

**Afghanistan's Systems of Justice:
Formal, Traditional, and Customary**

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EXECUTIVE FINDINGS

On the formal judiciary:

1. The Afghan judiciary suffers from a severe lack of human capacity as well as material resources. Many judges lack adequate legal training. Public legal advocates and defense attorneys do not exist within the Afghan legal system. Of those judges who are trained, the judicial leadership is divided between graduates of the *Sharia* School and those of the Law School at Kabul University. These groups are often at ideological loggerheads with each other. The three organs of the judiciary, the Ministry of Justice, the Supreme Court, and the Office of the Attorney General, lack effective coordination and communication and are often ideologically opposed.
2. The judiciary is highly susceptible to military and political influences at both the urban and rural level. Formal courts, including family courts, are either non-existent or barely functional in most rural areas. There are few women lawyers and judges in the urban areas and none in the rural areas, and rural women have great difficulty accessing the formal court system.

On police and detention centers in rural areas:

3. Very few police officers in rural areas of Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces have had any official police training. Many are still loyal to their former commanders, who often serve as the chief of police, army officers or district or provincial authorities. Police stations are extremely dilapidated and police officers lacked essential resources, including vehicles, communication equipment, and uniforms. Most police stations lack secure facilities for the storage of weapons. Most police officers use private weapons and take their weapons home after work hours.

4. The detention centers visited by the Tufts team in Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar provinces were in very poor condition and lacked basic necessities such as secure structures, sanitation facilities, and blankets for detainees. Prisoners are occasionally held in metal shipping containers or in private detention centers, and signs of mistreatment were common in the areas visited. Juvenile offenders were mixed with adult offenders in a number of centers visited by Tufts.

On traditional and customary justice systems:

5. Armed political groups, commanders, and warlords have strategically targeted traditional and customary justice systems (*Jirgas* and *shuras*) throughout rural Afghanistan in attempt to control local populations. In many instances, these predatory forces have successfully positioned their loyalists within these groups, thus undermining this avenue of justice for rural Afghans—which is often the only avenue available in rural areas.
6. In regions where political armed groups are able to exert control over the district government authorities, these groups often also have their members on the district *shura*, thus ensuring greater control of the district.
7. The current *shura* system operating in much of the country is based on a framework put in place by the Taliban regime that sought to replace the more democratic (though only for adult Afghan men) *Jirga* systems. With the Taliban regime now out of power, some communities are restructuring their *shuras*, but fewer are returning to the *Jirga* system.
8. However, some groups of rural Afghans, particularly among the tribal groups, are replacing the *shuras* with the more democratic (though only for adult males) *Jirga* system. This is, in part, an attempt to limit the influence of the armed political groups and commanders in control of the area, as well to minimize the interference of government district authorities.
9. Rural Afghan women are largely denied a direct voice in any *shura* or *Jirga* system and thus are denied justice within either traditional or customary systems.

EXECUTIVE RECOMMENDATIONS

Recommendation: Strengthen the Formal and Informal Justice Systems. Strengthen the formal justice systems that exist throughout Afghanistan, in particular the courts, the police, and detention centers. To this end:

- Establish a network of accredited law schools under the Ministry of Higher Education.
- Establish within the accredited law schools programs to train defense attorneys.
- Prioritize the expansion of legal clinics and workshop into the provincial levels with the aim of building professional capacity within the judicial sector.
- Establish and fund Special Family Courts, at least one in each province, to be administered and overseen by female judges to enable enhanced access for Afghan women to the formal legal system.
- Establish and fund Special Property Courts, at least one in each province, to handle extended property disputes throughout each province.
- Increase the number of city district courts in major urban centers.

Enhance Afghan Citizens Knowledge and Protection of Their Rights. To this end:

- Launch and support a public law awareness program using national radio and television to inform Afghan citizens about their legal rights and responsibilities.
- Nurture the democratic participation of rural Afghans within traditional systems of justice, prioritizing the development of women's councils and women's real and meaningful representation within *shuras* and *Jirgas*.
- Enhance and strengthen the space for civil society to develop democratic institutions that challenge fundamentalisms and armed political groups that rule by fear, intimidation, and clientism.

Work to develop a police force that is strong, just, and independent from the military and local and regional commanders and armed forces. To this end:

- Strongly support administrative reform in the police with a focus on dismantling the clientism among the current police forces.
- Establish police academies in each major urban center.
- Properly equip police stations and detention centers.
- Strengthen human rights training and accountability within the police forces.

Location of Fieldwork

The Tufts team conducted fieldwork from July-December 2003, in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces. Districts were chosen as those most representative (agro-ecologically, ethnic/tribes, conflict affected, and so on) of a group of rural districts within the province.

Villages within districts were randomly selected. Within each village the team conducted interviews with two to three women and two to three men. In Badghis, fieldwork was conducted in twelve villages in the districts of Bala Murghab, Jawand, and Qal-i-Now districts. In Balkh, fieldwork was conducted in Char Bulack, Marmul, and Mazar-i-Sharif. In Herat the team worked in 16 villages in Farsi, Guzara, Koshan, and Pastun Zargoon districts. In Kabul, the team worked in 16 villages in Mir Bacha Kot, Musayi, Paghman, and Surobi districts. In Kandahar, the team worked in 16 villages in Daman, Panj Wai, and Arghandab districts. In Nangarhar the team worked in 16 villages in Kama, Mohmand Dara, Pashir Wa Agam, Shurk Rod, and Rodat. The team conducted approximately 350 interviews with individual rural men and women, with total interview time of over 700 hours (for the entire study). Within each province, our study population provides an estimate of a proportion within ± 0.12 (95% confidence interval) for the provinces' rural population.¹ In other words, when percentages are given for rural populations within Badghis, Herat, Kabul, Kandahar, and Nangarhar, those percentages are representative of the entire rural population of the province within ± 0.12 percent.

In addition, the team interviewed approximately 30 rural police chiefs or heads of investigative units, 30 district judges and prosecutors, and approximately two dozen rural heads of districts or district authorities. Over 50 judges and prosecutors were interviewed in the urban centers of Balkh, Herat, Kabul, and Nangarhar. Over 40 interviews were conducted with United Nations, government, and national and international NGOs working in Afghanistan in fields related to human security or livelihoods.²

Although we relied on many sources in conducting our research, the vast majority of information in this report comes directly from in-depth interviews and conversations with rural Afghan men and women. We spoke with rural Afghan villagers, village leaders, members of *shuras* (local councils), rural police, police soldiers, and police chiefs, and district authorities, judges, and prosecutors. We were extremely fortunate to be able to conduct extensive, individual, interviews with rural Afghan women and girls in their own homes. We make every effort to prioritize the voices of the rural men and women interviewed for this study and to incorporate their perspectives, concerns, priorities, and hopes for the future.

¹ Rural populations for study provinces: Kabul (615,900), Balkh (688,300), Herat (910,700), Nangarhar (1,004,000), Kandahar (324,800), and Badghis (297,300). Population figures provided by Central Statistical Office of Transitional Islamic State of Afghanistan, *Estimated population of Afghanistan 2003-2004*, Author: Kabul, 2003.

² See footnote no. 2 for agencies, organizations, and government bodies interviewed (can be found in Human Security and Livelihoods of Rural Afghans, 2002-2003).

Systems of Justice:

Formal, Traditional, and Customary³

This section examines data primarily collected by the Tufts team regarding formal, traditional, and customary systems of justice. This section assesses the role of these systems in contributing to the human security and livelihoods of rural Afghans over the past two years in the provinces of Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar (see Methods). We document and assess the ability of formal, traditional, and customary systems of justice to provide protection and a just means of redress for rural Afghans. As part of our assessment, we take careful note of the dynamic social and political conditions that have emerged since the removal of the Taliban regime in December 2001 and the resulting impact on systems of justice.⁴

Part 1 presents our analysis of the formal justice system. Topics addressed include international efforts to reform and rebuild the justice system, the Afghan court system, the education of legal personnel, sources of legal texts, the staff of the judiciary, political and military influences on the judicial systems, the challenges facing both urban and rural courts, the civilian police, and detention centers. Part 2 provides data and analysis regarding traditional or customary justice systems, known as *shuras* and *Jirgas* (councils). Within this, we discuss the historical role and development of traditional judicial bodies and mechanisms in both urban and rural locations and their relationship with the formal legal system. Our analysis makes clear the negative effects of years of war and drought on these local systems.

Part 1: Formal Justice Systems in Afghanistan: The Courts, Police, and Detention Centers

The Court System

Findings

- **The Afghan judiciary suffers from a severe lack of human capacity and material resources and judicial reform lags behind progress in other areas of the Transitional Islamic State of Afghanistan. However, this sector has received relatively little funding or attention from international donors.**
- **Legal expertise and technical training of judicial personnel varies widely. Of those that are trained, there is an ideological split between graduates of the**

³ This Section was authored by Neamat Nojumi, Dyan Mazurana, and Elizabeth Stites.

⁴ To protect the identity of our informants we often give only the district or province and the month in which the interview was conducted.

***Sharia* School (conservatives) and those who attended the Law School at Kabul University (reformists).**

- **The judiciary is highly susceptible to influence and interference of political and military leaders, and many appointments are made and cases decided based on personal, tribal, or ideological ties.**
- **For the most part, the court system presently is functioning only in the urban areas. The urban courts are overwhelmed by a high case load.**
- **Rural courts are extremely under-resourced and subject to the will of local commanders. Judges and prosecutors in rural areas face security threats from commanders and militias.**
- **Rural Afghans, especially women, have very limited access to the court system.**
- **There are very few female judges or attorneys in the judicial system, which further limits the ability of Afghan women to approach the courts.**
- **Defense lawyers are largely unheard of in the Afghan legal system, but training programs are starting.**

In the past, the authority of the formal Afghan legal system was limited to the provincial and district centers. The population in the rest of the country relied on informal legal systems that were based on custom and traditions and functioned via local institutions. When seeking redress, rural people would often first approach the traditional local forum. If this forum failed to provide conflict resolution or to offer a suitable remedy, then people might approach the official government courts in the nearest district or provincial center. In some cases, the district government officials encouraged people to use local mechanisms in order to provide greater services to the residents, foster community harmony, and establish workable relations between the state and society.

Today, Afghanistan's formal justice system outside of the capital is comprised of an estimated 255 primary (district) courts and 32 Provincial Courts. Kabul is home to the High Court of Appeal (*Estinaf*), which hears appeals made against decisions by the Provincial Courts, and the Supreme Court, headed by the Chief Justice. The Court of Cassation (*Tamiz*) acts as an administrative Court of Appeal within the Supreme Court.⁵ All of these courts adjudicate litigations based on the legal codes embodied in the 1964 constitution and the Hanafi jurisprudence of Islamic *Sharia*. Additionally, there are now new provisions and special decrees issued by the Supreme Court and the President.

In theory, the police (falling under the jurisdiction of the Ministry of Interior) and the autonomous Office of the Attorney General are to enforce the body of law created and upheld by the formal court system. However, there exists a wide range of socio-political, logistical, and resource related factors that have negatively influenced the ability of the formal justice system to apply the laws accordingly and appropriately, and the ability of the police to enforce these laws. The core paradox of the Afghan formal justice system is

⁵ Amnesty International, *Afghanistan: Re-establishing the Rule of Law*, (London: Amnesty International, August 2003): 5. Afghanistan also has a separate system of specialized courts, which includes the Family Court and the Juvenile Court

not, therefore, the absence of laws but, rather, the weakness of the central authority to enforce these laws in a just way.

The Interventions of Donors and NGOs

Afghanistan's delegates to the conference that produced the Bonn Agreement agreed to use the country's 1964 Constitution as a legal framework until a new Constitution was ratified. This agreement conditioned the application of the 1964 Constitution "to the extent that its provisions are not inconsistent" with the Bonn Agreement or any international legal norms⁶ to which Afghanistan is a signatory. The Bonn Agreement also allowed the Afghan Authority to amend or appeal provisions that contradicted the agreed provisions or international norms.⁷ Although the newly formed Transitional Islamic State of Afghanistan (TISA) promised strong adherence to these international norms, the weakness of the judiciary and justice systems and the absence of resources has made the fulfillment of such promises elusive.

To further complicate matters, few of Afghanistan's national laws were codified or collected in one location. The 23 years of war brought the destruction of judicial institutions, and libraries and legal texts were burned and destroyed during the fighting. As a result, international agencies such as the International Development Law Organization (IDLO), based in Rome, and a numbers of US-based organizations reproduced and distributed the Afghan legal codes (1976 civil and penal codes) among the judiciary sectors.⁸ While IDLO has distributed a limited number of these texts, there are many more new cases that neither the 1964 nor 1976 constitution can offer remedies on. In addition, there are new legal provisions issued by President Karzai or passed by the Ministry of Justice that are not available in text form for most of the courts in the country. Many judges throughout the country are unaware of these new provisions, while other may have heard about them only on the radio.

Two years after the signing of the Bonn Agreement and more than a year since the establishment of TISA, the Afghan justice system is still struggling to put in place the basic elements essential for establishing the rule of law. The Bonn Agreement called for the establishment of three commissions: the Judicial Reform Commission (JRC), the Constitutional Commission, and the Afghan Independent Human Rights Commission (AIHRC). However, the Judicial Reform Commission remains under-resourced in

⁶ These norms includes all international legal provisions that were ratified by Afghanistan are as follow: The Genocide Convention of 1948 (acceded 1956), the Geneva Convention of 1949, the Convention of on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 (acceded 1983), the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (acceded 1980), The International Covenant on Civil and Political Rights of 1966 (acceded 1983), the Convention on Elimination of All Forms of Racial Discrimination of 1966 (acceded 1983), the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment Rights of the Child of 1989 (ratified 1994)

⁷ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (hereafter, "the Bonn Agreement"), II, 1, ii.

⁸ Interview, Minister of Justice, December 13, 2003. The 1964 and 1976 criminal and civil codes are the same.

comparison to the other committees and has made little tangible progress in the reform of the judicial system. To date, a civil and criminal justice system is functioning in some areas with international assistance, but courts are extremely poorly resourced, judges and prosecutors are not trained and are paid poorly and intermittently, and there is no agreed upon or codified system of law. The constitution was ratified in January 2004, but it will be years before a complete set of laws is created.

On 17 December 2002, IDLO convened a two-day donor conference held in Rome, at which Italy, the US, the UK, Germany, Austria, and Canada pledged a total of \$30 million USD in support of justice sector reform in Afghanistan. The final statement of this conference acknowledged the Afghan Judicial Reform Commission (JRC) as the responsible body for reforming the Justice sectors.⁹ The JRC established four working groups to focus on: a) law reform, b) the structure and organization of the judiciary organs, i.e., the Supreme Court and the Attorney General's Office, c) legal aid, access to justice, and the activities of NGOs dealing with legal initiatives, and d) the physical and human capacity of the judicial sector.

The Italian government is the lead donor to the judicial sector and sponsors the IDLO. To date, however, international donors have paid relatively little attention to the reform of the judicial system and re-establishing the rule of law outside of support to police training and reform. A forthcoming report on re-establishing the rule of law in Afghanistan states that the performance of Italy to date "is widely seen as lackluster and focused mainly on implementation of its own, relatively small projects. As a consequence, and despite the presence of some Afghan officials who are committed to reform, since the fall of the Taliban little progress has been made toward building a functioning justice system."¹⁰ Italy is also the lead international actor in the justice sector's Consultative Group (CG), the system created under the auspices of Ashraf Ghani at the Ministry of Finance to coordinate donors, UN agencies, and government ministries. Unlike other Consultative Groups, the CG of the judicial sector has yet to develop a strategy for judicial reform and does not function in a meaningful fashion.¹¹

The lack of human capacity is one the central problems of the Afghan judicial system at present. This problem of capacity has been recognized by donors, who have created two training programs for judges and prosecutors, but these two programs do not work in a coordinated fashion. The first program, run by the IDLO, is training approximately 400 judges and prosecutors. This course entails a three-month, part-time training program for currently serving judicial personnel. The IDLO program has been the subject of criticism because it attempts to train prosecutors and judges together, even though they do very different jobs and serve different functions within the judicial system. Also, the IDLO

⁹ Final Statement, Conference of Rome on Justice in Afghanistan (19-20 December 2002), p. 2.

¹⁰ Laurel Miller and Robert Perito, *Establishing the Rule of Law in Afghanistan*, Draft, (Washington: United States Institute of Peace, forthcoming. Permission to cite draft provided by the author.): 12. See also International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, (Kabul/Brussels: International Crisis Group, Asia Report #45, January 2003).

¹¹ Laurel Miller and Robert Perito, *Establishing the Rule of Law in Afghanistan*, Draft, (Washington: United States Institute of Peace, forthcoming. Permission to cite draft provided by the author): 14.

program does not include training on the human rights of women or gender sensitivity, which is considered a serious problem by some observers.¹² The IDLO is also continuing its work on the translation of existing legislation from the 1964 constitution.

The second training program is run by the Legal Education Center (LEC), a center set up under the auspices of the JRC. This program is a one-year course for young lawyers and began in May 2003. The first class includes 150 students, all of whom were employees of the Ministry of Justice, Supreme Court, or Attorney General's Office. Twenty of the 150 students are women. There are concerns regarding the long-term sustainability of this training program.¹³ The Tufts team received contradicting reports about the quality of these legal clinics. A long-standing judge criticized the IDLO for putting students with very different qualifications into the same program. He compared it to putting elementary, high school, and university students into one class. "The only thing that I have learned was legal issues that dealt with international human rights laws, which I could have learned by reading a book," he stated.¹⁴ In contrast, the head of primary court in Mohmand Darah district of Nangarhar, Judge Hashimi was optimistic about the IDLO's legal workshop and was encouraging other judges in Afghanistan to attend.¹⁵

Germany is the lead donor in the police sector and is working with the Ministry of Interior on police training and reform. A new police academy has been established and, as of November 2003, had 1,000 cadets and 500 non-commissioned officers in residence in either a five-year or three-month (for officers) training program. Working through the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), the German government development corporation, Germany has provided facilities for this trained police force, logistics for the human rights department of the police, training for a team of women counselors, and a small amount of funding for projects regarding the enforcement of law and order.

GTZ is also working to launch a major campaign for law awareness with a focus on human rights. In addition, UNAMA, UNICEF, UNODC, UNHCR, Norwegian Refugee Council, and the governments of the US and UK are supporting a number of different projects aimed to improved access to justice. Italy, Germany, the US, and UK have all allocated funds to assist TISA in building its capacity to enhance law and order, as well as trying to provide greater access to justice for average Afghan citizens. These funds are directed toward rebuilding infrastructure and training the existing government officials within the Ministry of Interior and the bodies that collectively make up the justice system. Despite the important assistance from these international agencies, the pace of training is very slow. In addition, key aspects to ensure that women's rights—rights shown throughout this report to be under constant threat—are upheld by these judicial systems are sorely missing. For example, neither the German nor the Italian programs for

¹² Amnesty International, *Afghanistan: Re-establishing the Rule of Law*, (London: Amnesty International, August 2003): 10.

¹³ Amnesty International, *Afghanistan: Re-establishing the Rule of Law*, (London: Amnesty International, August 2003): 10.

¹⁴ Interview, Anonymous, Kabul, December 2003.

¹⁵ Interview, primary district court judges, Mohmand Dara, Nangarhar, November 2003.

judicial reform or police training contain substantial areas for training on women's human rights, violence against women, or rape response. Nor do the Germans or Italians seem to have plans to incorporate these important aspects into their trainings. The resources and efforts that have been injected into the formal system of justice during the last two years is a positive development. However, for the system to work, it will require a strategic needs assessment to find remedies for the shortfalls that have been raised in a number of reports, including those we raise here.

The Afghan judicial system is suffering from a severe lack of human and material resources. Many judicial personnel have little legal knowledge or experience. Shortages of basic facilities, low salaries, and an increasing number of litigations have created a nightmare for officials.¹⁶

The Afghan Independent Human Rights Commission

A bright light in strengthening the rule of law is the Afghan Independent Human Rights Commission (AIHRC). Established under the Bonn Agreement in June 2002, the AIHRC monitors rights and investigates human rights abuses and violations in Afghanistan. The AIHRC is the first independent organ in the history of Afghanistan tasked to ensure that the Afghan legal codes are in harmony with the international conventions to which Afghanistan is a signatory. In addition, the mandate of the AIHRC allows the commission to play a consultative role in the preparation of a national mechanism that will focus on transitional justice and also seek to account for past violations.¹⁷ The AIHRC has expanded its work and presence through the establishment of satellite offices in the provinces of Balkh, Bamiyan, Herat, Kandahar, Nangarhar, and Paktia.¹⁸ The AIHRC is widely respected and has developed close working relations with UNAMA and numerous international and national NGOs. The AIHRC has also established working relations with number of government ministries, especially with the Ministry of Women Affairs. However, albeit unsurprisingly, the AIHRC officers report great difficulties with some provincial authorities, as well as commanders who control local armies. Importantly, the establishment of the AIHRC as a powerful presence has helped to open space for the possible creation of other civil society organizations.

The AIHRC is engaged in a number of significant justice projects around the country, most notably joining UNAMA's investigation of conditions in Shiberghan Prison in November 2002. The AIHRC has also investigated the role of the Afghan police in the killings of several students during a demonstration in Kabul; the land-grab scandal in Kabul that involved several high-ranking government officials; and is working with the

¹⁶ None of the primary courts that the Tufts team visited in the winter months was properly heated. No court had any means of transportation or communication. We found similar conditions in the High Court in Kabul, where offices were without heat or telephones. In Herat, the local government provided a mini-bus for transporting the officials from the two districts that were within a close distance to the city, but the officials have to pay for fuel and any necessary repairs of the vehicle.

¹⁷ "Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission", June 2002, Annex One, Article 9.

¹⁸ Interviews, the Afghan Human Rights Commissioners and regional/provincial directors in Kabul, Nangarhar, Herat, and Balkh, October-December 2003.

Return Commission for Pashtuns displaced from the north of the country in late 2002 refugees as well as with the Security Commission for the north.¹⁹ Working to strengthen the AIHRC, UNAMA and OHCHR offered workshops to train the Afghan commissioners and increase the Commission's professional capacity. Since its establishment, the AIHRC has received hundreds of complaints about human rights violations and abuses, and today has the distinction of being the only source that average Afghan people trust to file a complaint or grievance without intimidation and fear of reprisal.²⁰

Education of Judicial Personnel

The staff of the judiciary have a wide range of educational and training backgrounds. Most are graduates from local religious schools, with a small number from the *Sharia* School or the Law School at Kabul University. This pattern is also found among the leadership in the judiciary. For example, based on our interviews with officials, including over two dozen judges and prosecutors in Kabul, over 50% of those working in the judiciary and court system in the capital province have no official legal training.²¹ Indeed, the Tufts team found that in the provinces of Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar, the largest numbers of judiciary and court staff are theologians rather than legalists. They lack proper training in both Islamic and statutory law. Many judges, prosecutors, and faculty of training institutions insist that the lack of professional legal education and training significantly contributes to the current problems with the Afghan judicial system. For example, in Herat, educated and trained judges emphasized in conversations with the Tufts team that it is inappropriate to have a clergyman without any legal background as the head of the provincial court.²²

The Law School and *Sharia* School differ significantly in the training they provide to graduates who will work in the formal justice system. The Law School accepts only those students who receive the highest scores on the entrance exam for social sciences. In contrast, the *Sharia* School admits only those students who studied at official or private religious schools. Students at both the Law and *Sharia* Schools become familiar with statutory and *Sharia* law by following a four-year curriculum that combines both doctrines. Those students who are interested in judgeship enroll in a one-year program coordinated by the Ministry of Justice. Previously, all graduates of the Law and *Sharia* Schools were required to enter the public sector, i.e., into the Ministry of Justice, the court system, or the public prosecutor offices.²³

Neither the Law School nor the *Sharia* School provides four years of training exclusively in legal or judicial matters. To illustrate, the law school provides two years of general

¹⁹ Ibid. UNAMA and the AIHRC in Mazar have formed a regional forum comprised of representatives from all armed factions, as well as the regional PRT, AIHRC and some government local officials to coordinate security programs, prevent armed conflict between factions, and encourage dialogue.

²⁰ Ibid.

²¹ Interviews, judges and prosecutors Kabul, October-December 2003.

²² Interviews, judges, Kabul, November 2003.

²³ Defense attorneys are largely unknown in Afghanistan and defendants are almost never represented in court, even in criminal proceedings.

education in social and political sciences and two years of training in law. In the *Sharia* School, students spend the first two years on general theological issues and the second two years studying *Sharia* law. These mixed curriculums provide a weak basis in legal education for Afghan legal graduates, with only two years of direct studies in law. The practice of law is extremely complicated in Afghanistan given the multiple sources of law (i.e. statutory law, *Sharia* law—Hanafi, Jafari, and Ismaili--and the constitutional provisions and amendments), but graduates of these legal training institutions are left with a very limited understanding of legal standards and practices. In addition, there is extremely limited professional knowledge regarding legal research, analysis, case studies, and recorded observation. Perhaps most importantly, legal graduates, court officials, and judges have little knowledge of customary law, which is the most widely followed form of law in rural Afghanistan.

In addition, there is extremely limited professional knowledge and certification regarding legal research, analysis, case studies, and recording observations. As Denis Gallagher, director of Afghan Governance and Legal Reform Program, writes:

This inhibits execution of proper justice but also the ability of the country to relate to commercial/trade/international relations issues in a manner that involves local capacity. This problem must be rectified. Establishment of training programs for lawyers and the establishment of a Bar Association or some such support capacity for recognizing lawyers are important.²⁴

The Afghan justice system cannot and will not be compatible with the international norms and standards without establishing certified, independent law schools that train and certify qualified candidates exclusively in law and related practices.

Access to Legal Texts

The dominant language at the Law Schools is Dari or Pashto, but very few documents (including research texts, case studies, and comparative analysis) are available in either language. The dominant language at the *Sharia* School is Arabic, but no statutory articles or constitutional amendments specific to Afghanistan have been translated into Arabic to date. As a result, legal analysis regarding cases in Afghanistan is rare or non-existent in either Arabic or an Afghan language. This dearth of research and publications has led many Afghan legal experts to rely exclusively on legal texts and analysis that are published in other countries and are frequently not applicable to the legal system and cases in Afghanistan.

Due to the absence of official training, comprehensive legal education, and relevant texts, many judges are unfamiliar with the law and make decisions without any reference to legal codes or standards.²⁵ As of January, 2003, there was no complete set of the Afghan

²⁴ Denis Gallagher, personal communication, February, 2004. Gallagher is Chief of Party of Afghanistan Governance and Law Reform coordinated by Management System International (MSI) and funded by the USAID.

²⁵ Laurel Miller and Robert Perito, *Establishing the Rule of Law in Afghanistan*, Draft, (Washington: United States Institute of Peace, forthcoming. Permission to cite draft provided by the author.): 15.

Penal Codes available in the country.²⁶ In many areas, particularly at the district level, the Tufts team found that judges' personal opinions were the primary or only source of law. Many judges do not have access to any texts and do not use any written laws. On occasion, the Tufts team found that judges are relying on their privately owned legal texts interpreted by non-Afghan sources and printed outside of Afghanistan. These external texts are beyond the sources permitted under the legal jurisdiction of Afghan courts.

There is a lack of cohesion between legal texts and sources of laws at the national level. In turn, the lack of a standardized central system results in weak legal and official relations between the urban center and the rural periphery, as discussed above. Legal provisions ratified in Kabul have little effect on the local practice of judges and prosecutors. In most cases, the primary and provincial courts rely heavily or solely on the experience and knowledge of long-standing officials who have been working in the judiciary for over a decade, and these officials operate largely beyond the influence of Kabul. To illustrate, in Surkhroud, Nangarhar, all the primary court officials, including the head judge, were relying on the knowledge of an assistant judge who had been in the system for over 20 years.²⁷ A similar pattern was noted in the provincial court in Jalalabad, Nangarhar, where the leadership depended on the consultation of long-standing staff, rather than on official legal codes and Kabul directives.²⁸ In Gozara, Herat, the head judge of the primary court often consults with more experienced judges, including prominent legal experts at the provincial court, when finalizing his legal opinions. In such cases, the rulings of the court systems rely heavily on the expertise of local staff rather than legal texts and legislated codes.²⁹

Staff of the Formal Judiciary

The current composition of staff, cadres, and leadership in the law enforcement agencies and the judiciary (the Ministry of Justice, the Attorney General Office, Supreme Court, Afghan court system, and the Ministry of Interior) forms an imbalanced and often antagonistic system, wherein the rank and file personnel within different departments appear to misunderstand their positions within the legal system and do not interact appropriately. One of the underlying problems with the justice system is the compartmentalization of the Supreme Court, the Attorney General's Office, and the Ministry of Justice. These three bodies have poor relations and limited communication with each other and often seem to work at cross-purposes.³⁰

Ministries and offices express frustration over their over-lapping and unclear mandate and the lack of a due process of the rule of law. To illustrate, the Office of the Attorney General believes that it is an independent entity within the formal justice system, while the leadership of the Ministry of Justice believes that the Attorney General's Office

²⁶ International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, (Kabul/Brussels: International Crisis Group, Asia Report #45, January 2003): 7.

²⁷ Interview, primary court judges, Surkhroud, Nangarhar, November 13, 2003.

²⁸ Interview, provincial court judges, Jalalabad, November 12, 2003.

²⁹ Interview, provincial court judges, Herat, November 28, 2003.

³⁰ See also, Amnesty International, *Afghanistan: Re-establishing the Rule of Law*, (London: Amnesty International, August 2003): 5.

should fall under its directorate.³¹ In interviews with the Tufts team, officials within the Supreme Court complained that their “independent” space had been repeatedly violated by the officials from the Executive branch and that officials within the Executive branch use budgetary restraints as a means of applying pressure on the Supreme Court.³² Additionally, judges and prosecutors in Kabul complained that Kabul police arrest and release people without the involvement of the courts. The police contend that those they arrest end up back on the streets due to the misconduct and inefficiency of the courts. Judicial personnel suggested that the police act in this manner mainly because they do not know the parameters of their jobs and, therefore, the police are attempting to take on the combined duties of law enforcement officers, prosecutors, and judges. (As discussed elsewhere in this paper, other observers would say that the unsanctioned activities of the police are designed to intimidate, acquire personal power or wealth, or build allegiances with certain populations or political groups.)

Appointment of judges, especially head judges of the primary and provincial courts, is often based not on the merit of their legal education and expertise, but rather on their personal, tribal, ethnic, or political affiliations with the district or provincial leadership. For example, several judges and prosecutors in Nangarhar noted that significant numbers of newly appointed judges in eastern Afghanistan are from the same sub-ethnic group as the Chief Justice of the Supreme Court, who is responsible for judicial appointments. Additionally, a number of judges still in power were appointed by the Taliban regime and have strictly religious educations. The path to power of a given judge links closely to the patronage relationship built within the system, and many respondents reported that personal connections or political manipulation play a major role in judicial decisions. For instance, an active judge of the provincial court in Kabul stated, “We, the experienced staff, do the paperwork and rule on cases in a way that our bosses ask, not in a way that the justice should be served.”³³ In Char Bolak district of Balkh, the judge sets motions when he and the head of the district meet in the livestock market and most cases are solved out of the court.³⁴

High ranking officials enjoy almost total impunity in the absence of law and order and a working justice system in Afghanistan. For example, judicial motions against high ranking officials are likely to be dismissed or overturned by more powerful officials. There is presently no system for monitoring cases or of legal inquiry into the affairs of the upper echelons of the government. Publicized and well-known cases against high ranking officials, such as the recent land and property scandal in Kabul, are likely to be addressed only if the President intervenes.³⁵ The extent to which the country is now governed by decree is also an important element to be considered in the legal reform process.

³¹ Observations, Kabul, October-December 2003.

³² Ibid.

³³ Anonymous interview, Kabul, October 2003.

³⁴ Anonymous interview and Tufts team observation, Char Bolak, Balkh, December 2003.

³⁵ The scandal involved the forced expropriation of land from poor families in an up-scale district of Kabul in September 2003. The plots were then given to Cabinet ministers and military commanders. The United Nations and President Karzai intervened and two commanders were arrested and the chief of police in Kabul lost his job. Karzai has since set up an independent commission to investigate the allegations.

Court decisions are often not enforced. This leads to frustration among many of the actors involved in the judicial process, including prosecutors, police, district authorities, plaintiffs, and defendants. Widespread reports exist of corruption within the court system. Plaintiffs complain about the police demanding bribes for enforcing the court orders; some victims of this extortion stated that they could barely survive financially while paying off the courts.³⁶ But little is done to bring corrupt officials to justice, even after an arrest or when the situation is public knowledge. For instance, a judge in a rural district of Kabul was recently arrested for taking bribes. Under the current law, taking bribes is considered a serious crime against the state that is meant to be tried in a special court. The head of the district sent the case to the authorities in Kabul, but, by late 2003, no action had been taken against the judge and no replacement had been named for his district post.³⁷

The Judiciary: Political and Military Influences

As discussed above, of the judicial personnel who have had legal training, the leadership is divided between those who graduated from the *Sharia* School and those from the Law School at Kabul University.³⁸ Traditionally, the *Sharia* graduates represent the conservative camp in Afghan law and politics, while the Law School graduates represent the more progressive camp. This division extends to the Cabinet and Ministerial level, with the Ministry of the Interior considered to the reformists, and the judiciary/Supreme Court known as the leading conservatives. This ideological split has led to wide rifts throughout the government and contributes to the on-going failures in enforcing law and order and in reaching agreement on proposed legal reforms.³⁹

Graduates from the *Sharia* School currently form a majority in the judicial leadership, and appear to be taking pains to appoint as many of their political loyalists as possible to positions in the judiciary and court system. Many of those affiliated with the *Sharia* School also have ties to conservative political parties, such as the Islamic Unity led by Mr. Sayyaf, Islamic Society led by Mr. Rabbani, Islamic Party led by Mr. Khaless, and former members of the Islamic Party led by Mr. Hikmatyar. In turn, this link between the judiciary and the conservative parties has had a tremendous impact on judicial reform and the formation of the new constitution. The conservative majority's grip on the Afghan judiciary is likely to continue in the aftermath of the recent Constitutional Loya Jirga (December 2003) and through the Presidential elections (September 2004).

Prior to the Constitutional Loya Jirga, the Afghan government was a political battleground between reformists and conservatives, represented respectively by cabinet

³⁶ Interviews with a dozen of plaintiffs in Kabul, October-December 2003.

³⁷ Ibid.

³⁸ In an interview, Puhand Azizi, the dean of the *Sharia* School, tried to convince the Tufts team that his school is the true law school, and that it is more important than the Law School at Kabul University. When asked for an explanation, he has based his statement on the fact that Afghanistan is a Muslim country, and that all judicial personnel should be trained in *Sharia* law. .

³⁹ International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, (Kabul/Brussels: International Crisis Group, Asia Report #45, January 2003): 9-10.

members who had returned from exile and those affiliated with the local political parties, including the Islamist groups. The Afghan judiciary (including the Judicial Reform and Constitutional Commissions) became the frontline of this battleground, wherein each side endeavored to influence the new constitution, the pace of reform, and the application of laws. In this regard, returning members of the cabinet and a wide range of officials who served in the local armed forces were aligned in supporting progressive reforms based on a mixture of secular and Islamic law, while the Islamists and conservative camp demanded that Islamic law be the basis of the constitution and, thus, the law of the land for Afghanistan.

These political camps underwent a transformation during and after the Constitutional Loya Jirga, and shifted from conservative and reformists into more ethnically oriented platforms. This post-constitution development has sharply divided the top leadership and cabinet of TISA into Pashtun and non-Pashtun camps, a divide which is spreading throughout the ministerial ranks and further undermining the pace of reform. The politicization of the constitutional process, in particular regarding the process for amending the constitution, has become the center of legal and political debate among the former delegates to the Constitutional Loya Jirga.

The increased politicization of both the judiciary and the constitutional process has complicated and, in a number of areas, undermined the development of an independent justice system capable of serving the people of Afghanistan. According to several judges in Kabul city, the decisions of judges are open to the influence of the political and military leadership independently or via the Supreme Court. Such activities dangerously blur the line between the executive and the judiciary branches of the Afghan government in Kabul and throughout the country.

Compounding the politicization and blurring of the roles of government branches, judicial leaders and staff in the provinces often have affiliations with political factions and powerful military commanders. The influence of these factions and leaders on the courts seriously undermines the independence of the judicial system in these areas. The Tufts team found that in the rural districts of Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces, the heads of the government districts (*woleswal*), are often linked to military commanders or are commanders themselves and routinely overrule the decisions of the district courts. In some rural districts in Nangarhar and Kandahar, the district leaders do not even allow court officials to hear legal matters; instead, the district authorities settle case through the local *shuras* or police who are loyal to district officials. In the majority of cases encountered by the Tufts team, the police chief or the *woleswal* was more powerful than the members of the primary courts. This imbalance of relations between the judiciary and the political/military powers in the rural districts places significant risk on the populations' access to justice and ability to seek enforcement of their rights. This imbalance also directly contributes to maintaining systems of injustice and inhibiting meaningful and much needed reform.

Challenges Facing Legal Systems in Urban Centers

The major regional urban centers of Herat, Jalalabad, Kabul, Kandahar, and Mazar-i-Sharif are growing rapidly as thousands of people migrate from rural areas in search of employment, security, shelter, and access to services (such as schools and hospitals). These cities have attracted large numbers of returning refugees who became urbanized during their time outside of Afghanistan and do not wish to return to the villages. Rural people also moved to the cities during the drought, as they were no longer able to support their families on their land. Increasingly, rural people are also coming to urban areas to visit formal courts.

Disputes over property are the single-largest form of litigation currently in the Afghan court system. Presidential Executive Order Number 136 established the Special Property Court to handle all property disputes, particularly those that related to returning refugees and internally displaced persons. However, Supreme Court officials state that, due to limited resources and funds, a property court could only be established in Kabul.⁴⁰ As a result, most primary courts are jammed with property related disputes, which are reportedly more lucrative than family cases. Family cases are also being pushed aside in favor of property disputes in city districts. Interviews with both male and female plaintiffs of the family court in Kabul revealed that their cases were repeatedly postponed or left pending because the main judge was busy with property-related disputes.⁴¹

A nation-wide imbalance exists in the Afghan court system, with the vast amount of court facilities and resource concentrated in Kabul city. For example, there are no courts specializing in property outside of Kabul city. Furthermore, Kabul city has many more city district courts than the other major urban centers. Each of Kabul's 16 city districts has a district court, whereas Herat, Jalalabad, Kandahar, and Mazar-i-Sharif each have only one city court (based within the provincial court), although their districts have populations similar to those of the Kabul districts. The deputy chief of Herat's provincial court, Judge Aazam Karimi, argues that establishing property, family, and city district primary courts is absolutely necessary for the provinces:

In addition to the existing discrepancy regarding the function of the court between court leadership and the executive authority, trying to manage thousands of complaints that are reaching our courts with very limited resources is extremely difficult.⁴²

According to Judge Abdul Manan Mawlvizada, the Provincial Chief Justice in Balkh, his office has proposed the establishment of three additional primary courts in the city, but the Supreme Court did not approve these courts, citing shortage of funds. Judge Mawlvizada explained that they have the human resources but lack the budget and facility to establish these much needed courts.⁴³

⁴⁰ Interviews with the head and judges of the Special Property Court in Kabul city, November 2003.

⁴¹ Anonymous interviews with clients of the High Court in Kabul, November 2003.

⁴² Interview, Judge Aazam Karimi, Herat, November 2003.

⁴³ Interview, Judge Abdul Manan Mawlvizada, Balkh, December 2003.

There is also a serious imbalance in urban-rural court capacity. Very few district level courts are fully operational. The rapid growth in urban populations means that many cases dealing with rural issues are brought before city courts when rural residents relocate to the cities. In Balkh province, for example, a number of new migrants have brought cases that originated in rural areas to the city courts. The urban provincial courts cannot send the new urban residents back to the rural district to solve their disputes. The Balkh city court, however, was designed to serve only the population within the boundary of the city. The court is now attempting to use the same resources and structures to serve a dramatically increased population.⁴⁴

Provincial courts also serve as the appellate courts for the rural areas. The provincial courts are responsible for handling cases that were not or could not be heard by the primary courts that are meant to exist at the district level. Many of these primary district courts, however, are severely in need of rehabilitation and capacity building. Due to the lack of detention centers (especially for women), the provincial courts must also deal with a detainees from rural areas that are transferred to the urban detention facilities.⁴⁵ Establishing and funding additional courts in the major urban centers would assist the justice system to improve its accountability towards the rural districts and populations. The expansion of the primary court system would also give the rural Afghan population more reliable access to the justice system.

Family Courts, Female Judges, and Female Attorneys

Afghanistan has a parallel court system for Family and Juvenile Courts.⁴⁶ These courts were meant to exist in every province, but to date are operational only in Kabul city. The Special Family Court in Kabul is the only court in the country that is contains a small number of female judges.⁴⁷ Two law associations have been recently created with large number of female judges,⁴⁸ and there are some female judges and attorneys in other urban centers such as Herat and Mazar-i-Sharif. A very small number of these female judges and attorneys are currently allowed to serve in judiciary positions to adjudicate family cases on civil matters only. More are hired to serve in clerical duties and pushing paperwork around, while qualified female judges are working for the NGOs in non-related judicial services.

The employment of female judges within the court systems and their engagement in adjudicating litigations, especially in the family courts, is crucial. However, a number of

⁴⁴ Ibid.

⁴⁵ Anonymous interviews, officials at the provincial courts in Herat and Mazar-e-Sharif, November-December 2003,

⁴⁶ The specialized parallel system is also meant to include commercial courts and security courts, but these have yet to be established in Afghanistan.

⁴⁷ According to the cultural norms and gender relations in Afghanistan, family relations are considered highly private issues. It is hard—even impossible—for a married woman to discuss the details of her marriage in front of a male judge. Women judges, however, are considered to belong to the female social space, and women are able to be more open in front of female judges or prosecutors.

⁴⁸ Interview, former Judge Marzia Bassel, UNICEF's Juvenilia Protection Program, November 2, 2003.

cultural constraints and administrative restrictions continue to limit the role and involvement of women in the current judicial system. Women with legal educations and training often perform administrative duties or hold office positions, and do not hear legal cases.⁴⁹ According to a female judge in Kabul, the dominant theological culture within the judiciary prevents male officials from considering women to be competent judges or able to make sound legal judgments. She explained:

Since being a judge has leadership aspects, some of the leadership in the justice system, especially in the Supreme Court, believes that women's leadership in an Islamic society is un-Islamic and it shouldn't be allowed.⁵⁰

Another women judge who worked outside of the family court in Kabul stated:

Having women in the family court is a cover-up for the dominant culture that is based on gender prejudice and backward sentiments. It has nothing to do with the genuineness of holy Islam and the justice of God. In addition, it appears that having female judges in the court system, even at family courts, is a concept that has yet to be accepted by some of the males sitting on the Supreme Court.⁵¹

In interviews with family court judges in Kabul, the Tufts team learned of inconsistencies in the application of rule of law based on differing definitions of legal provisions. High ranking male judges who derive their decisions from a more restricted interpretation of *Sharia* law often deliver very different rulings than the female judges who combine the constitutional legal provisions with a more moderate interpretation of Islamic law.⁵²

According to female judges in Kabul city, greater participation of female judges and attorneys in Afghanistan's courts will help to strengthen the justice system by providing more qualified and trained lawyers to adjudicate legal matters. A greater number of female judicial personnel would also enhance access to justice for women plaintiffs and defendants. The latter rationale is based on the segmented social structure and local cultures, which separate the social and physical space for men and women throughout Afghanistan. This culture of separation is rooted in the local interpretation of gender relations based on religion (i.e., *mahram* and *hijab*) as well as the influence of customary issues (i.e., *nang* and *namus*, which have to do with honor in respect to women's social position). Because of the segmented gender spheres, rural Afghan women are discouraged from talking to or interacting with men who are not their relatives (see Understanding Threats and Attacks to Rural Afghan Women's Human Security, Section I). These social codes prevent women's direct access to the male-dominated world of the court system. However, because rural women are able to interact with other women, they might be more inclined to seek access to female judges and lawyers (see Women and Legal System, Section I).

⁴⁹ Amnesty International, *Afghanistan: Re-establishing the rule of law*, (London: Amnesty International, August 2003): section 5.3.

⁵⁰ Anonymous interview, former female judge working now for the UN, Kabul, October-December 2003.

⁵¹ Anonymous interview, female judge, Kabul, October-November 2003.

⁵² Ibid.

The Absence of Defense Attorneys

Another key legal dilemma facing the Afghan justice system at both the urban and rural levels is the absence of defense attorneys. A system of legal advocacy or independent defense has never existed within the Afghan judiciary. Under the previous legal system, legal advocates operating outside of the official justice system were available for hire, but were not provided by the courts. These legal advocates have varying levels of training and few were trained to present a client in a court or to act as his/her defense attorney.⁵³ In attempt to introduce a system of defense attorneys, a public advocacy office has recently been established at the Supreme Court in Kabul. However, no judges or clients interviewed by the Tufts team were aware of the existence of this office.

The Tufts team contends that the public advocacy office is presently little more than window dressing within the Afghan justice system, as neither the Supreme Court nor the Ministry of Justice has the space for a public defense mechanism included in their organizational structure or budgetary system. This has caused both the Supreme Court and the Ministry of Justice to shirk their responsibility for the development and maintenance of a public defense system. There is little doubt that the formation of a functioning public defense system is one of the most important initiatives of judicial reform in today's Afghanistan.

Professor Nassrullah Stankzai of the Kabul Law School believes that courses providing specialized knowledge about legal advocacy and defense should be included in the curriculum for law students. He argues that these additions are urgently needed, and believes that the establishment of a legal defense system may reduce the existing corruption in the justice system and help to expedite the slow process of bringing a case to court. Professor Stankzai states:

The cost for hiring a defense attorney is a fraction of what it costs people as far as their time and the time of the court, especially given all the extortion and bribery.⁵⁴

Recently, several NGOs have started concentrating on training a small number of Afghan attorneys to defend clients, although this training is currently available only at legal clinics within Kabul city.⁵⁵

Some NGOs are specifically training Afghan women defense attorneys to represent female defendants or inmates. These new trainees face formidable challenges in seeking to represent their female clients. Public prosecutors and judges are reluctant to accept

⁵³ N. Nojumi and C. Jones-Pauly, "Balancing Relations between Society and State: legal Steps toward National Reconciliation and Reconstruction of Afghanistan," draft copy, Harvard Law School's Islamic Legal Studies Program, October 2003.

⁵⁴ Interview, Professor Stankzai, Director of the Civil Law Department at the Kabul Law School, November 2003.

⁵⁵ Interview, Dr. Anu Borrey, Legal Project Manager, Medica Mondiale, Kabul, 9 November 2003.

legal challenges on behalf of the female defendants, especially in cases where the woman has already been convicted. On one occasion, a public prosecutor rejected the reopening of a case, basing his argument on moral standards rather than on the merits of the case. He accused the female defense attorney of defending “morally bad women.” In another case, the court officials yelled at an Afghan female attorney, saying that her desire to represent a female inmate was rooted in “western influences.” Both cases were eventually heard, however, and—due to the legal knowledge of the female defense attorneys—the female inmates were found not guilty and it was ruled that the court had no grounds on which to hold them.⁵⁶

Challenges Facing Legal Systems in Rural Settings

Challenges regarding the current formal justice systems in rural Afghanistan are formidable. The formal justice system in rural Afghanistan faces two main dilemmas: structural problems and conflicts over jurisdiction. Throughout rural districts in most of Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar, the relations between the executive and the judiciary (i.e. among the positions of the primary court judge/s, prosecutor, police chief, *woleswal*, and government head of district) are extremely chaotic. The separation of responsibilities, duties, and even office space is not clearly delineated. Officials from the executive routinely overrule the decisions or meddle in the affairs of the primary courts. In most cases, the primary court judges are not allowed, or are afraid, to rule independently in their cases. The Tufts team found that most primary court judges and prosecutors were reluctant or afraid to speak openly about their often difficult relations with the head of the districts or the police chiefs.

For example, in one district in Nangarhar, the primary court judge complained that the chief of the police and the head of the district were taking control of matters that belonged under the court’s jurisdiction. The local officials were then resolving these matters personally and outside of the local justice system.⁵⁷ In several other rural districts in Nangarhar, police chiefs reportedly detained people on false allegations, forced their families to pay bribes, and then released them without ever referring the case to the primary court. The district authority in one district in Nangarhar had his own private detention center, which he did not allow the local court officials to enter. In a rural district of Herat, the office of the prosecutor had detained a murder suspect, but was receiving pressure from the deputy head of the district for the suspect’s release. A judge in Herat stated that his life had been threatened by local commanders who were now part of the provincial army because he had agreed to take on several controversial cases.⁵⁸ In Balkh, the provincial court had supervision over only a few primary courts—the rest were under the control or influence of the local commanders.⁵⁹ In a district in Kandahar, court officials and the district authority were unable to access the detention centers and did not know who was being held captive, as the detention center was under the control of the police who would not allow access to the court officials. Compounding the situation,

⁵⁶ Ibid.

⁵⁷ Anonymous interview, Nangarhar, November 2003.

⁵⁸ Anonymous interview, Herat, November 2003.

⁵⁹ Anonymous interviews, Balkh, December 2003.

every primary court in rural Afghanistan visited by the Tufts team—without exception—lacked basic facilities, including equipment, office supplies, and transportation, and faced serious budgetary shortages.

Most judges in primary courts in rural Afghanistan are without judicial or legal training. Like the judges in urban areas, many do not have access to approved legal texts. Rural judges are largely unaware of recent changes to the formal system of justice and many base their understanding of the legal order on basic training courses from before 1970. For instance, the Tufts team interviewed judges in Nangarhar that were educated in Saudi Arabia, but they had no knowledge of local precedents, Afghan legal issues, or the legal provisions included in the Afghan constitution. At the time of our study, 400 judges were enrolled in legal clinics that were set up by the Italian funded IDLO, but only one judge from rural Afghanistan had been recruited into the program and his admission was based upon his previous job at High Court in Kabul.

The low levels of education and training of judges negatively affects the public image of the official justice systems in the rural areas and likely acts as a disincentive for people who might otherwise access the courts. Poor salaries and the lack of other benefits for judges and primary court staff have contributed to corruption and unlawful behavior, which further decreases the ability of the justice system to provide legal services. Reforming the organizational structure of the formal justice system in rural Afghanistan, improving professional education, and enhancing the living standards and work place environments for judicial staff in rural Afghanistan are important steps to help provide sustainable and reliable access to justice for the rural population.

Abuse of the Rights of Rural Afghans

Most rural Afghans neither understand their legal rights and obligations nor do they know the laws of Afghanistan. These factors allow those in positions of power to abuse the rights of rural people. Punishments are arbitrary and not necessarily in line with the law. Tufts interviews with several dozen inmates in a number of detention centers and jails revealed that most prisoners are held past the legal time limit without being charged. Most inmates claimed to be uncertain of why they were being held, unaware what the evidence was against them, and unsure of the possible outcomes of their cases. For instance, police in a rural district of Nangarhar were unlawfully holding more than a dozen people for minor offences. The Tufts team requested to visit the jail, but the deputy police chief arranged to have the prisoners removed from their cells and hidden in another part of the building before the Tufts team arrived. In another instance, police removed prisoners—covered in blood and unable to walk—from a metal shipping container in an attempt to relocate the detainees before they were seen by the Tufts team.⁶⁰

⁶⁰ In two instances, Tufts team members were informed by their drivers who saw the men being taken out in order to avoid their being seen by the team. In one instance, the Tufts team saw the prisoners being removed.

The Tufts team met more than a dozen individuals who had traveled to Kabul from rural areas to appeal their cases before the High Court.⁶¹ Many of these people explained that they had exhausted their family's resources in the pending case and had come to Kabul in a final attempt at resolution.⁶² In some instances, the Tufts teams witnessed clients pleading with court officials to hear their cases. At other times, people approached members of the Tufts team and asked for legal help and assistance in appearing before the court officials.⁶³

Insecurity and Rural Justice Systems

Top officials at the Supreme Court stated that there have been major budgetary and planning flaws in the strategy of building the TISA government. These officials added that problems within the National Development Framework had resulted in a lack of attention to the restoration of the Supreme Court.⁶⁴ According to Mr. Manawi, the First Deputy Chief of Justice, the court system is facing serious shortages of trained judges, especially in the provinces. Experiences and skilled judges receive around \$36 USD (AF2100) per month with no housing, transportation, or per diem. Mr. Manawi went on to explain:

None of the skilled judges wants to leave Kabul or the center of other provinces to serve in rural districts with this kind of funding... In addition, our judges are not secure from [attack by] armed groups.⁶⁵

Court and government officials who are not aligned with the major local and regional commanders face insecurity and the threat of attack throughout rural Afghanistan. To illustrate, the police and chief prosecutor of a rural district of Kabul told the Tufts team that they had identified accused murderers and knew where they lived. However, armed men aligned to local commanders have prevented the officials from making the arrests. The police and chief prosecutors stated that they were very concerned for their own physical safety, as well as the safety of their families, and expressed frustration at their inability to enforce the law.⁶⁶ In some rural districts of Kandahar, court officials were unwilling to speak with the Tufts team unless we could take them out of the district to a "safe place" for the interview.⁶⁷ In another instance, a district authority in Kandahar spoke of the involvement of numerous government officials in the illegal drug trade:

When I was the district authority in [rural district in Kandahar] I captured 138 kilos of hashish and brought this to the provincial level. I was given a receipt [produces official receipt with governor's stamp] from the government saying that

⁶¹ Anonymous interviews, clients and court officials at Kabul High Court, October-December 2003.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Anonymous interviews, officials at the Supreme Court, Kabul, November- December 2003.

⁶⁵ Interview, Manawi, Deputy Chief of Justice, Kabul, December 2003.

⁶⁶ Anonymous interview, chief prosecutor, Kabul, November, 2003; Anonymous interview, Head of Investigations Unit, Kabul province, November, 2003.

⁶⁷ Because the Tufts team could not guarantee the safety of the respondents these interviews were not conducted.

I turned over this much hashish. Later, I found out that the hashish was resold in the market in Kandahar. I also have this receipt for 52 kilos [produces official receipt with governor's stamp] that I captured using road checkpoints in [rural district]. This time I did not give this to the provincial police since they just sold it last time. Instead, I delivered it to the customs office of Kandahar to try to ensure they did not resell it. Then I received a letter from the new district authority of [another rural district] [produces letter that has the official stamp of said district authority] asking me to release the 52 kilos of hashish to the owners [of the drug] and not to bother them anymore.

This narrative demonstrates the high level involvement of officials in illegal activities and points to the impunity of those in power. Local officials and police who attempt to follow the rule of law are punished, risk attack, or are removed from their positions. The continuation of the story from above illustrates that these problems were not limited to the trafficking of narcotics:

The reason I am in this district is that I made a mistake in [rural district of Kandahar] when I caught six trucks full of iron being smuggled into Pakistan and I sent them back to the provincial center to the police. The assistant of the governor and the head of customs were very unhappy with this. Shortly thereafter, I was removed from [first district]...and sent here to [rural district of Kandahar].⁶⁸

In other rural districts in Nangarhar, court officials are at serious odds with the district authorities. In two rural districts, district authorities have refused to allow certain cases to come before the courts, and have instead sent the cases to the local *shuras* or *Jirgas*, who are supporters of the district official, or to the police who are also loyal to the district authority. One district court official explained:

People mostly use the *Jirga* system here... If the people of the *Jirga* are those who are using justice to make their decisions then the *Jirga* can work. However, for most of the cases, the *Jirgas* are heavily influenced by powerful people.⁶⁹

Prosecutors also face direct threats and intimidation from more powerful district authorities who may have an interest in a particular case, as illustrated by this rural prosecutor from Nangarhar:

I have a serious problem with the district authority. When I want to use the formal legal system as a prosecutor, the district authority will come to me and warn me not to do that. Sometimes the district authority intervenes in my work, he tells me to stop the official filing of the case and that he will solve the problem through the *Jirga*. Sometimes the district authority discloses my name to the people who have been accused of the crime. The district authority is telling them

⁶⁸ Interview, District Authority, Kandahar, December, 2003.

⁶⁹ Anonymous interview, district court official Nangarhar, December 2003.

to kidnap me or kill me if they want to stop me from doing my work. If this situation continues then I am going to strongly consider leaving this job.⁷⁰

The Police of Afghanistan

Findings

- **Few police officers in rural areas have professional training; most were former *mujahideen* fighters or militia members who became police officers when their commanders joined the official government or military structure.**
- **Police operations are characterized by patron-client relationships. Police forces continue to operate largely independently from a centralized command structure under the Ministry of the Interior, and many remain loyal to their former commander or to the commander in the area.**
- **All of the police in our sample in Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar provinces lacked the basic resources needed to conduct their jobs, including transportation, communications equipment, pens and paper, adequate buildings, uniforms, weapon safes, and furniture for police offices.**
- **All of the police in our sample Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar provinces had experienced delays of four to six months in receiving their salaries from the central government. Rural Afghans attributed, in part, the involvement of police in corruption to the delay in the receipt of their salaries.**

The Ministry of Interior is the main body responsible for enforcing laws throughout the country and oversees the national police. As discussed earlier, a central police academy is now training new recruits to be deployed countrywide. The presence of these police forces in outlying provinces helps to establish the reach of the central government. The establishment of a police academy seeking to promote professionalism within the police force is a step towards building law and order in Afghanistan. At present, however, the effects of this reform are negligible outside a few areas of Kabul province.

Afghan Police Linked With Militias and Military Commanders

Police chiefs at the district level often share close ties with the major regional commanders, who themselves serve as heads of army garrisons or major military units. The Tufts team observed these links between police and commanders in almost every rural district in which we worked in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces. In many cases, police chiefs moved from the head of a militia unit to the police system and brought their militia members with them. The militia members are then re-appointed as police officers or police soldiers. For instance, the chief of police in Paghman, Kabul, is a former unit commander under the chief commander of the

⁷⁰ Anonymous interview, district prosecutor, Nangarhar, December 2003.

central Army division in Kabul. Likewise, the chief of police in Mir Bacha Kot, Kabul, is a former unit commander of the current head of the Army 66th Battalion around Kabul.

Throughout the country, there are few trained and professional officers in leadership positions within the police. Professional training of those at the district level is practically non-existent. The Tufts team found that former fighters and militia forces with no training as police officers form the majority of police forces at the district and provincial levels in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar (Table 3.1). In most cases, the few trained police officers in the system serve as clerks who mainly push paperwork, write minutes of meetings, schedule appointments, and formalize the informal (and sometimes unlawful) activities of the higher ranking officers. For instance, when the Tufts team asked about the number of current prisoners in one district, the one uniformed officer present stated “zero” and confirmed this by producing the record book. However, a visit to the jail by the Tufts team found there to be 13 prisoners in custody.⁷¹ Trained and experienced police officers often approached the Tufts team to voice their frustration over serving under high ranking officers who lack training and experience. Indeed, the trained police have little power over police operations in most of the provinces and districts. Such situations contribute to growing frustration among professional police officers.

Table 3.1.
Percentage of District Police Forces in Uniform, With Uniforms Distinct From Military, Proper Registration of Firearms, Secure Location of Stored Firearms, and Composition of Police Force, by Province, 2003. Based on Tufts University study data.

	Badghis	Balkh	Herat	Kabul	Kandahar	Nangarhar
Majority of Police Force	Former Mujahideen					
Some Police in Uniform	50%	20%	75%	25%	0%	0%
Police Uniform Distinct from Military	50%	0%	75%	25%	0%	0%
Proper Registration of Firearms	50%	0%	75%	50%	0%	0%
Secure Location of Firearms	0%	0%	0%	75%	0%	0%

⁷¹ Observations, Nangarhar, November 2003.

Our study found that the majority of weapons in the hands of police at the district levels in Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar are personally owned by the police chief or are the personal weapons of individual police officers and police soldiers.⁷² In the majority of cases we studied, there was no official registry of weapons and no secure location to store or issue weapons. In several locations, the Tufts Team saw a number of automatic weapons, RPGs, rockets, and heavy weaponry lying on tables or on the ground outside the police buildings. In some cases, police chiefs have agreements with powerful commanders in the Afghan army to assist in proving weapons for the military unit if necessary. In return, the police rely on the assistance of the major military commanders in emergencies.

Police uniforms are visually distinct from military uniforms, but only some of the police in our sample were wearing uniforms. In no instance were all on-duty officers in uniform when the Tufts team arrived at the police station. The majority of police wore casual (street) clothes instead of uniforms, and usually only the chief of police and his top officers were in uniforms. Only one police chief reported having enough uniforms (supplied by the Ministry of Interior) for his officers.

The Ministry of Interior provides salaries (theoretically) and a limited amount of office supplies to the district police forces. Of our sample of police forces in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces, the vast majority lacked enough paper and pencils to record incidents and arrests. No station we visited had standard forms for recording incidents and arrests; all forms were handwritten. On several occasions the Tufts team found that there were not enough chairs for the team (of two people) and the police to sit during an interview. (The police would then stand for the discussion.) We came across only one woman officer, in Bala Murghab district of Badghis province, and she was in charge of female detainees. Although other district stations expressed the need for women officers, most did not have any plans to recruit women.

We found that 100% of police in our sample lacked sufficient transport to enable them to do their jobs. For example in Paghman, Kabul, the only car available was for the police chief, thus making it very difficult for the police to patrol, respond to requests, or visit the scene of a crime. The Paghman *shura* has mandated that local people with private cars (e.g., those who drive transport routes to Kabul) must provide their car for the nighttime use of the police for a rotating period of three to four months. The police can use this car at night to respond to emergencies. Police try to reach the location in emergency incidents; otherwise they send a message “asking the person to please come report to us.”⁷³ In Surobi, there is only one car for everyone, including the investigative unit. At the time of the visit by the Tufts team, that car had been in the repair shop in Kabul for several months. A murder case was reported two months ago, but the village where the

⁷² Interviews and observations, Kabul, Nangarhar, Herat, Kandahar, Badghis, and Balkh August-December 2003. Militia members transferring to police service were often allowed to bring their personal weapons or weapons caches with them.

⁷³ Interview, police officers, Paghman, Kabul, November 2003.

murder occurred is 40 kilometers from the district center and the police have not yet been able to visit the scene due to the lack of transport.⁷⁴

One hundred per cent of our sample police forces in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar had not received their salaries from the Ministry of Interior on time, with an average delay of 4-6 months. Rural police salaries are very low and average roughly \$17 USD (AF800) per month. In Mir Bacha Kot, for example, the police soldiers at the checkpoints have not been paid, and the police chief bought them carpets with his own small salary so they would have something warm to sit on in the check-posts. The police chief said that he feared his men would otherwise have become increasingly unhappy and would feel undervalued, and he worried that this would impact their job performance. In Surobi, police soldiers manning check-posts on the highway to Kabul were without carpets, bedding, or coats for warmth during the winter.⁷⁵

Tufts research in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces finds that the local police chiefs often operate independently from the Ministry of Interior. They receive a fixed salary from the Ministry of Interior, but largely function under the auspicious of the major military commander in the area. As discussed earlier, many police chiefs are former militia commanders who entered police work when their commanders came under the government system. A government official in Jalalabad stated that having police loyal to one powerful man in the area—even if this man is a commander outside of the police system—is a positive development, as it encourages accountability and makes work more efficient. However, the Tufts team argues that based on this system, the administrators/commanders often engage in issues through a network of patron-client relations, rather than through the police system, police regulations, and professional structure. For example, a government head of a rural district in Nangarhar complained that his police chief was not following official directives from local officials; rather, he was arresting and releasing people upon the orders of the chief of the police in Jalalabad, to whom he had greater loyalty.⁷⁶

These patron-client relationships make it nearly impossible to enforce justice. To illustrate, a former district authority from Kandahar spoke to the Tufts team of the problems he faced in trying to establish rule of law within this system of patronage:

In [a rural district of Kandahar], the head of the police [name withheld], was traveling to the main road and asking for 20,000 Afs per car for passing on the road. If they would not give the money, then he would take their car. He had power because the rest of the police supported him. Since he was from [rural district] people in the district would cover for him, because he had tribal and friendship support. The regular people were very unhappy and tired of this situation and they would complain to me since I was the district authority there at the time. But I could not stop him because he was powerful and well supported by his tribe.

⁷⁴ Interview, Head of Investigations, Kabul, November 5, 2003.

⁷⁵ Interview, police officers, Mir Bacha Kot, Kabul, November 2003.

⁷⁶ Anonymous interview, Nangarhar, November 2003.

The same pattern was also occurring when I was the district authority in [another rural district], with a person ... who was stealing cars and robbing houses. When I caught him, he admitted in front of the *shura* that he stole the cars and robbed the houses. I sent him to the provincial center to the police. The governor [now the former governor] became involved in his case. After one month the suspect was released and promoted as a commander. Now he has guards and cars and power. Instead of being punished, he was promoted, in part, because he is of the same tribe as the head of the military division of Kandahar.⁷⁷

The police themselves expressed frustration at the poor conditions they work under, the Ministry of Interior's inability to pay them in a reasonable time period, and their lack of training and resources, especially vehicles. In some cases, they also reported feeling under threat from armed forces. In one instance, police forces in Kabul called upon ISAF to assist in disarming local commanders and militias to enable them to carry out their work without interference.

Detention Centers

Findings

- **Many provinces and districts have no detention centers. District level detention centers visited in Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar provinces are in an extremely poor condition and lack basic necessities such as secure structures, sanitation facilities, and beds and blankets for detainees.**
- **Detainees are sometimes held in shipping containers or in private detention facilities. Some prisoners showed signs of being beaten and others were unable to walk or stand without assistance.**
- **In the areas visited, there were no detention facilities for women at the district level.**

The Ministry of Justice has recently taken over responsibility of jails throughout the country from the Ministry of the Interior. The media reported on this transfer of responsibility and officials in the capital conveyed the change to the heads of provinces and districts. In our interview with the Minister of Justice, Mr Karimi, he spoke of the high level of cooperation between himself and Mr. Jalali, the Minister of Interior.⁷⁸

However, based on our interviews with police chiefs in rural districts, the transfer of responsibility for the detention centers was not accompanied by an appropriate level of preparation and attention to logistics, administration, or financing. Police were receiving little to no support from the Ministry of Justice for running the detention centers. For

⁷⁷ Anonymous interview, Kandahar, December 2003.

⁷⁸ According to an anonymous high ranking official of the Supreme Court in Kabul, during shifting responsibilities of jails, some 114 hardcore criminals were able to escape. Anonymous interview, Afghanistan Supreme Court, Kabul city, December, 13, 2003.

example, in Mir Bacha Kot, Kabul, the police rely on the Ministry of Health to provide glasses, water, pots, and other essentials for the detainees. The police chief stressed that this relationship needed to continue because he had no budget for these services.⁷⁹ In other districts, the police chiefs are in debt to shopkeepers for the purchase of fuel, office supplies, and food. In Guzara, Herat, the government head of district asked a local merchant for financial assistance to (temporarily) prevent the collapse of his entire police force due to lack of funds and low salaries.⁸⁰

According to Minister Karimi, 18 provinces have no detention facilities while nine other provincial detention centers need serious reconstruction. District detention centers are presently still controlled by the police because the Ministry of Justice has no budget, trained officers, or office supplies for maintaining detention centers and inmates. The Tufts team visited rural detention centers throughout Balkh, Badghis, Herat, Kabul, Kandahar, and Nangarhar provinces that were in extremely poor condition. To illustrate, in Surobi, Kabul, the ceiling of the detention center was collapsing and infested with snakes.⁸¹ In Rodat, Nangarhar, the only light in the detention center came from a crack in the wood above the door frame; the room was infested with rats and mice; the bedding consisted of shreds of fabric on a dirt floor; and chains for the legs and arms of inmates hung from beams on the ceiling.⁸² In the detention center in Koshan, Herat, the only light and ventilation came through a door that was often chained shut.⁸³ In Bala Murghab, Badghis, militias had destroyed the police station and detention center, but inmates were still held in the partially destroyed building (a new detention center was under construction using funds and labor from the community).⁸⁴ In a district in Kandahar, the district authority and court officials were not allowed into the detention center which was privately controlled by the police, and they had no idea who was being held there or why.⁸⁵ According to the district authority in this district:

My administrative person plus the prosecutor wanted to visit the detention center, because I told them I needed an update on who is there, who is not there, and so on. But the police did not let them enter. The prosecutor has not visited the detention center for the past four months. Still we have not gotten in there to see what is happening and who is there.⁸⁶

The police did grant the Tufts team entrance to the detention facility in this district, although the district authority and prosecutor were not allowed to accompany us. The team saw children (boys) and several other detainees being held in the detention center. Within this prison, the Tufts team spoke to a 60-year-old man who said that his son had been suspected of kidnapping another boy. The police could not catch the boy so they arrested the father instead. The district chief of police said:

⁷⁹ Interview, police chief, Mir Bacha Kot, Kabul, October-December 2003.

⁸⁰ Anonymous interview, District Authority, Herat, November 2003.

⁸¹ Observation, Surobi, Kabul, November 5, 2003.

⁸² Observations, Rodat, Nangarhar, November 25, 2003.

⁸³ Observations, Koshan, Herat, November 13, 2003.

⁸⁴ Observations, Bala Murghab, Badghis, November 19, 2003.

⁸⁵ Human rights groups report that there are numerous private detention centers in Afghanistan.

⁸⁶ Anonymous interview, District Authority, Kandahar, December 11, 2003.

Yes, this is our method. If the person who has committed the crime is not present, then we go and arrest their close relatives so that they will turn themselves over to us.⁸⁷

In the majority of our sample, detention centers were located in mud or cement buildings, in the remaining cases they were iron shipping containers.⁸⁸ Juvenile male offenders were held with adult males due to lack of knowledge of the laws by police and lack of separate facilities. Half of these centers were crumbling and in very poor condition. In the majority there was only a hole, window or door to provide light, and in 95% of cases sanitation and hygiene facilities were poor. Importantly, these are often the same facilities that the police themselves use, and they also find the conditions hardly bearable. In Surobi, Kabul, for example, sanitation and hygiene facilities were so bad that the police would not take the Tufts team to inspect them, “They are unseeable and we won’t show you, but it is also what we use.”⁸⁹ One hundred percent of our police sample cited poor facilities, especially sanitation facilities, as a top concern. Half of the sample considered lack of facilities to hold women and children separate from adult males to be a top concern.

In 25% of visits to police stations and detention centers, the Tufts team saw prisoners who had been badly beaten or could not walk on their own. The Tufts team witnessed a public execution in a rural district in Balkh of a bodyguard who had allegedly killed his commander; there was no trial: the man was caught, dragged into the village center, and killed by armed members of the former commander’s group. On several occasions the Tufts team saw detainees performing labor for the police during their detention, such as splitting wood or serving as a cook. A number of detainees came up and spoke to the Tufts team of being held for long periods of time without charges being officially brought against them and others were being held for the alleged crimes of relatives.

Wardens of jails (where they exist) are now under the control of the Ministry of Justice. These men, however, continue to believe that they are part of the police, and are confused by the lack of clarity regarding their status. These wardens typically have no legal education, no training, and, in many cases, feel that they have been forgotten by the system.

Detention facilities for women were nonexistent in the districts visited by the Tufts team. As stated above, we met only one woman serving on a district police force. The lack of women officers to handle the arrest, detention, or transport of female detainees places any woman arrested at heightened risk of abuse. According to local officials, female detainees are usually held in a rented room in a private home until they can be transferred

⁸⁷ Anonymous interview, 60-year-old detainee, Kandahar, December 11, 2003; Anonymous interview, chief of police, Kandahar, December 11, 2003.

⁸⁸ As mentioned earlier, there were no women’s detention centers in the rural districts within the Tufts study.

⁸⁹ Interview, Head of Investigation Unit, Surobi, Kabul, November 5, 2003.

to a women's detention center in an urban area. However, in at least one case, women were taken not to the detention center but to the home of a police officer to await trial.⁹⁰

Women are often incarcerated for *zina* crimes, such as "running away from home" (even if this is to escape an abusive husband or violent domestic situation), presumed sex before marriage, or disobeying a family's wishes for marriage partner (see Women and the Legal System, Section I).⁹¹ Women inmates pay a triple price for their offences: 1) they endure punishment imposed by court; 2) they are often rejected by their families; and 3) they are at times rejected by their community following their release.

Based on interpretations of the traditional notion of *nang* and *namus*, a woman who is arrested for an offense, sentenced, and convicted is no longer considered a "good and honorable woman." Authorities are also likely to hold this perception of women who are alleged to have committed a crime. These views may serve as justification for abuse or sexual violence perpetrated by local law enforcement officers, who argue that "she is bad anyway."⁹² Few families will visit female relatives in prison due to the shame and stigma attached to women (and their families) who are accused of breaking the law or of straying from their expected roles.

In many cases, families (usually fathers or husbands) play a direct role in the conviction and incarceration of the woman for going against the family's will or violating *zina* crimes (see Women and the Legal System, Section I).⁹³ Female detainees are likely to lose custodial rights to their children. In many cases, families do not allow released inmates to return home; sometimes women inmates prefer to stay in jail because they have no place to go and fear violence upon leaving.⁹⁴ In addition, single women are extremely unlikely to be able to find a husband once they are released from jail as a result of the social stigma.

Conclusion

The development of rigorous systems of legal education, including the establishment of an Afghan Bar Association and corresponding examinations, the creation of professional legal societies based on qualifications and achievements, the continued training of the

⁹⁰ Interview, chief of police, Bala Murghab, Badghis, November 19, 2003.

⁹¹ See, *inter alia*, Amnesty International, *Afghanistan: "No one listens to us and no one treats us as human beings": Justice denied to women*, (London: Amnesty International, October, 2003); Amnesty International, *Afghanistan: Re-establishing the rule of law*, (London: Amnesty International, August 2003); Human Rights Watch, *Taking Cover: Women in Post-Taliban Afghanistan*, (New York: Human Rights Watch Briefing Paper, May 2002); International Crisis Group, *Afghanistan: Women and Reconstruction*, ICG Asia Report #48, Kabul/Brussels, 14 March 2003.

⁹² Amnesty International, *Afghanistan: "No one listens to us and no one treats us as human beings": Justice denied to women*, (London: Amnesty International, October, 2003): 22.

⁹³ Amnesty International, *Afghanistan: "No one listens to us and no one treats us as human beings": Justice denied to women*, (London: Amnesty International, October, 2003): 32.

⁹⁴ Amnesty International, *Afghanistan: "No one listens to us and no one treats us as human beings": Justice denied to women*, (London: Amnesty International, October, 2003): 39; Valerie Reitman, "20 Female Afghan Prisoners go free under presidential amnesty," (*Los Angeles Times*, November 11, 2002). Amy Waldman, "The 15 women awaiting justice in Kabul prison," (*New York Times*, March 16, 2003).

judiciary, and adequate funding for the judiciary and its counterparts (the police, detention centers, etc) are absolutely necessary for meaningful legal reform in Afghanistan. In order to ensure the development of a trained cadre of judicial staff, the Afghan government and international donors must promote a standardized and comprehensive legal curriculum within the higher education system, the establishment of legal clinics, and the replacement of those staff within the judicial system that have no formal legal education or qualifications. The qualifications for judges are laid out in Afghan law—these standards must now be applied and enforced.

While the separation of the judiciary and executive powers has been addressed in the new Afghan constitution, there is still a pressing need to assess this separation in light of the amended constitution. In particular, there is a need to develop and find pragmatic ways to clarify the distinctions and responsibilities among the Supreme Court, the Ministry of Justice, and the Attorney General’s Office. Justice cannot be served and the formal legal system cannot function without proper coordination in training and clear distinctions regarding the legal responsibility of the various law enforcement agencies and the justice sector; otherwise we will continue to see each of these branches negatively affect the efforts of the other.

The Attorney General’s Office is one of the most under-funded organs of the judiciary: it lacks materials for investigations, forensic labs, and a technical facility for evaluating evidence and crime scenes. As a result, suspects are forced to cover some of the costs of police investigations. To illustrate, suspects or their families are forced to pay for transport cost from a detention center to a local hospital if the court wishes to have a medical opinion regarding the mental health of the suspect.⁹⁵

Currently, many former commanders and their militias hold positions within the police. This status quo must be thoroughly and systematically dismantled if there is to be any real reform within the police. To accomplish this goal, police training academies should expand into the provinces, and the Afghan government and international donors should set of goal of training all police within the next five years. By this time, all untrained police should be replaced by those who have graduated from these academies with the proper training and qualifications.

“Donors should avoid looking for quick fixes where there can be none—that will be counterproductive.”⁹⁶ The international community and donors should not seek simplistic remedies or quick fixes, as lessons from East Timor and Bosnia show that these “quick fix” solutions are often not replaced by more sustainable and longer-term strategies.⁹⁷ Rather, donors and TISA need to design programs that reflect a careful

⁹⁵ Interview, district prosecutor, Guzara District, Herat, November 28, 2003.

⁹⁶ Denis Gallagher, personal communication, February, 2004. Mr. Gallagher is Chief of Party of Afghanistan Governance and Law Reform coordinated by Management System International (MSI) and funded by USAID.

⁹⁷ Denis Gallagher, personal communication, February, 2004. For instance, given their leadership in the reform of the formal justice system, the Italians are pushing for adopting an interim criminal procedures code to be used as the basis for immediate training of judicial personnel throughout the country. However, the efforts to adopt this interim code are, in fact, preventing the formation of real legal codes and systems

assessment and continuing reassessment of their initiatives as they develop within the changing nature of events within Afghanistan.

Part 2: Systems of Justice: Traditional and Customary

Traditional and Customary Systems of Justice in Afghanistan: *Jirgas* and *Shuras*

Findings

- **Political armed groups, commanders, and militias have strategically targeted traditional and customary justice systems in some parts of rural Afghanistan in attempt to exert control over local populations. In many instances, these predatory forces have successfully positioned their loyalists within these groups, thus undermining this avenue of justice for rural Afghans.**
- **In regions where political armed groups are able to exert control over the district authorities they often also have their members on the district *shura*, thus ensuring greater control of the district.**
- **The current *shura* system operating in much of the country is based on a framework that was put in place by the Taliban, which sought to replace the more democratic (though only for adult males) *Jirga* systems. With the Taliban now gone, some communities are restructuring their *shuras* but few are returning to the *Jirga* system.**
- **In other areas, particularly among the tribal groups, rural Afghans are replacing the *shuras* with the more democratic (for adult males) *Jirga* system. This is, in part, an attempt to limit the influence of the political armed groups.**
- **Rural women are largely denied a direct voice in any *shura* or *Jirga* system, and thus are also denied justice within traditional or customary systems.**

that can be upgraded within a more fully developed legal system. The advisability of this interim code and its provisions, which have multiple problems from procedural and human rights perspectives, runs the risk of making the judges who do know the law essentially “illiterate” and inhibits the process of the formation of well-thought-out, permanent, criminal codes. Drawing on lessons learned from East Timor and Bosnia, it is clear that there are no “easy, temporary fixes,” instead, there is a real risk that the quick temporary fixes will become permanent. Nonetheless, the proposed interim criminal procedures code has been pushed hard by some donors onto the Afghan judiciary. Yet, in our research, the Tufts team found no Afghan justice agencies that supported the law as something that was needed, useful, or likely to be implemented. However, Afghan officials and a number of foreign experts anticipated that this interim criminal law will be recommended to the President because of the pressure being applied by key donors. To this end, UNAMA is largely silent on the issue because Italy is the primary funding source of the judicial reform component of the UN program. However, such short-term, “quick fix” developments are ill-advised and counterproductive in the medium and long-term.

Traditional Social Institutions in Rural Afghanistan

In Afghanistan, tribal and non-tribal traditional social institutions have been deeply affected by continuous regime change, political violence, massive migration and displacement, great loss of lives, and the destruction of infrastructure, land, and the national economy. Today, Afghan societies are segmented social organizations wherein tribes and non-tribal communities govern their affairs—often autonomously via traditional or community-based systems of justice—without the direct interference (or engagement) of the central government or the formal justice system.⁹⁸

Approximately 85% of the Afghan population lives in rural areas, with a significant *kuchi* (nomad) population in the southern, southeastern, and northern regions of the country.⁹⁹ The social structure of Afghan society is predominantly divided between tribal groups and detribalized or non-tribal communities, each with their own set of local customs, while also sharing popular traditions.¹⁰⁰ However, the political violence experienced at numerous levels over the past 30 years has resulted in the transformation of many Afghan cultures and societies into more highly militarized social orders, in which the threat or use of violent force has become the means for personal, familial, and community self-defense and gain. These developments affect people's personal attitudes and group behavior toward the state and society, and resulted in crises in the social, cultural, and political institutions among tribal and non-tribal communities.

The Roles and Political Manipulations of *Jirgas* (Councils)

The Afghan Tribal Belt

In the past, the Afghan tribal groups, like Ahmedzai, Waziri, Mohmand, and Mangal, followed a traditional social system upon which they strove to gain greater autonomy from the outside world; notably, this autonomy included the desire to avoid the jurisdiction of the central government.¹⁰¹ In the past and today, individual members within the tribal groups have used their tribal membership as a source of identity and a means of security. The majority of marriages take place within the boundaries of a tribe, with the exception of the practice of *Bad* or *Badal*—the exchange of girls or women between tribes in order to solve a serious dispute between tribes (see *Badal* and the Exchange of Women and Girls, Section I).¹⁰² Tribal groups also strengthened or formed

⁹⁸ N. Nojumi, "Islam, Custom, and Customary law in Afghanistan," Unpublished research paper for Harvard Law School's Islamic Legal Studies Program, August 2003.

⁹⁹ For background information see Wardak, A., "The Tribal and Ethnic Composition of Afghan Society" in *Afghanistan: Essential Field Guides to Humanitarian and Conflict Zones* (Second Edition), edited by Edward Girardet & Jonathan Walter (Geneva: Crosslines Ltd., 2003).

¹⁰⁰ For instance, traditional and customary perceptions toward hospitality, honor, and revenge are shared among both tribal and non-tribal population without the importance of their origins.

¹⁰¹ For more details see Tapper, R., *The Conflict of Tribe and State in Iran and Afghanistan* (London: Croom Helm, 1983).

¹⁰² For additional background see Louis Dupree, *Afghanistan* (Princeton: Princeton University Press, 1980) 120.

alliances among themselves over a common predicament, such as resisting the interference of the central government or warding off outsiders. Until the 1970s, the Pashtun tribal groups in the southern and eastern regions of Afghanistan, in particular, were largely successful in avoiding conscription into the state military. They also were relatively successful in blocking the central government's interference in their local affairs. Instead, they managed their tribal affairs through a system of tribal and customary commandments that were rooted in their local perspectives of law. They applied their customary law through a highly flexible forum known as *Jirga* (council).¹⁰³

The local *Jirga* served as the forum for community social and political organization, where the adult male members of a village discussed issues of their interests, helped needy neighbors, and supported solidarity via *hashar* (voluntary collective work), such as building a bridge, cleaning a canal, harvesting, or building houses for other villagers. *Loya Jirga* (Grand Assembly) was a political forum—comprised of the local male delegates from all over the land—used for providing legitimacy to the political authority and making vital national decisions.¹⁰⁴

Jirgas were primarily used to voice concerns of community members, make decisions for the community, and handle disputes.¹⁰⁵ Historically, *Jirgas* were not held under any predetermined schedule, nor did they have a fixed organizational structure or membership. Instead, *Jirga* members were selected by various parties and the council was formed when needed, thus making a *Jirga* more of a community process than a standing local organization. In addition, the methods used to form a *Jirga* and the laws that apply differ throughout of the country. For instance, while the Pashtun *Jirga* has similarities with the non-Pashtun *shura*, its methods and social composition usually differ.

All parties involved in a dispute that came before the *Jirga* were obligated to accept and follow whatever decision came out of the *Jirga*.¹⁰⁶ In certain areas, the *Jirga* was capable of imposing sanctions and using tribal forces to enforce its decisions if necessary. In other areas, those who did not agree with final decisions could ignore the decision and hope that no further action would be taken, could bring the case to the government, or could leave the village.¹⁰⁷ The absence of formal justice systems in the rural areas during much of the 23 years of war led people to rely increasingly upon the traditional fora of *Jirgas* or *shuras* to solve disputes, settle grievances, and find remedies for local issues.

¹⁰³ E.g., Hakim Ayoubi, "Da Paktia simy tamodi huquq (The Customary Law of the Paktia Province)", in *Huquq VII* (Afghan periodical on law in Afghanistan) (cited in Ghani, op. cit., 1978, p. 269). Also see Noelle-Karimi, "The Loya Jirga – An Effective Political Instrument?" in *Fundamentalism Reborn? Afghanistan and the Taliban*, edited by William Maley (New York: St. Martins, 1998).

¹⁰⁴ For more details see Ali Wardak, "*Jirga*: Power and Traditional Conflict Resolution in Afghanistan," *Law After Ground Zero*, edited by John Strawson (Sydney: Glass House Press, 2002) 199.

¹⁰⁵ While only men can sit at the *Jirga*, in theory, women are able to voice their concerns through the adult males of their household at the *Jirga*.

¹⁰⁶ N. Nojumi, "Islam, Custom, and Customary law in Afghanistan," unpublished research paper for Harvard Law School's Islamic Legal Studies Program, August, 2003.

¹⁰⁷ *Ibid.*

In the 1980s, the Afghan tribal belt, held mostly by Pashtuns, became a highly sensitive political location in the war between the pro-Soviet regime and the *mujahideen* forces. As a result, massive military build up took place within the tribal areas on both sides of the Afghanistan-Pakistan border. Militarization of these areas radically changed the nature of the local economy, social organizations, and local customs. Tribal groups and their social, political, and cultural institutions were influenced by the rise of military commanders and an increasingly war-based economy.¹⁰⁸

The relative independence of the process of *Jirga* was increasingly undermined in this period by the military commanders who sought to manage populations through control of the *Jirgas*. Additionally, the practice of customary law was overwhelmed by numerous different interpretations of *Sharia* law, led by a new generation of clerics trained in Pakistan. These trends accelerated during the Taliban regime with the increased participation in the religious schools (*madradas*) in Pakistan of large numbers of young Afghans from the tribal areas. Upon coming to power, the Taliban sought to control the *Jirgas* directly and, as a result, the *Jirgas* increasingly lost their political independence.

Taliban leaders attempted to use the local institution of *Jirga* as an arena to raise political support for their cause. The Taliban banned all customary law and attempted to enforce their version of *Sharia*. They interfered with the traditional way of forming village *Jirgas*, whereby all adult male members of a community had previously been able to freely express their opinion and participate in electing delegates to the *Jirga*. The Taliban regime changed the Pashto word *Jirga* into the Arabic version *shura* (council), and appointed the village Mullah as the head of the *shura*. The village Mullahs were made government employees and were paid salaries by the Ministry of Pilgrimage and Endowment (*Wazarat-e-Haj wa Awqaf*). The local Mullah was authorized to select four to five adult male members of the village to work under him, who together formed the village *shura*. Each village *shura* elected one adult male to the district level *shura*. In most cases, the majority of members of the district *shura* were comprised of local Mullahs, who also held the membership of the *shura-e-ulama* (council of clergies) at the district level.

Currently, the word *shura* is used to describe local governing institutions throughout all of Afghanistan. The Taliban-introduced dual system (village and district level) has expanded to the provincial levels where selected/elected members from each district *shura* form the provincial *shura*, similar to what was introduced during Rabbani's government (1992-1996). Today, this *shura* structure is retained by the district and provincial authorities in most parts of the country as well as the tribal belt (see discussion below). *Jirgas* are being reestablished in some of the tribal areas with a structure similar to that of the past, which was based on customary law and local understanding of the Islamic faith rather than centralization of one specific interpretation of *Sharia* imposed by the state.

¹⁰⁸ N. Nojumi, "New Constitution and its relevance to New Afghanistan," Research Paper, Harvard Law School's Islamic Legal Studies Program (ILSP), September 2003.

Armed political groups are not the only ones involved in engaging with *Jirgas* and *shuras*. During the 1990s, some NGOs and the UN supported, to a certain extent, the formation of these local fora in urban centers and some rural areas. For example, community development programs sponsored by UN Habitat resulted in the establishment of a number of these local fora in Balkh province during the 1990s. This process was challenged by the local power-holders and armed groups who began to manipulate this process or build councils loyal to their cause.¹⁰⁹

In the early 1990s, UNOPS began to support the formation of women's councils in Badakhshan, a province known for traditionally having greater gender equality and freedom of movement for women than the rest of Afghanistan. The program to create women's councils was welcomed by significant numbers of women and community activists. A local women activist describes the development of the initiative for women's councils in an interview with the UNDP's Strategic Monitoring Unit:

Since five years there has been a women's organization established, it is not a political organization but a society, but no one has stopped us. Faizabad has 60 parts and in each we have one representative, chosen from a meeting of women. Her role is to sort problems ... And we have women's council in six city districts. We invited 100% of all of the women in the districts to take part in the election [in 1997] and this was how the council was set up. During the meeting we discussed the objectives of the council and candidates, we gave a biography and activities of these candidates. In district two there are 13 mosques and 13 neighborhoods, and they each sent their representatives to participate—13 representatives... I personally have traveled to 21 villages and we have established councils, and the village welcomes it. Traveling is no problem in Badakhshan, even they [the authorities] co-operate with us.¹¹⁰

The UN Habitat and UNOPS programs set up in Balkh and Badakhshan in the early 1990s are notable. Of particular note, some of these initiatives nurtured democratic participation of the local communities at the grassroots level that countered the rigid and militaristic domination of the Islamist groups. These grassroots initiatives and their sustainability, therefore, offer an important example of what might be achieved, as well as the likely challenges one could expect to face from armed groups, through international and local efforts to build a more sustainable peace.

The presence of female *shuras* to the degree that existed in Badakhshan has not been confirmed in any other part of Afghanistan. Today, throughout Afghanistan, women do not participate in the male dominated *shuras* and *Jirgas*. However, the success of the women's *shuras* and their partnership with international agencies in Badakhshan during the 1990s is an important case study that may have lessons for the development of civil society and women's *shuras* in other parts of Afghanistan.

¹⁰⁹ Interview, Najib Paykan, Director of Youth and Children Development Program, Mazar-e-Sharif, Balkh, December 9, 2003.

¹¹⁰ "Badakhshan" SMU Area Report, the Strategic Monitoring Unit Afghanistan, UNDP, May 2001, p. 17.

The Long Road to Rebuilding Traditional Tribal Institutions: Rebuilding *Jirgas*

Research by the Tufts team indicates that a number of the tribal communities are moving towards reestablishing their tribal organizations based on direct participation of local leaders and the rule of customary law. For instance, the Mohmand tribe in Nangarhar has increased participation from the male members of the local community for the *Jirga*, and the local district authority has not interfered with the *Jirga's* handling of legal cases.¹¹¹ However, a shortage of local resources due to the legacy of militancy, warfare, drought, and the existence of ideological political groups, means that some communities are having a slow and difficult time remobilizing their tribal organizations, especially the institution of *Jirga*. Currently, the reestablishment of tribal systems is occurring at different rates and in different forms in the different regions of the country, as illustrated below.

Tribal groups in the north, particularly the *Kuchi*, have suffered a series of disastrous social, political, and economic developments. Continuing hardship and displacement have made it nearly impossible for these groups to reestablish traditional systems of governance. In the past, tribal organizations, and local conflict management forums have helped the *Kuchi* to establish their leadership in order to represent them to the central authority, as well as offer remedies at the time of internal and external conflicts and hardships. In the late 1990s, Taliban leaders mobilized the Pashtun *Kuchis* to help the Taliban accomplish their military and political objectives of defeating their (mostly) non-Pashtun armed rivals. However, the fall of the Taliban in 2001 resulted in costly political consequences for the *Kuchi*.¹¹² The politically motivated ethnic tensions that arose in the north affected the lives of Pashtun *Kuchi* communities, and many fled or were driven from their homes and became internally displaced within Afghanistan.¹¹³ Years of severe drought also caused *Kuchi* populations to lose most of the livestock herds which underpin their livelihoods (see section on Livestock). Some *Kuchi* groups reached such levels of desperation that they sold their tents (their only form of shelter) in order to pay for travel to refugee or internal displacement camps.¹¹⁴

Under TISA, the government's Ministry of Tribal Affairs was formed to handle matters relating to the tribes and to assist these communities. UNHCR is the lead UN agency working to assist the return of tribal populations—as internally displaced persons or refugees—to their places of origin.¹¹⁵ In areas with ethnically heterogeneous populations, especially the North, several Afghan ministries are working with UNHCR and UNAMA to attempt to convince the local commanders to cooperate with populations returns. This

¹¹¹ Interviews with members of the tribal *Jirga*, Mohmand Dara, Nangarhar, November 2003.

¹¹² For more details see Human Rights Watch - Report April 2002, *Paying for the Taliban's Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan*, Vol. 14, No. 2 (C); "Is Afghanistan on the Brink of Ethnic and Tribal Disintegration?" in *Fundamentalism Reborn? Afghanistan and the Taliban*, edited by William Maley, New York: St. Martins Press 2001.

¹¹³ For more information see Liz Alden Wily, *Land Rights in Crisis*, Afghanistan Research and Evaluation Unit, Kabul, 2002.

¹¹⁴ For additional information see Sue Lautze *et al.*, *Qaht-E-Pool "A Cash Famine": Food Insecurity in Afghanistan 1999-2002*, (Medford: Tufts University, 2002).

¹¹⁵ Interview, Philip Leclerc, UNHCR Assistant Chief of Mission (Protection), Kabul, December 2003.

is being done through the mechanism of the Return Commission, which was established to promote the voluntary and safe return of Afghans to the Northern provinces.¹¹⁶ In the absence of legal systems to resolve the property disputes that lie at the heart of the dispossession of the Pashtuns, the commission has made limited progress by touring the country to facilitate discussions about the conditions in the north and possible problems faced by local communities.¹¹⁷

Nevertheless, due to the highly militarized environment in the north and the level of violence against members of the Pashtun tribal groups in the region, most of the internally displaced persons are afraid to return.¹¹⁸ In other cases, the displaced lack the financial means to return and the resources to rebuild their destroyed or damaged homes or to prepare their lands for farming.¹¹⁹ The poor economic conditions have negatively affected people's ability to reestablish social institutions and improve their living conditions. As a result, they remain largely dependent on foreign assistance while living in the internally displaced persons and refugee camps. Since the local institutions are too weak to overcome the power of the local commanders, the Afghan internally displaced populations and refugees that want to go back to their places of origin have high expectations regarding the central government's interventions to ensure their safe return. The current lack of effective intervention and continued security threats, however, lead the displaced to doubt the credibility of the current government in Kabul.¹²⁰

For the most part, tribal groups in the southern part of the country have been unable to demobilize their communities and reinstate the institution of *Jirga* in its more representative state with limited control and influence by outsiders, such as powerful commanders and armed political groups. This demobilization has been made more difficult due to the tension in communities caused by the resurgence and recent expansions of the Taliban forces in the region. The tribal groups living on the southern border with Pakistan continued to be influenced by the militant groups in the area who are opposed to both the central government and Coalition presence. The militarized atmosphere in the border area has caused increased insecurity for the tribal groups, and the militant groups have depleted local resources. This insecurity and associated developments have hampered the ability of the Afghan tribes to reestablish their traditional institutions and effectively manage their affairs. As a result, the border tribal groups are uprooted, and are now spread between Afghanistan, Pakistan, and in safer zones near to urban centers.¹²¹

¹¹⁶ The Return Commission has achieved mixed results in returning people to their land, largely because there are no legal mechanisms to resolve property disputes. See International Crisis Group, *Afghanistan: The Problem with Pashtun Alienation*, (Kabul/Brussels: ICG Asia Report No. 65, August 2003): 13-14.

¹¹⁷ International Crisis Group (ICG), *Peacebuilding in Afghanistan*, (Kabul/Brussels: ICG Asia Report #64, September 2003): 19.

¹¹⁸ "Report of Return Commission's Working Group on Mission to Jawzjan, Saripul, and Faryab Provinces," 5-21 May 2003.

¹¹⁹ Interview, Alexander Tyler, UNHCR Protection Officer, Kabul, December 2003.

¹²⁰ Interviews with internally displaced persons in Maslakh camp, Herat, November 2003.

¹²¹ Interviews with members of the Mohmand tribal groups, Nangarhar, November 2003.

Additionally, the southern region of Afghanistan continues to be seriously affected by drought. The humanitarian impact of the continued drought has been exacerbated by the recent withdrawal or cessation of UN and NGO programs in the region, which has been declared a High Risk Zone. As a result, local communities have lost their access to badly-needed relief supplies and other humanitarian assistance.

There are more positive developments in the east and southeast which suggest that traditional forms of conflict management and community stabilization such as the *Jirga* are being reestablished. In the eastern region, and particularly Nangarhar, tribal groups such as the Mohmands and Khogianis are reestablishing their tribal *Jirgas*. Increasingly, even the government district officials in these areas refer legal disputes to the local *Jirga*. According to Gul Mohammed, a *malik* from Dakah who represents six villages in the district *Jirga*, people are tired of war and group conflicts and are struggling to have a peaceful life.¹²² The activity of multiple armed groups continues, but, as explained by local Nangarhar residents, “with the establishment of TISA in Kabul the domination of the previous political parties [based in Pakistan] over the local affairs has been reduced.”¹²³ Refugees have been able to return to the area, people are engaged in farming, and neighborhoods and villages are being reinvigorated. People are gathering in the local mosque for Friday prayer; they meet without weapons in a peaceful environment and engage in discussions about distributing water, cleaning irrigation ditches, and forming neighborhood security watch systems. Such developments give people hope and the ability to begin to reestablish local institutions and move towards greater self-reliance outside of the control of the various armed political groups and commanders.

Tribal groups in the southeast provinces such as in Paktia are moving more rapidly than elsewhere in the country to rebuild their damaged local institutions.¹²⁴ Educated community members, offered two reasons for the accelerated revitalization of the traditional institutions, in particular the *Jirga*. First, the local communities do not want to lose more of their men to factional fighting or risk the continued destruction of their lands, homes, and communities. The community leaders are therefore pushing for the institution of *Jirga* as a superior form for making decisions, managing conflict, and maintaining group identity over those forms offered by local armed groups. Indeed, community leaders are seeking to bring the local commanders under the scrutiny of the *Jirga* as a means of reducing factional fighting and violence. Second, local leaders are moving to reestablish their traditional mechanisms for addressing conflict and seeking justice because they are suspicious of the presence of Coalitions and the Afghan National Army forces and the expansion of a central Afghan government, with its reestablishment of formal courts, training of judges and prosecutors, and deployment of newly trained police forces. As the residents explained, this local reaction does not mean that people are planning to fight against the central government, but it does reveal that they are cautious about these political developments.¹²⁵

¹²² Interviews with *Jirga* members in Surkhroud, Nangarhar, November 2003.

¹²³ Anonymous interviews, Nangarhar, November 2003.

¹²⁴ Anonymous interviews with persons from Paktia province, Kabul city, November-December 2003.

¹²⁵ Anonymous interviews, Kabul, December, 2003.

The Border Tribes

In recent history, tribal communities, especially those along Afghanistan borders, have relied extensively on their local institutions to manage their internal affairs and balance their relations with the central government in Kabul. The system of tribal leadership include a network of delegates who liaised with the the central government, while the tribal leaders received a degree of autonomy over their tribal areas. Internally, members of a tribe enjoyed individual rights and protection within the framework of the tribe. The autonomy of the tribe was protected in part by avoiding external disruptions. The central government was willing to recognize the limited tribal autonomy as long as the tribal powers did not jeopardize the integrity of the state. In return, the central government provided material benefits through the tribal leadership system to those who cooperated and held to their agreements with the state.

In this manner, border security was deeply rooted in maintaining the stability of the tribal groups who live in the vast regions that have always been beyond the control of any central government in the region. Currently, higher levels of border insecurity, especially between Afghanistan and Pakistan, prevent the tribal groups from crossing the borders easily, a migratory pattern that is often necessary to access fresh grazing land. The Afghan *Kuchi* have been pushed out of many other parts of the country and now conglomerate in the border areas, and this population is now facing increased threats to the livelihoods that they have maintained for centuries. Assisting the tribal communities along the border to regain their social institutions and move toward a greater self-reliance will help them to reorganize their livelihoods and could potentially improve border security. In an interview with the Tufts team, Darya Khan, a member of the Mohmand tribal *Jirga*, was critical of what he termed NGOs "empty promises" of assistance. He suggested that "the only way to get back to normal is reliance on our own people to reestablish their local organizations and restore peace and security in our land."¹²⁶

Non-Tribal Communities and Changes in Traditional and Community-Based Justice Systems

The non-tribal communities in the urban centers and surrounding towns and villages were also affected by war, drought, internal and external migration, and the devastation of the country's economy and agricultural systems. While rural areas continuously served as the frontlines between the Soviets and the *mujahideen* forces, urban centers, especially Kabul, bore the brunt of the devastation of the war.

In the past, large non-tribal communities resided in the major urban centers where people had a fair amount of direct contact with the rules and regulations put of the central government. This contact became weaker farther away from the urban centers, and the influence of government regulations was imperceptible in the Afghan tribal belt. The relations between urban centers and rural areas occurred at two levels: from the capital to the provinces and from the provincial centers to the districts. Economically, the urban

¹²⁶ Interviews with members of Mohmand *Jirga*, Nangarhar, November 2003.

centers were heavily dependent on the largely agricultural production of the rural communities. In turn, the urban centers provided the rural populations with hubs for trade, commerce, and modern services, and served as meeting points with provincial and central authorities.¹²⁷ Some rural people brought their legal cases before the official court system, conveyed complaints to the police, registered for conscription, sent their children to government run schools and institutions, and used state administered health centers in the major urban centers. However, the majority of people used non-governmental, local networks for handling their daily affairs.

The use of non-government, local networks becomes more pronounced as one moves from the urban centers to the rural peripheries, and this reliance is even more pronounced in the tribal areas. The local networks were based on local traditional practices rooted in each community and upon which people established relations, signed contracts, and formed social organizations. In most cases, the popular law of the land was customary law that was deeply rooted in historical traditions, local understandings of Islam and *Sharia*, and the spiritual role of the Sufi leaders.¹²⁸ Again, the social and political forum of social organization was the practice of local *Jirga*.¹²⁹

In the rural non-tribal areas, trade, financial contracts, marriages, conflict management, and cases involving disputes over land and water occurred beyond the domain of the institutions of the central government. A powerful class of leaders within local communities acted as mediators between the central authority and local communities. Often, these leaders were selected based on years of service to their community and extended that role to the space where the central state, local governance institutions, and society intersected. Such influential community leaders also existed in the urban centers and governors and other high ranking officials would at times seek the assistance of these community leaders to help secure support for a specific government initiated policy or to solve a dispute.¹³⁰

The emergence of armed political groups with open access to financial resources and the existence of powerful commanders significantly realigned local systems of governance. In the 1960s, social composition of a village consisted of the *malik* (landlord), *arbab* (head of the village), and different wealth groups (large and middle landowners, small land owners, and landless peasants).¹³¹ Beginning in the 1970s, however, the population of a village began to divide into two groups: the rich and powerful and the rest of community who are relatively powerless and poor. The ranks of the rich and powerful have increasingly been filled with members of armed political groups (known as *jihadi*) and the local commanders. Many connected to the Afghan Mujahideen political groups in

¹²⁷ Nojumi N., "New Afghanistan and the Prospect of the New Constitution," Research Paper written for Harvard Law School's Islamic Legal Study Program, Fall 2003.

¹²⁸ Nojumi N., "Islam, Custom, and Customary Law," Research Paper written for Harvard Law School's Islamic Legal Study Program, Summer 2003.

¹²⁹ For more details see Ali Wardak, "*Jirga: Power and Traditional Conflict Resolution in Afghanistan*," Law After Ground Zero, edited by John Strawson (Sydney: Glass House Press, 2002) 199.

¹³⁰ Interview, Abdul Wassea, member of the *Jirga* at Surkhroud, Nangarhar, November 2003.

¹³¹ N. Nojumi, *The Rise of the Taliban in Afghanistan: Mass Mobilization, Civil War, and Future of the Region* (New York, Palgrave/St. Martin's Press, 2002). pp 14-35.

Pakistan and Iran that had accumulated extensive external financial resources for the maintenance of their fighters. These more recent additions to the wealth groups have access to weapons and, through the use or threat of violence, are able to manipulate the weakness of the central government, capitalize on the absence of law and order, and maintain extensive influence over the distribution of local resources, including international relief. In addition, the majority of lucrative poppy farms are either owned or controlled by these rich and powerful commanders.¹³² In some cases, members of this powerful class collect up to a 20% tax from the growers of all agricultural goods, including poppy.¹³³ They may also run businesses through vast family network. Many have been able to establish substantial investments in trade and local industries in neighboring countries and Persian Gulf states.¹³⁴

At the same time, the shortage of domestic agricultural production due to scarcity of water for irrigation and the lack of rural reconstruction projects after 30 years of war resulted in the increased dependence of local communities on external resources, such as relief and cash. Scarcity of local resources makes local communities more vulnerable to the power of commanders and political armed groups.

As a result of this vulnerability, non-tribal Afghan communities are finding it increasingly difficult to rebuild and maintain their social safety networks. One of the key safety networks that most have been unable to reclaim and rebuild are the village *Jirgas*, which countrywide have retained much of the structural characteristics of the Taliban-introduced *shuras* and are under the influence of commanders and armed political groups.¹³⁵ In addition, the central authority's failure to protect rural populations has contributed to the difficulties faced by local communities in taking control back from these predatory groups and rebuilding their societal institutions.¹³⁶ For instance, in a rural district of Balkh, a local police chief explained that while local commanders take on the role of solving disputes and managing conflicts, they themselves are the source of many of the problems in the area and have impunity to act as they wish. Such systems do little to improve rule of law, increase communities' access to justice, or build a sustainable peace.¹³⁷

Like their tribal counterparts, non-tribal rural populations faced a similar pattern of political take-over of their social institutions by commanders, the Taliban, and now commanders and *jihadi* groups. Unlike their tribal counterparts, the non-tribal rural communities have largely remained with the less democratic structure of the *shura*.

Currently, here are several different patterns apparent in local *shuras* around the country. First, in nearly all cases, the institution of *shura* is strongly influenced by the powerful commanders and *jihadi* groups, as well as the local authorities at the village, district, and

¹³² Interviews, members of the Afghan Independent Human Rights Commission, Kabul, October 2003.

¹³³ Interviews, UNHCR officials, Kabul, December 2003.

¹³⁴ Anonymous interview, Nangarhar, November 2003.

¹³⁵ Interview, Neamatullah Ebrahim, ICG, Kabul office, November 2003.

¹³⁶ Ibid.

¹³⁷ Ibid.

provincial levels. This pattern was seen repeatedly by the Tufts team, regardless of the *shuras* local, tribal, non-tribal, or regional orientation. For instance, in the Surkhroud District, Nangarhar, Akbar Khan and Mohammed Mir Kuchi, two powerful local commanders, each have one representative in the district *shura* who represent no villages but whose votes carry equal weight as those members of the *shura* that are elected by local residents.¹³⁸

A second pattern that was observed in the rural districts of Balkh, Kabul, and Nangarhar, is the lessening of the power of the village Mullah within the *shura*, largely because people are suspicious of the political affiliations of the Mullahs. While the village Mullah may or not become a member of *shura*, if he is involved he is usually no longer the *shura* leader.¹³⁹

The third pattern involves the selection and political alignment of the *malik* or representative of the village. Members of the village *shura* elect one person and introduce him to the district authority. The district head then signs legal documents appointing the person as *malik* and sends those documents to the primary district court. After a series of additional legal processes, the court issues an entitlement seal that recognizes him as the *malik* of that particular village.¹⁴⁰ This recognition is then used by the district government or any other source, such as the UN, NGOs, or any outsider coming to the village to designate the *malik* as the person who gives permission to those that would like to work with the village community.

Since *maliks* are neither paid by government nor by local people, people tend to elect individuals who are more financially secure than the rest of the community. According to Haji Maqboul, (a *malik* of Zirani area), a representative who is economically independent is less likely to sell out his people to the central government or become corrupted by armed political groups, commanders, or NGOs.¹⁴¹ *Malik* Essmatullah (who represents 890 families in Amr Khil area) explains that people such as himself are willing to work without pay because:

By serving our people we are serving Allah, and when our people are happy and their problems are solved we are happy and our family are going to be happy and live in peace. We are free spirited people, the government is weak, there is too much corruption, and too many riflemen around. We believe what we do is for peace in our community.¹⁴²

However, the Tufts team received information from local residents in the rural districts that many of the *maliks* and members of the district *shura* are under the direct influence

¹³⁸ Observations and anonymous interviews, Nangarhar, November 2003.

¹³⁹ Observations, Kabul districts of Sorubi, Mir Bacha Kot, Paghman, Masyie, and Nangarhar districts of Mohmand Dara, Surkhrod, Kama, Rodat, Pachir wa Agem, November-December 2003.

¹⁴⁰ It is not uncommon for a *Malik* to represent several villages.

¹⁴¹ Interview with members of the district *shura*, Surkhroad District, Nangarhar, November 2003.

¹⁴² Interview, Essmatullah, Surkhroad, Nangarhar, November 2003.

of the local commanders or *jihadi* political leaders.¹⁴³ A common report was that the work of *shura* is under the scrutiny—sometimes control—of the government authority. At times, the director, his deputies, and the book-keeping clerk of the *shura* are handpicked by the government head of the district.¹⁴⁴ In some cases, such as occurs in most rural districts in Kabul, the Tufts team observed that a significant number of those who became *maliks* were affiliated with the dominant political party or powerful local commanders.

A fourth pattern is the evolving composition of the district and provincial *shuras*, which are now a mix of political loyalists and independent individuals. In some of these cases, a 50/50 division exists between the loyalists to the dominant political party/commanders and independent members within a district *shura*. Given that the loyalists usually vote in a block, the independent members have much less collective influence. For instance, the head of Paghman's district *shura* in Kabul is Ustad Sayyaf, a powerful commander, and a significant numbers of the *shura* members, as well as the deputies of the *shura*, are his political followers. Throughout Kabul's rural provinces, independent *shura* members told the Tufts team that they are cautious in their participation on the *shuras* because they fear for their personal and family security. Other independent members said that they cannot devote enough time to push for the changes they would really like to see because they have to struggle economically to support their extended families.¹⁴⁵

The fifth pattern is the differences in responsibilities of district *shuras* from one region to the next. In Kabul, for example, none of the village and district *shuras* are allowed to adjudicate criminal cases; they are restricted solely to the civil/family cases. In contrast, some of the Nangarhar district *shuras* handle criminal cases. For instance, the district authority allows the district *shura* in Mohmand Dara to adjudicate murder cases, convict defendants, and award compensation to plaintiffs, on the condition of total sanction of any further violence from those involved (i.e., to prevent future revenge killings).¹⁴⁶

Conclusion

Prior to the Soviet invasion, the relation between the formal and traditional legal systems was – to a certain degree – able to mediate the interests of the state and society towards fostering human security and enabling local livelihoods to be maintained. Whether or not such a relation was ideal for the state and its citizens is open to debate, but what is important here is that both systems were, in part, helping Afghans to pursue nonviolent, social and political interactions. These systems gave people an option to bring their

¹⁴³ Anonymous interviews with local shopkeepers and members of the district *shura* in Paghman and Mir Bacha Kot, Kabul, October 2003.

¹⁴⁴ Observations and anonymous interviews, Kabul districts of Sorubi, Mir Bacha Kot, Paghman, Masyie, and Nanngarhar districts of Mohmand Dara, Surkhrod, Kama, Rodat, Pachir wa Agem, November-December 2003.

¹⁴⁵ Anonymous interviews, rural districts throughout Kabul, November and rural districts throughout Herat, December 2003.

¹⁴⁶ Anonymous interviews, Mohmand Dara, Nanagarhar, November 2003.

disputes either in front of the legislated courts or to use the local remedies offered by traditional systems of justice.

Within the traditional systems, local interpretations of *Sharia* and customary law are dominant means used to handle legal disputes, however, such interpretations are often not in keeping with the Bonn Agreement or international standards. Section I, “Human Security and Rural Afghans,” and Section III of this report illuminate many problems within this traditional system, particularly when considered from human rights and gender perspectives. Many proponents of implementing a more modern legal system argue that justice cannot be served in these traditional systems that are so fraught with inequality and rights abuses. At the same time, Section I and Section III of this study also demonstrate that the current formal justice and governance systems are also fraught with injustice, clientism, fraud, and corruption and enjoy little if any standing with the local population. Is it possible, therefore, to reform and strengthen both the traditional and formal systems of justice? And if so, what are the best means to approach this reform? And how can these reforms be carried out without validating practices and judgments that are in clear violation of international standards and human rights, especially women’s human rights?

Recommendation: *Strengthen the formal and informal justice systems that exist throughout Afghanistan, in particular the court systems, the police, and detention centers.*

The Formal Court System

Strengthen the Cadre of Legal Personnel:

Establish a network of accredited law schools under the Ministry of Higher Education. This network of law schools should be separately established and accredited law schools with their own faculties, independent from the School of *Sharia* and Political Science.

Establish within the accredited law schools programs to train defense attorneys.

Establish a system of defense and legal advocacy within the Afghan court system. Work to ensure that the courts are obligated to inform litigants about their rights in choosing defense attorneys and advocates before any court proceedings.

Prioritize the expansion of legal clinics and workshop into the provincial levels with the aim of building professional capacity within the judicial sector.

Within legal clinics and workshops, include specific guidelines for judges, prosecutors, defense attorneys, and legal advocates regarding their need to enforce Article 517 of the Penal Law in response to eradicating customary practices, which include *Badal*, that are contrary to Islamic law and in violation of the civil and human rights of Afghan citizens,

especially girls and women.¹⁴⁷

Expand and Strengthen Special and District Courts:

Establish and fund Special Family Courts, at least one in each province, to be administered and overseen by female judges to enable enhanced access for Afghan women to the formal legal system.

Establish and fund Special Property Courts, at least one in each province, to handle extended property disputes throughout each province.

Increase the number of city district courts in major urban centers.

Establish legal advisory and support centers, at least one in each province, to provide legal information for Afghan women, working in close coordination and cooperation with the Afghan Independent Human Rights Commission, Ministry of Women Affairs, and Ministry of Justice, and UNAMA.

Reform the Judicial Sector:

Support efforts to reshape the judicial sector--the Supreme Court, Attorney General's Office, and Ministry of Justice--by supporting the appointment of qualified, trained officials in the leadership of this sector and providing their offices with adequate funding. One cannot expect that provincial and district judicial and justice sectors will have meaningful reform unless these core aspects of TISA undergo much needed reform where the previous systems of clientism and power consolidation are replaced with appointments of individuals based on qualifications, training, and results.

Enhance Afghan Citizens Knowledge and Protection of Their Rights:

Launch and support a public law awareness program using national radio and television to inform Afghan citizens about their legal rights and responsibilities. Within this, highlight the right to legal advocates and the rights of women under the new constitution.

Nurture the democratic participation of rural Afghans within traditional systems of justice, prioritizing the development of women's councils and women's real and meaningful representation within *shuras* and *Jirgas*.

Enhance and strengthen the space for civil society to develop democratic institutions that challenge fundamentalisms and armed political groups that rule by fear, intimidation, and

¹⁴⁷ *First part: The people who marry a widow or a girl over 18 against her agreement will be punished.*

Second Part: if the crime mentioned in above part is committed due to compensation of (Bad) the person should be punished, but not more than 2 years. (Punishment law of Afghanistan/ provision 517)

clientism. Here, the development and programs of the Afghan Independent Human Rights Commission could serve as a model.

The Police

Work to develop a police force that is strong, just, and independent from the military and local and regional commanders and armed forces. Administrative reform in the police is a must and should be focused dismantling the clientism among the current police forces. “*Why is it that the majority of current police forces in Afghanistan have no training as professional police?*” The answer to this question, as detailed in this report, is that professionalism and professional qualifications have nothing to do with why most police chiefs, police officers, and police soldiers currently hold their positions, or why they will continue to hold these positions in the future if these systems remain in place. What matters is that these persons were loyal fighters under a more senior commander who, in turn, is part of an armed political group and who may now hold the position of minister, deputy minister, governor, or senior commander within the new Afghan army. And what matters for these leaders is that those who serve under them were loyal fighters, then and now—not whether or not they are professional police. Some Afghans do have professional police training acquired under previous regimes; most of whom were trained by the Soviets during the Soviet occupation. The association of these police officers with the Soviet system means that they are not deemed loyal by the former *jihadis* and other armed groups now in control of the provincial and district government structures. The few trained police who have been able to maintain their jobs as police have little to no opportunity to use their skills; instead they push paper and perform routine administration tasks.

In Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar provinces where we worked, almost no rural people rely on the police to provide protection or as a means through which to access justice or seek redress if they are victims of a crime. Many rural men and women we spoke with said the current police forces were ineffective in upholding law and order and were corrupted, were thieves, and violated human rights. This is not surprising given the fact that the police have no loyalty to the rural populations or even, in many cases, to TISA. Rather, the police forces are beholden to the powerful commanders and armed political groups that control the areas in which they live and work. Based on this reality, we see that a lack of “professional” is not the central problem in the police forces. And it is highly questionable as to whether or not two weeks of training and a new uniform will even begin to scratch the surface of what is at the roots of the current crises facing the police and larger security sector reform in Afghanistan.

Establish police academies in each major urban center. A police force that is strong, just, and independent from the military and local and regional commanders and armed forces is essential to promote and provide a safe and secure environment for Afghanistan’s people. Administrative reform in the police is a must and should be focused dismantling the clientism among the current police forces. Emphasis should be

placed on enabling the educated and trained police officer a chance to serve the nation. Increasing the number of recruits in the Kabul Police Academy is a necessity for rebuilding the police cadres. However, a single police academy in Kabul is not enough to meet the urgent need of a strong, well trained, civilian police force in Afghanistan. The Ministry of Interior needs support to take steps toward establishing additional police academies, at least one in each major urban center in order to provide adequate forces around the country.

Reestablishing the central command and control of the police force can take place only if there are a significant number of cadres in the police force who form the organizational backbone of the ministry beyond Kabul. An educated, well trained, equipped, and properly paid police force that is not tied to any particular commander, warlord, or armed political group will enhance the public image of the central government, and also protect the Afghan citizen from abuses by those who breaking the law. This also reduces the nightmare of average citizens who fear abuse at the hands of those responsible for enforcing law, order, and justice.

Properly equip police stations and detention centers. Equip district police stations with basic supplies, such as paper, pens, standardized forms, furniture, communication equipment, transportation facilities, and supplies for detention centers (mattresses, secure facilities, bedding, etc). Invest in basic infrastructure (eg., buildings, detention centers with sections for different prisoners, secure facilities) for the district police stations.

Strengthen human rights with the police force. Human rights units within the divisions of the civilian police are ineffective and should be incorporated into the Ministry of the Interior. Within the police, human rights should not be kept as a separate department but should be mainstreamed into every aspect of education and training, and knowledge of human rights issues should be a professional requirement for all those who wish to be considered for employment in the police force.

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