift to a more multi-lateral approach to judicial reform has resulted in some improvements,<sup>12</sup> but many timelines and benchmarks for reform remain unmet.<sup>13</sup>

The result is a highly inefficient justice system that has left judges, prosecutors and judicial staff susceptible to outside influence and interference. Justice, as many Afghans view it, is little more than a "market commodity to be bought and sold".<sup>14</sup> While judicial institutions have languished, criminal powerbrokers have flourished. Neither the Afghan government nor the international community has provided adequate security to those who work in the sector.<sup>15</sup> Legal professionals daily fall prey to violence

perpetrated by government officials, criminal networks and local commanders, with an estimated 30 to 40 judicial personnel killed since 2002, including fifteen judges.<sup>16</sup> More must be done to provide security for justice institutions as well as to insulate judges from intimidation.

At the highest level of the judiciary, the Supreme Court has emerged as both bully pulpit for Islamist fundamentalists linked to Saudi-backed jihadist Abd ul-Rabb al-Rasul Sayyaf<sup>17</sup> and proxy ballot box for Karzai, supporting the president with little regard for the constitution, legal codes or the principle of the separation of powers. This culture of political interference has permeated every level of the judicial system, wreaking havoc at the primary and appellate court level where the vast majority of cases are lodged. Sayyaf's long-time associate, former Supreme Court Justice Fazl Hadi Shinwari, an ardent Islamist, appointed dozens of unqualified mullahs to the bench and parcelled out judicial staff posts to his cronies. Although Shinwari's successor, Chief Justice Abdul Salam Azimi, has made an effort to clean house by removing many Shinwari appointees since he took office in 2006, a substantial number remain.

The fundamental dissonance between the three legal foundations – secular statutory law, Islamic Sharia law and customary tribal law – lies at the heart of this dysfunctional judicial system. Deep tensions between concepts of adjudication and reconciliation, retribution and restitution are embedded within these competing systems of jurisprudence, complicating the national discussion on the politics of justice. Legal authority has been historically fickle, fluctuating between the formal state structure and informal structures, particularly during the three decades of civil war. There is also a longstanding tradition of Afghan powerbrokers abusing the law for political ends.<sup>18</sup> The

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<sup>9</sup> Although Afghan officials estimated that around \$190 million would be needed to rebuild the judiciary from 2002 to 2006, the judiciary received only 2 to 4 per cent of the total allocated for security sector reform. Matteo Tondini, "Rebuilding the System of Justice in Afghanistan: A Preliminary Assessment", *Journal of Intervention and Statebuilding*, Vol. 1, No. 3 (November 2007), p. 5.

<sup>10</sup> Matteo Tondini, "Justice Sector Reform in Afghanistan: From a 'Lead Nation' Approach to a 'Mixed Ownership Regime'?" *Transitional Studies Review*, No. 15 (2009), p. 665.

<sup>11</sup> Crisis Group interviews, Kabul, June-July 2010.

<sup>12</sup> Notably the strengthening of stage-training for judges under the direction of the International Developmental Law Organisation (IDLO); nascent efforts to organise a case management system under the leadership of the U.S. Justice Sector Support Program; and the establishment of a defence attorney's bar association in 2009.

<sup>13</sup> Kabul and the international community agreed in 2006 to a systemic review and the adoption and implementation of reforms by 2010, aimed at eliminating corruption, and addressing the lack of due process and miscarriage of justice. This process is far from finished. "Governance Rule of Law and Human Rights", Annex I, 2006 Afghanistan Compact.

<sup>14</sup> "Assessment of Corruption in Afghanistan", USAID, 15 January-1 March 2009, p. 8.

<sup>15</sup> "Actions needed for a more strategic approach to U.S. judicial security assistance", Special Inspector General for Afghanistan Reconstruction (SIGAR), Audit 10-3, 18 December 2009, p. 2.

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<sup>16</sup> Crisis Group interview, Abdul Salam Azimi, Chief Justice, Supreme Court of Afghanistan, Kabul, 10 July 2010.

<sup>17</sup> Sayyaf, an ethnic Pashtun from Paghman province, heads the Ittihad-e Islami Baray-e Azadi Afghanistan party, also known as the Islamic Union for the Liberation of Afghanistan. Educated in the Sharia faculty of Kabul University and a graduate of legal studies at al-Azhar University, Sayyaf has been accused of committing war crimes during the 1990s, including the massacre of dozens of ethnic Hazaras and Qizilbash in Kabul. For more on Sayyaf's background see "Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity", Human Rights Watch, July 2005; Ahmed Rashid, *Descent into Chaos: How the War against Islamic Extremism Is Being Lost in Pakistan, Afghanistan and Central Asia* (London, 2008); and Steve Coll, *Ghost Wars: The Secret History of Afghanistan and Bin Laden, from the Soviet Invasion to September 10, 2001* (New York, 2004).

<sup>18</sup> Sari Kouvo, "State-building and Rule of Law: Lessons from Afghanistan?", NATO Defense College, Research Division, Rome, March 2009, p. 16.

outcome has been a labyrinth of laws that bear the imprint of the country's political convulsions since the 1970s. From the constitution to civil codes, lines of authority are blurred, and the ensuing disorder has exacerbated centre-periphery frictions, with perceptions of the formal justice sector often clashing with perceptions of the informal.<sup>19</sup> Attempts to untangle the deep-seated contradictions in Afghan law have frequently been thwarted by the political obfuscation of Afghan powerbrokers and dubious input of international stakeholders.

The lack of clarity over established authorities for detection and discovery has made the task of investigating crime difficult, muddled basic procedures and expanded opportunities for corruption.<sup>20</sup> While the critical link between police and prosecutors has been historically weak, faltering international attempts to strengthen the working relationship between the two has further weakened the rule of law. Indeed, as one veteran Afghan prosecutor put it: "There was a time when I was able to rely on my personal relationships with police to make sure a case was properly pursued, but today the morality of the police has declined so much that there is no way to get a government police officer to even serve people with a summons". The prosecutor continued, "When a police officer shows up at someone's house with a summons, all that is needed is a couple hundred Afghanis to make him go away".<sup>21</sup>

International input into other areas of the rule of law has also negatively impacted the administration of justice. The establishment of a number of specialised courts, high commissions and investigative bodies over the last nine years under international encouragement has added unnecessary complexity to the system. It is not at all clear whether such specialised legal entities are effective. For instance, while the sheer scale of the narcotics trade<sup>22</sup> certainly requires courts competent to handle often intricate drug-related cases, there is little evidence that the counter-narcotics tribunal has succeeded in unravelling multifaceted trafficking networks.<sup>23</sup> Efforts to combat corruption through the establishment of governmental commissions have similarly faltered.

Many Afghans have turned to the informal justice sector instead. In predominantly Pashtun areas, the use of jirgas and shuras to resolve disputes in many communities is common. These bodies apply a blend of tribal codes of *Pashtunwali* and Sharia, often resulting in violations of Afghan and international law.<sup>24</sup> Given the endemic lack of capacity to implement and enforce existing laws, it seems unlikely that experimental programs to enhance the role of jirgas and shuras – many backed by the U.S. – will improve the administration of justice. The efficacy of investing in a parallel or hybrid justice system in an atmosphere of political instability and high insecurity is questionable.

This report analyses the complexities and challenges of judicial reform in Afghanistan. It examines Kabul's failure to support the rule of law and assesses the adverse impact of political interference and insecurity on the justice sector. Drawing heavily on the scholarship of international experts and Afghan legal scholars, the report analyses the relationship between the three main bodies of the judiciary: the Supreme Court, the attorney general's office and the ministry of justice. It suggests ways in which these institutions can be strengthened to counterbalance widespread corruption and the abuse of power while enhancing access to justice. Although there are ample challenges to judicial reform in the areas of commercial and civil law, the report focuses on the nexus between criminal law and security. It emphasises the strategic value of enhancing the rule of law and reducing centre-periphery tensions in the legal system.

Since a comprehensive assessment of judicial institutions has yet to be conducted, there is a limited amount of reliable statistical data. The Afghan government provided figures reluctantly and some statistics were unavailable because there is no organised process to gather such information. The accuracy, therefore, of many facts and figures cited by official Afghan sources must be viewed in that light. Research in the provinces of Kabul, Parwan, Nangarhar, Bamiyan and Wardak, a broad review of published literature and primary documents, and interviews with experts and various Afghan and international interlocutors, helped to overcome some of these limitations.

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<sup>19</sup> Tondini, "Rebuilding the System of Justice in Afghanistan: A Preliminary Assessment", op. cit., p. 342.

<sup>20</sup> Crisis Group interview, senior European adviser, Kabul, 5 June 2010.

<sup>21</sup> Crisis Group interview, Kabul, 15 June 2010.

<sup>22</sup> According to the UN Office on Drugs and Crime (UNODC), Afghanistan produces 90 per cent of the world's opium with roughly \$90-\$160 million out of an annual total of about \$3 billion in opium trade channelled to the insurgency.

<sup>23</sup> "Afghanistan Drug Control: Strategy Evolving and Progress Reported, but Interim Performance Targets and Evaluation of Justice Reform Efforts Needed", U.S. Government Accountability Office (GAO), Washington DC, March 2010, pp. 27-29.

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<sup>24</sup> Rod Norland and Alissa J. Rubin, "Child brides escape marriage, but not lashes", *The New York Times*, 30 May 2010.



## II. A LEGACY OF POLITICAL INTERFERENCE

Afghanistan's justice system has been shaped by a fundamental divide between proponents of secular state law and Islamic jurisprudence. It has been constrained by cultural fissures between the urbanised centre and rural periphery. Throughout much of its modern history, Afghanistan's political leaders have historically exploited these divides to enhance their political power and to diminish avenues of access to power for potential rivals. The political and socio-cultural rift between the secular and the religious and the urban centre and rural periphery has left an indelible mark on Afghan jurisprudence. The inability of the state to adequately bridge these divides has perennially undermined the independence of the judiciary and imperilled the rule of law.

### A. CONSTITUTIONAL MONARCHY: 1923-1973

King Amanullah (1919-1929) is credited with introducing secular law, following Afghanistan's declaration of independence in 1919. In 1923, Amanullah introduced a constitution, which described for the first time the rights and responsibilities of Afghan citizens. Although, like his predecessors, Amanullah was mindful of Islam's important role in Afghan culture, specifically naming it the state religion in the constitution, his constitution also provided protections for other religions.<sup>25</sup> Sweeping changes to the law were also made in an effort to modernise the state. Female education, the abolition of child marriage and other changes to family law were introduced, provoking a sharp response from the tribal elite and religious leaders.

Courts were reorganised under the constitution, which outlined a three-tiered system in which Sharia courts were renamed and court jurisdictions were defined, with primary courts handling general cases, and appeal courts and the High Cassation Board in Kabul handling questions of legal interpretation at the higher level.<sup>26</sup> Courts of Reconciliation (*mahkhama-e islahiya*) were introduced for the express purpose of resolving civil disputes. Under this scheme, civil cases had to be presented to justice departments (the equivalent today of *Huquq* departments) before being submitted to the primary court for further con-

sideration. These special courts, located in provincial centres, were designed as arbitration mechanisms strictly for civil cases; criminal cases were referred to ordinary primary courts.<sup>27</sup> The reconciliation courts only lasted until the 1930s when their jurisdiction was transferred to the commercial courts.

Sharp resistance from tribal and religious leaders to Amanullah's reforms forced him into exile in January 1929.<sup>28</sup> Amanullah's successor, Nadir Shah, continued the modernising program although on a more modest scale, giving tribal and religious leaders a role in reviewing proposed legislation, albeit limited, through the National Council.<sup>29</sup> Influential members of Naqshbandiyya Sufi pirs, a moderate Sunni order, who had only years earlier incited rebellion against Amanullah were granted high positions in government, including the religious leader Fazl Ahmad Mujaddidi, who was named deputy minister of justice.<sup>30</sup>

Borrowing heavily from the Turkish and Egyptian models of justice, the Afghan government also established separate Law and Sharia Faculties at Kabul University. Graduates of the Islamic law faculty were trained primarily as judges while graduates of the judiciary and prosecution branch of the Law and Political Science faculty were trained to work as judges in the commercial and administrative courts. France provided the secular law faculty with financial aid while Egypt's al-Azhar University sponsored the Sharia faculty, resulting in the sharp divisions in jurisprudential outlook that would later harden into all-out political conflict.

The "New Democracy" period of the 1960s under Nadir Shah's successor, Zahir Shah, saw the beginning of the process of secularising criminal, commercial and general civil law. In 1963, Zahir Shah convened a Loya Jirga in Kabul to draft a new constitution. Drawing in part from various Western charters and declarations, the 1964 constitution articulated for the first time the separation of powers between the executive, legislature and judiciary.<sup>31</sup> Along with the secular tone of the document embodied in

<sup>25</sup> Article 2 of the 1923 constitution states: "The religion of Afghanistan is the sacred religion of Islam. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided they do not disturb the public peace".

<sup>26</sup> Ramin Moschtaghi, "Afghanistan court organisation and its compliance with the constitution and international law", Max Planck Institute for Comparative Public Law, Amended 3rd Edition (Kabul, 2009), p. 5.

<sup>27</sup> Ibid, p. 7.

<sup>28</sup> Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven, 1996), pp. 55-58.

<sup>29</sup> The National Council was selected by the 1930 Loya Jirga (national assembly) from among its own members. In practice, the Council "simply rubber-stamped Cabinet proposals", Louis Dupree, *Afghanistan* (Princeton, 1980), p. 463.

<sup>30</sup> Asta Olesen, *Islam and Politics in Afghanistan* (Richmond, 1995), p. 163.

<sup>31</sup> A French constitutional expert was highly influential in the drafting of the document. Ibid, p. 207.

Article 2,<sup>32</sup> Islam was established as the religion of state and *Hanafi* Sharia<sup>33</sup> as the main guide but only in cases where no secular law applied.<sup>34</sup> This inclusion of Islamic law in what appeared to be a secular document set the stage for conflicts that are endemic in Afghanistan today over the application of Sharia in complex legal matters.

Several legal reforms were adopted and new legislation passed with the aim of catalysing economic and social development, including the 1965 Criminal Procedure Code and the 1967 Law on the Organisation and Jurisdiction of the Courts.<sup>35</sup> Most controversial among these was the 1971 marriage law, which called for equality between husband and wife. Yet even this law steered clear of controversial questions such as marriageable age and polygamy, reflecting the tensions contained in the 1964 constitution between the secular and the religious.<sup>36</sup> Reform was additionally constrained by Zahir Shah's restrictions on political participation. Although political parties were allowed to organise, they were barred from contesting elections because of the king's refusal to sign legislation broadening political access. This pattern of intolerance of political opposition and the resultant violent rejection of state authority runs throughout Afghan history.

## B. DAOD AND PDPA GOVERNMENTS: 1973-1989

The 1964 constitution coincided with the rise of Islamist and leftist leaders and parties in Afghanistan. During this era several future mujahidin leaders rose to prominence, including future president and Jamiat-e Islami leader Burhanuddin Rabbani, a close associate of Professor Ghulam Mohammad Niazi of the Sharia faculty until Niazi's arrest in 1972, and Ghulam Rasul, also now known as Abd ul-Rabb al-Rasul Sayyaf. Similarly, later prime minister and head of the Islamist Hizb-e Islami party Gulbuddin Hek-

matyar<sup>37</sup> took up leadership of the aggressive and often violent Muslim Youth Group at Kabul University in 1970. Under the partial influence of Niazi, Mohammad Ibrahim Mujaddidi and Sebghatullah Mujaddidi, strong protests were registered against the ban on the veiling of women and the expansion of women's rights under the marriage law.<sup>38</sup>

This period also witnessed the emergence of the communist People's Democratic Party of Afghanistan (PDPA), which split into two factions: the largely urban Parcham (flag) faction and the Khalq (masses), predominantly comprised of upwardly mobile rural activists. In 1973, the king's cousin Sardar Mohammad Daoud Khan seized power in a coup with the support of the Parcham faction. Under Daoud (1973-1978), the 1977 constitution was adopted, largely aimed at reinforcing the move from constitutional monarchy to a one-party republic. Daoud soon spurned his communist supporters and also moved against his Islamist opponents, turning his secret police into a repressive organ of political reorganisation. Within a few years, he had banned all political parties except his own, including both factions of PDPA.

The reform of the 1960s and early 1970s gained little traction in rural areas, where power lay with khans (tribal leaders and landowners) and moral authority with the mullahs. Much of the country, therefore, remained outside the control of the central state and largely immune to applicable statutes. Frictions between the centre and periphery were in fact reinforced by a constitution that

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<sup>32</sup> Article 2 of the 1964 constitution establishes Islam as the "sacred religion of Afghanistan" but also states: "Non-Muslim citizens shall be free to perform their rituals within the limits determined by laws for public decency and public peace".

<sup>33</sup> There are five main schools of Islamic jurisprudence, four Sunni and one Shia. In the Sunni sect, there is the *Maleki*, *Shafi'i*, *Hanbali* and *Hanafi* which predominates in Eastern Europe, India, Pakistan, Afghanistan, Turkey, Syria, Lebanon and Jordan. *Ja'fari* jurisprudence predominates in Shia majority Iran.

<sup>34</sup> Article 69, constitution of Afghanistan (1964).

<sup>35</sup> Although many reforms from this era did not have much impact, the Criminal Procedure Code of 1965 and the Law on the Organisation and Jurisdiction of the Courts of 1967 formed the fundament of Afghan criminal law and became the basis for reforms adopted under international direction in the post-Taliban era.

<sup>36</sup> Olesen, op. cit., p. 210.

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<sup>37</sup> Known alternately as Engineer Hekmatyar, Hekmatyar is an ethnic Pashtun from Kunduz who emerged on the political scene as a student at Kabul University where he became a key organiser of the Muslim Brotherhood-inspired Islamic Youth Group. After a brief period in prison, then exile in Peshawar, Hekmatyar burnished his Islamist credentials as leader of the Hizb-e Islami political party and soon became a key client of the U.S. and Pakistan in the covert proxy war against the Soviet Union in the 1980s. He served briefly as prime minister of Afghanistan from 1993 to 1994 and again in 1996 before becoming entrenched in violent clashes with the Northern Alliance over control of Kabul. After a short period in exile in Iran, the U.S. designated Hekmatyar a global terrorist and placed him on a watch list along with figures such as Osama bin Laden. Hekmatyar continues to wield considerable influence over the non-combat arm of the Hizb-e Islami Afghanistan party. Although he once was closely allied with Mullah Mohammad Omar's Quetta Shura, Hekmatyar is believed to have split with the Taliban leadership over tactics within the last three years and has several times publicly offered to enter into negotiations with the Karzai administration.

<sup>38</sup> Olesen, op. cit., p. 214.

emphasised centralised authority and a body politic deeply divided along geographic and ethnic lines.<sup>39</sup>

When the Soviet-backed PDPA forcibly seized power in 1978, one of its chief aims was to use state institutions to carry out its social and political agenda to transform and modernise Afghan society. By November the same year, the PDPA government had introduced new regulations on rural land ownership, tenancy, debt, marriage and bride price. Popular committees composed of state bureaucrats were established in 1979 to resolve legal disputes over land ownership. Thousands of opponents of the new reforms were killed, with the violent political purges only provoking more violent opposition, which in turn forced the regime to rely increasingly on the secret police and summary proceedings to eliminate spoilers. These and other attempts to challenge the power of the tribal elite and to impose concepts alien to large parts of rural Afghanistan prompted widespread revolts, spearheaded by the Pakistan-backed Islamist opposition, which eventually led to the Soviet intervention of 27 December 1979.

Under Soviet-backed PDPA governments, state institutions were modelled on their counterparts in Moscow. Soviet advisers established an internal security agency similar to the KGB, the State Information Services (Khidamat-e Ittila'at-i-Dawlati, or KhAD), which reported directly to the prime minister and carried out arrests, interrogation and torture of political detainees. The Supreme Court was disbanded and the Special Revolutionary Court subsequently established. The 1977 constitution was repealed, with the Revolutionary Military Council issuing a decree that also called for all other laws outside of the constitution to remain in force.<sup>40</sup> This decree in effect transferred Supreme Court powers to the Supreme Judicial Council, headed by the justice minister and answerable to the Revolutionary Military Council.<sup>41</sup>

In reality, KhAD exercised full judicial power through summary arrests, detentions and executions.<sup>42</sup> The transfer of judicial authority was accompanied by waves of arbitrary detentions under the Soviet-backed regimes of Hafizullah Amin, Babrak Karmal and Mohammad Najibullah, the former KhAD chief. Thousands of political activists were

killed in summary executions and buried in mass graves at Pul-e Charki prison just outside the capital.<sup>43</sup>

### C. THE MUJAHIDIN AND TALIBAN: 1990-2001

The withdrawal of Soviet forces in 1989 weakened Najibullah. His efforts to compromise with traditional tribal elites were capped by a failed attempt to sew together a reconciliation program, including partial amnesty in January 1988 for mujahidin leaders such as Northern Alliance commander Ahmad Shah Massoud.<sup>44</sup> To accommodate his Islamist opposition, Najibullah also invoked Islam in the preamble of the revised constitution adopted in 1990. Keyed heavily on the theme of reconciliation, the constitution allowed for political pluralism but gave no quarter on religious plurality, cutting previous references to the right of non-Muslim citizens to practice their faith.<sup>45</sup>

In terms of jurisprudence, two articles tried to reverse the damage done to the legal system after years of arbitrary arrests under Daoud and successive Soviet-backed leaders. Article 41 spelled out for the first time the citizen's right to the presumption of innocence and expressly prohibited arbitrary detention, declaring that "no person can be punished unless by a verdict of a court in accordance with the provisions of law". Article 110 of the revised constitution restored some of the previous legal order and introduced the Law on the Organisation and Jurisdiction of Courts. But it also placed the chief justice under the direct authority of the president.<sup>46</sup>

Not long after the 1990 constitution was adopted, Najibullah's government collapsed under the pressure of attacks from mujahidin groups and widespread food and fuel shortages. Having lost the confidence of his party, Najibullah was forced to resign in April 1992. A Pakistan-backed power-sharing deal placed Rabbani in the presidency and his erstwhile rival, Gulbuddin Hekmatyar, in the position of prime minister. As with the administration of central government, there was little coherence in the justice sector despite the adoption of another constitution in 1992, which was never promulgated. Torture and the operation of private jails by rival mujahidin factions were hallmark features of the civil war of the 1990s. Ordinary courts operated in some areas, but widespread violence in Kabul prevented cases from being brought to the Supreme Court.<sup>47</sup> Local variations on judicial authority, meanwhile, prolif-

<sup>39</sup> For more detailed discussion of the impact of centre-periphery relations on Afghanistan's legal structures see Crisis Group Asia Report N°56, *Afghanistan's Flawed Constitutional Process*, 12 June 2003.

<sup>40</sup> Moschtaghi, op. cit., p. 13.

<sup>41</sup> The authority of the Supreme Court was re-established with the adoption of the 1980 constitution.

<sup>42</sup> Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven, 2000), p. 12.

<sup>43</sup> See "A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan", Afghanistan Independent Human Rights Commission, 29 January 2005.

<sup>44</sup> Olesen, op. cit., p. 267.

<sup>45</sup> Article 2 and Article 5, 1990 constitution of Afghanistan.

<sup>46</sup> Moschtaghi, op. cit., p. 14.

<sup>47</sup> Crisis Group Report, *Afghanistan: Judicial Reform and Transitional Justice*, op. cit., p. 5.

erated countrywide. When the Taliban captured power in September 1996, one of their first acts was to torture and hang Najibullah in a public square in Kabul, a graphic portent of brutal Taliban justice.

Under the new regime led by Mullah Mohammad Omar, a Kandahari Pashtun, all women judges were dismissed. Local judges were replaced with mullahs who swore allegiance to the Deobandi-influenced Taliban interpretation of Sharia. The Supreme Court remained the court of last resort but its decisions could be and often were bypassed by Mullah Omar, who was unsparing in his imposition of the death penalty. Ghazi Stadium, the national arena built during Amanullah's reign, became the primary venue for public executions. The powerful Ministry of Enforcement of Virtue and Suppression of Vice (*al-Amr bi al-Ma'ruf wa al-Nahi'an al-Munkir*) was established, responsible for enforcing decrees on moral behaviour, and imposing stringent codes on dress and personal freedoms. Administration of justice was swift and harsh with summary trials often ending with specific penalties for the crimes outlined under Sharia law, such as the amputation of a limb for theft.

#### D. AFTER BONN: 2001-2004

Following the 11 September 2001 attacks, the U.S.-led military intervention toppled the Taliban. On 5 December 2001, the Bonn agreement was adopted, outlining guidelines and timelines for the establishment of the post-Taliban political order. The agreement called for an independent judiciary under the auspices of the Supreme Court, re-establishment of the 1964 constitution as the founding document and creation of several commissions with the aim of rebuilding the rule of law.<sup>48</sup> Under the Karzai-led Interim Afghan Authority, the Judicial Reform Commission and Constitutional Commission were tasked with reconstructing "the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions" and with supporting the process of a constitutional Loya Jirga, which would in turn adopt a new constitution.<sup>49</sup>

In theory, the Judicial Reform Commission was to focus primarily on reform, assessment and development of tech-

nical, logistical resources, structural review and evaluation of administrative divisions, and administration of legal aid. In practice, the commission, initially stacked with members with strong links to the conservative Supreme Court and other ministries, became bogged down in factional politics soon after it was established in June 2002. It was later disbanded and re-established, ostensibly acquiring a more neutral character in November 2002.

In October 2002, a Constitutional Drafting Commission was established. Although the work of the Constitutional Commission was underway much quicker than its judicial reform counterpart, it also fell victim to factionalism.<sup>50</sup> The two commissions emerged as part of a multi-faceted and highly fragmented reform process that pitted the Supreme Court against the Attorney General, international donors against the Afghan government, while the Judicial Reform Commission emerged as a faction all its own.

In 2002, Italy was named the lead nation in charge of supporting judicial reform. Its efforts were dogged from the outset by insufficient manpower and misallocation of scarce resources. While international stakeholders touted Italy's role and pronounced reconstruction of the judiciary vital to stability, there was little evidence that the scale of the challenge was understood. Aid and resources were slow in coming, leaving Italy to shoulder the bulk of the costs.

Meanwhile, factionalism flourished at the highest levels of the judiciary. Prominent fundamentalists swiftly marked out their territory, targeting the highest court of the land as the primary venue for pursuing their political agendas. Fazl Hadi Shinwari, a close associate of Sayyaf, had been selected by former President Burhanuddin Rabbani<sup>51</sup> to head the Supreme Court in December 2001. Once confirmed as head of the transitional authority Karzai reaffirmed Shinwari in June 2002. Although Shinwari was then believed to be about 80 years old, Karzai ignored constitutional provisions that called for the head of the court to be no older than 60, setting the stage for further political interference in the judicial system.<sup>52</sup>

Shinwari's unrestrained pursuit of a fundamentalist agenda coloured every aspect of the court's operations. Formerly the head of a Peshawar madrasa, Shinwari packed the

<sup>48</sup> Article II, Part II of the "Agreement on the Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions" (Bonn, December 2001) stated: "The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration".

<sup>49</sup> Article II, Part II, and Article I, Part VI of the Bonn agreement established the Judicial and Constitutional Commissions, respectively.

<sup>50</sup> For more on the constitutional process see Crisis Group Report, *Afghanistan's Flawed Constitutional Process*, op. cit.

<sup>51</sup> An ethnic Tajik from Badakhshan province, Rabbani is a founding member and leader of the Jamiat-e Islami party. He served as president of Afghanistan from 1992 to 1996 when the Taliban routed his government from power. He briefly served again as the titular president before Karzai was named as head of the Interim Administration.

<sup>52</sup> Title 7; Article 105; Part 3 of the 1964 constitution states that the judges of the Supreme Court must not be "less than 40 years or more than 60 years" old.

bench with conservative allies who had little or no legal education although the 1964 constitution required judges to "have knowledge of jurisprudence, the national objectives, and the laws and legal system of Afghanistan".<sup>53</sup> In little under a year, Shinwari appointed some 137 judges to the bench; only a few appeared to have appropriate knowledge even of Islamic law and only one had training in both secular law and Sharia, as required under the constitution. His conservative streak further evinced itself in several controversial rulings, including a decision to ban cable television in January 2003. The decision was eventually rescinded, but this did not deter him from pushing the conservative agenda of the Ulema Council.<sup>54</sup>

It was against this backdrop that the transitional administration launched, in cooperation with UNAMA (United Nations Assistance Mission to Afghanistan), the unwieldy and politically fraught process of creating a new constitution.<sup>55</sup> The Bonn agreement had set an eighteen-month timeline for the transitional authority to convene a constitutional Loya Jirga.<sup>56</sup> The Constitutional Commission was likewise to be convened with UN assistance within two months of the transitional authority taking power but was instead only inaugurated five months later. This left the drafting commission a little more than a year to craft the founding document.

The nine-member drafting commission was chaired by the transitional authority's vice president, Niamatullah Shahrani, a former chancellor of Kabul University with links to Sayyaf.<sup>57</sup> Two members of Shahrani's faction – Azimi and Mohammad Musa Ashari – were graduates of al-Azhar University, Sayyaf's postgraduate alma mater. A second faction consisted of Musa Marufi and Rahim Sherzoi, two legal scholars who had lived in the U.S. for a substantial period of time and were considered more liberal. Much of the factionalism in the commission was, however, hidden from public view.

Tasked with finalising the draft constitution and public consultation, the larger 35-member Constitutional Com-

mission was divided into eight mobile teams that travelled the country and to Pakistan and Iran.<sup>58</sup> The commission was essentially split between Sayyaf's Salafist party and members of the Ahmad Shah Massoud's Shuray-e Nazar political-military council.<sup>59</sup> The demand for laws to conform to the basic tenets of Islam in Article 3 and the judicial review authorities granted to the Supreme Court under Article 121 allowed mullahs, championed by Sayyaf and Rabbani, to use the court to consolidate their political power.

Members of the highly factionalised commission insisted that the draft constitution be withheld from the public, a position that UNAMA supported. Focus group participants consequently were left to debate the proposed constitution without any substantive knowledge of the process that had taken place beforehand. When the draft was finally released in November 2003 just ahead of the constitutional Loya Jirga, substantive changes had been made with little or no explanation, including provisions that concentrated greater power in the hands of the presidency.<sup>60</sup>

The upshot of this process was the adoption of a constitution that created a strong presidential system, following the constitutional Loya Jirga in December 2003. It gathered together 502 delegates, of whom about 100 were women. Delegates were diverse and drawn from across the country, but this provided little insurance against the trenchant factionalism increasingly at play under Karzai's transitional authority. Within days, the assembly almost collapsed after a Farah province delegate, Malalai Joya, accused several participants, including chairman Sibghatullah Mujaddidi, of committing war crimes.<sup>61</sup> With most of the assembly committees under the control of Sayyaf and his jihadist cadre, whatever dissenting voices were left after the violent response to Joya's speech were immediately silenced.<sup>62</sup>

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<sup>58</sup> Secretariat of the Constitutional Commission of Afghanistan, "The Constitution-Making Process in Afghanistan", Kabul, 10 March 2003.

<sup>59</sup> Coll, op. cit., pp. 110-113.

<sup>60</sup> The draft submitted to President Karzai at the end of September 2003 was resubmitted to him on 15 October with changes suggested by the president to a subcommittee of the Review Commission and two external advisers, Professor Barnett Rubin, an American scholar who currently works as an adviser on Afghanistan to the Obama administration and Professor Yash Ghai, a constitutional expert from Kenya. The National Security Council of Afghanistan reworked this draft before it was released publicly.

<sup>61</sup> Amy Waldman, "A young Afghan dares to mention the unmentionable", *The New York Times*, 18 December 2003.

<sup>62</sup> Following her speech, Joya was declared an "infidel" by Loya Jirga chairman Sibghatullah Mujaddidi. Shortly after this, Joya was placed under the protection of the UN after several Loya Jirga delegates threatened to kill her. In May 2006, sever-

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<sup>53</sup> Ibid. See also Rama Mani, "Ending Impunity and Building Justice in Afghanistan", Afghanistan Research and Evaluation Unit, December 2003, p. 16.

<sup>54</sup> The Ulema Council of Afghanistan is the official state-sanctioned board of religious scholars charged with upholding the *fiqh* (Islamic jurisprudence). The council currently comprises an estimated 3,000 Islamic scholars who receive a monthly government stipend under an arrangement originally established by King Amanullah.

<sup>55</sup> For detailed analysis of the post-Taliban constitutional process see Crisis Group Report, *Afghanistan's Flawed Constitutional Process*, op. cit.

<sup>56</sup> Section I, Part 6, Bonn agreement.

<sup>57</sup> Crisis Group Report, *Afghanistan's Flawed Constitutional Process*, op. cit., p. 16.

The assembly adopted the constitution by consensus on 4 January 2004, but not before several more delegates staged a walkout and the assembly was essentially stripped of its voting powers as a result of factional infighting. As with previous constitutions, the devolution of power from the centre to the periphery was constrained by a strong executive, and the powers of the legislature and judiciary were also sharply curtailed. Checks and balances were only vaguely outlined, leaving the parameters of the separation of powers open to interpretation. Most importantly, from the point of view of the judiciary, was the ambiguity surrounding the authority of the Supreme Court to resolve constitutional disputes.<sup>63</sup>

Under Chief Justice Shinwari, this flaw was regularly exploited to advance Sayyaf's Salafist agenda. Four years after Shinwari was appointed, the Supreme Court was embroiled in an international controversy when a lower Kabul court sentenced an Afghan convert to Christianity to death in March 2006.<sup>64</sup> The case of Abdul Rahman, an Afghan refugee who returned after a failed bid to seek asylum in Belgium, received worldwide attention after Ansarullah Mawlawizada, a Shinwari appointee, rejected international calls for his release. After much political manoeuvring and under considerable U.S. pressure, Rahman was eventually declared mentally unfit for trial and was allowed to seek asylum in Italy.<sup>65</sup>

The case was a major embarrassment for Karzai who faced the unsavoury choice of losing the support of Islamic clerics or losing international donor funding, after several countries expressed their dismay over the court's ruling. In the end, the president sought to placate international concerns by replacing eight of the Supreme Court's nine justices but left Shinwari in place.<sup>66</sup> The National Assembly however voted to also remove Shinwari, who was replaced in May 2006 by Karzai's legal adviser, Abdul Salam Azimi.

When his name was first proposed as a potential replacement, Azimi was relatively unknown and reportedly not particularly close to the president.<sup>67</sup> An ethnic Pashtun from Farah province, he was far better qualified than his predecessor, and many viewed him as a moderate. Educated at George Washington University and al-Azhar University, Azimi had served as the rector of Kabul University in the 1970s and had also lived in exile in Pakistan.<sup>68</sup> A long-time associate of Sayyaf, he eventually moved to the U.S. where he worked for a while as a university professor. He returned to Afghanistan as an adviser on energy pipeline projects in the 1990s before becoming Karzai's legal adviser.<sup>69</sup>

Azimi has tried with mixed results to set himself apart from his predecessor. Beginning his four-year term in June 2006<sup>70</sup>, he fired eight judges for corruption within months of taking office and launched a review of some 6,000 pending cases on the Supreme Court docket under Shinwari.<sup>71</sup> Reforms have, nonetheless, proceeded slowly under Azimi's watch and he has played a worryingly prominent role in a number of controversial cases brought before the court at Karzai's insistence.<sup>72</sup> While touted as a moderate, Azimi has not shied away from backing the Islamist agenda, most notably supporting harsh punishment for alleged cases of blasphemy, including the prosecution of Parwez Kambakhsh, a student journalist, whose case received worldwide attention after he was arrested for downloading and distributing allegedly "un-Islamic" materials.<sup>73</sup>

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al members of parliament physically attacked Joya after a speech in which she railed against the presence of warlords in the Afghan government. She was subsequently suspended from parliament in May 2007.

<sup>63</sup> J. Alexander Thier and John Dempsey, "Resolving the Crisis over Constitutional Interpretation in Afghanistan", United States Institute for Peace (USIP), March 2009.

<sup>64</sup> Abdul Waheed Wafa and David Rohde, "Kabul judge rejects calls to end trial of Christian convert", *The New York Times*, 24 March 2006.

<sup>65</sup> Mandana Knust Rassekh Ashfar, "The Case of an Afghan Apostate – The Right to Fair Trial between Islamic Law and Human Rights in the Afghan Constitution", Max Planck Institute for Comparative Public Law and International Law, Vol. 10 (2006), p. 591.

<sup>66</sup> Carlotta Gall, "Afghan lawmakers review court nominees", *The New York Times*, 16 May 2006.

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<sup>67</sup> Crisis Group interview, senior Western adviser, Kabul, 15 July 2010.

<sup>68</sup> [www.supremecourt.gov.af](http://www.supremecourt.gov.af), accessed on 1 June 2010.

<sup>69</sup> Crisis Group interview, former Supreme Court official, Kabul, 25 July 2010.

<sup>70</sup> Azimi's term technically expired in June 2010, but as of November 2010 he has remained on the bench and there has been no public discussion of replacing him.

<sup>71</sup> Kim Barker, "At Supreme Court an unlikely new hero", *The Chicago Tribune*, 21 January 2007.

<sup>72</sup> A May 2007 ruling by the Supreme Court declaring adherents of the Baha'i faith apostates is but one of several examples of controversial cases pursued under the Azimi court. The ruling essentially criminalised conversion to the Baha'i faith, placing adherents at risk of prosecution for blasphemy.

<sup>73</sup> The university student and part-time journalist was arrested in Mazar-e Sharif in October 2007 for downloading and circulating an article about women's rights under Islamic law. In January 2008, a primary court in Balkh province sentenced Kambakhsh to death for blasphemy. His sentence was commuted to twenty years in prison by an appeals court and ultimately upheld by the Supreme Court.

### III. INTERNATIONAL INVOLVEMENT

When the Bonn agreement was adopted in late 2001, courts were only nominally functional. Judicial staffing had shrunk to a fraction of its size in 1978 and little remained in the way of records or legal documents. It was estimated that only about 20 per cent of judges were qualified, and only a handful were women.<sup>74</sup> The international community was faced with the monumental task of rebuilding the judiciary from scratch. Given these multiple challenges, a coordinated strategic approach was needed to achieve even minimal success. None was forthcoming, however. The international community's "light footprint" approach to reconstruction laid the foundation for a series of discordant efforts at reform. Although Italy was cast as the lead nation in support of judicial reform, multiple donors also stepped into the fray, including the U.S., UK, Canada, UNODC and UNDP.

The Italian effort to support judicial reform was inconsistent and inept from the start, including by outsourcing much of the programming to the International Development Law Organisation (IDLO) but without providing the needed resources. Experienced in legal training in emerging democracies, IDLO, in many ways, was well suited to re-educating the hundreds of poorly trained judges and prosecutors still left on the rolls following the fall of the Taliban. But months after Italy had taken the lead role, IDLO had only one full-time representative in the country.<sup>75</sup>

Italy bore most of the costs for judicial reform assistance, providing some \$20 million of the \$27 million requested by the Afghan government for justice sector reform for the 2003-2004 fiscal year.<sup>76</sup> While this sum represented only a fraction of the actual needs, Italy's contribution was generous compared to those of other donors such as the U.S., which in 2003 spent only around \$13 million on non-police related rule of law assistance.<sup>77</sup> Financial constraints ultimately scaled back ambitions for a reconstructed judiciary and impeded momentum.

Italy largely focused on a limited legal review of existing statutes, but without substantial consultation with Afghans.<sup>78</sup> Strong disagreements over the rewriting of the criminal procedure codes, in particular, led several Afghan law-

yers and legal scholars to raise objections to the Interim Criminal Procedure Code for Courts (ICPC) before it was adopted in February 2004.<sup>79</sup> Prepared primarily by an Italian judge experienced in organised crime, Afghan critics claimed the law ignored the realities of a country devastated by decades of war. Time limits on the initial period of detention upon arrest and phases of investigation inserted into the law proved especially troubling. Little consideration appeared to have been given to the burden imposed by lengthy transport times for defendants arising out of poor infrastructure and lack of personnel.<sup>80</sup>

Further, contradictions later arose with the passage of the Police Law that allows suspects to be held for up to 72 hours as opposed to the 24-hour period stipulated in the ICPC.<sup>81</sup> Additionally, the absence of a *habeas corpus* clause presents problems for defendants inclined to challenge the legality of their arrest.<sup>82</sup> Unsurprisingly, amendments to the ICPC were immediately introduced in parliament after the Supreme Court and Attorney General's Office flagged concerns over unrealistic time constraints in the detection, investigation and prosecution of cases among other defects.<sup>83</sup>

The perception that Italy was developing and delivering assistance on its own not only resulted in opposition from several of the Afghans involved but also widened divisions in the already deeply factionalised legal cadres heading the reform effort. Moreover, a large number of international advisers were contractors with little or no knowledge of Afghanistan's complex politico-legal development, and a significant number had no legal background.<sup>84</sup> As the cur-

<sup>74</sup> "Afghanistan: Re-establishing the rule of law", Amnesty International, 21 November 2003, p. 12.

<sup>75</sup> Crisis Group Report, *Afghanistan: Judicial Reform and Transitional Justice*, op. cit., p. 8.

<sup>76</sup> Tondini, "Rebuilding the System of Justice in Afghanistan: A Preliminary Assessment", op. cit., p. 336.

<sup>77</sup> "Establishing Rule of Law in Afghanistan", USIP, Special Report No. 117, March 2004.

<sup>78</sup> Crisis Group interview, senior Afghan prosecutor, Kabul, 13 June 2010.

<sup>79</sup> For in-depth discussion of the drafting process and implementation of the ICPC, see Faiz Ahmed, "Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code", *Hasting International and Comparative Law Review*, Vol. 29 (Fall 2005), p. 93.

<sup>80</sup> Article 31; Section 1 of the ICPC states, "the judicial police, after having identified the person arrested on their own initiative, inform him of the reasons of the arrest and interrogate the same about the crime and its circumstances within a maximum of 24 hours". Section 2 further states, "immediately after a report [of the arrest] is sent to the Primary Saranwal [prosecutor] the [arrested] person shall be put at the prosecutor's disposal".

<sup>81</sup> Article 25 of the Police Law states, "in order to comprehensively detect the crime and the criminal, the police may hold an arrested suspect in custody for a period of up to 72 hours".

<sup>82</sup> Tondini, "Rebuilding the Justice System in Afghanistan: A Preliminary Assessment", op. cit., p. 343.

<sup>83</sup> Crisis Group interview, Mohammad Yousuf Halim, chief of finance and administration, Ministry of Justice, Kabul, 7 August 2010.

<sup>84</sup> Crisis Group interview, Western legal adviser, Kabul, 7 July 2010. The insufficient training and expertise of justice sector advisers has been commented on widely in literature on the Afghan justice sector. See additionally "Review of Justice Sec-

rent minister of justice and former Judicial Reform Commission member Habibullah Ghalib put it, donors – Italy, the U.S., UN and UK, in particular – cherry-picked their way through existing statutes with little discernible logic:

Donors selectively chose which laws would remain from the previous governments, disregarding laws that were already in place and adopting new ideas that did not fit. Many of those new ideas were not perceived to be credible and in the end they seeded the grounds for inefficiency and corruption in the system.<sup>85</sup>

Compounding these problems was a lack of recognition of the inherent challenges in connecting the centre to the periphery. Donors spent much of their funding supporting Kabul-based advisory programs during the first few years, limiting the effectiveness of the aid.

The international community appeared ill-equipped to handle the complexities of a justice system in transition. The re-emergence of mujahidin-era powerbrokers in key government positions provoked strong objections from Afghan civil society over the U.S. refusal to push the Afghan government to address atrocities during earlier conflicts. In January 2005, the Afghanistan Independent Human Rights Commission (AIHRC) produced a detailed report on the legacy of rights abuses that attested to “a deeply eroded trust in public authorities due to the absence of justice”.<sup>86</sup>

A spike in violence and a growing recognition that the Taliban insurgency was on the rise in 2005 prompted a re-examination of international involvement and an effort to prioritise rule-of-law initiatives. In May 2005, the justice ministry in conjunction with the Justice Sector Consultative Group, which had been established in 2003 to provide international donors with a forum to share expertise and input, produced the first comprehensive analysis of the legal system's shortcomings. The “Justice for All” report marked a turning point, laying out a detailed strategy for tackling the system's many deficits over a projected twelve-year period.

2006 saw the establishment of the International Coordination Group for Justice Reform (ICGJR) and adoption of the 2006 Afghanistan Compact that outlined four rule-of-law benchmarks to be met by 2010. They included ensuring that judicial institutions would be fully operational in all provinces and the completion of a review of “oversight procedures relating to corruption, lack of due proc-

ess and miscarriage of justice”.<sup>87</sup> Meanwhile, the European Union sent an assessment mission to evaluate gaps in the justice sector, leading to the establishment of the EU Police Mission (EUPOL) in 2007. Combined with the adoption in 2006 of the interim Afghanistan National Development Strategy (ANDS), which outlined a National Justice Sector Strategy, it was clear that justice and rule of law needed to be pushed to the forefront of the agenda.<sup>88</sup>

It was not until the July 2007 Rome conference on the rule of law, however, that the international community began in earnest to realign its judicial sector support. Chaired by Karzai, UN Secretary-General Ban Ki-moon and then-Italian Prime Minister Massimo D'Alema, the conference brought together Afghan and international experts and legal scholars and established a coordinated funding mechanism under the auspices of the Afghanistan Reconstruction Trust Fund. An estimated \$98 million was pledged at the conference, including \$15 million from the U.S.<sup>89</sup> A number of internationally supported rule-of-law programs were subsequently launched, including several with the aim of educating the rural public about the legal system and extending the reach of the judiciary to remote regions. Results have been mixed due to funding delays and the perennial lack of manpower that has plagued European support programs.<sup>90</sup>

Although the U.S. has dominated almost every other aspect of the counter-insurgency campaign, its leadership on the rule of law and justice reform has been exceedingly weak. Its investment in judicial institutions is modest, as opposed to the billions invested in standing up the Afghan army and police.<sup>91</sup> USAID, one of the primary conduits of American aid to Afghanistan, allocated \$64 million for

<sup>87</sup> 2006 Afghanistan Compact, Annex I, Governance, Rule of Law and Human Rights, p. 8.

<sup>88</sup> Consultations on ANDS continued for nearly two years before the draft strategy paper was finalised. President Karzai ultimately approved it on 21 April 2008.

<sup>89</sup> “Inspection of Rule-of-Law Programs in Afghanistan”, U.S. Department of State, Office of the Inspector General, Report No. ISP-I-08-09, January 2008.

<sup>90</sup> The UNDP-administered Access to Justice at District Level project, for instance, apparently suffered delays because of difficulties in coordinating funding with Italy and recruiting project managers. “Action Fiche for Afghanistan: Support for the Justice Sector”, European Commission, DCI-ASIE/2008/20112 2008, p. 4.

<sup>91</sup> As of April 2010, combined U.S. aid contributed to the Afghan National Security Forces Fund totalled \$25.2 billion. For further discussion of international support for training the Afghan National Army and Afghan National Police, see Crisis Group Asia Report N°138, *Reforming Afghanistan's Police*, 30 Aug 2007; Asia Briefing N°85, *Policing in Afghanistan: Still Searching for a Strategy*, 18 December 2008; and Asia Report N°190, *A Force in Fragments: Reconstituting The Afghan National Army*, 12 May 2010.

tor Support in Afghanistan”, Governance and Social Development Resource Centre, 5 August 2010, p. 3.

<sup>85</sup> Crisis Group interview, Kabul, 7 July 2010.

<sup>86</sup> “A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan”, Afghanistan Independent Human Rights Commission, op. cit., p. 5.



rule-of-law support from fiscal year 2002 to 2007, a mere 1 per cent of USAID's total budget for the country during that period.<sup>92</sup> Minimal U.S. engagement in the early years resulted in a messy mosaic of contractor-led American justice support programs.

USAID, with its emphasis on assistance to the Supreme Court and clarifying commercial law, is but one of several U.S. agencies contributing to justice sector support. Additional U.S. rule of law assistance comes from the State Department's Bureau of International Narcotics and Law Enforcement Affairs, the U.S. Drug Enforcement Agency, U.S. Department of Justice and rotating civilian and military advisers in provincial reconstruction teams. Coordination has proven challenging. Disagreements between representatives of competing agencies over rule-of-law strategy have not been uncommon, and these tensions have also compounded rivalries between donors and impeded progress.<sup>93</sup>

Currently, the Bureau of International Narcotics and Law Enforcement Affairs leads the main U.S.-led judicial reform efforts, through the Justice Sector Support Program (JSSP) and Correctional System Support Program (CSSP). One of the JSSP's primary functions has been to train police and prosecutors through regional training centres in Kabul, Herat, Nangarhar, Balkh, Kunduz, Bamiyan, Paktia and Kandahar. Similarly, the CSSP supports training, capacity building and infrastructure development in the prison system. Both programs have had some success in terms of outreach to the provinces, but, as with many other U.S. programs, much momentum has been lost due to staff turnover and lag times between policy evaluation and implementation. The reorganisation of U.S. rule of law programs under a single ambassador is an important step toward better coordination, but there remains a clear need for more legal experts on the U.S. team. International stakeholders, in general, need to do far more to coordinate policy, funding and implementation.

Selection standards for implementers of such programs need to be more rigorously applied. Reform of the contracting process used by Washington is imperative to aid effectiveness. The case for reform is strongest in the rule of law sector and is best demonstrated by the questionable no-bid selection of a well-known U.S. contracting firm to implement USAID's \$25 million Rule of Law Stabilisation program in early 2010.<sup>94</sup> Much as it did with the out-

sourcing of police training to companies like DynCorps, the U.S. once again appears poised to gamble on private contractors to strengthen a crucial sector, the judiciary. The U.S. must end its dependence on them if it expects to see real results.

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<sup>92</sup> "Afghanistan: Budget and Obligations", USAID, <http://afghanistan.usaid.gov/en/Page.Budget.aspx>, accessed on 10 August 2010.

<sup>93</sup> "Inspection of Rule-of-Law Programs in Afghanistan", *op. cit.*, p. 8.

<sup>94</sup> In January 2010, the U.S.-based firm Checchi and Company was selected to implement the program. Having previously held the contract for similar work under the Bush administration,

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Checchi was again selected as the incumbent under a no-bid waiver arrangement instituted by USAID. See further details in section VI.C below.

## IV. LEGAL ARCHITECTURE

Responsibility for upholding the rule of law in Afghanistan is divided among three main institutions: the Supreme Court, the attorney general's office and the ministry of justice. In theory, each has its own distinct mandate and responsibilities in the administration of justice. In practice, lack of clarity on the legal authority of each institution, overlapping mandates and persistent political interference have led to constant turf wars.<sup>95</sup> Relations between the ministry and the attorney general's office fractured early on over a dispute as to whether the latter should operate independently or under the administrative aegis of the justice ministry.<sup>96</sup> The acrimonious relationship between these judicial organs and the interior ministry, which oversees police operations, has complicated the task of reform even more. Longstanding disagreements over the parameters of police and prosecutorial investigative powers and pervasive corruption have also fuelled frictions between the two and undermined law enforcement.<sup>97</sup>

Unresolved conflicts in the 2004 constitution over the Supreme Court's mandate and those of other judicial actors are a main cause of these tensions. The twenty articles in the constitution outlining the judiciary's role are vague on constitutional interpretation; specific references to the application of *Hanafi* jurisprudence also appear to contradict other sections of the constitution that call on the government to respect obligations undertaken as a signatory to a number of international conventions, including the Universal Declaration of Human Rights.<sup>98</sup> The Supreme Court's dual role as apex court and administrator of the judiciary has done little to clarify the situation. The court's legal authority to interpret the law is poorly defined in the constitution, and articles pertaining to the establishment of a separate constitutional court are even more unclear.<sup>99</sup> Any genuine attempt at judicial reform will require a serious look at comprehensive legal review and removing

these flaws in the constitution. Vigorous constitutional reform under the aegis of a Loya Jirga will need to take place if there is to be an effective balance of power between the judiciary, legislative and executive.<sup>100</sup>

### A. THE 2004 CONSTITUTION

State authority as defined under the 2004 constitution reflects Afghanistan's struggle to adequately incorporate a tradition of legal pluralism within a culture that is defined by complex political, ethnic and religious dynamics. Nowhere has this been truer than on the question of reconciling secular and Islamic law. As mentioned, the constitutional drafting process involved contentious clashes over the role of Islam and the country's obligations under international law. This resulted in unwieldy political compromises that ultimately led to the adoption of a constitution that is riddled with contradictions. As one Western analyst put it, the constitution is the outcome of a "pick and choose process where everyone got something" – a grab-bag approach that virtually guaranteed continuation and expansion of the Afghan conflict.<sup>101</sup>

The 2004 constitution lays out the rights and responsibilities of Afghan citizens in its preamble and further describes the institutional framework of state authority in 162 articles. Equality under the law is firmly defined in Article 6, which declares that the state is responsible for creating a "prosperous and progressive society based on social justice ... as well as equality between all peoples and tribes". Narrowly defined legal authority and the role and structure of the judiciary are described primarily in Articles 2 and 3 of Chapter 1, Articles 116 to 135 of Chapter 7 and Article 157 of Chapter 11. As with the 1964 constitution, Article 2 declares Islam to be the "sacred religion" of the "Islamic Republic of Afghanistan"<sup>102</sup> but allows followers of other religions to exercise their faith and perform their religious rites.

Article 3, however, enshrines Sharia as the centre of the state's legal authority, declaring, "no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan". This principle is further reinforced in several other articles, including Article 149, Chapter 10 that states, "the provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended". Yet a further provi-

<sup>95</sup> "Establishing the Rule of Law in Afghanistan", USIP, op. cit.

<sup>96</sup> "Afghanistan: Re-establishing the Rule of Law", Amnesty International, op. cit., p. 10.

<sup>97</sup> In Crisis Group interviews conducted in Kabul, Parwan and Nangarhar the vast majority of Afghan prosecutors, police officials and international advisers identified the deterioration in relations between police and prosecutors as a main cause of corruption and weak rule of law. Crisis Group interviews, May-July 2010.

<sup>98</sup> Article 3, Article 7 and Article 131, 2004 constitution.

<sup>99</sup> Article 157 of the 2004 constitution calls for the establishment of a Independent Commission for the Implementation of the Constitution but offers little detail about the structure of the commission or its relevant competencies, simply stating that the commission "shall be established in accordance with the provisions of the law" and that members "shall be appointed by the President with the approval of the House of Representatives".

<sup>100</sup> While constitutional reform is overdue, the amendment process must remain within constitutional bounds. See Crisis Group Asia Briefing N°96, *Afghanistan: Elections and the Crisis of Governance*, 25 November 2009.

<sup>101</sup> Crisis Group interview, Sari Kouvo, co-founder, Afghanistan Analysts Network, Kabul, 12 August 2010.

<sup>102</sup> Article 1, Chapter 1 declares: "Afghanistan shall be an Islamic Republic, independent, unitary and an indivisible state".

sion commits the state to honour its obligations under international treaties and to respect the Universal Declaration of Human Rights.<sup>103</sup>

The problematic relationship between international human rights standards and Afghan jurisprudence and the tensions between Afghan political realities and secular and Islamic interpretations of the law have been much debated and widely written about.<sup>104</sup> The demand in the constitution for all laws to conform to *Hanafi* jurisprudence is not new.<sup>105</sup> Mullahs have used the so-called “repugnance clause”<sup>106</sup> and Islam to shield themselves and their patrons among the Afghan elite from political challenges for more than a century. The additional obligation to adhere to international human rights standards contained in Article 7, Chapter 1<sup>107</sup> is new and unique to Af-

ghanistan, however, and presents serious problems in terms of constitutional review and application of the law in general.<sup>108</sup>

Equality under the law is a primary principle of the Universal Declaration of Human Rights.<sup>109</sup> But under Islamic law, when it comes to the rights of women and men, equality before the law is watered down. It has frequently been argued that differentiation between women's and men's rights under Islamic law verges on the discriminatory.<sup>110</sup> A woman's testimony, for instance, carries much less weight than that of a man. Since the Afghan constitution has no specific reference to Sharia tenets pertaining to the division of rights and property between men and women, conflicts frequently arise in areas of family law and criminal law.

In theory, a judge confronted with a case that is ambiguous on the question of where international standards end and Sharia begins should weigh the facts with a view to striking a balance between the two. Since judges, however, are only required to be versed in either Islamic *or* secular jurisprudence (and many are not well versed in either) international standards are suborned in the interest of an often conservative interpretation of the law. The adoption of *Hanafi* Islamist jurisprudence as the primary legal framework under Article 130 further reinforces a conservative interpretive outlook. Though there is an additional provision calling for the application of *Ja'fari* jurisprudence in cases involving Shias, it is limited to “personal matters involving followers of [the] Shia Sect”. This presumably privileges the application of *Hanafi* jurisprudence in other, non-personal matters.<sup>111</sup>

The leverage provided to fundamentalists in the constitution has deeply affected the evolution of the country's legal institutions. This is particularly true of the Supreme Court, which has been buffeted by both a strong executive and the heavy influence of jihadi leaders such as Sayyaf. Any attempt to reform the court or other judicial organs will necessarily entail a comprehensive constitutional review process. Such a process will also need to circumscribe the excessive range of powers allotted to the executive and bring greater balance between the three branches of government. The National Assembly must, therefore, consider its options for triggering constitutional review either through convening a constitutional Loya Jirga, or through adopting a constitutional amendment that requires the ini-

<sup>103</sup> Article 7, Chapter 1.

<sup>104</sup> See for instance: Martin Lau, “Afghanistan's Legal System and its Compatibility with International Human Rights Standards”, International Commission of Jurists (Geneva, 2002); Andrew Finkelman, “The Constitution and its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002-2004”, *al Nakhlah*, The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilisation, Spring 2005; Said Mahmoudi, “The Sharia in the New Afghan Constitution: Contradiction or Compliment”, Max Planck Institute for Comparative Public Law and International Law (Heidelberg, 2004); Faiz Ahmed, “Sharia, Custom and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan”, *Global Jurist*, Vol. 7, No. 15 (2007).

<sup>105</sup> Article 130, Part 2 of the 2004 constitution states: “when there is no provision in the constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this constitution in accord with Hanafi jurisprudence and in a way to serve justice in the best possible manner”. The article draws on a similarly worded principle articulated in Article 69 of the 1964 constitution which states: “Excepting the conditions for which specific provisions have been made in this constitution, a law is a resolution passed by both houses [of parliament], and signed by the king. In the area where no such law exists, the provisions of the Hanafi jurisprudence of the Shariat of Islam shall be considered as law”.

<sup>106</sup> The “repugnance clause” bars the implementation and enforcement of laws that contradict tenants of Islam and more specifically *Hanafi* jurisprudence. For further discussion of the role of Islam in the Afghan constitution see Finkelman, *op. cit.*

<sup>107</sup> Afghanistan is a signatory to the following international conventions and treaties: The 1949 Geneva Conventions; the 1948 Genocide Convention; the 1968 Convention on Non-Applicability of Statutory Limitations of War Crimes and Crimes Against Humanity; the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1966 International Covenant on Civil and Political Rights; the 1966 Convention on Elimination of All Forms of Racial Discrimination; the 1984 Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment; the 1989 Convention on the Rights

of the Child and the 1998 Rome Statute of the International Criminal Court.

<sup>108</sup> Finkelman, *op. cit.*, p. 2.

<sup>109</sup> Article 7 of the Universal Declaration of Human Rights states, “all are equal before the law and are entitled without any discrimination to equal protection of the law”.

<sup>110</sup> Mahmoudi, *op. cit.*, p. 875.

<sup>111</sup> Article 131, Chapter 7, 2004 constitution.

tiation of a full-scale review of the founding document by 2014. It could take years to achieve the level of stability needed to undertake such a challenging task but Afghan and international stakeholders must realise that reform is unlikely to move forward otherwise. The resolution of the constitution's internal contradictions is critical to promoting the rule of law.<sup>112</sup>

## B. THE COURTS

### 1. Supreme Court

As stated, the powers of the Supreme Court were restored under the 2001 Bonn agreement, which invoked the 1964 constitution as an interim legal framework. The legal authority and administrative functions of the court were further outlined in Chapter VII of the 2004 constitution and the 2005 Law of the Organisation and Jurisdiction of the Courts (Law of the Courts). There are eight justices and one chief justice in the Supreme Court, each of whom is appointed to a single ten-year term by the president with the approval of the Wolesi Jirga.<sup>113</sup> The high court contains four separate divisions or *dewans*: criminal, public security, civil and commercial. Practically speaking, the Supreme Court is both the court of last resort and the chief administrative body for all court personnel, including judges and clerks.<sup>114</sup> In addition to oversight of appointment, transfer, promotion and punishment of judges, the court also holds budgetary authority over all subordinate courts and court staff.

Under Article 121, Chapter 7, the Supreme Court is also granted the power of constitutional review. Another provision calls for the establishment of an Independent Commission for the Supervision of the Implementation of the Constitution, leaving open to question the competency of the Supreme Court to interpret the constitution and to determine whether laws conform to the founding document.<sup>115</sup> Article 157 of the 2004 constitution calls for the creation of the commission "with the provisions of the law" and for the members of the commission to be "ap-

pointed by the President with the approval of the Wolesi Jirga". But there is no specific reference to the structure of the commission, the range or limits of its power or the selection process or qualifications for commission members. Nor are its responsibilities referred to in any detail, leaving open to interpretation the ultimate purpose of both the Supreme Court and this commission. This as yet unresolved conflict has left the system with no clear arbiter of the constitution, leaving the Supreme Court highly vulnerable to manipulation.<sup>116</sup>

Karzai has adeptly exploited this weakness to blunt challenges from rivals and circumscribe the powers of other branches of government. Although the law does not allow the Supreme Court to weigh in on controversial political questions that are not specifically linked to a case, the president has often turned to the court to settle political disputes, substantially weakening perceptions of its independence. The president has, for instance, successfully used the Supreme Court to block parliament's efforts to override presidential vetoes and assert its powers. In May 2007, when the parliament attempted a vote of no confidence in then Afghan Foreign Minister Rangin Dadfar Spanta and subsequently stripped him of his position, Karzai referred the issue to the Supreme Court for review.<sup>117</sup> It ultimately sided with the president, calling the vote unconstitutional.

A similar appeal was made to the Supreme Court in 2009 when controversy erupted over the timing of the second round of presidential and provincial elections. Invoking an exception in the Electoral Law that allows for the postponement of polls "if security, financial or technical conditions or other unpredictable events or situations make the holding of an election impossible",<sup>118</sup> the Independent Election Commission announced in December 2008 that elections would be held on 20 August 2009, four months later than constitutionally mandated. As the campaign season drew near, the announcement sparked controversy over whether Karzai was trying to illegally extend his mandate beyond May 2009. In the end, the Supreme Court backed Karzai, allowing him to stay in office until election day.<sup>119</sup>

In the Afghan system, presidential influence over the composition of the bench constrains the independence of the courts. The executive and the lower courts hold the exclusive right to refer a case or to submit a law, decree or

<sup>112</sup> While constitutional reform is overdue, the amendment process must remain within constitutional bounds.

<sup>113</sup> Chapter 7, Article 117 states that following initial appointments under staggered term limits, appointments to the high court "shall be for ten years" and that justices shall not be appointed for a second term.

<sup>114</sup> Chapter 7, Article 124 states that officials and administrative personnel of the judiciary shall be subject to laws related to civil servants and that the Supreme Court: "shall regulate their appointment, dismissal, promotion, retirement, rewards and punishments".

<sup>115</sup> Sari Kouvo, "Six years late, the Constitutional Commission is formed; but will it take on president and parliament?", Afghanistan Analysts Network, <http://aan-afghanistan.com/index.asp?id=877>, accessed on 3 July 2010.

<sup>116</sup> For more detailed analysis see Thier and Dempsey, *op. cit.*

<sup>117</sup> Carlotta Gall, "Afghan legislators vote out foreign minister", *The New York Times*, 13 May 2007.

<sup>118</sup> Article 55 of the Electoral Law.

<sup>119</sup> See Crisis Group Asia Report N°171, *Afghanistan's Election Challenges*, 24 June 2004, p. 13.

treaty to the Supreme Court for constitutional review.<sup>120</sup> Since lower court judges are appointed by the president without parliamentary approval, they would be disinclined to refer a politically controversial case to the Supreme Court.<sup>121</sup> Hence the presidential right to appoint lower court staff strengthens the executive's hold on the judiciary. Moreover, access to constitutional review is denied to those parties that oppose the government.<sup>122</sup> There are no avenues for private citizens or entities to file complaints pertaining to the violation of their constitutional rights.<sup>123</sup> Although the procedural manoeuvres required to extend to parliament the right of approval on lower court postings would admittedly be complex, it is worth considering whether the Law of the Courts might be amended to enhance parliament's role in the judicial appointment process.

Parliament has several times tried to address the problem of the judicial independence and constitutional jurisdiction of the Supreme Court, but so far has been thwarted. Following the 2004 constitution's prescription for the establishment of an independent commission for the implementation of the constitution,<sup>124</sup> the Wolesi Jirga introduced the amended text of the Law on the Independent Commission for the Supervision of the Implementation of the Constitution in November 2006. The most controversial elements of the draft law pertained to provisos that granted the commission authority to interpret the constitution and authority over legal review. Karzai rejected this version of the bill and sent it back to the lower house for further review.

In April 2007, the debate over Spanta's tenure as foreign minister further catalysed the parliamentary debate over the establishment of the Independent Commission for the Supervision of the Implementation of the Constitution. Karzai, however, refused to sign the law on the grounds that it was unconstitutional.<sup>125</sup> Parliament overrode the presidential veto with a two-thirds majority a little more than a year later.<sup>126</sup> The law languished for several months. On 6 March 2009, Karzai referred the law to the Supreme

Court for review, which, not surprisingly, promptly ruled in the executive's favour, declaring the law unconstitutional.<sup>127</sup> In June 2009, Karzai submitted the Supreme Court's ruling against the establishment of the commission to the *taqnin* for review and eventual publication in the official gazette in July that same year.<sup>128</sup> These manoeuvres by the president effectively circumvented legislative review and quashed all challenges to the executive in the original draft law on the commission.

Increasingly resistant to executive interference, the Wolesi Jirga pushed ahead with a review of the nominees submitted by Karzai under this spuriously passed law.<sup>129</sup> The commission was officially established in June 2010 with the confirmation of its five members – all of whom agreed to vigorously pursue their duties as constitutional arbiters.<sup>130</sup> It remains to be seen, however, whether commission members will demonstrate the courage of their convictions and whether parliament will deliver on its promise to support the commission against undue pressure from the executive. Until such time as the impasse between the president, the high court and legislature is resolved, little should be expected from commission members. It is much more likely, as one Kabul MP commented, that the struggle to locate interpretive authority within one body or the other – either the Supreme Court or the commission – will have to be handled through a vigorous constitutional review process.

Article 121 of the constitution does not grant the right to the Supreme Court to interpret the constitution. Anybody with low literacy in Dari can clearly understand what this article is about. Nor does article 157 of the constitution grant the Independent Commission the right to interpret the constitution. There is a vacuum in

<sup>120</sup> Chapter 7, Article 121 of the constitution states: "Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them in accordance with the law".

<sup>121</sup> Rainer Grote, "Separation of Powers in the New Afghan Constitution", *Heidelberg Journal of International Law*, Max-Planck Institute for Comparative Public Law and International Law, 2004, pp. 897-915.

<sup>122</sup> *Ibid.*, p. 911.

<sup>123</sup> Moschtaghi, *op. cit.*, p. 45.

<sup>124</sup> Article 157, 2004 constitution.

<sup>125</sup> Moschtaghi, *op. cit.*, p. 43.

<sup>126</sup> Article 94 of the constitution requires a majority vote of two thirds of the Wolesi Jirga to override a presidential veto.

<sup>127</sup> The Supreme Court ruled that clauses 1 and 4 of Article 8 in the draft law were unconstitutional, effectively striking down the Wolesi Jirga's proposal to grant the commission legal review authority and the power to interpret the constitution.

<sup>128</sup> Established in 1962 under Daoud, the *taqnin* is the ministry of justice department charged with reviewing draft laws issued by parliament. The role of the *taqnin* is further articulated under a 1999 charter which states that the department's chief mission is to scrutinise, draft and publish laws as well as to offer legal advice to other government departments.

<sup>129</sup> Kouvo, "Statebuilding and Rule of Law: Lessons from Afghanistan?", *op. cit.*

<sup>130</sup> The National Assembly voted to confirm Gul Rahman Qazi, Sayed Omar Munib, Mohammad Amin Ahmadi, Abdul Qadir Adalatkhwa and Mahbuba Huquqmal. Commission nominees were confirmed after heated debate in parliament and were placed under considerable pressure by several MP's to publicly promise to implement their constitutional review power. This marked a clear effort by opposition parliament members to check the president's power and further politicised the commission's establishment. Crisis Group interview, Abdul Kabir Ranjbar, MP-Kabul, Kabul, 3 August 2010.

the constitution that can only be filled by a constitutional amendment.<sup>131</sup>

## 2. Lower courts

Afghanistan has parallel court systems: the general courts and special courts. General courts consist of the district, provincial, appellate and Supreme Court. Provincial primary courts, based in provincial capitals such as Kabul, Herat, Kandahar, Jalalabad and Mazar-e Sharif, follow a similar pattern of that of the Supreme Court with four divisions – public security, civil, commercial and penal. Each city zone and district is allotted one primary court where the bulk of cases are initially lodged. Of these primary courts, 364 are district courts and 45 are city courts.<sup>132</sup> The Supreme Court is in charge of the overall budget and administration of all judicial staff,<sup>133</sup> including 409 primary courts and 36 appellate courts. The Supreme Court's General Administrative Office of the Judiciary manages the administration and training of judicial staff.

There is no constitutional provision pertaining to the establishment of special courts to deal with specific criminal offences.<sup>134</sup> Rather, a relatively loose interpretation of the Law of the Courts and the proliferation of specialised public security laws since 2001 has allowed for the creation of several special courts with distinct competencies.<sup>135</sup> Family law and juvenile justice cases are adjudicated in separate courts. As of 2008, however, only three juvenile primary courts had been established in Kabul, Mazar-e Sharif and Jalalabad.<sup>136</sup> The promulgation of the Counter Narcotics Law in December 2005 established specialised courts to handle narcotics trafficking cases. A separate anti-corruption tribunal was set up in early 2010, shortly after the London conference on Afghanistan.

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<sup>131</sup> Crisis Group interview, Kabir Ranjbar, MP-Kabul, president of the Afghanistan Democratic Lawyers Union, chief of the Wolesi Jirga Commission on Central Audit and Oversight for the Implementation of the Law, Kabul, 3 August 2010.

<sup>132</sup> Crisis Group interview, Ghulam Hussain Safi, human resources director, Supreme Court, Kabul, 21 July 2010.

<sup>133</sup> Article 125, 2004 constitution.

<sup>134</sup> Although Article 122, Chapter 7 of the constitution outlines court jurisdiction, it refers only to the establishment of military courts and specialised courts stipulated in Articles 69, 78, 127, which pertain to presidential impeachment procedures, war crimes and treason allegations linked to government ministers and impeachment proceedings against members of the Supreme Court, respectively.

<sup>135</sup> Moschtaghi, op. cit., p. 21.

<sup>136</sup> "Justice for Children: The Situation for Children in Conflict with the Law in Afghanistan", UNICEF, 2008, p. 7. It was unclear at the time of writing how much progress had been made in establishing juvenile courts in other provinces, though several Afghan and international officials lamented the slow pace of juvenile justice reform.

With the exception of civil and commercial matters, the majority of cases are initially filed in the primary court.<sup>137</sup> In theory, primary court judges are tasked with rendering verdicts, but their duties also include administrative tasks such as issuing marriage licenses.<sup>138</sup> Criminal cases make their way to the primary courts from an initial filing by prosecutors in the Attorney General's office. Under the law, a defendant in a case should be notified in writing of a claim against him. In practice, notification of filings is haphazard and many police view the execution of a summons as the quickest route to a bribe. The right to counsel is enshrined in the constitution, and the state is obligated to assign counsel to the indigent.<sup>139</sup> The defence bar, however, is very small – and nonexistent in many parts of the country.<sup>140</sup> The vast majority of cases are tried without the defendant or the prosecutor present let alone the defence counsel. As one ministry of justice official noted:

In most cases, court sessions aren't held. Instead a group of judges sit together in a room. There is no defence lawyer there. There is no prosecutor there. The defendant is rarely allowed to participate. If the family members of the accused are there, they are barred from speaking. When we ask these judges why they are conducting court this way they say: "We called the prosecutor. We called the defence lawyer. But we couldn't reach them". Or they say, "The prosecutor has done his job and we know what our job is so we don't need him there" .... The problem is that our judges and prosecutors believe they personally are the highest authority in the land, not the law, and they abuse the law as a result of this thinking.<sup>141</sup>

Limitations imposed on the legal system by the country's rugged terrain and lack of basic resources cannot be underestimated. Judges and prosecutors complain that cases can take months to proceed from arrest to trial because witnesses and defendants either fail to appear or because local jails do not have sufficient vehicles or personnel to transport prisoners in a timely manner.<sup>142</sup> Insecurity has also increasingly played a role in the lack of coordination between the centre and the provinces, with at least 69

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<sup>137</sup> Civil and commercial matters pertaining to property rights, contracts, etc, are generally first referred to the *Huquq* department of the justice ministry at the provincial level.

<sup>138</sup> Livingston Armytage, "Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War", Study for USAID, 2007, pp. 185-210.

<sup>139</sup> Article 31, 2004 constitution.

<sup>140</sup> For details on the shortage of defence counsel, see Section VI.A.

<sup>141</sup> Crisis Group interview, senior Afghan official, ministry of justice, Kabul, 9 June 2010.

<sup>142</sup> "The State of Regional Justice Systems in Balkh, Herat and Nangarhar", U.S. Department of State, JSSP, Washington DC, 10 December 2006.

primary district courts shuttered as a result of insurgent activity.<sup>143</sup> In many parts of the country, there simply are no district courts because they have not been built, a circumstance that frequently forces judges and other judicial staff to travel long distances to perform their duties. In Bamiyan province, for instance, lack of infrastructure and critical shortages in staff has led to a huge backlog of cases. The province is allotted 41 slots for judges and eighteen for administrative support staff, but only 30 judges and eleven judicial staff were working full time as of July 2010.<sup>144</sup>

The Afghan government, under the auspices of the District Delivery Program (DDP),<sup>145</sup> initiated efforts to fill these gaps following the February 2010 ISAF offensive in Marjah district in Helmand province. In all, some 48 districts identified as critical to stabilisation have been targeted under the DDP plan with the goal of rapidly filling key government positions, including the addition of at least three judges and two prosecutors to each district.<sup>146</sup> Yet, even this relatively modest plan to increase the number of judicial personnel has proven problematic despite the enticement of salary increases since personal security often trumps all other concerns for potential candidates. For instance, the *tashkil* or organisational plan for the southern province of Kandahar calls for a total of 90 judges, but only about twelve of those slots were filled by autumn 2010.<sup>147</sup>

Problems in the judiciary at the provincial level reflect the lack of devolution of power to the periphery. Under the constitution, budgetary authority for local courts rests firmly with the Supreme Court. In practical terms, this means that the very real and urgent needs of local courts are often subject to the whims of Kabul's politics. Areas with poor or no representation or political clout in the capital are often those where the judiciary is weakest. In general the central government gives few resources to the

provinces and provincial councils have no budgetary authority. The judiciary has, as a result, suffered from poor coordination between primary courts at the district level and higher courts in provincial capitals and Kabul. Even the Supreme Court Chief Justice has acknowledged the problem: "When I came here I found myself totally isolated from the other courts. There was no communication between courts in other provinces or even here in Kabul. I didn't even know how many cases I had or what was pending in the criminal court or what was pending in the civil court".<sup>148</sup>

The lack of coordination between high courts and primary courts in the provinces contributes to corruption and inefficient case management. Procedural flaws run like a contagion through the system from top to bottom, driving up the rate of appeals exponentially. Although few independent comprehensive assessments of the judicial system have been conducted publicly since 2002 and the Supreme Court does not track such statistics, a study conducted on behalf of the USAID estimated that 80 per cent of primary court decisions were appealed and some 70 per cent of appellate court decisions were appealed.<sup>149</sup>

Progress in setting up a comprehensive case management system and implementing provincial justice coordination mechanisms has been exceedingly slow. It was not until 2008 that the Afghanistan Case Administration System (ACAS) was established under the aegis of a U.S. financed aid project. While a positive first step toward reducing the disconnect between the provinces and the centre, for the case tracking system to be effective donors and the Afghan government will have to step up the pace of training. As of July 2009, 1,724 judicial staff had been trained on ACAS, representing only a third of the country's judicial staff.<sup>150</sup>

### 3. Special courts: counter-narcotics

Afghanistan's role as the world's largest producer of illicit opium and the insurgency's reliance on the illicit drug economy are well known.<sup>151</sup> In May 2005, the Criminal Justice Task Force (CJTF) was established with the help of UK and U.S. advisers to investigate and prosecute serious drug-related crimes. This was followed by the pas-

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<sup>143</sup> In a 21 July 2010 Crisis Group interview, Supreme Court Human Resources Director Ghulam Hussain Safi estimated that 69 of 364 district courts were not operational due to insecurity. Anecdotal accounts from Crisis Group field research in Nangarhar, Parwan, Bamiyan, Wardak and Kabul provinces indicate that number of courts that are not operational is likely considerably higher, but short of a district-by-district assessment conducted by an independent organisation, it is impossible to verify the actual number of courts that are operating at the local level at any given time.

<sup>144</sup> Crisis Group interviews, Afghan judicial officials, Bamiyan, 19 July 2010.

<sup>145</sup> This program is coordinated by the Independent Directorate of Local Governance (IDLG).

<sup>146</sup> "Security Sector Reform Monitor: Afghanistan", Centre for International Governance Innovation, Ontario, No. 4, September 2010, p. 6.

<sup>147</sup> Ibid.

<sup>148</sup> Crisis Group interview, Abdul Salam Azimi, Chief Justice of the Supreme Court of Afghanistan, Kabul, 10 July 2010.

<sup>149</sup> Armytage, op. cit.

<sup>150</sup> According to Management Systems International – the subcontractor hired by USAID's primary rule of law contractor, Checchi and Company Consulting – 826 judges and 898 judicial administrators from 356 courts received training in case registration and file management. See [www.msi-inc.com/index.cfm?msiweb=project&p\\_id=91](http://www.msi-inc.com/index.cfm?msiweb=project&p_id=91), accessed on 10 August 2010.

<sup>151</sup> "Addiction, Crime and Insurgency: The Transnational Threat of Afghan Opium", UNODC, Vienna, October 2009.

sage in December 2005 of the Counter Narcotics Law, the first of its kind in Afghanistan. The U.S. State Department has allocated about \$383 million since 2005 to support counter-narcotics rule-of-law programs and justice institutions.<sup>152</sup>

Afghan officials point to the arrests and conviction of hundreds of drug trafficking suspects since the creation of the CJTF as evidence that the money has been well spent. Indeed, a total of 440 people were prosecuted and convicted in CJTF courts from March 2009 to March 2010, including 21 government officials.<sup>153</sup> These convictions, however, have come at a price. In September 2008, one of CJTF's senior judges, Alim Hanif, was gunned down near his home in Kabul as he was on his way to work. Few details have been published about the judge's assassination but CJTF officials have said that Hanif had apparently refused a bribe from a defendant in a major drugs case a day before his killing.<sup>154</sup>

Extra security may not help much in light of the pervasive political interference in major drug cases. Despite the hundreds of drug convictions secured by the CJTF, there is no evidence that these specialised courts are equipped to convict major criminal figures protected by high-ranking government officials. In April 2009 President Karzai ordered the release of five well-known, convicted drug traffickers from Nangarhar province caught with more than 260 pounds of heroin.<sup>155</sup> The move was largely viewed as a campaign manoeuvre to curry favour with several long-time Karzai backers, including Haji Din Mohammad, the former governor of Nangarhar and a relative of one of the released drug traffickers. If such brazen political interference is to be avoided, judicial staff need better protection from violent or political retribution.

### C. ATTORNEY GENERAL

The office of the attorney general was established under Article 134 of the 2004 constitution, which states that the attorney general or *Loya Saranwal* is part of the executive but that the office "shall be independent in its performance."<sup>156</sup> The constitution further calls for the "organisation, authority and method of work" to be regulated by

law and mandates the application of a "special law" to regulate the investigation of crimes by members of the armed forces, police and national security officials. The 2004 Interim Criminal Procedure Code for Courts more explicitly states in Article 22 that the attorney general is obligated to "introduce prosecution of all crimes, known directly by him or reported to him".

The president appoints the attorney general with approval of the Wolesi Jirga. Parliament has not demonstrated much independence, however, when it comes to vetting candidates. The attorney general's office has thus become a political dumping ground for appointees whose loyalty is first to palace patrons and a distant second to the law. The selection process for the attorney general has also been susceptible to the strong-arm tactics of international stakeholders. Since the fall of the Taliban, the U.S., in particular, has leaned heavily on the Afghan government to influence the selection of attorney generals and to push for the chief prosecutor's office to pursue specific policy agendas.<sup>157</sup> Consequently, the ability of the attorney general to shape and impact the rule of law has depended as much on personality as it has on the strength of the chief prosecutor's backing from both Afghan elites and internationals. The upshot is that the attorney general's office is often the weakest link in the justice system since it has a poorly defined legal mandate and little recourse against outside political pressure.<sup>158</sup>

The attorney general's office is split into five main divisions: judiciary, monitoring, investigation, administrative affairs and the military. Each division is headed by a deputy attorney general who oversees various directorates such as the separate directorates of criminal investigation and anti-corruption unit under the deputy attorney general for investigation. As with other government institutions, the individuals leading divisions and directorates are drawn from the networks of either the presiding attorney general or powerbrokers linked to the presidential palace. Several prosecutors complained that the connections between influential powerbrokers and prosecutors in the attorney general's office has virtually paralysed the office. Although prosecutors, like judges, are required to be trained in either secular or Sharia law, many are uneducated holdovers from previous regimes that have leveraged their connections with patronage networks to secure their slots.<sup>159</sup> A veteran Kabul prosecutor complained that lack of enforcement of administrative procedures in the appointments process has encouraged corruption:

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<sup>152</sup> "Afghanistan Drug Control: Strategy Evolving and Progress Reported, but Interim Performance Targets and Evaluation of Justice Reform Efforts Needed", U.S. Government Accountability Office, GAO-10-291, March 2010, p. 6.

<sup>153</sup> 2009/10 Annual Report, Criminal Justice Task Force, Islamic Republic of Afghanistan.

<sup>154</sup> Crisis Group interview, CJTF adviser, Kabul, 23 August 2010.

<sup>155</sup> Ben Farmer, "Afghanistan: senior female judge accuses Hamid Karzai over release of drug lords", *The Christian Science Monitor*, 6 September 2009.

<sup>156</sup> Chapter 7, Article 134.

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<sup>157</sup> Crisis Group interview, Kabul, 21 June 2010.

<sup>158</sup> Ernesto Londono and Greg Miller, "U.S. officials say Karzai aides derailing cases involving elite", *The Washington Post*, 28 June 2010.

<sup>159</sup> Crisis Group interview, senior Western adviser, Kabul, 5 June 2010.



Nowadays people get their positions through political connections. You have people in the attorney general's office with a seventh or eighth grade education in positions as high-level prosecutors. Meanwhile, you have young prosecutors who have graduated from university and completed the stage training course, earning \$75 a month. They can't survive on that and there's little chance they'll be promoted without using connections so they leave. We need to change things so young graduates stay in their jobs.<sup>160</sup>

The appointment of a chief prosecutor in any nation is a politically fraught process that has the power to alter the very course of the rule of law. Afghanistan has had three chief prosecutors in less than eight years. Following the fall of the Taliban, Abdul Mahmoud Daqiq, a leading member of Massoud's Northern Alliance, was named attorney general. A former district attorney who had studied law at Kabul University during the Daoud era, Daqiq's appointment surprised few who knew the inner-workings of Massoud's powerful Shuray-e Nazar political-military council. Daqiq had briefly served as attorney general under Rabbani and was considered one of the most loyal members of the Northern Alliance. He earned both plaudits and criticism for his pursuit of cases against allegedly abusive communist era commanders and soon fell out of favour with the Karzai administration after refusing to drop embezzlement charges against transport minister Enayatullah Qasimi in 2005.<sup>161</sup>

Abdul Jabar Sabit, a one-time member of Hizb-e Islami and long-time aide to Hekmatyar, replaced Daqiq in May 2006. Sabit, who lived and worked for a time in Canada and the U.S., had close ties to U.S. government officials, and acknowledged that his connections to the U.S. embassy had helped secure the position.<sup>162</sup> His vocal support for Karzai's cooperative stance vis-à-vis the Guantanamo military prison also won him U.S. backing. Upon taking office, Sabit became notorious for his public promises to confront corruption and prosecute high-ranking Afghan officials.<sup>163</sup> In contrast with his predecessor, Sabit was considerably more accessible, regularly holding public consultations in his office. But his ambitious campaign to make his mark as attorney general was partially derailed by his aggressive and sometimes erratic pursuit of prosecutions, including an April 2007 raid on the independent

Afghan television station Tolo after it aired a program critical of the judicial system.<sup>164</sup>

The Tolo incident did little to bolster Sabit's credibility as a defender of the law, but he pressed on with his very public campaign to prosecute Afghan officials accused of corruption. This included the case against Abdul Rashid Dostum, former deputy defence minister and sometimes Karzai ally, who was accused of attacking his former political campaign manager, Akbar Bai, at his Kabul home in February 2008.<sup>165</sup> Sabit quickly learned the limits of the power of his office when he swore out a warrant for Dostum's arrest, which Dostum countered with an armed assault on the Afghan police sent to detain him.<sup>166</sup> Despite the public and brazen challenge to the attorney general's authority, the contretemps drew a mere slap on the wrist from Karzai, who instead of pressing for Dostum's prosecution allowed him to flee the country. Sabit was then forced to resign after announcing his intention to run for president and Dostum was welcomed home by Karzai.<sup>167</sup>

In August 2008, Mohammad Ishaq Aloko, a Kandahari Pashtun who worked as a counter-intelligence officer under Daoud,<sup>168</sup> took up the mantle of attorney general. Like Sabit, Aloko maintained ties with Hekmatyar's Hizb-e Islami party. After the collapse of Daoud's regime in 1978, Aloko had moved to Pakistan where he contributed articles to *Shahadat*, the official publication of Hizb-e Islami in Peshawar.<sup>169</sup> He later moved to Germany where he worked for a time in the German justice ministry. Joining Karzai's government after returning to Afghanistan in 2003, Aloko worked in the policy review and studies department of the attorney general's office before rising to the rank of first deputy attorney general and serving as head of Afghanistan's Commission on Guantanamo Detainees.

Well aware of how his predecessors were removed from office after publicly falling out with the president, Aloko

<sup>160</sup> Crisis Group interview, senior Afghan prosecutor, Kabul, 20 June 2010.

<sup>161</sup> Mohammad Jawed, "Ministers play the blame game", Institute for War & Peace Reporting, 13 December 2005.

<sup>162</sup> Unpublished interview with Abdul Jabar Sabit, 19 July 2008.

<sup>163</sup> Pamela Constable, "Top prosecutor targets Afghanistan's once-untouchable bosses", *The Washington Post*, 23 November 2006.

<sup>164</sup> "Afghan official with Canadian past tied to violent TV raid", Canadian Broadcasting Corporation, 18 April 2007.

<sup>165</sup> Longtime head of the Junbesh-e Milli party, Dostum has been accused of committing war crimes during the PDPA and mujahidin eras as well as after the Taliban's ouster. Accusations against Dostum include the 2002 massacre of about 2,000 Taliban fighters who were allegedly buried in a mass grave at Shirbegan in Dostum's home province of Jawzjan. See also "Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity", op. cit.

<sup>166</sup> Abdul Waheed Wafa, "Former warlord in standoff with police at Kabul home", *The New York Times*, 4 February 2008.

<sup>167</sup> Carlotta Gall, "Afghanistan's president moves to bolster bid for re-election", *The New York Times*, 16 August 2008.

<sup>168</sup> Crisis Group interview, Mohammad Ishaq Aloko, attorney general, Kabul, 17 August 2010.

<sup>169</sup> Crisis Group interview, former Supreme Court official, Kabul, 25 July 2010.

has been more cautious. He refused, for instance, to open an investigation into allegations that Dostum had ordered the mass burial of hundreds of Taliban fighters in Shiberghan in 2002, though human rights groups had presented substantial evidence warranting an inquiry.<sup>170</sup> Aloko has protected Karzai allies repeatedly since taking office, according to staff in the attorney general's office and U.S. officials.<sup>171</sup> Under Aloko, the nexus between high-level powerbrokers and prosecutorial staff has been quite pronounced, making the office particularly susceptible to outside influence. International advisers and Afghan officials complain that he has been too timid in his pursuit of corruption cases.<sup>172</sup> Despite a flurry of high-profile investigations against Afghan ministers, including Minister of Hajj and Islamic Affairs Mohammad Siddiq Chakari, Aloko has yet to successfully prosecute a single case. Instead, most have continued their illegal activities or, like Chakari who left for London under Aloko's apparent protection after he was charged, allowed to flee the country.

#### D. MINISTRY OF JUSTICE

The mandate of the justice ministry is to draft, review and propose legislative documents and amendments and to provide legislative advice to the executive. Additionally, the ministry manages legal aid services and support for defence counsel, administers correctional operations, as well as acts as an arbiter in civil and commercial disputes through its *Huquq* departments. The ministry is in effect the chief legal counsel for the government in disputes pertaining to state properties and defends government interests through court litigation. It is de facto vested with investigative authority for cases concerning the use of, access to and ownership of government lands.

In the absence of laws pertaining to the ministry's specific mandate, its legal authority and effectiveness are considerably circumscribed by both the lack of direction and lack of capacity. Responsible for a broad range of activities, the ministry has made little headway on reform. Moreover, its broad and somewhat vague mandate frequently brings it into conflict with the Supreme Court and attorney general's office.<sup>173</sup> Overlapping responsibilities for legal review between the justice ministry and Supreme Court, and between the ministry and the chief prosecutor's office for mediation/arbitration of land, water and commercial disputes fuel many of these clashes.

The ministry of justice in effect became the sole arbiter of legislative and legal review following the dissolution of the Judicial Reform Commission in 2005. Policy proposals, draft laws and legal revisions are filtered through the ministry's *Taqnin* department, which is the final authority on the writing, revision and publication of laws. Its role in strengthening existing laws and defining new ones makes the *Taqnin* one of the most important nodes for potential reform within the justice system. With expert support from the Law Reform Working Group, which includes international and Afghan experts, this relatively small body has reviewed legislation and published numerous laws since 2002. As of 2007, the *Taqnin* had drafted and reviewed an estimated 188 legislative documents, averaging about 40 documents a year.<sup>174</sup> But with hundreds of legislative documents to review and other laws in various stages of drafting, it is clear that more resources are needed to reduce delays in the review process.

Department staffing is minimal and the professional background of many staffers, like other departments in the ministry, is quite low. In 2007, the ministry reported that only ten out of the 47 staff in the department could be considered "highly experienced and skilled legislative drafters".<sup>175</sup> The department is also short on legal translators and materials in Dari and Pashto, which has caused significant delays. Its ability to ensure that laws published in the Official Gazette are widely distributed and that the public has proper access to them is extremely limited. This has led to confusion over the enactment of laws and has occasionally facilitated political manipulation. Although there has been some discussion of creating an independent commission for legal review, it is unlikely that any commission appointed in the current political environment would remain independent for long. Instead of creating yet another parallel structure, the Afghan government would be better served by an increase in international aid and dedicating more resources to build the capacity of the *Taqnin*.

Manipulation and political interference in land and water disputes is another area where the ministry has been especially challenged. Land tenure law has long been divisive in Afghanistan. Heavily affected by successive regime change, land codes are a confusing patchwork of tenure rights and have often been abused to gain leverage over political and economic rivals. The destruction of documents and legal records during decades of conflict has created innumerable opportunities for criminal land grabs. Many Afghan officials contend that high-ranking mem-

<sup>170</sup> Tom Lassiter, "As possible Afghan war-crimes evidence removed, U.S. silent", *McClatchy Newspapers*, 12 December 2008.

<sup>171</sup> Miller and Londono, "U.S. officials say Karzai aides are derailing corruption cases involving elite", op. cit.

<sup>172</sup> Crisis Group interview, senior U.S. official, Kabul, 11 August 2010.

<sup>173</sup> "Establishing the Rule of Law in Afghanistan", op. cit., p. 6.

<sup>174</sup> Sarwar Danesh, "Strategy of Ministry of Justice with Focus on Prioritization", Ministry of Justice of Afghanistan, Kabul, 21 April 2007, p. 4.

<sup>175</sup> Ibid.

bers of the government are leading illegal land schemes.<sup>176</sup> Under the Karzai administration, the government has worked to consolidate its holdings, issuing a series of decrees aimed at reducing land grabbing.<sup>177</sup> In 2004, the Afghan government issued a decree that turned any land that could not be proven to be held by any one person or private entity over to the government. Since then the administration of disputes involving government land has largely fallen to the justice ministry while questions of cadastre and land registry have been handled by the agriculture ministry.

Fear of violent retaliation has prompted many ministry officials to wash their hands of administering land disputes. With violence on the rise across the country and little security provided at most ministry offices, it is little wonder that scant progress has been made on resolving land cases. In Nangarhar province, for instance, Afghan officials estimated that tens of thousands of acres of government land are in dispute. In June 2010, at least thirteen people had been killed and some 65 houses destroyed as a result of longstanding disputes between rival factions of the Shinwari tribe. In all, some twenty to 25 people were killed in Nangarhar province alone in 2009 over land ownership disputes.<sup>178</sup> Said one Afghan official:

A lot of these cases aren't acted on because of the factional, tribal and political pressures exerted on us. We are basically stuck in a quagmire here. We can't do anything without coming under threat .... It's quite clear nationally and in Nangarhar specifically who is involved in land grabbing. Their presence in this province has weakened rule of law and given rise to corruption. People are running mafias and drug trafficking rings here; the only way forward is rule of law and the proper application of justice.<sup>179</sup>

The ministry's biggest challenge, by far, is prison administration and correctional reform. The prison population has exploded since 2001 when a total of 600 people were imprisoned countrywide. According to government and international estimates, there is now a prison population of around 17,000 as of 2010, up from 10,000 in 2007.<sup>180</sup> About 500 are women, up from 300 in 2007, indicating a

disproportionate rise in cases involving women.<sup>181</sup> Widespread judicial corruption, a culture of impunity that encourages arbitrary detentions and a trend toward punitive application of the law account for much of this increase.

The prison population consists largely of petty offenders, drug addicts, the mentally ill and those with weak links to patronage networks or those who are unable to buy their way out of the system. Unsanitary conditions and overcrowding in dilapidated buildings has been a perennial problem. Prisons have, as a result, become a breeding ground for the insurgency and contributed heavily to the deterioration of the rule of law, as demonstrated by the deadly riots at Pul-e Charkhi prison in February 2006 and the violent prison break at the Sarposa facility in Kandahar in 2008.<sup>182</sup> To date the ministry has focused its prison reform efforts on improving infrastructure and training. Root causes such as overly punitive laws, misapplication of procedures and lack of sentencing guidelines have yet to be addressed by any reform program – Afghan or international.

The former Minister of Justice Sarwar Danesh, an ethnic Hazara from Daikundi province, appeared to have a firm grasp of the many challenges facing his ministry. In 2007, the ministry, under Danesh's instructions, issued an assessment that provided a long-term outlook on its development needs. The report identified priority areas for improvement and called for the establishment of a policy and planning advisory unit that would work closely with national and international bodies to coordinate reform and development efforts. Danesh, however, was removed from office when Karzai reshuffled his cabinet in early 2010 before many of the recommendations could be fully implemented. It remains to be seen whether Danesh's successor, Habibullah Ghalib, an ethnic Tajik who was a member of the highly factionalised Judicial Reform Commission, will be able to effect genuine change within the ministry.

<sup>176</sup> Crisis Group interview, senior Afghan official, Ministry of Agriculture and Livestock, Kabul, 20 May 2010.

<sup>177</sup> Alec McEwen and Brendan Whitty, "Water Management, Livestock and the Opium Economy: Land Tenure", Afghanistan Research and Evaluation Unit, Case Studies Series, June 2006.

<sup>178</sup> Crisis Group interview, Afghan official, Jalalabad, 23 June 2010.

<sup>179</sup> Ibid.

<sup>180</sup> "Afghanistan: Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation", UNODC, May 2008, p. 2.

<sup>181</sup> Crisis Group interview, Amir Mohammad Jamshid, general director of prisons and detention centres, Kabul, 4 August 2010.

<sup>182</sup> Sultan M. Munadi and Carlotta Gall, "Prisoners riot in Afghan prison and seize cell block", *The New York Times*, 26 February 2006; Carlotta Gall, "Taliban free 1,200 inmates in attack on Afghan prison", *The New York Times*, 14 June 2008.

## V. THE CAPACITY-CORRUPTION CONTINUUM

The judicial sector has historically been under-resourced, but it has further weakened since the fall of the Taliban with devastating effect on the rule of law. The disjointed approach to reform has placed many undereducated staff in important positions, which has in turn undermined institutional links between key judicial actors. Poor coordination between judges, prosecutors and police has acted like a petri dish for corruption, allowing for the exponential growth of complex systems of graft run by rival networks. Under heavy pressure from local warlords, meddling politicians and insurgents, judges feel little obligation to protect the rights of victims and witnesses or to ensure due process when their own lives are at risk. Prosecutors, similarly, are often at odds with police officers, who typically represent the frontline of complex government-sponsored bribery schemes.

These problems are exacerbated by an overall lack of human and material resources. Some provinces are more affected than others. Nationwide, the ratio of citizens to judges is an estimated 21,317 persons to a judge. In highly insecure and unstable areas, the ratio is much worse with 76,200 citizens to a judge in Kandahar province and 60,200 per judge in Helmand.<sup>183</sup> Thus, a single judge decides many cases if they are decided at all. Dozens of district courts are simply inoperable because there are either not enough judges or prosecutors available to work in them or insecurity has prevented the courts from operating freely. Sustained and targeted investment in training, pay and rank reform, infrastructure, materials and equipment, and security is urgently needed to improve capacity and reduce corruption in the judiciary.

### A. A QUESTION OF CAPACITY

Decades of conflict have left Afghanistan bereft of human resources. The devastation arising from the civil war forced many professional, educated Afghans to flee. The resultant brain-drain will take generations to reverse. The majority of judges have not obtained the educational training required by law.<sup>184</sup> In 2007, some 47 per cent of

judges did not hold bachelor's degrees or the equivalent;<sup>185</sup> 14 per cent are high school graduates.<sup>186</sup> Since no new assessment of judges' qualifications has since been published, it is unclear what impact funding for increased training and education for judges has had overall. Anecdotal accounts suggest that substantial numbers of judges still lack the education and legal training to do their jobs properly. Not surprisingly, in areas of the south and east where instability and insecurity are worst, many judges have little or no qualifications at all. In Uruzgan province, for example, not one of the seven working judges has a university degree.<sup>187</sup>

The trend appears similar for prosecutors. Although the attorney general's office asserts that some 47 per cent of professional and administrative staff has a university degree, this figure is likely inflated.<sup>188</sup> Anecdotal accounts and published research suggest that education levels are far lower; the percentage of prosecutors with university degrees is extremely low in a number of economically deprived provinces. In Bamiyan only three out of eighteen prosecutors had bachelor's degrees while the rest were high school graduates.<sup>189</sup>

Many of the judges and prosecutors with advanced degrees studied at Kabul University (or similar universities), which offers a four-year program either in the Faculty of Sharia or the Faculty of Law and Political Science. The curricula at both are out of date and out of synch with the demand to develop critical thinking among legal elites. As Chief Justice Azimi has pointed out himself, the majority of graduates from these faculties obtain a bare minimum

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ence faculty, or must have obtained an alternate degree from an official madrasa. See detail on stage training below.

<sup>185</sup> Armytage, *op. cit.*, p. 5. Crisis Group interviews with judiciary officials in Nangarhar, Parwan, Bamiyan, Wardak and Kabul provinces from June to August 2010 indicate that the number of judicial officials with university degrees in those provinces ranged from 0 to 20 per cent.

<sup>186</sup> Crisis Group interviews, June-August 2010.

<sup>187</sup> Roder and Zia, *op. cit.*, pp. 13-14.

<sup>188</sup> Official estimates of staff numbers and qualifications vary considerably. In a 6 July 2010 Crisis Group interview with Abdul Wakil Amini, deputy attorney general for administrative affairs, Amini estimated that the total number of staff working for the attorney general's office stood at 4,831 with 4,077 qualifying as professional or contract workers and 754 support staff (maintenance, custodial, etc). Amini said he was unable to provide information about the educational levels of the staff. In a 17 August 2010 Crisis Group interview, however, Shir Aqa Shinwari, director of human resources, stated that the total staff of the attorney general's office was 2,610 of which 1,337 had obtained bachelor's degrees in Sharia or law and politics, 38 had master's degrees, one had a doctorate and the rest were high school graduates.

<sup>189</sup> Crisis Group interview, Azizullah Hadafmand, chief prosecutor, appellate division, Bamiyan, 19 July 2010.

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<sup>183</sup> Tilmann Roder and Sayed Hameed Zia, "Provincial Needs Assessment: Criminal Justice in Uruzgan Province", Embassy of the Royal Kingdom of the Netherlands/German Technical Corporation (GTZ), 15 May 2010, p. 16.

<sup>184</sup> Article 58 of the Law of the Courts describes the requirements for appointment to the bench. Judges must be at least 25 years old, have no criminal background or affiliation with a political party and must have completed either a bachelor of arts from either the faculty of Sharia or the Law and Political Sci-

of legal education, and a full overhaul of the curriculum is needed:

We have students who spend time in these classes and come out with no real background. After four years, they graduate and they know nothing. They don't know what the law is or what is required of them. The judges in the courts have not read the books or the laws they just apply the articles without interpretation.<sup>190</sup>

The Supreme Court has tried to address the knowledge gap by requiring that all judges take a one-year judicial stage-training course that covers the basics of fair trial standards, judicial ethics and constitutional law among other subjects. A substantial number of sitting judges, however, have not completed the course. A 2007 study estimated that less than 200 of the nearly 700 judges appointed by the Karzai administration – that is less than 30 per cent of the judges appointed under former Chief Justice Shinwari – have not completed stage training.<sup>191</sup> Completion of the induction course is still no guarantee that judges have absorbed all the complexities of the system. Current Chief Justice Azimi has said he would like to increase the course to two years, but it remains unclear when this change would be implemented or what the additional costs of expanding the program might be. International support for stage training and continuing education for judges and prosecutors has come from a number of quarters. But there is as yet no national program with clear priorities for boosting post-secondary/continuing education for legal professionals.

Compounding the knowledge gap is an overall shortage of personnel in the justice sector. As of July 2010, 1,577 judges were reportedly on the bench, only 119 of them women;<sup>192</sup> of 6,607 positions billeted nationwide for the entire judiciary, the Supreme Court reported that only 4,712 of those positions were actually filled, representing a 29 per cent shortfall in personnel.<sup>193</sup> These figures do not necessarily reflect the numerous “ghost personnel” whose names remain on the rolls but do not actually work or live in their assigned province though their salary is nonetheless collected by division supervisors. In Kandahar province, for example, the chief prosecutor reported that 85 per cent of his prosecutors lived outside of the province.<sup>194</sup> Likewise, in Wardak only two out of twelve assigned prosecutors were working as of August 2010.<sup>195</sup>

Women are barely represented among legal professionals in the provinces. Officials in both the local attorney general's office and the courts in Parwan, Bamiyan, Nangarhar and Wardak all reported that there were no women judges or prosecutors on staff.<sup>196</sup>

The personnel gap is indicative of wider problems. Salaries are low and security is poor in the justice sector. In 2001, the average judge earned about \$60. A series of decrees calling for emergency wage increases has elevated the monthly salary for a judge to about \$400 to \$900 a month, but the average entry-level prosecutor still earns about \$60 a month. Insecurity in the provinces, meanwhile, has driven large numbers of prosecutors and judges to move to Kabul or other urban centres. Judges and prosecutors report they are constantly under threat from local powerbrokers or even more influential national figures, and several have said they need better security.<sup>197</sup> At least 69 primary district courts are shuttered as a result of insurgent activity.<sup>198</sup>

Judicial officials in Wardak reported that most of the province's court staff had been forced to move to the provincial capital of Maidan Shar and that only about half of the district courts were operable.<sup>199</sup> Within the last year, two judges and two prosecutors have been kidnapped while two prosecutors have been killed. Many judicial staff expressed fears that failing a sharp reversal of these trends, it would not be long before all but a handful of staff currently living and working in Maidan Shar would be forced to quit their jobs and leave the area altogether. “Security institutions can't even provide security for themselves here. Every day or every week they are taking casualties. So how can they provide security for us?” one Wardak judge complained. “I am constantly being threatened when I'm in my office, when I'm in my home or on the road. In areas where the Taliban have control, the people are basically barred from coming to the courts in the capital. We have very few cases here as a result. Instead of coming

<sup>190</sup> Crisis Group interview, Abdul Salam Azimi, Chief Justice, Supreme Court, 10 July 2010.

<sup>191</sup> Armytage, *op. cit.*, p. 191.

<sup>192</sup> Crisis Group interview, Ghulam Hussain Safi, human resources director, Supreme Court, Kabul, 21 July 2010.

<sup>193</sup> *Ibid.*

<sup>194</sup> Crisis Group interview, Kabul, 1 June 2010.

<sup>195</sup> Crisis Group interview, Afghan prosecutor, Maidan Shar, 18 August 2010.

<sup>196</sup> Crisis Group interviews, Parwan, Bamiyan, Nangarhar, Wardak, June–August 2010.

<sup>197</sup> Crisis Group interview, CJTF officials, Kabul, 8 August 2010.

<sup>198</sup> In a 21 July 2010 Crisis Group interview, Supreme Court Human Resources Director Ghulam Hussain Safi estimated that 69 of 364 district courts were not operational due to insecurity. Anecdotal accounts from Crisis Group field research in Nangarhar, Parwan, Bamiyan, Uruzgan and Kabul provinces indicate that number of courts that are not operational is likely considerably higher, but short of a district-by-district assessment conducted by an independent organisation, it is impossible to verify the actual number of courts that are operating at the local level at any given time.

<sup>199</sup> Crisis Group interview, senior Afghan judge, Maidan Shar, 18 August 2010.

to us, they are forced to go to the Taliban to solve their problems".<sup>200</sup>

International responses to Kabul's requests to shore up judicial security have been slow. Judicial staff in several provinces said they had raised the need to improve security at courthouses and other installations years ago but their concerns had gone unheeded.<sup>201</sup> In 2007, the U.S. began providing training and other support to the Afghan Judicial Security Unit (JSU), a specialised unit of the counter-narcotics police under the interior ministry but it was not clear whether the unit would provide security to facilities beyond those at the counter-narcotics court in Kabul. Two years later, the U.S. also financed and built a \$4.5-million compound in Kabul to house JSU personnel. It remained vacant, however, for more than six months because of funding delays.<sup>202</sup> At the end of 2009, it was still unclear which U.S. agency would oversee supporting the JSU and what kind of funding would be needed. Though the ranks of the JSU are expected to eventually grow to 750<sup>203</sup> there was also no indication as to the current size of the force or a full public assessment of manpower and infrastructure needs.<sup>204</sup>

Progress on building courts has been uneven. In at least a few cases, recently constructed courthouses and other judicial installations have not been used for their intended purpose. In Kandahar City, a building intended as secure housing for judicial staff had been overrun by the gunmen of various local powerbrokers for months until coalition and Afghan forces ousted them in spring 2010. The Supreme Court has estimated that the cost of building sufficient courthouses and providing transportation and housing for judges is \$43.2 million.<sup>205</sup> It is unclear whether this estimate takes into account the potential extra cost of housing and transporting judicial staff in areas of high insecurity.

## B. CONFRONTING CORRUPTION

The lack of capacity and under-resourcing of the justice system has favoured corruption. Many Afghan judicial officials repeatedly pointed to low salaries as one of the primary factors perpetuating petty bribery. Insecurity plays an equally prominent role, especially in high-level cases

of corruption, where death threats and intimidation reduce the chances that perpetrators will be held accountable.

President Karzai's tolerance of corruption within his administration and reported palace interference in a number of high-profile cases against members of his cabinet have also had a definitive trickle-down effect.<sup>206</sup> Afghanistan ratified the UN Convention on Anti-Corruption in September 2007 but there is no evidence that the Karzai administration takes the convention's obligations seriously. Almost none of the dozen or so prominent Afghans charged with embezzlement, fraud and corruption since the convention was signed have been convicted. Many, in fact, have been allowed to return to their jobs.<sup>207</sup> Palace interference runs so deep that it is not uncommon for the very investigators appointed by the government to combat corruption to be pressured by the president's inner-circle to drop cases against government officials or political cronies.<sup>208</sup> Given the pervasiveness of "telephone justice", it is unsurprising that, in survey after survey, a majority of Afghans single out judicial institutions as the most corrupt.

Legal barriers to interference in cases are crucial to create new ways of enforcing accountability. Although judges and prosecutors are required by the code of ethics to report undue influence from parties related to a particular case, there is currently no complimentary law in the general criminal code to ensure that allegations of interference are investigated and prosecuted. Pressure on prosecutors is so pervasive that many cases never even make it out of the attorney general's office. Attempts to influence the office have not been limited to the presidential palace.<sup>209</sup> In interviews, veteran Afghan prosecutors frequently blamed members of parliament for instigating corruption within the prosecutor's office, and repeatedly commented on the futility of resistance:

It's impossible to spend so much energy resisting this kind of pressure from the outside .... We handle about 500 cases a month. I can't say with certainty that in those 500 cases there was no corruption. All accountability has been razed. The people in my unit, for example, have been known to take a bribe for passing a case on for a simple signature. But I'm in charge of eleven units, and everyone makes so little money in

<sup>200</sup> Ibid.

<sup>201</sup> Crisis Group interviews, Afghan officials, Charikar and Jalalabad, June 2010.

<sup>202</sup> "Actions needed for a more strategic approach to U.S. security assistance", SIGAR, Audit 10-3S, 18 December 2009, p. 3.

<sup>203</sup> Crisis Group interview, Western adviser, Kabul, 23 August 2010.

<sup>204</sup> Ibid.

<sup>205</sup> "Strategy of the Supreme Court with Focus on Prioritizations", Supreme Court of Afghanistan, March 2007, p. 6.

<sup>206</sup> Joshua Partlow and David Nakamura, "Karzai aide part of wider investigation", *The Washington Post*, 20 August 2010.

<sup>207</sup> "Karzai uses speech on corruption to defend convicted mayor", Reuters, 15 December 2009.

<sup>208</sup> Crisis Group interview, senior Western legal adviser, Kabul, 5 June 2010.

<sup>209</sup> Alissa J. Rubin, "Afghan Attorney General says U.S. ambassador pushed corruption prosecutions", *The New York Times*, 29 June 2010.

my division that at some point something is bound to slip by.<sup>210</sup>

Salary improvements are not necessarily a panacea, especially since, as noted, pay-and-rank reform has proceeded unevenly across the justice sector. Nevertheless without genuine pay-and-rank reform in the attorney general's office, prosecutors there will remain among the most aggressive facilitators and perpetrators of graft. As one Western adviser put it, the cash generated by illicit drug activities and the massive inflow of international aid have rolled like a tidal wave over the country's cadre of under-educated, under-paid prosecutors:

In a lot of cases, prosecutors might say to themselves, all I need is to take \$10,000 to drop this case. What do I care if the internationals are giving me a polygraph test a year later? If I take the money now and lose my job because of the test then I still have \$10,000 that I didn't have before.<sup>211</sup>

When the twelve prosecutors in the attorney general's anti-corruption unit were asked in a 2009 polygraph test whether they had either taken a bribe or had worked for insurgent groups within the last two years, results indicated that 90 per cent probably had been involved in graft schemes or were linked to insurgents.<sup>212</sup> There is strong evidence to suggest that many of the cases submitted to the anti-corruption unit are low-level schemes designed to distract investigators from tackling more substantial cases involving high-ranking government officials. As of early June 2010, about 350 cases were pending with the anti-corruption unit. Of those, 40 resulted in indictments, but only ten of those led to convictions and sentencing.<sup>213</sup> The Afghan government should clarify criteria for corruption investigations and harmonise policy on pursuing sensitive cases involving high-level officials.

This inconsistent implementation of anti-corruption measures has caused Attorney General Aloko to run afoul of both the president and international officials on several occasions. Aloko and U.S. officials, have been engaged in a highly unproductive public tug-of-war over corruption since the fraudulent August 2009 presidential and provincial council elections. Not long after Karzai retook office in November 2009 and vowed to fight corruption, clashes erupted over the U.S.-backed Major Crimes Task Force and the Sensitive Investigations Unit, two specialised law enforcement agencies that were established with the aid of the U.S. Drug Enforcement Agency and Federal Bu-

reau of Investigation. Within months of the January 2010 London conference, at which Karzai agreed to create a special anti-corruption tribunal, Aloko became the focal point of U.S. frustration over the slow prosecution of corruption cases.<sup>214</sup> Aloko has refuted allegations about his inaction on prominent corruption cases.<sup>215</sup> Without express guarantees from the president that there will be no palace interference in such cases, these specialised investigative units will likely be constrained by the volatile politics surrounding this issue.

Privately, U.S. officials have held a number of high-level meetings to craft strategy to push the chief prosecutor to be more forceful. The Obama administration even sent U.S. Attorney General Eric H. Holder Jr. to Kabul shortly after the reports about weaknesses in Aloko's office surfaced in July 2010.<sup>216</sup> This has had the unfortunate, and perhaps unintended, effect of putting Aloko on the defensive and at the same time undermining the independence of the office.<sup>217</sup> This heavy-handed approach and interference by the U.S. in the attorney general's office risk alienating its few remaining allies in the Afghan government. Threatening and cajoling individual Afghan officials is unlikely to produce any positive lasting results. The U.S. and international stakeholders would do better to help remove institutional barriers that hinder Afghan officials from supporting the rule of law.

With American officials facing increasing public disquiet over U.S. engagement in Afghanistan and the corruption within the Karzai administration, "anti-corruption" has become the watchword of U.S. politicians. Many Afghans, however, remain unconvinced that the vociferous Washington-led campaign to clean house in Kabul is anything more than political posturing for a domestic audience. Less than half of the respondents in a 2010 survey said they believed that the international community was serious about fighting corruption.<sup>218</sup> A Western rule of law adviser summed up the mood of many experienced observers of politics in Kabul:

All this focus has been put on anti-corruption. It's the buzzword of the day but it has no meaning without a penal code and criminal code in place. All these spe-

<sup>210</sup> Crisis Group interview, Afghan prosecutor, Kabul, 15 June 2010.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ernesto Londono, "Afghan official accuses U.S. ambassador of making threat over corruption cases", *The Washington Post*, 30 June 2010.

<sup>215</sup> Crisis Group interview, Mohammad Ishaq Aloko, Attorney General, 17 August 2010.

<sup>216</sup> Ernesto Londono, "Attorney General Holder meets in Kabul with Karzai, other top officials", *The Washington Post*, 29 June 2010.

<sup>217</sup> Londono, "Afghan official accuses U.S. ambassador of making threat over corruption case", op. cit.

<sup>218</sup> "Afghan Perceptions and Experiences of Corruption: A National Survey", Integrity Watch Afghanistan, 2010, p. 20.

cial courts are hijacking the real purpose of the judiciary .... The political factor was the predominant reason behind these moves to create anti-corruption institutions. After the elections it became very clear what needed to be done. The key [international] players must have said to themselves, 'We can't sell this to the public, so we better do something'. In the end these anti-corruption pushes have turned out to be a quick and dirty exercise that is devoid of any substance.<sup>219</sup>

Over the years, U.S. officials have eagerly backed steps taken by the Karzai administration to establish extraordinary government bodies to tackle corruption. Internationally, specialised anti-corruption agencies have had a poor track record, and not a few have fallen prey to corruption themselves. Weak political will, lack of resources, and insufficient accountability or independence often conspire against the success of such experiments. Two strong cases in point are the ill-fated General Independent Administration for Anti-Corruption and Bribery (GIAAC) and the semi-functional High Office of Oversight (HOO).

The GIAAC was established in 2004 with the ostensible purpose of bringing corruption oversight under one administrative umbrella. Unfortunately, problems with the agency became almost immediately apparent when it was revealed that the GIAAC's head, Izatullah Wasifi, had been convicted of drug-trafficking charges in the U.S. and spent eight months in prison.<sup>220</sup> The agency continued operating, but its efforts were highly politicised. Several employees of the 84-member staff indicated that they had been directed to pursue cases against a politically troublesome governor.<sup>221</sup> In the end, only about a third of GIAAC's cases ended in prosecutions; in a number of instances, when GIAAC forwarded cases to the attorney general's office, the president dissuaded prosecutors from pursuing charges against certain officials. Despite this track record of dysfunction, Wasifi remained at the helm until parliament dissolved GIAAC in 2008.

The HOO was created by presidential decree in July 2008 and placed under the direct control of the office of the president. It essentially picked up where the GIACC left off, inheriting many of the same flaws. Tasked with overseeing both anti-corruption policy and initiating investigations into government corruption, the HOO had no real legal or investigative authority in its first two years of op-

eration.<sup>222</sup> In addition, it was grossly understaffed and many HOO employees lacked the experience or skills to handle complex corruption investigations.<sup>223</sup>

The agency's powers were expanded following the London conference. But it remained constrained by the same problems and continued to have a precarious, ill-defined relationship with the attorney general's office. An attempt has been made to address some of these flaws with the introduction of the High Office of Oversight draft law in May 2010. A proposal in the draft law to grant police and prosecutorial powers to all members of the HOO seems overly ambitious and could potentially become a serious source of political manipulation in the future if more checks and balances are not built into the law. In any case, given the very public political battles shaping up between the U.S. and the Karzai administration over corruption, it is unlikely that this law will be ratified and signed soon. In the interim, donor funding for anti-corruption activities might be better directed at shoring up existing institutions such as the attorney general's office, which is at least theoretically independent and, unlike the HOO, is not directly under the president's control.

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<sup>219</sup> Crisis Group interview, Western rule of law adviser, Kabul, 5 July 2010.

<sup>220</sup> Matthew Pennington, "Afghan anti-corruption chief a convicted heroin trafficker", Associated Press, 18 February 2010.

<sup>221</sup> Manija Gardizi, Karen Hussmann and Yama Torabi, "Corrupting the State or State Crafted Corruption? Exploring the Nexus between Corruption and Subnational Governance", Afghanistan Research and Evaluation Unit, June 2010, p. 31.

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<sup>222</sup> Crisis Group interview, Qaseem Ludin, deputy director, HOO, Kabul, 6 July 2010.

<sup>223</sup> "Afghanistan's High Office of Oversight Needs Significantly Strengthened Authority, Independence, and Donor Support to Become an Effective Anti-Corruption Institution", SIGAR, Audit 10-2, 16 December 2009.



## VI. OPERATING OUTSIDE THE LAW

### A. EXTRAORDINARY JUSTICE

The absence of procedural protections and the rule of law have long been a trademark of the Afghan justice system. For many Afghans, there is little to distinguish today's system from the random justice of the mujahidin era. Legal trials rarely meet international standards; contradictory laws and legal practices have proliferated; and there are no checks and balances. In fact, it has been estimated that 80 per cent of cases decided in primary courts are appealed while 70 per cent of those cases are subsequently appealed to the Supreme Court – a strong indicator of the numerous procedural weaknesses in the system.<sup>224</sup> Insecurity has allowed the current Afghan government and its Western backers to invoke national security concerns to curtail the rights guaranteed to citizens by the law. Unfair trials and recourse to arbitrary detention have become the rule, not the exception in the Afghan justice system. These circumstances have driven many Afghans to seek redress from informal councils such as jirgas and shuras. This system is equally arbitrary and ill-equipped to meet the state's obligation to provide equal protection under the law.

Afghan law ostensibly provides protection from such abuses and guarantees of procedural fairness. Several articles of the 2004 constitution lay the foundations for legal due process, the most important of which include the presumption of innocence, freedom from arbitrary detention and prohibitions against the use of torture in criminal investigations.<sup>225</sup> Additional guarantees of the right to fair trial, provisions for terms of arrest during investigation, sentencing, conditions of detention and other procedural norms are likewise described in the 2004 ICPC, the 1976 Penal Code, the 2005 Law on Detention Centres and Prisons, the 2005 Law of the Courts and the 2007 Law on Advocates.

Few Afghan judges or prosecutors have access to copies of laws and statutes and even if they do, many lack the skills or experience to analyse the complex ways in which these laws intersect and diverge. This often leads to an unfair application of the law and disproportionately harsh sentencing. As mentioned, procedural guidelines are often violated due to difficulties in transportation or poor record keeping. It is not uncommon for defendants to be held in jail for months before a trial simply because the

police neither have the means nor the personnel to transport a prisoner to court.

In the absence of a functioning bail system, the possibility of gaining release on bond before trial to prepare a defence is usually quite slim. Defence attorneys are few and far between and the few who are active frequently charge exorbitant fees for simple tasks such as writing a letter to a court.<sup>226</sup> In 2007, only 236 private attorneys had registered with the justice ministry. The situation improved slightly with the passage of the 2007 Law of Advocates that established the Afghan Independent Bar Association. Membership stood at 400 as of May 2010, and only a handful of bar members provide legal aid. The government is obligated under the constitution and the ICPC to provide legal aid for the indigent, but little or no funding has been targeted for this purpose. Without more focused investment on developing a substantial, active defence bar, other structural changes are unlikely to have a lasting impact on the justice system.

Beyond these structural limitations, problems with due process most often result from misinterpretation of the law. A substantial number of arbitrary detentions stem from the criminalisation of acts that do not constitute actual crimes.<sup>227</sup> Numerous cases have been documented in which citizens are detained for alleged crimes involving land disputes, debts, or family conflicts although the law expressly prohibits detention in such cases. As insecurity has risen and the pendulum has swung in favour of harsh Taliban justice in large parts of the country, alleged breaches of tribal law or Sharia often lead to illegal detention and punishment.<sup>228</sup> Women and girls are disproportionately targeted in the prosecution of so-called moral crimes. The video-taped beating of two young women from Ghor province who were arrested by Afghan police in the spring of 2010 after they left home to avoid forced marriages is but one of many recent examples of runaway customary justice.<sup>229</sup>

There are few procedural means available to defendants to counter misapplications of the law of this sort. Avenues for triggering a court review to determine whether an arrest is lawful are limited to procedural challenges taken up at the appellate or Supreme Court level – that is only once a defendant is convicted.<sup>230</sup> The suspect's rights are

<sup>224</sup> Armytage, *op. cit.*, p. 188.

<sup>225</sup> See Chapter 2 of the 2004 constitution which articulates the "fundamental rights and duties of citizens". Specific reference is made to the presumption of innocence, the right to due process, the right to legal aid and prohibitions against forced confessions, torture and arbitrary detention.

<sup>226</sup> "The State of Regional Justice Systems in Balkh, Herat and Nangarhar", *op. cit.*, p. 12.

<sup>227</sup> "Arbitrary Detention in Afghanistan: A Call for Action", UNAMA, Office of the High Commission on Human Rights, Vol. 1, January 2009, p. 6.

<sup>228</sup> *Ibid.*

<sup>229</sup> "Child brides escape marriage, but not lashes", *op. cit.*

<sup>230</sup> Articles 15 and 16 of the ICPC outline avenues of procedural challenge. Article 16 states that such challenges must be made upon appeal or "in recourse to the Supreme Court" and either the "Appeal court or the Supreme court declares the invalidity

only nominally referred to in Article 5 of the ICPC. Although the right to legal counsel is guaranteed, there is no mention of the presumption of innocence in the criminal code or the right of the defendant to challenge pre-trial detention. Under the law, the only judicial official empowered to intervene in an arrest is the primary prosecutor, who may decide at his own discretion without consulting any outside body whether a suspect can be released.<sup>231</sup>

Several remedies to these deficiencies have been proposed and incorporated in the new draft criminal procedure code, including clarification of rights of the victim, suspects and the accused. The draft law additionally lays out more specific provisions for bail and describes the prosecutor's responsibility to report and remedy illegal detentions. The new code is the result of nearly two years of legal review and complex negotiations between Afghan and international members of the Criminal Law Working Group. Consensus on the law was more or less reached by June 2009 and the draft was presented at a November 2009 conference on rule of law held in Vienna. But Minister Ghalib, who in his short term in office has already proven resistant to reform on a number of scores, has delayed the law's passage.<sup>232</sup> There is an urgent need to promulgate the new criminal code so that revisions of other crucial laws such as the penal code can be implemented and reform can begin in earnest.

## B. U.S. DETENTION POLICY

U.S. detention policy has frequently been cited by Afghan and international legal experts as one of the chief obstacles to restoring balance to the Afghan justice system and citizens' faith in the rule of law.<sup>233</sup> The operation of parallel U.S.-controlled prisons has been problematic from the start. Thousands of Afghans have been detained since the start of Operation Enduring Freedom in 2001 without recourse to trial or the means to challenge their detention. Abuse of prisoners at the U.S.-run Bagram Theatre Internment Facility in the early years of its operation under the Bush administration has been well documented, including the use of harsh interrogation techniques that resulted in

the deaths of two Afghans.<sup>234</sup> Extrajudicial detentions at Bagram have eroded support for foreign troops and for many Afghans – Pashtuns in particular – stand as a symbol of oppression. Like its sister facility at the U.S. military base in Guantanamo, Cuba, the Bagram prison has provided much grist for Taliban propaganda mills.<sup>235</sup>

U.S. officials under the Obama administration appear to have begun to recognise that extrajudicial detentions have negatively impacted Afghan perceptions of the rule of law. In January 2009, the U.S. government announced plans to close the facility at Guantanamo and to re-evaluate its detainee programs overall. A U.S. federal district court ruling in April 2009 concluding that non-Afghan detainees held at the Bagram facility have a right to challenge their detention in American courts has hastened the need to find solutions to the legal conundrum posed by the extrajudicial status of prisoners at Bagram.<sup>236</sup> In September 2009, the U.S. Department of Defense adopted a new framework for evaluating the status of detainees in U.S. facilities in Afghanistan. Responsibility for detainee policy and operations now falls to Task Force 435, an inter-agency unit under joint military-civilian leadership whose mission is to bring detention and rule of law practices in line with U.S. strategic goals in Afghanistan. The old Bagram facility has since been replaced by the more modern Detention Facility in Parwan (DFIP), which opened in 2009 at the edge of the Bagram military base.

Under this new policy, new detainee review board (DRB) procedures were adopted to bring detention practices in Afghanistan more in line with U.S. and international law. They replaced the Unlawful Enemy Combatant Review Boards, which had been generally deemed inadequate because they afforded detainees few, if any, opportunities to challenge their arrest or to review evidence in cases brought against them in closed hearings. Under the new procedures, a military panel determines if a detainee has been properly captured and poses a future threat to the Afghan government or international security forces. Although the U.S. government is careful not to characterise the proceedings as legal or adversarial in the sense that a trial might be,

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of the procedure whenever it appears that the violations of procedural provisions have provoked relevant distortions in the decision of the case".

<sup>231</sup> Article 35, Part 2, 2004 Interim Criminal Procedure Code.

<sup>232</sup> Crisis Group interview, Western rule of law adviser, Kabul, 5 July 2010.

<sup>233</sup> A number of international NGOs have followed developments with the Bagram prison facilities closely, including Human Rights Watch, Human Rights First and the Open Society Institute. For more detailed analysis, see "Fixing Bagram: Strengthening Detention Reforms to Align with U.S. Strategic Priorities", Human Rights First, November 2009.

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<sup>234</sup> See for instance Carlotta Gall and David Rohde, "New charges raise questions on abuse at Afghan prisons", *The New York Times*, 17 September 2004; and Tim Golden, "In U.S. report, brutal details of two Afghan inmates' deaths", *The New York Times*, 20 May 2005.

<sup>235</sup> For more detailed analysis of Taliban propaganda and its effects on Afghan perceptions of foreign troops see Crisis Group Asia Report N°158, *Taliban Propaganda: Winning the War of Words?*, 24 July 2008.

<sup>236</sup> In *Al Maqaleh v. Gates*, U.S. District Court Judge John D. Bates found that the writ of *habeas corpus* should extend to three non-Afghan detainees held at Bagram. The ruling was reversed on appeal by a three-judge panel in the Washington DC District Court on 21 May 2010.

detainees are allowed to some extent to present their version of events with the help of a U.S.-assigned "personal representative". Hundreds of detainees have had their cases reviewed since the new review procedures were adopted and a number have been released because of insufficient evidence that they posed a threat to the Afghan government.<sup>237</sup>

These new guidelines are an important step forward, but they are far from replicating internationally recognised fair trial standards. A number of other actions must be taken to make U.S. detention policy more transparent, humane and fair and to bring it in line with international law. Specifically, U.S. investigation and intelligence gathering standards must be improved and the review board process must incorporate a more vigorous mechanism that allows detainees to review and challenge evidence brought against them, including measures for classified evidence. Transition to Afghan control of specially designated detainees will also necessitate a re-evaluation of classification procedures both at the point of capture and across agencies – both Afghan and U.S. The current process of declassifying information is far too cumbersome and there is a demand for greater clarity on the rules of transfer of information from coalition and Afghan sources to Afghan government sources.<sup>238</sup> Changes in declassification policy will necessitate a serious review of current Afghan law and investigative practices and procedures employed by the Afghan National Directorate of Security and other security organs.

In January 2010, the U.S. and Afghan government signed a memorandum of understanding calling for the DFIP to pass from U.S. to Afghan control in July 2011. By that time, review proceedings should be conducted entirely by Afghan judges and prosecutors; an Afghan judge in the Parwan provincial courts has already reviewed a number of detainee cases.<sup>239</sup> The U.S. has set up a rule of law centre at the new facility with a view to training Afghan legal professionals to build cases against the roughly 1,100 detainees housed at the prison. The training and transition are important first steps toward dismantling the parallel legal systems that have co-existed uneasily in Afghanistan since the start of the U.S. military engagement. The

transition could entail some tricky procedural challenges in terms of potential conflicts between Afghan courts and U.S. military authorities over the danger posed by "high-risk" detainees.<sup>240</sup> This and other issues should be clarified before the transition in 2011.

### C. THE LIMITS OF INFORMAL JUSTICE

As mentioned, the Afghan legal system has evolved out of state laws, Sharia law and customary tribal law.<sup>241</sup> Embedded in these competing systems are fundamental conflicts between adjudication and reconciliation, retribution and restitution. Intrinsic to these tensions is a difference in interpretations of authority and the coercive means to reinforce that authority.<sup>242</sup> Where state law depends on fines, imprisonment and, in some cases, execution, customary or tribal law seeks to restore social order through the imposition of stigmas that are locally defined. In contrast, Sharia is, in theory, universally applicable, drawing on interpretation and implementation of the Quran and the *hadith* and *sunnah* by trained judges who form the clerical community *ulama*.<sup>243</sup>

The primacy of state law in this three-way competition has fluctuated throughout Afghanistan's history, giving rise to the political clashes and violent conflict of the last three decades. The collapse of the Rabbani government in the 1990s saw a return to greater reliance on tribal or community councils to resolve disputes at the local level.<sup>244</sup> Similarly, the many inadequacies of state justice institutions under the Karzai administration have left customary law to fill the void, especially in predominantly Pashtun areas in the south and east. The Afghan government has subsequently tried to incorporate the informal sector into the formal justice system, including references to this effect in its 2008 National Justice Sector Strategy.<sup>245</sup>

On its face, the consensus process employed by customary tribal *jirgas* or *shuras* holds out attractive possibilities for a more conciliatory, community-based approach to

<sup>237</sup> Crisis Group has thrice visited U.S. detainee facilities at the Bagram Air Base within the last year. On 15 November 2009, Crisis Group toured the newly built DFIP and spoke with facility operations officials in Task Force 435 about the new detention policy. On 22 March and 29 September 2010, Crisis Group attended a series of detainee review boards conducted by Task Force 435 at the DFIP. As of November 2010, some 1,800 detainee review boards had been conducted, according to Task Force 435 officials; of those 65 per cent of detainee cases reviewed were recommended for continued internment.

<sup>238</sup> Crisis Group interviews, Michael Gottlieb, civilian deputy, Task Force 435, Kabul, 29 September and 2 November 2010.

<sup>239</sup> Crisis Group interview, Afghan judge, Charikar, 21 June 2010.

<sup>240</sup> Alissa J. Rubin, "U.S. backs trial for four detainees in Afghanistan", *The New York Times*, 17 July 2010.

<sup>241</sup> Thomas Barfield, "Afghan Customary Law and its Relationship to Formal Judicial Institutions", USIP, 26 June 2003, p. 1.

<sup>242</sup> *Ibid.*, p. 10.

<sup>243</sup> Karim Khurram, "The Customary Laws of Afghanistan", International Legal Foundation, September 2004.

<sup>244</sup> Thomas Barfield, Neamat Nojumi and J. Alexander Thier, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan", USIP, November 2006.

<sup>245</sup> The strategy refers to the role traditional justice plays in filling the void left by dysfunctional state judicial institutions. But it also cautions that traditional justice is "often out of step with Islam, the constitution, state law and human rights". See the Afghanistan National Development Strategy, Section 7.3, "Sector Two: Good Governance and the Rule of Law", pp. 121-126.

resolving conflict. But the binding authority of such councils has been drastically altered by violent changes to Afghan society wrought by decades of war and the march of time. The meaning of *Pashtunwali* and its application has changed as customs among adherents of tribal codes living in urban areas have come to be demarcated from the customs employed by those living in rural areas.<sup>246</sup> Peaceful settlements in the informal system rely on ethnic and tribal homogeneity in a given community, a condition that exists in very limited areas of the country. The exclusion of women from the decision-making process of jirgas and the continued practice of *bad*, that is trading a woman in marriage to settle a debt or score, make it nearly impossible to reconcile the informal justice system with national and international law. Power imbalances between landowners or commanders and the landless or the poor have also distorted the fabric of customary decision-making bodies.<sup>247</sup>

Violations of national and international laws in the informal justice sector have been widely documented, and must be given due consideration before proceeding further with any plans to blend the formal with the informal. Some of these concerns were taken into account in the "National Policy on Relations between the Formal Justice System and Dispute Resolution Councils", which acknowledges the complex role of informal councils within the country's legal culture. Drafted in November 2009 by a working group composed of representatives from the Afghanistan Independent Human Rights Commission (AIHRC), justice ministry, Supreme Court, USAID and UNODC, among others, the policy ambitiously aims to "increase women's overall participation" in informal dispute resolution processes as well as find means of "linking the formal and informal systems in constructive, systematic ways".<sup>248</sup> It also grants state courts sole jurisdiction over serious crimes, an important distinction but one that the current Afghan government is ill equipped to enforce.

These grandiose goals rest on faulty assumptions about the practicalities of implementation in a political system shaken to its core by corruption and violent insurgency. The policy is in effect designed for a post-conflict system, but Afghanistan today is hardly a post-conflict state. Limiting the purview of jirgas and shuras to strictly property-related matters, as proposed by some Afghan and interna-

tional experts, and perhaps even more narrowly to land and water disputes may eventually reduce the overwhelming burden on state justice institutions. It could take generations, however, for such a scheme to bear fruit.

Given the profusion of contradictory laws on the books, the paucity of land title and other legal records and the pervasive insecurity plaguing the country, current proposals to codify the legal authority of informal dispute mechanisms are not likely to succeed. High insecurity in areas where resort to jirgas is more common will make it next to impossible for the government to monitor abuses and violations of the policy. Moreover, there are still strong disagreements between the justice ministry and the Supreme Court, among other Afghan institutions, about how or whether the informal system can be regulated.<sup>249</sup> A draft law intended to regulate informal dispute mechanism is currently under consideration in parliament, but the initial draft leaves open to wide interpretation the role of women in jirga process, among many other procedural holes.

Despite these many limitations, the U.S. is supporting informal justice mechanisms and has hired an American contractor, Checchi and Company, to implement and monitor the programs. Some \$10 million of the \$25 million USAID has earmarked to support traditional justice programs in Afghanistan will be spent by Checchi and Company on a study of the informal justice sector.<sup>250</sup> It is unclear whether this will have any impact on the rule of law in the country. Nor is it evident that hiring private contractors to lead an evaluation of the role of traditional tribal law in the justice system will amount to anything more than an exercise in cultural relativity. Funding directed toward dubious experiments to legitimise politically tainted tribal shuras and jirgas would be better spent on getting regular quantitative and qualitative assessments of the justice system at both the local and national level.

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<sup>246</sup> Palwasha Kakar, "Tribal Law of Pashtunwali and Women's Legislative Authority", Afghanistan Legal History Project, School of Law, Harvard University, undated, accessed on 23 June 2010 at [www.law.harvard.edu/programs/ilsp/research/alhp.php](http://www.law.harvard.edu/programs/ilsp/research/alhp.php).

<sup>247</sup> Barfield, Nojumi and Thier, op. cit., p. 3.

<sup>248</sup> "Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils", English translation, 10 November 2009.

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<sup>249</sup> Noah Coburn and John Dempsey, "Informal Dispute Resolution in Afghanistan", Special Report 247, USIP, August 2010.

<sup>250</sup> SIGAR, Quarterly Report to the United States Congress, 30 April 2010, p. 84; and Crisis Group interview, U.S. rule of law adviser, 11 August 2010.

## **VII. CONCLUSION**

A substantial course correction is needed to restore the rule of law in Afghanistan. Protecting citizens from crime and abuses of the law is elemental to state legitimacy. Most Afghans do not enjoy such protections and their access to justice institutions is extremely limited. As a result, appeal to the harsh justice of the Taliban has become increasingly prevalent. In those rare instances when Afghans do appeal to the courts for redress, they find uneducated judges on the bench and underpaid prosecutors looking for bribes. Few judicial officials have obtained enough education and experience to efficiently execute their duties to uphold and enforce the law. Endemic problems with communications, transport, infrastructure and lack of electricity mean that it is likely that the Afghan justice system will remain dysfunctional for some time to come.

Restoring public confidence in the judiciary is critical to a successful counter-insurgency strategy. The deep-seated corruption and high levels of dysfunction within justice institutions have driven a wedge between the government and the people. The insurgency is likely to widen further if Kabul does not move more swiftly to remove barriers to reform. The first order of business must be to develop a multi-year plan aimed at comprehensive training and education for every judge and prosecutor who enters the system. Pay-and-rank reform must be implemented in the attorney general's office without further delay. Building human capacity is essential to changing the system. Protecting that capacity, and providing real security for judges, prosecutors and other judicial staff is crucial to sustaining the system as a whole.

The international community and the Afghan government need to work together more closely to identify ways to strengthen justice institutions. A key part of any such effort will necessarily involve a comprehensive assessment of the current judicial infrastructure on a province-by-province basis with a view to scrutinising everything from caseloads to personnel performance. This must be done regularly to ensure that programming and funding for judicial reform remains dynamic and responsive to real needs. More emphasis must be placed on public education about how the system works and where there are challenges. Transparency must be the rule of thumb for both the government and the international community when it comes to publishing information about judicial institutions. Little will change without more public dialogue about how to improve the justice system.

The distortions created in the justice system by lack of due process and arbitrary detentions under both Afghan institutions and the U.S. military are highly problematic. Until there is a substantial change in U.S. policy that provides for the transparent application of justice and fair tri-

als for detainees, the insurgency will always be able to challenge the validity of the international community's claim that it is genuinely interested in the restoration of the rule of law. If the international community is serious about this claim, then more must be done to ensure that the transition from U.S. to Afghan control of detention facilities is smooth, transparent and adheres to international law.

Justice will not return overnight to Afghanistan. It could take a generation to change the system. But if Karzai's government continues to drag its feet on judicial reform, it is very likely that it will become a victim of its own failure to act and the country will be plunged deeper into violent conflict. The only way forward is to protect and advance the rule of law.

**Kabul/Brussels, 17 November 2010**

## APPENDIX A

### MAP OF AFGHANISTAN



## APPENDIX B

### GLOSSARY OF TERMS

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ACAS	Afghanistan Case Administration System
AIHRC	Afghanistan Independent Human Rights Commission
ANA	Afghan National Army
ANDS	Afghanistan National Development Strategy
ANP	Afghan National Police
ANSF	Afghan National Security Forces
CJTF	Criminal Justice Task Force
CLWG	Criminal Law Working Group
CSSP	Correctional System Support Program
DDP	District Delivery Program
DFIP	Detention Facility in Parwan
DRB	Detainee Review Board
EUPOL	European Union Police Mission
GAO	Government Accountability Office (U.S.)
GIAAC	General Independent Administration for Anti-Corruption and Bribery
HOO	High Office of Oversight
ICGJR	International Coordination Group for Justice Reform
ICPC	Interim Criminal Procedure Code
ICSIC	Independent Commission for the Supervision of the Implementation of the Constitution
IDLG	Independent Directorate of Local Governance
IDLO	International Developmental Law Organisation
ISAF	International Security Assistance Force
JCMB	Joint Coordination Monitoring Board
JSSP	Justice Sector Support Program
JSU	Judicial Security Unit
KhAD	State Information Services ( <i>Khidamat-e Ittila 'at-i-Dawlati</i> )
MCTF	Major Crimes Task Force
NTM-A	NATO Training Mission-Afghanistan
PDPA	People's Democratic Party of Afghanistan
SIGAR	Special Inspector General for Afghanistan Reconstruction
SIU	Special Investigations Unit
UNAMA	United Nations Assistance Mission to Afghanistan
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development