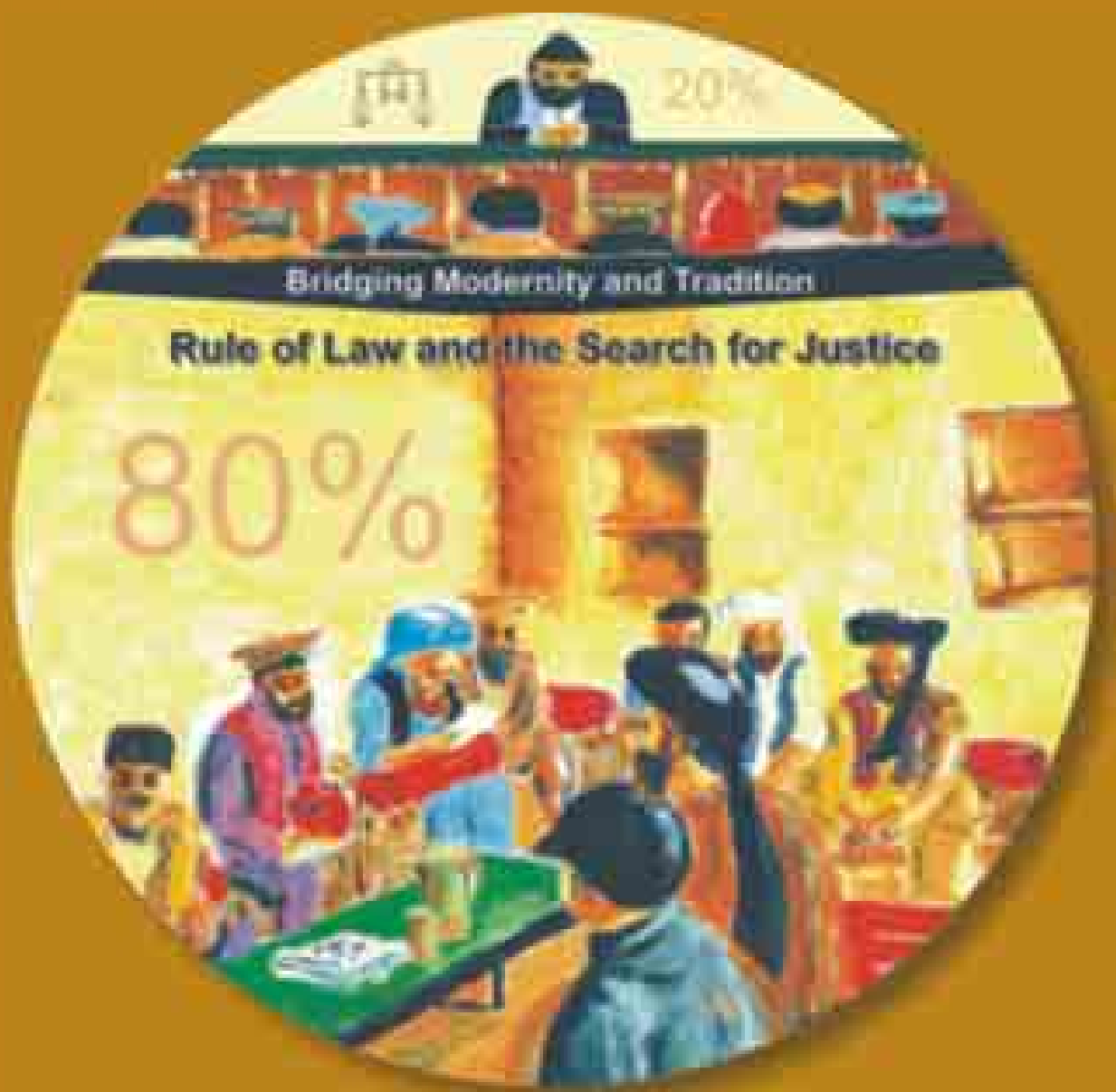
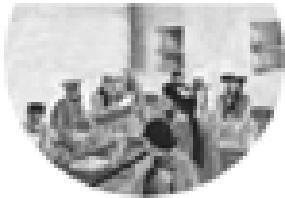


# AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007



The cover design, is based on two images. The upper part of the circle showing a formal court in session represents the less than 20% of disputes that are currently settled through the state court system in Afghanistan.



The larger portion below signifies the more than 80% of cases settled through traditional justice bodies. When affordable access to the rule of law is viewed as the chief criterion for progress, a marrying of the two systems becomes possible for a transitional period. With support from the international community, awareness and recourse to justice can reach new levels to ensure basic Afghan freedoms and lay the foundations for a durable peace.

Percentages drawn from USIP study and CPHD perceptions survey.

#### **Disclaimer**

The views expressed in this report are attributable to the authors and do not necessarily reflect those of the United Nations Development Programme and Kabul University



# **AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007**

**Bridging Modernity and Tradition:  
Rule of Law and the Search for Justice**



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# Foreword

Since the publication of the first Afghanistan Human Development Report in 2004, we have continued making progress towards democratization and development. Millions of Afghans participated eagerly in the parliamentary and presidential elections. The revival of an independent judiciary complemented and completed the structure of our young democracy. We built many roads, schools, and hospitals. Provision of public services has improved significantly, and now more people than ever have access to public services. A visible drop in infant mortality is an indicator that life is gradually improving for many Afghans, who have seen so much pain and misery in the past.

The income per capita has increased two-fold since 2002, indicating that Afghans have earned more and therefore will be able to spend more. While this increase in income does not automatically translate into human development, we are committed to complementing our economic growth with social and political development.

In 2006, we entered into a new Compact, with our partners from around the globe on critical issues of security, governance, and social and economic development. Our preliminary strategy to achieve the time-bound benchmarks in the Compact is outlined in the Interim Afghanistan National Development Strategy (I-ANDS). Earlier this year, Afghanistan became the newest member of the South Asian Association for Regional Cooperation (SAARC), and we continue to reach out to our neighbors to resolve issues of mutual concern. Commerce with neighboring countries is growing exponentially, while a climate conducive to investment and limited industrialization is starting to take hold.

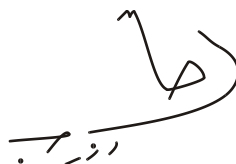
Regrettably, the last six years have not been a period characterized by solid advances alone. We continue to face many of the challenges outlined in my foreword to the

Afghanistan Human Development Report 2004. Confronting terrorism, building effective security forces, creating jobs, countering narcotics, and combating corruption, in addition to building capacities for good governance and rule of law remain some of our most significant challenges.

In analyzing the challenges of human development and the rule of law, the Afghanistan Human Development Report 2007 advocates a bold and creative approach to strengthening the justice institutions in Afghanistan. While remaining committed to universal principles of human rights and Afghan laws, we believe that a more collaborative relationship between the state and traditional justice bodies can help make justice and the rule of law more readily available to Afghans.

The Government of Afghanistan may not agree with everything stated and argued in this Report, but it is pleased to see the constructive role that such an initiative can play in facilitating informed debate on some of the most pressing challenges facing Afghanistan today. It will surely influence the consultative process now underway towards the finalizing of the full Afghanistan National Development Strategy, particularly on issues related to the rule of law.

I would like to congratulate the Center for Policy and Human Development at Kabul University on the production of the 2007 Afghanistan Human Development Report during its inaugural year.



**Hamid Karzai**  
President of the Islamic Republic of  
Afghanistan

# Preface

The United Nations Development Programme (UNDP) and Kabul University (KU) entered into partnership in late 2005 to establish the Center for Policy and Human Development (CPHD). The first Afghan policy research institution of its kind, CPHD has become the focal point of human development and policy research, teaching, and advocacy in the country.

The first major outcome of the CPHD is the Afghanistan Human Development Report 2007 (AHDR): *Bridging Modernity and Tradition: Rule of Law and the Search for Justice*. This second Afghanistan HDR explores the importance of the rule of law to human development. Establishing effective rule of law is essential to rebuilding the nation, restoring justice, shaping development and making it effective, and preventing a chaotic relapse into conflict. Because Afghanistan is emerging as a modern state in a society still anchored in traditional values, the simplistic approach of replicating existing systems of rule of law that evolved elsewhere cannot work here. The country's unique characteristics and their intricate interdependencies require an approach that is both complex and creative.

*Bridging Modernity and Tradition* argues that the rule of law in Afghanistan must be widely accepted, enforceable, and consistent with internationally accepted norms of human rights. It suggests that in Afghanistan, this can be achieved by combining the best practices of the traditional institutions of justice with the strengths of the modern justice system.

As Afghans continue to move forward in their quest for democratization and

development, the theme of this report could not be more timely. The long history of this country is full of examples that bring together traditions with modern institutions and practices. Applied now, this approach can lead to broadening Afghan choices and strengthening national capabilities.

Afghanistan is well on its way to showing significant progress towards meeting the Afghanised Millennium Development Goals. This report demonstrates that gradual steps towards improved human development are being firmly taken. The Interim Afghanistan Development Strategy is the means by which Afghanistan and its international partners have begun moving towards the building of a prosperous future for all Afghans.

While Afghanistan still faces significant challenges, this report is itself a major step forward, certainly as compared with the circumstances under which its predecessor was produced in 2004. Not only did the 2007 AHDR benefit from increased awareness, greater data availability and additional resources; more significant, it represents a wholly Afghan product, born of a young institution housed at a premier Afghan University. The team responsible for this HDR were independent of both UNDP and Kabul University in their research, analysis, and the production of this report. We are confident that their insights will complement and inform other collective knowledge efforts now under way and that it will also support the development of the Afghan National Development Strategy (ANDS) and its finalization.

Further, we hope that *Bridging Tradition and Modernity: Rule of Law and the Search for Justice* Afghanistan Human Development Report 2007 has marked only the first step towards establishing an ongoing process of collaboration between academia and the national and international communities

charged with making policy.

The United Nations Development Programme and Kabul University are proud to support CPHD in continuing its work, and its eventual emergence as a self-sustaining institution firmly rooted within the Afghan higher education system.



**Anita Nirody**  
Country Director  
United Nations Development Programme



**Dr. Abdul Rahman Ashraf**  
Chancellor  
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# Acknowledgments

This Report has evolved as a collaborative effort that has benefited from the skills and commitment of many people, including the research, writing, and production teams and others who have generously offered their time to contribute at various stages.

## **Center for Policy and Human Development**

The Center for Policy and Human Development (CPHD), based at Kabul University campus, provided a welcoming institutional home. A modern facility with a Human Development Resource Center accessible to students, faculty, and researchers, the CPHD also organizes a lecture series, a capacity building program, and an international faculty and student exchange program.

## **Contributors**

A large number of authors, contributors, and background paper authors were involved in the project.

Dr. Ali Wardak, Professor of Criminology, Dr. Daud Saba, environmentalist and human development specialist, and Halima Kazem, freelance journalist, served as the Report's main authors. They formulated the conceptual framework for this Report, designed a national survey, undertook data collection, and facilitated inclusive consultations across the country, in addition to writing the Report.

Dr. Masoud Yama and Dr. Naeem Poyesh provided research assistance, which included compiling reports, collecting data, and providing initial analysis. Abdul Bari Ahmadzai served as the focal point for data collection, verification, and the preparation of tables, charts, and graphs.

## **Background papers were commissioned by:**

- Abdul Bari Ghairat, of the Supreme Court, on "Organizational and administrative reform of the Afghan judiciary";
- Hafizullah Haddad, of the Academy of Sciences, on "The economy and human development in Afghanistan";
- Sayed Yousuf Halim, of the Ministry of Justice, on "The process of making new laws and amendment of existing laws in Afghanistan";
- Shahmahmood Miakhel, of UNAMA, and Dr. Hussian Ramoz, of the Afghanistan Independent Human Rights Commission, on "Governance and the rule of law in Afghanistan";
- Safia Milad, independent journalist, on "Police and crime information in Afghanistan";
- Dr. Nilab Mobarez, freelance author and journalist on "Gender and human development in Afghanistan";
- Zainab Mohaqeq, freelance writer, on "The process of lawmaking"; and
- Nader Nadery and Mohammad Farid Hamidi, of the Afghanistan Independent Human Rights Commission, on "Transitional justice and human rights in Afghanistan".

## **Project Advisors**

Richard Ponzio served as policy research adviser and provided assistance to the authors in the areas of conceptual development, initial editing, and production. Peter Wingfield-Digby served as statistical advisor responsible for calculation of the human development indicators and providing assistance to table preparations.

### **National Advisory Panel**

Drawn from diverse professional and institutional backgrounds, the panel included:

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- Hafizullah Haddad, member, Afghanistan Academy of Sciences
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- Shahm Mahmood Miakhel, Governance Officer, United Nations Assistance Mission in Afghanistan
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- Assadullah Walwalji, independent scholar and civil society leader
- Dr. Omar Zakhilwal, President and CEO of Afghanistan Investment Support Agency

### **International Expert Panel**

Providing advice on thematic areas, the panel included the following leading

international experts:

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- Michael Schoiswohl, International Law and Human Rights Consultant
- J. Alexander Thier, Senior Rule of Law Advisor, United States Institute of Peace
- George Varughese, Deputy Country Representative (Governance), The Asia Foundation

The following individuals provided substantive feedback, advice and reviewed sections of various chapters: Hamish Nixon of the Afghanistan Research and Evaluation Unit, Tonita Murray of Ministry of Interior, Nils Taxell of UNDP, Shanthini Dawson of

the Ministry of Education, Matteo Pasquali and Carla Ciavarella of UNDOC, Liliana De Marco and Rick Reimann of UNAMA, John Patterson of the UNDP SEAL project, Najim Animashaun of the UNDP Justice Project and Yohannes G. of the ANDS Land Issues Working Group.

### **Provincial Consultations**

Extensive provincial consultations, led by the Report authors and national advisory panel members were conducted in Bamiyan, Gardez, Herat, Kandahar, Mazar-i-Sharif, and Nangarhar. The team met senior provincial officials, including some provincial governors, local judges and court officials, security officials, *Jirga/Shura* leaders, human rights officers, Community Development Councils, and university students and professors, in addition to representatives from the business community and media groups.

### **Editing, Production, and Translation**

Brooke Shawn, for whose services we owe a debt of gratitude to the Afghanistan National Development Strategy Secretariat by making her available, provided assistance to editing and copy-editing. Shawna Tropp conducted text editing. Sayed Ikram Afzali conceived the cover design in addition to joining Abdul Hadi Mansoor in designing the layout. Mohammad Nasim and Hamdullah Arbab drew the cartoons. Dari and Pashto translations were undertaken by Homa Sorouri and Sadeq Wardak, respectively.

### **Institutional support**

This initiative would have not been possible without the hard work and dedication of the Center for Policy and Human Development staff. Sayed Ikram Afzali, Deputy Project Coordinator, led the production phase in addition to providing essential support from the outset; Fazelullah Stanekzai, Administrative Assistant, was responsible for all administrative, financial, and logistical arrangements; support staff Haji Rahimdad, Nazeera, Mohammad Nazir,

Gul Ahmad and Mohammad Ismail—all CPHD staff went beyond the call of duty to support the team.

Finally, Ameerah Haq, Deputy Special Representative of the Secretary-General and UN Resident Coordinator remained fully supportive throughout the project; Anita Nirody, UNDP Country Director, took a close personal interest in the project and ensured continued financial and institutional support; former Kabul University Chancellor Ashraf Ghani conceived of the idea for establishing the CPHD; former Kabul University Chancellor Abdul Hai Nazifi warmly welcomed the CPHD as a member of Kabul University family; and Dr. Abdul Rahman Ashraf, recently appointed as the new Kabul University Chancellor, has assured his full support for the Center and its activities. At UNDP Ian Holland, Deputy Country Director, provided extensive support; Fakhruddin Azizi, concerned Program Officer, played a central role in backstopping the project and sharing experiences from NHDR 2004. Mohd Yunus Payab, former Assistant Country Director, also supported the project.

Many more people—making it difficult to recognize them all by name—from the Government of Afghanistan, civil society (including traditional institutions of justice such as *Jirgas/Shuras*), donor countries, United Nations agencies, international financial institutions, non-governmental organizations, the private sector, and national and international scholars and researchers on Afghanistan contributed their thoughts, responded to our queries, and provided critical moral support to the initiative. Although deeply thankful for all their support, the authors are responsible for the analysis and views expressed in the Report.



**Humayun Hamidzada**

Project Coordinator  
Center for Policy and Human Development

# Abbreviations

ACBAR	Agency Coordinating Body for Afghan Relief
ACSOR	Afghan Center for Socio-economic and Opinion Research
ADR	Alternative Dispute Resolution
AGO	Attorney General's Office
AIHRC	Afghanistan Independent Human Rights Commission
AIMS	Afghanistan Information Management Service
ANA	Afghan National Army
ANBP	Afghanistan's New Beginnings Program
ANP	Afghan National Police
AREU	Afghanistan Research and Evaluation Unit
ARTF	Afghan Reconstruction Trust Fund
BPHS	Basic Package of Health Services
CDC	Community Development Councils
CG	Consultative Group
CPHD	Center for Policy and Human Development
CRC	Convention on the Rights of the Child
CSO	Central Statistical Office
DAB	Da Afghanistan Bank
DAD	Donor Assistance Database
DDR	Disarmament, Demobilization and Reintegration
DIAG	Disbandment of Illegal Armed Groups
DRC	Disarmament and Reintegration Commission
EC	European Commission
EU	European Union
FDI	Foreign Direct Investment
FTO	Field Training Officer
GDP	Gross Domestic Product
GEM	Gender Empowerment Measure
GIAAC	General Independent Administration for Anti Corruption
GNP	Gross National Product
HDI	Human Development Index
HDR	Human Development Report
HPI	Human Poverty Index
HRW	Human Rights Watch
I-ANDS	Interim Afghanistan National Development Strategy
IARCSC	Independent Administrative Reform and Civil Service Commission
ICC	International Criminal Court
ICG	International Crisis Group
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
IDU	Injecting Drug Users
IMF	International Monetary Fund
IOM	International Organization for Migration
I-PRSP	Interim Poverty Reduction Strategy Paper
IRC	International Rescue Committee
IWA	Integrity Watch Afghanistan

JRC	Judicial Reform Commission
JSCG	Justice Sector Consultative Group
LCG	Local Consultative Group
MDGs	Millennium Development Goals
MICS	Multiple Indicator Cluster Survey
MMR	Maternal Mortality Ratio
MoI	Ministry of Interior
MoJ	Ministry of Justice
MRRD	Ministry of Rural Rehabilitation and Development
NDB	National Development Budget
NDF	National Development Framework
NEEP	National Emergency Employment Program
NHDR	National Human Development Report
NRVA	National Risk and Vulnerability Assessment
NSP	National Solidarity Program
NSS	National Surveillance System
OAA	Office of the Administrative Affairs
PAR	Public Administration Reform
PPP	Purchasing Power Parity
PRR	Priority, Reform and Restructuring
PRSP	Poverty Reduction Strategy Paper
RIMU	Reform Implementation and Management Unit
SAARC	South Asian Association for Regional Cooperation
SAF	Securing Afghanistan's Future
TISA	Transitional Islamic State of Afghanistan
UNAMA	United Nations Assistance Mission in Afghanistan
UNCAC	United Nations Convention Against Corruption
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development
VAU	Vulnerability Analysis Unit, MRRD
WB	World Bank
WFP	World Food Program
WHO	World Health Organization
WPP	World Population Prospect

# Glossary of Afghan expressions

Arbakian	Informal village police
Assasnamas	By-laws
Awri/awar	Gathering of elders to resolve a local dispute in Nuristan
Baad	Forced marriage of a woman from the side of the accused to the victim's close relative.
Badbini	A mild form of animosity; unfriendly feelings towards someone
Bank-e-Milli	National Bank
Chaddari	A form of Afghan Veil used in urban and rural areas
Daira-yi-idalat	Circle of justice
Dewan	A division/department in the Afghan Supreme Court and Provincial Courts of Appeal.
Fiqh	Islamic jurisprudence
Hadith	The statements and deeds of the holy Prophet of Islam
Hanafi	One of the four schools of Islamic jurisprudence mainly followed in Afghanistan, Egypt, and Turkey
Hejrat	Migration
Hojra	A guest room attached to the main residential building, which is more common in Eastern Afghanistan
Hoquq	Rights department in the Ministry of Justice, which has offices at provincial and district levels
Huququllah	The rights of God (or the rights of state) in a criminal case
Ijma	The consensus of Islamic jurists on a ruling
Jaddi	The 10th month of Afghan calendar
Jafary jurisprudence	A school of Shiite jurisprudence
Jenayat	Felony
Jirga	Gathering of elders to resolve a local dispute
Jonha	Misdemeanor
Kareez	Underground canals connecting wells
Kuchi	Nomad
Loya Jirga	Grand Council, "grand assembly of elders and leaders"
Mahakama-e-shahri	Urban Primary Courts
Mahakem-e-estinaf	Provincial appeals courts
Maharam	Close relationship with whom marriage is prohibited
Mahkam-e-ibtedaia	District primary courts
Majlis-e-qawmi (or jalsa)	Form of <i>shura</i> common in Bamyan and other places
Manteqa	Region
Marakachian	Mediators in <i>jirga</i>
Maulawi	Islamic religious scholar
Meshrano jirga	Upper house of Afghan parliament
Moharrer	Court clerk
Mujahideen	Anti communist Afghan groups active during and after Soviet occupation
Nanawate	Truce and forgiveness
Narkh	Customary law
Nikah	Marriage
Nokool	Not pleading guilty
Orf	Customary law
Ozrana	Offer of apology
Pikra	<i>Jirga</i> ruling
Qabahat	Obscenity
Qanun	Legal code
Qazi-ol qozat	Chief Justice

Rishsafidan	Elders
Rogha	Reconciliation
Sharia	Islamic law
Sharwali	Municipality
Shura	Dari equivalent of <i>jirga</i>
Shura-e-islahi	Peace making council
Shura-e-ulama	Council of religious scholars in Bamyan
Solh	Peace
Sunnah	Deeds of Prophet Mohammad (PBUH)
Taqnin	Drafting Laws
Tawan	Damage
Ulama	Religious Scholars
Ulama shura	Council of religious scholars
Wolaswali	District
Wolayat	Province
Wolessi jirga	Lower house of parliament



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# Overview



Photo: UNDP



# Bridging Modernity and Tradition: The Rule of Law and the Search for Justice

Human development refers to the freedom of people to exercise real choices and enhance their capabilities to live healthy, long, and meaningful lives. For Afghans, human development means government institutions and a society that educates its young, offers medical services to all, facilitates sustainable livelihoods, and ensures peace in a manner consistent with Islam. Achieving this requires a profound commitment by the Government of Afghanistan and its citizens to social justice based upon the rule of law and democratic empowerment of all Afghans.

The *2007 Afghanistan Human Development Report: Bridging Modernity and Tradition - the Rule of Law and the Search for Justice* builds on the *2004 Afghanistan Human Development Report*. The human development conceptual framework and associated indicators were applied to better understand how justice and the rule of law can be strengthened to advance human development in Afghanistan. In addition to providing conceptual and other analytical tools for measuring and comprehending the linkages between human development and the rule of law, this Report presents bold policy alternatives to strengthen the rule of law in Afghanistan, including through formal and informal systems of justice.

Before delving into these pivotal issues, the broader human development agenda is introduced, and progress made towards meeting the country's Millennium Development Goals (MDGs) is presented. Despite decades of war and suffering, Afghanistan continues to make progress in achieving its development goals. The GDP per capita (in purchasing power parity terms) has increased from US\$683 in 2002 to US\$964 in

2005. An additional 132,000 square kilometers of land was cleared of landmines in 2006 (1385). The number of telephone users has shot up to 2.5 million (or 10% of the population). School enrollment has grown in the past five years from approximately 900,000 to nearly 5.4 million, and the prevalence of malaria and tuberculosis has dropped dramatically.

The human development index (HDI) for Afghanistan has a value of 0.345. It remains far behind neighboring countries with a rank of 174 out of 178 countries on the global HDI (a composite indicator that measures education, longevity, and economic performance). A number of factors contribute to the low HDI value for Afghanistan: 6.6 million Afghans do not meet their minimum food requirements. Gender discrimination remains widespread. To compound these negative trends, 2006 witnessed a significant rise in terrorist attacks and a 59% spike in the area under poppy cultivation, making the country a world leader in the production of illegal opium (90% of global production).

A first line of defense to many social ills in any democracy, but particularly in war-ravaged societies, is a country's judicial system. Institutions such as the courts, police, and the legislature play a critical role in protecting citizens' rights. In Afghanistan, rebuilding the justice sector in a manner that bridges modern with traditional justice institutions holds the key to a successful political transition. This is a central theme of the *2007 Afghanistan Human Development Report*.

By acting in isolation, state and non-state institutions of justice are missing an opportunity to improve significantly the

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delivery of justice in war-affected Afghanistan. This report presents the case for "a hybrid model of Afghan justice" that articulates, in detail, a collaborative relationship between formal and informal institutions of justice. According to this model, traditional justice institutions will cooperate with and work alongside the state justice institutions. Such an arrangement will harness the positive aspects of non-state dispute settlement institutions while ensuring that their decisions are compatible with the Afghan Constitution, Afghan laws, and international human rights standards. Utilizing such an approach to transform Afghanistan's justice system may offer Afghans a more efficient, effective, and fair outlet to resolve disputes peacefully.

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**Although Afghans have made tremendous advances in human development since 2002, the country is not progressing fast enough in many sectors to achieve the Afghanistan Millennium Development Goals by 2020, with dire consequences for the poor and most vulnerable.**

Afghanistan's development challenges demand immediate attention, especially given the connected formidable security concerns that remain prominent throughout the country. The Report evaluates progress and challenges towards achieving Afghanistan's nine Millennium Development Goals. The Afghan MDGs commit the Government and international community to work together to meet twenty-five concrete, time-bound development targets by 2020. These targets are measured against specific baseline indicators (see **chapter one**).

The two major vehicles for championing and monitoring the Afghan MDGs are the Afghanistan Compact and Interim Afghanistan National Development Strategy (I-ANDS), which were both presented to the January 2006 London Conference. The Compact is a political agreement between the Government and the international community to work together to achieve

specific five year benchmarks of progress across the three pillars of the I-ANDS: 1) security, 2) governance, rule of law and human rights, and 3) economic and social development. The Afghanistan National Development Strategy (ANDS), scheduled to be finalized by mid-2008, will be a comprehensive national action plan to promote progress towards achieving the Afghan MDGs and all dimensions of human development. Three distinguishing features of the ANDS are the highly consultative process being utilized for its preparation—including consultations in all 34 provinces, a detailed costing, and a robust monitoring framework to track development outcomes.

Although still attainable, the nine Afghan Millennium Development Goals require accelerated action to ensure their successful and timely completion over the next thirteen years. The economy has maintained a steady growth rate since 2002, setting the stage for the achievement of goal one (*Eradicate Extreme Poverty and Hunger*) by 2020. The increase in school enrollment rates, particularly for girls, indicates that Afghanistan can reach its targets for goal two (*Achieve Universal Primary Education*). The country continues to face daunting challenges that must be tackled through the Government's new National Education Strategy.

Despite tremendous strides, Afghanistan still has an enormous gender gap to bridge to meet goal three (*Promote Gender Equality and Empower Women*). Only 12.6% of female adults are literate, their economic opportunities are limited, and they remain victims of discrimination and violence. Yet women constitute 25% of the National Assembly, exemplifying a growing window of opportunity for women in Afghanistan. Significant progress is underway toward meeting goal four (*Reduce Child Mortality*). The infant mortality rate has fallen from 165/1,000 to 135/1,000, resulting in 40,000 more successful births each year. Low literacy and a lack of access to safe drinking water, food, and sanitation contribute to the

*Although still attainable, the nine Afghan Millennium Development Goals require accelerated action to ensure their successful and timely completion over the next thirteen years*

still relatively high child mortality rate. With the maternal mortality ratio estimated at 1600 deaths per 100,000 live births, Afghanistan maintains one of the highest maternal mortality rates in the world. To achieve Afghanistan Millennium Development Goal five (*Improve Maternal Health*) female access to maternal health care and education must be improved and cultural barriers overcome.

Though Afghanistan maintains a low prevalence of HIV/AIDS, it is at high risk of an epidemic spread of the virus. It also ranks 17th out of the 22 countries with the highest tuberculosis levels. Although the incidence of malaria and tuberculosis have dropped, to meet the goal six targets (*Combat HIV/AIDS, Malaria, Tuberculosis, and other Diseases*), increased technical and financial assistance are required to implement the Government's strategic plans in response to these critical health issues.

The soil, water, and the forests—the basis of livelihood for most Afghans—have been degraded severely due to excessive demands from agriculture and household energy use. From 2000-2005 alone, forest cover has dropped from 10,150 to 8,670 square kilometers. To reverse this trend and achieve goal seven (*Ensure Environmental Sustainability*), a comprehensive Environment Law was ratified recently. To emerge from prolonged violent conflict and to realize goal eight (*Global Partnership for Development*), Afghanistan also needs regional and international partnerships to connect to global markets. To attain this target, more efforts are needed to reduce the large gap between donor pledges, amounts disbursed, and the time that elapses between disbursements and actual implementation. In accordance with the 2005 Paris Principles on Aid Effectiveness, the amount of aid disbursed outside of the Government's core budget should also lessen steadily as national capacity grows.

Goal nine (*Enhancing Security*) is unique to Afghanistan. It addresses what many Afghans view as their greatest problem.

Particularly in the South and South-Eastern regions, the armed opposition is a major threat that undermines all facets of human development. Substantial progress has been made toward reforming and professionalizing the Afghan National Army and Afghan National Police. Yet concerns still abound regarding the quality of these security forces. The MDGs represent a positive vision for Afghanistan in the 21st century. Although announced only in 2005, increased investments in human development and corrective policy actions must be undertaken immediately if Afghans are to succeed in reaching these ambitious targets.

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**The movements for rule of law and for human development have had distinct traditions and approaches. When stronger linkages are forged, these mutually reinforcing concepts can unleash human freedoms and peace across Afghanistan.**

A rich, multi-faceted concept that forms an integral part of democratic governance, the rule of law is defined by legal philosophers, sociologists of law, development specialists, and policy makers in different ways (see **chapter two**). Those adopting a formal approach to the rule of law emphasize transparent and consistent processes and procedures rather than final outcomes. Others see the rule of law as an ideal that ensures that 1) citizens are protected against arbitrary state power; 2) they are subject to clearly written laws (rather than the rule of one man) adjudicated by an independent judiciary; and 3) laws are enforced equally among all individuals and societal groups, including the state.

To re-establish effective rule of law and build sustainable peace in a conflict-affected society, four major dimensions of justice need to be embraced: legal, transitional, distributive, and restorative justice. Legal justice refers to the formal, state rule of law institutions designed to maintain law and order and deliver justice. Transitional justice

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typically refers to the short-term and often temporary judicial and non-judicial mechanisms and processes that address gross human rights violations, war crimes, and crimes against humanity committed in armed conflict. Distributive justice seeks to address the underlying causes of conflict, which often lie in real or perceived forms of socio-economic, political, or cultural injustice. And restorative justice involves a community based model of justice that places a strong emphasis on the restoration of dignity, peace, and relationships between offenders and victims. These forms of justice are highly interconnected within the Afghan context.

For Afghans, the rule of law refers to *all those state and non-state institutions that promote justice and human development through the application of public rules that are deemed fair, applied independently, enforced equally, and consistent with human rights principles*. This definition of rule of law in Afghanistan consists of four major dimensions: 1) independence of rule of law institutions, 2) public and fair laws, 3) equal enforcement, and 4) consistency with human rights principles. The main formal justice and law enforcement institutions in Afghanistan include the judiciary, Attorney General's Office, the Ministry of Justice, the Police, and the National Assembly. Informal and non-state institutions of dispute resolution are also prominent and include *jirgas/shuras* (local traditional/tribal councils), Community Development Councils (CDC), other civil society groups, and individuals that provide mediation and arbitration services. Educational and watchdog organizations, such as the Afghanistan Independent Human Rights Commission (AIHRC) and those within the media and civil society, also play a vital role in promoting the rule of law. Most of these institutions are active in providing alternative dispute resolution (ADR) services in Afghanistan.

The Afghanistan formal legal system, enshrined in the Constitution, is based

mainly on *sharia* (Islamic law) and positive law traditions. In remote, rural parts of the country, where the far majority of Afghans still reside, *orf* (customary laws) serves as the framework for the delivery of justice by *jirgas/shuras*. To improve the rule of law and access to justice in Afghanistan, a central challenge is how best to reconcile the inherent tensions between the formal and informal justice systems, while nurturing the respective strengths of these sometimes competing and conflicting approaches to the rule of law.

The *Afghanistan Human Development Report 2007* is the first report of its kind to define the distinct traditions, yet firm linkages between the rule of law and human development. The strengthening or establishment of well-functioning justice institutions does not automatically lead to human development. Strengthening the rule of law can, nonetheless, serve as an important means to advance the freedom of people to exercise choices and enhance their capacity to live meaningful and healthy lives. From a human development perspective, an examination of the efficacy of the rule of law should extend beyond an assessment of the content and form of laws and how they are applied in practice. Rather, the legal and justice systems should be evaluated to determine whether and how they enhance people's capabilities—and their freedoms—to exercise the rights and entitlements associated with legal progress. When the level of human development increases, efforts of key state and non-state rule of law institutions to promote justice are reinforced and enhanced.

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**Multiple problems threaten the expansion of the rule of law in Afghanistan. A holistic response to the inter-related challenges to strengthen the rule of law is required for justice and law enforcement institutions to promote human development for all Afghans.**

Key challenges to the rule of law, such as

1) personal insecurity, 2) past human rights violations, 3) injustice towards women and children, 4) the growing narcotics trade, 5) institutionalized corruption, and 6) land disputes, threaten both Afghan livelihoods and regional stability (see **chapter three**). Personal security is a prerequisite to the rule of law which, in turn, creates an environment conducive to human development. In 2006 alone, more than 4,400 Afghans, including 1000 civilians, have died in anti-government related violence. The number of deaths is twice as many as in 2005 and more than any year since the *Taliban* regime was toppled in 2001. Vested criminal interests exploit the high levels of personal insecurity to acquire more resources and power. They also preclude the Afghan judiciary from operating independently, free of intimidation, and in accordance with the Constitution and international human rights standards.

Despite documented evidence of war crimes, crimes against humanity, and other rights violations committed over the past 30 years, a climate of impunity still prevails in Afghanistan. In response to popular demands for justice, an "Action Plan on Peace, Justice and Reconciliation" was adopted by the Government in December 2005. It recommends undertaking initiatives aimed at realizing peace and national reconciliation, restoring co-existence among and between former combatants and affected civilians, healing the wounds and pains of victims of past injustice, and reintegrating all citizens back into society. Political resistance within the Government and other state institutions to address past human rights violations and war crimes persists.

Injustices towards Afghan women and children, which are reflected in the Report's human development indicators, represent another major challenge to ensuring the rule of law for all. Afghan women and children lack sufficient healthcare, education, and livelihood opportunities. New Constitutional provisions and the expanded reach of

primary and secondary education present two examples of major steps to reverse past trends. The full development of Afghan society is impossible when half of the productive population is denied many of their rights, including the right to judicial recourse. Women in Afghanistan constitute an estimated 48.8% of the population. Enforcing Constitutional provisions and laws that guarantee equal rights for women provide double dividends; they directly benefit women and the children they raise, who together make-up a majority of Afghan citizens. Conversely, domestic violence and discrimination against women is often shown to lead to the mistreatment of their children through practices such as child marriage.

Another major challenge to the expansion of the rule of law in Afghanistan is the ever-expanding narcotics trade. Opium production was estimated at approximately 6,100 tons in 2006, representing an increase of about 49% from 2005. Opium in Afghanistan is worth around US\$ 3.1 billion or almost 50% of Afghanistan's legal GDP. The Afghan economy is far more dependent on the production, refinement, and export of narcotics than any other in the world, with per capita income from narcotics exceeding official development assistance. Anti-government elements are likely reaping financial benefits from opium, with threatening implications for security throughout the country and the region.

Pervasive corruption in Afghanistan is a symptom of poor governance and severely undermines the rule of law. If unchecked, it can erode the legitimacy of both the Government and international assistance. Abuse of political and military power, the misuse of public funds, the non-transparent privatization of state owned enterprises, kickbacks from the sale of narcotics, and other criminal activities are all major concerns of Afghans. Such acts fuel feelings of injustice and distrust towards the Government and internationally supported reconstruction efforts. In terms of the rule of

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*Despite some rehabilitation and construction of courts, the physical infrastructure of most [courts] is hardly conducive to holding a trial*

law, regulatory quality, and control of corruption, Afghanistan ranks among the bottom one-eighth of countries with serious governance problems. Public perception surveys further indicate that Afghans perceive the courts as among the most corrupt institutions in Afghanistan. Although the Government has committed itself to a number of time-bound benchmarks under the Afghanistan Compact, it must develop and implement a comprehensive anti-corruption strategy to begin making noticeable progress within this sphere.

Land entitlement and secure property rights also remain key roadblocks towards the establishment of the rule of law in Afghanistan. Current high population growth, coupled with the return of refugees, has diminished the availability of usable land—the main source of livelihoods for Afghans. At the same time, the country's complicated and confusing land registry exacerbates the potential for land disputes, which lead regularly to violence between communities. A comprehensive land use policy, based on the principles of good land stewardship and environmental sustainability, is urgently needed. Besides the development of a new legal regime to regulate land use, new formal and informal mechanisms for resolution of land disputes merit consideration.

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**The judiciary, police, and legislature are failing in their mission to meet the changing needs of Afghan citizens. Under-resourced with a limited reach, the formal state institutions of justice require a renewed and more coherent strengthening and restructuring effort.**

The judiciary is central to the provision of justice in Afghanistan. It consists of the *Stara Mahkama* (Supreme Court), *Mahakem-e-Estinaf* (Court of Appeal), and *Mahkam-e-Ibtidaia* (Primary Courts). Specialized courts were created to administer particular offences, including those concerning

national security, property issues, and narcotics. With 1107 judges, Afghanistan's estimated ratio of citizens per judge is 19,962 (see **chapter four**).

The judiciary suffers from manifold deficiencies. Most judges cannot access legal text books, procedures and practices, written decisions of the Supreme Court, or receive professional support from experienced mentors. Despite some rehabilitation and construction of courts, the physical infrastructure of most is hardly conducive to holding a trial. Stage training and a university degree in law or *sharia* are pre-requisites for judicial appointment. Yet, according to one recent survey, only a little more than one-half of 157 randomly selected judges hold university degrees in law or *sharia*, and only approximately 60% of the Afghan judges interviewed completed stage training prior to their appointment. The lack of citizens with the proper educational and training background has led to severe impediments for merit based appointments of judges and judiciary personnel. Yet, new appointments within the Supreme Court, who are deemed to be honest and have high professional standards, lend new hope to progress within the judiciary.

Afghan judges suffer from a lack of economic and physical security. Independence and neutrality in judicial decision making are affected adversely because judges receive low salaries and do not necessarily have secure places to live and work. Allegations of corruption within the formal justice system have tarnished its legitimacy and made the informal justice sector more appealing in the eyes of many citizens. There is a back-log of 6,000 cases awaiting adjudication. These trends indicate that the Afghan judiciary is not well-prepared to deliver justice.

Similar problems exist within the Ministry of Justice, the Attorney General's Office, the central prisons system, and within the Police. They lack adequate human resources and physical infrastructure. Inmates are often treated inhumanely

in Afghanistan's prisons. Equally troublesome is the failure of the various justice institutions to cooperate and work together as components of an integrated justice system, so essential to the effective delivery of justice.

The Bonn Agreement contained provisions mandating the establishment of an Afghan Judicial Reform Commission (JRC) to review the structure and functions of the justice system, facilitate law reform, strengthen technical, logistical and human resources, expand legal aid, and promote access to justice more generally. As an interim body, the role of the JRC was limited to proposing reform strategies and facilitating international assistance for the Afghan rule of law institutions. Its success was tied closely to the cooperation of Afghanistan's key rule of law institutions—the Supreme Court, the Ministry of Justice and the Attorney General's Office—in implementing its proposed reforms. The poor coordination between these institutions, coupled with limited managerial experience to drive reforms, limited the success of the JRC and its associated Justice Sector Consultative Group. One notable exception was the approval by the Cabinet, in October 2005, of the comprehensive framework for justice sector reform known as "Justice for All: A Ten Year Strategy for Justice Reform in Afghanistan."

The establishment of the National Assembly marked a significant step forward in Afghanistan's democratic development. Yet, the National Assembly is also held back in its law-making, representative, and oversight functions due to several operational constraints. Professional vetting of draft laws is required by the Ministry of Justice's *Taqnin* department to ensure consistency with the Constitution, *sharia*, and international agreements to which Afghanistan is a party. With its current staff constraints, the *Taqnin* is only able to draft and process about 40 legal documents per year. Delays in drafting laws within the *Taqnin* further inhibit the timely passage of

laws by the National Assembly. Since its formation in December 2005, the National Assembly has faced a backlog of 433 Presidential decrees and pieces of legislation. On the other hand, during its first year, the *Wolesi Jirga* (lower house) and *Meshrano Jirga* (upper house) of the National Assembly successfully established their rules of procedure and committee structures, reviewed legislation introduced by the executive branch, and vetted the approval of all members of the Cabinet of Ministers and the nine judges on the Supreme Court.

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**Afghans have relied on traditional institutions of dispute settlement, such as *jirgas* and *shuras*, for hundreds of years to apply customary laws. In combination with other actors, such as the Afghanistan Independent Human Rights Commission, civil society organizations, and the media, informal institutions of dispute settlement can complement formal state institutions to enable more Afghans to access affordable justice that is viewed as legitimate and can progressively do more to meet national and international legal and human rights standards.**

Traditional and modern civil society institutions continue to play an important role in local dispute settlement in Afghanistan (see chapter five). Traditional decision-making assemblies are estimated to account for more than 80% of cases settled throughout Afghanistan. The particular form and composition of a *jirga/shura* are determined by the dispute at hand, but typically a body of esteemed *marakachian/rishsafidan* (elders and leaders) typically weigh customary laws and institutionalized rituals to reach a settlement that is socially and morally binding on the parties involved. A variety of other local collective decision-making bodies perform community governance and resource management tasks in different parts of the country, while the National Solidarity Program (NSP) has introduced elected Community Development Councils

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(CDCs) based on these forms in much of Afghanistan.

Dispute resolution *jirgas/shuras* address issues ranging from minor bodily harm and agricultural land boundaries to serious and sometimes violent conflicts concerning communal lands and murder. They employ various dispute settlement mechanisms, including 1) *solh* or peacemaking and reconciliation between disputants, 2) *ratal* or a collective communal boycott of a wrongdoer, 3) compensation for the victim, and 4) *baad* or the marriage of a woman from the side of the accused to the victim's close relative. Three-quarters of the respondents to a national survey commissioned for this Report based on a random sample of more than 2000 people spread over 32 of the 34 provinces said that *solh* was always or sometimes the final outcome of a *jirga/shura*. Half of the respondents said that compensation for the victim was always or sometimes the final result. The overwhelming majority of the respondents reported that *ratal* and *baad* were only sometimes or never the final outcome, and that the burning of an offender's house was even less frequent. Unlike the state justice system, which creates losers and winners, *jirgas/shuras* reach community-led decisions that promote restorative justice, helping to restore peace and dignity between the victims, offenders, and other key stakeholders. They also aim to reintegrate the offender back into the community after holding him or her responsible for a wrongdoing. As a kind of Alternative Dispute Resolution (ADR) mechanism, such practices can also reduce strain on a capacity-deficient formal justice system.

There are many aspects of *jirgas/shuras* that suggest their utility relative to formal justice institutions. *Jirgas/shuras* are shown to be more accessible, more efficient (in terms of time and money), perceived as less corrupt, and more trusted by Afghans compared to formal state courts. These findings have important implications for the enforcement of their decisions: an individ-

ual's trust in and sense of fairness towards a justice institution enables him or her to accept its legitimacy and moral validity. This is an important reason why the decisions of *jirgas/shuras* are often accepted more easily as binding (socially and morally) compared to decisions made by the state courts. Rarely do decisions need to be enforced through the use of force.

On the other hand, women are almost totally excluded from participating in the decision-making of *jirgas/shuras*, resulting in serious consequences for their status and the protection of their rights. Male elders (*rishsafidan/marakachian*) tend to dominate gatherings of these bodies. Another serious concern is that while exceptional, some settlements made by *jirgas/shuras* include *baad* and other practices that violate Afghan state laws, *sharia*, and fundamental human rights. Contrary to public perception, however, regional commanders and local militia do not often dominate decision-making within *jirgas/shuras*.

Given corruption and weak capacities across Government, and in the state court system, Afghans also depend on independent accountability mechanisms to monitor and investigate government actions and affairs. These include non-state actors, such as civil society, media, and human rights groups. There are an estimated 2,500 national civil society (non-governmental) organizations in Afghanistan. Among these, the expanded outreach of new legal aid providers over the past two years is a particularly welcome development. Nevertheless, civil society in Afghanistan has yet to be firmly established, despite high expectations for it to contribute to accountability. The elected Community Development Councils (CDCs) cover 16,502 of Afghanistan's estimated 24,000 villages, and they have the potential to play a central role in promoting justice locally.

A free and vigorous media is an essential element of a well-functioning democratic system. There are currently more than 400 newspapers and magazines, 50 privately

owned radio stations, six television stations, and five news agencies within Afghanistan. The media within Afghanistan serves as a powerful education and advocacy tool for preventing individuals and institutions from standing above the law. Yet conditions for journalists have deteriorated in large parts of the country over the past two years, undermining the potential for the media to play such a role. Deteriorating levels of personal security, threats from warlords and conservative religious leaders, and signs of Government censorship all inhibit the ability of the media to promote the rule of law and uphold democracy.

A key, but as yet underdeveloped, independent accountability mechanism is the Afghanistan Independent Human Rights Commission (AIHRC), an independent agency of the state, identified in the Bonn Agreement and the Constitution. As the country's primary institution for carrying out judicial monitoring activities, the AIHRC's Monitoring and Investigation Unit made 1137 monitoring visits to prisons and detention centers in all 34 provinces between 2005 and 2006. The AIHRC is already mandated to monitor the performance of administrative, legal, and judicial systems. Given the AIHRC's progressive success, the extension of its monitoring and human rights training activities to include the local dispute resolution activities of *jirgas/shuras* merit serious consideration. Such activities could contribute to ameliorating the negative justice characteristics of *jirgas/shuras* while recognizing these institutions' roles in local justice throughout the country. This would require at least one human rights officer for every province.

**The Afghanistan National Development Strategy (ANDS) offers unprecedented opportunities for Afghan citizens to make their voices heard to policy-makers. In developing the ANDS, special attention should be afforded to deliberating upon and adopting a hybrid model of justice that realistically combines the features of all**

**relevant systems-old and new, Islamic and positivist-for the promotion of the rule of law and human development.**

The full Afghanistan National Development Strategy will provide the roadmap to attain the Afghanistan Compact benchmarks and will meet the requirements of a Poverty Reduction Strategy Paper (PRSP). The full ANDS will be finalized in mid-2008, following a series of extensive sub-national consultations in all 34 provinces. (see **chapter six**). With more than 48 benchmarks, the Afghanistan Compact identify priority national reforms in eight sectors: 1) security; 2) good governance and the rule of law; 3) infrastructure and natural resources; 4) education, culture, media and sport; 5) health and nutrition; 6) agriculture and rural development; 7) social protection; and 8) enabling private sector development. Both are also designed to address five cross-cutting issues: 1) gender equity; 2) counter-narcotics; 3) regional cooperation; 4) environment; and 5) anti-corruption.

The first line of the I-ANDS refers to the ancient concept of the *Daira-yi-adalat* or "Circle of Justice", implying that the rule of law weaves through every fibre of the strategy and will, ultimately, permeate throughout the Afghan state and society. The I-ANDS acknowledges that good governance, justice, and the rule of law are preconditions for development and lay the foundation for legitimate government, the protection of citizens' rights, and a competitive market economy. The strategy also commits the Afghan Government to making state-sponsored justice available to all Afghans; a functioning justice system is described as an essential component for confronting the country's violent past and for building a secure and prosperous future.

The challenge for the full ANDS will be to synthesize the strategies of the various justice institutions into one sector strategy. This process will include determining how strategies for the Ministry of Justice, the Attorney General's Office, and the Supreme

*The challenge for the full ANDS will be to synthesize the strategies of the various justice institutions into one sector strategy*



*Access to justice and the rule of law is critically limited for Afghans under the age of 18, which represents over 50% of the population*

Court intersect and compliment each other. This task is compounded by the many areas of potential overlap and confusion, as well as the need to integrate cross-cutting issues such as gender, anti-corruption, and counter-narcotics.

Based on analysis presented in chapters three, four, and five of this Report, modifications are proposed to the four rule of law benchmarks within the I-ANDS. Specifically, timelines require revision (with medium-term milestones to be achieved well before *Jaddi* 1389/end-2010), indicators are needed for new benchmark components, and, most importantly, Afghan institutions and donor partners critical to the achievement of the benchmarks should be identified to ensure accountability. For example, the second rule of law benchmark calls for "fully operational" institutions of justice in each province without providing concrete criteria for such a classification. Similarly, benchmark component indicators would help to measure progress toward building the professionalism, credibility, and integrity of justice institutions mentioned in the third rule of law benchmark: "by end-2010 reforms will strengthen the professional credibility and integrity of key institutions of the justice system." These suggested changes are intended to help shape a more coherent and effective strategy for the justice sector.

Access to justice and the rule of law is critically limited for Afghans under the age of 18, which represents over 50% of the population. Cases against Afghans in this age group must be considered in accordance with applicable laws and international standards. Beyond separate prison facilities for juveniles, targeted investments should be made towards protecting, rehabilitating and reintegrating young offenders back into the care of their families and communities, where they maintain the highest chance of becoming productive, law-abiding citizens. The Report, therefore, introduces a new benchmark that reads:

*By Jaddi 1387 (end-2008), a fully costed*

*restorative justice based strategy for juvenile offenders will be prepared that specifies the responsibilities of all relevant state and non-state institutions.*

As recognized in the Government's 2005 "Justice for All" strategy, Afghanistan's justice institutions should be inclusive and engage constructively non-state informal institutions, such as *jirgas* and *shuras*. Despite the significant influence of *jirgas* and *shuras* within local communities relative to state courts and their potential for buttressing the legitimacy of newly democratic institutions, the I-ANDS does not adequately address the need to develop a more pluralistic justice system that includes non-state ADR mechanisms. The hybrid model proposed in this Report recommends the creation of cost-effective ADR and Human Rights Units alongside the state justice system. ADR Units would be responsible for selecting appropriate mechanisms to settle disputes outside the courtroom. This would include *jirgas/shuras*, Community Development Councils, and other civil society organizations. ADR mechanisms would handle minor criminal incidents and civil cases, while giving people a choice to have their cases heard at the nearest state court. All serious criminal cases would fall exclusively within the jurisdiction of the formal justice system. When ADR decisions are not satisfactory to the disputants, they can be taken back to the formal, state justice system.

The Human Rights Unit would be staffed by officials from the AIHRC, or by specially trained law graduates. It would be mandated to monitor decisions made by ADR bodies to ensure their consistency with human rights principles. The Human Rights Unit would also carry out educational and training activities and would maintain investigative powers to examine past human rights abuses, domestic violence, and war crimes.

In support of this reform initiative, a further ANDS rule of law benchmark is proposed:

*By mid-2008, a pilot project will be initiated in at least five provinces to test the applicability of the Hybrid Model of Afghan Justice. By mid-2009, a comprehensive review of lessons learned will be conducted. By 2010, based on the conclusions reached from the review, a national rollout of the model could be undertaken.*

This proposed collaborative interplay between the state justice system, ADR mechanisms, and the Human Rights Units would make justice more widely accessible, efficient, cost-effective, and humane. It would also provide an important channel of communication between the state and ordinary Afghan citizens, reinforcing the new political order initiated in December 2001. In an effort to carefully test the viability of this new model, it is recommended that it first be piloted—with active international support—in a few select Afghan provinces. The cost of the pilot study for ten districts in five provinces is estimated at US\$ 515,000 for a year. A national rollout would cost approximately US\$ 40,000,000 over a period of five years.

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The *Afghanistan Human Development Report 2007* shows that (re) establishing the rule of law in Afghanistan is a daunting task. Central to this massive initiative is the rebuilding and reform of the state justice system—a long-term endeavor that faces a multitude of complex obstacles. These include the lack of professional capacity and resources, inadequate physical infrastructure, institutionalized corruption and nepotism, lack of security, and the lack of a single, coherent long-term vision for building the justice system.

Many of these shortcomings in the search for justice and human development in Afghanistan can be overcome by bridging modern and traditional justice institutions. Engaging traditional rule of law institutions should not be viewed as a panacea to resolve immediately the multitude of complex problems discussed in this Report. It should be viewed as an appropriate and integral component of the over-arching strategy to transition, in a slow yet determined fashion, toward an effective, modern system of Afghan justice. In the true spirit of human development, the reform agenda presented places a premium on empowering Afghans pragmatically to chart their own destiny. Only when Afghans secure their rights and uphold their responsibilities will justice prevail and the country and region be able to build the foundations for a durable peace.

*Engaging traditional rule of law institutions should not be viewed as a panacea to resolve immediately the multitude of complex problems discussed in this Report*

# Chapter 1



Photo: UNDP

Afghan schoolgirls celebrating Independence Day

Although Afghans have made tremendous advances in human development since 2002, the country is not progressing fast enough in many sectors to achieve the Afghanistan Millennium Development Goals by 2020, with dire consequences for the poor and most vulnerable.



# The state of Human Development and the Afghan Millennium Development Goals

## AFGHANS AND HUMAN DEVELOPMENT

Human development focuses on enlarging people's choices so that they can lead the lives they value, expanding their capabilities, enhancing their freedoms and enabling them to enjoy their human rights. This means putting people at the centre of development efforts, ensuring that they themselves become agents of change and that they are able to live in an environment conducive to the full development of their potential. Human development aims to ensure that everyone has certain basic capabilities, such as leading a long and healthy life; having a livelihood with dignity, free of insecurity; engaging in productive work; accessing information and communicating freely; and participating in the political and social life of one's community.<sup>1</sup>

*Human Development Reports*, now produced in more than 140 developing countries, have shown that economic growth is a necessary—though not sufficient—condition for reducing poverty. Other human development priorities, such as investing in people's education and empowering them through democratic governance, also play critical roles in enhancing the capabilities of people, safeguarding their freedom, and improving their well-being. A major tool for measuring the concept of human development is the Human Development Index or HDI (box 1.1).

Political freedom is vital to human development—if only because human development concerns enlarging human choices. Even if states achieve a certain level of economic growth and development, the

absence of civil and political rights can result in visible signs of repression and arbitrary threats to individuals, as well as the deprivation of people's legitimate choices and their ability to achieve what they value. Political freedom entails the ability to seek to change the government through appropriate legal channels, as well as to adjust the laws of one's country. Such freedoms must be set out in the legal framework and exercised in practice.

*A major tool for measuring the concept of human development is the Human Development Index*

### BOX 1.1

#### Measuring Human Development: the HDI

The expansion of human capabilities and freedoms lies at the core of human development. Measuring human development provides a yardstick against which people can assess their developmental achievements. More broadly, it can help gauge the state of human, social, and economic progress in different regions of a country, as well as in comparison to other regions or countries over a defined period of time.

One important measurement tool for human development is the human development index (HDI). While human development represents the full expansion of people's choices and capabilities, the HDI measures more specific achievements of people in education, health and economic prosperity for attaining and maintaining decent living standards. However, because the HDI does not encompass other indicators of human progress such as political freedoms, participation in the life of one's community, physical security, and the rule of law the index does not reflect the full breadth and complexity of human development.

Unlike one-dimensional indicators

of human progress, such as Gross Domestic Product (GDP) per capita, the human development index provides a more comprehensive picture of a society's development by integrating three basic measures: a long and healthy life, knowledge, and a decent standard of living. It is a composite index that contains three variables: life expectancy at birth, educational attainment (measured by adult literacy and the combined gross primary, secondary and tertiary enrolment ratios), and GDP per capita (measured by using purchasing power parity formula: PPP). The index's measure of income serves as a proxy for a decent standard of living, as well as a surrogate for all the human choices that are not reflected in the other two factors.

In most cases, the HDI is based on readily available initial data. It is simple to construct, and also easy to interpret with minimum controversy. Efforts to refine this index further have been undertaken since its inception in the 1990s, and each human development report contributes to the HDI's development.

Source: Fukuda-Parr 2002



The rule of law, which provides for a fair trial and the independence of the judiciary from executive or legislative interference, is a key component of political freedom, freedom in a more general sense, and therefore human development.<sup>2</sup>

According to Amartya Sen, the effort “to broaden the limited lives into which the majority of human beings are willy-nilly imprisoned by force of circumstances is the major challenge of human development in the contemporary world.”<sup>3</sup> This is equally the challenge for human development in Afghanistan. During their country's two decades of conflict, Afghans experienced an absence of freedom in which the governments in place could not even provide for the physical security of citizens. Both political freedom and the rule of law were largely absent. With the completion of the political transition outlined in the Bonn Agreement, governance institutions, including some within the judicial system, have been reformed and strengthened, but much work lies ahead. As this report argues, the relatively limited reach of the rule of law in Afghanistan continues to act as a critical barrier to human development.

Before the path to advancing human development in Afghanistan is discussed, the current state must be presented. The status of human development in Afghanistan remains poor. Nonetheless, achievements that will enhance human development have been made. Afghanistan's human development indicators reveal that the country remains one of the poorest in the world, with one of the lowest levels of human development. Gross enrollment appears to have increased since the publication of the 2004 NHDR, yet the percentage of girls attending school continues to be significantly below that of boys. Levels of malaria and tuberculosis have taken a marked fall. Health indicators for both women and children are exceptionally low. Yet a significant increase in the number of female health workers provides the opportunity for women to have much greater access to health care. Violence

against women is rampant, and they continue to lack means for redress. There is an array of challenges to upholding the rule of law in Afghanistan: the ability of the Afghanistan National Police (ANP) to maintain law and order remains weak, courts are ineffective and largely perceived as corrupt, and the penal system is inadequate. Strengthening the rule of law and access to justice in Afghanistan is critical to creating an enabling environment for progress in other key areas of human development, including economic growth, social development and political freedom. This report therefore assesses the strengths and weaknesses in the formal and informal justice systems and provides recommendations for leveraging the strong points of each system to increase access to justice, extend the reach of the rule of law and thereby foster human development. This chapter begins by presenting the current status of human development indices within Afghanistan. Because reviewing progress towards achieving the “Afghanised” Millennium Development Goals (MDGs) also provides a means for measuring key components of human development, the chapter then assesses progress towards meeting the MDGs. It concludes by describing how the Afghanistan National Development Strategy (ANDS) will serve as the vehicle for advancing the MDGs and human development in Afghanistan.

## HUMAN DEVELOPMENT TRENDS IN AFGHANISTAN

Although Afghanistan has made great strides in raising its level of economic prosperity, along with access to health care and education, the needs of many remain unfulfilled. Afghanistan's HDI stands at 0.345, far behind those of its regional neighbors (figure 1.1). Indeed, the index for 2007 falls slightly under that of 2004 (0.346).<sup>4</sup> In terms of global rankings, this places Afghanistan 174<sup>th</sup> out of 178 countries—ahead of only four other countries, all of these in sub-Saharan Africa: Burkina

*The status of human development in Afghanistan remains poor*

### Human Development Indices of Afghanistan compared to its neighbors and some of least developed countries in Africa

Source: Niger, Sierra Leone, Mali, Burkina Faso, Tajikistan, Uzbekistan, Turkmenistan, Iran, Pakistan, China. UNDP 2006; Afghanistan. CPHD calculations

Since the publication of the first Afghanistan National Human Development Report (NHDR) in 2004, GDP per capita has risen from \$683 in 2002 (in PPP terms) to \$964 in 2005.<sup>5</sup> The gross enrolment ratio (for the primary, secondary and tertiary levels combined) has risen to 59.3 %<sup>6</sup> in 2005, up from the figure of 45 % for 2002 reported in NHDR 2004.<sup>7</sup> However, the percentage of girls attending school remains well below that of boys. Similarly, while levels of malaria and tuberculosis have dropped markedly, health indicators for both women and children remain exceptionally low. The female mortality rates reflect the dire conditions in which most of them live. Although a significant increase in the number of female health workers has potentially broadened female access to health care, it can never adequately treat the effects of widespread violence against women in Afghanistan. In addition, both life expectancy and adult literacy have fallen. Life expectancy at birth is estimated at 43.1 years for 2005,<sup>8</sup> compared with 44.5 in 2003. Adult literacy fell from 28.7 % in 2003 to 23.5 % in 2005.<sup>9</sup>

FIGURE 1.1

Country	Percentage
China	0.768
Iran	0.746
Turkmenistan	0.724
Uzbekistan	0.696
Tajikistan	0.652
Pakistan	0.539
Afghanistan	0.345

to improving human development, calculating the Human Poverty Index (HPI) is vital. In contrast to the HDI, which portrays average achievements, the HPI focuses on deprivations, specifically those that limit a long and healthy life, a decent standard of living, and lack of knowledge or exclusion from the world of reading and communication.<sup>10</sup>

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*Afghan women face enormous obstacles to receiving an adequate education, to holding gainful employment, and to accessing health care*

population lack sustainable access to clean water,<sup>14</sup> and 50 % of Afghan children under five are underweight.<sup>15</sup>

While HDI measures average achievements, the Gender Development Index (GDI) adjusts this average to reflect the inequalities between men and women in the same three dimensions—a long and healthy life, knowledge, and a decent standard of living.<sup>16</sup> At .310, the GDI for Afghanistan is not encouraging.<sup>17</sup> It accurately reflects the inequality in opportunity faced by women in Afghanistan. Afghan women face enormous obstacles to receiving an adequate education, to holding gainful employment, and to accessing health care. Although the GDI acts as a useful indicator for revealing inequalities between women and men, it is not sufficiently comprehensive to reveal the human rights violations or the lack of access to justice suffered by women, as well as their limited role in governance and decision-making. Thus, it does not give a full picture of the impact of the paucity of the rule of law on women's lives. Despite a slight increase in its GDI since NHDR 2004, Afghanistan still ranks below all other countries but Niger (0.292).<sup>18</sup> Overall, Afghanistan has progressed in its GDI and possibly regressed in its HDI and HPI scores (Table 1.2), although improvements in data collection methodologies make a full comparison between the 2002 and 2005 datasets impossible (see Annex I).

The Gender Empowerment Measure (GEM), which focuses on women's opportunities (rather than the capabilities measured

by GDI), cannot yet be fully calculated in Afghanistan because of data shortcomings. Nonetheless, figures currently in hand reveal gender inequality in three areas: political participation and decision-making power, economic participation and decision-making power, and power over economic resources.

## THE MILLENNIUM DEVELOPMENT GOALS IN AFGHANISTAN

At the Millennium Summit, held at the UN General Assembly in New York in September 2000, world leaders adopted the Millennium Declaration, committing countries to strengthen global efforts for peace, human rights, democracy, strong governance, environmental sustainability, poverty eradication, and to promoting principles of human dignity, equality, and equity. The eight Millennium Development Goals were designed on the basis of the Millennium Declaration as measurable targets to advance development and eradicate poverty. These benchmarks oblige countries to improve the human condition through eradicating hunger and poverty, providing sufficient levels of education and health care, promoting gender equality, and protecting the environment. World leaders pledged to meet the benchmarks by 2015.

When the Millennium Summit was held in New York, Afghanistan was still writhing in the midst of conflict. After President Karzai sent a letter to the United Nations Secretary-General endorsing the MDGs in March 2004, Afghanistan began preparing to participate in this global effort. Because Afghanistan was still recovering from two decades of conflict, it was decided to modify the global calendar for achieving the MDGs and to amend the benchmarks to account for the still-devastated state of the country. Yet the Government decided to give Afghanistan only 15 years to meet the benchmarks that other countries had 25 years to achieve.<sup>19</sup>

Although the MDGs were originally

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**Trend of HDI indicators for Afghanistan during 2004-2007 period**

Indicators	Afghanistan HDR 2004		Afghanistan HDR 2007	
	Value	Year	Value	Year
HDI	0.346	2002	0.345	2005
GDI	0.300	2002	0.310	2005
HPI	59.3	2002	62.3	2005

TABLE 1.3

**Afghanistan MDGs**

Goals	Targets
Goal 1: Eradicate extreme poverty and hunger	Target 1: The proportion of people whose income is less than US \$1 a day decreases by 3% per annum until the year 2020
	Target 2: The proportion of people who suffer from hunger decreases by 5% per annum until the year 2020
Goal 2: Achieve universal primary education	Target 3: Ensure that, by 2020, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling
Goal 3: Promote gender equality and empower women	Target 4: Eliminate gender disparity in all levels of education no later than 2020
	Target 5: Reduce gender disparity in economic areas by 2020
	Target 6: Increase female participation in elected and appointed bodies at all levels of governance to 30% by 2020
	Target 7: Reduce gender disparity in access to justice by 50% by 2015 and completely (100%) by 2020
Goal 4: Reduce child mortality	Target 8: Reduce by 50%, between 2003 and 2015, the under-5 mortality rate, and further reduce it to 1/3 of the 2003 level by 2020
Goal 5: Improve maternal health	Target 9: Reduce by 50% between 2002 and 2015 the maternal mortality ratio, and further reduce the MMR to 25% of the 2002 level by 2020
Goal 6: Combat HIV/AIDS, malaria and other diseases	Target 10: Have halted by 2020 and begun to reverse the spread of HIV/AIDS
	Target 11: Have halted by 2020 and begun to reverse the incidence of malaria and other major diseases
Goal 7: Ensure environmental sustainability	Target 12: Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources
	Target 14: By 2020, achieve a significant improvement in the lives of all slum dwellers
Goal 8: Develop a global partnership for development	Target 15: Deal comprehensively and influence the provision of foreign aid through appropriate measures to enable Afghanistan develop sustainably in the long term
	Target 16: Develop an open, rules-based, predictable, non-discriminatory trading and financial system that includes a commitment to good governance, development and poverty reduction
	Target 18: In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries
Goal 9: Enhance security	Target 20: Reform and professionalize the Afghan National Army by 2010
	Target 22: Reform, restructure and professionalize the Afghan National Police by 2010
	Target 23: All emplaced antipersonnel mines destroyed by 2013. All other explosive contaminants destroyed by 2015
	Target 24: All stockpiled antipersonnel mines destroyed by 2007. All other abandoned or unwanted explosive stocks destroyed by 2020
	Target 25: To reduce the contribution of opium to the total (licit and illicit) GDP to less than 5% by 2015, and to less than 1% by 2020

formulated by the United Nations, they must be nationally owned and driven as "people's goals" in order to be fully realized. Not only should the goals be tailored to ground realities in each country; action to meet them should be driven both by the Government along with civil society groups and local communities.<sup>20</sup> In other words,

both top-down and bottom-up approaches must be adopted to fulfill the Millennium Development Goals.

To ensure that the Millennium Development Goals accurately depict what the Afghan people sought to attain, and to adjust the benchmarks to the country's specific context, three sets of actions were

*Many Millennium Development Goals nonetheless correspond to the achievement of key elements of human development*

taken to "Afghanise" the MDGs. This involved extending the time period for attaining the targets to 2020, revising the global targets to make them more relevant to Afghanistan, and adding a ninth goal on enhancing security. This process enabled Afghanistan to formulate goals that accurately reflected the country's own aspirations for its people (table 1.3).<sup>21</sup>

## THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN DEVELOPMENT

The Millennium Development Goals can serve as a tool to advance human development. The detailed, time-bound indicators for each of the MDGs allow for measuring progress in a systematic fashion toward key aspects of human development. Both the Goals and the human development concept share the objectives of promoting human well-being that entails dignity, freedom, and equality for all people. Yet realizing the MDGs or making progress towards them is necessary, but not sufficient for human development. *Human Development Reports*

assert that development is intended to improve people's lives by expanding their choices, freedom, and dignity. The Millennium Development Goals are designed to ease the constraints on people's ability to make choices, but they do not encompass all aspects of human development. For instance, the Goals do not mention enhancing levels of political participation or the granting of civil or political freedoms. Many Millennium Development Goals nonetheless correspond to the achievement of key elements of human development. As discussed above, one of the most basic capabilities for human development is a healthy life. This corresponds to the MDGs for reducing child mortality, improving maternal health, and combating major diseases. Achieving the MDGs will also advance economic, social and cultural rights, but their full realization requires a more comprehensive effort. Meeting or even working towards the Goals is, however, an important step towards fulfilling such rights.<sup>22</sup>

Understanding progress and challenges towards meeting the MDGs, as well as continuing to monitor and gather relevant data, is essential to formulate and readjust strategies for their achievement. It is also vital to moving the human development agenda forward. An assessment of progress towards meeting the MDGs is presented below (table 1.3). It reveals the accomplishments that can be made when meticulous judgment, persistence, energy and well-targeted resources come together. This assessment also illustrates how an even more dedicated effort will be needed in the coming years for such targets to be met.

## ACHIEVEMENTS AND CHALLENGES

### ERADICATE EXTREME POVERTY AND HUNGER (GOAL 1)

The Afghan economy has maintained an impressive rate of economic growth over the past few years.<sup>23</sup> Yet this growth has failed to significantly reduce extreme poverty and

MDG	Indicator	Kuchi	Rural	Urban	National average
1	Eradicate extreme poverty and hunger	24	30	31	30
2	Achieve universal primary education	9	36	53	37
	Literacy rate of 15-24 year-olds (%)	5	25	63	31
3	Promote gender equality and empower women	0.5	0.6	0.9	0.7
	Ratio of literate women to men, 15-24 years old	0.9	0.3	0.8	0.5
4	Reduce child mortality	35	51	63	53
5	Improve maternal health	7	9	52	53
6	Combat HIV/AIDS, malaria and other diseases	17	8	9	8
7	Ensure environmental sustainability	98	98	75	94
	Proportion of population using solid fuels (%)	16	26	63	31
	Proportion of population with sustainable access to an improved water source, urban and rural (%)	0	3	28	7
	Prop. HHs with secure housing tenure (%)	28	44	83	49
8	Develop a global partnership for development	0.1	0.3	8.3	1.5
	Telephone lines and cellular subscribers per 100 population	0.00	0.01	0.52	0.09
	Personal computers in use per 100 people	0	0.01	0.18	0.03



hunger in the country; 6.6 million Afghans do not meet their minimum food requirements, with 24 % of households characterized by poor food consumption.<sup>24</sup> Based on a minimum caloric intake of 2067 kilocalories per day adjusted by sex and age, 30 % of the population eat, on average, below their daily requirement (table 1.5).<sup>25</sup> Households in urban areas are slightly more food-insecure than both rural and Kuchi populations. When diversity of diet is included in the analysis, 61 % of households are likely to be below the threshold for food insecurity.<sup>26</sup>

Nearly 40 % of children under three years of age are underweight, 54 % of children under five are stunted, and 6.7 % are wasted due to malnutrition.<sup>27</sup> In general, 44 % of the population view themselves to varying degrees as food insecure. The highest percentage of households that struggled to meet their food needs lie in Nuristan province and in the central part of the country.<sup>28z</sup>

#### ACHIEVE UNIVERSAL PRIMARY EDUCATION (GOAL 2)

Despite marked progress in primary education, over half of school age children remain out of school. The national average for attendance of children six to thirteen years of age is estimated at 37 % (table 1.6). Enrollment in urban areas is considerably higher than that in rural areas, and there is almost a 1:1 ratio of girls and boys attending primary school in urban areas.<sup>29</sup> Although the reasons for the greater level of attendance of girls in urban areas may be due to variations in cultural factors, it probably stems from greater access as well. Distance is often referred to as the most common reason for keeping girls from going to school.<sup>30</sup> The disparity in the number of boys in school compared to girls continues to be narrowed—an issue of concern that needs focused attention and energy. Girls still face significant obstacles that prevent them from accessing education, including restricted movement, a shortage of female

TABLE 1.5

#### Population (%) below minimum level of dietary energy consumption adjusted by age and sex

Percentage	Kuchi	Rural	Urban	National
	24	30	31	30

Source: NRVA2005

TABLE 1.6

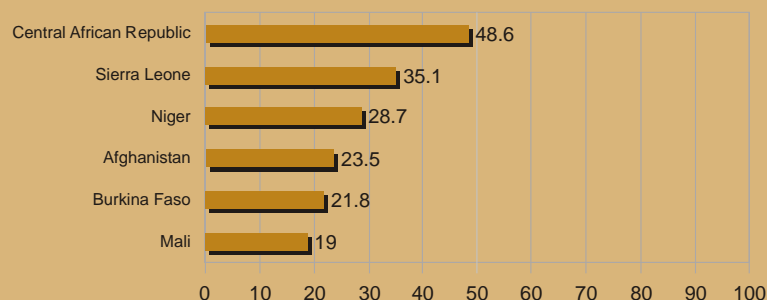
#### Net enrolment (%) in primary education (6 to 13 years old)

Kuchi			Rural			Urban		
Female	Male	All	Female	Male	All	Female	Male	All
6	11	9	27	44	36	51	55	53

Source: NRVA2005

FIGURE 1.2

#### Adult literacy rate in Afghanistan compared with other countries with lowest adult literacy rates



Source: Central African Republic, Sierra Leone, Niger, Burkina Faso, Mali, UNDP 2006; Afghanistan, NRVA2005

teachers (who comprised only 28 % of teachers in 2005), poor facilities, competing demands on girls' time and the lack of value placed on female education.<sup>31</sup> Such hurdles are more common in rural than urban areas.

Provinces in the South and South-east continue to exhibit particularly low levels of enrollment for girls and boys.<sup>32</sup> Zabul (1 %), Uruzgan (1%), Helmand (6%) and Paktika (9%), in the South and South-east have the lowest levels of enrollment. Insecurity has become an increasingly formidable challenge to accessing education. The number of attacks on schools, teachers, and students rose considerably into 2006.<sup>33</sup> While the issue of access to education remains significant, the quality of education in Afghanistan remains poor and also

*Insecurity has become an increasingly formidable challenge to accessing education*

## An education strategy to empower Afghans

by Haneef Atmar, Minister of Education

Never before in recent history have more children been enrolled in schools in Afghanistan. Schools enrolment has grown from around 900,000 to nearly 5.4 million in the last five years, including a growth from 0 - 35 % of girls in the school-going population. In sending their girls and boys to school in their millions, parents are exercising the basic right to education that was denied to their generation during the years of war and strife. They are also demonstrating their aspirations for the future and their children.

The challenge for Government now is to honor the commitment shown by parents by delivering decent education services to all children, youth and adults—including the remaining half of school-age children not enrolled, especially girls in rural areas, nomadic children and those with special needs—hundreds of thousands of unskilled youth and young adults who are unemployed and millions of illiterate youth and adults, especially women.

It is my strong belief that a revitalized education system that is guided by the tenets of Islam is at the core of the State Building exercise. Therefore, one of the top

priorities of Government is to rebuild the education system that will *"facilitate the development of a vibrant human capital by providing equal access to quality education for all and to enable our people to participate and contribute productively to the development, economic growth and stability of our country."*

In addition to affirming the right to education for all citizens, the 1382 Constitution of Afghanistan obliges *"the State to devise and implement effective programs for a balanced expansion of education all over Afghanistan."* To fulfill this obligation and the long-term commitment made in the Millennium Development Goals, the Ministry of Education, in conjunction with its partners, has developed its first 5-year National Education Strategic Plan and will lead the delivery of an holistic education, whose content is responsive, relevant and representative, which is implemented in a sustainable, accountable and transparent manner, and which is fair and equitable in distribution across the country.

Based on this strategy, we are developing and implementing a National Education Program that comprises eight mutually reinforcing and intertwined sub-programs:

1. General Education
2. Teacher Education
3. Education Infrastructure Development
4. Curriculum Development
5. Islamic Education
6. Technical/Vocational Education
7. Literacy
8. Education Administration Reform and Development

Together these sub-programs will facilitate equal access to education for all without discrimination and will deliver a quality, broad-based education system from which students will emerge literate, numerate and technologically proficient as a basis for lifelong learning. Quality of education will be assured through a national curriculum in general, Islamic, vocational and technical studies that meets regional and international standards. This curriculum will be taught by a cadre of well-qualified and motivated teachers whose knowledge base and teaching skills are broadened by intensive training. And, education will be delivered in conducive and safe learning environments and workspaces, facilitated through an efficient, effective and accountable Ministry of Education.

*Afghanistan's adult literacy rate ranks sadly among the lowest in the world*

requires concerted attention.<sup>34</sup> Through its new National Education Strategy (box 1.2), the Government is committed to increase school enrollment with a focus on expanding the attendance rate of girls, while increasing simultaneously both access to and the quality of education.

### PROMOTE GENDER EQUALITY AND EMPOWER WOMEN (GOAL 3)

As is noted above, while girls' access to education has increased, particularly in urban areas, additional energy and resources must be focused on improving access to education for girls in rural areas. Enrollment rates for women at the primary,

secondary and tertiary levels are almost half that of men—41.8 % for females and 73.7 % for males (map 1.1). Afghanistan's adult literacy rate ranks sadly among the lowest in the world (figure 1.2). Only 23.5 % of the population 15 and older can read and write. More shocking, only an estimated 12.6 % of women are literate, compared to 32.4 % of men.<sup>35</sup> The female to male literacy ratio is 0.4 for the entire population, far lower than in neighboring countries such as Iran (0.8) and Pakistan (0.6).<sup>36</sup>

There is also a large discrepancy in the estimated earned income between females (\$478) and males (\$1428).<sup>37</sup> Yet, in Afghanistan, 80-90 % of economic activity occurs within the informal sector.<sup>38</sup> Women often

# PERCENTAGE OF GIRLS IN SCHOOL BY PROVINCE

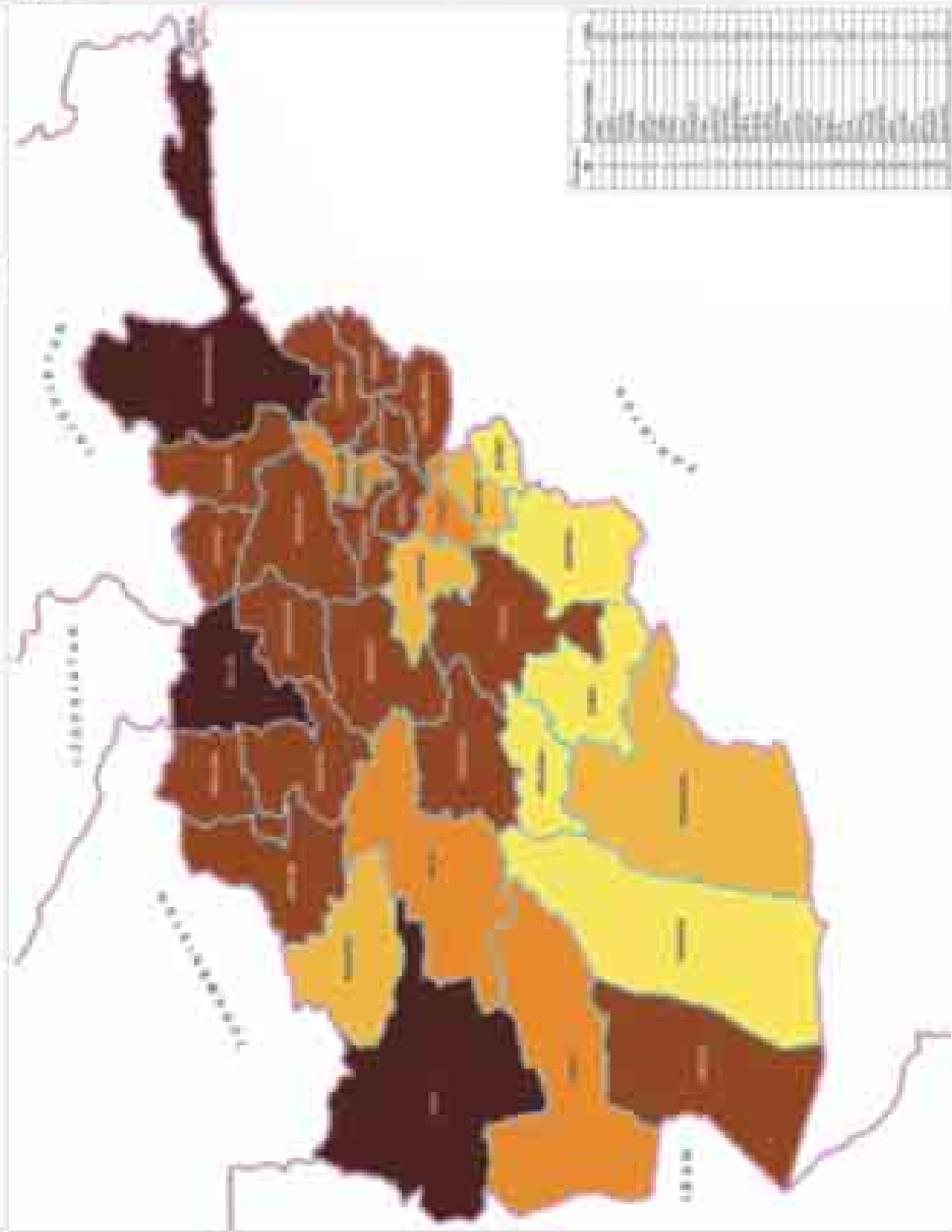
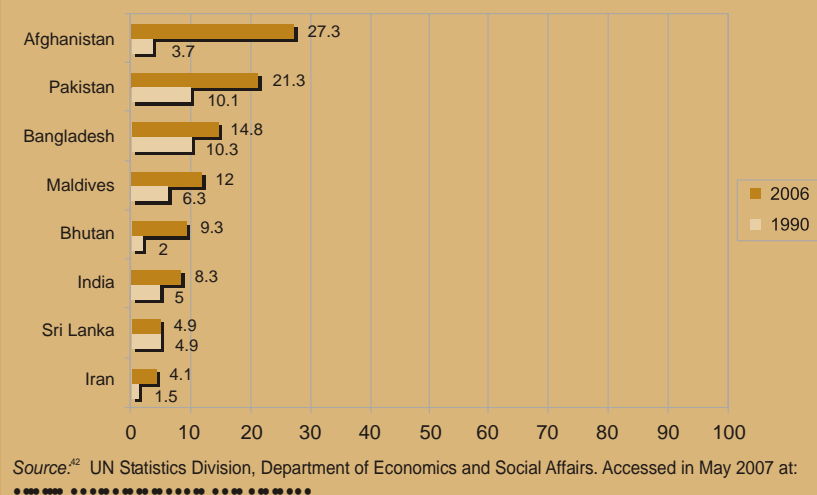




FIGURE 1.3  
**Female Parliamentarians as a Percentage of all Parliamentarians  
 for all South Asian Countries**



*The number of women participating in governance does not, however, reveal their decision-making power or to what extent their voice is heard*

work at home in agriculture, livestock management and as caregivers, but such activities, while income-generating, are not remunerated. Women continue to face a number of barriers to earning their own livelihoods, inhibiting their empowerment as well as their ability to enjoy their rights. In addition, high fertility affects women in a number of ways. Frequent pregnancy often prevents women from pursuing an education or from taking part in gainful economic opportunities. Women's limited access to education further inhibits their productivity and ability to participate more widely in the economy. Cultural constraints on women's movement, as well as security concerns, also limit women's access to work outside of the home.

Whereas women's low literacy rate remains an urgent issue, the trend to empower women politically at the national is encouraging. By allocating women a minimum 25 % of the seats in the *Wolesi Jirga* (lower house) of the National Assembly, Afghanistan has taken steps to bring about gender parity in the formal representation of women in decision-making (figure 1.3). In regard to the extent of women's participation in national politics, Afghanistan fares well among its neighbors as well as among the South Asian Association for Regional

Cooperation (SAARC) members (figure 1.3). The number of women participating in governance does not, however, reveal their decision-making power or to what extent their voice is heard.

Violence against women in Afghanistan is widely believed to have reached epidemic proportions. Yet, because the majority of cases remain unreported due to the severe restrictions women face in seeking justice or redress, limited evidence exists to confirm this perception.<sup>39</sup> Women suffer from tremendous human rights violations. One example is the high level of forced and child marriages. Between 60 and 80 % of marriages in the country are forced.<sup>40</sup>

In contrast to Afghanistan's neighbors, male mortality is lower than female mortality for women above 24 years. This is likely the cause of the extremely poor condition in which women in Afghanistan live. Lack of access to health care, poor nutrition, and frequency of marriage before fifteen probably all contribute to this mortality rate.<sup>41</sup>

#### REDUCE CHILD MORTALITY (GOAL 4)

The probability at birth of not surviving to age 40 is .419 in Afghanistan.<sup>43</sup> This figure is the highest of any SAARC member country or of any of the countries surrounding Afghanistan (figure 1.4). Yet notable progress is being made in improving the health of Afghan babies; The rate of Afghans dying before their first birthday has fallen from 165 to 135 per 1,000 live births. This results in 40,000 more successful births each year.<sup>44</sup> Yet as available data indicates, the mortality rate for children under five remains the world's third highest.<sup>45</sup>

Health indicators for Afghan women and children are a matter of serious concern. High mortality rates stem at least in part from a lack of access to safe drinking water, food, poor access to health care services, inadequate sanitation, and low literacy.<sup>46</sup> Many of the country's immunization programs have showed marked success in

recent years (Box 1.3). The measles immunization program has led to coverage for 64 % of children under twelve months of age.<sup>47</sup>

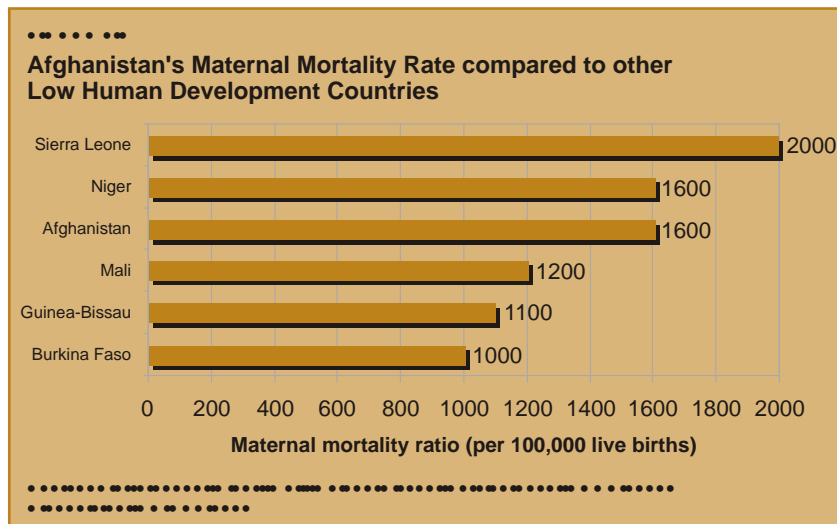
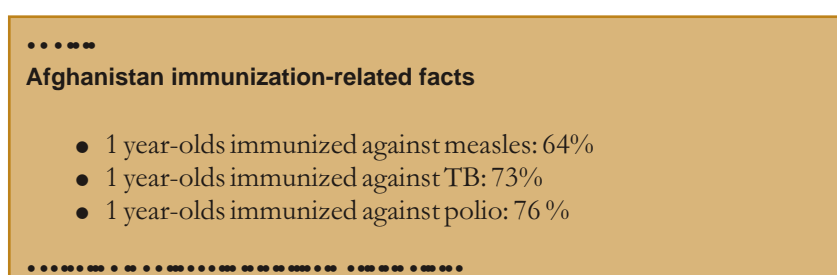
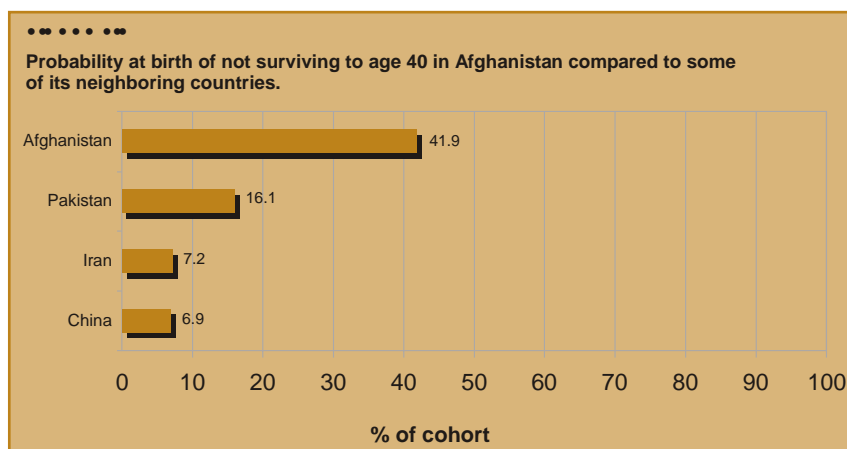
The Government initiated the Basic Package of Health Services (BPHS) in 2003 to address the greatest health problems within Afghanistan, particularly those of the most in need, including women and children. The BPHS is now essentially the basis for the primary care system in Afghanistan. A number of reforms have bolstered health services for women and children, including those in remote rural areas. The Package focuses on the main causes of morbidity and mortality in a cost-effective and affordable manner, and is now accessible to 82 % of the population.<sup>48</sup> Its success thus far provides great hope and momentum for continued progress in reducing child mortality.

#### IMPROVE MATERNAL HEALTH (GOAL5)

Afghanistan's maternal mortality ratio (MMR) is estimated at 1600 per 100,000 live births.<sup>49</sup> Kabul had an MMR of 400 per 100,000, and a remote rural district of Badakhshan 6,500 per 100,000 live births. This particular local rate is the highest ever recorded, even in a country with one of the highest MMRs in the world.<sup>50</sup> Only a few other countries, including Angola with 1700, Malawi with 1800, and Sierra Leone with 2000 deaths per live births are comparable (figure 1.5).<sup>51</sup>

The disparity in the number of women assisted by skilled health personnel in urban and rural areas in this regard is vast. While 52 % of mothers in urban areas are assisted by skilled personnel, only 9 % in rural areas are.<sup>52</sup> This highlights that women in rural areas do not have access to any form of reproductive health care, as well as the urgent need to continue to expand and improve the provision of health care services for women in remote rural areas.

Women in Afghanistan face many barriers to accessing health care. Not only does their restricted mobility inhibit their



#### BOX 1.4

##### Fast facts on child and maternal health in Afghanistan:

- Infant mortality rate per 1,000 live births: 135
- Under-5 mortality rate per 1,000 live births: 257
- Probability at birth of not surviving to age 40: 0.431
- Maternal mortality ratio per 100,000 live births: 1,600

Source: NRVA 2005; JHU 2007; UNICEF 2007

*Many factors increase the likelihood of an epidemic breaking out in Afghanistan, including the prevalence of intravenous drug use and paid sex*

visiting health facilities; the treatment of women by male doctors is largely considered unacceptable. As indicated above, the BPHS is improving health services throughout the country, but a more concerted effort is needed to meet the needs of Afghan women, particularly in rural areas. Significant progress has already been forthcoming. Not only has the number of health care workers increased to 15,001 in 2007; 49.3 % of these are women.<sup>53</sup> Nonetheless, many challenges remain. Many of the deaths of women and children are largely preventable. Such deaths are a direct result of the young age of marriage, overall poor health, frequency of child birth as well as virtually no access to gynecological and obstetrical surveys.<sup>54</sup> As mentioned above, the majority of marriages in Afghanistan are

forced, and many of these involve girls below the age of fifteen. Child marriages constitute about 40 % of all marriages.<sup>55</sup> The gender gap in education also has severe health consequences.

*COMBAT HIV/AIDS, MALARIA, TUBERCULOSIS, AND OTHER DISEASES (GOAL 6)*

Although little hard evidence is available on the prevalence of HIV/AIDS in Afghanistan, UNAIDS and WHO have estimated that the number carrying HIV in Afghanistan could range from 1,000 to 2,000. Many factors increase the likelihood of an epidemic breaking out in Afghanistan, including the prevalence of intravenous drug use and paid sex. The large number of refugees and

### **Afghanistan faces a serious challenge posed by HIV/AIDS**

Afghanistan has low HIV/AIDS prevalence. The first full-blown case was detected in 1998. Since then, given a lack of surveillance and reporting, little is known about how far the virus has spread. The blood banks and the Voluntary Confidential Counseling and Testing Centers (VCCT) are the only sources of information on HIV/AIDS prevalence in the country. So far, they have detected a total of only 61 actual AIDS cases. Though the available information is not representative of all of Afghanistan, it does provide sufficient evidence of an emerging HIV/AIDS epidemic.

For many reasons, Afghanistan is at high risk. Widespread poverty, high unemployment, low literacy, a large number of vulnerable groups, the low social status of women, sex slavery and prostitution, drug production and trafficking, a large number of drug abusers and Injecting Drug Users (IDUs), the poor social and public health infrastructure, lack of blood safety and injection practices, and, perhaps more than anything, a limited knowledge of HIV/AIDS among Afghans - all these factors contribute to making conditions for an HIV/AIDS

epidemic highly favorable. Afghan women are particularly vulnerable to the potential epidemic because of their social status as well as their biological vulnerabilities.

Aside from the poor state of blood transfusion facilities, a lack of comprehensive information on the HIV/AIDS prevalence among those at "high risk" -- in particular, the estimated 14,000 injecting drug users (IDUs) -- throughout the country is a matter of great concern. A study by the Government and UNODC (2005) revealed approximately one million drug users in the country, 14% of them IDUs. Neighboring Iran, Tajikistan, and Pakistan have each reported outbreaks of HIV/AIDS among IDUs. International experience shows that the spread of this infection within the IDU community is rapid.

Because the National Health Policy Document makes no reference to HIV/AIDS, the existing National HIV/AIDS Strategic Plan (2006-2010) is not yet underpinned by a National HIV/AIDS Policy and the political support associated with such a policy. There is only limited understanding of HIV/AIDS as a com-

bined health and development issue at both the senior and technical levels of the Government. At the societal level, little is known about HIV/AIDS. Because the disease is perceived largely as a taboo, signs of infection are denied.

Confronting this threat demands a coordinated policy, followed by decisive action without delay. Targeted resource allocation within comprehensive preventive programs and services must be provided by the Government. Capacity development in the health care system must also be accelerated and the affected communities assisted. The country should move towards a cultural environment in which the HIV/AIDS threat is acknowledged, and strong support is provided to fight it. Social discrimination and the stigma associated with HIV/AIDS should be addressed head-on with realistic and culturally sensitive public awareness campaigns. Policy-makers must project a proactive vision from which specialists can design a multi-pronged HIV/AIDS prevention response that reflects sensitivity to Afghanistan's national capacity.

Source: Mirwais Sarah, UNDP

displaced peoples, high levels of illiteracy, and lack of access to information on the virus and how people can be protected all contribute to Afghanistan's vulnerability to such an epidemic (box 1.5)

Malaria is widespread in approximately 60 % of the country and is extending to higher altitudes as the climate warms. An estimated 8 % of the population is afflicted with malaria each year.<sup>56</sup> Although the annual incidence of malaria is estimated to be 1,500,000 cases per year,<sup>57</sup> the number of cases detected and reported is significantly lower. Malaria incidence has dropped by almost half from 2002 to 2006. In 2002, the number of reported cases was 626,839,<sup>58</sup> yet the officially reported malaria incidence for 2006 is 329,754.<sup>59</sup> The expansion of the BPHS has facilitated the detection and treatment of malaria cases in vast areas of the country.<sup>60</sup>

But Afghanistan has one of the highest incidences of tuberculosis in the world. Among the 22 high-TB burden countries, Afghanistan ranks 17th.<sup>61</sup> The current prevalence of tuberculosis is estimated at 228 cases per 100,000 of the population.<sup>62</sup> The death rate from tuberculosis in Afghanistan is still approximately 12,000 deaths per year.<sup>63</sup> Tremendous progress has been made in detecting and treating cases of tuberculosis over the past six years, resulting in a significant decrease in the prevalence of the disease. There were approximately 50,249 cases of tuberculosis in 2005,<sup>64</sup> though this dropped to 41,000 new tuberculosis cases in Afghanistan in 2006. Women of reproductive age continue to be the majority of the population suffering from this disease. The increase in access to the BPHS has contributed to the detection and treatment of tuberculosis. Over 25,000 individuals were treated for tuberculosis in 2006, approximately 16,000 of whom were women.<sup>65</sup>

#### ENSURE ENVIRONMENTAL SUSTAINABILITY (GOAL 7)

The population of Afghanistan is extremely dependent on environmental resources,

particularly natural resources, for their livelihoods. Environmental degradation directly threatens the livelihoods of Afghans.<sup>66</sup> Forest cover has been reduced by almost half since 1978, and the loss of environmental resources in Afghanistan does not appear to be reversing.<sup>67</sup> From 2000-2005 alone forest cover has dropped from 10,150 to 8,670 square kilometers.<sup>68</sup> Lack of access to alternatives for energy is only one of the reasons for the reduction of forest cover.<sup>69</sup> The extent to which environmental resources are being depleted is further reflected by the extremely high percentage of the population that uses solid fuels (98 % rural and 75 % urban).<sup>70</sup>

Access to safe drinking water varies considerably throughout the country (map 1.2). Only 31% of households nationwide have access to safe drinking water, with

*The increase in access to the BPHS has contributed to the detection and treatment of tuberculosis*



.....

**Access to safe drinking water and sanitation in Afghanistan**

Categories	% households with access to safe drinking water	% households with sanitation facilities within their compounds
<b>Kuchi</b>	16	29
<b>Rural</b>	26	72
<b>Urban</b>	64	85
<b>National</b>	31	73

.....

### Access to safe sanitation facilities, 2005.



In 2006, both houses of parliament ratified the Environmental Law, which provides the National Environmental Protection Agency (NEPA) with the power to "develop and implement national environmental policies and strategies in order to integrate environmental issues and sustainable development approaches into the legal and regulatory frameworks."<sup>73</sup>



In 2004, the Afghan Government estimated that the amount of aid required for minimal stabilization would be \$27.5 billion over a period of seven years, equivalent to about \$168 per capita per year.<sup>75</sup> Disbursements over the period of 2002-2005



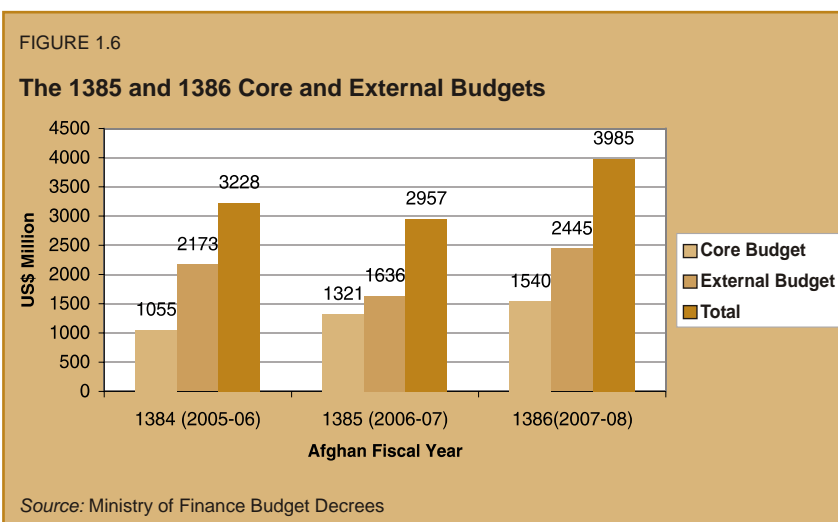
are estimated at about \$83 per capita per year—reflecting initial difficulties mobilizing donor pledges and constrained absorption capacity on the part of the Government.<sup>76</sup> From 2002 until the end of fiscal year 2004/5, only \$3.3 billion of the \$13.4 billion pledged was spent on projects.<sup>77</sup> Approximately \$1.5 billion in official development assistance was disbursed in Afghanistan during Afghan fiscal year 2005/06.<sup>78</sup> However, there are good signs that disbursements are improving, both in terms of Government and donor performance which indicates that aid is likely being used more effectively. Government expenditures as a percent of amount budgeted rose from 65 % in 2005/06 to 71 % in 2006/07.<sup>79</sup>

The Government has put forward an action plan to enhance aid effectiveness, much of which is based in part on the Paris Declaration on Aid Effectiveness. It includes actions to increase Government ownership and to further enable it to exercise effective leadership over development policies and strategies. To accomplish this, the Government emphasizes the primacy of the ANDS as the guiding document for international partnership in combination with the Afghanistan Compact. To align aid flows with national priorities, the Government has requested that donors align their aid flows with national policies. The ANDS enables the Government's international partners to align their aid flows with Government policies while building its capacity.<sup>80</sup> Although as yet most aid monies have been outside the control of the Afghan Government, at least on paper the donors are increasing their commitments to the Core Budget, which is under the Government's control and thus funds its own nationally determined priorities. The Ministry of Finance Budget Decrees reveal that for fiscal years 2006/07 and 2007/08 commitments to the Core Budget have increased to approximately \$ 1.3 billion and \$ 1.5 billion respectively. On the other hand the External Budget, which the Government has limited or no direct control over, has

dropped from \$2.1 billion in 2005/06 to \$1.6 billion in 2006/7 (figure 1.6). According to the Principles of the Paris Declaration, the increase in funding to the Core Budget should increase the effectiveness of aid. Although the proportion of total assistance channeled to the Treasury appears to be increasing, these figures can be misleading. Not only are there problems with spending from the Core Budget; many donors make "off-budget" plans, leading to significant under-reporting of the External Budget.<sup>81</sup>

At present, nearly three quarters of donor assistance is still disbursed and delivered outside the Government budget.<sup>82</sup> Initial findings from a recent study indicate that assistance channeled through the Government can also yield greater local economic impact than funds provided to "international companies or NGOs." According to this recent study, of the \$1.36 billion spent in 1384 by major donors from whom information could be gathered, the local impact was around 31.2 % or \$424 million.<sup>83</sup> Yet this is only one measure of aid effectiveness. To bring changes to the lives of the Afghan people, aid must be used effectively, but also targeted to those areas that will bring about and encourage sustainable development. The benefits of communications and information technology are beginning to reach Afghans throughout the country. Approximately 150 people out of every 10,000 have access to a

*At present, nearly three quarters of donor assistance is still disbursed and delivered outside the Government budget*





*The estimated area upon which opium poppy cultivation is taking place in Afghanistan increased by 59 % in 2006*

telephone or mobile phone. Those with access to telephones varies significantly between urban and rural areas. 830 out of every 10,000 have access to telephones in urban areas versus 30 out of every 10,000 in rural areas.<sup>84</sup> New initiatives are introducing telephone services available to the public in district centres.

#### ENHANCING SECURITY (GOAL 9)

Afghans continue to perceive security as the most striking challenge for the nation.<sup>85</sup> Because security throughout Afghanistan deteriorated significantly in the past year, such opinions continue to be fuelled. The number of fatalities of Afghan civilians, security forces, as well as international civilian and military personnel, was the highest of any year since the establishment of the Interim Authority in 2001. The number of suicide attacks increased five-fold,<sup>86</sup> and anti-government elements continue to demonstrate their strength amidst the ongoing insurgency.

Continuingly high rates of opium production place significant amounts of money in the hands of warlords and organized crime, which in close cooperation with the insurgency, have great potential to continue to destabilize the country, or undermine nascent institutions through corruption.<sup>87</sup> The estimated area upon which opium poppy cultivation is taking place in Afghanistan increased by 59 % in 2006. The extremely high levels of income earned by such actors from the opium crop gives them little incentive to support the state or the licit economy. Licit GDP in Afghanistan was \$US 6.7 billion in 2005/6. The overall potential value of the opium sector of Afghanistan in 2006 is estimated to be the equivalent to 46 % of licit GDP or 32 % of the overall economy, if the opium sector is included in the economy. Because of the strong growth of the licit economy, the overall size of the illicit opium industry declined from 61 % of licit GDP in 2004 to 52 % in 2005 and 46 % in 2006.<sup>88</sup> Initial projections indicate that poppy cultivation is

likely to increase in 2007.<sup>89</sup>

Although the number of Afghan National Police (ANP) has increased in the past year, the force's ability to maintain law and order throughout the country remains weak,<sup>90</sup> and the people's faith in the police remains tenuous.<sup>91</sup> Currently standing at 62,000 the ANP is allowed to take its personnel total to a temporary ceiling of 82,000.<sup>92</sup> Reforming and strengthening the capacity of the Ministry of Interior (MoI), which holds the responsibility for law enforcement, is essential to improving the performance and efficacy of the ANP.

In 2007, the Afghanistan National Army (ANA) reached a strength of 37,000 troops, with an additional 12,000 in training, transit, hospital, and studies. Increased levels of insecurity also inhibited the Disbandment of Illegally Armed Groups (DIAG), but in order to accelerate progress on this front, a DIAG Action Plan has been drafted and approved by the President. A weapons registration program has also been initiated.<sup>93</sup> Furthermore, 132,000 square kilometers of land was cleared of landmines.<sup>94</sup>

Security is a pre-requisite to state-building. The ANP cannot properly function if the ANA cannot secure Afghanistan's borders. DIAG cannot successfully move forward if a legitimate security force is not in place to maintain people's personal security or if disarmed groups do not have other jobs to turn to. Until the Government holds a monopoly of force, its ability to uphold the rule of law, strengthen good governance, tackle the opium trade, or simply control Afghanistan's harsh terrain will remain limited.

#### AFGHAN HUMAN DEVELOPMENT CHAMPIONED THROUGH AN MDG-BASED DEVELOPMENT STRATEGY

The Bonn Agreement, signed in December 2001, laid the path for Afghanistan's political transition, including the establishment of an Interim Authority; the convening of an Emergency Loya Jirga to elect a

Transitional Administration; the drafting and approval of a Constitution; and national elections for a President and the National Assembly. The first gathering of the National Assembly in December 2005 marked the official completion of the transition laid out in the Bonn Agreement. Despite the progress made in establishing democratic institutions in Afghanistan, the Government of Afghanistan and its people still face formidable challenges to develop and consolidate the nascent state.

The Afghanistan Compact signed in January 2006 serves as the framework for further strengthening the Afghan state and society. The Afghanistan Compact articulates the Government's priorities in the areas of security; governance, rule of law, and human rights; and economic and social development. The Afghanistan National Development Strategy (ANDS) will provide the strategy and the mechanisms to achieve the five-year benchmarks agreed upon with the international community in the Afghanistan Compact. The ANDS is also being formulated to move Afghanistan toward the achievement of the MDGs. More than any other instrument, the ANDS is the fundamental vehicle for guiding and monitoring efforts to achieve, by 2020, the country's Millennium Development Goals.

The Interim Afghanistan National Development Strategy (I-ANDS) was presented alongside the Afghanistan Compact in January 2006 at the London Conference. The I-ANDS represents a national consensus of Afghanistan's development priorities and is the interim strategy for meeting the Afghanistan Compact benchmarks. The I-ANDS attempted to accommodate the country's main human development challenges in pursuit of a pro-poor development agenda, and it met the requirements of an Interim Poverty Reduction Strategy Paper (I-PRSP). The I-ANDS is currently being implemented.

The full ANDS will be finalized by mid-2008. A number of activities contributing to

the development of the ANDS are ongoing. For the ANDS to be translated into meaningful change for ordinary Afghans, the strategy must be fully integrated into the national budget. In order to do so, all programs that will make up part of the ANDS will be prioritized and costed. The consultation process is central to the development of the ANDS. Two rounds of consultations on the ANDS will be conducted at the national and the sub-national level. The emphasis is on building national ownership to ensure that Afghans are not only in the "front seat" of the process, but are also securely behind the steering wheel. The process for formulating the ANDS is based, at its core, on consultations with and direct contributions from Afghans, as well as representatives of the international community.

While the MDGs are important, the priority placed on each Goal must be determined through the process of developing the ANDS, and the MDGs should be linked directly to the political agenda of the country.<sup>95</sup> The manner in which MDGs are prioritized will be determined in part by the extensive ANDS consultation process. Through this process communities across the country will contribute to prioritizing the MDGs against other national development priorities. The full ANDS is expected to reflect an overwhelming national consensus on the country's core development priorities for the next five years, as well as to promote all dimensions of human development and progress toward the MDGs.

The ANDS will also meet the requirements of a Poverty Reduction Strategy Paper (PRSP) needed to secure future concessional loans as well as increased debt relief from the international community. One of the challenges faced by the Government of Afghanistan is to develop policies that foster pro-poor growth. This entails targeted interventions to improve the living conditions of poverty stricken households by raising their level of real income along-

*For the ANDS to be translated into meaningful change for ordinary Afghans, the strategy must be fully integrated into the national budget*

*Trust in the Government and the reconstruction process is central to achieving peace and security*

side non-poor households, thus reducing the country's high levels of inequality.

\*\*\*

Although Afghanistan has made significant progress towards achieving the MDGs, the Government and its people still face enormous obstacles to meeting these targets and to furthering human development in Afghanistan. The Government of Afghanistan, its citizens, and the international community have a unique opportunity to move forward towards these objectives.

Afghanistan serves as one of the most prominent examples of the intersection of international peace, security, and development. The country is still at great risk of falling back into conflict. Approximately 50% of countries that have entered a peace agreement after conflict have descended into violent conflict again within ten years.<sup>96</sup> Afghanistan has been working to consolidate peace and security throughout the country since 2001. Trust in the Government and the reconstruction process is central to achieving peace and security. Such trust can only be earned by the Government of

Afghanistan and the international community through a combination of addressing basic needs and by developing a strategy to make reconstruction work over the long-term.<sup>97</sup> Providing resources to this end is insufficient. A national development strategy must be developed that adequately meets the needs of the Afghan people, furthers human development, and addresses the causes of conflict.

In the Millennium Declaration, world leaders declared that:

*"We will spare no effort to free our peoples from the scourge of war, whether between or within States, which has claimed more than 5 million lives in the past decade.. "..."*

They thus resolved to *"strengthen the rule of law in international as in national affairs..."*

For international peace and security to prevail the Government and the nations of the world must develop and implement a strategy sufficient to ensure that the missing links to human development in Afghanistan—the rule of law and access to justice—are tended to.

# Chapter 2



Photo: UNDP

An image of Afghanistan

**The movements for rule of law and for human development have had distinct traditions and approaches. When stronger linkages are forged, these mutually reinforcing concepts can unleash human freedoms and peace across Afghanistan.**



## Rule of law for human development: a conceptual framework

This chapter seeks to provide a conceptual framework for understanding better the legal and moral underpinnings and inherent tensions among the most common approaches to justice in Afghanistan. It also aims to highlight some of the particular rule of law conceptual challenges Afghanistan faces as a country recovering from years of devastation and protracted armed conflict. In light of a theoretical discussion of the definitions of rule of law and consultations with Afghans in different parts of the country, an Afghan definition of rule of law is proposed. This formulation comprises four dimensions: independence of the rule of law institutions; public and fair laws; equal enforcement; and consistency with human rights principles.

Rich and varied, the linkages between the rule of law and human development are also complex and confused from time to time. This derives from the fully developed body of norms and principles associated with the two versions of Islamic *sharia*, positive law, and customary legal traditions that currently exist alongside one another and occasionally compete. This chapter also attempts to lay the ground for developing a future rule of law composite index for Afghanistan. Consequently, the four fundamental dimensions are assessed against the available body of qualitative and quantitative data relating to the rule of law and the country's justice institutions, however limited this data may be.

### MAJOR APPROACHES TO THE CONCEPT AND DEFINITION OF RULE OF LAW

No single universal definition exists for the rule of law. Legal philosophers, sociologists

of law, development specialists, and rule of law reformers have all put forward definitions that vary with the purpose of each attempt and the social, political, and economic context within which each was posited.<sup>1</sup> Some scholars have classified definitions of the rule of law into two major categories: *formal* and *substantive*.<sup>2</sup>

The formalists tend to emphasize the formal characteristics of law and the legal system; they are more concerned with transparent and consistent processes and procedures rather than with their final outcomes. By contrast, proponents of the substantive approach stress the content of law and its normative and moral aspects rather than its form.<sup>3</sup> They stress the sense of justice of a society or community, rather than strict adherence to officially declared rules, procedures, and criteria. As we shall see, both approaches to the rule of law are practiced in the ravaged, violence-ridden Afghanistan of today. For many Afghan legal specialists, the formal features of the rule of law supersede moral substance, while others attach greater importance to ethical, emotional, religious, or political factors in judicial processes.

Similarly, practitioners engaged in rule of law reform have classified definitions as institutional attributes-based and ends-based (see box 2.1).<sup>4</sup> Proponents of the former envision the key elements of the rule of law as: (i) publicly promulgated laws; (ii) a professional, well-trained and efficient judiciary, and (iii) an efficient law enforcement agency that executes judicial decisions professionally.<sup>5</sup> By contrast, those who support an ends-based definition see the rule of law not as a single entity but a composite of at least five separate elements:

*The formalists tend to emphasize the formal characteristics of law and the legal system; they are more concerned with transparent and consistent processes and procedures rather than with their final outcomes*



## Conceptions of the rule of law by leading international organizations

### The United Nations

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

(Kofi Annan, former UN Secretary-General's report, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004.)

### The World Bank

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.

(James Wolfensohn, *Proposal for a Comprehensive Development Framework*, 1999.)

### The European Union

The primacy of law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political, or economic, social, and cultural. This entails means of recourse enabling individuals to defend their rights...The principle of placing limitations on the power of the State is best served by a representative government drawing its authority

from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example:

- a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary;
- effective and accessible means of legal recourse;
- a legal system guaranteeing equality before the law;
- a prison system respecting the human person;
- a police force at the service of the law;
- an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.

(European Initiative for Democracy and Human Rights, *"Presentation on the Rule of law"* 1998.)

### United States Agency for International Development (USAID)

The Rule of law ensures that individuals are subject to, and treated equally according to the law, and that no one is subject to arbitrary treatment by the state. A rule of law that contributes to the building of sustainable democracy is one that protects basic human rights... It is one in which market based economic activity is enabled, and freely operates. It is one in which the processes and institutions of justice are available to all individuals. A democratic rule of law is also one in which the processes and institutions of justice work efficiently and effectively to establish justice and resolve disputes.

(USAID, *Handbook of Democracy*, 1998.)

- (i) a government bound by law, (ii) equality before the law, (iii) law and order, (iv) predictable and efficient rulings, and (iv) human rights.<sup>6</sup>

The variety of approaches set out above

shows that the concept has no fixed meaning or universally accepted definition. However, examining these approaches helps inform the theoretical foundations of this rich concept. It also assists us in contextualizing the key dimensions of the rule of law in Afghanistan, along with their relationships to human development.

## THE RELATIONSHIP BETWEEN THE RULE OF LAW AND HUMAN DEVELOPMENT

As chapter one explained, human development refers to the enlargement of people's choices and capabilities. It not only emphasizes the outcomes of development, but also the process by which these outcomes are achieved. Reaching human development targets and maintaining these achievements depend on effective rule of law in contemporary societies, including war-shattered Afghanistan. Human development is a holistic concept. Legal and judicial development is only one element of a far larger picture of a society's progress, in which rule of law institutions and practices are intricately linked with the goals of economic prosperity, social betterment, and political empowerment. These forms of development complement each other and are mutually reinforcing. This also means that advances in one sector cannot be sustained in the absence of progress across society.

Human development focuses on the freedoms people enjoy rather than simply on the development of institutions—which are the ways and means of achieving development. The judiciary, the legislature, markets, the media, political parties, business enterprises, non-governmental organizations, and other economic, political and social institutions all play specific and interconnected roles in the development of a country's citizens.<sup>7</sup> Within the human development framework, the rule of law is not merely what the law states on paper and what the judicial system formally accepts and asserts as being in accordance with the



law and, therefore, legitimate. Legal development must also set out to enhance people's capabilities—their freedoms—to exercise the rights and entitlements that we associate with legal progress. There are two major reasons for viewing "legal" and "economic", and "social" and "political" development elements of a holistic concept:<sup>8</sup>

First, *conceptual coherence and integrity*: Self-contained notions of development—legal, economic, social and political concerns—are conceptually incomplete. Legal and judicial reform contributes to human development and should be seen as integral components of that overall framework.

Legal development may be contingent on certain social or economic realities. For example, if governments grant women their human rights, this form of legal development may be hollow if these women are unable to exercise any of these rights because they are illiterate. The realization of the legal rights of women depends not only on legislation, but also on the ability of women to read and write and on other social and economic opportunities that women may or may not have.

Second, *causal interdependence*: Development within different spheres is intertwined; progress in one often depends on progress in another. Consequently, legal and judicial reform is important not only for legal development, but also for economic and political development. These are also key elements of human development. We can easily see these links by looking at the way land reform spurred the high growth rates and shared economic expansion of East and South-east Asia, especially Japan, Korea, China, and Thailand. In addition, educational improvement played a momentous part in Asia's economic growth.<sup>9</sup>

## FORMS OF JUSTICE IN WAR-SHATTERED SOCIETIES

In post-war societies the rebuilding and reform of the various justice institutions are

central to the establishment of rule of law, largely because these institutions are often partially or totally destroyed or deligitimized. Widespread human rights violations and war crimes are committed, and the core causes of conflict concerning social injustice continue to exist. The devastating human, economic, social, and political consequences of contemporary conflicts are even more complex and multi-dimensional. Re-establishing effective rule of law and building sustainable peace requires the consideration of three major dimensions of justice: legal, transitional (or rectificatory), and distributive justice.<sup>10</sup>

*Legal justice*: This form of justice refers to the fundamental justice system and rule of law institutions that are designed to maintain law and order and deliver justice. Since legal justice institutions are usually destroyed or deligitimized in the process of conflicts, restoring, reforming, or building them from the ground up becomes an immediate priority as well as a long-term strategy. Restoring the rule of law and justice institutions sends the message of a return to stability, order, and security. It assures citizens that disputes can be resolved through a system of justice, rather than the use of violence, and that the law will be applied independently and enforced equally.

*Transitional (or rectificatory) justice*: The second main form of justice needed in states or societies emerging from conflict is transitional justice, which addresses the gross human rights violations, war crimes, and crimes against humanity that are committed in the process of armed conflict. Transitional justice is critical because of its hugely positive legal, political, and psychological implications for lasting peacebuilding.

*Distributive justice*: The third and relatively neglected form of justice in post-war societies is distributive justice.

*Legal development must also set out to enhance people's capabilities—their freedoms—to exercise the rights and entitlements that we associate with legal progress*

This form of justice concerns the core causes of conflict (real or perceived) related to socio-economic, political, or cultural injustice, such as political oppression and the systematic exclusion of certain segments of the society, together with discrimination against their members.

All three forms of justice are enormously important to Afghanistan. Over the course of several decades, the country's rule of law institutions have been either completely destroyed or severely damaged. Warlords in different part of the country applied laws arbitrarily so as to serve their own interests.<sup>11</sup> Consequently, re-establishing legal justice in Afghanistan is critical to preventing the subversion of justice by individuals.

In the process of this brutal conflict, various war crimes and crimes against humanity were committed, along with gross human rights violations.<sup>12</sup> Transitional justice initiatives will be necessary to provide redress for victims of such atrocities and to further reconciliation within Afghanistan.

Political repression, unequal distribution of political power, and perceptions of cultural injustice have long existed in Afghan society.<sup>13</sup> Factional leaders have exploited the realities and perceptions of these injustices, contributing to the intensification and continuation of the conflict. These leaders, together with warlords, committed serious crimes, including the illegal appropriation of private and public lands, looting national treasure, and misallocating huge sums of aid and goods that were intended for war-stricken Afghans.<sup>14</sup> These crimes not only exacerbated the already large gap between the poor and the rich, but also created an acute sense of economic and social injustice among ordinary citizens. Without the adoption of distributive justice mechanisms for redress, conflict can once again break out.

All three forms of justice—legal, transi-

tional, and distributive—need to be addressed simultaneously. While the need for legal justice may seem most pressing, all three forms are intricately intertwined in the Afghan context. Rectifying past wrongs and guaranteeing equal rights for all citizens depend tremendously on the establishment of effective legal and justice institutions. Transitional and distributive justice initiatives also have the potential to strengthen legal justice and rule of law institutions by increasing their legitimacy and people's trust in them.

A fourth form of justice, "restorative justice", is also highly relevant to peacebuilding and promoting the rule of law in Afghanistan. Restorative justice refers to a process for resolving crimes by focusing on redressing the harm done to the victims, holding offenders accountable for their actions, and often engaging the community as well in the resolution of that conflict.<sup>15</sup> Restorative justice frequently entails a community-based model of justice that strongly emphasizes the restoration of dignity, peace, and relationships between offenders and victims and the provision of restitution to victims. It is also used to promote the reintegration of offenders into the community.<sup>16</sup> To these ends, it often takes advantage of endogenous informal and semi-formal processes and mechanisms for delivering justice and settling disputes (box 2.2).

Restorative justice usually involves a shift in attention away from the centralized state (and mainly punitive) justice system and gives communities ownership of the problem of crime and its solutions; it enables the main stakeholders—victims, offenders, and the community—to find solutions that they find suitable and satisfactory. For these reasons, restorative justice programmers are increasingly accommodated within the state justice systems of many developed and developing countries, and are strongly promoted by the United Nations.<sup>17</sup> This form of justice also has important implications for making the other three main forms

*Political repression, unequal distribution of political power, and perceptions of cultural injustice have long existed in Afghan society*

of justice—legal, rectificatory, and social justice—more communitarian and people-oriented. Further, the spirit of restorative justice has much in common with traditional local institutions of dispute settlement in Afghanistan known as *jirgas* and *shuras*.

Because Afghanistan's devastated formal justice system lacks human and material resources and widespread legitimacy, the country would do well to harness the positive powers of these local traditional institutions, along with other Alternative Dispute Resolution (ADR) mechanisms—the more so given evidence of pervasive corruption within the remains of the formal system. Chapter five will examine why the *jirga* and *shura* are perceived as more legitimate, less corrupt, and more effective than state bodies in the settlement of disputes, despite some of their serious shortcomings. They resolve disputes through good offices and the expertise of local elders and are, thereby, both cost-effective and efficient. These institutions, especially the *jirga* and *shura*, could also be incorporated into the formal justice system in meaningful ways. The two systems could complement each other to deliver justice efficiently and in accordance with Afghan legal norms and international human rights principles. While this issue will be discussed in chapter six, it is important to point out here its relevance to the rule of law.

## THE RULE OF LAW IN AFGHANISTAN

The rule of law in the Afghan context is too complex to be described in a severely circumscribed way. While the inclusion of key elements of a formal and institutional attributes based definitions of the rule of law is essential, it is equally important to pay full attention to ends-based and substantive definitions. Indeed, the substantive elements of the rule of law in Afghanistan may be more important than its formal elements. As one recent field

### BOX 2.2

## Peace-making committees, Zwelethemba (South Africa)

In 1997, the Community Peace Programme launched a "model-building experiment" aimed at mobilizing local knowledge and capacity around issues of dispute resolution and community-building. The project took place in a local community in Zwelethemba, a township near Worcester. The peace committees are made up of local township residents who undertake both peace-making and peacebuilding. Peace-making revolves around resolving specific conflicts, while peacebuilding aims to address the underlying problems in the community, such as poverty or lack of access to services. Peace-making activities deal with a range of legal disputes—including both civil and criminal matters.

The peace committees initially received almost all their referrals directly from the community rather than the police or the courts. As the

project evolved, however, increasing interaction has taken place with state agencies, notably the police.

The process does not follow strict procedural rules, though there are "steps in peace-making" that are followed as guidelines rather than rules. The committees have developed their own code of good practices, and all problem-solving techniques must be legal and adhere to the code. The peace-making process does not involve adjudication, but rather focuses on discovering what can be done to reduce or eliminate the problem. The outcomes of peace-making meetings are restorative in nature: apologies, restitution, and compensation.

Peacebuilding initiatives take the process even further, looking at the wider issues affecting the community and trying to resolve these problems with a view to avoid a reoccurrence of the conflict.

Source: UNODC, *Handbook on Restorative Justice Programmes*, Vienna, 2006 (p.28)

study states:

*As against the international framework of justice as a universal application of rights and obligations, Afghans' prize a notion of "fairness," which is often relative and shaped by local norms. This notion is the driving perception during their everyday experiences in conducting legal arrangements and conflict resolution outside of the government legislated system of laws. This popular notion of fairness forms the most authoritative basis for building consensus, signing contracts, and resolving disputes throughout Afghanistan.<sup>18</sup>*

During the consultations for this Report held in Kandahar, people described the rule of law negatively. They viewed the formal justice and rule of law institutions as mainly serving the interests of the powerful at the

*Because Afghanistan's devastated formal justice system lacks human and material resources and widespread legitimacy, the country would do well to harness the positive powers of these local traditional institutions*

*They [people] want  
rules enforced equally  
for everyone*

expense of the powerless. When asked what the Rule of Law meant to him, one man replied, "It is a sword whose grip lies in the hands of the rulers, and its blade in the hands of ordinary people"<sup>19</sup> —a view also expressed by the cartoon below. The man amplified this epigram by saying that in the current situation in Afghanistan, the legal system was designed to oppress and exploit the powerless whenever they came into contact with it; those with guns and money who dominated political power applied the law as they wished with regard to all crimes, including murder.

A professor at Kandahar University took much the same view:

"Actually the rule of law in this country is born at the home of the ruler dies at the home of the rich, and is buried at the home of a *mullah* (Muslim religious leader). Look who dominate the Parliament? Who are senior police officers? Who are [provincial] governors? You know who they are—these are the people who make laws and enforce them."<sup>20</sup>

He added that many of the government officials considered themselves above the law and, in fact, were former *mujahideen* commanders and factional leaders.

Those who described the rule of law

positively held that it was essentially about equal application of the law to all groups, especially the state and state officials. A man in western Herat province said, "rule of law can prevail in Afghanistan when both ordinary people and the state abide by the law in the same way, and no one takes advantage of his (and her) status in the violation of law. The rule of law means the application of the law to everyone in the same way."<sup>21</sup>

Similarly, a student at Herat University described the Rule of Law in the Afghan context as "the supremacy of law over [personal, ethnic/tribal and factional/ideological] relations in public life. This means the eradication of corruption in government offices and in public life..."

All in all, the statements of Afghans throughout the country during such consultations clearly indicate their desire for strengthening the formal institutions of the rule of law—especially the judiciary—and the independence of these institutions from the influences of the politically powerful. They want rules enforced equally for everyone. They want the power of state and state officials checked closely through the application of rules that are publicly promulgated through legitimate processes (see box 2.3).

In addition, many said that the rule of law could be strengthened only if ordinary people perceived it as consistent with Islam and their cultural traditions. As a Nangarhar University student put it: "The Rule of Law can only prevail in Afghanistan, when our laws are in line with Islamic Law, with our cherished customs and traditions, and with our moral values. In addition, laws can only be enforced promptly and fairly, when they are applied by judges who are good Muslims and fair-minded."<sup>22</sup> A student at Kandahar University went even further, saying "The current talk about the rule of law and democracy is nonsense; it is talk about (President) Bush's law, which is against Islam. Fairness and the Rule of Law in Afghanistan are not possible without the implementation of Islamic law."<sup>23</sup>





Other Afghans, including high-ranking judicial officials, in Kandahar stressed the importance of customary law and traditional institutions of dispute settlement for the rule of law. They underscored the important role of traditional mechanisms of conflict resolution in maintaining social order at local levels—which, in turn, resulted in the maintenance of law and order at a broader societal level. Indeed, the head of the provincial appeal Court in Kandahar<sup>24</sup> said:

...most people [here] resolve their disputes through the *jirga*. And this helps us and the local people a great deal. In fact, *jirgas* do the jobs that courts in Kandahar are unable to do: First of all, because of security problems and our weak enforcement capabilities, we could not enforce our decisions. But the *jirgas*' decisions are enforced by the community through social pressure and other mechanisms. Second, courts could settle a dispute, but could not end enmities between the disputants. A *jirga* does both. In most civil cases, we encourage people to resolve their disputes by *jirga*, and then bring them to the court. As long as these decisions do not contradict the law and *sharia*, we endorse them formally.

What was very interesting in the process of consultations was that even local officials and members of civil society organizations in Kandahar expressed views similar to those of local people and university students. Only an official of Afghanistan's Independent Human Rights Commission (AIHRC) favored strengthening formal rule of law institutions, and criticized traditional mechanisms of conflict resolution as "backward and discriminatory against women."<sup>25</sup> However, he hardly ignored the importance of traditional mechanisms of conflict resolution; he stressed the compatibility of these mechanisms and human rights principles.

#### BOX 2.3

### Afghans views on the rule of law

The rule of law means creating a legal system, fairness, and social justice in Afghanistan. It is a fair legal system that distinguishes between right and wrong. The rule of law must promote development progress in Afghanistan.  
(A woman from Hawze Karbas, Herat)

We talk about the rule of law when laws are applied on every one in the society—on the powerful, the powerless, the poor, the rich, the rulers, and on ordinary people. No one should be above the law—whatever he may be. In Afghanistan, if every state official set an example by obeying the law, then there will be no problems in the implementation of law. Currently the rule of law does not have a practical side; it is law only on paper.  
(Nangarhar University student)

### AFGHAN RULE OF LAW: A PROPOSED DEFINITION AND ITS KEY DIMENSIONS

*For Afghans, the rule of law refers to all those state and non-state institutions that promote justice and human development through the application of public rules that are deemed fair, applied independently, enforced equally, and consistent with human rights principles.*

This proposed definition derives from a review of the existing body of literature, as well as the extensive consultations and interviews conducted for this Report. It encompasses public institutions, institutional processes, and rules dealing with four fundamental dimensions described earlier: independence of the rule of law institutions; public and fair laws; equal enforcement; and consistency with human rights principles. Further, the definition embraces and encourages the coexistence of the three major legal traditions in Afghanistan today: Islamic *sharia*, Western positive, and customary law (box 2.4).

The four dimensions of the Afghan definition of the rule of law—independence of the rule of law institutions, public and fair laws, equal enforcement, and consistency with human rights principles—are assessed against the limited body of qualitative and quantitative data available relating to the rule of law and the justice system in today's Afghanistan. Special stress is placed on the key justice institutions, namely the

*In fact, jirgas do the jobs that courts in Kandahar are unable to do: First of all, because of security problems and our weak enforcement capabilities, we could not enforce our decisions*

*A major issue is the independence of the Afghan judiciary institutionally from the executive so as to hold the state accountable to the rule of law*

judiciary, the police, the attorney general's office and prison system—key institutions for promoting the rule of law. Their institutional attributes and the links among them as a system are assessed in terms of such factors as the number of qualified police, judges, prosecutors, and prison officers who have received training; the level of the rehabilitation of courts and prisons; the level of the functioning (and effectiveness) of these institutions; and their perception by ordinary Afghans are used as indicators of the level of the [re]-establishment of the rule of law in Afghanistan (table 2.1).

#### THE INDEPENDENCE OF AFGHAN STATE AND NON-STATE RULE OF LAW INSTITUTIONS

The independence of the application of law by relevant institutions is a key element of the formal definition of the rule of law. It ensures that both citizens and the state are subject to the rule of law. The relationship between the executive and the judiciary, and the insulation of judges from political, economic and other pressures, are examined. A major issue is the independence of

the Afghan judiciary institutionally from the executive *so as to hold the state accountable to the rule of law*. Similarly, traditional non-state institutions of dispute settlement that contribute to the maintenance of social order must be impartial indirectly. The extent of their independence from the influences of local strongmen is measured against both the qualitative data furnished by Afghanistan Research and Evaluation Unit and the qualitative data produced by the Centre for Policy and Human Development survey for this Report.

#### FAIR AND PUBLIC AFGHAN LAWS

Another major dimension of the of the Afghan definition of the rule of law is the public promulgation of rules as clearly written laws after they go through all the necessary formal processes of legislation. Laws that pass through appropriate legislative mechanisms and declared publicly are more likely to reflect the wishes and needs of members of society. This, in turn, makes laws and the outcomes of their application predictable. And this is important for the consolidation of the rule of law in society. This dimension can be measured, in part, by the number of laws that have been drafted and adopted since 2004, along with the conformity of this legislation to the Afghan Constitution and to other legislative processes.

Substantive issues are equally important for the establishment of the rule of law: because Afghans prize the notion of fairness, shaped by local cultural, moral, and religious factors, it is essential to pay attention to the sense of both justice and the rule of law expressed by ordinary people. As indicated earlier, most of those consulted for this Report said that Afghan laws could be fair only when they were consistent with Islamic principles. Further, as chapter five will demonstrate, it is important to take into account the importance of customary Afghan laws, which are not publicly promulgated, but largely govern social

#### BOX 2.4

### Major legal traditions in Afghanistan

*Islamic Sharia:* *Sharia* in Arabic means "the path to follow", and it also refers to legislation, legitimacy, and legality in modern Arabic literature. In a jurisprudential context *sharia* means Islamic Law, the primary sources of which are the *quran* (The holy book of Muslims) and the *sunnah* (the statements and deeds of the Prophet of Islam). The secondary sources of *sharia* mainly include *ijma* and *qeyas*. The first refers to the consensus of Islamic jurists on a ruling, and the second to analogical reasoning—deriving new rulings for cases and questions not seemingly found in the primary sources of *sharia*.

*Positive Law:* In contemporary jurisprudence positive law generally refers to man-made law, which is

created by governmental authority through formal processes and is codified into a written form or statutory law. In the Afghan context, the term is often used to refer to secular state law—in contrast with *sharia* and *orf* (customary law).

*Customary law:* Customary law or *orf* may be described in the Afghan context as those law-like unwritten social/moral codes of behavior that are deeply present in the collective conscience of members of a community (tribe, ethnic group, village), which have binding effects (socially and morally) on members. These codes of behavior are often used as a guide for local dispute settlement within the contexts of *jirgas* and *shuras*.



TABLE 2.1

**Measuring the four dimensions of Afghan Rule of Law**

	Unit	Value	Year	Source
<b>1. Independence of institutions</b>				
I. Judges appointed in accordance with objective merit-based criteria	%			Information not available at present
II. Police officers appointed in accordance with objective merit-based criteria	%	1.4	2007	Ministry of Interior, 25.03.07
III. Degree of independence of the judiciary from the executive and political factions/warlords	-			Information not available at present
IV. Degree of independence of <i>jirga/shura</i> from influence of government and local warlords	-			Information not available at present
V. Cases handled by the public defender, legal aid, or law clinics	No.			Information not available at present
<b>2. Public and fair rules</b>				
I. Laws submitted to the legislature that were drafted in the last two years	No.	14	2005-06	Ministry of Justice, 19.03.07
II. Laws ratified in the past two years	No.	5	2005-06	Senate, 19.03.07
III. Percent of people who regard State Courts as being fair	%	65	2007	CPHD survey: Agree "strongly" or "somewhat"
IV. Percent of people who regard decisions of <i>jirga/shura</i> as being fair	%	82	2007	CPHD survey: Agree "strongly" or "somewhat"
<b>3. Equal enforcement of Afghan laws and access to justice</b>				
I. Criminal cases involving high-ranking government officials brought to trial in the last 2 years	No.			Information not available at present
II. Persons per judge	Rate	21,317	2007	CHECCHI/USAID
III. Percent of court houses that are functional	%			Information not available at present
IV. Persons per police officer	Rate	381	2007	Ministry of Interior
V. Persons per local <i>jirga/shura</i>	Rate			Information not available at present
<b>4. Consistency of Afghan laws with Human Rights principles</b>				
I. Laws passed in the last two years incorporating the principles of human rights	No.	11	2005-06	AIHRC Annual Report 2006, p. 46 and Annual Report, 2005, page, 46
II. Human rights violations filed with the AIHRC in the last two years, per 100,000 population	Rate	29	2005-06	AIHRC Annual Report 2006, p. 25 and Annual Report, 2005, page, 43.
III. Human rights violations brought to trial in the last two years	No.			Information not available at present
IV. Alleged war criminals brought to trial in the last two years	No.			Information not available at present

relations at the community level.<sup>26</sup> These unwritten laws are deeply present in the collective consciousness of local populations. The notion of fairness and sense of justice are measured by indicators, such as trust in the legal system or the extent of the perception of fairness of the legal system (see table 2.1).

#### *THE EQUAL ENFORCEMENT OF AFGHAN LAWS AND ACCESS TO JUSTICE*

The enforcement of rules, regardless of gender, social class, ethnicity, and political power is another important dimension of both formal and end-based definitions of the rule of law. But more importantly in the process of consultations with ordinary Afghans, the equal enforcement of law emerged as central to their conception of the rule of law; for most Afghans, the rule of law can exist only when laws are enforced equally for the poor, the rich, the politically powerful, and the powerless. This is assessed by the extent to which the police, courts, and prison services represent the various segments of society and treat them equally. The issue of access to justice and of legal aid to disadvantaged segments of society is addressed in this context. In addition, women and those without connections to state officials and/or money (for bribes) seem to receive the short end of the law.

#### *THE CONSISTENCY OF AFGHAN LAWS WITH HUMAN RIGHTS PRINCIPLES*

Both the Bonn Agreement (2001) and the Afghanistan Compact (2006) strongly emphasize the conformity of Afghan laws to fundamental principles of human rights. This dimension of the proposed definition largely represents the demands of the international community and donor countries. Few Afghans who were consulted saw this as an important dimension of the rule of law. Despite the importance of understanding the issue of "cultural

relativism" in the Afghan context (and potential tension between certain Islamic and human rights principles), the Afghan Constitution and new and amended Afghan laws are consistent, in general, with the fundamental principles of human rights. The main problem here is with traditional justice institutions and mechanisms, which on occasion contravene fundamental principles of human rights—an issue that will be examined in chapter five. In addition, the rule of law without human development and the delivery of justice may not necessarily have desirable outcomes: oppressive laws, policing, and prison regimes may promote social order, but they may exacerbate the problems of the poor, along with the socially, economically, and politically excluded groups. This dimension of the definition, too, is assessed against available qualitative and quantitative data.

#### **AFGHAN RULE OF LAW AND HUMAN DEVELOPMENT: STRATEGIC LINKAGE**

The relationship between the rule of law and human development is multifaceted. The rule of law in Afghanistan is underpinned by four key dimensions as outlined earlier. If state and non-state institutions (including traditional councils, the media, and civil society organizations) act independently; are governed and govern by public and fair laws that are consistent with human rights principles; enforce laws equally; and promote access to justice, they are well-positioned to promote human freedoms. These freedoms enable people to utilize fully their capabilities to improve the quality of their lives and their communities—in short, the essence of human development. When human development is enriched, it contributes to the creation of a virtuous circle that helps buttress efforts of the key state and non-state rule of law institutions to uphold justice and the rule of law. Human development and the rule of law can forge a mutually beneficial relationship that enhances the impact of these

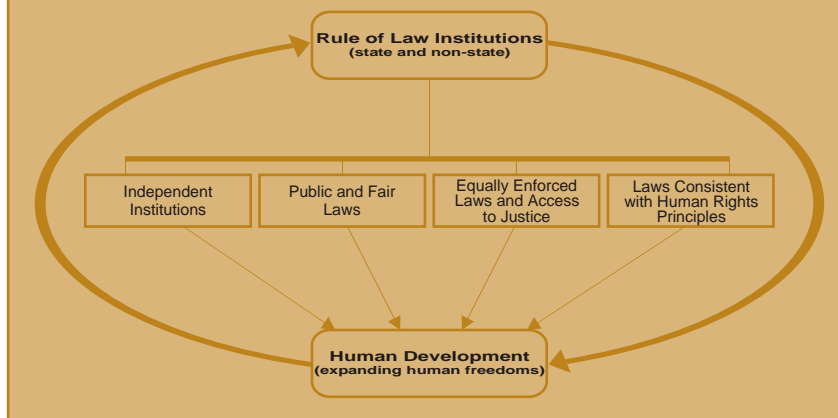
*Human development and the rule of law can forge a mutually beneficial relationship that enhances the impact of these interdependent concepts*

interdependent concepts as figure 2.1 illustrates.

As the above diagram shows, legal and justice institutions—especially an independent judiciary—can deliver justice in an impartial manner. This assures ordinary people that the state is not above the law and enables its citizens to freely exercise their economic, political, and social rights—especially those central to human development. In Afghanistan, if non-state institutions of dispute settlement are impartial and if their decisions are consistent with human rights principles, they have tremendous potential to supplement and strengthen state rule of law institutions and to promote human development. The independence of Rule of law institutions alone is not sufficient for prompting human development if laws do not represent the values, wishes, and needs of ordinary citizens, or if they are seen as unfair. When members of society (or their representatives) are involved in the creation of laws, they are more likely to see these laws as relevant to their lives and fair and, hence, binding on their behavior. Perceiving laws as fair increases people's trust in the law and respect for it. And this, in turn, has important implications for law enforcement. People are more likely to obey the law that they have accepted and trust, even in the absence of strong law enforcement agents.<sup>27</sup>

In addition to the independence of rule of law institutions and their perception as fair, laws must be enforced equally on everyone—the poor, the rich, the powerless and the powerful, and among women and men alike. This prevents the strong from violating the rights of the socially, economically, and politically excluded. Protecting citizens' economic, political, and social rights facilitates their human development. Access to justice, especially for the socially excluded and disadvantaged, is critical to equal enforcement of the law. Only when the law serves these citizens can it have a meaningful impact on human.

FIGURE 2.1  
The links between Afghan rule of law and human development



Legal and justice institutions promote human development when the laws in which they are governed by are consistent with human rights, including political and civil liberties as well as economic, social, and cultural rights. When these laws are upheld by effective institutions, these institutions are closely bound to advancing human development. Even when a government lacks the resources to fulfill the rights of all, recognizing human rights and ensuring that laws incorporate human rights helps encourage their fulfillment. The institutionalization of human rights also helps ensure that those responsible for implementing justice do not harm citizens.<sup>28</sup> Nonetheless, in the Afghan context, tensions do exist between aspects of national laws and human rights principles. These tensions need to be resolved prudently and sensitively.

These mutually reinforcing attributes of the rule of law can release human freedoms throughout the country and buttress the foundations of peace. Enhanced human development could also play an important role in contributing to the consolidation of the rule of law. When people are educated, healthier, and have a decent standard of life, they also have a stake in the maintenance of law and order, and in the rule of law. Thus, as figure 2.1 illustrates above, a two-way relationship exists between the rule of law and human development.

*The institutionalization of human rights also helps ensure that those responsible for implementing justice do not harm citizens*

*Enhanced human development could also play an important role in contributing to the consolidation of the rule of law*

For national policy-making, for a comparison of national human development trends, and for the purposes of international comparison, it is important that the various dimensions of the rule of law in Afghanistan are measured in standardized ways against empirical data. This, however, is a daunting task in Afghanistan. Nevertheless, an attempt is made towards developing a rule of law composite index for Afghanistan.

## **TOWARDS A RULE OF LAW COMPOSITE INDEX FOR AFGHANISTAN**

Although insufficient data has prevented the full construction of a composite rule of law index in time for the publication of this report, this measurement tool remains a worthwhile goal for future analysis of the rule of law in Afghanistan. Its key attributes and the ways it could serve as a tool for informed policy-making are outlined below.

One of the first attempts at developing a rule of law index was presented in the global *Human Development Report 1992*. The Report's second chapter dealt with political freedom and human development, and it identified the rule of law as one of five broad clusters of political freedom. Emphasizing the need for appropriate indicators of political freedom, it suggested three criteria for these indicators: the relevance to human development, universal applicability, and freedom from cultural bias. For the rule of law component, *HDR 1992* recommended that indicators be easily quantifiable and suggested a checklist of five: (i) fair and public hearings; (ii) competent, independent, and impartial tribunals; (iii) availability of legal counsel; (iv) review of conviction; and (iv) possible failures to prosecute government officials or pro-government forces. The authors concluded at the time that further research should be undertaken on a political freedom index—in a university or other research center—to improve its conceptual, methodological, and statistical basis.

To apply the rule of law index to the context of Afghanistan, the present HDR team has consulted several sources of information: the four rule of law high-level benchmarks contained in the Afghanistan Compact of January 2006; the interim Afghanistan National Development Strategy (I-ANDS), which includes the same four rule of law benchmarks, together with a detailed list of targets and indicators to be met by the end of 2010; the detailed list of rule of law indicators contained in the USAID Handbook of Democracy and Governance Program Indicators; the various rule of law indicators (from a variety of sources) available on the World Bank's governance website; and the list of indicators shown in table 5 of the 1999 report on *Human Development in South Asia*.

All these sources, supplemented by empirical evidence, led to a specific definition of the rule of law for use in Afghanistan, along with a range of indicators that correspond to each of the four dimensions of the rule of law discussed above. The values of those indicators that are known to date appear in table 2.1.

The indicators are shown under the four broad headings that characterize the definition of the rule of law in Afghanistan: independence, fairness, equality in enforcement, and consistency. Each of these terms merits some explanation.

Of the 18 indicators tabulated below, five relate to the dimension of independence, four to fairness, five to equal enforcement, and four to consistency with the principles of human rights. Table 2.2 indicates the probable availability of data. Although data for most indicators are likely to be available, none is currently available for six.

Collecting the data required for each indicator is the necessary first step for producing a rule of law index. The next is deciding how the indicators will be combined within each dimension and the weight assigned to each. The final step entails deciding how to combine the indices for each dimension to achieve an

TABLE 2.2

Key dimensions of Afghan rule of law and associated indicators

Availability of indicator

	Potentially available now	Available within 5 years
<b>1. Independence of Afghan rule of law institutions</b> (State and non-State institutions)		
I. Percentage of judges appointed in accordance with objective merit-based criteria		✓
II. Percentage of police officers appointed in accordance with objective merit-based criteria	✓	
III. Degree of independence of the judiciary from the executive and political factions/warlords		✓
IV. Degree of independence of <i>jirgas/shuras</i> from the influence of government and local warlords		✓
V. Number of cases handled by the public defender, legal aid, or law clinics		✓
<b>2. Public and fair rules</b>		
I. Number of laws submitted to the legislature that were drafted in the last two years	✓	
II. Number of laws ratified in the past two years	✓	
III. Percent of people who regard State Courts as being fair	✓	
IV. Percent of people who regard decisions of <i>jirgas/shuras</i> as being fair	✓	
<b>3. Equal enforcement of Afghan laws and access to justice</b>		
I. Number of criminal cases involving high-ranking government officials brought to trial in the last two years		✓
II. Number of people per judge	✓	
III. Percent of court houses that are functional		✓
IV. Number of people per police officer	✓	
V. Number of people per local <i>jirga/shura</i>		✓
<b>4. Consistency of Afghan laws with Human Rights principles</b>		
I. Proportion of laws passed in the last two years incorporating the principles of human rights	✓	
II. Number of human rights violations filed in the last two years, per 100,000 population	✓	
III. Number of human rights violations brought to trial in the last two years		✓
IV. Number of alleged war criminals brought to trial in the last two years		✓

overall score.

To take one example, for the first dimension—*independence*—the five indicators cannot be combined in their present format because they are measured in different units. The first two are percentages, the fifth a number. Moreover, the units of the third and fourth indicators are unclear at the moment. If the last indicator were expressed as a percentage (perhaps by finding out also the number of cases not dealt with by the public defender, legal aid, or law clinics), it would be possible to combine the first two indicators with the last. If all three indicators are considered equally important (ignoring the third and fourth indicator for the time being), a simple average of the three indicator values could be calculated, and the result divided by 100 to provide an index for the dimension of

independence.

Similar considerations would be required for the second dimension—*fairness*—where two of the indicators are percentages and the other two whole numbers. For the third dimension—*equal enforcement*—the situation is more complicated. Here, the first indicator measures the number of cases, while the third indicator is a percentage, and the other three indicators are rates. A methodology would therefore have to be developed so as to produce a single index for fairness.

For the fourth dimension—*consistency with human rights principles*—the first indicator is a percentage and the second a rate, while the third and fourth are numbers of cases. Even when two indicators are measured in the same units (e.g. number of cases), a decision needs to be made about



*From the human development point of view, legal and judicial development concerns far more than a well-functioning judiciary, professional police, and an effective prison service*

how they should be combined.

Clearly, designing a suitable index still demands considerable research, but the broad outlines of the indicators are set out below. At this stage, the most helpful task is the collection of data for each indicator. In turn, collecting this information requires care in specifying the source (person and agency); the date on which the information was received; the date or period to which the data refers; and any special definitions or characteristics that may help the researcher to understand the information collected.

These rigorous requirements notwithstanding, the rule of law composite index can provide a quantifiable baseline of the extent and quality of the rule of law in Afghanistan. It would allow policy-makers not only to better understand the current state of the rule of law throughout the country, but also enable them to formulate and adjust their strategies for strengthening and reforming the justice sector accordingly. In addition, if continuously updated, the index could further their understanding of where progress is being made within the sector.

\* \* \*

This chapter examined the basic elements for devising an Afghan definition of the Rule of Law grounded in existing literature and contextualized in current national realities. It proposed a definition comprising four dimensions: independence of the rule of law institutions; public and fair laws; equality in enforcement; and consistency with human rights principles. In addition, the chapter assessed each of these four dimensions against relevant available qualitative and quantitative data, and tabulated the results.

Both individually and together, these dimensions contribute to human development. Conversely, human development plays an important role in promoting and consolidating the rule of law. From the human development point of view, legal and judicial development concerns far more than a well-functioning judiciary, professional police, and an effective prison service. Legal and judicial development help enhance people's capabilities—their freedoms—to exercise the rights and entitlements associated with legal progress. In short, legal development and human development go hand-in-hand.



# Chapter 3



Photo: UNDP

Afghan National Army in the making

Multiple problems threaten the expansion of the rule of law in Afghanistan. A holistic response to the inter-related challenges to strengthen the rule of law is required for justice and law enforcement institutions to promote human development for all Afghans.



## Key challenges to establishing the rule of law

Establishing the rule of law in Afghanistan entails resolving multiple problems that not only threaten the lives and livelihoods of Afghans, but also contribute to regional destabilization. This chapter considers the key challenges of personal insecurity, past human rights violations, injustice towards women and children, the growing narcotics trade, institutionalized corruption, and land disputes from a human development perspective. The final chapter of this report, chapter six discusses the holistic approach required to respond to these interrelated obstacles to the expansion of the rule of law in the country.

### THREATS TO PERSONAL INSECURITY

Security is a prerequisite for the rule of law that, in turn, creates an environment conducive to human development. It is also essential to the independent functioning of the judiciary in accordance with national laws and internationally accepted norms of human rights. The current security environment in Afghanistan is hardly uniform. While parts of the country have moved into a post-conflict phase and even beyond, other areas still face armed violence and require humanitarian help.

In Kabul and in the North, North-West, West, and Central regions, state and non-state agencies operate in post-conflict and even development modes. By contrast, in the East, South, and South-West, Government agencies are extremely weak and isolated from the population, while non-state agencies are either absent or work with an extremely low profile. In the southern provinces, Afghan and interna-

tional forces control the main towns and district centers during the daytime, while at night, anti-Government elements maintain a disturbing freedom of movement.<sup>1</sup>

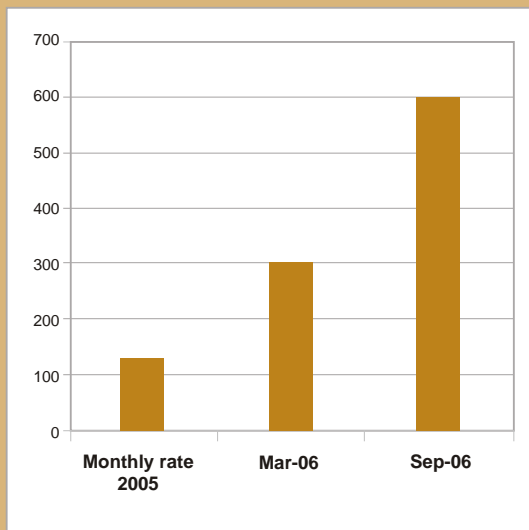
From 2005 to the present, the insurgents' response to both international and Afghan security forces has increased the risk to civilian lives and livelihoods exponentially. An overwhelming majority of citizens who had suffered under the authoritarianism of the Taliban welcomed its overthrow 2001. However, Afghans also crave security and stability. These attributes appear elusive with the increasing number of insurgent attacks. In 2006 alone, more than 4,400 Afghans, including 1000 civilians, died from

*Security is a prerequisite for the rule of law that, in turn, creates an environment conducive to human development*



Courtesy: Hozhabar Shinwary

FIGURE 3.1

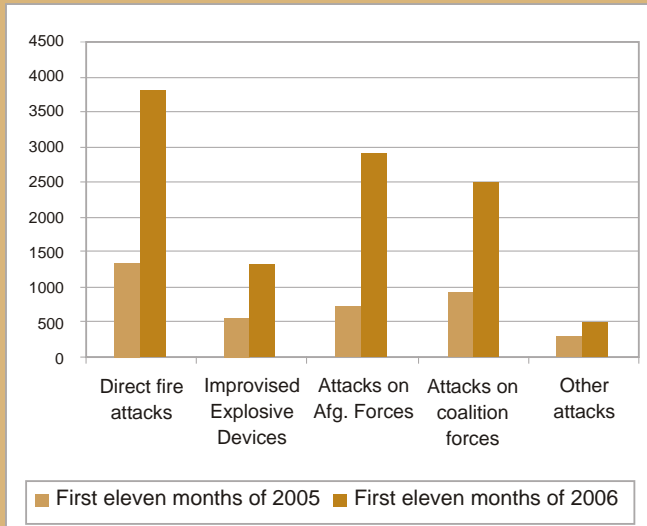
**Number of attacks per month launched by insurgents, 2005-2006**

Source: The Associated Press, *Insurgent Activity Rising in Afghanistan*, 13 November 2006.<sup>3</sup>

an average of three per day in 2005 (for an annual total of 1,347) to more than ten per day in 2006 (for an annual total of 3,824). Similarly, during this period, the use of improvised explosive devices increased from 530 to 1,297 and other types of deadly attacks from 269 to 479. The total number of incidents against Afghan forces also increased from 713 to 2,892 and attacks against the Coalition forces from 919 to 2,496 (figure 3.2).<sup>4</sup>

Moreover, suicide attacks, previously little known in the Afghan conflict, have taken their toll on Afghan civilians. Two were recorded in 2002, 27 in 2005 and 139 in 2006 (figure 3.3), killing 212 civilians and 12 foreign military personnel and effectively terrifying the non-combatant population.<sup>5 6</sup> With growing anxiety about future attacks in large parts of the country,<sup>7</sup> general confidence has ebbed dangerously.

FIGURE 3.2

**Attacks in 2005 and 2006 by type**

\*Numbers for both years exclude December.

Source: *New York Times*, *One War We Can Still Win*, December 13, 2006

conflict-related violence, twice as many as in 2005 and more than in any year since the Taliban regime was toppled (figure 3.1).<sup>2</sup>

A comparison of the first 11 months of 2005 with the first 11 months of 2006 revealed that direct-fire attacks grew from

### THE INTERNATIONAL DIMENSION

The NATO-led International Security Assistance Force and the US-led Coalition Forces, have had mixed success in securing the country and rebuilding the Afghan security forces. Compared to other recent international stabilization operations, the mission in Afghanistan is under-resourced. There are 1.5 international soldiers for every 1000 persons in Afghanistan, compared to 20.5 per 1000 in Kosovo 19 in Bosnia, 10 in Sierra Leone and nearly 4 in Haiti.

Local observers in southern Afghanistan believe the opportunity to bring security and development to this critical area has been missed. The 2006 NATO military offensive, which relied heavily on airpower because of a shortage of ground troops in the South-West, South, and Eastern Afghanistan, caused civilian casualties causing serious resentment.<sup>9</sup> The ability of the Afghan Government to take the lead role in the military operations remains limited.

At present, NATO military leaders acknowledge that failure to reinforce military gains with reconstruction, jobs and

development undermines their mission. As one scholar explains, “The desire for a quick cheap war followed by a quick cheap peace is what has brought Afghanistan to the present, increasingly dangerous, situation.”<sup>11</sup> A strategy that relies too heavily on foreign military forces is unlikely to guarantee a sustainable peace. To establish the rule of law, Afghanistan requires robust and sustainable levels of security forces to safeguard political, social, and economic achievements.

## PAST HUMAN RIGHTS VIOLATIONS

During the war many Afghans were victims, of large scale war crimes, crimes against humanity, and other heinous human rights violations; 69% of Afghan respondents in one survey noted that either a family member or they personally were a direct victim of injustice and human rights violations during more than two decades of war.<sup>13</sup> Despite the demands from a large majority of Afghans for justice, a climate of impunity continues to pervade the country.

A consultation among civil society actors, religious figures, academics, and human rights defenders, conducted in late 2003 by the Afghanistan Independent Human Rights Commission (AIHRC), indicated a consensus around the year 1978 as the starting point of the Afghan conflict. A nation-wide consultation, held in 2004, reconfirmed this perception; only 12% of those consulted voiced a belief that the conflict had grown out of earlier social injustices. The majority of participants viewed the conflict as developing in three distinct phases. The first phase was under Communist and Soviet rule and lasted for fourteen years between 1978 and 1992. Most atrocities, including forced disappearances, mass killings, and the forced displacement of ordinary civilians and political opponents, occurred during this period.<sup>14</sup>

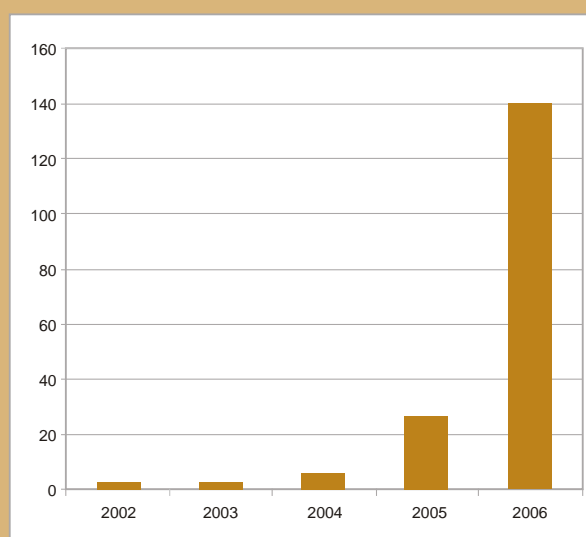
The second phase started with the collapse of the pro-Soviet regime in 1992 and its replacement by a coalition of

*Mujahideen* politico-military factions, which sparked a period of chaos in the country – with another round of serious human rights violations and war crimes. This was followed by the emergence of Taliban rule from 1995 to 2001, which inflicted serious suffering on most citizens. The primary victims of human rights violations and war crimes were women, children, and ethnic and religious minorities.<sup>15</sup>

In December 2001, the United Nations Secretary-General underlined the fact that

FIGURE 3.3

### Suicide attacks in Afghanistan, 2002-2007



Source: Centre for Conflict and Peace Studies, Kabul<sup>6</sup>

*"If NATO wants cooperation from people, they should change their strategy, stop fighting and build roads and schools."*

*Haji Abdul Khaliq, a Senator from Uruzgan province.*<sup>10</sup>

*"If it keeps going on like this, nothing will get better. For the Taliban fighting is work. That's all they have. My business has almost halved in the past few months due to worsening violence. I spent all my life in Afghanistan. Now we will be refugees. I don't think things will improve. It is getting worse day-by-day."*

*Faizal Huk, runs one of about 70 car sales yards along the airport road in Kandahar*<sup>12</sup>

*Public support has grown steadily for the removal of war criminals from positions of power*

"a sustainable peace cannot be built on a foundation of impunity". He urged the international community and the Afghan people to "commit themselves to addressing the problems of the past by ending impunity and ensuring accountability for past abuses, including gross and systematic violations of human rights."<sup>16</sup> The discourse of dealing with past human rights violations has been a cornerstone of establishing justice and the rule of law in Afghanistan. To help lead this effort, the Afghanistan Independent Human Rights Commission was mandated to convene national consultations to develop a national strategy to address past human rights abuses.

#### THE TRANSITIONAL JUSTICE STRATEGY

The action plan on transitional justice adopted by the Government acknowledges that establishing the rule of law in Afghanistan is closely linked to transitional justice.<sup>17</sup>

The introduction of the idea of "transitional justice" in Afghanistan represents a critical turning point in helping Afghans to begin to come to terms with past injustices, war crimes, and gross human rights violations. Public support has grown steadily for the removal of war criminals from positions of power.<sup>19</sup>

*"There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: without justice, there can be no lasting peace."*

UN Secretary-General, Kofi Annan.<sup>18</sup>

*"[An]other important matter to consider is the question of human rights violations in the past. I cannot say whether the current interim administration has the full authority to address this issue, but it is my hope that the *loya jirga* ... will have the authority to establish a truth-seeking mechanism and ensure that the people will have justice..."*

Hamid Karzai<sup>21</sup>

Incorporating these views, an action plan was devised by the AIHRC, with support from the Government and UNAMA. Entitled "Action Plan on Peace, Justice and Reconciliation" (APPJR), it was adopted in December 2005, by the Afghan Cabinet.<sup>20</sup> It elaborates several transitional justice approaches aimed at realizing peace and national reconciliation, restoring coexistence and cooperation among and between former combatants and affected civilians, healing the wounds and pains of victims of past injustice, and reintegrating all citizens back into society.

The over-arching transitional justice strategy tries to balance a myriad of goals, including 1) acknowledging the suffering of the Afghan people; 2) ensuring credible and accountable state institutions and purging human rights violators and criminals from state institutions; 3) truth-seeking and documentation; 4) promotion of reconciliation and improvement of national unity; and 5) establishment of effective and reasonable accountability mechanisms.<sup>22</sup>

Many in Afghanistan have a great desire for criminal justice; they want to see it take place through a mechanism that prosecutes those accused of committing serious human rights violations and war crimes. Many people also favor forgiveness for minor human rights violations.<sup>23</sup> Because the implementation of such processes is the most challenging, expensive, and difficult task of transitional justice, it requires both enhanced institutional capacity and a long-term financial and political commitment from the state.

While acknowledging the suffering of victims to facilitate personal and community healing, the APPJR places greater emphasis on improving the credibility and performance of state institutions through enhanced accountability and confidence-building measures. The Action Plan also prioritizes documentation and truth-finding to enhance trust in the public service and to put an end to the culture of baseless accusations brought against individuals.

## CHALLENGES AHEAD FOR TRANSITIONAL JUSTICE

The main challenge to Afghanistan's transitional justice strategy arises from provisions within the Bonn Agreement, which – unlike other UN-sponsored peace initiatives – failed to address concerns about past human rights atrocities. In many conflict settings, issues of justice and peace are dealt with as a single, continuous agenda. However, in the case of Afghanistan, given competing political priorities, the international community pursued an agenda of "first peace". This stemmed from the argument that focusing state-building and recovery on accountability and justice for past human rights abuses could challenge and even disrupt the country's fragile peace. Transitional justice and the political process have proceeded on separate tracks, resulting in unaddressed grievances of the victims of human rights violations.<sup>24</sup>

Although the debate on transitional justice provides an opportunity for the victims of human rights violations to speak out, it has simultaneously provoked the alleged perpetrators to take a tough stand against this process. Consequently, a culture of impunity continues to characterize the post-Bonn era. Nonetheless, the AIHRC, civil society groups, and a few remarkable leaders are boldly offering Afghans a narrow window of hope for justice to prevail.

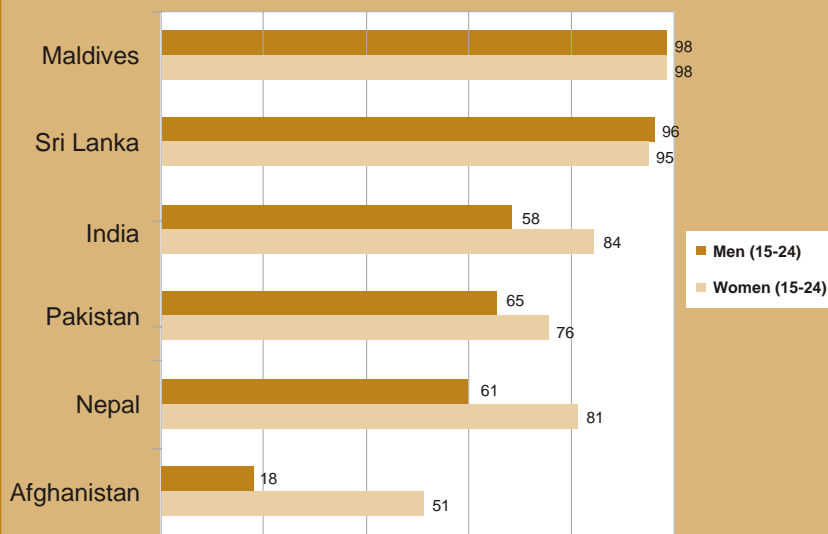
## INJUSTICE TOWARDS WOMEN AND CHILDREN

Women in Afghanistan make up an estimated 48.8% percent of the total population.<sup>26</sup> Children under the age of eighteen are estimated to comprise 53%<sup>27</sup> of the population. Human development cannot take place in Afghanistan, if half of the productive population are deprived of their rights. Gender equality and justice for women provide double dividends, as it

A man in Salang district of Parwan became quite emotional while responding to the survey questions, saying: "Now I feel that I am a part of this society. Nobody ever asked our view on such important decisions." A man in Kandahar said: "So far, no one has asked us: what do you, victims, want? Do you desire revenge? Do you want housing? Food?"<sup>25</sup>

FIGURE 3.4

### Literacy among young men and women in Afghanistan compared to other South Asian countries



\* Data on youth literacy rate are not available for Bangladesh.  
Source: UNESCO Institute for Statistics,  
<[www.uis.unesco.org/ev.php?URL\\_ID=5204&URL\\_DO\\_TOPIC&URL\\_SECTION=201](http://www.uis.unesco.org/ev.php?URL_ID=5204&URL_DO_TOPIC&URL_SECTION=201)>,  
accessed September 2006.

benefits both women and children. There is no doubt that healthy, educated, and empowered women are more likely to raise healthy, educated, confident, and successful children who can become positive change agents to create a more prosperous society.

## WOMEN

The past few years witnessed celebrations for the new Afghan Constitution and a revolution in the reach of primary and secondary education. The sudden spike in school enrolment is a cause of hope and optimism for women and girls, who were oppressed and deprived of education and employment opportunities under the medieval Taliban regime. As chapter one demonstrated, the overall human develop-



ment conditions for women remain dismal. The new Constitution states in Article 43 that free education is the "right of all citizens", including women. But the majority of girls in Afghanistan still cannot access basic schooling and some analysts view the status of Afghan women as having been altered only marginally in the last five years.<sup>28</sup>

#### *Lack of Access to Justice*

The high level of discrimination against Afghan women is reflected in the operations of the country's formal, as well as informal rule of law institutions.<sup>29</sup> Female victims and defendants are often denied equal and fair access to justice because traditionally they are rarely able to register cases themselves.<sup>30</sup> Gender inequality also prevails as a feature of the judiciary, where women are greatly under-represented. Although 25 % of students at Balkh and Kabul universities were female in 2003, only some 3 % of judges are women.<sup>31</sup> To correct this historical imbalance, affirmative action is needed to ensure greater participation of women in the Afghan judiciary and other rule of law institutions.<sup>32</sup>

Millions of Afghan women and girls

continue to face systematic discrimination and violence either in their homes or their communities, as indicated by the common practice of forced and early-age marriages. Domestic violence against women is a common practice. Women, who have few places to take shelter from such violence, may undertake self-immolation or suicide in extreme cases. The numbers of such cases are now rising. In Kandahar province alone, at least 64 women have attempted suicide, and 36 others resorted to taking poisons such as rat-killers during the first eight months of 2006.<sup>33</sup> Such tragedies scar children psychologically; their wounds cannot be easily healed. Those women who do seek shelter from domestic violence often face problems trying to reintegrate into their communities or return to their families.

Although Afghan women have secured legal gains during the past few years, serious challenges to the protection and fulfillment of their rights continue and need to be addressed urgently. These include challenges to their safety.<sup>34</sup> The rule of law cannot be established if it excludes half of the national population from its right to justice.

#### *CHILDREN*

The main challenge to realizing the rights of children in Afghanistan stems from the culture of discrimination against women, which in turn leads to discrimination against children (see box 3.1)<sup>35</sup> This situation has negative implications for the young society that Afghanistan currently harbors; an estimated 53.07% of the population is under age 18.<sup>36</sup>

#### *Access to Justice*

Access to justice and the rule of law for Afghan children is limited, especially for girls. Most child abuse cases resulting from domestic or community violence remain unreported. Child marriage is also a common practice in Afghanistan. Girls are the main victims because 57% of all mar-

*The rule of law cannot be established if it excludes half of the national population from its right to justice.*



Courtesy: Hozhaber Shinwary

riages in the country involve girls below the legal age of 16 (some are as young as 6 years old).<sup>44</sup> Sometimes, this practice ends in suicide by self-immolation.

The story of Zinat is not uncommon among poor Afghan families. Among 32 inmates in Kabul Women's Prison from September to December 2003, 60% were married before the age of sixteen. Available data strongly suggests a connection between child marriage, family abuse and violence, and the subsequent use of the law against such women.<sup>46</sup>

The justice system for juveniles, who allegedly commit crimes, is largely non-existent in most provinces. This leaves most of such children subject to the same criminal laws and penalties as adults – in violation of both the provision of the Juvenile Code, adopted in early 2005, and the principles of the 1989 United Nations Convention on the Rights of the Child to which Afghanistan is a party. The Juvenile Code raised the age of criminal liability from seven to twelve years, and acknowledges the definition of a child as being under the age of 18. The law also introduced alternative measures to improve the protection of children accused of breaking the law. Most of the accused children are tried in adult courts and detained in prisons and detention centers for adults. A regulation that was promulgated to organize the structure and procedures of the Juvenile Justice Administration Department within the Ministry of Justice requires children suspected, accused, or sentenced to be detained only in juvenile rehabilitation centers. There is currently one juvenile rehabilitation center in all 34 provinces throughout Afghanistan. Centers in Logar, Panjshir, Nooristan and Zabul are still not operational.<sup>47</sup>

## THE NARCOTICS TRADE

Afghanistan's economy is far more dependent on the production, refinement, and export of opium than any other economy in

### BOX 3.1

#### Some Facts about Children in Afghanistan

- 60,000 children in Afghanistan are addicted to drugs.<sup>37</sup>
- 100,000 children are disabled and otherwise severely affected physically due to the prolonged conflicts in the country.<sup>38</sup>
- There are an estimated 8,000 former child soldiers in Afghanistan. Many of them have left militia groups voluntarily, but they still need assistance to reintegrate back into civilian life.<sup>39</sup>
- Nearly 56% of landmine casualties (472) were under 21 years, with the largest group of children between seven and fourteen years (54%).<sup>40</sup>
- There are an estimated 1 million child laborers between seven and fourteen years of age. Of these, about 60,000 are reported to work in the streets.<sup>41</sup>
- More than 37,000 children work and beg in the streets of Kabul alone, some 80% of them being boys, 36% of whom are aged 8-10 years.<sup>42</sup>
- Among children under age five, 6.5% suffer from acute malnutrition and 54% are chronically malnourished.<sup>43</sup>

When Zinat was 10 years old, her parents sold her in marriage for 60,000 Afghani to a 50-year-old man who was deaf and dumb. She was raped on her wedding night. During the ensuing years, she ran back to her father's house some seven or eight times, but each time her father beat her and held her in chains until her husband came to get her.<sup>45</sup>

the world (figure 3.6). Afghans receive only a tiny share of the ultimate value of narcotics in retail markets, and many opium farmers are burdened with massive debt. The little that Afghans do receive nevertheless forms a substantial part of their impoverished national economy.

Poppy cultivation was officially banned in 2003 by Afghanistan's interim administration. There was a spike of 61% in poppy cultivation during the 2006 harvest season, enabling Afghanistan to produce over 90% of the world's opium, with serious political and national security implications for the country and the region (figure 3.5).<sup>48</sup>

About a third of the Afghan crop transits through Pakistan, while the rest travels through Iran and other central Asian countries towards European markets. Of the total value of USD \$3.1 billion from the opium revenue in Afghanistan, only USD \$755 million reaches Afghan farmers, while

**Most of the accused children are tried in adult courts and detained in prisons and detention centers for adults**

FIGURE 3.5

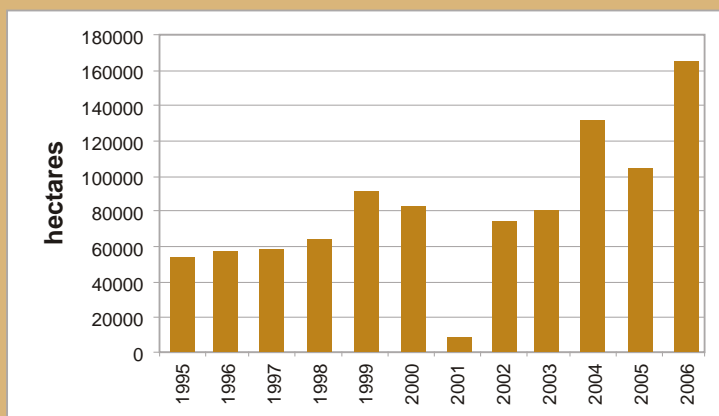
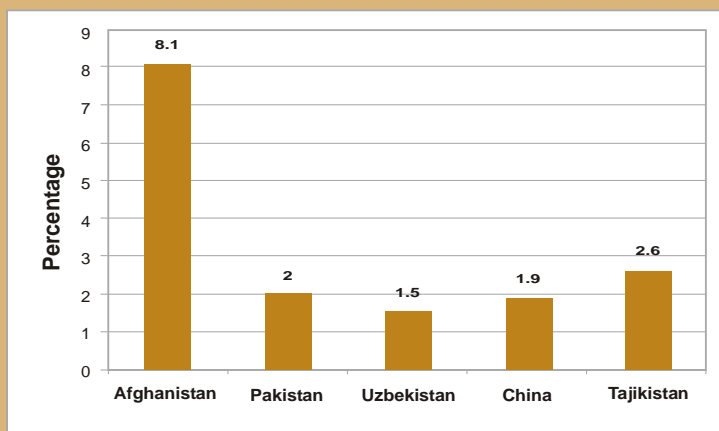
**Opium poppy cultivation from 1995 to 2006 (hectares).**Source: UNODC and GoA.<sup>51</sup>

FIGURE 3.6

**Comparison of unofficial payments by businesses in Afghanistan compared to four neighboring countries**

Source: World Bank, Investment Climate Survey, 2005.

*The Government has pursued an internationally supported counter-narcotics plan*

the rest is pocketed by traffickers.<sup>49</sup>

The Afghan national law enforcement agencies alone are unable to end the production and trafficking of narcotics throughout the country. The narcotics trade may be linked to an inward flow of weapons into Afghanistan,<sup>50</sup> connecting the booming drug trade to the insurgency, as well as to corruption, and criminality. Close links between some within the Ministry of Interior and ANP with those in the drug trade may be facilitating its continued growth. Consequently, law enforcement interventions may be used to prevent those very law enforcement interventions that would undercut the opium trade. More

generally, the opium economy is a source of corruption and undercuts public institutions, particularly those in the security and justice sectors.<sup>52</sup>

Although institutional reforms seek to address the legal short-comings to combat narcotics in Afghanistan, neither the agencies mandated with tackling the drug trade, nor the prosecutors office nor the judiciary seem able or willing to apprehend and prosecute those who benefit from illegal narcotics.

### *THE NATIONAL ANTI-NARCOTICS STRATEGY*

The multi-dimensional nature of the impact of the opium economy on the Afghan state reveals the necessity of properly mainstreaming the counter-narcotics policy throughout the Government's development strategy. The Government has pursued an internationally supported counter-narcotics plan. However, eliminating almost half of Afghanistan's economy without endangering people's livelihoods and the country's fragile stability will require massive resources. The Government's current strategy is based on five pillars – eradication, interdiction, alternative development, judicial reform, and public information.

### **CORRUPTION**

Evidence worldwide demonstrates that the effects of corruption on development can no longer be questioned. It impacts the poor disproportionately; hinders economic development; reduces social services; and diverts investment in infrastructure, institutions and social services. The existence of corruption points clearly to a deficit in democracy, human rights and governance that augments poverty and shrinks human security.<sup>53</sup>

Post-conflict countries are particularly vulnerable to corruption because of weak government institutions and the inability to ensure the rule of law. Corruption poses a

particular threat to post-conflict countries by undermining the legitimacy of the Government and fomenting public distrust towards internationally supported efforts to rebuild the country. Corruption also destabilizes efforts to build security. A survey conducted by Transparency International in 2004<sup>54</sup> indicates that corruption outranks even security in terms of the biggest challenges for the Government to tackle in the near future. According to the Corruption Perception Index of Transparency International, Afghanistan ranked 117<sup>th</sup> out of 159 countries.<sup>55</sup>

A number of internationally recognized governance indicators highlight the seriousness of corruption in Afghanistan. According to the World Bank Institute, Afghanistan ranks in the second or third lowest percentile for the control of corruption.<sup>56</sup> According to the World Bank,<sup>57</sup> Afghanistan, in addition to scoring poorly on control of corruption, remains in the bottom eighth of countries with severe governance problems, particularly those related to the rule of law and regulatory quality. Abuse of political and military power, misuse of public funds, land grabs, abuse of public land management by high-ranking government officials, corruption related to the opaque and obscured privatization processes of state-owned enterprises, widespread graft, drugs and other crime-related corruption are major concerns for Afghans.<sup>58</sup> In their eyes, corruption fuels feelings of injustice, along with distrust of reconstruction efforts.

Within the Afghan state, the courts are perceived as the most corrupt institution, followed by administrative branches of the Government, mainly in the Ministry of Interior, the municipalities, the Ministry of Finance, and the National Security Directorate.<sup>59</sup> A survey conducted in 2005 found that 76% of people perceive corruption as high in the judiciary, and 71% perceive it as frequent in the administrative services.<sup>60</sup> According to this survey, too, Afghans viewed corruption as a frequent occurrence in access to



Courtesy: Hozhaber Shinwary

education (59%), access to health services (55%), access to establishing a new business (46%), and investment from abroad (45%). The survey conducted by Integrity Watch Afghanistan indicated that almost half the Afghan households surveyed across the country had paid an average bribe of USD \$100 in 2006.<sup>61</sup> The same survey also revealed that Afghans regard a high proportion of civil servants as corrupt.

Corruption has also been identified as one of the main constraints to doing business in Afghanistan—for example, 58 percent of firms cited corruption as a major or severe problem for the establishment of their business in Afghanistan. This threatens foreign investment, as firms pay, on average, 8 percent of sales towards bribes, more than four times the average reported in Pakistan and other neighboring countries (Figure 3.6).<sup>62</sup>

The grave threat that corruption poses to

*In their [people's] eyes, corruption fuels feelings of injustice, along with distrust of reconstruction efforts*

## Anti-corruption and the Interim Afghan National Development Strategy (I-ANDS)

As the I-ANDS states:

Corruption undermines the accountability of government, eroding public trust and reducing the legitimacy of state institutions. Corruption is a means for Illegal Armed Groups to maintain their hold on power structures at the provincial and district levels, preventing the consolidation of state authority and rule of law. In the justice sector, the sale of judicial access

and favourable decisions to the highest bidder fundamentally undermines the security and basic rights of citizens, especially the poor, women, and children. State and non-state actors who violate the law are emboldened by this culture of impunity. The burgeoning illegal narcotics trade finances corruption of the public sector, made easier by low civil servant wages.

the future of Afghanistan is increasingly being acknowledged by the Government (box 3.2) with a number of measures being taken to address this issue. However, to date the measures and initiatives taken have been largely *ad hoc* in nature and a comprehensive and coordinated approach is much needed.

In order to combat corruption successfully, the capacity of civil society and media to play an oversight function will also need to be developed to hold public officials accountable. The fight against corruption will also require support from the highest political level. This includes the need for the Government to set an example in terms of taking action against corrupt high-level officials, rather than focusing on low-level public servants. A holistic approach, effectively supported by all relevant stakeholders, based on a realistic, achievable, well-resourced and nationally owned anti-corruption strategy, is a prerequisite for progress in the fight against corruption.

### CORRUPTION IN THE JUDICIARY

Corruption in the judiciary undermines confidence in governance as it facilitates corruption across all sectors of government. Corruption in the judiciary also denies victims as well as the accused the basic human right to a fair and impartial trial.

Corruption in the Afghan judiciary is in part a result of its outdated organizational structure, overly complex judicial procedures, lack of adequately trained staff, insufficient financial resources as well as poor implementation of existing legislation. The impact of more than two decades of conflict as well as regime change in undermining the effectiveness and accountability of the judiciary should also not be underestimated.

A corrupt judiciary is also an obstacle in itself to effectively fighting the wider phenomenon of corruption because decisions within a corrupt judiciary against those involved in corruption and the payment of bribes are unlikely to be enforced. Furthermore, a weak judiciary "provides 'legal' protection to those in power for dubious or illegal strategies such as embezzlement, nepotism, crony privatizations or political decisions that might otherwise encounter resistance in the legislature or from the media".<sup>63</sup>

A report by Transparency International<sup>64</sup> on corruption and judicial systems highlights four areas that need to be addressed in order to minimize corruption in the judiciary:

- Judicial appointments, which include ensuring that judges, prosecutors and other staff in the judiciary are appointed based on merit and competence;
- Terms and conditions of service, which include sufficient remuneration for judges, prosecutors and other staff in the judiciary;
- Accountability and discipline, which include sufficient disciplinary procedures and effective whistle blower protection; and
- Transparency in the functioning of the justice sector.

Of the above mentioned issues, judicial appointments and terms and conditions of service are of particular relevance in the

*Corruption in the judiciary undermines confidence in governance as it facilitates corruption across all sectors of government*



Afghan context. Low wages increase the risk that judges and other justice sector officials will succumb to the temptation of corruption.

It is essential that measures be put in place to address the problem of corruption in the justice sector in order to safeguard the rule of law as well as the basic human rights of the people of Afghanistan.

#### ANTI-CORRUPTION STRATEGY

The Government of Afghanistan has committed itself to a number of time bound anti-corruption benchmarks under the Afghanistan Compact, including ratification of the United Nations Convention Against Corruption (UNCAC). Although the UNCAC provides a useful benchmark against which to assess the Government's efforts to come to terms with corruption, little will be achieved without effective implementation and proper mechanisms to measure progress. Furthermore, while the Government envisages a number of key policies and anti-corruption strategies to be undertaken, to date implementation of anti-corruption measures remains *ad hoc*. A coordinated and comprehensive approach to the fight against corruption remains lacking. This has resulted in limited progress in terms of addressing corruption within the public sector. It is crucial that emphasis is placed on such a comprehensive approach rather than simply meeting politically expedient procedural benchmarks.

Ensuring a comprehensive and coordinated approach to the fight against corruption requires the development of a national anti-corruption strategy that outlines the necessary actions and reforms that need to be taken in the fight against corruption. Whilst the approach taken towards the development of a national anti-corruption strategy must take the Afghan context into account, the strategy will need to be: (1) driven by political support at the highest level and national ownership; (2) holistic

and balanced; (3) needs-based, targeted and sequenced; (4) resource and capacity-based; (5) measurable; and (6) transparent, non-partisan and mindful of all relevant issues of conflict of interest.<sup>65</sup> In order to ensure sustainability, it is essential that any anti-corruption strategy is nationally owned and not overly dependent on international support.

The effective implementation of an anti-corruption strategy will also require effective mechanisms of coordination as well as clear roles and responsibilities amongst the institutions mandated to fight corruption as well. Afghanistan currently suffers from a lack of clarity in terms of institutional arrangements for combating corruption. This lack of clarity implies an inefficient use of limited human and financial resources, which may lead to unwanted competition between the various institutions. The lack of clarity can also be attributed to overlapping legislation. An example of this is the mandate for investigation of the corruption offences afforded to the General Independent Administration Against Corruption and Bribery (GIAAC) by the Law on the Campaign Against Bribery and Official Corruption. This law contradicts Article 134 of the Afghan Constitution, which states that investigation falls within the mandate of the Attorney General's Office. Clarifying institutional arrangements will be an essential element to developing a comprehensive anti-corruption strategy.

It is essential that the national anti-corruption strategy places emphasis on measures to address the root causes of corruption. Care should be taken to ensure that the strategy does not overly emphasize enforcement and punitive measures. An effective approach to combating corruption also requires that sufficient attention is paid to the prevention of corruption as well as awareness-raising and education of the public on the ills of corruption. The effective implementation of the national anti-corruption strategy will also require that a

*A coordinated and comprehensive approach to the fight against corruption remains lacking*

*One of the primary challenges to land administration, and thus a central cause of land disputes, is the absence of an effective legal framework for land issues*

transparent monitoring mechanism is put in place.

Coming to terms with corruption will require the involvement of all relevant stakeholders. The Government of Afghanistan can not achieve success on its own. It will require the effective involvement of all branches of Government with the National Assembly as well as the judiciary playing an active role. It will also require the involvement of the media and civil society playing crucial oversight functions, as well as undertaking activities to raise awareness.

## LAND ISSUES

Lack of availability of land and disputed ownership constitutes a significant challenge to establishing the rule of law. Dispossession by the state, forced fleeing from the country because of insecurity, lengthy refugee status, successive changes in government without continuing accountability have made land one of the most contentious issues in Afghanistan.

This has been further exacerbated by the massive population growth throughout the country, which puts more pressure on available land. The population has grown from an estimated 15 million people in 1978 to 24 million in 2005. Alongside this growth, usable land, the main resource to support rural livelihoods as well as the country's agro-based economy, has shrunk steadily

due to environmental and war-related land degradation.<sup>66</sup> These adverse conditions, in turn, were further complicated by returning refugees and displaced persons.

One of the primary challenges to land administration, and thus a central cause of land disputes, is the absence of an effective legal framework for land issues. The Draft Land Policy concisely describes the challenges to land management in Afghanistan. As it states:

*"Land management in Afghanistan is governed by an ineffectual and inadequate legal framework. The strict application of existing laws is limited both administratively and judicially. In many respects the situation of land management and use is characterized by informality. While many provisions embodied in existing laws are useful, many other provisions have not been sufficiently adjusted to address the post conflict reality; these provisions require reform."*<sup>67</sup>

## URBAN LAND ISSUES

Cities have borne the major brunt of mass migration and exponential population growth, as they were viewed as safer places during the occupation years of the 1980s. During this period, large movements of people changed the dynamics of ownership and use of land across the country.

Kabul in particular has experienced an explosion in size since the late 1990s, albeit in waves. Between 1999 and 2002, the city's population grew at 15% per year, and it was estimated, in 2004, to have reached approximately three million persons.<sup>68</sup> This growth is manifested in the spurt of informal land and housing developments. A similar trend has been witnessed in other urban areas and major cities of the country.<sup>69</sup>

## LAND DISPUTES, LAND REFORM AND REGISTRATION

Afghanistan's land registry is a complicated and confusing documentation system, with enormous potential for land disputes that

### BOX 3.3

#### Urban land in conflict in Mazar-i-Sharif

A 300 acres parcel of land belonging to a family from Mazar-i-Sharif was confiscated by the government in 1978, based on decree No 7. At the time, the owners were forced to flee the country for political reasons. However, in 1992, they returned to their home and reclaimed their land. Since then, they have fought to secure their property though unsuccessfully, as their land is occupied by city power-brokers.

Despite having obtained a Presidential decree and a decision from the central Government in its favor, the family has been subjected to threats from Government officials to offer a share of 50 acres from the parcel for help in returning the stolen property. The case has been brought to the attention of the Afghanistan Independent Human Rights Commission in 2004, and it is still pending in the courts.

Source: AIHRC. 2006. Personal correspondence by Daud Saba, with AIHRC, Shamsullah Ahmadzai, Head of the Department of Complaints Hearing Section, Kabul. Nov 9, 2006.

can turn violent (box 3.4). Normally, land-related disputes vary according to the type and location of property, which determines overall value.

Close to three-quarters of all cases referred to the Attorney General's Office for investigation involve land disputes; these deal with more than 600,000 hectares of private and public land that have been grabbed lawlessly during the last two and a half decades of war.<sup>70</sup> Illegally appropriated land can be divided into a few distinct categories: (i) public property that has been stolen by the powerful, (ii) privately-owned land that has been appropriated by various strongmen, and (iii) public or private land illegally seized by one or another arm of the government.

Most land disputes do not find their way to the courts, as courts consider only land disputes over officially registered private lands. Normally, public land lacks a registry, and land deeds are needed to conduct official investigations. Consequently, this category of cases is dismissed by the judiciary immediately; informal dispute resolution mechanisms, such as *jirgas* or *shuras*, are therefore approached for assistance in adjudication. Most cases in urban centers considered by the formal courts concern high-value private properties, whose estimated price, rather than their size, ignites land disputes. While in rural settings, conflicts involve large public lands grabbed by the powerful, urban disputes normally arise from claims by different communities for a stake in the right of use or ownership.

To tackle the complex challenges associated with land use in war-shattered Afghanistan, a well designed and comprehensive land use policy based on good stewardship of the land and environment is needed urgently. The new policy must examine the issues of tenure and title registry with an eye towards radical revisions of the existing system. This, in turn, would increase ownership and equitable access to land and other natural

#### BOX 3.4

### Rural land in conflict in Khost

In the past few years, tired of long-standing land disputes with local Babakarkhel tribes over a public desert tract of land surrounded by mountains in the Baak district in South-Eastern Khost province, Kuchi nomads have asked the government, as well as the United Nations, to solve their right-of-use land dispute problem to no avail. At the end of December 2006, the dispute turned into a violent conflict that resulted in many casualties on both sides. The Kuchis claimed that ten of their men were killed, fifteen

wounded, and nine taken hostage in clashes, including one woman. Overall, this dispute took the lives of about 20 men from both sides, and forced 2,700 families, mainly Kuchis, to flee to other areas from their traditional camping ground in Baak. Hundreds of nomadic houses were also set on fire by the Babakarkhel tribesmen. Though this particular dispute has reportedly been resolved, the potential for a relapse in violence in this sensitive region is high.

Sources: World Bank. 2005. Kabul: Urban Land in Crisis, A Policy Note. Policy Notes on Land Issue, Kabul Urban Policy Notes Series No 3, September; Pajhwak Afghan News. 2007. Kuchi-Babakarkhel land dispute resolved. Reports by: Abdul Majid Arif. Khost City, January 1.

resources necessary for community development and a peaceful co-existence of different groups. To ease social tensions, the focus of the land use reform agenda should be on vulnerable groups, especially the Kuchi nomads, poor landless rural populations, and returning displaced persons and refugees. New initiatives are required by the Government to establish a modern system of land management and property registration and to formalize land ownership. This entails the development of a new legal regime to regulate land use in accord with environmental sustainability principles.

To improve the administration of land in Afghanistan, both formal and informal mechanisms of conflict resolution should be engaged fully and, for a transitional period, integrated and regulated by the state (see chapter six). Informal dispute resolution mechanisms, such as *jirgas* and *shuras*, are acceptable fora to complement the formal land dispute settlement system. Equally important is the development of innovative tools for land use planning, including a national urban development plan, along with expedited land development schemes in rural Afghanistan.<sup>71</sup>

*To tackle the complex challenges associated with land use in war-shattered Afghanistan, a well designed and comprehensive land use policy based on good stewardship of the land and environment is needed urgently*

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*The provision of personal security for all Afghans is the key challenge; this demands that the Government rethink the governance status quo*

A long way stretches ahead for the people of Afghanistan and the Government in overcoming their enormous challenges to extend and deepen the rule of law. The provision of personal security for all Afghans is the key challenge; this demands that the Government rethink the governance status quo. Otherwise, the likely distancing of Afghans from political participation will further undermine the legitimacy of the Government, along with all (state and non-state) rule of law institutions. An important step towards regaining people's trust is dealing with past human rights violations inflicted upon the people of Afghanistan prior to 2002. Social injustices towards women and children, in particular, merit special attention.

Narcotics are not only a social, economic and security menace for Afghans. They also endanger regional and global security. The ever-expanding narco-trade in Afghanistan undermines good democratic governance and promotes a culture of institutionalized corruption. Though the Government has begun to announce serious measures to curb corruption, genuine and high-level political commitment is still lacking. Cumulative land issues also contribute to promoting a culture of unaccountability and red tape in both the Government and rule of law institutions. Pursuing a human development agenda to move towards the objectives outlined in the Interim Afghanistan National Development Strategy is not possible without addressing these and related challenges in a serious and holistic manner.

# Chapter 4

Photo: Sayed Ikram Afzali



A newly built Charkh District Administration Office, where the District Court is housed

**The judiciary, police, and legislature are failing in their mission to meet the changing needs of Afghan citizens. Under-resourced with a limited reach, the formal state institutions of justice require a renewed and more coherent strengthening and restructuring effort.**





# The Judicial System, Police, and the Legislature: justice through the state

After more than two decades of civil war and alternating political regimes, the post-Taliban government inherited weak and extensively damaged justice institutions among those that still existed. In addition to the physical disrepair and destruction of facilities, the sector lacked, qualified judges, attorneys, prison wardens, police and other professional and administrative personnel. This chapter seeks to examine those institutions responsible for drafting, upholding, and enforcing laws in Afghanistan as well as those mandated to administer justice. This includes the judiciary, the Ministry of Justice, the Attorney General's Office, the Police and the National Assembly. The structure and functions of these institutions are also described.

## THE STATE JUSTICE SYSTEM

The phrase state justice system normally refers to positive law that functions through legal codes and state institutions, such as the courts, police, prosecutors, the legal bar, and the prison service. These institutions are central to the reestablishment of rule of law in post-Taliban Afghanistan, and are supposed to be highly interconnected and to work as a system.

The contemporary formal legal order in Afghanistan is mainly based on a combination of *sharia* (Islamic law), and civil law. It is partly modeled on the Egyptian legal system, which itself is influenced by Western (mainly French) conceptions of legality and a moderate version of *sharia*. Furthermore, between 1978-2001, the People's Democratic Party of Afghanistan (PDPA), *mojahedin*, and the *taliban* regimes tried to impose their own legal orders that

were strongly inspired by radical Marxism and radical interpretations of *sharia*, respectively. However, the legal regimes of the Afghan Marxist and *mojahedin* regimes were rejected, while the *taliban's* was implemented through a harshly oppressive and highly brutal use of force.

## THE JUDICIARY

The Supreme Court is an independent organ of the state. Its mandate is to protect the fundamental rights of all Afghan citizens, to resolve legal disputes in a fair and transparent manner, and to work to ensure justice through an independent, honest and effective judicial system.<sup>1</sup> It is also responsible for the overall administration and oversight of the judicial system in Afghanistan, the appointment of judges, and their impeachment, in addition to assuring the constitutionality of various laws, and their consistency with Islamic *Sharia*.

According to Article 116 of the Constitution of the Islamic Republic of Afghanistan (2004) and the *Law of the Organization and Authority of the Courts* (2005), the Afghan judiciary comprises the Supreme Court, the Courts of Appeal, and the Primary Courts. The Supreme Court (*stara mahkama*) is the highest judicial authority in the Afghan judiciary and is based in the capital Kabul. It is composed of nine judges, one of which is the Chief Justice (*qazi-ol'qozat*), who leads the Supreme Court. Each Supreme Court justice is appointed by the President for ten years. Their appointment is subject to the approval of the *wolessi jirga* (the lower house of the Afghan National Assembly). The eight justices of the Supreme Court are supported by 36 experienced judges,

*The contemporary formal legal order in Afghanistan is mainly based on a combination of sharia (Islamic law), and civil law*

A recent survey of 157 randomly selected judges reveals that while 44% of judges have obtained university degrees from a shariat (Islamic law) faculty, only 11.6% have obtained university degrees from a law faculty

referred to as "judicial advisers." The appointment of Supreme Court justices is based on a criterion prescribed by the Constitution—among these, including being no younger than forty years of age and having a higher education degree in either law or Islamic jurisprudence.<sup>2</sup>

The Supreme Court is mandated to review cases referred to it by the Courts of Appeal (and by a court of first instance in specific cases). These cases usually fall into four main categories: civil, criminal, commercial law, and public rights. These categories determine the structure of the main four *dewans* (departments) of the Supreme Court.

The second highest judicial authority resides in the Provincial Appeal Courts (*mahakem-e-estinaf welayat*), which review judicial decisions of the Primary Courts. Provincial Appeal Courts also deal with cases relating to commercial, public security, and public rights issues both at primary and at appellate levels. An Appeal Court usually has six *dewans*, which are: *criminal, public security, civil and family, public rights, commercial, and juvenile*. There are 34 Provincial Appeal Courts (one in each province) in Afghanistan.<sup>3</sup>

According to the *Law of the Organization and Authority of the Courts*, the lowest tier of the Afghan court system is the sub system of Primary Courts (*mahkam-e-ibtidaia*). In each of the 364 *wolaswalis* (districts)<sup>4</sup> a District Primary Court should exist. Each should consist of at least three judges, one of whom

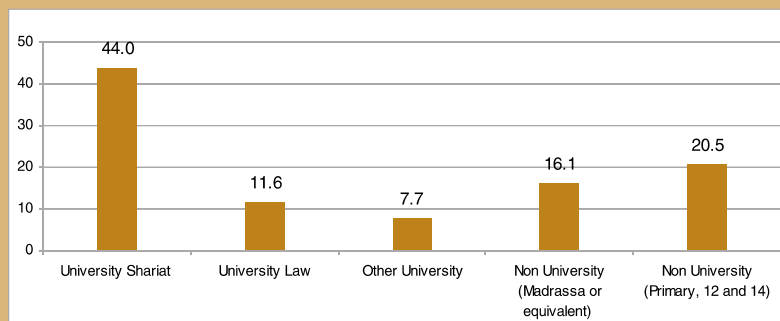
heads this institution.<sup>5</sup> The law also states there should be Urban Primary Courts (*mahakama-i-shahri*) in every provincial centre. These are courts of first instance, which handle general criminal, civil, public rights, public security, and traffic related cases at primary level.

A number of specialized courts exist in Afghanistan, including the courts for offences against national security, cases relating to property issues, military courts and the Counter Narcotics Criminal Justice Task Force. The latter was established in February 2005 to process cases of medium and high level drug offenders. A high security prison facility for such drug offenders has been created at *pul-e-charkhi* prison. Furthermore, if deemed necessary, "traveling courts" may be established on the recommendation of the Supreme Court and with the approval of the President.<sup>6</sup>

Among the legal requirements for serving as a judge in Afghanistan, two are particularly important for ensuring professional capacity and competency. Judges must have the necessary educational qualifications. A recent survey of 157 randomly selected judges reveals that while 44% of judges have obtained university degrees from a shariat (Islamic law) faculty,<sup>7</sup> only 11.6% have obtained university degrees from a law faculty (figure 4. 1). This indicates that little more than the half of the judges surveyed have the relevant formal higher education. The diagram further reveals that 7.7% of the judges have non-legal higher education background, and 16.1% are educated in informal educational settings (including *madrassas*, and private homes). What is surprising is that one fifth of the judges (20.5%) have only primary, secondary or high school education:

The second most important requirement for judges is that they successfully pass the practical stage course in judicial training (*setaj-e-qazaie*). This practical training is a year long session that is divided into eight months of theoretical study, one month of convening a supervised mock trial, and

FIGURE 4.1  
Judges' Level of Education



Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

three months of secondment to different courts. Yet, according to the same survey a little more than half (56.7%) of the Afghan judges surveyed completed *setaj-e-qazaiee* stage training prior to appointment. Only 10.1 % of the judges said that they had participated in other (often short-term) judicial training programs. And 14.3 % of the judges interviewed for this survey said that they have attended stage training after their appointment as judges.

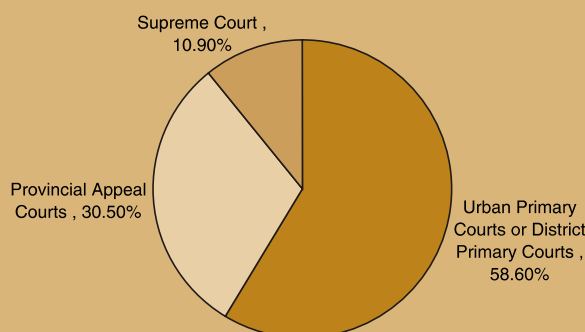
According to Supreme Court records, the total number of judges appointed in Afghan courts is 1415.<sup>8</sup> However, Supreme Court records indicate that there are only 1384 judges in Afghanistan. Data collected by the CHECCHI Rule of Law Project reveals that the actual number of working judges is 1107.<sup>9</sup> This discrepancy may be explained by the fact that a significant number of judicial positions are currently unfilled. Utilizing the latter number, there are an estimated 21,317 persons per judge in Afghanistan today.

The Supreme Court records also indicate that 58.6% of judges work in Urban Primary Courts or District Primary Courts, 30.5% work in Provincial Appeal Courts, and 10.9% work in the Supreme Court (figure 4.2). Despite reform efforts now underway, women only account for 3% of judges.<sup>10</sup> Furthermore, it seems that few women are seeking to work within the judiciary. For the 2005-2006 judicial stage course, of the 170 students who completed the course only 12 were women. According to the Supreme Court, 635 applied for the 200 places in the stage course that began on 1 April 2007. Of the 635 applicants 30 were women, and only 17 of these women were selected for the course.<sup>11</sup>

Besides the low level of human resources and judicial professionalism, the Afghan judiciary faces a severe shortage of essential legal and professional resources. As table 4.1 illustrates, 36.3% of judges said that they do not have sufficient access to statutes or governmental regulations (figure 3). Half of the judges surveyed (54.8%) said that they

FIGURE 4.2

### Where Judges Work



Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

TABLE 4.1

### Judges' Access To Legal Resources

Access:	Yes	No
Statutes or other governmental regulations	63.7 %	36.3 %
Text books on the law	45.2 %	54.8 %
Written decisions of the Supreme Court	17.2 %	82.8 %
Professional support from experienced mentor	19.1 %	80.9 %

Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

do not have access to legal text books or procedural codes. The overwhelming majority (82.8%) stated that they do not have access to written decisions of the Supreme Court. Another 80.9% said that they do not have access to professional support from experienced mentors. Because of judges poor qualifications, their lack of training and access to relevant texts, many judges are unfamiliar with the law, and make decisions without reference to the law. In many areas, judges decisions are largely based on personal opinion.<sup>12</sup>

Other than the constraints facing the judiciary, including lack of sufficiently qualified judges, lack of professionalism, and lack of access to resources necessary to properly hold trials in accordance with the law, it also lacks sufficient physical resources and court facilities. Out of 437 courts assessed across Afghanistan, 132 (57.4 %) were in need of construction, whereas 93 (40.4 %) were in need of rehabili-

*Despite reform efforts now underway, women only account for 3% of judges. Furthermore, it seems that few women are seeking to work within the judiciary*

tation.<sup>13</sup> This implies that a staggering 97.8% of Afghanistan's court houses are in need of construction or rehabilitation. Such a paucity of proper court facilities is not conducive to the effective functioning of courts. There is currently a back-log of 6,000 appeal cases in the country awaiting adjudication, indicating the slow and ineffectual nature of the judiciary

*Alleged corruption within the judiciary may stem in part from the low salaries received by judges, as their salaries are insufficient for caring for their families*

#### JUDICIAL INDEPENDENCE AND IMPARTIALITY UNDER THREAT

In addition to the inadequacy of human, legal/technical and infrastructural facilities, the independence of the Afghan judiciary is challenged. According to Article 116 of the 2004 Constitution, the judiciary is an independent organ of the state. Independence in this context could be categorized as independence of the institution as well as independence of the individual. For institutions, this refers to the principle of the separation of powers—the prohibition of intrusions by the executive and the legislative branches of the state in the affairs of the judiciary.<sup>14</sup> Independence of the individual, on the other hand, refers to the impartiality and autonomy of individual judges in the process of applying the law.<sup>15</sup> Both the Constitution (2004) and the *Law of the Organization and Authority of the Courts* (2005), include specific safeguards to maintain the independence of the judiciary.

However, it is unknown at this point to what extent these safeguards are translated into practice.

The impartiality of many individual judges may be compromised.<sup>16</sup> Many judges appear to be appointed on the basis of patronage networks. This assertion is supported by the high level of representation of some ethnic groups in the Afghan judiciary relative to their percentage in the population. (figure 4.3).<sup>17</sup>

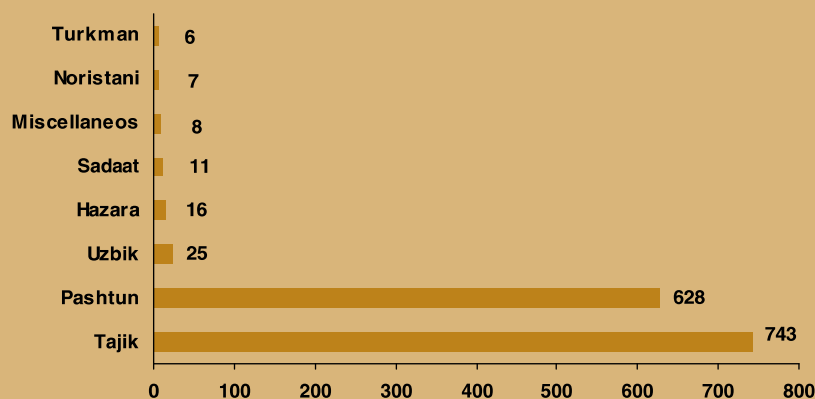
The judiciary is perceived as the most corrupt institution within Afghanistan.<sup>18</sup> Alleged corruption within the judiciary may stem in part from the low salaries received by judges, as their salaries are insufficient for caring for their families. The majority of judges in the provinces receive a salary between \$35-50.<sup>19</sup> A junior judge in a district court in Nangarhar province said that: "My monthly salary is 3500 Afghanis (around USD \$70), but I am not from this area and therefore commute to my home every day. Half of my salary is spent on bus fares."<sup>20</sup>

Lack of security for justice officials may also inhibit judges from acting impartially. The same judge in Nangarhar commented that he did not have physical security. He recounted one such incident: "One day, I made a decision against the interests of a powerful man in the district. When I announced the decision, the man who lost the case asked me how could I go safely home now? As I am not from this area and have no one to protect me, I was very frightened; I had to change my decision." Although many judges may have a strong will and convictions, others are likely to give priority to personal safety over impartial judgment. Low salaries of judges and their lack of physical security may significantly impact the extent to which they act independently and impartially. There have nonetheless been some promising developments in Afghanistan's justice sector (box 4.1).

The problems within the judiciary mentioned above are likely to prevent many within the population from looking to the

FIGURE 4.3

#### Ethnic Background of Judges



Source: USAID (CHECCHI) Rule of Law Project/the Supreme Court (2006)



## Afghanistan's judicial development in the post-taliban era

J. Alexander Thier, Senior Rule of Law Adviser, United States Institutes of Peace

The development of an independent judiciary, for the first time in Afghanistan's history, is a momentous opportunity to advance accountable government and the rule of law. Afghanistan's judicial system has historically been subordinate to the executive branch. In civil and criminal cases, whether under Islamic or state law, the judiciary has always deferred—both legally and in practice—to the Government. Under such a system, the state is almost never held responsible for its wrongdoing, and the state is considered by itself and its citizens to be above the law. Under Afghanistan's new constitution, the judiciary is a co-equal branch of the Government. The Supreme Court, which sits at the top of the judicial system, has the power to hear all legal claims, and it has the power to review laws and treaties to ensure their compliance with the constitution. The constitution provides several protections to ensure the independence of the court: the Supreme Court justices have a fixed ten year term, continue to receive their salary for life, and the budget of the judiciary is prepared by the Supreme Court. At the same time, the constitution includes many provisions meant to keep the judicial system accountable:

trials are open to the public, the legal reasoning behind judicial decisions must be written, and appointments and promotions of all lower-court judges must be approved by the President.

In practice, however, the Afghan judicial system must travel a long road to competence, legitimacy, and independence. Three decades of war and political upheaval have taken an enormous toll against the judicial system. There are few buildings to house judges, prosecutors, attorneys, police, or prisoners. There are equally few skilled professionals to fill the buildings. Until recently, few Afghan judges had copies of the laws of Afghanistan, and most had not been trained in those laws. There is no communications infrastructure, no file management system, and no libraries. Fundamentally, a political culture that respects the rule of law is also missing. Afghan judges and prosecutors from around the country complain that government officials and militia commanders interfere with their decisions. At the same time, the level of corruption within the judicial system is reportedly quite high. As a result, citizens who want justice often cannot find it, and those who want to evade justice can

do so easily.

It is, therefore, not surprising that an estimated 80-90 percent of all legal claims are handled outside the formal system, by informal dispute resolution mechanisms such as *jirgas* and *shuras*. These community-based forums for mediation, a core tradition in Afghan culture, are generally closer, cheaper, faster, and more easily comprehensible to the average Afghan. But such mechanisms have their limitations and problems as well. A process of building bridges between the two systems to increase citizens' access to justice is just getting underway.

Afghanistan's future is dependent on having a judicial system that is capable and trusted by the people. Whether dealing with political disputes, commercial enterprises, interpretations of Islamic law, or the problems of ordinary citizens, there must be a system that will treat all claims fairly, and all people equally. There are numerous programs underway, with international support, to build courthouses, print law, and train judges and prosecutors, but it will take years of hard work and commitment before all the parts start functioning as a coherent system again.

formal justice system as opposed to *jirgas* or *shuras* for the fair resolution of particular disputes.<sup>21</sup> A survey commissioned by UNDP found that only 31% of the people interviewed said that if they had a dispute over property stolen from their houses, they would take their cases to the formal state courts.<sup>22</sup> However 38% said that they would take such cases to traditional *jirgas* or *shuras*. The responses regarding disputes

over land ownership were similar. However, for murder cases, two fifths (41%) of the respondents said that they would take such cases to state courts. Only one fifth (20%) of those surveyed said that they felt more confident with *jirgas* and *shuras*. For commercial disputes, more of those surveyed would take their cases to state courts rather than to a *shura* or *jirga*. Yet, the largest ever national survey in Afghanistan,



TABLE 4.2

### Types of disputes and the preference to take them to state courts, or to non-state traditional institutions

Question: Now I am going to ask you a few questions about justice systems and ways of settling a dispute or offense. If it would happen to you, where would you take each of the following cases – to a state court, village or neighborhood based *shura/jirga*, or to a community forum?

Type of case	Percentages				
	State Court	Village or neighborhood based <i>shura/jirga</i>	Other kind of community forum	Don't know	Refused
Dispute over land	53	37	8	2	1
Other property dispute, not land	39	42	15	2	1
Commercial dispute	49	31	16	3	1
Divorce	58	25	10	4	3
Pick-pocketing	50	28	16	4	2
Robbery/burglary	57	25	15	2	1
Physical assault	49	30	17	3	1
Murder	80	11	6	2	1

Source: CPHD Perceptions Survey, February 2007

revealed that among the random sample of 6226 Afghans who were asked, "Who do you trust the most to resolve any dispute that you may have?" only 16% said that they trusted formal state courts most.<sup>23</sup> Alternatively, 33% trusted local elders the most, 19% tribal leaders, and 16% the local *shura*. Although the percentages that trusted state courts versus *shuras* are equal, the overwhelming majority (68%) trusted informal institutions and traditional figures of authority most. As will be examined in chapter 5, it is traditional figures of authority—local elders, and tribal leaders—who play very important role in resolving dispute within the context of local *jirgas*.

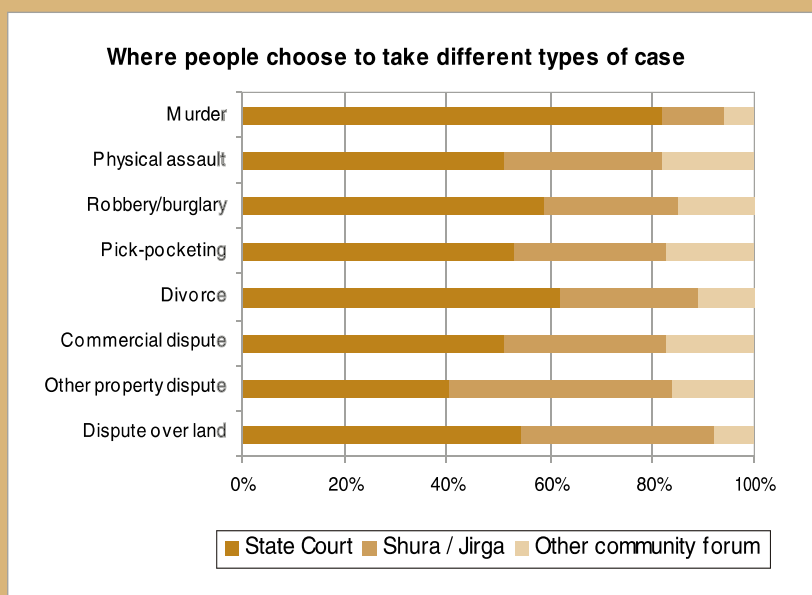
In a nationwide survey commissioned for this report by the Centre for Policy and Human Development (CPHD), Afghan citizens were asked about their experiences in using both the formal and informal systems of justice, as well as their views on various legal issues.<sup>24</sup> About half of the respondents acknowledged that state courts were generally their preferred option for the resolution of different types of disputes or offences (table 4.2). Afghans surveyed were just as likely to prefer to go to a *jirga* or *shura* for property disputes not involving land. For murder cases, more than 80% of respondents stated that they would prefer to go to a state court. Generally and for serious crimes in particular respondents preferred bringing their cases to state courts. Yet the differences between these surveys reveals the need to conduct further research on this subject.

There was usually very little variation by age and sex in people's preferences, but there were some notable differences according to ethnicity and region of residence. Those living in the other three regions (Eastern, South-Western, and Northern) showed no strong preference between state and non-state resolution of their cases.

On average, six out of ten people agreed that state courts could be trusted, were less corrupt than other dispute resolution

FIGURE 4.4

### Peoples preference to take different disputes to state courts, or to non-state traditional institutions



Source: CPHD Perceptions Survey, February 2007

mechanisms, followed local norms and values, where more effective in delivering justice, and helped to promote human rights and other international standards. Yet, there were strong variations by region, with those in the Central, Eastern, Northern and South-western regions more likely than those in other regions to agree with the above views (table 4.3).

As examined in chapters 5 and 6, when Afghans were asked the same questions above about traditional *jirgas* and *shuras*, a slightly higher proportion of respondents said that traditional institutions were accessible, fair and trusted, not corrupt compared to other options, followed local norms and values, were effective in delivering justice, and promoted human rights and other international standards. Moreover, those who have taken a dispute to a state court or to *jirga/shura* were asked about the level of their satisfaction with outcome. 60% of respondents said that they were satisfied with the outcome at the state court, whereas 78% of respondents said that they were satisfied with *jirga/shura* decision.<sup>27</sup> Regardless of the extent to which *shuras* are perceived as fair and trusted, there are a number of reasons to be concerned with both the means through which *shuras* and *jirgas* reach decisions as well as with the

decisions they reach. (See Chapter 5).

Afghan justice institutions - both formal and informal—can only deliver justice adequately and comprehensively, when at the same time they contribute to the human development of the people they serve. As mentioned in chapter two, delivery of justice and human development are closely interconnected—they go hand in hand.

#### THE MINISTRY OF JUSTICE

Afghanistan's Ministry of Justice (MOJ) is another central institution within the justice system. The mandate of the Ministry of Justice includes:

- Drafting, reviewing and proposing legislative documents and amendments to them and providing legal and legislative advice to the Ministries and the Government of Afghanistan;
- Acting as legal counsel for the Government to defend state properties and interests; and litigate in courts;
- Regulating and managing legal aid services and cooperating with defense counsels;
- Resolving civil and commercial disputes among citizens;
- Developing and publishing legal information to enhance public awareness;

*Regardless of the extent to which shuras are perceived as fair and trusted, there are a number of reasons to be concerned with both the means through which shuras and jirgas reach decisions as well as with the decisions they reach*

TABLE 4.3

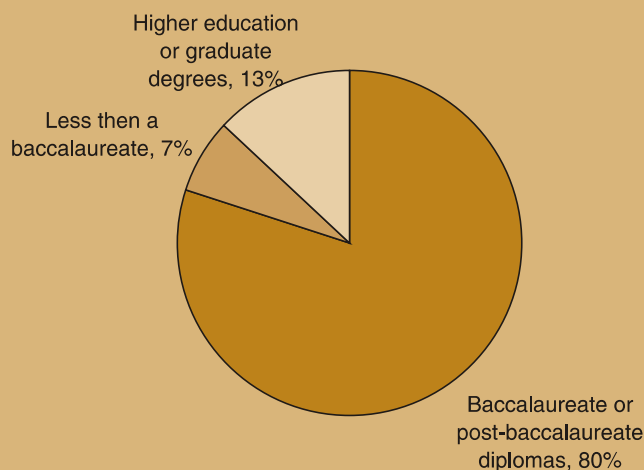
#### Attitudes towards State Courts

Question: Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree, with the following statements about State Courts?

Statement: State Courts....	Percentages					
	Strongly agree	Agree somewhat	Disagree somewhat	Strongly disagree	Don't know	Refused
...are accessible to me	41	44	10	3	*	1
...are fair and trusted	22	43	26	8	*	1
...are not corrupt compared to other options	22	35	29	10	*	3
...follow the local norms and values of our people	24	39	26	8	1	2
...are effective at delivering justice	28	37	23	8	1	3
...promote human rights and other international standards	27	38	21	8	1	6

Source: CPHD Perceptions Survey, February 2007

FIGURE 4.5

**Level of Education within the Ministry of Justice**

- Publishing of legal documents;
- Managing the evaluation and registration of political parties and social organizations; and
- Managing affairs related to prisons, detention centers and juvenile rehabilitation centers.

Departments within the MOJ include the Departments of Legislative Drafting (*taqnin*), Central Prisons Department, Juvenile Rehabilitation, Publication, Administration, Government Cases, Political Parties and Social Organizations, *hoquq* (rights), and *hoquq* of Kabul Province. Several departments maintain offices in the country's 34 provinces.

There are 1815 professional posts, excluding the military positions within the prisons, within the Ministry of Justice. Of a total of 1919 posts only 1325 are filled—1235 by men and 90 by women. Although the number of female personnel within the Ministry has recently increased, greater efforts to recruit and train women to work within the institution are still needed. There are currently 42 women employed in professional posts at headquarters and seven women employed in the provinces by the MOJ. Eighty percent of the Ministry's personnel have baccalaureate or post-baccalaureate diplomas, while 7% have less than a baccalaureate. The remaining 13% of the staff have received a higher education or

a graduate degree (figure 4.5).

Within the departments of the MOJ, the *taqnin* has a particularly heavy workload. It is responsible for considering more than 700 legislative documents of the country that must be reviewed to ensure that they are consistent with the Constitution as well as international treaties and conventions to which Afghanistan is a party.

The *taqnin* is also responsible for drafting laws required by state agencies. During the last five years, the *taqnin* has drafted, reviewed, and amended 188 legislative documents, which is close to 40 legislative documents per year. Delays in drafting laws within the *taqnin* inhibit the timely passage of laws by the National Assembly. The *taqnin* faces a number of challenges to the effective and timely drafting of laws. Yet over the past year, they have made some steps to streamline the process of drafting laws and legislative documents. Although the Law on Publications and Enforcement of Legislative Documents in the Islamic Republic of Afghanistan, 1999, requires laws to be drafted and reviewed pursuant to an annual legislative plan, no such plans were developed from 2002-2006. In December 2006 the Ministry of Justice began work on a Legislative Work Plan for 1386 (2007/8). The Work Plan identifies 41 legislative documents, including 29 laws and 12 regulations that need to be drafted within the year.<sup>26</sup> The annual plan was approved by the Council of Ministers in March 2007, concurrent to the Afghan New Year, and work has begun according to the plan.

The translation of draft laws, accompanying reports, and final laws is a major bottleneck in the legislative process. The *taqnin* lacks sufficient capacity in translating hundreds of draft laws and legal documents that are sent to it each year. The work of the *taqnin* is often delayed due to lack of professional legal translators and the absence of legal material in Afghan languages. Furthermore, some drafts are first prepared in English and can include

*The translation of draft laws, accompanying reports, and final laws is a major bottleneck in the legislative process*

## Legal aid in Afghanistan

Charles Briefel, UNAMA Senior Rule of Law Officer  
and

Liliana DeMarco, UNAMA Rule of Law Officer

Legal aid can be defined as the provision, at low or no cost, of legal advice or representation before a judicial body for people who cannot afford to pay for legal assistance. The provision of legal aid is shaped differently in various jurisdictions, but effective access to legal services is generally recognized as being of paramount importance for the protection of human rights and the promotion of a fair and efficient justice system.

Most legal systems acknowledge the right to defense as a fundamental human right. In the Quran, as well as in the Hadith of the Prophet, several references are found to the need for allowing the accused to present his or her case before a decision is reached. The Afghan Constitution and the Interim Criminal Procedure Code also provide for the right to legal assistance for all accused. The Afghan Constitution adopted an exceptional approach to the right to defense by qualifying legal aid in

criminal cases as a constitutional right of indigent defendants.

Since the promulgation of the Constitution in 2004, considerable efforts have been made to promote and protect human rights in Afghanistan. Yet, most Afghan citizens go unrepresented before the courts, and the right to defense is not fully understood. This is due to a number of reasons, including the small size of the legal profession, the lack of confidence in the formal legal system, and the difficulties in exercising due process free from interference. Legal aid providers also report cases of obstruction by judges, prosecutors and police officials who often fail to ensure defendants' access to a lawyer, intimidate lawyers, or criticize their role in defending the rights of the accused.

Despite the challenges faced by defense lawyers, it is to be noted that there is a vibrant legal aid community growing

in Afghanistan today. Legal aid issues have also attracted considerable attention from international donors who have invested significantly in NGOs providing legal aid services. Currently, around ten NGOs provide effective access to legal aid services for the needy in several regions. This number is expected to increase in the future. There is also some limited capacity within the Legal Aid Department of the Supreme Court (currently supported by fourteen lawyers), but an organic and sustainable legal aid scheme needs to be developed to effectively ensure access for the needy to legal defense. Admittedly, legal aid is a costly service, both in terms of human and financial resources, the government is unlikely to be able to provide such support in accordance with Article 31 of the Constitution to the most needy Afghans without a strong legal aid strategy combined with the financial support of the international community.

concepts and language not easily translatable into *Dari* or *Pashto*. For instance, the Commercial Bank Law was first drafted in English, but the *taqnin* faced such difficulty with the translation that the law was not published for almost two years. This is, in large part, due to the lack of capacity in translating the law into *Dari* and *Pashto*. Moreover, *taqnin* professionals report that translations of complicated legal concepts from *Dari* to *Pashto* can be extremely time consuming and contentious, as arguments over proper choice of *Pashto* wording often surface.<sup>27</sup> Consequently, the Official Gazette sometimes includes laws drafted only in *Dari*, while all laws must be published in both official languages.

The *taqnin* receives substantial expert advice, largely through the Law Reform Technical Working Group, which includes international and national experts. Nonetheless, the professional capacity and

resources of the *taqnin* remain low compared to its extensive demands. Out of 47 professional staff of the *taqnin*, only about 10 professional staff are highly experienced and skilled legislative drafters.

Another major challenge faced by the Ministry of Justice is increasing legal awareness among the population. Disputes often arise because disputants lack an understanding of their legal rights and obligations. Low levels of awareness of legal issues, such as the rights of women and children, pose a major obstacle to the realization of those rights.

The level of legal aid provided in Afghanistan is not sufficient for fulfilling the constitutional right of the accused for legal assistance (box 4.2). The Ministry of Justice is not currently mandated to provide legal aid services. However, a law submitted to the National Assembly and expected to be passed soon would give the Ministry the

*The Commercial Bank Law was first drafted in English, but the taqnin faced such difficulty with the translation that the law was not published for almost two years*

mandate to provide legal aid services to qualifying persons. There are not sufficient numbers of professionals providing legal aid, which leaves many defendants providing their own defense in courts. The total number of lawyers registered with the Ministry of Justice is 236, few of whom provide legal aid. The known number of legal aid lawyers includes 19 from the Supreme Court Legal Aid Clinic and several NGOs. Further, the role of legal aid is not widely understood or appreciated, even among members of the legal community. Currently, the Supreme Court has a small unit in Kabul for providing legal aid, which clearly does not meet the enormous need.<sup>28</sup>

## CORRECTIONS

Poor funding of prison facilities both from the Government of Afghanistan and the donor community is a significant challenge to prison reform. To uphold the rule of law it is essential to have, at the very least, a functioning prison system as well as judicial and police systems.<sup>29</sup> International human rights organizations have raised concerns about the general conditions of detention in Afghanistan. There are a number of reports of torture and inhumane treatment of prisoners.<sup>30</sup> Prisoners have been held in severely over-crowded conditions, deprived of adequate food, sleeping space, heat in the winter, health care, and even rudimentary toilet facilities.

Prior to 2001, the absence of an effective central government led to the absence of central control of the prison system. Various regional commanders operated their own facilities throughout the country with numerous reports of prisoner abuse, torture, and murder.

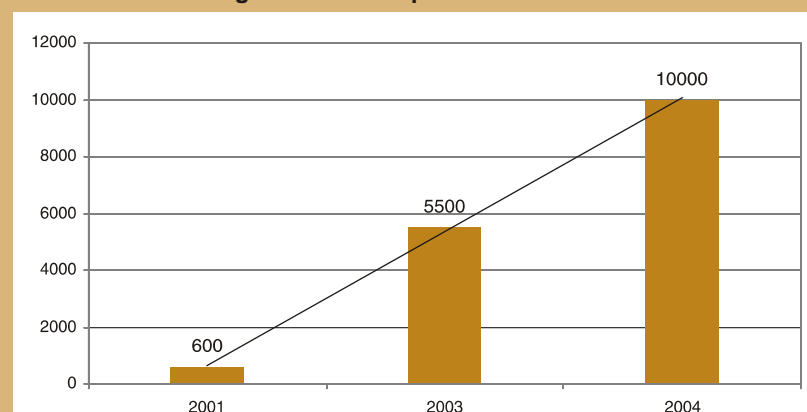
The Central Prisons Department was transferred from the Ministry of the Interior to the Ministry of Justice in March 2003. There is currently one prison within each province; however, over half of these facilities are located in rented properties that do not belong to the Ministry of Justice.<sup>31</sup> Most prisons require urgent and substantial physical improvements in order to bring them up to international standards. Most females also have dependent children living with them. Adequate separate housing for women with children and juveniles remains an issue, as most prisons do not have the capacity to care for their needs as mandated in the 2005 Prisons and Detention Centers Act.<sup>32</sup> Moreover, in November 2006, the Central Prisons Department reported that they were unable to provide indoor sleeping accommodation for nearly 1000 prisoners in eleven of their facilities. This issue remains unaddressed.

One large detention centre is located in Kabul, and the 242 small, district detention centers maintain limited capacity throughout Afghanistan. Not only do most not meet international standards, they cannot provide for detainees most basic needs. The conditions in most of these centers are considered deplorable. Many detainees are being held illegally as the legal timeframe for the processing of their cases is often exceeded. The number of detainees is almost equal to the number of prisoners. The prison population has increased exponentially since 2001 (figure 4.6).<sup>33</sup> However, it is difficult to explain whether this increase in the number of Afghan prison population is a result of the partial re-establishment of criminal justice institutions, or an increase of crime in Afghan society.

*Many detainees are being held illegally as the legal timeframe for the processing of their cases is often exceeded*

FIGURE 4.6

### Recent Trends in Afghan Prison Population



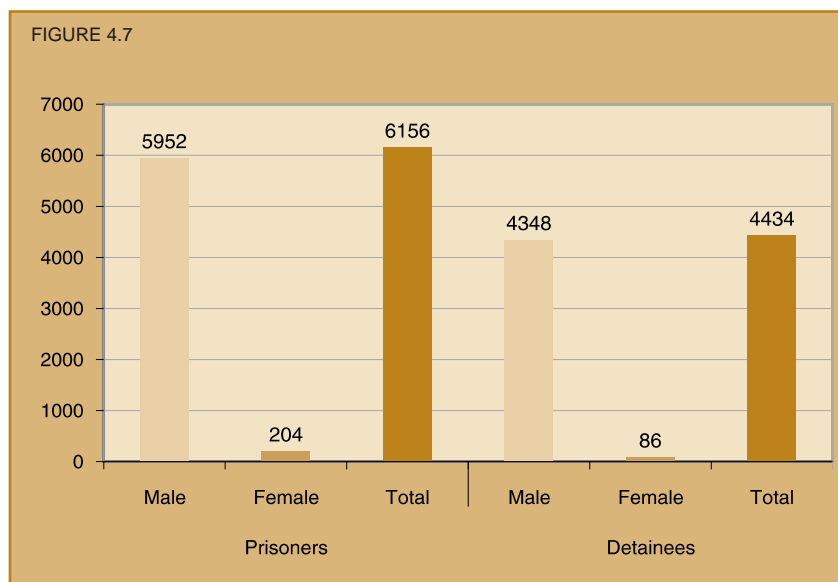


According to UNODC, as of May 2007, there were 6156 prisoners of whom 204 were women. The comparison of the 2004 and 2007 figures indicates a very significant decrease in the number of prisoners in Afghan prisons. (figure 4.7)<sup>34</sup>. Moreover, the same source also reveals that the number of detainees in Afghan detention centers, as of May 2007, was 4423 of whom 86 were women. The decrease in the number of detainees is highly significant: as mentioned earlier, many of detainees have been illegally detained, and for long periods. It is particularly important to notice a reduction in the number of women detainees in detention centers throughout Afghanistan

There are a number of reforms underway within the corrections system. Despite under-funding by the Government and minimal donor support by the international community, various prison reform activities have been carried out<sup>35</sup>. In August 2005, the construction and rehabilitation of the detention facility in Kabul was completed in addition to Block 1 and the visiting and kitchen areas at *pul-e-charki* prison.<sup>36</sup> Other prison construction and rehabilitation projects are also underway. Construction of a new, closed women's facility and a closed juvenile reformatory in Kabul are due to be completed in 2007. The construction of two new provincial prison facilities in Gardez and Mazar-e-Sharif has also commenced. Nevertheless, prisons and detention centers in Afghanistan are in a very bad state; the prisoners and detainees continue to suffer, and there is little attention paid to their plight.

#### THE PROSECUTION: THE ATTORNEY GENERAL'S OFFICE

The Attorney General's Office (AGO) is designed to provide a key link between the police and the courts. It is a unique institution in that it is an organ of the executive, but it is not under the authority of the executive.<sup>37</sup> The main function of the AGO is the 'investigation and prosecution' of crimes.



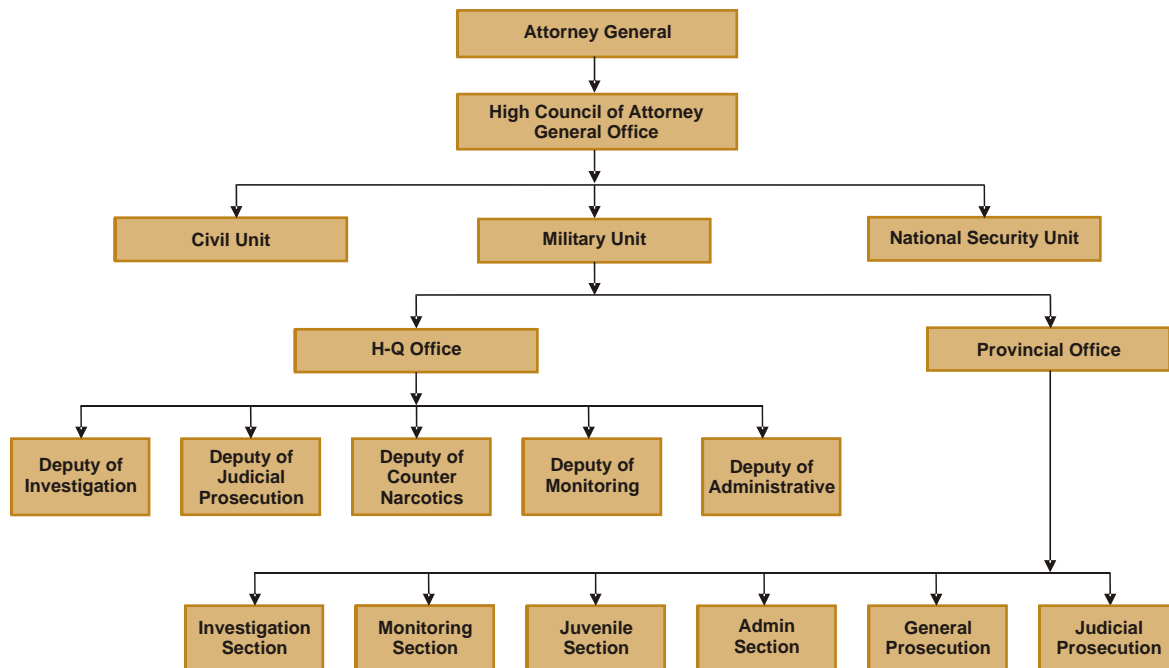
The police, on the other hand, are responsible for the detection of crimes. After almost three decades of war and near dismantlement under the *taliban*, the AGO's ability to act as a modern, independent, prosecution service is severely undermined. One assessment suggests that the AGO has the capacity to investigate and prosecute simple crimes, such as theft and simple robbery. Yet, it does not have the capacity to handle complex crimes such as organized crime, terrorism, or white-collar crimes, due to an unfamiliarity with proactive investigations, resources constraints, the need to build up cases through detailed interviews of witnesses and experts such as forensic auditors, as well as the inability to gather circumstantial evidence before making an arrest.<sup>38</sup> The structure of the Attorney General's Office in Afghanistan is highly centralized.

However, the above structural organization of the Attorney General's Office illustrated in Figure 4.8 is currently under review, and is likely to undergo important changes. At present, a district structure only exists in theory. It is estimated that some 80 district offices have either never been opened or are non-functioning.

The total number of permanent employees working for the AGO is 4900, yet the total number of technical staff in the civil

*The comparison of the 2004 and 2007 figures indicates a very significant decrease in the number of prisoners in Afghan prisons*

FIGURE 4.8

**Structure of the Attorney General Office**

Source: UNDP Justice Program

*Despite the critical role played by the AGO within the justice system an unquantified proportion of the prosecutors do not have the requisite degrees from faculties of law or sharia.*

department is 1521. According to AGO's records, the total number of its female technical employees in the Prosecution Service throughout Afghanistan is 74. In addition, there are 247 female officers in the Service who work as administrative and support staff.<sup>39</sup> Despite the critical role played by the AGO within the justice system an unquantified proportion of the prosecutors do not have the requisite degrees from faculties of law or *sharia*.<sup>40</sup>

Like the other key institutions of the Afghan justice system, lack of resources, trained and experienced prosecutors in conjunction with the lack of adequate equipment, transportation, and physical infrastructure, prevents the majority of cases from being properly prepared for trial by the Afghan prosecution service. As will be examined in the section on Afghan National Police, inadequate collaboration between the AGO and the police during investigations further contributes to this situation.<sup>41</sup> This has very negative conse-

quences for the Afghan justice institutions in operating as a system, and hence, for the delivery of justice to the Afghan population.

#### **JUDICIAL SYSTEM REFORM EFFORTS: 2002-2006**

The Bonn Agreement of December 2001 authorized the creation of the Afghan Interim Administration and emphasized the rehabilitation and reform of Afghanistan's justice institutions. Under the Bonn agreement, the 1964 Constitution of Afghanistan and existing laws were reinstated to the extent that they were not inconsistent with the provisions contained in the agreement and with Afghanistan's international obligations. Provisions relating to the Afghan Monarchy and the Prime Minister and their executive powers were particularly considered as inconsistent with the Agreement. The Bonn Agreement also established an independent Afghan Judicial Reform Commission (JRC) "to

rebuild the domestic justice system in accordance with Islamic principles, international standards, and the rule of law and Afghan legal traditions.”<sup>42</sup>

The 1964 Afghan Constitution and existing laws provided an interim legal framework, and the JRC was assigned the task of facilitating the rehabilitation and reform of the Afghan justice system. This included reviewing the structure and functions of the justice system, facilitating law reform, strengthening technical, logistical and human resources, expanding legal aid, and promoting access to justice. The work of the JRC was ultimately limited to proposing reform strategies and facilitating international assistance for rebuilding the Afghan justice sector. The JRC had achieved only a limited level of success when it was dissolved in June 2005.<sup>43</sup> This was closely tied to the lack of cooperation between Afghanistan's justice institutions—the Supreme Court, the Ministry of Justice and the Attorney-General's Office—to implement proposed reforms.<sup>44</sup>

In early 2003, the Justice Sector Consultative Group (JSCG) was created as the national level coordination mechanism for the Afghan government, donor countries, and international organizations to discuss and coordinate their activities, policies, and to draw plans for implementing them.

Although the Justice Sector CG managed to facilitate information sharing on the progress of activities, it was unable to develop collectively an agreed upon long-term vision for the Afghan justice system. In 2005, the permanent justice institutions in cooperation with UNAMA and UNDP developed a general framework for Afghanistan's justice sector entitled "Justice for All." This was approved by the Afghan Cabinet on 10 October 2005, and provided a detailed plan for coordinating future reforms efforts and donor investments. "Justice for All", feeds directly into the process of preparing the Afghanistan Compact and the Interim Afghanistan National Development Strategy (I-ANDS).<sup>45</sup>

#### BOX 4.3

### Afghanistan Compact rule of law benchmarks

- By end of 2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public.
- By end of 2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible. A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end -2006 and fully implemented by end-2010.
- By end 2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General's Office, the Ministry of the Interior and National Directorate of Security).
- By end 2010, justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles.'

The "Justice for All" strategy was further refined and specifically tailored for inclusion in the Interim Afghanistan National Development Strategy (I-ANDS) in late 2005. One sector within the I-ANDS focuses on Governance, Rule of Law and Human Rights. The I-ANDS and the Afghanistan Compact lay out a number of time-bound benchmarks to be achieved to strengthen the rule of law in Afghanistan (box 4.3). The Afghanistan Compact called for the creation of high level Joint Coordination and Monitoring Board (JCMB) to drive the Compact implementation and to resolve strategic issues related to its implementation. A Consultative Group for the Governance, Rule of Law and Human Rights sector was created to provide strategic coordination for achieving the ANDS benchmarks within this sector. This Consultative Group replaced the Justice Sector CG.

Together, the "Justice for All" strategy, the Interim Afghanistan Development Strategy, and the Afghanistan Compact provide the foundation for developing a detailed framework for rebuilding the judicial system in Afghanistan. They also provide mechanisms for the establishment of collaborative relationships among the

*Together, the "Justice for All" strategy, the Interim Afghanistan Development Strategy, and the Afghanistan Compact provide the foundation for developing a detailed framework for rebuilding the judicial system in Afghanistan*

*During the Soviet occupation from 1979-1989, the police were militarized. The police force was further weakened during the civil war*

Afghan Government and its international partners. Progress achieved within this sector to date includes the reform of existing laws, the drafting and publishing of new laws, the training of a few hundred judges and prosecutors, and the building and rehabilitation of court facilities in key locations.<sup>46</sup> In addition, some progress has been observed with regard to the enhancement of the administrative capacity of the personnel within the justice system.

However, this progress is very patchy and modest, and building on it faces serious obstacles. Institutionalized corruption, the continued political and military influence of warlords, and the lack of security outside a few key urban centers (especially for judges, judicial personnel, and prosecutors) pose serious challenges to the establishment of the rule of law in Afghanistan. Low salaries for judges, prosecutors, and other judicial personnel, limited public trust in the formal justice system and the police, lack of professional capacity within the justice sector, and the inadequacy of detention facilities and correctional services further adds to the weakness of the formal justice sector.<sup>47</sup>

As outlined in the concluding chapter, the establishment of an effective justice system not only requires overcoming such obstacles, it also requires a coherent vision

for Afghanistan's justice institutions that aims at the creation of a new pluralistic system of justice that has the capacity to serve the complex needs of the Afghan population efficiently. The fulfillment of these needs of the Afghan population are closely connected to their human development needs. An important element of an efficient pluralistic system of justice that promotes human development is the enforcement of law.

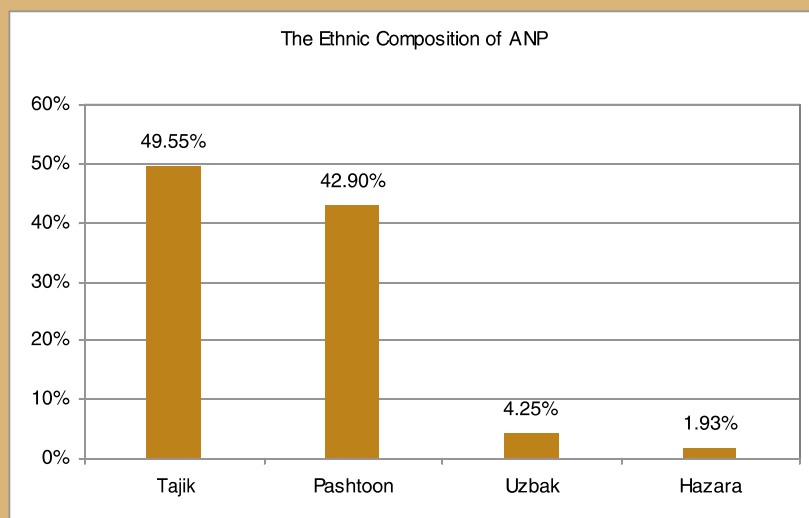
## THE AFGHAN NATIONAL POLICE

The Afghan National Police (ANP) is part of the Ministry of the Interior. It was formed as a civilian police organization during the 1960s. During the Soviet occupation from 1979-1989, the police were militarized. The police force was further weakened during the civil war.<sup>48</sup> As a result, the civilian Afghan police officers were so rare as to be virtually non-existent in 2002. From 1992-1995, under the *mojahedin* alliance, armed groups were only in de facto control. When the Taliban took control of Kabul in 1996, they did not re-establish the police force, but instead established a "Vice and Virtue Police" to support the Department for Promotion of Virtue and Prevention of Vice. As a result, following the fall of the Taliban no civilian police force existed.<sup>49</sup>

The Afghan National Police was created in April 2003 by Presidential decree. There was initially an ethnic imbalance within the police, as most senior posts were held by Tajiks. Provincial and local police commanders owed their allegiance to local military commanders, and central control was virtually non-existent. As figure 4.13 illustrates, while Tajiks are over-represented in the ANP, Pashtuns, Hazara, Uzbek and other ethnic groups continue to be under-represented in the police,. However, while five years ago most senior commanders were Tajik, they now comprise slightly less than 50 per cent. Of the top 30 police generals, 14 are Tajik, 13 Pashtun, 2 Hazara and 1 Uzbek. An organization

FIGURE 4.9

### The Ethnic Composition of ANP





reflecting more closely the composition of the general population is likely to garner greater public acceptance and trust.

There are currently roughly 62,000 police,<sup>50</sup> or one for every 381 Afghans.<sup>51</sup> This ratio is roughly comparable with the police to population ratio of 1:370 in England and Wales, or 1:374 in South Africa. While the ratio of police to the population is within normal bounds for civilian police, it may be low given the conflict status of Afghanistan, and the need to establish peace and security for all civilians. Military engagements are also taking their toll on the police who are losing more lives to suicide bombers, improvised explosive devices and insurgents than the Afghan army.<sup>52</sup>

Because of the current security situation, there is ongoing discussion to increase the strength of the ANP to 82,000.<sup>53</sup> The 12,000-strong Afghan National Auxiliary Police (ANAP) was formed in the summer of 2006 on a temporary basis to help the ANP improve security, particularly in the South and South-East of the country. The ANAP was designed to be a “community-based” force recruited and vetted in their local province and district. The ANAP only receive only a ten-day basic training course, to be followed each quarter by a week-long “sustainment” course.<sup>54</sup> The creation of the national auxiliary police has been criticized for merely rebuilding disbanded militias. The training provided is barely sufficient to prepare the auxiliary police to undertake simple policing functions. Although the creation of the ANAP is unlikely to provide improved policing services for the civilian population, it may help contain the insurgency and preempt police commanders from forming their own auxiliary police.<sup>55</sup>

Another important issue relating to the rebuilding of ANP is the gender issue. Since 1960, small numbers of women have served in the police force. Currently, women constitute slightly more than one-third of 1% of police personnel. There has been a recent modest increase in the numbers of women in the police (table 4.4).

TABLE 4.4  
Numbers of women in the police May 2005 - Feb 2007

Category	2005	2007	Difference
Officers	80	93	13
Sergeants	84	118	34
Patrol	0	22	22
Total	164	233	69

Source: Personnel Department, Afghan Ministry of Interior, Kabul, 2007

BOX 4.4

Family Response Units

The first of the police family response units (FRU) was created in Kabul in June 2005 by American police advisors supported by a number of agencies. By the summer of 2007, it is expected that there will be 19 FRUs across Afghani-

stan. They are a remarkable example of how simple grassroots projects started with little or no funding but significant imagination, goodwill and cooperation can succeed and flourish.

Policewomen do not perform the full range of police functions and, with a few notable exceptions, have played only a minor support role to male police.<sup>56</sup> Women face many obstacles to working within the ANP. In addition to the social, cultural or religious barriers that women working in policing face, the ANP itself is a “gendered” organization—one built on masculine premises that inherently discriminate against women. This is evident in the organizational and rank structures, uniforms, firearms, and emphasis on physicality in the force.<sup>57</sup> A particular Afghan example of organizational bias is the uniform forage cap, which reveals some of the policewomen’s hair, making it difficult for them to go on the street without offending religious sensibilities.

Even though the ANP understands the role policewomen can play in providing services to the female population, the failure to make the necessary organizational changes that would enable police women to perform their duties safely and effectively prevents this from occurring. This dynamic was evident in the pay and rank restructuring exercise. Despite the systemic bias that denied them the opportunity to gain the

*Currently, women constitute slightly more than one-third of 1% of police personnel*



*Strengthening the police also depends on reforms throughout the rest of the criminal justice system*

same knowledge and experience as their male colleagues, senior female officers were compelled to compete on the basis of male-determined standards of merit for the positions they already held. Apart from one female general, who had acquired the necessary background because of exceptional circumstances, all the female candidates failed. Nonetheless, some progress towards gender mainstreaming has occurred in the last two years. A residence for women was built at the Police Academy and police women have received some training. Units designed and mandated to respond to family violence have also been created to serve female victims (box 4.4).

Only 70 women recruited to the middle ranks of the police have graduated from the Police Academy. Four female officer recruits are currently in training and will be joined by two more in the near future. A few women have been recruited at the patrol level in some provinces. Training for women entering the middle ranks of the police is being instituted in the provinces to encourage recruitment into the police of women who are deterred by having to leave home to train in Kabul.

*THE REFORM OF THE ANP: 2002-2006*

International aid for the reform of the ANP has totaled over USD \$1.5 billion in the last five years. It has largely concentrated on the rebuilding of police facilities, providing uniforms and equipment, training, and pay and rank reform. Payment of salaries was reinstated in 2002 following the establishment of the Law and Order Trust Fund (LOFTA). The most senior officers receive leadership training and have international police mentors. There is a vigorous training program at all levels, that emphasizes human rights and the rule of law.

Although the performance of the police is improving, several analysts view reforms to date as disappointing.<sup>58</sup> Although the quantity of the police has improved, quality is still a significant issue. The quality of the ANP remains exceptionally low. Combined

Security Transition Command-Afghanistan (CSTC - A) has determined that the police are incapable of conducting law enforcement operations.<sup>59</sup>

Corruption in the ANP is likely widespread and has undermined the legitimacy and utility of the police in the eyes of the Afghan populace.<sup>60</sup> Extortion at check points, demanding money in exchange for necessary documents, or taking bribes to ignore criminal acts are commonplace. Abuse of position is also manifested in the crimes and brutal acts that police commit, only some of which are ever reported.<sup>61</sup> Improved facilities, increased training and better equipment may be insufficient for enabling the ANP to become a fully functional organization. The culture within the ANP must change. The police must show that they are working not just for their own interests, but for nation as a whole and to uphold the rule of law.<sup>62</sup> Strengthening the police also depends on reforms throughout the rest of the criminal justice system. Until elements of the Afghan criminal justice system, including the corrections components and the judiciary have developed sufficiently so that laws can be standardized and uniformly applied "the ANP will function more as a security force than as a law enforcement organization."<sup>63</sup> Without thorough-going reform, the Afghan National Police—as an important element of the justice system—to enforce law is likely to affect the human development of the Afghan people. Laws that are not enforced are not worth the paper on which they are written.

## THE LEGISLATURE

For hundreds of years, an Afghan legislative body has been either non-existent or symbolic in even the most open and forward-looking regimes. Instead, legislative authority was controlled primarily by decree through the incumbent king, prime minister, or president. With every conqueror came a new set of legal rules and changes to the form of the quasi-legislature.

## Early Legislative History

Before the founding of the modern state of Afghanistan in 1747 by Ahmad Shah, the country was considered by many to be a lawless land. Ahmad Shah's regime introduced a basic judicial system, and promulgated a handful of laws by royal decree.

The first real legal reformer of Afghanistan was Abdur Rahman Khan, who took power in the 1870s. As the creator of the first modern legal system in Afghanistan, he is often referred to as the "Justinian of Afghanistan." Abdur Rahman ordered that Islam would be the official law of the land.<sup>64</sup> He divided laws into three categories, customary law, Islamic law, and statutory law (administrative and civil laws called *qanun*) and began codifying the laws.

In 1922, continuing Abdur Rahman's legacy, his grandson Amanullah Khan initiated the full codification of laws in Afghanistan. He also began drafting Afghanistan's first Constitution in 1923. The 1923 Constitution called for the

establishment of [selective] state, provincial, and district level councils.<sup>66</sup> These councils served as the country's first legislative bodies. Amanullah left a judicial legacy by codifying Hanafi criminal law and built the foundation for the development of the rule of law in Afghanistan. He left a legal precedent that would be duplicated by successive regimes and Constitutions.

The 1931 Constitution, which was written under Nader Khan's rule, contained provisions for the establishment of a bicameral parliament, which became the primary legislative body of the country. Yet, the king had the right to override any parliamentary decision, declare<sup>66</sup> an emergency, dissolve parliament, and promulgate laws by decree. This was also the case in the Constitution of 1964, which was seen as the most progressive constitution of the country.

Under Mohammad Daud Khan the legislature was slightly weakened because

the 1977 Constitution allowed legislative proposals to originate from the executive.

Legislative and judicial developments of the last hundred years were reversed after the communist coup d'état of 1978. The rule of law was immediately weakened by the prevalence of arbitrary arrests, indictments, and executions of thousands of people believed to oppose a communist state. The 1987 Constitution tightened control by the President over the Government by providing him with full control of the executive, legislature, and judicial powers.

Amid the civil war that broke out in 1992, uncertainty remained regarding which laws were applicable.<sup>67</sup> Thus, Islamic and customary laws were frequently applied as the only certain sources of law, especially in the remote areas of the country. With the arrival of the Taliban regime from 1996 to 2001, the country was ruled by decrees and edicts issued by Mullah Omar.

Although Afghanistan's history dates back thousands of years, its formal legal institutions are less than 150 years old and were never allowed to mature.

What has been consistent is the struggle to find a balance between positive law and the various schools of Islamic law. Tied to this debate has been the politicization of the role of the *ulema*—Muslim religious scholars/leaders—in the country, in interpreting and implementing laws. Customary law and tribal dispute resolution mechanisms have added a third dimension of complexity to the Afghan legal landscape. However, to understand the current context of Afghanistan's judicial and legal situation, it is imperative to know the history of how it progressed and regressed over various regimes and eras (box 4.5).

### YEAR ONE OF THE NATIONAL ASSEMBLY

In accordance with the Bonn Agreement, the *wolessi jirga* and Provincial Council elections were held on 18 September 2005. The

*mishrano jirga* or upper house of the National Assembly was formed in November 2005. On 19 December 2005, the first gathering of the new National Assembly was held. The National Assembly is comprised of a 249-seat *wolessi jirga* and a 102-seat *mishrano jirga*.

The 2004 Constitution identifies the National Assembly "as the highest legislative organ and is the manifestation of the will of its people and represents the whole nation."<sup>68</sup> The *wolessi jirga* is specifically tasked to "review as well as investigate the actions of the Government", giving it a primary accountability function.<sup>69</sup>

Since its inauguration, the National Assembly has faced the colossal task of reviewing 433 Presidential decrees and pieces of legislation that the Transitional and Interim Authorities of Afghanistan had passed since the end of the Taliban era. The new National Assembly has also had to review and approve all members of the Cabinet of Ministers, the nine judges on the Supreme Court, and all new pieces of legislation drafted by the Ministry of Justice.

*Customary law and tribal dispute resolution mechanisms have added a third dimension of complexity to the Afghan legal landscape*

*The current legal framework lacks both formal and informal linkages between the executive and legislature*

In its first year, the National Assembly reviewed and decided on two pieces of legislation passed since 2001, and did not introduce any draft bills. The Charter for National Reconciliation or the "Amnesty Bill", developed in January 2007 and finalized two months later, was the first piece of legislation to originate in the National Assembly.

The Constitution requires each house to have standing technical committees to study specific topics and proposed laws. In the *wolessi jirga*, there are eighteen committees, including ones for legal affairs, justice, and defense. Each committee contains ten to 25 members. The committees review draft bills, propose amendments and submit bills.

The *mishrano jirga* has sixteen standing technical committees and joint committees mirroring those in the *wolessi jirga*. Responsibilities include reviewing draft bills pertaining to the committee's specific area of competence, proposing amendments to draft bills, and preparing and presenting reports and references about the bill to the full National Assembly.

Despite the detailed rules of procedure for the organization of these committees in both houses of the National Assembly, the development of some has been characterized by a relative lack of discipline and focus rather than on specific areas of particular importance to the national interest or the expertise of each parliamentarian. In general, capacity in all technical areas remains low in the National Assembly. A significant proportion of the parliamentarians are barely literate, while others are only functionally literate. This contributes to the backlog of legislation in the National Assembly, and can impede the legislative process. Challenging timelines in some of the areas where the executive and legislature must work together most closely may also prove to be sources of discord. The multitude of 30-day deadlines to confirm the entire cabinet, Supreme Court and other appointments, as well as for passing the budget (the new financial year began on 21 March), while also creating the framework

of an entirely new legislative institution, has been fortunately treated with some degree of flexibility.<sup>70</sup> However, not holding the National Assembly to its Constitutional and procedural timelines undermines the legitimacy of the institution itself. This issue doesn't have a simple solution, as amending procedural timelines identified in the Constitution may prove difficult and raising the technical capacity of parliamentarians is a long term effort.

The current legal framework lacks both formal and informal linkages between the executive and legislature. Legislators cannot sit in the Cabinet, and the National Assembly, which has downplayed the role of political parties, includes no large political blocs that straddle government and parliament and can, therefore, shape policy and ensure that bills are passed.<sup>71</sup> By refusing to head a political organization, President Karzai has allowed himself to become isolated, without stable political support. A joint committee between the *wolessi* and *mishrano jirgas* is now tasked to break any deadlocks between the two houses of the National Assembly, but there is little explicit guidance on what to do in case of a deadlock between the executive and legislature.<sup>72</sup> Indeed, little preparation has been undertaken to determine how the executive and legislature should work together.

#### ANNUAL LEGISLATIVE PLAN

Although Official Gazette 787, Part IV, Article 3 requires laws to be drafted and reviewed pursuant to an annual legislative plan, no such plans were developed from 2002-2006. In December 2006 the Ministry of Justice began work on a 2007 draft annual legislative work annual plan which identified 20 laws, 5 for each quarter. This draft plan was based on the needs of the line ministries and considered the legislation required by the Afghanistan Compact. The draft was submitted to the cabinet, which eventually added another 21 legislative documents to the list, expecting the *taqnin* to

produce and develop close to 1 piece of legislation every 10 days. The annual plan was approved by the cabinet in March 2007, concurrent to the Afghan New Year, and work has begun on according to the plan. Positive as this development is, it is important for the MOJ to hold the executive branch accountable for following the 1386 Annual Legislative Plan and not continue the process in an ad hoc manner. A few pieces of important or emergency legislation are expected throughout the year, but for the most part the plan should be followed in order to give the *taqnin* and eventually the National Assembly time to properly prepare for specific pieces of legislation. Without a coherent legislative plan, some parties try to circumvent proper procedures by submitting their drafts directly to the *taqnin* without an executive order.<sup>73</sup>

With such a large number of laws needed to fully develop a proper legal framework, prioritization of these laws by the President's office and Council of Ministers is necessary. Laws then need to be prioritized firstly in the Annual Legislative Plan and potentially in 3 year and 5 year legislative plans. The MOJ needs to determine how it will handle new laws that are introduced throughout the year but are not on the Annual Legislative Plan. A system of prioritizing priorities needs to be developed between the Executive and the MOJ. It is also believed that the prioritization of sectors in the ANDS will help lead this process. A more strategic relationship is needed between the MOJ's *taqnin* department and the President's Office, where setting the agenda for the laws to be reviewed by parliament.

There remains a false understanding that the National Assembly is completely independent and that any interference by MOJ or executive is not acceptable. Since the formation of the National Assembly, the President and the Council of Ministers hold back on engaging strategically in the legislative process because of fears of being criticized for interfering in the National

Assembly's legislative duties. At the same time, the executive appears to believe the National Assembly is not a separate and equal arm of state, but rather another ministry to be managed.<sup>74</sup>

In the December 2006 through February 2007 National Assembly recess, the executive rushed to enact eight laws, including the Labor Law and the Limited Responsible Shareholder Corporation Law, which could have been too complicated for the National Assembly to properly review and debate in an efficient manner and would therefore have been held hostage within the legislative system. Legislative decrees considered 'immediately needed' are allowed under Article 79 of the 2004 Constitution but must be approved by the National Assembly within 30 days of reconvening. However, with the backlog of legislation to be reviewed by the National Assembly, the 30 day timeline has yet to be enforced. Additionally, it lacks basic knowledge of state building and reform efforts, it is believed that the National Assembly has been bypassed in the development process of the interim Afghanistan National Development Strategy. Despite its shortcomings in technical expertise and experience, undermining the National Assembly can backfire on the executive and further hamper developments towards building a solid government and foundation for the rule of law.

Further complicating matters is the lack of clarity about the official role of the Office of Administrative Affairs (OAA) in the Office of the President in the legislative process. In theory, the OAA is the primary liaison between the executive and the legislature, but the Office is considered by many as an unnecessary bureaucratic step unless its role can be further defined and its legislative activities consistently institutionalized in the legislative process.<sup>75</sup> For example, the OAA administers a committee for each draft law, which reviews and researches the draft and defends it in the meeting of the Council of Ministers. The committee is lead by Vice President Karim Khalili and is comprised of relevant

*Without a coherent legislative plan, some parties try to circumvent proper procedures by submitting their drafts directly to the taqnin without an executive order*



OAA legal experts and relevant ministers. The functions of this committee simply replicate those performed by the Ministry of Justice, which is part of the executive anyways, before the draft law ever reaches the OAA. Like the OAA review committee, the working group developed for each draft law by the *taqin* department and the Executive Committee at the Ministry of Justice reviews all draft laws and sends them for review by all relevant Ministers, including the Ministers of Economy and Finance. Furthermore, each draft submitted by the MOJ must be accompanied by a primary report and a secondary report including a brief overview of the law, its purpose, similar past and current laws, and a list of the Government officials and ministries that have approved the draft.<sup>76</sup> With this thorough process already taking place within the executive, an additional review within the OAA only adds another bottleneck to the already sluggish Afghan legislative process.

Additionally, once a draft law has been approved by the National Assembly and is forwarded to the President's Office, the OAA, the Ministry of Parliamentary Affairs, and the Ministry of Justice advise the President on whether or not to sign the legislation. Officials at the OAA say their advice to the President is a mandatory administrative function and that the advice of the Ministry of Parliamentary Affairs is only voluntary.<sup>77</sup> However, representatives of the Ministry of Parliamentary Affairs interviewed for this report identified policy advice to the President as one of its primary functions. Further complicating matters both the OAA and the Ministry of Parliamentary Affairs are headed by the same senior official.

These redundancies in the legislative process create yet another backlog of work

for all three branches of Government, and most importantly stunt the much needed advancement of rule of law implementation. Combining the lawmaking and judicial functions of the OAA and the Ministry of Parliamentary Affairs under one office with the Office of the President would make help make the Afghan legislative process more efficient and effective

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Since the Bonn Agreement was signed in December 2001, progress in strengthening the rule of law in Afghanistan has been made. Yet, as is described above, such advances are not yet sufficient. The judiciary, the Ministry of Justice, the Attorney General's Office, the Police, and the National Assembly are all crucial institutions for upholding the rule of law in Afghanistan. Each of these institutions faces a number of difficulties that impede their performance, including lack of professionalism, insufficiently trained staff, limited or no access to legal texts, inadequate physical infrastructure, and potentially pervasive corruption and nepotism. The failure of these institutions to cooperate and work as a system inhibits the effective delivery of justice, and therefore creates serious obstacle for the human development of the Afghan population. For both the rule of law and human development to be advanced in Afghanistan a comprehensive strategy must be devised and carried out to ensure that these institutions work together as a system with the aim of improving the lives of the Afghan people. To devise such a strategy, one that meets the needs of Afghanistan's ground realities, the state's unique culture must be taken into account.

*The failure of these [justice] institutions to cooperate and work as a system inhibits the effective delivery of justice, and therefore creates serious obstacle for the human development of the Afghan population*



# Chapter 4

Photo: Sayed Ikram Afzali



A newly built Charkh District Administration Office, where the District Court is housed

**The judiciary, police, and legislature are failing in their mission to meet the changing needs of Afghan citizens. Under-resourced with a limited reach, the formal state institutions of justice require a renewed and more coherent strengthening and restructuring effort.**



# The Judicial System, Police, and the Legislature: justice through the state

After more than two decades of civil war and alternating political regimes, the post-Taliban government inherited weak and extensively damaged justice institutions among those that still existed. In addition to the physical disrepair and destruction of facilities, the sector lacked, qualified judges, attorneys, prison wardens, police and other professional and administrative personnel. This chapter seeks to examine those institutions responsible for drafting, upholding, and enforcing laws in Afghanistan as well as those mandated to administer justice. This includes the judiciary, the Ministry of Justice, the Attorney General's Office, the Police and the National Assembly. The structure and functions of these institutions are also described.

## THE STATE JUSTICE SYSTEM

The phrase state justice system normally refers to positive law that functions through legal codes and state institutions, such as the courts, police, prosecutors, the legal bar, and the prison service. These institutions are central to the reestablishment of rule of law in post-Taliban Afghanistan, and are supposed to be highly interconnected and to work as a system.

The contemporary formal legal order in Afghanistan is mainly based on a combination of *sharia* (Islamic law), and civil law. It is partly modeled on the Egyptian legal system, which itself is influenced by Western (mainly French) conceptions of legality and a moderate version of *sharia*. Furthermore, between 1978-2001, the People's Democratic Party of Afghanistan (PDPA), *mojahedin*, and the *taliban* regimes tried to impose their own legal orders that

were strongly inspired by radical Marxism and radical interpretations of *sharia*, respectively. However, the legal regimes of the Afghan Marxist and *mojahedin* regimes were rejected, while the *taliban's* was implemented through a harshly oppressive and highly brutal use of force.

## THE JUDICIARY

The Supreme Court is an independent organ of the state. Its mandate is to protect the fundamental rights of all Afghan citizens, to resolve legal disputes in a fair and transparent manner, and to work to ensure justice through an independent, honest and effective judicial system.<sup>1</sup> It is also responsible for the overall administration and oversight of the judicial system in Afghanistan, the appointment of judges, and their impeachment, in addition to assuring the constitutionality of various laws, and their consistency with Islamic *Sharia*.

According to Article 116 of the Constitution of the Islamic Republic of Afghanistan (2004) and the *Law of the Organization and Authority of the Courts* (2005), the Afghan judiciary comprises the Supreme Court, the Courts of Appeal, and the Primary Courts. The Supreme Court (*stara mahkama*) is the highest judicial authority in the Afghan judiciary and is based in the capital Kabul. It is composed of nine judges, one of which is the Chief Justice (*qazi-ol'qozat*), who leads the Supreme Court. Each Supreme Court justice is appointed by the President for ten years. Their appointment is subject to the approval of the *wolessi jirga* (the lower house of the Afghan National Assembly). The eight justices of the Supreme Court are supported by 36 experienced judges,

*The contemporary formal legal order in Afghanistan is mainly based on a combination of sharia (Islamic law), and civil law*

A recent survey of 157 randomly selected judges reveals that while 44% of judges have obtained university degrees from a shariat (Islamic law) faculty, only 11.6% have obtained university degrees from a law faculty

referred to as "judicial advisers." The appointment of Supreme Court justices is based on a criterion prescribed by the Constitution—among these, including being no younger than forty years of age and having a higher education degree in either law or Islamic jurisprudence.<sup>2</sup>

The Supreme Court is mandated to review cases referred to it by the Courts of Appeal (and by a court of first instance in specific cases). These cases usually fall into four main categories: civil, criminal, commercial law, and public rights. These categories determine the structure of the main four *dewans* (departments) of the Supreme Court.

The second highest judicial authority resides in the Provincial Appeal Courts (*mahakem-e-estinaf welayat*), which review judicial decisions of the Primary Courts. Provincial Appeal Courts also deal with cases relating to commercial, public security, and public rights issues both at primary and at appellate levels. An Appeal Court usually has six *dewans*, which are: *criminal, public security, civil and family, public rights, commercial, and juvenile*. There are 34 Provincial Appeal Courts (one in each province) in Afghanistan.<sup>3</sup>

According to the *Law of the Organization and Authority of the Courts*, the lowest tier of the Afghan court system is the sub system of Primary Courts (*mahkam-e-ibtidaia*). In each of the 364 *wolaswalis* (districts)<sup>4</sup> a District Primary Court should exist. Each should consist of at least three judges, one of whom

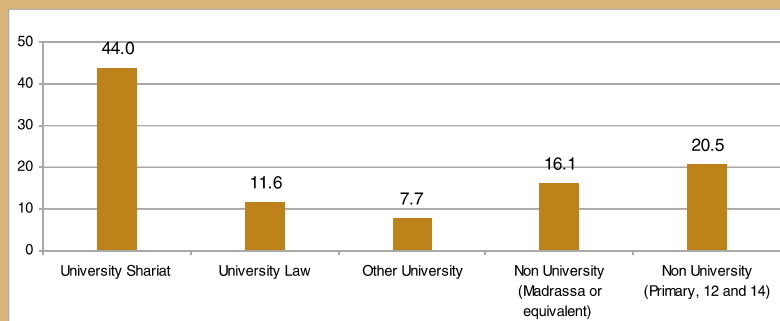
heads this institution.<sup>5</sup> The law also states there should be Urban Primary Courts (*mahakama-i-shahri*) in every provincial centre. These are courts of first instance, which handle general criminal, civil, public rights, public security, and traffic related cases at primary level.

A number of specialized courts exist in Afghanistan, including the courts for offences against national security, cases relating to property issues, military courts and the Counter Narcotics Criminal Justice Task Force. The latter was established in February 2005 to process cases of medium and high level drug offenders. A high security prison facility for such drug offenders has been created at *pul-e-charkhi* prison. Furthermore, if deemed necessary, "traveling courts" may be established on the recommendation of the Supreme Court and with the approval of the President.<sup>6</sup>

Among the legal requirements for serving as a judge in Afghanistan, two are particularly important for ensuring professional capacity and competency. Judges must have the necessary educational qualifications. A recent survey of 157 randomly selected judges reveals that while 44% of judges have obtained university degrees from a shariat (Islamic law) faculty,<sup>7</sup> only 11.6% have obtained university degrees from a law faculty (figure 4. 1). This indicates that little more than the half of the judges surveyed have the relevant formal higher education. The diagram further reveals that 7.7% of the judges have non-legal higher education background, and 16.1% are educated in informal educational settings (including *madrassas*, and private homes). What is surprising is that one fifth of the judges (20.5%) have only primary, secondary or high school education:

The second most important requirement for judges is that they successfully pass the practical stage course in judicial training (*setaj-e-qazaie*). This practical training is a year long session that is divided into eight months of theoretical study, one month of convening a supervised mock trial, and

FIGURE 4.1  
Judges' Level of Education



Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

three months of secondment to different courts. Yet, according to the same survey a little more than half (56.7%) of the Afghan judges surveyed completed *setaj-e-qazaiee* stage training prior to appointment. Only 10.1 % of the judges said that they had participated in other (often short-term) judicial training programs. And 14.3 % of the judges interviewed for this survey said that they have attended stage training after their appointment as judges.

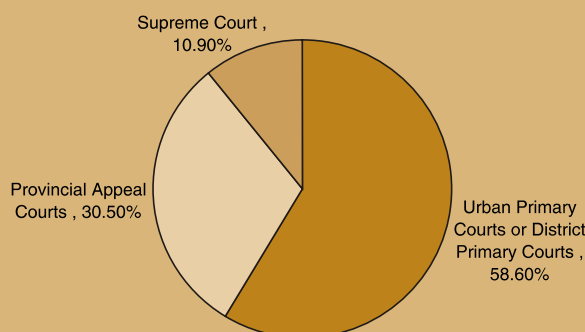
According to Supreme Court records, the total number of judges appointed in Afghan courts is 1415.<sup>8</sup> However, Supreme Court records indicate that there are only 1384 judges in Afghanistan. Data collected by the CHECCHI Rule of Law Project reveals that the actual number of working judges is 1107.<sup>9</sup> This discrepancy may be explained by the fact that a significant number of judicial positions are currently unfilled. Utilizing the latter number, there are an estimated 21,317 persons per judge in Afghanistan today.

The Supreme Court records also indicate that 58.6% of judges work in Urban Primary Courts or District Primary Courts, 30.5% work in Provincial Appeal Courts, and 10.9% work in the Supreme Court (figure 4.2). Despite reform efforts now underway, women only account for 3% of judges.<sup>10</sup> Furthermore, it seems that few women are seeking to work within the judiciary. For the 2005-2006 judicial stage course, of the 170 students who completed the course only 12 were women. According to the Supreme Court, 635 applied for the 200 places in the stage course that began on 1 April 2007. Of the 635 applicants 30 were women, and only 17 of these women were selected for the course.<sup>11</sup>

Besides the low level of human resources and judicial professionalism, the Afghan judiciary faces a severe shortage of essential legal and professional resources. As table 4.1 illustrates, 36.3% of judges said that they do not have sufficient access to statutes or governmental regulations (figure 3). Half of the judges surveyed (54.8%) said that they

FIGURE 4.2

### Where Judges Work



Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

TABLE 4.1

### Judges' Access To Legal Resources

Access:	Yes	No
Statutes or other governmental regulations	63.7 %	36.3 %
Text books on the law	45.2 %	54.8 %
Written decisions of the Supreme Court	17.2 %	82.8 %
Professional support from experienced mentor	19.1 %	80.9 %

Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

do not have access to legal text books or procedural codes. The overwhelming majority (82.8%) stated that they do not have access to written decisions of the Supreme Court. Another 80.9% said that they do not have access to professional support from experienced mentors. Because of judges poor qualifications, their lack of training and access to relevant texts, many judges are unfamiliar with the law, and make decisions without reference to the law. In many areas, judges decisions are largely based on personal opinion.<sup>12</sup>

Other than the constraints facing the judiciary, including lack of sufficiently qualified judges, lack of professionalism, and lack of access to resources necessary to properly hold trials in accordance with the law, it also lacks sufficient physical resources and court facilities. Out of 437 courts assessed across Afghanistan, 132 (57.4 %) were in need of construction, whereas 93 (40.4 %) were in need of rehabili-

*Despite reform efforts now underway, women only account for 3% of judges. Furthermore, it seems that few women are seeking to work within the judiciary*

tation.<sup>13</sup> This implies that a staggering 97.8% of Afghanistan's court houses are in need of construction or rehabilitation. Such a paucity of proper court facilities is not conducive to the effective functioning of courts. There is currently a back-log of 6,000 appeal cases in the country awaiting adjudication, indicating the slow and ineffectual nature of the judiciary

*Alleged corruption within the judiciary may stem in part from the low salaries received by judges, as their salaries are insufficient for caring for their families*

#### JUDICIAL INDEPENDENCE AND IMPARTIALITY UNDER THREAT

In addition to the inadequacy of human, legal/technical and infrastructural facilities, the independence of the Afghan judiciary is challenged. According to Article 116 of the 2004 Constitution, the judiciary is an independent organ of the state. Independence in this context could be categorized as independence of the institution as well as independence of the individual. For institutions, this refers to the principle of the separation of powers—the prohibition of intrusions by the executive and the legislative branches of the state in the affairs of the judiciary.<sup>14</sup> Independence of the individual, on the other hand, refers to the impartiality and autonomy of individual judges in the process of applying the law.<sup>15</sup> Both the Constitution (2004) and the *Law of the Organization and Authority of the Courts* (2005), include specific safeguards to maintain the independence of the judiciary.

However, it is unknown at this point to what extent these safeguards are translated into practice.

The impartiality of many individual judges may be compromised.<sup>16</sup> Many judges appear to be appointed on the basis of patronage networks. This assertion is supported by the high level of representation of some ethnic groups in the Afghan judiciary relative to their percentage in the population. (figure 4.3).<sup>17</sup>

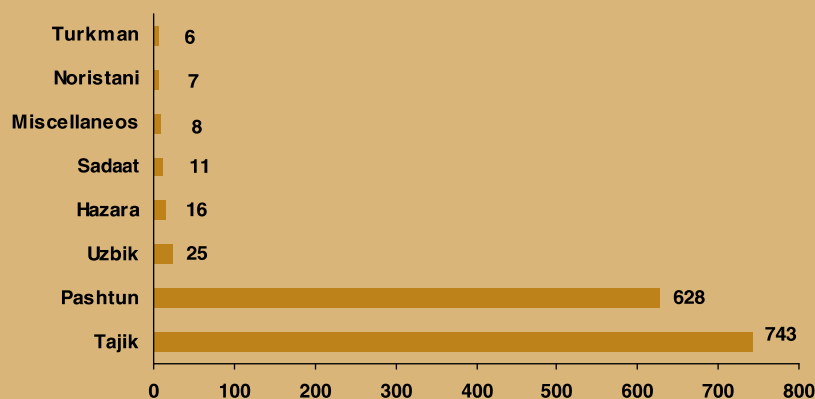
The judiciary is perceived as the most corrupt institution within Afghanistan.<sup>18</sup> Alleged corruption within the judiciary may stem in part from the low salaries received by judges, as their salaries are insufficient for caring for their families. The majority of judges in the provinces receive a salary between \$35-50.<sup>19</sup> A junior judge in a district court in Nangarhar province said that: "My monthly salary is 3500 Afghanis (around USD \$70), but I am not from this area and therefore commute to my home every day. Half of my salary is spent on bus fares."<sup>20</sup>

Lack of security for justice officials may also inhibit judges from acting impartially. The same judge in Nangarhar commented that he did not have physical security. He recounted one such incident: "One day, I made a decision against the interests of a powerful man in the district. When I announced the decision, the man who lost the case asked me how could I go safely home now? As I am not from this area and have no one to protect me, I was very frightened; I had to change my decision." Although many judges may have a strong will and convictions, others are likely to give priority to personal safety over impartial judgment. Low salaries of judges and their lack of physical security may significantly impact the extent to which they act independently and impartially. There have nonetheless been some promising developments in Afghanistan's justice sector (box 4.1).

The problems within the judiciary mentioned above are likely to prevent many within the population from looking to the

FIGURE 4.3

#### Ethnic Background of Judges



Source: USAID (CHECCHI) Rule of Law Project/the Supreme Court (2006)



## Afghanistan's judicial development in the post-taliban era

J. Alexander Thier, Senior Rule of Law Adviser, United States Institutes of Peace

The development of an independent judiciary, for the first time in Afghanistan's history, is a momentous opportunity to advance accountable government and the rule of law. Afghanistan's judicial system has historically been subordinate to the executive branch. In civil and criminal cases, whether under Islamic or state law, the judiciary has always deferred—both legally and in practice—to the Government. Under such a system, the state is almost never held responsible for its wrongdoing, and the state is considered by itself and its citizens to be above the law. Under Afghanistan's new constitution, the judiciary is a co-equal branch of the Government. The Supreme Court, which sits at the top of the judicial system, has the power to hear all legal claims, and it has the power to review laws and treaties to ensure their compliance with the constitution. The constitution provides several protections to ensure the independence of the court: the Supreme Court justices have a fixed ten year term, continue to receive their salary for life, and the budget of the judiciary is prepared by the Supreme Court. At the same time, the constitution includes many provisions meant to keep the judicial system accountable:

trials are open to the public, the legal reasoning behind judicial decisions must be written, and appointments and promotions of all lower-court judges must be approved by the President.

In practice, however, the Afghan judicial system must travel a long road to competence, legitimacy, and independence. Three decades of war and political upheaval have taken an enormous toll against the judicial system. There are few buildings to house judges, prosecutors, attorneys, police, or prisoners. There are equally few skilled professionals to fill the buildings. Until recently, few Afghan judges had copies of the laws of Afghanistan, and most had not been trained in those laws. There is no communications infrastructure, no file management system, and no libraries. Fundamentally, a political culture that respects the rule of law is also missing. Afghan judges and prosecutors from around the country complain that government officials and militia commanders interfere with their decisions. At the same time, the level of corruption within the judicial system is reportedly quite high. As a result, citizens who want justice often cannot find it, and those who want to evade justice can

do so easily.

It is, therefore, not surprising that an estimated 80-90 percent of all legal claims are handled outside the formal system, by informal dispute resolution mechanisms such as *jirgas* and *shuras*. These community-based forums for mediation, a core tradition in Afghan culture, are generally closer, cheaper, faster, and more easily comprehensible to the average Afghan. But such mechanisms have their limitations and problems as well. A process of building bridges between the two systems to increase citizens' access to justice is just getting underway.

Afghanistan's future is dependent on having a judicial system that is capable and trusted by the people. Whether dealing with political disputes, commercial enterprises, interpretations of Islamic law, or the problems of ordinary citizens, there must be a system that will treat all claims fairly, and all people equally. There are numerous programs underway, with international support, to build courthouses, print law, and train judges and prosecutors, but it will take years of hard work and commitment before all the parts start functioning as a coherent system again.

formal justice system as opposed to *jirgas* or *shuras* for the fair resolution of particular disputes.<sup>21</sup> A survey commissioned by UNDP found that only 31% of the people interviewed said that if they had a dispute over property stolen from their houses, they would take their cases to the formal state courts.<sup>22</sup> However 38% said that they would take such cases to traditional *jirgas* or *shuras*. The responses regarding disputes

over land ownership were similar. However, for murder cases, two fifths (41%) of the respondents said that they would take such cases to state courts. Only one fifth (20%) of those surveyed said that they felt more confident with *jirgas* and *shuras*. For commercial disputes, more of those surveyed would take their cases to state courts rather than to a *shura* or *jirga*. Yet, the largest ever national survey in Afghanistan,

TABLE 4.2

### Types of disputes and the preference to take them to state courts, or to non-state traditional institutions

Question: Now I am going to ask you a few questions about justice systems and ways of settling a dispute or offense. If it would happen to you, where would you take each of the following cases – to a state court, village or neighborhood based *shura/jirga*, or to a community forum?

Type of case	Percentages				
	State Court	Village or neighborhood based <i>shura/jirga</i>	Other kind of community forum	Don't know	Refused
Dispute over land	53	37	8	2	1
Other property dispute, not land	39	42	15	2	1
Commercial dispute	49	31	16	3	1
Divorce	58	25	10	4	3
Pick-pocketing	50	28	16	4	2
Robbery/burglary	57	25	15	2	1
Physical assault	49	30	17	3	1
Murder	80	11	6	2	1

Source: CPHD Perceptions Survey, February 2007

revealed that among the random sample of 6226 Afghans who were asked, "Who do you trust the most to resolve any dispute that you may have?" only 16% said that they trusted formal state courts most.<sup>23</sup> Alternatively, 33% trusted local elders the most, 19% tribal leaders, and 16% the local *shura*. Although the percentages that trusted state courts versus *shuras* are equal, the overwhelming majority (68%) trusted informal institutions and traditional figures of authority most. As will be examined in chapter 5, it is traditional figures of authority—local elders, and tribal leaders—who play very important role in resolving dispute within the context of local *jirgas*.

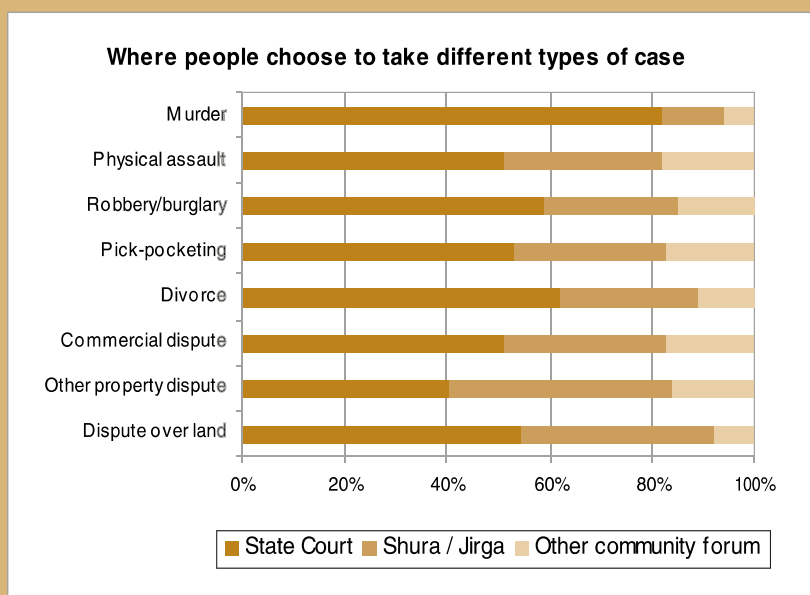
In a nationwide survey commissioned for this report by the Centre for Policy and Human Development (CPHD), Afghan citizens were asked about their experiences in using both the formal and informal systems of justice, as well as their views on various legal issues.<sup>24</sup> About half of the respondents acknowledged that state courts were generally their preferred option for the resolution of different types of disputes or offences (table 4.2). Afghans surveyed were just as likely to prefer to go to a *jirga* or *shura* for property disputes not involving land. For murder cases, more than 80% of respondents stated that they would prefer to go to a state court. Generally and for serious crimes in particular respondents preferred bringing their cases to state courts. Yet the differences between these surveys reveals the need to conduct further research on this subject.

There was usually very little variation by age and sex in people's preferences, but there were some notable differences according to ethnicity and region of residence. Those living in the other three regions (Eastern, South-Western, and Northern) showed no strong preference between state and non-state resolution of their cases.

On average, six out of ten people agreed that state courts could be trusted, were less corrupt than other dispute resolution

FIGURE 4.4

### Peoples preference to take different disputes to state courts, or to non-state traditional institutions



Source: CPHD Perceptions Survey, February 2007

mechanisms, followed local norms and values, where more effective in delivering justice, and helped to promote human rights and other international standards. Yet, there were strong variations by region, with those in the Central, Eastern, Northern and South-western regions more likely than those in other regions to agree with the above views (table 4.3).

As examined in chapters 5 and 6, when Afghans were asked the same questions above about traditional *jirgas* and *shuras*, a slightly higher proportion of respondents said that traditional institutions were accessible, fair and trusted, not corrupt compared to other options, followed local norms and values, were effective in delivering justice, and promoted human rights and other international standards. Moreover, those who have taken a dispute to a state court or to *jirga/shura* were asked about the level of their satisfaction with outcome. 60% of respondents said that they were satisfied with the outcome at the state court, whereas 78% of respondents said that they were satisfied with *jirga/shura* decision.<sup>27</sup> Regardless of the extent to which *shuras* are perceived as fair and trusted, there are a number of reasons to be concerned with both the means through which *shuras* and *jirgas* reach decisions as well as with the

decisions they reach. (See Chapter 5).

Afghan justice institutions - both formal and informal—can only deliver justice adequately and comprehensively, when at the same time they contribute to the human development of the people they serve. As mentioned in chapter two, delivery of justice and human development are closely interconnected—they go hand in hand.

#### THE MINISTRY OF JUSTICE

Afghanistan's Ministry of Justice (MOJ) is another central institution within the justice system. The mandate of the Ministry of Justice includes:

- Drafting, reviewing and proposing legislative documents and amendments to them and providing legal and legislative advice to the Ministries and the Government of Afghanistan;
- Acting as legal counsel for the Government to defend state properties and interests; and litigate in courts;
- Regulating and managing legal aid services and cooperating with defense counsels;
- Resolving civil and commercial disputes among citizens;
- Developing and publishing legal information to enhance public awareness;

*Regardless of the extent to which shuras are perceived as fair and trusted, there are a number of reasons to be concerned with both the means through which shuras and jirgas reach decisions as well as with the decisions they reach*

TABLE 4.3

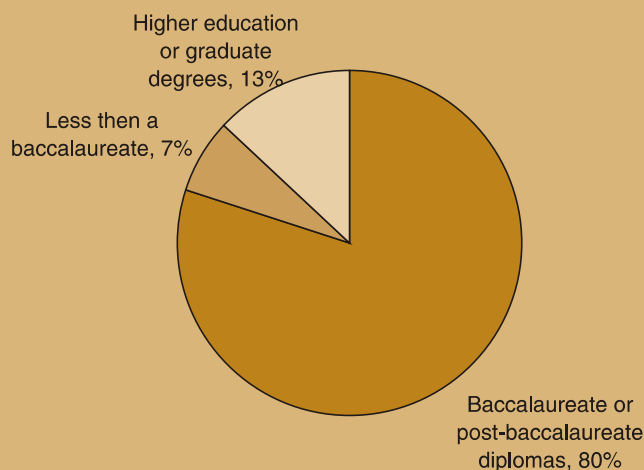
#### Attitudes towards State Courts

Question: Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree, with the following statements about State Courts?

Statement: State Courts....	Percentages					
	Strongly agree	Agree somewhat	Disagree somewhat	Strongly disagree	Don't know	Refused
...are accessible to me	41	44	10	3	*	1
...are fair and trusted	22	43	26	8	*	1
...are not corrupt compared to other options	22	35	29	10	*	3
...follow the local norms and values of our people	24	39	26	8	1	2
...are effective at delivering justice	28	37	23	8	1	3
...promote human rights and other international standards	27	38	21	8	1	6

Source: CPHD Perceptions Survey, February 2007

FIGURE 4.5

**Level of Education within the Ministry of Justice**

- Publishing of legal documents;
- Managing the evaluation and registration of political parties and social organizations; and
- Managing affairs related to prisons, detention centers and juvenile rehabilitation centers.

Departments within the MOJ include the Departments of Legislative Drafting (*taqnin*), Central Prisons Department, Juvenile Rehabilitation, Publication, Administration, Government Cases, Political Parties and Social Organizations, *hoquq* (rights), and *hoquq* of Kabul Province. Several departments maintain offices in the country's 34 provinces.

There are 1815 professional posts, excluding the military positions within the prisons, within the Ministry of Justice. Of a total of 1919 posts only 1325 are filled—1235 by men and 90 by women. Although the number of female personnel within the Ministry has recently increased, greater efforts to recruit and train women to work within the institution are still needed. There are currently 42 women employed in professional posts at headquarters and seven women employed in the provinces by the MOJ. Eighty percent of the Ministry's personnel have baccalaureate or post-baccalaureate diplomas, while 7% have less than a baccalaureate. The remaining 13% of the staff have received a higher education or

a graduate degree (figure 4.5).

Within the departments of the MOJ, the *taqnin* has a particularly heavy workload. It is responsible for considering more than 700 legislative documents of the country that must be reviewed to ensure that they are consistent with the Constitution as well as international treaties and conventions to which Afghanistan is a party.

The *taqnin* is also responsible for drafting laws required by state agencies. During the last five years, the *taqnin* has drafted, reviewed, and amended 188 legislative documents, which is close to 40 legislative documents per year. Delays in drafting laws within the *taqnin* inhibit the timely passage of laws by the National Assembly. The *taqnin* faces a number of challenges to the effective and timely drafting of laws. Yet over the past year, they have made some steps to streamline the process of drafting laws and legislative documents. Although the Law on Publications and Enforcement of Legislative Documents in the Islamic Republic of Afghanistan, 1999, requires laws to be drafted and reviewed pursuant to an annual legislative plan, no such plans were developed from 2002-2006. In December 2006 the Ministry of Justice began work on a Legislative Work Plan for 1386 (2007/8). The Work Plan identifies 41 legislative documents, including 29 laws and 12 regulations that need to be drafted within the year.<sup>26</sup> The annual plan was approved by the Council of Ministers in March 2007, concurrent to the Afghan New Year, and work has begun according to the plan.

The translation of draft laws, accompanying reports, and final laws is a major bottleneck in the legislative process. The *taqnin* lacks sufficient capacity in translating hundreds of draft laws and legal documents that are sent to it each year. The work of the *taqnin* is often delayed due to lack of professional legal translators and the absence of legal material in Afghan languages. Furthermore, some drafts are first prepared in English and can include

*The translation of draft laws, accompanying reports, and final laws is a major bottleneck in the legislative process*

## Legal aid in Afghanistan

Charles Briefel, UNAMA Senior Rule of Law Officer  
and

Liliana DeMarco, UNAMA Rule of Law Officer

Legal aid can be defined as the provision, at low or no cost, of legal advice or representation before a judicial body for people who cannot afford to pay for legal assistance. The provision of legal aid is shaped differently in various jurisdictions, but effective access to legal services is generally recognized as being of paramount importance for the protection of human rights and the promotion of a fair and efficient justice system.

Most legal systems acknowledge the right to defense as a fundamental human right. In the Quran, as well as in the Hadith of the Prophet, several references are found to the need for allowing the accused to present his or her case before a decision is reached. The Afghan Constitution and the Interim Criminal Procedure Code also provide for the right to legal assistance for all accused. The Afghan Constitution adopted an exceptional approach to the right to defense by qualifying legal aid in

criminal cases as a constitutional right of indigent defendants.

Since the promulgation of the Constitution in 2004, considerable efforts have been made to promote and protect human rights in Afghanistan. Yet, most Afghan citizens go unrepresented before the courts, and the right to defense is not fully understood. This is due to a number of reasons, including the small size of the legal profession, the lack of confidence in the formal legal system, and the difficulties in exercising due process free from interference. Legal aid providers also report cases of obstruction by judges, prosecutors and police officials who often fail to ensure defendants' access to a lawyer, intimidate lawyers, or criticize their role in defending the rights of the accused.

Despite the challenges faced by defense lawyers, it is to be noted that there is a vibrant legal aid community growing

in Afghanistan today. Legal aid issues have also attracted considerable attention from international donors who have invested significantly in NGOs providing legal aid services. Currently, around ten NGOs provide effective access to legal aid services for the needy in several regions. This number is expected to increase in the future. There is also some limited capacity within the Legal Aid Department of the Supreme Court (currently supported by fourteen lawyers), but an organic and sustainable legal aid scheme needs to be developed to effectively ensure access for the needy to legal defense. Admittedly, legal aid is a costly service, both in terms of human and financial resources, the government is unlikely to be able to provide such support in accordance with Article 31 of the Constitution to the most needy Afghans without a strong legal aid strategy combined with the financial support of the international community.

concepts and language not easily translatable into *Dari* or *Pashto*. For instance, the Commercial Bank Law was first drafted in English, but the *taqnin* faced such difficulty with the translation that the law was not published for almost two years. This is, in large part, due to the lack of capacity in translating the law into *Dari* and *Pashto*. Moreover, *taqnin* professionals report that translations of complicated legal concepts from *Dari* to *Pashto* can be extremely time consuming and contentious, as arguments over proper choice of *Pashto* wording often surface.<sup>27</sup> Consequently, the Official Gazette sometimes includes laws drafted only in *Dari*, while all laws must be published in both official languages.

The *taqnin* receives substantial expert advice, largely through the Law Reform Technical Working Group, which includes international and national experts. Nonetheless, the professional capacity and

resources of the *taqnin* remain low compared to its extensive demands. Out of 47 professional staff of the *taqnin*, only about 10 professional staff are highly experienced and skilled legislative drafters.

Another major challenge faced by the Ministry of Justice is increasing legal awareness among the population. Disputes often arise because disputants lack an understanding of their legal rights and obligations. Low levels of awareness of legal issues, such as the rights of women and children, pose a major obstacle to the realization of those rights.

The level of legal aid provided in Afghanistan is not sufficient for fulfilling the constitutional right of the accused for legal assistance (box 4.2). The Ministry of Justice is not currently mandated to provide legal aid services. However, a law submitted to the National Assembly and expected to be passed soon would give the Ministry the

*The Commercial Bank Law was first drafted in English, but the taqnin faced such difficulty with the translation that the law was not published for almost two years*



mandate to provide legal aid services to qualifying persons. There are not sufficient numbers of professionals providing legal aid, which leaves many defendants providing their own defense in courts. The total number of lawyers registered with the Ministry of Justice is 236, few of whom provide legal aid. The known number of legal aid lawyers includes 19 from the Supreme Court Legal Aid Clinic and several NGOs. Further, the role of legal aid is not widely understood or appreciated, even among members of the legal community. Currently, the Supreme Court has a small unit in Kabul for providing legal aid, which clearly does not meet the enormous need.<sup>28</sup>

## CORRECTIONS

Poor funding of prison facilities both from the Government of Afghanistan and the donor community is a significant challenge to prison reform. To uphold the rule of law it is essential to have, at the very least, a functioning prison system as well as judicial and police systems.<sup>29</sup> International human rights organizations have raised concerns about the general conditions of detention in Afghanistan. There are a number of reports of torture and inhumane treatment of prisoners.<sup>30</sup> Prisoners have been held in severely over-crowded conditions, deprived of adequate food, sleeping space, heat in the winter, health care, and even rudimentary toilet facilities.

Prior to 2001, the absence of an effective central government led to the absence of central control of the prison system. Various regional commanders operated their own facilities throughout the country with numerous reports of prisoner abuse, torture, and murder.

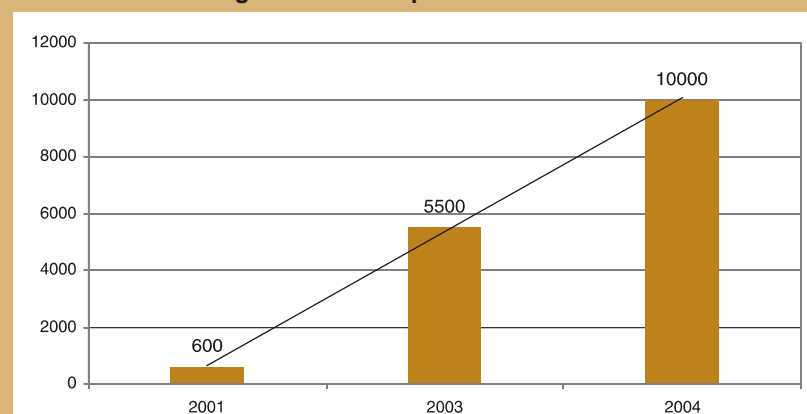
The Central Prisons Department was transferred from the Ministry of the Interior to the Ministry of Justice in March 2003. There is currently one prison within each province; however, over half of these facilities are located in rented properties that do not belong to the Ministry of Justice.<sup>31</sup> Most prisons require urgent and substantial physical improvements in order to bring them up to international standards. Most females also have dependent children living with them. Adequate separate housing for women with children and juveniles remains an issue, as most prisons do not have the capacity to care for their needs as mandated in the 2005 Prisons and Detention Centers Act.<sup>32</sup> Moreover, in November 2006, the Central Prisons Department reported that they were unable to provide indoor sleeping accommodation for nearly 1000 prisoners in eleven of their facilities. This issue remains unaddressed.

One large detention centre is located in Kabul, and the 242 small, district detention centers maintain limited capacity throughout Afghanistan. Not only do most not meet international standards, they cannot provide for detainees most basic needs. The conditions in most of these centers are considered deplorable. Many detainees are being held illegally as the legal timeframe for the processing of their cases is often exceeded. The number of detainees is almost equal to the number of prisoners. The prison population has increased exponentially since 2001 (figure 4.6).<sup>33</sup> However, it is difficult to explain whether this increase in the number of Afghan prison population is a result of the partial re-establishment of criminal justice institutions, or an increase of crime in Afghan society.

*Many detainees are being held illegally as the legal timeframe for the processing of their cases is often exceeded*

FIGURE 4.6

### Recent Trends in Afghan Prison Population

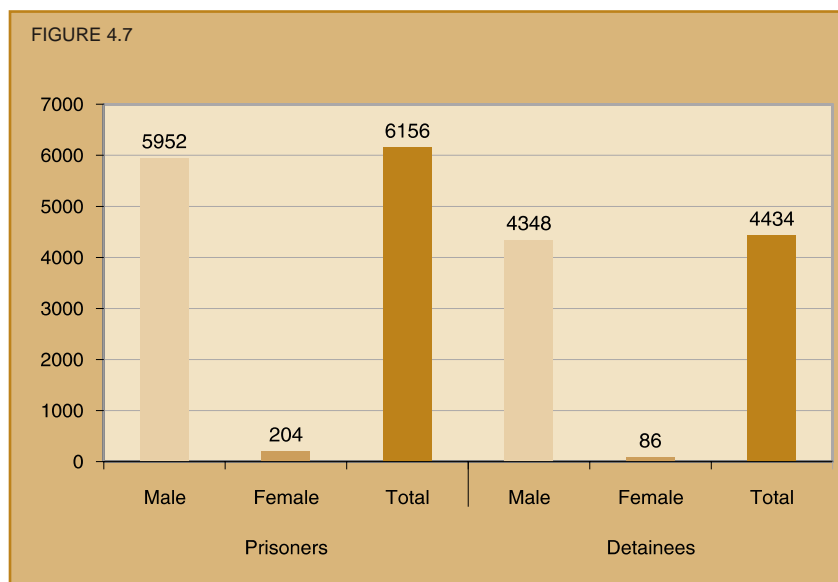


According to UNODC, as of May 2007, there were 6156 prisoners of whom 204 were women. The comparison of the 2004 and 2007 figures indicates a very significant decrease in the number of prisoners in Afghan prisons. (figure 4.7)<sup>34</sup>. Moreover, the same source also reveals that the number of detainees in Afghan detention centers, as of May 2007, was 4423 of whom 86 were women. The decrease in the number of detainees is highly significant: as mentioned earlier, many of detainees have been illegally detained, and for long periods. It is particularly important to notice a reduction in the number of women detainees in detention centers throughout Afghanistan

There are a number of reforms underway within the corrections system. Despite under-funding by the Government and minimal donor support by the international community, various prison reform activities have been carried out<sup>35</sup>. In August 2005, the construction and rehabilitation of the detention facility in Kabul was completed in addition to Block 1 and the visiting and kitchen areas at *pul-e-charki* prison.<sup>36</sup> Other prison construction and rehabilitation projects are also underway. Construction of a new, closed women's facility and a closed juvenile reformatory in Kabul are due to be completed in 2007. The construction of two new provincial prison facilities in Gardez and Mazar-e-Sharif has also commenced. Nevertheless, prisons and detention centers in Afghanistan are in a very bad state; the prisoners and detainees continue to suffer, and there is little attention paid to their plight.

#### THE PROSECUTION: THE ATTORNEY GENERAL'S OFFICE

The Attorney General's Office (AGO) is designed to provide a key link between the police and the courts. It is a unique institution in that it is an organ of the executive, but it is not under the authority of the executive.<sup>37</sup> The main function of the AGO is the 'investigation and prosecution' of crimes.



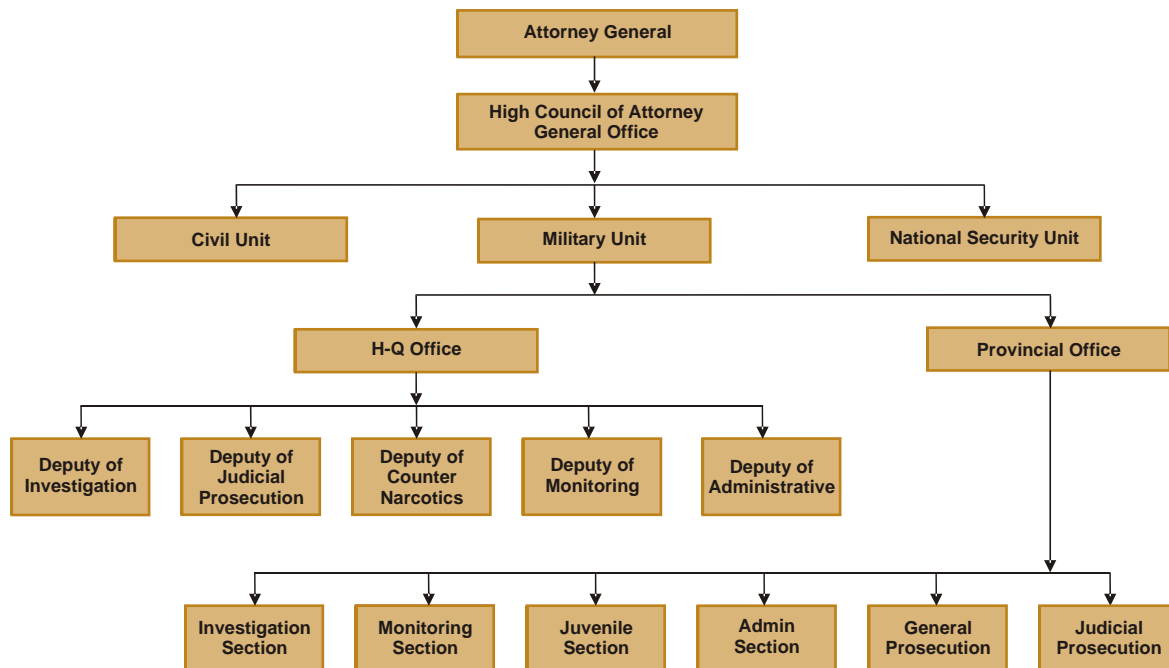
The police, on the other hand, are responsible for the detection of crimes. After almost three decades of war and near dismantlement under the *taliban*, the AGO's ability to act as a modern, independent, prosecution service is severely undermined. One assessment suggests that the AGO has the capacity to investigate and prosecute simple crimes, such as theft and simple robbery. Yet, it does not have the capacity to handle complex crimes such as organized crime, terrorism, or white-collar crimes, due to an unfamiliarity with proactive investigations, resources constraints, the need to build up cases through detailed interviews of witnesses and experts such as forensic auditors, as well as the inability to gather circumstantial evidence before making an arrest.<sup>38</sup> The structure of the Attorney General's Office in Afghanistan is highly centralized.

However, the above structural organization of the Attorney General's Office illustrated in Figure 4.8 is currently under review, and is likely to undergo important changes. At present, a district structure only exists in theory. It is estimated that some 80 district offices have either never been opened or are non-functioning.

The total number of permanent employees working for the AGO is 4900, yet the total number of technical staff in the civil

*The comparison of the 2004 and 2007 figures indicates a very significant decrease in the number of prisoners in Afghan prisons*

FIGURE 4.8

**Structure of the Attorney General Office**

Source: UNDP Justice Program

*Despite the critical role played by the AGO within the justice system an unquantified proportion of the prosecutors do not have the requisite degrees from faculties of law or sharia.*

department is 1521. According to AGO's records, the total number of its female technical employees in the Prosecution Service throughout Afghanistan is 74. In addition, there are 247 female officers in the Service who work as administrative and support staff.<sup>39</sup> Despite the critical role played by the AGO within the justice system an unquantified proportion of the prosecutors do not have the requisite degrees from faculties of law or *sharia*.<sup>40</sup>

Like the other key institutions of the Afghan justice system, lack of resources, trained and experienced prosecutors in conjunction with the lack of adequate equipment, transportation, and physical infrastructure, prevents the majority of cases from being properly prepared for trial by the Afghan prosecution service. As will be examined in the section on Afghan National Police, inadequate collaboration between the AGO and the police during investigations further contributes to this situation.<sup>41</sup> This has very negative conse-

quences for the Afghan justice institutions in operating as a system, and hence, for the delivery of justice to the Afghan population.

#### **JUDICIAL SYSTEM REFORM EFFORTS: 2002-2006**

The Bonn Agreement of December 2001 authorized the creation of the Afghan Interim Administration and emphasized the rehabilitation and reform of Afghanistan's justice institutions. Under the Bonn agreement, the 1964 Constitution of Afghanistan and existing laws were reinstated to the extent that they were not inconsistent with the provisions contained in the agreement and with Afghanistan's international obligations. Provisions relating to the Afghan Monarchy and the Prime Minister and their executive powers were particularly considered as inconsistent with the Agreement. The Bonn Agreement also established an independent Afghan Judicial Reform Commission (JRC) "to

rebuild the domestic justice system in accordance with Islamic principles, international standards, and the rule of law and Afghan legal traditions.”<sup>42</sup>

The 1964 Afghan Constitution and existing laws provided an interim legal framework, and the JRC was assigned the task of facilitating the rehabilitation and reform of the Afghan justice system. This included reviewing the structure and functions of the justice system, facilitating law reform, strengthening technical, logistical and human resources, expanding legal aid, and promoting access to justice. The work of the JRC was ultimately limited to proposing reform strategies and facilitating international assistance for rebuilding the Afghan justice sector. The JRC had achieved only a limited level of success when it was dissolved in June 2005.<sup>43</sup> This was closely tied to the lack of cooperation between Afghanistan's justice institutions—the Supreme Court, the Ministry of Justice and the Attorney-General's Office—to implement proposed reforms.<sup>44</sup>

In early 2003, the Justice Sector Consultative Group (JSCG) was created as the national level coordination mechanism for the Afghan government, donor countries, and international organizations to discuss and coordinate their activities, policies, and to draw plans for implementing them.

Although the Justice Sector CG managed to facilitate information sharing on the progress of activities, it was unable to develop collectively an agreed upon long-term vision for the Afghan justice system. In 2005, the permanent justice institutions in cooperation with UNAMA and UNDP developed a general framework for Afghanistan's justice sector entitled "Justice for All." This was approved by the Afghan Cabinet on 10 October 2005, and provided a detailed plan for coordinating future reforms efforts and donor investments. "Justice for All", feeds directly into the process of preparing the Afghanistan Compact and the Interim Afghanistan National Development Strategy (I-ANDS).<sup>45</sup>

#### BOX 4.3

### Afghanistan Compact rule of law benchmarks

- By end of 2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public.
- By end of 2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible. A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end -2006 and fully implemented by end-2010.
- By end 2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General's Office, the Ministry of the Interior and National Directorate of Security).
- By end 2010, justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles.'

The "Justice for All" strategy was further refined and specifically tailored for inclusion in the Interim Afghanistan National Development Strategy (I-ANDS) in late 2005. One sector within the I-ANDS focuses on Governance, Rule of Law and Human Rights. The I-ANDS and the Afghanistan Compact lay out a number of time-bound benchmarks to be achieved to strengthen the rule of law in Afghanistan (box 4.3). The Afghanistan Compact called for the creation of high level Joint Coordination and Monitoring Board (JCMB) to drive the Compact implementation and to resolve strategic issues related to its implementation. A Consultative Group for the Governance, Rule of Law and Human Rights sector was created to provide strategic coordination for achieving the ANDS benchmarks within this sector. This Consultative Group replaced the Justice Sector CG.

Together, the "Justice for All" strategy, the Interim Afghanistan Development Strategy, and the Afghanistan Compact provide the foundation for developing a detailed framework for rebuilding the judicial system in Afghanistan. They also provide mechanisms for the establishment of collaborative relationships among the

*Together, the "Justice for All" strategy, the Interim Afghanistan Development Strategy, and the Afghanistan Compact provide the foundation for developing a detailed framework for rebuilding the judicial system in Afghanistan*

*During the Soviet occupation from 1979-1989, the police were militarized. The police force was further weakened during the civil war*

Afghan Government and its international partners. Progress achieved within this sector to date includes the reform of existing laws, the drafting and publishing of new laws, the training of a few hundred judges and prosecutors, and the building and rehabilitation of court facilities in key locations.<sup>46</sup> In addition, some progress has been observed with regard to the enhancement of the administrative capacity of the personnel within the justice system.

However, this progress is very patchy and modest, and building on it faces serious obstacles. Institutionalized corruption, the continued political and military influence of warlords, and the lack of security outside a few key urban centers (especially for judges, judicial personnel, and prosecutors) pose serious challenges to the establishment of the rule of law in Afghanistan. Low salaries for judges, prosecutors, and other judicial personnel, limited public trust in the formal justice system and the police, lack of professional capacity within the justice sector, and the inadequacy of detention facilities and correctional services further adds to the weakness of the formal justice sector.<sup>47</sup>

As outlined in the concluding chapter, the establishment of an effective justice system not only requires overcoming such obstacles, it also requires a coherent vision

for Afghanistan's justice institutions that aims at the creation of a new pluralistic system of justice that has the capacity to serve the complex needs of the Afghan population efficiently. The fulfillment of these needs of the Afghan population are closely connected to their human development needs. An important element of an efficient pluralistic system of justice that promotes human development is the enforcement of law.

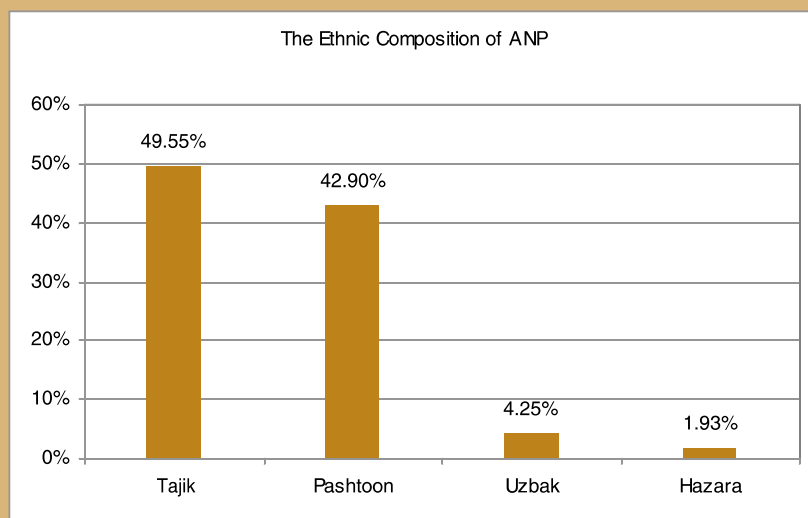
## THE AFGHAN NATIONAL POLICE

The Afghan National Police (ANP) is part of the Ministry of the Interior. It was formed as a civilian police organization during the 1960s. During the Soviet occupation from 1979-1989, the police were militarized. The police force was further weakened during the civil war.<sup>48</sup> As a result, the civilian Afghan police officers were so rare as to be virtually non-existent in 2002. From 1992-1995, under the *mojahedin* alliance, armed groups were only in de facto control. When the Taliban took control of Kabul in 1996, they did not re-establish the police force, but instead established a "Vice and Virtue Police" to support the Department for Promotion of Virtue and Prevention of Vice. As a result, following the fall of the Taliban no civilian police force existed.<sup>49</sup>

The Afghan National Police was created in April 2003 by Presidential decree. There was initially an ethnic imbalance within the police, as most senior posts were held by Tajiks. Provincial and local police commanders owed their allegiance to local military commanders, and central control was virtually non-existent. As figure 4.13 illustrates, while Tajiks are over-represented in the ANP, Pashtuns, Hazara, Uzbek and other ethnic groups continue to be under-represented in the police,. However, while five years ago most senior commanders were Tajik, they now comprise slightly less than 50 per cent. Of the top 30 police generals, 14 are Tajik, 13 Pashtun, 2 Hazara and 1 Uzbek. An organization

FIGURE 4.9

### The Ethnic Composition of ANP





reflecting more closely the composition of the general population is likely to garner greater public acceptance and trust.

There are currently roughly 62,000 police,<sup>50</sup> or one for every 381 Afghans.<sup>51</sup> This ratio is roughly comparable with the police to population ratio of 1:370 in England and Wales, or 1:374 in South Africa. While the ratio of police to the population is within normal bounds for civilian police, it may be low given the conflict status of Afghanistan, and the need to establish peace and security for all civilians. Military engagements are also taking their toll on the police who are losing more lives to suicide bombers, improvised explosive devices and insurgents than the Afghan army.<sup>52</sup>

Because of the current security situation, there is ongoing discussion to increase the strength of the ANP to 82,000.<sup>53</sup> The 12,000-strong Afghan National Auxiliary Police (ANAP) was formed in the summer of 2006 on a temporary basis to help the ANP improve security, particularly in the South and South-East of the country. The ANAP was designed to be a “community-based” force recruited and vetted in their local province and district. The ANAP only receive only a ten-day basic training course, to be followed each quarter by a week-long “sustainment” course.<sup>54</sup> The creation of the national auxiliary police has been criticized for merely rebuilding disbanded militias. The training provided is barely sufficient to prepare the auxiliary police to undertake simple policing functions. Although the creation of the ANAP is unlikely to provide improved policing services for the civilian population, it may help contain the insurgency and preempt police commanders from forming their own auxiliary police.<sup>55</sup>

Another important issue relating to the rebuilding of ANP is the gender issue. Since 1960, small numbers of women have served in the police force. Currently, women constitute slightly more than one-third of 1% of police personnel. There has been a recent modest increase in the numbers of women in the police (table 4.4).

TABLE 4.4  
Numbers of women in the police May 2005 - Feb 2007

Category	2005	2007	Difference
Officers	80	93	13
Sergeants	84	118	34
Patrol	0	22	22
Total	164	233	69

Source: Personnel Department, Afghan Ministry of Interior, Kabul, 2007

BOX 4.4

Family Response Units

The first of the police family response units (FRU) was created in Kabul in June 2005 by American police advisors supported by a number of agencies. By the summer of 2007, it is expected that there will be 19 FRUs across Afghani-

stan. They are a remarkable example of how simple grassroots projects started with little or no funding but significant imagination, goodwill and cooperation can succeed and flourish.

Policewomen do not perform the full range of police functions and, with a few notable exceptions, have played only a minor support role to male police.<sup>56</sup> Women face many obstacles to working within the ANP. In addition to the social, cultural or religious barriers that women working in policing face, the ANP itself is a “gendered” organization—one built on masculine premises that inherently discriminate against women. This is evident in the organizational and rank structures, uniforms, firearms, and emphasis on physicality in the force.<sup>57</sup> A particular Afghan example of organizational bias is the uniform forage cap, which reveals some of the policewomen’s hair, making it difficult for them to go on the street without offending religious sensibilities.

Even though the ANP understands the role policewomen can play in providing services to the female population, the failure to make the necessary organizational changes that would enable police women to perform their duties safely and effectively prevents this from occurring. This dynamic was evident in the pay and rank restructuring exercise. Despite the systemic bias that denied them the opportunity to gain the

*Currently, women constitute slightly more than one-third of 1% of police personnel*

*Strengthening the police also depends on reforms throughout the rest of the criminal justice system*

same knowledge and experience as their male colleagues, senior female officers were compelled to compete on the basis of male-determined standards of merit for the positions they already held. Apart from one female general, who had acquired the necessary background because of exceptional circumstances, all the female candidates failed. Nonetheless, some progress towards gender mainstreaming has occurred in the last two years. A residence for women was built at the Police Academy and police women have received some training. Units designed and mandated to respond to family violence have also been created to serve female victims (box 4.4).

Only 70 women recruited to the middle ranks of the police have graduated from the Police Academy. Four female officer recruits are currently in training and will be joined by two more in the near future. A few women have been recruited at the patrol level in some provinces. Training for women entering the middle ranks of the police is being instituted in the provinces to encourage recruitment into the police of women who are deterred by having to leave home to train in Kabul.

*THE REFORM OF THE ANP: 2002-2006*

International aid for the reform of the ANP has totaled over USD \$1.5 billion in the last five years. It has largely concentrated on the rebuilding of police facilities, providing uniforms and equipment, training, and pay and rank reform. Payment of salaries was reinstated in 2002 following the establishment of the Law and Order Trust Fund (LOFTA). The most senior officers receive leadership training and have international police mentors. There is a vigorous training program at all levels, that emphasizes human rights and the rule of law.

Although the performance of the police is improving, several analysts view reforms to date as disappointing.<sup>58</sup> Although the quantity of the police has improved, quality is still a significant issue. The quality of the ANP remains exceptionally low. Combined

Security Transition Command-Afghanistan (CSTC - A) has determined that the police are incapable of conducting law enforcement operations.<sup>59</sup>

Corruption in the ANP is likely widespread and has undermined the legitimacy and utility of the police in the eyes of the Afghan populace.<sup>60</sup> Extortion at check points, demanding money in exchange for necessary documents, or taking bribes to ignore criminal acts are commonplace. Abuse of position is also manifested in the crimes and brutal acts that police commit, only some of which are ever reported.<sup>61</sup> Improved facilities, increased training and better equipment may be insufficient for enabling the ANP to become a fully functional organization. The culture within the ANP must change. The police must show that they are working not just for their own interests, but for nation as a whole and to uphold the rule of law.<sup>62</sup> Strengthening the police also depends on reforms throughout the rest of the criminal justice system. Until elements of the Afghan criminal justice system, including the corrections components and the judiciary have developed sufficiently so that laws can be standardized and uniformly applied "the ANP will function more as a security force than as a law enforcement organization."<sup>63</sup> Without thorough-going reform, the Afghan National Police—as an important element of the justice system—to enforce law is likely to affect the human development of the Afghan people. Laws that are not enforced are not worth the paper on which they are written.

## THE LEGISLATURE

For hundreds of years, an Afghan legislative body has been either non-existent or symbolic in even the most open and forward-looking regimes. Instead, legislative authority was controlled primarily by decree through the incumbent king, prime minister, or president. With every conqueror came a new set of legal rules and changes to the form of the quasi-legislature.

## Early Legislative History

Before the founding of the modern state of Afghanistan in 1747 by Ahmad Shah, the country was considered by many to be a lawless land. Ahmad Shah's regime introduced a basic judicial system, and promulgated a handful of laws by royal decree.

The first real legal reformer of Afghanistan was Abdur Rahman Khan, who took power in the 1870s. As the creator of the first modern legal system in Afghanistan, he is often referred to as the "Justinian of Afghanistan." Abdur Rahman ordered that Islam would be the official law of the land.<sup>64</sup> He divided laws into three categories, customary law, Islamic law, and statutory law (administrative and civil laws called *qanun*) and began codifying the laws.

In 1922, continuing Abdur Rahman's legacy, his grandson Amanullah Khan initiated the full codification of laws in Afghanistan. He also began drafting Afghanistan's first Constitution in 1923. The 1923 Constitution called for the

establishment of [selective] state, provincial, and district level councils.<sup>66</sup> These councils served as the country's first legislative bodies. Amanullah left a judicial legacy by codifying Hanafi criminal law and built the foundation for the development of the rule of law in Afghanistan. He left a legal precedent that would be duplicated by successive regimes and Constitutions.

The 1931 Constitution, which was written under Nader Khan's rule, contained provisions for the establishment of a bicameral parliament, which became the primary legislative body of the country. Yet, the king had the right to override any parliamentary decision, declare<sup>66</sup> an emergency, dissolve parliament, and promulgate laws by decree. This was also the case in the Constitution of 1964, which was seen as the most progressive constitution of the country.

Under Mohammad Daud Khan the legislature was slightly weakened because

the 1977 Constitution allowed legislative proposals to originate from the executive.

Legislative and judicial developments of the last hundred years were reversed after the communist coup d'état of 1978. The rule of law was immediately weakened by the prevalence of arbitrary arrests, indictments, and executions of thousands of people believed to oppose a communist state. The 1987 Constitution tightened control by the President over the Government by providing him with full control of the executive, legislature, and judicial powers.

Amid the civil war that broke out in 1992, uncertainty remained regarding which laws were applicable.<sup>67</sup> Thus, Islamic and customary laws were frequently applied as the only certain sources of law, especially in the remote areas of the country. With the arrival of the Taliban regime from 1996 to 2001, the country was ruled by decrees and edicts issued by Mullah Omar.

Although Afghanistan's history dates back thousands of years, its formal legal institutions are less than 150 years old and were never allowed to mature.

What has been consistent is the struggle to find a balance between positive law and the various schools of Islamic law. Tied to this debate has been the politicization of the role of the *ulema*—Muslim religious scholars/leaders—in the country, in interpreting and implementing laws. Customary law and tribal dispute resolution mechanisms have added a third dimension of complexity to the Afghan legal landscape. However, to understand the current context of Afghanistan's judicial and legal situation, it is imperative to know the history of how it progressed and regressed over various regimes and eras (box 4.5).

### YEAR ONE OF THE NATIONAL ASSEMBLY

In accordance with the Bonn Agreement, the *wolessi jirga* and Provincial Council elections were held on 18 September 2005. The

*mishrano jirga* or upper house of the National Assembly was formed in November 2005. On 19 December 2005, the first gathering of the new National Assembly was held. The National Assembly is comprised of a 249-seat *wolessi jirga* and a 102-seat *mishrano jirga*.

The 2004 Constitution identifies the National Assembly "as the highest legislative organ and is the manifestation of the will of its people and represents the whole nation."<sup>68</sup> The *wolessi jirga* is specifically tasked to "review as well as investigate the actions of the Government", giving it a primary accountability function.<sup>69</sup>

Since its inauguration, the National Assembly has faced the colossal task of reviewing 433 Presidential decrees and pieces of legislation that the Transitional and Interim Authorities of Afghanistan had passed since the end of the Taliban era. The new National Assembly has also had to review and approve all members of the Cabinet of Ministers, the nine judges on the Supreme Court, and all new pieces of legislation drafted by the Ministry of Justice.

*Customary law and tribal dispute resolution mechanisms have added a third dimension of complexity to the Afghan legal landscape*

*The current legal framework lacks both formal and informal linkages between the executive and legislature*

In its first year, the National Assembly reviewed and decided on two pieces of legislation passed since 2001, and did not introduce any draft bills. The Charter for National Reconciliation or the "Amnesty Bill", developed in January 2007 and finalized two months later, was the first piece of legislation to originate in the National Assembly.

The Constitution requires each house to have standing technical committees to study specific topics and proposed laws. In the *wolessi jirga*, there are eighteen committees, including ones for legal affairs, justice, and defense. Each committee contains ten to 25 members. The committees review draft bills, propose amendments and submit bills.

The *mishrano jirga* has sixteen standing technical committees and joint committees mirroring those in the *wolessi jirga*. Responsibilities include reviewing draft bills pertaining to the committee's specific area of competence, proposing amendments to draft bills, and preparing and presenting reports and references about the bill to the full National Assembly.

Despite the detailed rules of procedure for the organization of these committees in both houses of the National Assembly, the development of some has been characterized by a relative lack of discipline and focus rather than on specific areas of particular importance to the national interest or the expertise of each parliamentarian. In general, capacity in all technical areas remains low in the National Assembly. A significant proportion of the parliamentarians are barely literate, while others are only functionally literate. This contributes to the backlog of legislation in the National Assembly, and can impede the legislative process. Challenging timelines in some of the areas where the executive and legislature must work together most closely may also prove to be sources of discord. The multitude of 30-day deadlines to confirm the entire cabinet, Supreme Court and other appointments, as well as for passing the budget (the new financial year began on 21 March), while also creating the framework

of an entirely new legislative institution, has been fortunately treated with some degree of flexibility.<sup>70</sup> However, not holding the National Assembly to its Constitutional and procedural timelines undermines the legitimacy of the institution itself. This issue doesn't have a simple solution, as amending procedural timelines identified in the Constitution may prove difficult and raising the technical capacity of parliamentarians is a long term effort.

The current legal framework lacks both formal and informal linkages between the executive and legislature. Legislators cannot sit in the Cabinet, and the National Assembly, which has downplayed the role of political parties, includes no large political blocs that straddle government and parliament and can, therefore, shape policy and ensure that bills are passed.<sup>71</sup> By refusing to head a political organization, President Karzai has allowed himself to become isolated, without stable political support. A joint committee between the *wolessi* and *mishrano jirgas* is now tasked to break any deadlocks between the two houses of the National Assembly, but there is little explicit guidance on what to do in case of a deadlock between the executive and legislature.<sup>72</sup> Indeed, little preparation has been undertaken to determine how the executive and legislature should work together.

#### ANNUAL LEGISLATIVE PLAN

Although Official Gazette 787, Part IV, Article 3 requires laws to be drafted and reviewed pursuant to an annual legislative plan, no such plans were developed from 2002-2006. In December 2006 the Ministry of Justice began work on a 2007 draft annual legislative work annual plan which identified 20 laws, 5 for each quarter. This draft plan was based on the needs of the line ministries and considered the legislation required by the Afghanistan Compact. The draft was submitted to the cabinet, which eventually added another 21 legislative documents to the list, expecting the *taqnin* to



produce and develop close to 1 piece of legislation every 10 days. The annual plan was approved by the cabinet in March 2007, concurrent to the Afghan New Year, and work has begun on according to the plan. Positive as this development is, it is important for the MOJ to hold the executive branch accountable for following the 1386 Annual Legislative Plan and not continue the process in an ad hoc manner. A few pieces of important or emergency legislation are expected throughout the year, but for the most part the plan should be followed in order to give the *taqnin* and eventually the National Assembly time to properly prepare for specific pieces of legislation. Without a coherent legislative plan, some parties try to circumvent proper procedures by submitting their drafts directly to the *taqnin* without an executive order.<sup>73</sup>

With such a large number of laws needed to fully develop a proper legal framework, prioritization of these laws by the President's office and Council of Ministers is necessary. Laws then need to be prioritized firstly in the Annual Legislative Plan and potentially in 3 year and 5 year legislative plans. The MOJ needs to determine how it will handle new laws that are introduced throughout the year but are not on the Annual Legislative Plan. A system of prioritizing priorities needs to be developed between the Executive and the MOJ. It is also believed that the prioritization of sectors in the ANDS will help lead this process. A more strategic relationship is needed between the MOJ's *taqnin* department and the President's Office, where setting the agenda for the laws to be reviewed by parliament.

There remains a false understanding that the National Assembly is completely independent and that any interference by MOJ or executive is not acceptable. Since the formation of the National Assembly, the President and the Council of Ministers hold back on engaging strategically in the legislative process because of fears of being criticized for interfering in the National

Assembly's legislative duties. At the same time, the executive appears to believe the National Assembly is not a separate and equal arm of state, but rather another ministry to be managed.<sup>74</sup>

In the December 2006 through February 2007 National Assembly recess, the executive rushed to enact eight laws, including the Labor Law and the Limited Responsible Shareholder Corporation Law, which could have been too complicated for the National Assembly to properly review and debate in an efficient manner and would therefore have been held hostage within the legislative system. Legislative decrees considered 'immediately needed' are allowed under Article 79 of the 2004 Constitution but must be approved by the National Assembly within 30 days of reconvening. However, with the backlog of legislation to be reviewed by the National Assembly, the 30 day timeline has yet to be enforced. Additionally, it lacks basic knowledge of state building and reform efforts, it is believed that the National Assembly has been bypassed in the development process of the interim Afghanistan National Development Strategy. Despite its shortcomings in technical expertise and experience, undermining the National Assembly can backfire on the executive and further hamper developments towards building a solid government and foundation for the rule of law.

Further complicating matters is the lack of clarity about the official role of the Office of Administrative Affairs (OAA) in the Office of the President in the legislative process. In theory, the OAA is the primary liaison between the executive and the legislature, but the Office is considered by many as an unnecessary bureaucratic step unless its role can be further defined and its legislative activities consistently institutionalized in the legislative process.<sup>75</sup> For example, the OAA administers a committee for each draft law, which reviews and researches the draft and defends it in the meeting of the Council of Ministers. The committee is lead by Vice President Karim Khalili and is comprised of relevant

*Without a coherent legislative plan, some parties try to circumvent proper procedures by submitting their drafts directly to the taqnin without an executive order*



OAA legal experts and relevant ministers. The functions of this committee simply replicate those performed by the Ministry of Justice, which is part of the executive anyways, before the draft law ever reaches the OAA. Like the OAA review committee, the working group developed for each draft law by the *taqin* department and the Executive Committee at the Ministry of Justice reviews all draft laws and sends them for review by all relevant Ministers, including the Ministers of Economy and Finance. Furthermore, each draft submitted by the MOJ must be accompanied by a primary report and a secondary report including a brief overview of the law, its purpose, similar past and current laws, and a list of the Government officials and ministries that have approved the draft.<sup>76</sup> With this thorough process already taking place within the executive, an additional review within the OAA only adds another bottleneck to the already sluggish Afghan legislative process.

Additionally, once a draft law has been approved by the National Assembly and is forwarded to the President's Office, the OAA, the Ministry of Parliamentary Affairs, and the Ministry of Justice advise the President on whether or not to sign the legislation. Officials at the OAA say their advice to the President is a mandatory administrative function and that the advice of the Ministry of Parliamentary Affairs is only voluntary.<sup>77</sup> However, representatives of the Ministry of Parliamentary Affairs interviewed for this report identified policy advice to the President as one of its primary functions. Further complicating matters both the OAA and the Ministry of Parliamentary Affairs are headed by the same senior official.

These redundancies in the legislative process create yet another backlog of work

for all three branches of Government, and most importantly stunt the much needed advancement of rule of law implementation. Combining the lawmaking and judicial functions of the OAA and the Ministry of Parliamentary Affairs under one office with the Office of the President would make help make the Afghan legislative process more efficient and effective

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Since the Bonn Agreement was signed in December 2001, progress in strengthening the rule of law in Afghanistan has been made. Yet, as is described above, such advances are not yet sufficient. The judiciary, the Ministry of Justice, the Attorney General's Office, the Police, and the National Assembly are all crucial institutions for upholding the rule of law in Afghanistan. Each of these institutions faces a number of difficulties that impede their performance, including lack of professionalism, insufficiently trained staff, limited or no access to legal texts, inadequate physical infrastructure, and potentially pervasive corruption and nepotism. The failure of these institutions to cooperate and work as a system inhibits the effective delivery of justice, and therefore creates serious obstacle for the human development of the Afghan population. For both the rule of law and human development to be advanced in Afghanistan a comprehensive strategy must be devised and carried out to ensure that these institutions work together as a system with the aim of improving the lives of the Afghan people. To devise such a strategy, one that meets the needs of Afghanistan's ground realities, the state's unique culture must be taken into account.

*The failure of these [justice] institutions to cooperate and work as a system inhibits the effective delivery of justice, and therefore creates serious obstacle for the human development of the Afghan population*

# Chapter 5



Photo: Sayed Ikram Afzali

An image of *jirga* in Gardez

Afghans have relied on traditional institutions of dispute settlement, such as jirgas and shuras, for hundreds of years to apply customary laws. In combination with other actors, such as the Afghanistan Independent Human Rights Commission, civil society organizations, and the media, informal institutions of dispute settlement can complement formal state institutions to enable more Afghans to access affordable justice that is viewed as legitimate and can progressively do more to meet national and international legal and human rights standards.



## Engaging non-state institutions in the pursuit of justice

As Afghanistan faces multiple cross-cutting challenges to establishing the rule of law through its tattered formal judicial system, alternative dispute resolution mechanisms and non-state institutions often fill the void. Afghans have relied on traditional justice bodies, such as *jirgas* and *shuras*, for hundreds of years to administer justice. It is estimated that *jirgas* and *shuras* settle more than 80% of judicial cases in Afghanistan and are meeting an urgent need in Afghan society. Although *jirgas* and *shuras* can be biased against women and other vulnerable groups, data shows that a majority of the people surveyed view them as trustworthy, efficient, and less corrupt than state courts.

There is an urgent need for internal monitoring mechanisms to be developed for Afghanistan's justice system, as well as for many other governmental institutions. However, given the high levels of corruption and the weak capacities within the Government and in the state court system, checks and balances within state institutions are largely non-existent. This leaves Afghans to depend primarily on independent accountability mechanisms to monitor and investigate Government actions and affairs. These independent accountability mechanisms include non-state actors, such as civil society, the media, and human rights groups.

*Jirgas* and *shuras*, like other rule of law institutions, need to be held accountable on various fronts. The Afghan Independent Human Rights Commission (AIHRC), as an independent Government institution funded primarily by external donors, is in a unique position to monitor the compliance of *jirgas/shuras* with human rights principles. Reforming and monitoring

*jirgas/shuras* and creating a framework in which they can act as complementary dispute resolution mechanisms will give them an even wider appeal and will make justice in Afghanistan more accessible. However, such a process will require considerable increases in the capacity of the AIHRC.

### INFORMAL JUSTICE SYSTEMS: *JIRGA* AND *SHURA*

With the formal justice system fragmented, ineffective, and lacking resources, reach, and legitimacy, informal justice institutions serve as important alternative mechanisms of dispute resolution in Afghanistan. These informal systems of justice are, by and large, based on indigenous customary practices and local religious traditions. One of the most important institutions of informal justice in Afghanistan is the *jirga* (or its approximate equivalent *shura*). The term *jirga* is widely used in Pashto, but is also found in Dari and Turkish languages. In all these three languages, *jirga* has very similar meanings - a wrestling circle, a gathering of people, and a consultation among a group of people.<sup>1</sup> In the cultural and political context of Afghanistan, *jirga* is most closely associated with the rituals and processes of Pashtun traditional tribal dispute settlement, where people sit in a large circle in order to resolve a dispute, and/or make collective decisions about important communal issues and problems.

While *jirga* may be strongly identified with the Pashtuns, there is well-documented evidence showing that *jirga* (or *jirga*-like local institutions) are also used as the main mechanisms of dispute settlement

*Jirgas and shuras, like other rule of law institutions, need to be held accountable on various fronts*

Among Afghan Tajiks, Hazaras and Uzbeks, local councils called *shuras* operate as informal mechanisms of dispute settlement

among Afghan Tajiks, Hazaras, Uzbeks, and Nuristanis.<sup>2</sup> Recent field research indicates that there are striking similarities between the traditional Pashtun *jirga* and *shura* among other ethnic groups. Among Afghan Tajiks, Hazaras and Uzbeks, local councils called *shuras* operate as informal mechanisms of dispute settlement.<sup>3</sup> They are defined by Carter and Connor as "a group of individuals which meets only in response to a specific need in order to decide how to meet the need. In most cases, this need is to resolve a conflict between individuals, families, groups of families, or whole tribes."<sup>4</sup> These traditional councils are also referred to as *majlis-e-qawmi* (or *jalsa*) in Hazarajat, *awrilawar* in Nuristan, and as *shura-e-islahi* in Badakhshan.<sup>5</sup> All these various institutions, in fact, operate as Alternative Dispute Resolution (ADR) mechanisms (see box 5.1).

The term *shura* can also refer to institutions that handle ongoing community governance or resource management tasks. These may contribute to broader issues of community governance, including natural

resource management, public infrastructure, and support to the local mosque. These councils may have been traditionally present in some areas, but in many cases have been introduced in recent decades by local commanders of *mujahedin* groups or district and provincial governors—or by NGOs for the management of local development. Since 2003, the National Solidarity Program (NSP) has also introduced a form of elected standing local *shura* with both community governance and development functions called the Community Development Council (CDC) (box 5.3).

In the context of the resolution of disputes and crimes, *jirga* and *shura* are much more often an ad hoc body rather than a standing institution with a fixed membership or, in some cases, a combination of these two forms—a standing body with additional members chosen according to the issue at hand. In the South and East of Afghanistan the traditional *jirga*—as the main means of dispute settlement—is more strongly institutionalized and structured. In this context, the *jirga* at the local community and *mantega* (multi-community) levels is a local or tribal institution of dispute settlement that incorporates the prevailing *narkh* (customary laws) institutionalized rituals, and the views of a body of *marakachian* (esteemed elders and leaders) whose *prikra* (judgment) is binding (morally and socially) on the parties involved.<sup>6</sup>

In this definition, the *narkh* describes the centuries-old unwritten body of civil and penal tribal customary laws, and the *marakachian* is the name for the local or tribal elders and leaders who are respected for their expertise and social influences in the community or tribe. Other terms for these concepts in Pashtun areas are *pashtunwali*, which describes various tribal codes, and *jirgamar*, which indicates an individual particularly respected for his judgment in *jirga*. Often the elders who participate in *jirga* may be known as *rishsafed*, or "white-beard". *Prikra* is the collective ruling (with binding effects on the parties involved)

#### BOX 5.1

### Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) refers to any method of settling disputes outside of the courtroom and typically includes arbitration, mediation, and community-based approaches. In the last 30 years, ADR mechanisms have become more prevalent in order to avoid the cost, delay, and adversarial nature of litigation. Supporters of ADR argue that such methods are not only cost effective and efficient, but that they improve access to justice, lighten the load on the state system, and reduce court backlog.

Arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence. Parties involved in the arbitration process select on one or more arbitrator to

listen and decide on the dispute. Mediation is an even less formal than arbitration, in that mediators are individuals trained in negotiations who bring opposing parties together and attempt to work out a settlement or agreement that both parties accept or reject.

Community-based ADR, used in India, Sri Lanka, Latin American is becoming a popular method of ADR in developing or post conflict countries where the formal court system may be destroyed, corrupt or otherwise inaccessible to a population. Similar to Afghanistan's *jirgas* and *shuras*, many traditional models of community-based justice rely on elders, religious leaders, or other community figures to help resolve conflict.

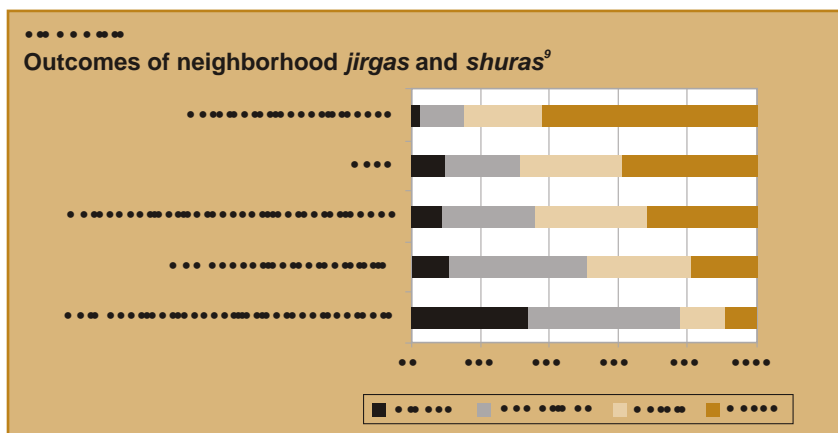
Source: Cornell Law School. 2007. Alternative Dispute Resolution: An Overview. Accessed on 4 June 2007 at: <http://www.law.cornell.edu/wex/index.php/ADR>

about the settlement of a specific dispute. The *jirgas* also include institutionalized rituals, the intensity of which varies in accordance with the nature of a dispute. Serious disputes, such as murder and inter-communal disputes over land, woods or mountains, usually have more elaborate ceremonial aspects. *Jirgas* deal with issues ranging from relatively minor problems, such as disputes over the boundaries of farms and minor bodily harm, to more serious offenses, including murder and disputes over personal property and inheritance. The survey commissioned for this study reveals that Afghans tend to take non-public land and other property disputes to *jirga* and *shuras* for settlement; only occasionally are murder cases taken to these institutions for resolution.<sup>7</sup>

An important feature of the *jirga* is that its outcome commands a morally and socially binding effect only when it is arrived at fairly, and so perceived by the accused offender, the victim, and the village. Should any of these stakeholders, especially the immediate protagonists, see a *prikra* as unfair, the affected party can appeal. This often happens when customary laws are wrongly applied and/or misinterpreted, or when corruption and favoritism by the mediators are noticed. In a typical situation, especially among Pashtun, the dissatisfied party has the right to appeal to another *jirga*. If the second *jirga* confirms that the outcome has not been fair, the (first) group of elders may lose their reputation and the right to participate in future *jirgas*; they may also have to pay *tawan* (compensation) to the parties. Thus, a *jirga* can be reconvened three times. The third decision by a *jirga* is final and must be implemented.<sup>8</sup>

An official of the *hoquq* (out-of-court mediation) department at Ghani Khil district, Nangarhar, described this process of appeal as follows:

*Of course they can show it to the other elders; the procedure in the jirga is like the court procedures. If one side of the dispute is not happy with the decision he can appeal to other*



*white beards. These white beards will see the decision whether it is a right and fair decision, or not. If it is found to be a fair decision, it will be endorsed by these other white beards as well. Otherwise these white beards will declare that the decision is not a fair decision and it should be reviewed by another jirga. (AREU, Interview with an official of hoquq department at Ghani Khil district on 16 January 2007)*

*Jirga* and *shura* may be held in a *hojra* (a guest room usually attached to the main building of a house), village mosque, or under the shadow of a tree. Depending on the nature of the dispute and on the form of *jirga/shura*, it is often concluded within a few days. However, some that focus on the resolution of more serious issues, such as murder or a dispute over communal lands, may take longer.

#### OUTCOMES OF JIRGAS/SHURAS

For this report, Afghans from across the country were asked about the frequency of different outcomes from *jirga/shura* gatherings. The outcomes were: (i) *solh* (peace) and the reconciliation of disputants; (ii) compensation of the victim; (iii) *ratat* (the collective social boycott of the offender); (iv) *baad* (the marriage of a woman from the offender's family to the victim's close relative to settle a dispute); and (v) burning of the offender's house (figure 5.2). Three-quarters of the respondents said that *solh* was always or

*An important feature of the jirga is that its outcome commands a morally and socially binding effect only when it is arrived at fairly, and so perceived by the accused offender, the victim, and the village*



*The processes, rituals, and outcomes of jirgas/shuras as an informal institution of dispute settlement in Afghanistan have close resemblances to restorative justice practices in modern criminology and criminal justice*

sometimes the final outcome; half of all respondents said that compensation of the victim was always or sometimes the final result. The overwhelming majority of the respondents reported that *ratal* and *baad* were never or sometimes the final outcome, while the burning of the offender's house was far less common.

The data further reveals substantial variations across regions and ethnic groups. In Kabul *solh* was much less likely to be the sole final result, whereas those in the Western, Northern, and Central-Hazarajat Regions more often see *solh* as the final outcome of a case. Compensation appears rarely to be employed in settling disputes in the South-Central Region. And *ratal* seems to be used more in communities of Uzbeks than among other ethnic groups. In the case of *baad*, the Hazaras hardly ever use it as a means of settling disputes, and it is even less common in the Western regions. The burning of an offender's house is also practiced most rarely among the Tajik and Hazara ethnic groups. These variations are important and must be considered when thinking about the compatibility of these systems of informal justice with national justice sector initiatives.

Nevertheless, these findings suggest that *jirga* is fundamentally a peace-making institution that mainly aims at the reconciliation of disputants. Unlike state courts the

outcome of which usually result in finding losers and winners (the guilt and the non-guilty), *jirga* brings disputants and the village together to find collective solutions to problems. As this chapter will later show, this feature of *jirga* is consistent with values and principles of the restorative justice paradigm in criminal justice that is now increasingly prominent internationally. Furthermore, the present findings belie the generalization that the outcome of *jirga* is often *baad*.<sup>10</sup> The data at hand suggests that while *baad* can be an outcome of *jirga*, it is an exception - not a norm. This emphasis on reconciliation and compensation has important implications for integrating restorative models of justice with the formal justice sector in the Afghan context.

#### JIRGAS/SHURAS AND RESTORATIVE JUSTICE

The processes, rituals, and outcomes of *jirgas/shuras* as an informal institution of dispute settlement in Afghanistan have close resemblances to restorative justice practices in modern criminology and criminal justice. Increasingly popular in New Zealand, Australia, Canada, and South Africa, restorative justice not only reduces the workload of the formal justice systems in these countries; it is also more economical.<sup>11</sup> Restorative justice is normally achieved through the use of alternative dispute resolution mechanisms (ADR), methods of settling disputes outside of the courtroom and typically including arbitration, mediation, and community-based approaches. In the community-based model of restorative justice, there is a strong emphasis on the restoration of dignity, peace, and relationships between offenders and victims to provide restitution to victims reintegrate offenders back into a community (box 5.2).<sup>12</sup>

The basic values and principles of restorative justice as introduced in chapter two are central to the process, proceedings and outcomes of the Afghan *jirga/shura*—

##### BOX 5.2

#### Family Group Conference: South Saint Paul, Minnesota (USA)

After the offender, his mother and grandfather, the victim, and the local police officer who had made the arrest had spoken about the offence and its impact, the youth justice coordinator asked for any additional input from other members of the group of about ten citizens assembled in the local school (the group included two of the offender's teachers, two friends of the victim and a few others). The coordinator then asked for input into what should be done by the offender to pay

back the victim, a teacher who had been injured and had a set of glasses broken in an altercation with the offender, as well as to pay back the community for the damage caused by his crime. In the remaining half hour of the approximately hour long conference, the group suggested that restitution to the victim was in order to cover medical expenses and the costs of a new pair of glasses and that community service work on the school grounds would be appropriate.

Source: UNODC, Handbook on Restorative Justice Programmes, Vienna, 2006 (pp27)

especially to the institution of *nanawate*. *Nanawate*, also known as *ozrana* and *ozr* among Hazaras and Nuristanis, respectively, means seeking forgiveness or a pardon and the obligatory acceptance of this truce offer, whose main purpose is reconciliation between disputants. This reconciliation process is called *roggha* among Pashtuns and *roggha jura* among Nuristanis. What is important in this ceremony is that the offender is accepted back into the village after being publicly held responsible, and told that what she or he has done is wrong and unacceptable. At the same time, she or he is treated with respect as a fellow kinsman and villagers. In this way, repairing the damage caused by wrongdoing, and reintegrating the wrongdoer back into village life is an important feature of a *jirga/shura*.

More important, the speed and reconciliation emphasis in the restorative justice paradigm aims at the reintegration of an offender back into the community, rather than on the rejection of the offender by labeling him a bad person and a deviant criminal. Criminological evidence shows that labeling has a very negative impact on first-time offenders, and it tends to turn them into more hardened, and repeat offenders.<sup>13</sup> Because the formal justice system in Afghanistan has severe shortfalls in human and material resources, Afghans could potentially harness the positive restorative justice characteristics of their

endogenous institutions of informal justice. For example, building and running a modern prison service (compatible with international standards) includes the rehabilitation of offenders, a process that is very expensive in a penal context. In light of the inevitably constrained resources available to the Afghan justice sector, the failure to sustain minimum rehabilitative programs within the corrections system is bound to have disastrous consequences for inmates, the justice system, and for the society as a whole.

#### POSITIVE PERCEPTIONS OF JIRGAS/SHURAS

Qualitative data suggests that Afghans see *jirgas* and *shuras* as more accessible, more effective in the delivery of justice, less corrupt, and more trustworthy than formal state courts. Respondents were asked how much they agreed with six statements related to the functioning of *jirgas/shuras*, community fora and other non-state options to settling a dispute. They deal with whether these actors are deemed accessible, fair and trusted, honest (compared to formal state courts), consistent with local norms and values, effective in delivering justice, and able to promote human rights and other international standards. The data indicates that the overwhelming majority of respondents agreed "strongly" or "somewhat" with each of the six statements (table 5.1).

*Criminological evidence shows that labeling has a very negative impact on first-time offenders, and it tends to turn them into more hardened, and repeat offenders*

TABLE 5.1

#### Afghan views about non-state justice providers

Question: Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree, with the following statements about local *jirgas*, *shuras*, <sup>1</sup>community forums and other non-state options for settling a dispute or reconcile a case ?

Statement:	Percentages						Total
	Strongly agree	Agree somewhat	Disagree somewhat	Strongly disagree	Don't know	Refused	
Local <i>jirgas</i> , <i>shuras</i> and other non-state options...							
...are accessible to me	43	44	9	2	*	2	100
...are fair and trusted	33	49	13	2	*	2	100
...are not corrupt compared to other options	34	42	17	4	*	3	100
...follow the local norms and values of our people	37	44	13	2	*	4	100
...are effective at delivering justice	37	45	12	2	*	3	100
...promote human rights and other international standards	39	40	17	4	1	5	100

Source: CPHD Perceptions Survey, February 2007

Across all six categories, it is noteworthy that a slightly larger proportion of respondents viewed *jirgas/shuras* (and other non-state institutions of dispute settlement) positively as compared with state courts, even as both groupings received positive feedback from a majority of Afghans surveyed. The widest disparity was recorded on the question about perceptions of fairness and trust, and corruption. The results show that about four-fifths 82% of respondents saw *jirgas/shuras* and other non-state dispute settlement institutions as

fair and trustworthy, while only some 65% expressed this attitudes towards state courts; 76% of respondents saw *jirgas/shuras* and other non-state dispute settlement institutions as not corrupt, while 58% said this about state courts (table 5.2).

These findings have important implications for the enforcement of the decisions made by *jirga* and *shura*: an individual's trust in and his/her perception of the fairness of a justice institution, and its ability to deliver justice effectively, make him/her better able to accept its legitimacy and moral validity. When people accept laws and legal institutions as morally valid, they are more likely to see their decisions as binding on their behavior. People who have faith and confidence in the fairness of the law and legal institutions are more likely to feel an obligation to obey the law.<sup>15</sup> This may be an important reason why *jirga* decisions are more easily upheld than those reached by the state courts.

These results are generally supported by another recent study that similarly asked "Who do you trust the most to resolve any dispute that you may have?"<sup>16</sup> While approximately 33 % of respondents said they most trusted a local elder, only 19 % said that they trusted a tribal elder most (figure 5.3).<sup>17</sup> About 16 % said they trust local *jirgas/shuras* most. What is important in this study is that an overwhelming majority (77%) of respondents said that they trusted non-state figures or institutions-local elders, tribal elders, local *jirgas/shuras*, and mul-lahs-to resolve any dispute that they may have. These findings would seem to indicate that Afghans across the country attach much greater importance to traditional figures of authority than to those of state institutions. It is also possible the study artificially disaggregates the roles of elders and *jirgas/shuras* (which almost uniformly involve these elders), and thus may under-represent their importance. At the same time, the data illustrate that there is considerable diversity in the institutions in use across the country.

TABLE 5.2

### Comparing formal and informal justice bodies

Percentage who agree(strongly or somewhat) with following statements:	Percentages	
	State Courts	<i>Jirgas/Shuras</i>
...are accessible to me	85	87
...are fair and trusted	65	82
...are not corrupt compared to other options	58	76
...follow the local norms and values of our people	63	80
...are effective at delivering justice	66	82
...promote human rights and other international standards	65	73

Source: CPHD Perceptions Survey, February 2007

### BOX 5.3

### Jirga versus State court A judge's view at a state court

To tell you the truth, the court process is very long. A judge can't make a decision without witnesses, confession, swearing and nokool (not pleading guilty). I don't mean that white beards make decision without investigation of the dispute and witnesses, but since they are living in the same area, they know each other better than a judge in a court. In the court, even when two people are witnesses in a case, they should tell the judge the same words. If a minor difference occurs even in their words, according to the sharia, it is considered false testimony. Another thing is that even if the witnesses say the same thing, the judge has to determine from

the co-villagers of witnesses, and even from the Mullah of the village, whether they are honest people and if they pray or not. So I can say that a small dispute can last in the court for months. Here in Ghani Kheil, let me add something: the court is the last option for disputants. Everyone first tries to solve their dispute within the village through the white beards; but if they can't, they come here. There is a difference between court and *jirgas'* decisions. Courts make decisions, but can't end hostility and bad bini (animosity and bad feelings). When a *jirga* makes a decision, hostility and bad bini are also finished.

Mohammad Alam, Judge at Ghani Kheil District Court, Nangarhar Province  
(Interview by AREU on 24-01-07)

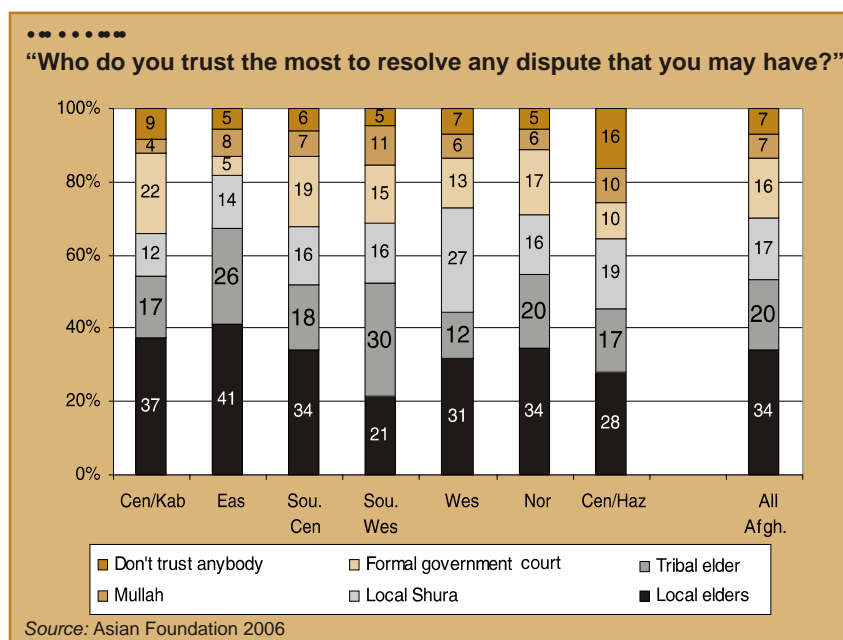
## NEGATIVE ASPECTS OF JIRGAS/SHURAS

Although the preceding section examined primarily the strengths of informal justice institutions in Afghanistan, jirgas and shuras also have some very negative features. Among the most serious of these are the lack of participation by and the treatment of women in the process of dispute settlement. Normally, all-male or male-dominated local council, *jirgas/shuras* exclude women and young people from participation and decision-making.<sup>18</sup> A recent (preliminary) report by UNIFEM states that

Women on both sides of the fence, meaning the traditional dispute resolution mechanisms and the formal justice sector, are on the losing end. In both systems there is limited access to justice for them; however it seems that women and girls have even less possibility for equal redress within the traditional dispute resolution mechanisms.<sup>19</sup>

In addition to issues of participation and process, *jirga* outcomes can also be extremely harmful for women and girls. For example, *jirgas* may -- and occasionally do -- recommend *baad*, a practice that clearly violates Afghanistan's laws, Islamic *Shari'a* principles, and human rights principles. However, as illustrated in figure 5.2 above, *baad* and burning the offender's house are in fact quite rare outcomes. In some places, for example among the Shinwaris of Nangarhar province, *baad* is completely prohibited.<sup>20</sup> Nevertheless, this practice still occurs in other parts of Afghanistan, seriously affecting their human development and violating basic human rights and freedoms.

A second problem area is enforcement. While decisions by *jirga/shura* are mostly enforced through social pressures and informal local and tribal mechanisms, in some cases (particularly in strongly tribal Pashtun areas), decisions are enforced through the non-statutory and unregulated use of force by *arbakian*.<sup>21</sup> *Arbakian* are normally young, unmarried male members



of the village, sub-tribe, or the tribe who act as informal police. Occasionally, *arbakian* may be instructed to burn down the house of the offender who does not adhere to *jirga/shura* decisions or persists in his offending behavior. The deployment of these forces presents serious problems for the role of the state security sector and the state's attempt to acquire a monopoly on legitimate violence.<sup>22</sup>

Another criticism of *jirga* and *shura* concerns their being influenced - even created -- by militia commanders in parts of the country during the Afghan civil war:

"Armed political groups, commanders, and warlords have strategically targeted traditional customary justice systems (*jirgas* and *shuras*) throughout rural Afghanistan in their 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 often is the only avenue available in rural Afghanistan."<sup>23</sup>

However, this assertion is not supported by the data collected for the present report. When asked how often ordinary elders, mullahs, local leaders, commanders, and women were represented in a local *jirga* or *shura*, 65% of respondents said that

*Women on both sides of the fence, meaning the traditional dispute resolution mechanisms and the formal justice sector, are on the losing end*



Notably, only a small minority (12 %) of respondents said that commanders were always represented on local *jirgas* or *shuras*

ordinary elders (*rishsafidan*) were always represented, while another 25% said they were sometimes represented (figure 5.4). Further, 36% said that mullahs were always represented, and 43% or more said that they were sometimes represented. There was a similar response about local leaders (khans or *maliks*). Notably, only a small minority (12 %) of respondents said that commanders were always represented on local *jirgas* or *shuras*. These findings indicate that *jirga* and *shura* tend to involve respected ordinary local elders and leaders, rather than those with guns and money - commanders and warlords. This may be an important reason why people trust *jirga* and *shura* more than state justice institutions (tables 5.1 and 5.2).

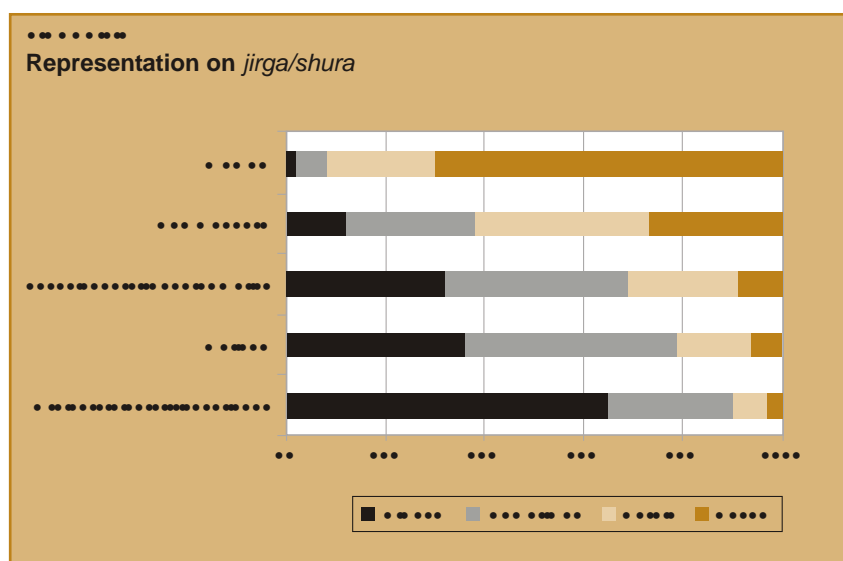
On the other hand, only 2% of respondents said that women were always represented in these local institutions of dispute settlement, while the results confirm that women are very rarely represented on *jirga* and *shura*. The fact that women also have insignificant representation in state justice institutions, as shown in chapter 4, indicates the comprehensive barriers to women's access in both the formal and the informal systems of justice in Afghanistan. Male and female respondents offered similar responses. In general, there was limited regional variation -- except that those in rural areas were more likely to mention local leaders as being represented

on *jirgas* or *shuras*, and those in the Eastern Region were less likely to do so, perhaps reflecting the different relative importance of tribal leadership or local leadership.

Afghans surveyed were also asked to say who they felt had the dominant role in the decisions of these bodies, and who had the next most dominant role. Table 5.3 reveals that two-thirds thought that ordinary elders (*rishsafidan*) played the most dominant role. The remaining one-third were evenly split between mullahs and local leaders, while commanders and women were rarely mentioned. If asked to include who had the second-most dominant role, three-quarters mentioned ordinary elders as one of the two most dominant groups, while one-half mentioned mullahs, and one-half mentioned local leaders. As indicated earlier, these results suggest that decisions within the context of *jirga* and *shura* are predominantly made by traditional authority figures rather than by local strongmen. But the dominance of male traditional figures of authority also excludes women from participation in the decision-making processes of *jirga* and *shura*.

On the surface, the data seem to indicate that traditional *jirgas* and *shuras* are a space for *rishsafidan* to play a dominant role in community disputes across Afghanistan. However, a supplementary explanation may be that these institutions were revived because they have been partially freed from the influence of local commanders during recent years. As one man in Nangarhar province put it, "Warlords and commanders have left these areas; they got very good jobs in the Government - some have become *wolaswals* (district governors) and *walis* (provincial governors), and others have become members of *wolesi jirga* and *mishrano jirga*. Many decent people live in our areas now, and our disputes are resolved by respected elders."<sup>24</sup>

It appears that the traditional authority of *rishsafidan* (who act as *marakachian*) plays an important part in making the *prikra* of *jirgas/shuras* binding on parties to a dispute.





Interviews across Afghanistan indicate that the main sources of *speengeri/rishsafidan* authority are their personal qualities-piety, religious observance, generosity, virtuousness, social status, and leadership skills, and their knowledge of *jirga* rules and prevalent customary laws. Furthermore, some of the *rishsafidan* are mullahs (or accompanied by mullahs) who use persuasion skillfully by invoking the fear of Allah as an important technique for achieving a *prikra* that is satisfactory to all major stakeholders-the victim, the offender, and the community.

In part because of the negative characteristics of informal justice through *jirgas* and *shuras* just noted, international donors concerned with rebuilding the Afghan justice system have paid little attention to them. In one view, policy-makers "either fail to acknowledge the significance of the informal justice system or make general references to its significance while offering limited concrete suggestions on improving its integration with the formal legal system"<sup>25</sup>. Others have adhered to the view that rejects the possibility that Afghan informal justice institutions can meet international standards of justice and rights protection. Informal justice institutions are thus very controversial. No consistent approach to them has emerged in international programming or strategy. At the same time, the current uncoordinated efforts by international donors to transplant elements of foreign (mainly Western) justice models into Afghanistan are unlikely to take root. This reflects a general problem with introducing institutions without legitimization on local terms. As Samuels explains:

"Exogenous institutions can be transplanted through external projects, but they do not tend to deeply entrench themselves in the culture, remaining mere institutional shells and reinforce relationships of accountability between the government and the international donors, rather than the government and the population."<sup>26</sup>

Both historically and worldwide, legal norms and institutions reflecting core

TABLE 5.3 Influence and decision-making in <i>jirgas</i> and <i>shuras</i>		
Question: Of these groups that could be present at a village or neighborhood based <i>jirga</i> or <i>shura</i> - ordinary elders ( <i>rishsafidan</i> ), <i>mullahs</i> , local leaders ( <i>khan</i> or <i>malik</i> ), commanders, women and others - who in your opinion: (a) has the most dominant role in the final decision of the local <i>Jirga</i> or <i>Shura</i> ? (b) has the next most dominant role in the final decision?		
Group	Percentages	
	(a) Has the most dominant role	(a) + (b) Has one of the two most dominant roles
Ordinary elders ( <i>rishsafidan</i> )	63	78
<i>Mullahs</i>	18	48
Local leaders ( <i>khan</i> or <i>malik</i> )	15	46
Commanders	3	17
Women	0	3
Other	1	1
Don't know	0	0
Refused	-	-
<b>Total</b>	<b>100</b>	<b>100</b>
Source: CPHD Perceptions Survey, February 2007		

societal moral and religious values constitute a kind of implicit social contract between the state and the society. When laws and legal institutions are artificially transplanted or imposed by outsiders, serious problems of legitimacy and sustainability arise. As Kleinfeld Belton points out, "while customs without material institutions can manage to uphold some rule-of-law ends [...] institutions without customs are weak and easily circumvented by raw power."<sup>27</sup> Although leaving customs and customary practices unchecked may result in breaching national and international legal norms and human rights principles in Afghanistan, building unsustainable formal institutions may be disastrous over the long term.

As people try to find a way to bridge this divide between the accepted customs of the society and the institutions required to ensure justice, it is important to point out that Afghanistan's informal institutions are not systematically embedded in any formally structured accountability mechanisms. While it is not true, as is sometimes asserted, that there no contact exists between the two systems of justice, there is

*In one view, policy-makers "either fail to acknowledge the significance of the informal justice system or make general references to its significance while offering limited concrete suggestions on improving its integration with the formal legal system"*

currently no relationship for monitoring and accountability to promote adherence to law and rights among jirgas and shuras. The potential for developing such relations is logically the next area for exploration. .

## INDEPENDENT ACCOUNTABILITY MECHANISMS IN AFGHANISTAN

In Afghanistan, where corruption is widespread in Government ministries and agencies and where administrative structures are weak, vertical accountability mechanisms fail to ensure transparency and accountability in government activities. Vertical accountability mechanisms common to modern constitutional systems, such as ombudsman bodies, audit commissions, special appeals tribunals, and parliamentary investigations, do not yet exist in an effective way in Afghanistan. Despite the 2004 Constitution enabling the Government to create such monitoring bodies, the justice system has yet to follow suit. A partial exception is the Afghanistan Independent Human Rights Commission (AIHRC). While still limited in its capacity, it has an important role to play in the future of the justice sector.

The vertical accountability mechanisms that do exist in Afghanistan, such as the judiciary's internal appeals system, are procedurally outdated and generally unused. Where they are used, they are often more driven by opportunities for rent-seeking by the officials involved and, consequently, rarely produce decisive resolutions of issues. Internal accountability procedures are also hobbled by disadvantages, including (i) the challenge of separating the primary decision-maker and the appeal body or investigator, (ii) secrecy and lack of transparency, and (iii) the low quality of carrying out internal procedures, which arises from a lack of training or proper organization.<sup>28</sup> All these problems are manifested in Afghanistan's struggling public administration and, more specifically, its justice system. The election of

representative bodies at the national and provincial level should promote checks and balances among the branches of Government, but the Provincial Councils and the National Assembly have still to prove their effectiveness in promoting true vertical or intra-governmental accountability.

As a result, Afghans must rely largely on horizontal accountability mechanisms to monitor and investigate Government actions and affairs. More commonly called "independent accountability mechanisms", these include such non-state actors as civil society, the media, and human rights groups. In the absence of effective state checks and balances, these organizations must shoulder the colossal responsibility of providing such structures, but have very limited capacity to do so in Afghanistan today. The Interim-Afghanistan National Development Strategy (I-ANDS) supports an active role for non-state actors, encouraging them to assume responsibility for supporting state rule of law institutions:

"Civil society, including traditional *jirgas* and *shuras*, should be encouraged to demand transparency and accountability from the organs of the state, including the judiciary, and to demand a decrease in corruption and create reporting mechanisms from the center to the provinces and vice-versa."<sup>29</sup>

This responsibility fits the definition of what civil society should do in a hypothetical democratization setting. But in Afghanistan, where effective governance and security are in short supply, it is premature to expect non-state groups to monitor the government capably and hold it accountable for its actions. Furthermore, the theoretical category "civil society" is complicated by the diversity of non-state actors and institutions in the Afghan context. For this report, civil society refers to an area of uncoerced collective action around shared interests, purposes and values.<sup>30</sup> [PLEASE, LET'S NOT USE ARENA; THE TERM CONNOTES CONFLICT.] Civil societies often consist of

*The vertical accountability mechanisms that do exist in Afghanistan, such as the judiciary's internal appeals system, are procedurally outdated and generally unused*

organizations such as registered charities, development NGOs, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups,<sup>31</sup> social movements, business associations, coalitions, and advocacy groups. In short, they are expected to promote a better informed citizenry, who can make better voting choices, participate constructively in politics, and hold Government more accountable.

#### *JIRGAS, SHURAS, AND CDCs AS BODIES OF CIVIL SOCIETY*

The definition of civil society spelled out above – and particularly its tendency to focus on development and issue-based groups – has some limitations when applied to the Afghan cultural context. For example, some common conceptions of civil society contend that formal registration is required to qualify a civil society organization (CSO) as such. This calls into question the legitimacy of *jirgas* and *shuras* as civil society bodies and thereby creates challenges in a traditional society like Afghanistan, where *jirgas/shuras* have engaged for centuries in advocacy and social services either in the absence of more formalized and well-funded CSOs or alongside them. Instead of de-legitimizing tribal councils or traditional groups of elders, Afghan definitions of civil society should help to engage *jirgas* and *shuras* as CSOs among the original civil society bodies of the country.

Instead, the opposite takes place; despite their historical role in Afghan society, *jirgas/shuras* are generally excluded from discussions of civil society. In 1999, Amnesty International published a report entitled: *Human Rights Defenders in Afghanistan: Civil Society Destroyed* that largely equated civil society with the so-called intelligentsia-professionals, politicians, and artists with a background in the modern system of higher education.<sup>32</sup> This kind of elitist view conceals the fact that as the Afghan state

collapsed in the 1990s, *jirgas/shuras* and local and international humanitarian groups partially filled the governance vacuum in many areas.

Lately, traditional *jirgas/shuras* have played roles similar to CSOs, especially as international and national agencies and civil society groups are partnering with them in relaying key development messages to communities and villages. Furthermore, the Community Development Councils (CDC), formed under the Government's National Solidarity Program, are based in part on traditional models of deliberation and discussion. CDCs have the primary function of planning and leading community infrastructure and education projects, but have also in many cases taken on dispute resolution and governance functions, often in combination with more traditional authority figures. (box 5.3)

The National Solidarity Program in part aims at a modernized version of *jirgas* and *shuras*, requiring them to be elected democratically by community members and to meet on a regular basis. This is very different from the traditional dispute resolution *jirgas/shuras*, which tend to meet on an ad hoc basis. Furthermore, women can be elected as members of a CDC, but fully integrated councils are rare in most rural communities of Afghanistan. If further developed and supported, CDCs can fill the local governance gap and potentially contribute greatly to the progress of establishing the rule of law at the village level.

#### *NATIONAL NON-GOVERNMENTAL ORGANIZATIONS (NGOs)*

In addition to *jirgas/shuras* and CDCs, there are an estimated 2500 national civil society (non-governmental) organizations in Afghanistan. Most consider themselves to be CSOs, but many function more as private businesses rather than non-profit development or advocacy institutions. An ACBAR survey of known national organizations in

*Lately, traditional jirgas/shuras have played roles similar to CSOs, especially as international and national agencies and civil society groups are partnering with them in relaying key development messages to communities and villages*

## The Role of Community Development Councils

by Hamish Nixon - Afghanistan Research and Evaluation Unit

The National Solidarity Programme (NSP) was introduced in June 2002 and is a national community-driven development program run by the Ministry of Rural Reconstruction and Development (MRRD) and funded by various bilateral and multilateral donors. Its goals are to deliver community-driven development and improve community governance. The program is based on a combination of customary Afghan practices (shuras or councils, and ashars or collective community labour) and Islamic principles (such as consultation and participation) with international community driven development experience. The program, which is implemented by more than twenty international and NGO partners, facilitates the election of Community Development Councils (CDCs), help them to identify community development priorities to be addressed by block grant funds delivered in three installments, and facilitate sub-project implementation.

By March 2007, the NSP had elected 16,502 Community Development Councils in 34 provinces, completed 10,410

subprojects, with another 16,193 underway. During 2007 the program is moving to a second phase that emphasizes the expansion of NSP to the remaining communities of the country in line with the Rural Development benchmarks of the Afghanistan Compact and the Interim-Afghanistan National Development Strategy. Ongoing financial support for existing CDCs under the NSP program is not featured in the second phase, but there are other efforts under way to support these institutions.

In 2006 a bylaw was ratified by the President defining the role of CDCs as a key community institution for liaising with government and non-governmental organizations planning local development activities. In many communities, CDCs have taken on roles outside choosing development sub-projects. CDCs have organized community initiative labor projects (ashar), disaster response, and dispute resolution. The dispute resolution role of CDCs currently varies widely across regions and facilitating partners. In some cases, the CDC has become the shura

body dealing with local disputes, but more often CDC members participate with other traditional dispute resolution bodies, and sometimes the CDC remains a separate body dealing with development only. In the same way, the recognition of the CDCs by district governments varies widely.

Questions remain about the sustainability of CDCs as the original NSP grant support is phased out. However, the integration of CDCs into district level planning structures under the National Area-Based Development Program (NABDP), along with increased awareness of the bylaw may reinforce the legitimacy of the CDC as a community representative institution. In many areas, there are already programs to group CDCs together and provide support through other rural development programming. Longer-term questions about the relationship between CDCs and the constitutionally-mandated village councils, or the formal court system, remain unanswered but are gaining prominence.

*Many international CSOs claimed to prioritize the building of Afghan civil society, and donors gave somewhat blindly to organizations that advocated about certain issues on behalf of the public*

2000 revealed that a large proportion were either construction organizations, which really did not fit any conventional definition of a civil society organization, or were inactive "storefront" or "briefcase" organizations.<sup>33</sup>

From 2001 to 2004, funding and technical assistance to develop Afghan civil society organizations was relatively widespread. Many international CSOs claimed to prioritize the building of Afghan civil society, and donors gave somewhat blindly to organizations that advocated about certain issues on behalf of the public. Despite these efforts, CSOs in Afghanistan are now facing an identity crisis. As one organization's director in Mazar-e-Sharif said during a consultation for this report, "Civil society is like a suit or a dress that has been given to us, but it is too big on us. It doesn't fit well. It will take a long time for us

to fit into it, or we may need to have it altered."<sup>34</sup> (See figure 5.5.) While most Afghans may categorize all types of non-state groups as CSOs, a recent civil society assessment estimates that only 150 to 400 of the registered national CSOs -around 20% of the 2500 estimated groups-fit the "real", or internationally accepted, definition of a civil society organization.<sup>35</sup>

### INTERNATIONAL CIVIL SOCIETY ORGANIZATIONS

For more than 40 years, international civil society (or non-governmental) organizations have been a mainstay of Afghan civil society. The humanitarian work of organizations like CARE, the Norwegian Refugee Council, and Oxfam has long been appreciated by Afghans. However, the role of many of the some 333



international CSOs currently operating across the country has changed since the fall of the Taliban regime in 2001.<sup>36</sup> Their activities have shifted from emergency humanitarian aid delivery towards longer-term socioeconomic development activities. Early after 2001, when a large increase in the assistance flowing into Afghanistan took place, international organizations were typically the first stop for donors reluctant to channel money through the fledgling Afghanistan transitional Government. Consequently, many of these organizations were transformed overnight into large service contractors for large donors, and later, with the advent of national programs like the NSP or the Basic Package of Health Services (BPHS), parts of the Afghan Government. Currently over 80 % of NGO activities are linked in some way to Government programs.<sup>37</sup>

This "mixed-model" potentially leaves a growing gap in the monitoring, advocacy, and accountability-orientated work required of civil society in Afghanistan. While other civil society institutions and activities are important, the need for CSOs focused on the judicial branch emerged immediately in 2002, when judicial reform began in Afghanistan. It is even more crucial today (box 5.7).

In the absence of strong national independent human rights organizations, this role is currently filled by international human rights groups, which have funding and the resources to research, monitor, and advocate for policy changes, especially on issues concerning the rule of law. International human rights and advocacy organizations like Amnesty International, Human Rights Watch, and the International Committee of the Red Cross have played a significant role in advocating on a global and national level about human rights concerns in Afghanistan.

Amnesty International has raised a number of human rights concerns, including violations carried out by armed groups, poor governance and delivery of justice,



"Civil society is like a suit or a dress that has been given to us, but it is too big on us. It doesn't fit well. It will take a long time for us to fit into it, or we may need to have it altered."

attacks on human rights defenders, failure to effectively address past human rights violations, and the inability of Afghan women to lead their lives free from fear of violence. Where national human rights organizations would have trouble making specific claims and criticism against Government agencies, Amnesty International has filled this gap. In a statement to the UN Security Council in November 2006, the advocacy group wrote, "Amnesty International is concerned that national bodies, such as the National Security Directorate and provincial governments, who are charged with maintaining the rule of law, are reportedly carrying out human rights violations, beyond the reach of justice."<sup>38</sup>

International security forces and insurgent groups in Afghanistan have also been criticized by international human rights groups for undermining the rule of law. Human Rights Watch, a New York based human rights organization, recently



## Civil Society's Role in Legal Aid

by Charles Briefel, UNAMA

The last two years have seen the expansion of the outreach of a number of increasingly effective internationally funded NGO defense legal aid providers. These include the International Legal Foundation, Qanum Ghushtonky, Legal Aid Organisation of Afghanistan, and the Afghan Human Rights Organization. Medica Mondiale and the Afghan Women Judges Association, which provides legal support and representation specifically for women. The Norwegian Refugee Council provides advice and legal assistance to returnees and refugees with a focus on land issues, family, water rights and debt.

The NGOs that provide legal aid report that the right to legal representation is still not properly understood or respected by the courts. Although the Criminal Procedure Code specifies that the defense lawyer should be notified prior to trial, in practice, lawyers are given little or sometimes no notice of the hearing. Courts sometimes conduct hearings in prisons or in private without notifying the lawyer. Prosecution witnesses are rarely called to court, so there is no opportunity to properly challenge the prosecution evidence. Lawyers are often criticized by judges for defending their clients and face intimidation from judges, prosecutors and police, including threats to have their licenses

withdrawn. In provinces where NGO legal aid providers are active, there has been an improvement in the application of the law and some reduction in the incidence of arbitrary detention. However, in many provinces, particularly those where security is poor, there remains no legal aid at all.

Funding of legal aid was highlighted as a Government commitment in the "Justice for All" strategic framework endorsed by the Government in October, 2005. However state-funded legal aid remains extremely limited and much more needs to be done to build the professional capacity of lawyers. The most effective provision of legal aid remains through internationally funded NGOs. A detailed assessment of the costs and sustainability of different legal aid schemes has yet to be carried out to review what system should be put in place; it must be affordable and must also be able to provide adequate legal protection. In current conditions, a state-funded public defender system or state-funded system of court-appointed lawyers could not fully provide for the legal aid needs of the population of Afghanistan, nor would either system have the necessary independence. International funding for independent legal aid providers therefore remains

Bagram detainees and many of the 380 those at Guantanamo are Afghans.<sup>40</sup> ICRC currently visits 75 detention centers under different authorities including the Ministry of Justice, the Interior Ministry, the National Department of Security, and United States detention sites in Afghanistan. ICRC delegates visit detainees regularly, conducts private interviews with them, report in a confidential way and make recommendations in an ongoing dialogue with different authorities involved in detention in Afghanistan today. Working together with the Afghan Red Crescent Society (ARCS), the ICRC also traces Afghans who have been reported as missing by their families and sends messages between detainees and family members who have no other means of communication.

In a recent assessment of a detention center in Afghanistan ICRC stated, "There are people chained to windows or doors because the walls of their cells or their compound walls have crumbled and the only way of making sure that people don't run away is to chain them up—for us a very basic human rights concern caused by structural problems." Recommendations about this have been made in the usual confidential way to the authorities concerned. ICRC's advocacy work on this issue has contributed to making the rehabilitation of prisons a top rule of law priority for the Afghan Government and international community.

reported that "at least 230 civilians were killed during coalition or NATO operations in 2006, some of which appear to have violated the laws of war."<sup>39</sup> The organization also notes the much higher civilian casualties caused by insurgent action.

Since January 2002 the International Committee of the Red Cross has visited detainees captured in the context of what is often referred to as the "global war on terror" and being held at US detention facilities at Bagram military base in Afghanistan and at Guantanamo Bay, Cuba. Most of the 630

### *MEDIA ON THE MOVE*

A free and vigorous press is an essential element of a modern democracy. Even though many media organizations are for-profit businesses, the Afghan media are an integral part of civil society. This is due to the role they play in monitoring Government activities and policies, and for their education and advocacy efforts. Most media outlets in Afghanistan are subsidized by international donors and put their revenue from advertisements or sales towards

TABLE 5.4

**Sources of information about human rights**Question: Tell me, which of the following has been your **most credible** source of information about human rights in the past five years?

Sources	Percentages					
	All	Males	Females	Rural	City/town	Kabul
Media (television, radio, newspapers)	64	65	63	61	69	84
Local government leaders	3	4	3	3	4	1
Local elders	10	9	11	12	9	3
Mosque / Mullah	6	8	4	7	3	1
Afghan Independent Human Rights Commission	6	6	5	6	8	4
Haven't received any information about human rights in the past five years	9	7	11	10	6	7
Don't know	2	1	2	2	2	-
Refused	*	*	1	1	-	*
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>
Sample size	2339	1181	1158	1867	208	264

Source: CPHD Perceptions Survey, February 2007

meeting operational costs. As a result, a large number of Afghan media firms are effectively not-for-profit organizations.

Since 2002, international aid agencies have focused heavily on Afghan media capacity, spending millions of dollars to revive the sector. With more than 400 newspapers and magazines, 50 privately owned radio stations, six television stations, and five news agencies, Afghan media groups are a considerable education and advocacy force and, in many ways, carry the accountability torch for Afghan civil society as a whole.<sup>41</sup> In a country with an 85% illiteracy rate and weak educational infrastructure, the media - primarily radio programming - is the most effective means of educating and informing Afghans about their Government's policies and activities, human rights issues, and various social and economic problems.

International media outlets reporting on Afghanistan have also made a significant contribution to national monitoring and accountability efforts. Where the local media has brought attention to important issues on the home front, international media has often echoed those concerns around the world; both have helped to raise public discourse about controversial issues and affect policy change. A CPHD survey

showed that 64% of respondents identified media as their most credible source of information about human rights. (see table 5.4) Men and women in rural areas and cities consistently reported media as their most credible source for information.

Together, the domestic and international media have influenced some key policy issues. In mid-2006, President Hamid Karzai's cabinet approved a proposal to re-establish the Department for the Promotion of Virtue and Prevention of Vice. The Department's responsibilities were vague, but this proposal raised concerns that it would reinstate the kinds of "moral" rules and ruthless punishment the Department had been known for under the Taliban regime. Media outlets raised the concerns of political leaders, citizens, along with civil society groups opposed to reinstating the Department, especially women who were afraid that it would slowly limit their access to education and participation in the workforce. "The Government presents it as a symbolic force today, but there is no guarantee that tomorrow this force does not change to a brutal and religious extremist force, the same as the past," said Parliamentarian Shukria Barakzai. "I am surprised - what is the need to recreate what is a bad memory for the public?"<sup>42</sup> After more than

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*Afghanistan also needs a public information law, identifying the types of Government documents that should routinely be available to media and civil society*

two weeks in the spotlight and the publication of hundreds of news articles, radio programs, and television debates, the bill was stopped before making its way to the National Assembly.

Despite the media's growth spurt in 2003 and 2004, conditions for journalists in Afghanistan have deteriorated over the past two years. According to Reporters Without Borders, a Paris-based media advocacy group that conducts annual press freedom rankings, press freedom in Afghanistan has dropped considerably, from 97th place in 2004 to 130<sup>th</sup> in 2006 (box 5.5).<sup>43</sup> Worsening security, threats from warlords and conservative religious leaders, and increasing government censorship are all contributing to decreased press freedoms.

In 2006, Afghanistan tied for first place with the Philippines as the most dangerous place in Asia for journalists.<sup>44</sup> This rapid decline in press freedoms, including personal safety, restricts severely the media's roles and responsibility for investigating Government activities and reporting on controversial issues, such as corruption within the Government. As a result, the Afghan media is becoming more reactive and cautious in monitoring Government activities. This "wait and then report" attitude will reduce public confidence in the media's central role as a watchdog of powerful institutions in the state and the private sector.

Lack of information and access to government information continues to hamper the already limited investigative journalism in Afghanistan. As one reporter from the Kabul-based Pajhwok Afghan News agency lamented, "the Government won't give us the most basic information, like the final decision on a court case. This

should be public information once the case is decided and closed."<sup>45</sup> Reporters interviewed suggest that many factors contribute to this problem, including lack of communication between Afghan Government institutions, inadequate recording and archiving of Government information, and a generally uncooperative attitude by civil servants towards journalists.

Since 2002, hundreds of journalists have been trained by international media development organizations, such as the Institute for War and Peace Reporting and Internews. Their programs have taught the basics of modern international journalism standards to Afghan journalists. However, if Afghan reporters are to fully realize their role as Government watchdogs, they need investigative reporting skills to delve deeper into stories and build comprehensive source files. Specialized training in legal concepts and judicial processes for journalists and editors would provide them with some of the tools to better investigate rule of law topics and institutions. Afghanistan also needs a public information law, identifying the types of Government documents that should routinely be available to media and civil society. Public access to these documents through a non-bureaucratic and timely process will be essential in facilitating CSO monitoring of Government activities. As a result, civil society organizations can play a bigger role in monitoring rule of law institutions and holding them accountable for corruption and injustice.

## FORMAL ACCOUNTABILITY MECHANISMS: REPRESENTATIVE INSTITUTIONS AND THE AIHRC

### PROVINCIAL COUNCILS

Provincial Councils, elected in the November 2005, do not have legislative responsibilities, but the laws governing them do emphasize a monitoring and accountability function towards other provincial gover-

.....

#### Afghanistan's deteriorating press freedom (global ranking)

2004	97 out of 167
2005	125 out of 167
2006	130 out of 168

Source: Reporters Without Borders

nance institutions, and in particular the provincial administration. The Law on Provincial Councils gives the bodies a range of responsibilities including participation in provincial development planning, monitoring and appraisal of other provincial governance institutions, and participating in various levels of conflict resolution. Several duties of Provincial Councils pertain to the area of rule of law. The councils are mandated to monitor and appraise "law enforcement bodies" in "areas lacking freedom" and report its findings to the provincial governor and the citizens of the province. As important as this function of the Provincial Council is, members of many Provincial Councils like Mohammad Farhad Azimi, the Chairperson of the Balkh Provincial Council, say that monitoring Governmental institutions, especially the police and courts, requires resources, personnel, and, most importantly, the authority to ask questions of these institutions and having them legally obliged to answer honestly. Although the Provincial Council law allows for meetings between Government bodies and the Council, there are no corresponding obligations in law for the administration, and particularly "law enforcement bodies", to attend meetings or respond to questions or requests for information from the Council.<sup>46</sup> Development of these legal mechanisms is required to give Provincial Councils the power to fully take part in reforming sub-national governance.

The Provincial Council law also requires them "to participate actively and in possible ways in the elimination of customs and traditions contrary to the law and Islamic Shari'a such as forced marriages, exchange of females for settlement of disputes, and efforts to ensure human rights." To settle ethnic or local disputes and enforce their decisions, Provincial Councils can hold "correctional assemblies", which are based on the traditional dispute resolution *jirga/shura* model. Many Provincial Council members sit on local dispute resolution

*jirgas/shuras* and may well be able to act as liaison bodies between the informal justice mechanisms and state judicial system.

#### AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION

The Afghan Independent Human Rights commission (AIHRC) is a governmental institution with important independent accountability functions. The AIHRC operates in a manner similar to a civil society organization, making routine visits to prisons across the country and investigating the conditions for prisoners, to take only one example of its activities. In 2005 and 2006, the AIHRC's Monitoring and Investigation Unit made 1137 monitoring visits to prisons and detention centers in 34 provinces of Afghanistan. The Commission reports that in 2006, standards of prisons improved in sixteen provinces, including in Khost, Nangarhar, Badghis, and Kabul. Improvements include the behavior of prison wardens, quicker legal processing of cases, better lighting conditions of prison cells and rooms, increased number of beds, provision of clean drinking water, and timely medical care.<sup>47</sup>

In 2006, the AIHRC investigated three prison wardens in Kabul over an alleged case of a prisoner torturing another prisoner that is still under investigation. As a result of these monitoring efforts, all three prison wardens were dismissed from their duties. In Ghazni province, the AIHRC Monitoring and Investigation Unit looked into a case of torture perpetrated by the police and shared its findings with the Attorney General. The Commission's intervention led to the arrest of several police officers responsible for this act of torture.

These AIHRC activities are good examples of the role it can play through the monitoring of Government institutions and processes. Considering the gradual success the AIHRC has had since its inception in 2002, its activities could potentially be expanded to include other kinds of monitor-

*To settle ethnic or local disputes and enforce their decisions, Provincial Councils can hold "correctional assemblies", which are based on the traditional dispute resolution jirga/shura model*



*Monitoring jirgas/shuras for compliance with international human rights conventions is necessary to ensure that the rights of vulnerable groups, particularly women and children, are protected*

ing activities, including monitoring of local dispute resolution *jirgas* and *shuras*.”<sup>48</sup>

As defined in Chapter 2 of this report and discussed in this chapter, it is possible to include *jirgas* and *shuras* within the sphere of informal judicial institutions in Afghanistan "affecting human rights". They handle almost 80 % of judicial cases in the country and therefore can easily be construed as falling under the legal mandate of the AIHRC.<sup>49</sup> Monitoring *jirgas/shuras* for compliance with international human rights conventions is necessary to ensure that the rights of vulnerable groups, particularly women and children, are protected. As identified earlier in this chapter, traditional dispute resolution *jirgas/shuras* are and have historically been male- dominated; reforming the *jirga/shura* system will consequently require educating its members about human rights standards and monitoring for abuses.

There is support for such a role among citizens. For this report, Afghans across the country were asked whether they thought a human rights officer should be present at all local dispute resolution *jirgas* and *shuras*; 76% of those surveyed strongly or somewhat agreed. Only 4% strongly disagreed (table 5.5).

As a Government institution that is

nonetheless funded primarily by external donors, the AIHRC is in a unique position to monitor *jirgas/shuras*' compliance with human rights principles. As an agency of the state identified in the Bonn Agreement of 2001 and the 2004 Afghan Constitution, the AIHRC has a built-in legitimacy needed to ensure that other government institutions cooperate with it and implement its recommendations. Building on the monitoring capacities and successes of the AIHRC holds potential, despite serious challenges from its own limited capacity and the weakness of surrounding legal and judicial frameworks. Other monitoring bodies and organizations are urgently needed to expand on the AIHRC's activities, but would face tremendous challenges in being viewed as legitimate. Their work could be hampered by lack of access, information, and cooperation by government agencies/ministries. These competing mechanisms could also dilute the human rights resources made available to Afghanistan. It is best to build on an existing institution with some record of success.

However, at its current capacity, the AIHRC is extremely short-staffed and under-resourced to undertake additional monitoring activities. At present, the AIHRC has eight regional offices and three

TABLE 5.5

# **The role of human rights organizations**

Question: Nowadays people hold different opinions about the role and involvement different kinds of Afghan Human Rights organizations could have in the process of dispute settlement in our country. Do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following types of involvement for different kinds of Afghan Human Rights organizations?

Statement	Percentages						Total
	Strongly agree	Agree somewhat	Disagree somewhat	Strongly disagree	Don't know	Refused	
a) Should review and approve all cases for compliance with human rights conventions	38	41	13	4	*	4	100
b) Should review and approve only cases that include human rights dimensions	34	45	14	3	*	3	100
c) A human rights officer should be present in all local <i>Jirgas/Shuras</i>	38	38	15	4	*	4	100
d) A human rights officer should be present in all court proceedings	43	36	13	4	*	5	100
e) Human rights organizations should not be involved in any dispute settlement	20	25	25	21	*	8	100

Source: CPHD Perceptions Survey, February 2007



provincial offices. In these offices, it employs 92 people for its monitoring and investigation unit, of which only 30 concentrate on judicial monitoring activities, primarily of government detention centers and prisons.<sup>50</sup> Mohammad Farid Hamidi, AIHRC's Director of Monitoring and Investigations points out that "In order for us [AIHRC] to expand our monitoring activities we not only need more human rights officers trained in both Afghan and international law, but also personnel who can report and record their findings in an efficient manner." Finding individuals with legal, reporting, and technical skills has been AIHRC's main challenge.

For the AIHRC to properly monitor local dispute resolution *jirgas* and *shuras*, it must have at the least one office in every province and one trained human rights officers for every 1-3 districts in the province, according to district population or grade. With 364 districts in Afghanistan, this would mean approximately 120 - 370 human rights officers trained to monitor dispute resolution *jirgas* and *shuras*. The officers could be responsible for recording *jirga/shura* activities, educating *jirga/ shura* leaders about decisions that do not comply with national or international human rights standards, and reporting the decisions of *jirgas* and *shuras* to the district courts for their final review and approval. It is important to note that there is already some basis for this in some districts, where the district courts record some *jirga* and *shura* decisions already.<sup>51</sup> Because *jirgas* and *shuras* are not held according to a set timetable and are for the most part reactive judicial institutions, district human rights officers might engage in other human rights monitoring and education activities when not sitting in or reporting on *jirgas/shuras*. If human rights officers cover more than one district in a province, their role could be limited to liaising with specific *jirga/shura* leaders to collect decisions for monitoring by the AIHRC and district courts.

Such examples of expanded AIHRC

responsibilities ought to form part of a larger process of developing a Strategic Human Rights Framework for Afghanistan.<sup>52</sup> This framework should also include a 5-7 year human rights training component, bringing the training programs, which have been ad hoc until now, under one comprehensive strategy. The framework should also include the development of a standardized multidisciplinary human rights curriculum for Afghan universities and other educational institutions.<sup>53</sup> Such a human rights framework would be a cornerstone for the development of rule of law in Afghanistan.

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Ultimately, strengthening Afghanistan's civil society organizations will facilitate a more informed citizenry, who make better voting choices, participate constructively in politics, and hold government more accountable. It is imperative that the interim-Afghanistan National Development Strategy makes good on its support for an active role for non-state actors, encouraging them to assume responsibility for supporting and/or monitoring state rule of law institutions.

*Jirgas* and *shuras* are fundamentally civil society organizations with a peace-making mandate and mission to reconcile disputants. Unlike state courts that focus on finding losers and winners (the guilt and the non-guilty), *jirga* brings disputants and the village together to find collective solutions to problems. This feature of *jirga* is consistent with values and principles of the restorative justice paradigm in criminal justice now increasingly prominent internationally. It can also, along with Community Development Councils and other mechanisms, be considered a form of Alternative Dispute Resolution.

This emphasis on reconciliation and compensation has important implications for integrating restorative models of justice with the formal justice sector in the Afghan

*Jirgas and shuras are fundamentally civil society organizations with a peace-making mandate and mission to reconcile disputants*

context. In addition, as its formal justice system severely lacks both human and material resources, Afghanistan's formal justice system could potentially harness the positive restorative justice characteristics of its endogenous institutions of informal justice to lessen the capacity demands on a formal system, which will experience capacity constraints for the foreseeable future. The successful results of strengthen-

ing rule of law in this way will reverberate across all other areas of society and provide a solid backbone for other development efforts. The following chapter discusses the opportunities presented by the development of the Afghanistan National Development Strategy for the justice sector, and presents an approach to bridging the gap between formal and informal justice in Afghanistan.

# Chapter 6



Photo: Sayed Ikram Afzali

An image of development in Afghanistan

**The Afghanistan National Development Strategy (ANDS) offers unprecedented opportunities for Afghan citizens to make their voices heard to policy-makers. In developing the ANDS, special attention should be afforded to deliberating upon and adopting a hybrid model of justice that realistically combines the features of all relevant systems-old and new, Islamic and positivist-for the promotion of the rule of law and human development.**



## The ANDS, Afghanistan Compact, and citizen empowerment: towards justice for all

The preceding chapters of this Human Development Report have outlined the current situation of the rule of law in Afghanistan. On the one hand, the formal justice institutions of the country are inadequate to meet the justice needs of the Afghan population. These institutions have been subject to unbalanced and piecemeal attempts at reform, and remain inefficient, corrupt, expensive and limited in their capacity to deliver justice or resolve disputes. At the same time, informal justice institutions have carried the burden of justice sector activity, despite their own shortcomings in the areas of rights and protections, particularly for women and girls. These institutions, and *jirgas* and *shuras* in particular, have considerable potential to both provide justice that is viewed as legitimate, and through their affinity with systems of restorative justice and Alternative Dispute Resolution, can continue to take some of the burden of justice provision from a formal system likely to be highly constrained for the foreseeable future.

The development of the Afghanistan National Development Strategy between now and mid-2008 will involve the formulation of sector strategies, including in the justice sector. This chapter introduces this process, and describes its implications for justice sector strategies, including the challenges ahead. It then proposes a model for the formal and informal interface that could contribute to a justice sector strategy that is pragmatic, builds on current realities, and offers considerable advantages for both the formal and the informal systems of justice already operating, albeit imperfectly, across Afghanistan.

### THE ANDS AND THE AFGHANISTAN COMPACT

The Afghanistan National Development Strategy (ANDS) will form Afghanistan's road map for democratic state-building and prosperity for all citizens as well as the central instrument for working towards the country's Millennium Development Goals (see chapter one). Currently in its Interim stage (I-ANDS), the full strategy is expected to be finished by mid-2008 and will set out strategic priorities and mechanisms for realizing the Government's development vision. The ANDS is divided into three pillars: (1) security, (2) governance, rule of law, and human rights, and (3) economic and social development. With more than 43 benchmarks across these pillars, the ANDS identifies the focus for priority national reforms organized into eight sectors and five cross-cutting areas. The development and monitoring of the ANDS is managed through a system of Consultative and Working Groups organized in line with the pillar, sector and cross-cutting elements of the strategy. The ANDS will also form the country's Poverty Reduction Strategy Paper (PRSP), an instrument required for World Bank and International Monetary Fund (IMF) Highly Indebted Poor Country (HIPC) assistance and debt relief.

The Afghanistan Compact, signed at the London Conference (January 31-1 February 2006), is a political agreement or "contract" between the Afghan Government and the international community to work together towards 42 five-year benchmarks of progress across the three pillars of the ANDS. The Compact is linked intrinsically

*The Compact is linked intrinsically to implementing ANDS and, ultimately, achieving Afghanistan's Millennium Development Goals for the year 2020*

to implementing ANDS and, ultimately, achieving Afghanistan's Millennium Development Goals for the year 2020. The progress towards these benchmarks is monitored and reported on by a Joint Coordination and Monitoring Board (JCMB), led jointly by donors and the Government of Afghanistan. Precursors of the I-ANDS are the National Development Framework, prepared in 2002, and the Securing Afghanistan's Future (SAF) exercise, undertaken for the 2004 Berlin meeting on Afghanistan.

#### *POVERTY REDUCTION, THE ANDS AND HUMAN DEVELOPMENT*

The ANDS is meant to become Afghanistan's Poverty Reduction Strategy Paper, a concept originally developed by the IMF and World Bank in 1999 to help developing countries with heavy volumes of international debt relieve their burden. A Poverty Reduction Strategy Paper (PRSP) describes the macroeconomic, structural, and social policies and programs that a country will pursue over several years to promote broad-based growth and reduce poverty, as well as external financing needs and the associated sources of financing.<sup>1</sup> PRSPs are intended to guide the investment of those resources freed by debt relief into direct poverty-reducing activities, often in the education and health sectors.<sup>2</sup> This "pro-poor" approach aspires to reflect the multidimensional nature of poverty, and to develop policies that benefit the poor by reducing inequalities and encouraging growth with pro-poor income distribution.

At its core, the PRSP concept is compatible with the philosophy and practical policy initiatives associated with human development. It encourages national ownership of long-term development strategies, results-based policies aimed at tackling the root causes of poverty and benefiting the poor. The shared emphasis on policies that distribute growth benefits rests at the heart of the human development's vision of

recognizing human potential and expanding people's choices. Advances in human development require sustainable and equitable access to assets such as education, health and an enabling environment for private sector development, which can help enable the poor to increase productivity and participate in the political process. Towards these ends, PRSPs are designed as participatory exercises, with multi-tiered consultations held among representatives of government, donors, civil society organizations, and the general public. For Afghanistan, this policy approach is quite revolutionary because it emphasizes a more participatory and less top-down way of looking at fostering progress than the heavily centralized and top-down systems of past Governments, and previous internationally led strategic exercises, such as Securing Afghanistan's Future.

On the other hand, the broad focus of PRSPs as comprehensive national development strategies can at times dilute their pro-poor vision in favour of a growth-centric approach.<sup>3</sup> There is a large body of economic evidence and analysis indicating that pro-growth strategies are instrumental in poverty reduction. However, the impact of growth on poverty is not automatic, and is clearly reduced when inequality remains as high as it does in Afghanistan.<sup>4</sup> There is also evidence that PRSPs are most effective in situations of more effective governance and rule of law, a condition as yet still lacking in Afghanistan and one at which this report is aimed.<sup>5</sup> In the Afghan context, broad-based economic growth is crucial for progress in political normalization and national reconciliation—as is growth spread out ethnically and regionally that can avoid exacerbating political tensions among different groups and regions.<sup>6</sup>

Despite impressive levels of year-on-year aggregate economic growth (albeit from very low baselines), the poverty gap in Afghanistan is not shrinking. As illustrated in detail in Chapter 1, Afghanistan continues to exhibit high poverty indicators. The

*At its core, the PRSP concept is compatible with the philosophy and practical policy initiatives associated with human development*



human poverty index (HPI) for Afghanistan, standing at 62.3, is one of the worst in the world. The country's Human Development index (HDI) stands at (0.345), which continues to place it far behind all its regional neighbors, as well as in the 174<sup>th</sup> position out of 178 countries -- ahead of only four low human development countries.

Although reliable and consistent disaggregated quantitative data in the areas of income, purchasing power parity, and consumer prices are not yet available, recent quantitative research points to large disparities in income. A survey commissioned by UNHCR and the International Labor Organisation found that among 600 households in Kabul, Herat, and Nangarhar provinces, 10% earned an average of US\$920, but 90% earned an average of US\$130.<sup>7</sup> Of the latter group, 35% had an income of less than US\$100 per month. The study also found that the average monthly income per household was US\$212, compared to a mean monthly expenditure of US\$200, forcing families to live on a month-to-month basis. The 2007 National Risk and Vulnerability Assessment, developed by the Afghan Government, shows no or negative change in incomes for the lowest income strata. Seventy-three percent of the individuals in Afghan households perceive themselves as being in the same or worse situation as one year prior to the survey.<sup>8</sup> Twenty-four percent regard themselves as being slightly better off, and only 2% see a clear improvement.

Growing perceptions of inequality are also fed by the disproportionate few who control access to contracts from international institutions or armed forces, druglords and smugglers, and family members of warlords, commanders, and other political elites. The United Nations Office on Drugs and Crimes reports that in recent years, nearly 80% of the income from narcotics went not to farmers, but to traffickers and heroin producers, creating an economic elite.<sup>9</sup> Visible signs of inequality in Kabul's building boom, along with

rising housing and food prices, provide powerful symbols that fuel these perceptions of inequality. Inequality is not only a poverty issue in Afghanistan, but has profound implications for political stability.

Sustaining Afghanistan's high levels of growth is a key challenge confronting the country, but should not be the be-all and end-all indicator for pro-poor economic progress. Developing the Afghan private sector is necessary and central to help drive the country out of poverty, but the impact of private sector development on poverty is hampered by significant barriers. State-led financial services are in an early stage of development and reach, and private sector-led financial services are also not equally available to most citizens. Small and medium-sized formal loans are out of reach for many Afghan entrepreneurs, and loans for the average borrower who has little collateral or credit history is unavailable formally—though informal credit practices are complex and highly adaptive.<sup>10</sup> In this context, accelerated private sector development often gives foreign corporations an unfair head start while leaving home-grown Afghan companies struggling. Investment incentives must be balanced with an attempt to protect and encourage Afghan companies to flourish and deliver quality products and services to the domestic market.

Furthermore, Afghan policy-makers should be cautious not to prioritize private sector development over other key areas of reform, such as the delivery of vital social services that ultimately provide the preconditions for a thriving private sector. Weak human resources, which reduce the ability of the private sector to make the best use of physical capital and thereby reduce the incentive to invest in the future, need to be strengthened.<sup>11</sup> Problems include the low general education level, lack of more specific professional skills (from agricultural techniques to financial or accounting skills), and poor health indicators. Without such investment in human capital, the private sector cannot yet be the engine of

*Growing perceptions of inequality are also fed by the disproportionate few who control access to contracts from international institutions or armed forces, druglords and smugglers*

*Despite the realization of the central role of justice sector reform in linking security and governance into a "virtuous circle", the former has received disproportionately low priority in Afghanistan's reconstruction*

growth. Moreover, until key concerns around the security situation and the extent to which rule of law is followed are addressed, the level of private investment will be limited. As emphasized in the Afghanistan NHDR 2004, "Securing Afghanistan's Future", a focused social welfare policy is needed to address the needs of the poor and vulnerable, especially the disabled, female-headed households, and other victims of war who will not be well-placed to benefit from growth. Three years later, the Afghan Government has yet to develop such a welfare policy, but has made steady gains in developing private sector policies.

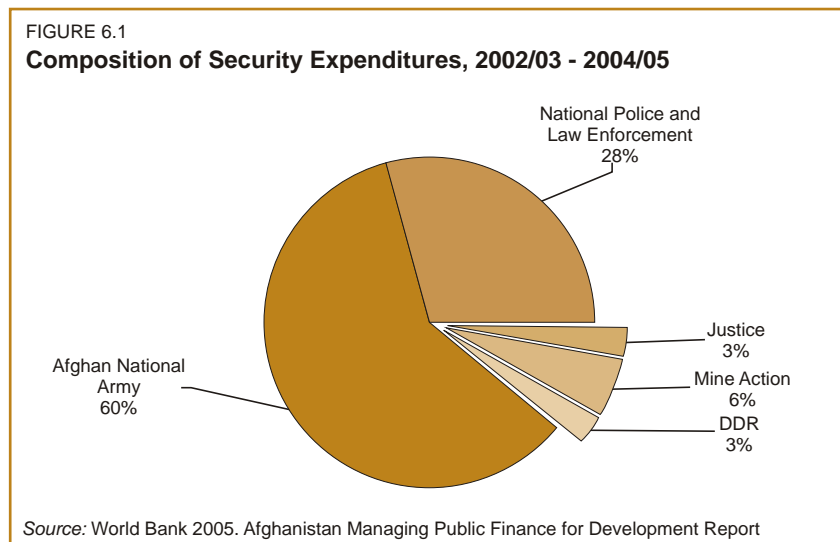
#### *JUSTICE AND THE RULE OF LAW IN THE ANDS AND COMPACT*

The i-ANDS recognizes that good governance, justice, and the rule of law are preconditions for development and lay the foundation for legitimate government, the protection of citizens' rights, and a competitive market economy. They are also essential to combat corruption and curb the illegal drug economy. The first line of the I-ANDS introduces the concept of the *Daira-yi-adalat* or Circle of Justice, reflecting the idea that the issue of the rule of law binds together every fiber of the I-ANDS and, ultimately, Afghan society.

In the Circle of Justice, the Government depends on the armed forces to ensure security. To maintain the army, the Government needs resources, which it can derive only from prosperity and development. Prosperity and development depend in turn on justice and good governance.

The strategy commits the Afghan Government to making state-sponsored justice available to all Afghans; a functioning justice system is viewed as an essential component to come to terms with a violent past and to build a secure and prosperous future.<sup>12</sup> However, insecurity continues to threaten efforts to extend the rule of law, undermining capacities in service delivery and pushing up the costs of executing the national budget and carrying out development projects. Weak capacity and the slow pace of administrative reform have also hampered efforts to move towards the national vision.

Despite the realization of the central role of justice sector reform in linking security and governance into a "virtuous circle", the former has received disproportionately low priority in Afghanistan's reconstruction. According to the World Bank, from 2002 - 2005, development of the Afghan National Army and the National Police and Law Enforcement Agencies accounted for 88% of Afghanistan's security expenditures.<sup>13</sup> For the World Bank report, the security sector included reforms and initiatives in justice institutions, the Afghan National Army, national police and law enforcement, mine-clearing programs, and disarmament and reintegration programs. Meanwhile, justice sector reform and development accounted for a mere 3% of security expenditures during the same period (Figure 6.1). As chapter four demonstrated in detail, a lack of funding, coordination, and proper prioritization has left the formal justice sector among Afghanistan's slowest performers. The development of the full Afghanistan National Development Strategy offers a critical opportunity to



reverse this trend and to create a comprehensive justice sector strategy and implementation plan (building on the Government's 2005 Justice for All Strategy). The ANDS can help guide Afghanistan's main rule of law institutions (the Supreme Court, Ministry of Justice, and Attorney General's Office), as well as the international community, in a more coordinated and human development-oriented reform and development process.

## RULE OF LAW BENCHMARKS

As a foundation for legitimate government, the i-ANDS identifies four primary benchmarks to guide rule of law development in Afghanistan. The benchmarks articulate general goals within the justice sector that were recognized as early as 2002 by the second Judicial Reform Commission and various external reports.<sup>14</sup> The added value of the I-ANDS for the justice and other sectors lies in the preparation of comprehensive strategies anchored in concrete, time-bound benchmarks that help facilitate coordination among various national and international partners. Despite this, considerable will and effort will be needed to fulfill the actual requirements of such frameworks.

The Afghanistan Compact mirrors the four I-ANDS benchmarks, a remarkable convergence that took place in late 2005, when ministry strategies had yet to be developed and consultations had not extended beyond a limited group of people. A fifth benchmark categorized under rule of law in the I-ANDS, but categorized separately in the Compact, calls for the establishment of a process of land registration. To keep the focus on the legal landscape and primary rule of law institutions, this report analyzes the four primary rule of law benchmark identified in the Afghanistan Compact. The I-ANDS views these benchmarks as guidance for the design of more detailed strategies, rather than as final, irrevocable decisions. Revisiting and

strengthening the benchmarks, particularly in the area of the formal and informal justice interface, can help guide the development of a more comprehensive and integrated reform process in the justice sector.

The current Ministry of Justice's March 2007 ministerial strategy is based on the four main rule of law benchmarks of I-ANDS and the Compact. [As one ministry official commented, "...the benchmarks are what we have to achieve, so we work around them." The challenge for the full ANDS, to be completed in mid-2008, will be to synthesize and compile the strategies of the various rule of law institutions into one Justice/Rule of Law sector strategy. This includes determining where and how strategies for the Ministry of Justice, the Attorney General's Office, the Supreme Court, and the Ministry of Interior's Police strategy intersect and compliment each other. The task is hardly easy when one considers the interdependencies in justice sector reform, as well as cross-cutting issues such as gender needs, anti-corruption requirements and anti-narcotics demands. For example, the strength of the national police force and army will remain compromised without proper legal frameworks to enforce and competent justice institutions to complement their work. One potential starting point is to intensify interaction between the ANDS Security Consultative Group and the Governance, Rule of Law, and Human Rights Consultative Group so as to encourage more coordination in sequencing and prioritization across the sector.

The four I-ANDS and Compact rule of law benchmarks are as follows:

1. **By Jaddi 1389 (end-2010), the legal framework required under the Constitution, including civil, criminal, and commercial law, will be put in place, distributed to all judicial and legislative institutions, and made available to the public.**

The Bonn Agreement states that existing laws and regulations would remain

*To keep the focus on the legal landscape and primary rule of law institutions, this report analyzes the four primary rule of law benchmark identified in the Afghanistan Compact*

enforceable, provided that they were consistent with the Bonn Agreement, the 1964 Constitution, and the international legal treaties to which Afghanistan is a party.<sup>15</sup> This was confirmed by a Presidential Decree on 5 January 2002, by which the Afghanistan Interim Authority officially ordered the abolition of all "decrees, laws, edicts, regulations and mandates, which are inconsistent with the 1964 Constitution and the Bonn Agreement."<sup>16</sup> The Ministry of Justice was assigned responsibility to study all legal documents issued before the date of this Decree and to check them for consistency. Proposals for changes to the law should then have been brought to the Government for approval.<sup>17</sup> This did not mean that all laws issued during Taliban rule or earlier regimes would be abolished. Instead, only those laws deemed by the Ministry of Justice to be inconsistent with the 1964 Constitution and the Bonn Agreement were to be abolished. This process has yet to take place, even after the enactment of the 2004 Constitution. The result is considerable statutory inconsistencies and confusion.

The Ministry of Justice's *Taqnin* (drafting), department is hard pressed to meet its basic responsibilities in a timely manner. Compounding this problem are the new laws that are now necessary to meet this first rule of law benchmark. Until an assessment of all past and current laws is carried out, just how many laws will be needed remains unclear. With its current staff of about 100, but only six professional full-time drafters, the *Taqnin* is able to draft and process about 40 legal documents a year. An assessment is needed urgently to see what part of the full legal framework (civil, criminal, and commercial) already exists and what needs to be further developed. In any case, achieving this benchmark seems unlikely in light of the current capacity of the *Taqnin* and the sluggish pace of the Afghan parliament.

**2. By Jaddi 1389 (end-2010), functioning institutions of justice will be fully operational in each province of Afghanistan.**

**The average time to resolve contract disputes will be reduced as much as possible.**

The second ANDS rule of law benchmark is written in quite non-specific language, making its attainment difficult to assess from an operational standpoint. The benchmark lacks a clear definition of what constitutes "functioning" institutions of justice. "Fully operational" is another elusive term. At a minimum, the definition requires further clarification, either by the rule of law institutions themselves through their individual strategies or in the overall justice and rule of law sector strategy. Identifying quantifiable criteria for what functioning and fully operational institutions are will make monitoring the progress of this benchmark more practical. A baseline study should be undertaken to determine what the current average time is to resolve civil, criminal, and commercial disputes. The baseline should identify the number of formal and informal steps needed to resolve disputes in the current judicial system and will provide a measuring point for the benchmark. A percentage or range of percentages could then replace the words "as much as possible." As argued earlier, developing fully functional and operational national and provincial justice institutions demands enormous commitments in physical resources, training, personnel, and administrative reform. It appears unlikely these basic requirements for functional and operational institutions of justice will be met by the end of 2010.

**3. A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by Jaddi 1385 (end-2006) and fully implemented by Jaddi 1389 (end-2010); reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General's office, the Ministry of Interior and the National Directorate of Security).**

*An assessment is needed urgently to see what part of the full legal framework (civil, criminal, and commercial) already exists and what needs to be further developed*



The third rule of law benchmark concerns the reform and implementation of oversight procedures in the rule of law institutions and appears, in large part, achievable. In November 2006, the office of the Attorney General drafted a code of ethics, which contains disciplinary procedures for prosecutors. The Supreme Court also established a Judicial Service Advisory Board to evaluate all aspects of the judicial service, including recommendations on judicial conduct and ethics as well as enforcement procedures. Further, the Ministry of Justice is further creating a committee to review all laws and regulations and identify areas of improvement, including a code of ethics to include professional standards. To combat corruption, the ministry has made plans to strengthen its Department of Inspections and to ensure it complies with international standards. However, the National Police and National Security Directorate have yet to initiate preparations for internal and external oversight procedures and mechanisms. Reform in the Ministry of Interior in support of police probity is a key area that has thus far lagged.

The second part of the benchmark, dealing with the implementation of these new plans, awaits consideration. To strengthen this benchmark in terms of facilitating concrete actions by which rule of law actors can be held accountable, indicators for this benchmark should include specific and quantifiable criteria for the meanings of "professionalism, credibility, and integrity." Additionally, legislation should be proposed to encourage and protect "whistleblowers", people willing to expose corruption within institutions.

#### **4. By Jaddi 1389 (end-2010) justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles.**

Of the some 437 courts across Afghanistan, 132 (57.4 %) are in need of complete recon-

struction, whereas 93 (40.4 %) require rehabilitation.<sup>18</sup> Many courts lack electricity and water, as well as office supplies such as computers, printers, bookcases, cabinets, and the like. In addition, there are 34 prisons (one central prison, Pul-I Charkhi, and 33 provincial prisons), and 243 legal detention centers throughout Afghanistan, in addition to numerous unofficial jails and detention centers. The majority of these are in deplorable condition, without separate facilities for women and children. Since 2001, many assessments on their condition have been conducted, but very little has been done in terms of actual construction or repair.<sup>19</sup> Various construction projects are under way or in the planning stages for both courts and prisons, but with growing demands on both, efforts need to be stepped up to reach the 2010 target.

As is clear from this assessment of the rule of law benchmarks, many challenges must be overcome to implement an effective and comprehensive justice sector strategy in Afghanistan. If implemented more effectively, the current four rule of law benchmarks in the I-ANDS can contribute to a more cohesive formal justice sector reform effort than what has been seen in the ad hoc programs and piecemeal reform efforts of the last five years.

#### **ANDS AND THE INFORMAL JUSTICE SECTOR**

In the absence of a properly functioning formal judicial system, *jirgas* and *shuras* have filled a large portion of the rule of law gap, especially in rural areas. As chapter five showed in detail, more than 80% of disputes in Afghanistan are now decided through *jirgas/shuras*,<sup>20</sup> which are perceived by many Afghans as more trustworthy, more cost-effective, efficient, and less corrupt than the formal justice system.<sup>21</sup> The i-ANDS narrative identifies *jirgas/shuras* as "informal justice mechanisms" and makes reference to their current prominence in Afghanistan:

*Additionally, legislation should be proposed to encourage and protect "whistleblowers", people willing to expose corruption within institutions*



## JUSTICE FOR ALL

Before work on the interim ANDS commenced, the Ministry of Justice and the Justice Sector Consultative Group developed a strategy paper called Justice for All. The process was initiated in late 2004, and included staff from the MOJ, Attorney General's Office, the Supreme Court, as well as international rule of law advisers from the United Nations and other donor and non-governmental organizations. At the time, Justice for All was the most significant and comprehensive Afghan-driven strategy for the Justice Sector to date. Justice for All identified bottlenecks in the development of the Justice sector after almost three years of reconstruction and reform. In particular, it recommended improved donor coordination, prioritization in the national development framework, and recognition and consultation with the informal justice institutions. Justice for All recognized the importance of consulting with communities on traditional/informal justice structures and mechanisms and recommended development assistance for the dispute settlement role of jirgas/shuras:

State-sponsored justice, available everywhere in Afghanistan, is a critical goal for Government. Without it, the very claim to being a state is called into question. The Government, however, cannot ignore the traditional system.

Considerable further study and dialogue and policy development will be required with a view, in particular, to protecting the rights of disadvantaged groups such as women, children, and minorities. Strategy: It is proposed to conduct further study, dialogue, and policy development with a view, in particular, to protecting the rights of disadvantaged groups such as women, children, and minorities.<sup>22</sup>

Justice for All served as a key input to the initial deliberations of the ANDS Justice sector Consultative and Working Groups. However, despite its recommendation to further study the "traditional" justice system, the ANDS process left out a key element. Some believe the organic process used to develop Justice for All was overshadowed by the highly institutionalized approach necessary to develop the interim Afghanistan National Development Strategy. Further study of non-state, alternative dispute settlement mechanisms was not conducive to a process with strict deadlines and Kabul-based actors. Nonetheless, as described later in this chapter, a reformed and appropriate model of justice that engages traditional forms of carrying out justice can be imagined and could be incorporated into the justice sector strategy. A key task in moving from Justice for All to the ANDS framework is to "bring the informal back in".

*Public confidence in the power of the justice sector, and by extension the state, is therefore extremely low, causing people to seek redress through traditional or informal justice mechanisms. (I-ANDS pg 58-59)*

Furthermore, the ANDS states the Government's commitment to developing non-state institutions alongside formal justice institutions, noting that both systems have a role to play in the administration of

justice in the country, but also noting the need for regulation.

*The justice system will be reformed, and Government will invest in its capacity and infrastructure, including prisons and corrections services, with the aim of assuring Afghans in all parts of the country of access to formal justice and judicial supervision of informal dispute resolution mechanisms. (ANDS pg 71)*

*The MoJ will formalize the role of formal and informal justice mechanisms and their respective roles, enhancing the legitimacy and efficiency of both. (ANDS pg 125)*

Despite including non-state institutions in the Government's justice sector strategy, the I-ANDS refrains from including an actionable benchmark on the formal/informal justice interface. While it can be argued that the benchmarks are general goals rather than detailed means to an end for a particular sector, the lack of a concrete benchmark does have an impact on the strategic process. For example, the Ministry of Justice draft strategy submitted to the ANDS secretariat in March 2007 was developed around the existing I-ANDS benchmarks, but fails to address in detail the area of non-state institutions as resources in rebuilding the justice sector. However, earlier justice strategies have begun to address this question (box 6.1).

## THE ANDS PROCESS: OPPORTUNITIES AND CHALLENGES FOR JUSTICE

The consultative process for developing the ANDS is centered on the multi-tiered Consultative Group system, based on the eight sectors across three pillars described early in this chapter. Each sector is represented by a Consultative Group (CG), which comprises Afghan Government officials, representatives of various civil society organizations, and officials from international organizations and United Nations Member States. Each Consultative Group has subsidiary working groups. Both the

Consultative and Working Groups meet quarterly and prepare a series of reports for the ANDS secretariat (box 6.2)

To support the CGs, Working Groups are aligned by ministries and designed to focus on one or more of the benchmarks in the Afghanistan Compact. These Working Groups form the critical points of contact in gathering information for monitoring purposes, as well as liaising with relevant ministries to prepare details of budget proposals. Membership in these groups includes Government and donor representatives, as decided by the Consultative Groups.

The ANDS Governance, Rule of Law, and Human Rights Sector Consultative Group has more than 75 members, of whom more than half are international advisers, specialists, or personnel from various international organizations. This CG is divided into eight working groups. The Rule of Law Working Group is chaired by the Ministry of Justice with UNAMA and Italy as the lead international donor, and is further divided into seven technical working groups: law reform, justice physical infrastructure, justice institutions reform, legal education and training, legal aid and access to justice, corrections, and an advisory group on women and children in justice. This complex structure can be a hindrance to quick action, but the Consultative and Working Group structure need to be regimented to ensure consultation and avoid the "back room" dimensions that some earlier strategic exercises featured. As an UNAMA rule of law adviser noted, the ANDS process requires that the CGs can be organized only in a highly structured way.<sup>23</sup> A further challenge is the need for translation between the Afghan and international participants in each Working Group, where modern legal terminology and concepts need to be understood by all meeting participants before engaging in conversations at the policy level. Additionally, with such a high number of international advisers in each Working Group, the

meetings have become forums for Afghan ministry staff to request funding for specific projects or programs.

The pace of the ANDS process creates a trade-off between timing and the degree of Afghan ownership. As one international member of the Rule of Law Working Group said, "the Afghan ministry staff do not yet have the capacity to prepare such high level strategies and documents; most of this work is being done by international advisers and technical teams." This brings into question the level of Afghan involvement in the development of strategies that they will have to implement and will be judged by in terms of the outcomes achieved. As one adviser to the ANDS secretariat put it, "We are on a tight timeline to produce the ANDS; this may not be the most realistic timeline for the Afghan government; we may need to slow the pace down to make this a true Afghan process." Various incentives among various stakeholders are contributing to this quick pace. Some donor countries want to see reform take place at a faster rate in order to lessen Afghanistan's dependency on international aid, while other donors need reform milestones to point to in order to justify their presence and continued funding. Although the Government recognizes the risks of rushed reforms where Afghans are excluded, they too are driven to appear as an active participant in control of the political situation despite the speed of developments.

Putting Afghans at the head of the table throughout the ANDS process is necessary, especially in an environment when the turnover of international participants is high and institutional memory is too weak for effective and efficient development. Afghan ownership of the development process could come at the cost of slower reforms, but this could also contribute further to public perceptions that the Afghan government is moving at an apathetic and sluggish pace in the reconstruction process.

As indicated in Chapter four, since 2002,

*The pace of the ANDS process creates a trade-off between timing and the degree of Afghan ownership*

*"The needs are huge and the funds are sparse; the challenge is prioritizing within the priorities"*

judicial reform has fallen prey to the egos of foreign governments, leading to a series of failed attempts to organize the sector and the development of a coherent long-term vision based on the realities of the reconstruction process and the traditions of the Afghan people. The ANDS process is beginning to introduce a more comprehensive and strategic approach by organizing Afghan governmental institutions and international aid agencies around sectors and developing detailed visions for each. A more Afghanised process could mean allowing Afghans to develop sector strategies, however imperfect they may seem, but ones that they feel can they can understand, implement, and be held accountable for. In the justice sector, this may mean reforms that bridge the gap between the country's wide-reaching informal justice institutions and the redevelopment efforts for the formal legal system.

## PRIORITIZATION OF JUSTICE AND THE RULE OF LAW

Prioritization is a major challenge in Afghanistan, when almost every sector is in need of critical reform and development. The strength of the ANDS rests in how it prioritizes across and within sectors, but there is still a need to think more carefully about how and where to focus efforts and how to sequence interventions. As one World Bank consultant to the ANDS process said, "The needs are huge and the funds are sparse; the challenge is prioritizing within the priorities."<sup>24</sup> According to a costing exercise done for the i-ANDS, Afghanistan would need close to \$20 billion to have the possibility to achieve the development benchmarks outlined in the ANDS (see table 6.1). This figure takes into consideration growing domestic revenue and its implications on external financing requirements.

If aid for Afghanistan gradually decreases, it could mean that the \$20 billion

TABLE 6.1

### Costing the ANDS

I-ANDS Sectors	Original SAF Costing Projection not including adjustments (in US\$ million)	Costing Projection including adjustments (in US\$ million)
1. Governance	749	749
2. Security	1,113	2,800
3. Infrastructure & Natural Resources	8,226	8,266
4. Education, Culture & Media	2,546	2,546
5. Health	1,012	1,012
6. Agriculture & Rural Development	2,698	2,698
7. Social Protection	233	233
8. Economic Management and Private Sector Development	561	561
<b>Total Development Requirement</b>	<b>17,178</b>	<b>18,865</b>
Total Recurrent Costs	5,872	5,453
Domestic Revenue	(3,578)	(4,489)
<b>TOTAL Required</b>	<b>19,472</b>	<b>19,829</b>

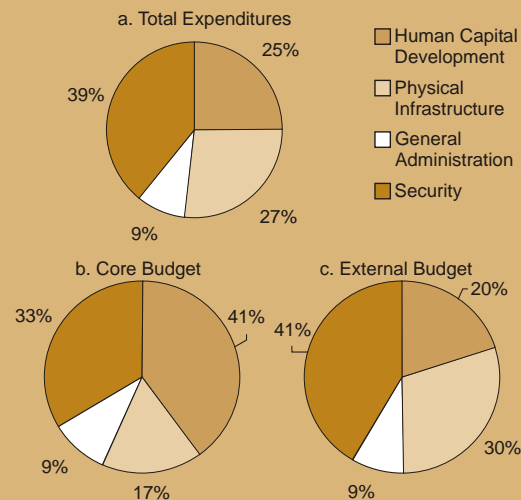
\* This is not a re-costing exercise, but rather a re-mapping exercise that makes known sectoral adjustments for security, recurrent costs and domestic revenue collection. In many sectors, the costs of meeting the SAF targets have changed, and in other areas the ANDS has introduced new targets based on the I-ANDS needs assessment.

needed over the next four years to implement the ANDS may not be forthcoming. At this point, donor countries have contributed or pledged \$10 billion to Afghanistan since 2006 (in London)—only half of what the Government believes is necessary to fully implement the ANDS. However, some donors, including the United States, don't make multi-year pledges. This disparity is striking in the security pillar, where a disproportionate focus on training and equipping the security forces, to the detriment of initiatives to reform the judiciary and legal frameworks, have stunted comprehensive security sector reform.<sup>25</sup>

With the bulk of public spending still financed externally and most of it donor-executed, the Government must work closely with donors to prioritize spending—or public allocations will be determined in an ad hoc manner by fragmented priority-setting. The external budget executed by donors greatly shapes how public funds will be spent annually. According to the World Bank, for example, the core budget developed by the Afghan Government, in 2004/05, prioritized spending in human capital development, which includes spending on teacher's salaries, further development of the National Solidarity Program, and on basic health services.<sup>26</sup> However, the external budget placed human capital development third on its priorities list and security as its first. While these different priorities can be complementary, they require more alignment and harmonization so as to form a coherent statement of strategic goals. An appropriate and aligned balance of core and external budget spending is needed, with increasing emphasis on government execution of the budget. Where this isn't possible, more use of country systems and information is needed for the external budget to serve a coherent development and statebuilding strategy.<sup>27</sup> While these steps will support a more strategic and comprehensive development process, there are still

FIGURE 6.2

### 2004/05 Expenditure Composition



Source: MoF (preliminary annual statements for Core Budget and preliminary annual report for External Budget).

significant barriers in taking them. Two of these barriers are public administration reform and weak information resources available to the government and development actors. (Figure 6.2)

### PUBLIC ADMINISTRATION REFORM AND THE ANDS

Many of the sector strategies of the ANDS will depend heavily on the Public Administration Reform (PAR) process, which has had limited success across the Government to date. At the center of the Government's PAR strategy is a commitment to improve the performance and ministries, agencies and civil servants:

*Our Public Administrative Reform (PAR) program will encourage performance-oriented institutions to promote progressive social change. Ministries and government agencies in both the centre and the provinces will be more efficient and effective, and they will be staffed by a cadre of well-trained and competent professionals recruited on the basis of merit. Government machinery will be restructured and rationalized to reflect core functions and responsibilities*

*The external budget executed by donors greatly shapes how public funds will be spent annually*



*clearly. We will make civil service and military salaries competitive with the private sector.*<sup>28</sup>

The justice sector is one striking example, with reform sought at all levels of the court system, including the Supreme Court, the Attorney General's Office, and the Ministry of Justice. However, the PAR program, ongoing since mid-2002, has been criticized by many including one of its primary implementing agencies, the Independent Administrative Reform and Civil Service Commission (IARCSC), for being slow and superficial.<sup>29</sup> A central issue in this area has been the issue of the large size of the civil service and public sector salaries. The World Bank, with a few other dominant actors, favored a paring down of public administration reform, including drastic cuts in numbers, but encountered resistance from the Afghan Government which wanted to capitalize on public sympathy towards the newly established regime.<sup>30</sup> The disagreement eventually led to the freezing of civil servants' salaries, while inflation rose at about 10% annually. Corruption within the civil service may have grown as a result. The primary vehicle for PAR, the Priority, Reform, and Restructuring (PRR) program, has been largely ineffective. The higher salaries of the PRR system led to even more corruption; civil servants used it to reshuffle from lower salaried jobs to permanent positions with higher pay without actually further developing their skills or being placed in positions for which they were qualified—as the program stipulated, but failed to implement effectively.

Other constraints have contributed to numerous problems in the implementation of PAR. According to a study by the Afghan Research and Evaluation Unit, another major issue has been the slow establishment and weak capacity of the Independent Administrative Reform and Civil Service Commission (IARCSC), the main body responsible for steering and overseeing PAR. Targets and timetables have been

unrealistic, and coordination among donors in their support to the IARCSC has been poor. Ministries have also had very limited capacity to implement reform, and there has not been sufficient competent technical assistance to help them do so.<sup>31</sup>

At the same time, there have been some notable achievements for PAR and PRR, especially in the Ministry of Justice. According to a draft strategy for the Ministry of Justice prepared in April 2007, all permanent justice institutions signed up for PAR and PRR in 2003. With the exception of the Prisons Department, the MOJ has restructured its organization and is in the second stage of the PRR process for all departments. The second stage includes a new structure for each department containing job descriptions, staffing needs, and proposed salaries. The recruitment process for these posts in Kabul has been completed, while the process is continuing in the provinces. According to the MOJ, in order to expedite the PRR process, the Ministry, with the cooperation of the IARCSC, established the Reform Implementation and Management Unit (RIMU) in November 2006. RIMU oversees the implementation of the reform process and build the capacity of the recruited staff. By March 2007, the implementation of reform had been completed in 17 provinces and their districts.<sup>32</sup> Despite these achievements, a senior adviser to the MOJ says that even with the higher PRR salary scales, retaining professional staff and keeping them from working for higher-paid justice reform projects implemented by international aid agencies remains a primary challenge.

#### STATISTICAL AND MONITORING PROBLEMS

Afghanistan's institutions responsible for the management of statistical data still face serious human resource, material and physical constraints. In turn, a lack of baseline data and the absence of mechanisms for systematic data collection,

*The justice sector is one striking example, with reform sought at all levels of the court system, including the Supreme Court, the Attorney General's Office, and the Ministry of Justice*



## Improving information in Afghanistan: Statistics Law and the Census

At the center of the national statistical system is the Central Statistical Office (CSO). In 2006, a new Statistics Law was passed, giving the CSO wide powers. Previously operating under the Ministry of Economy, the Office is now an independent Government body with its own budget. It is responsible for "ensuring harmonization and coordination of all statistical activities in the nation". While other organizations are allowed to publish statistics, this must be done in agreement with this Office..

A key feature of the new law is the formation of a National Statistical Committee (NSC) of ten members, comprising representatives of Government departments, the private sector, and academia, appointed by the President on the advice of the Director-General of Statistics. The NSC is chaired by the First Vice-President of Afghanistan and meets at least twice each year, with members serving for a period of four years. The NSC has been given wide powers. It coordinates and reviews the statistical work plans of the CSO and other ministries; it can comment on staffing and budget requirements in the Office; it can review and approve the statistical classifications used by CSO; and it can give advice on any other statistical matter.

There are several other useful features of the new law:

1. One important duty of CSO is to prevent duplication in the information collected by Ministries and governmental

administrations or by agencies other than the state.

2. At the beginning of each fiscal year, the CSO is required to establish a calendar showing the most important releases of statistics to take place that year.

3. The CSO may share the data collected from a respondent with others, but only so long as the CSO has given prior notice of this to the respondent and the respondent has not objected.

In addition to an appropriate legal framework and institutional capacity in the system for managing national statistics, a national population census is essential. In addition to detailed information on the distribution of the population and its characteristics, it also provides the sampling frame for national household surveys. No complete population census has been carried out in living memory. A first census was attempted in 1979, but was not completed because of the outbreak of hostilities. Preparations for a second census began in 2004 with a major household listing of the settled population carried throughout the country. The population estimates derived from that listing were used in planning the political process and the parliamentary elections of September 2005. Based on these incomplete activities, the CSO has issued a small report entitled "Estimated Population of Afghanistan 2006-2007." This shows the distribution of the urban and rural population by sex for each civil division within each province. The estimated

settled population is 22.6 million, of whom 4.9 million live in urban areas and 17.7 million live in rural areas. In addition to this number, there is a nomadic population of about 1.5 million, but their numbers have probably diminished as some nomads adopt a more settled way of life.

A census was specifically requested in the 2001 Bonn Agreement, and a benchmark for its completion by the end of 2008 was included in the Afghanistan Compact. Scheduled for July 2008, it is expected to cost USD \$44 million. Funding is likely to come from a variety of donors; for instance, the European Commission recently announced a contribution of 15 million Euros to UNFPA for the census. An impressive building has already been constructed in the back of the Central Statistics Office compound for storing census questionnaires, data processing, and enumerator training. A census adviser with many years of census experience has been appointed. A draft questionnaire for the census has been prepared, and a pilot is planned for July 2007 to be carried out in all provinces.

In any country, a census is a major undertaking, requiring enormous inputs of time, staff, and financial resources. In the cultural and security context of Afghanistan, it is a massive initiative. All departments of government, at both national and provincial levels, will need to cooperate, and the international community, the media, and the non-governmental sector will also play important roles.

collation, and analysis of socioeconomic data impose huge constraints on the ability to effectively monitor progress in relation to benchmarks in many areas. Since poverty outcomes will depend on how a given policy affects growth and inequality, assessing the appropriateness of a particular policy for a poverty reduction strategy requires knowledge about the links between policies and growth, on the one hand, and between those same policies and inequality, on the other hand.<sup>33</sup> In order to monitor the effects of ANDS policies and programs, the

Government must initiate a full monitoring program and poverty assessment plans. A set of meaningful indicators, baselines and targets will be required to measure inputs, policy actions or commitments, outputs, and outcomes affecting the well-being of the population (box 6.3).

While the I-ANDS has introduced a more consultative and comprehensive strategic process for articulating the development goals and priorities of Afghanistan, there is still a considerable way to go before this process results in a

justice sector strategy with concrete and achievable goals, priorities and sequences. As just noted, such a strategy will have to reintroduce and increase the attention given to the informal justice mechanisms of Afghanistan in "Justice for All", while overcoming challenges in terms of formulating actionable benchmarks, deficiencies in the reform of public administration, and problems of statistical information for human development. The rest of this chapter introduces an approach to meeting the challenge of the formal and informal justice interface that could form part of a comprehensive justice sector strategy.

## DEVELOPING A HYBRID MODEL OF FORMAL AND INFORMAL JUSTICE

Earlier chapters in this Report indicate that despite some progress, efforts by international donors and the Government to (re) establish the formal state justice system in post-war Afghanistan face serious difficulties. These difficulties include the lack of professional capacity and resources, inadequate physical infrastructure, relative lack of accessibility, institutionalized corruption, the continued strong influence of militia and factional leaders over justice institutions, lack of security, and low levels of confidence and trust in the justice system. Furthermore, the lack of a single, coherent long-term vision for (re) building the justice system, and the lack of effective co-ordination among donors and Afghan justice institutions, further complicates reform efforts.

At the same time, non-state justice institutions—mainly *jirgas* and *shuras*—continue to operate as important mechanisms of dispute settlement across the country, including in many urban centers. According to Afghan government's "Justice for All" strategy, "Traditional institutions take up the slack and may deal with 90% of legal matters across the country."<sup>34</sup> Empirical data examined in chapter five shows that non-state justice institutions often resolve

local disputes in a manner more trusted, considered fairer and less corrupt, and deemed more accessible than state courts. Data and interviews conducted for this Report also suggest that non-state justice institutions in Afghanistan deliver justice more effectively (and cost-effectively), and are more in line with local norms and traditions, than state justice institutions. Among those who have contact with the two systems of justice, a large majority say that they feel satisfied with the outcome of *jirgas/shura*.<sup>35</sup> And unlike the state justice system that punishes wrongdoers in a way that alienates them from mainstream society, non-state justice institutions promote restorative justice and aim to reintegrate law-breakers into the community as respectable members. Besides the advantages of re-integrating wrongdoers into the community in a deeply troubled conflict-affected society, such reintegration can benefit overloaded formal justice institutions, and especially prisons.

However, this report (particularly in chapter five) also confirms that informal justice institutions have negative aspects. *Jirgas* and *shuras* are highly patriarchal institutions where women are rarely allowed to participate in decision-making. The exclusion of women from these traditional councils has very negative implications, especially when they are a party to a dispute. Furthermore, some of the decisions made by *jirgas* and *shuras* include *baad*—the practice of offering a woman or girl into marriage as a means of dispute settlement. This practice violates the Afghan Constitution, Islamic law and principles of Human Rights. Although it is still practiced at times, the practice of *baad* is an exception rather than a norm. Nevertheless, it has serious implications for the human rights of women in Afghan society, and for their fundamental freedoms.

In these senses, both state and non-state institutions are seriously deficient in delivering justice efficiently and in humane ways respectively. On the one hand, the

*"Traditional institutions take up the slack and may deal with 90% of legal matters across the country"*

current state of affairs requires serious and coordinated attention to the reform and strengthening of the formal justice system. However, the slow and expensive task of reforming/strengthening the centralized state justice system will take a long time, as one report concluded: "Rule of law will only exist in Afghanistan with the creation of an effective formal justice system; but such a system is years, if not decades, away. In the meantime, alternative dispute resolution mechanisms should be strengthened."<sup>36</sup>

Even after the successful establishment of an effective formal justice system, there are likely to be serious problems with fiscal sustainability and accessibility. In addition, a centralized formal state justice system will tend to emphasise retributive justice and punishment over the increasingly internationally accepted practices of restorative justice, in particular as practiced through mechanisms of Alternative Dispute Resolution (ADR). On the other hand, non-state justice institutions have their own inadequacies and problems—especially with regard to human rights and gender equity.

All of this suggests that collaborative relationships between formal and informal justice institutions may have value, if they can be formed in a way that ameliorates the biggest challenges to each system's functioning well. These relationships should aim at harnessing the positive aspects of informal non-state institutions of dispute settlement (especially *jirgas/shuras*), while ensuring that their decisions are supervised and regulated, so that they are compatible with the Constitution of Afghanistan, especially Article 54, Afghan legal norms and international human right principles.

The "Justice for All" strategy, which "sees positive elements in traditional mechanisms, including their role in community cohesion and locally accessible dispute resolution" forms a suitable backdrop to both donor and government acceptance that these institutions will play a role.<sup>37</sup> Furthermore, the "Justice for All" strategy identified

ADR mechanisms as an "approach [that] has considerable appeal in Afghanistan."<sup>38</sup> However, the "Justice for All" strategy did not further elaborate on what the "positive elements in traditional mechanisms" are, and how they could be exploited constructively by the state justice system to achieve out-of-court dispute settlements that are supervised and regulated. Similarly the strategy does not elaborate on how ADR mechanisms could be practically used in Afghanistan. The hybrid model presented here attempts to fill these gaps while providing an input for the ongoing development of a comprehensive ANDS justice strategy. (Figure 6.3)

The political commitment required to take innovative programmatic steps toward building a new justice system that meets the needs of the Afghan population is considerable. Currently, too much of the already limited attention and resources are given to "strengthening" and partially reforming the pre-war justice system—a system that was ill-prepared (and inappropriate) to deliver justice even in the pre-war era. It is hard to imagine how the old—albeit partially reformed—justice system will meet the new complex needs of Afghans in the 21<sup>st</sup> century. The Afghan population needs a response that draws on formal and informal justice systems and traditions in Afghanistan. This is in part a policy direction, but also a pragmatic response to an existing and enduring reality. Nevertheless, some concerns of the Afghan government and international community are valid.

Members of the international donor community, particularly the United Nations, are concerned that some traditional dispute resolution practices result in the breach of fundamental human rights principles, as discussed in chapter five and above. Many institutions of the Government of Afghanistan, on the other hand, seem opposed to the formal recognition of informal justice; this is perceived as a threat to the authority of the state and state-building. This issue can be demonstrated in

*Even after the successful establishment of an effective formal justice system, there are likely to be serious problems with fiscal sustainability and accessibility*

the distinction drawn in Islamic jurisprudence between "God's (state's) rights" (*huqullah*) and "victim's rights" (*haqullabd*). In criminal cases, informal justice institutions reconcile victims with the offender by emphasizing restorative principles of *haqullabd*. By contrast, the state enforces *huqullah*, (the rights of God) on which the state has a partial monopoly punish the offender.<sup>39</sup> Here two principles can operate in conflict, if for example, the restorative process is disturbed by state insistence on punishment, or if the informal system prevents the incarceration of a dangerous individual. State justice authorities are also concerned that recognition of the informal system may reduce or undermine their authority and lessen public resources for state courts.

While Government officials express understandable concerns about the recognition of non-state dispute settlement, research indicates that multi-layered, practical forms of collaboration between the state and non-state justice institutions already exists at the local level. Most local officials, including judges, *huqoq* (civil law) officers, and provincial and district governors, refer cases routinely to local or tribal *jirgas* and *shuras*. For example, among the Shinwaris of Nangarhar province, the local population have renewed their historical agreements with the district government (called "Sang-Naweshta") to resolve most of their civil and criminal cases according to the Shinwar customary law - "the Shinwar Lar". In many cases, the decision made by local *jirgas* is endorsed by the district justice institutions, which are binding legally on the parties involved.<sup>40</sup> These referral paths are found in other parts of the country regardless of ethnicity or region.

Another kind of formal and informal justice linkages is observed where shi'ite populations live, for example in Bamyan Province.<sup>41</sup> These populations tend to be followers of *Tashayu* jurisprudence. According to the new Constitution (2004), the Shi'it population of Afghanistan may resolve their

familial disputes (divorce, inheritance) through *Tashayu* (*Ja'afari* and *Ismaili*) jurisprudence. Although *Shi'it* judges maintain this option within the formal court of justice, in practice family law matters are referred to the *shura-i-ulama* that consist of local elders and village *mullahs*. There are very few judges with formal training in these forms of jurisprudence in Afghanistan, and it is unlikely there will be many judges able to use both systems anytime soon. In fact, all kinds of cases are either taken directly to *shura-i-ulama*, or they are referred to it by the formal court. As a District Judge in Yawkawlang explained:

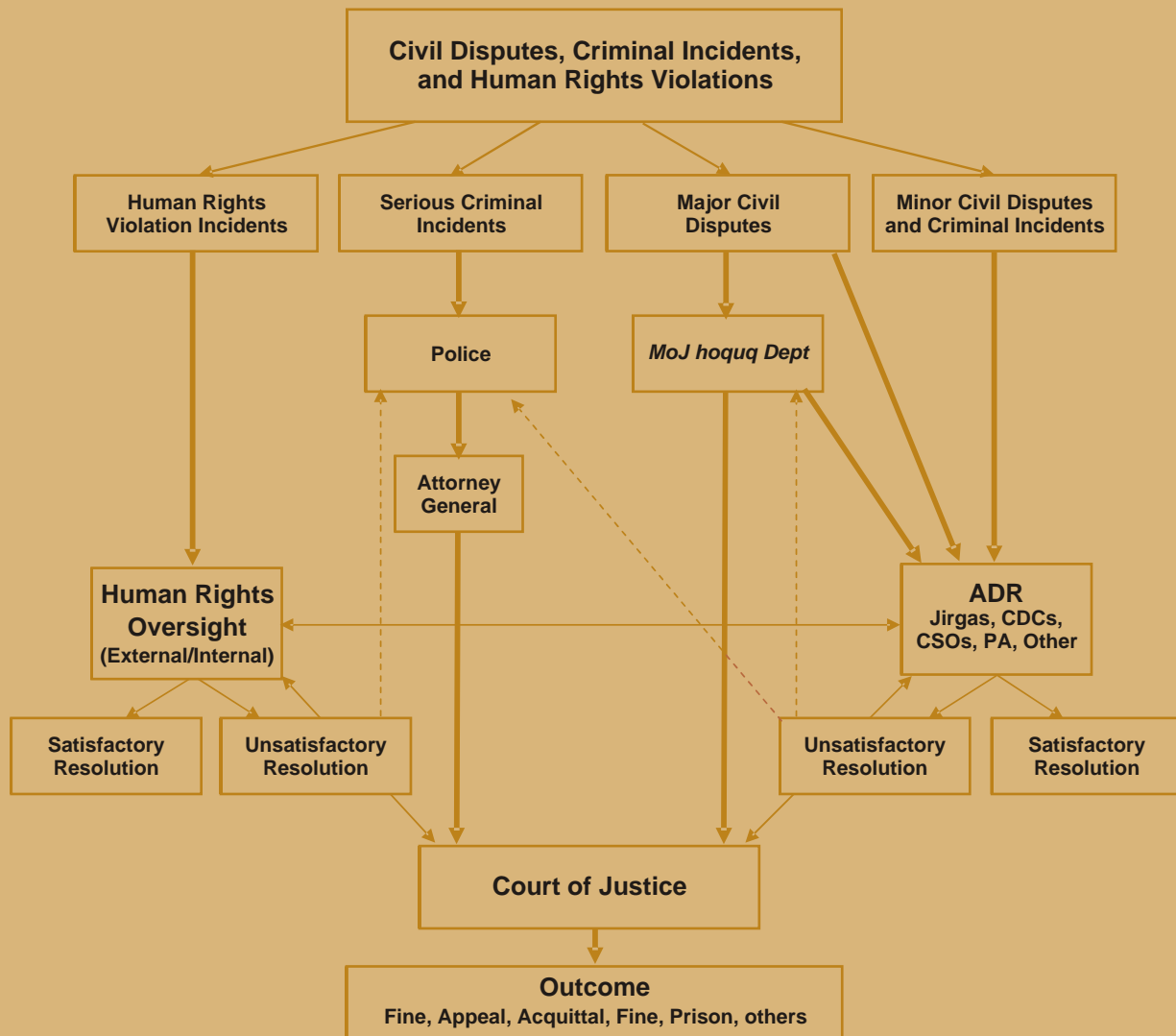
"In the Afghan Constitution it is clearly written that the *Shi'it* people can use the *Jafariah Shari'a* for three things: divorce, *Nikah* (Islamic marriage), and inheritance. The other disputes should be solved through the *Hanafi Sharia*. The people cannot differentiate this, and they are claiming that if we have *ulamas* who are *shi'it*, we will also want to solve our problems through only *Jafariah Shari'a*. So I also do not have any objection to taking those cases to the *ulama shura*."<sup>42</sup>

In Yakawlang, the *ulama shura* has been shown to resolve even serious cases such as murder. Most cases of murder, however, may be too complex to be dealt with effectively by non-state dispute resolution institutions; such cases may require special police investigations, medical examinations, and autopsies. Furthermore, in the case of murder, there is a strong element of *huqullah* (the rights of God) that falls mainly within the domain of the state. More importantly, by punishing those who endanger citizens' lives, the state exercises its authority and restores the damage caused to law and order; it assures the citizens that the moral and social order of the society is intact. It is important to note that, while unregulated informal practices may be inappropriate or violate laws and legal norms, there is already a basis for interaction between the formal and informal justice systems.

Most local officials, including judges, *huqoq* (civil law) officers, and provincial and district governors, refer cases routinely to local or tribal *jirgas* and *shuras*

Figure 6.3

**A hybrid model of the justice system in Afghanistan**



This suggests that while ADR institutions are badly needed in Afghanistan, having them function in an unsupervised and unregulated manner can be problematic, as this section indicated earlier. Potential breaches by ADR can be addressed through institutional relationships between the informal and state rule of law institutions. But the question remains: how can these relationships be developed in a collaborative way, which at the same time guarantees the autonomy of alternative dispute settlement institutions?

This report proposes a hybrid model for

justice in Afghanistan in which alternative dispute resolution mechanisms remain important in providing justice—but under the regulation of state institutions. Building on the analytical findings found in chapters three to five, this proposal—far from embracing a romantic or ideological view of informal rule of law institutions—represents a pragmatic approach consistent with current and medium-term realities across the country. As illustrated in figure 6.3, the hybrid model proposes the creation of ADR and Human Rights Units alongside existing state judicial institutions. The ADR Unit



would be responsible for identifying appropriate mechanisms to settle disputes outside the courtroom. In the Afghan context, these mainly include *jirgas/shuras*, Community Development Councils (CDCs), civil society organizations (CSOs), and private arbitration (PA). ADR institutions may settle disputes through arbitration, mediation, conciliation, and other methods.

A key feature of the model is that while the ADR Unit could address minor criminal incidents (all qabahat and most jonha crimes - obscenity and misdemeanors respectively) and all types of civil disputes (property, commercial complaints, etc.), disputants would have the choice to process these cases either through an alternative dispute resolution institution or the nearest state court.<sup>43</sup> However, as the diagram shows, all serious criminal cases (*jenayat*) should be dealt with mainly by the state justice system. Those cases where alternative dispute settlement bodies fail to reach a conclusion satisfactory to the disputants should be taken back to the formal justice system-with minor criminal cases taken to the police and civil cases to the hoquq department.

The second element of the model is a Human Rights Unit mandated to monitor decisions made by ADR institutions to ensure consistency with human rights principles and Afghan and international law. Ideally, this Human Rights Unit would be an extension of the Afghanistan Independent Human Rights Commission. Or they may be staffed by law graduates with special training in human rights from domestic human rights organizations. These officers will have the responsibility to check the outcome of each case resolved by ADR, so that the outcomes are compatible with Afghan constitution and human rights principles. The Human Rights Unit would also have the responsibility to play an educational and advocacy role in creating public awareness about human rights. A further possibility is that, once established, it could also have the power to proactively

investigate serious past human rights abuses and war crimes, compiling evidence and possibly reporting them to any future Special Court of Human Rights of Afghanistan or Truth and Reconciliation Commission. The Unit could also tackle issues relating to domestic violence and deal with them in culturally sensitive ways.

The proposed hybrid model may raise concerns about its practicality if implemented. At an international conference on the subject, entitled "The Relationships between State and Non-State Justice Systems in Afghanistan", held in December 2006 in Kabul, the establishment of a Human Rights Unit alongside a proposed *jirga/shura* unit and the court of justice was criticized for creating unnecessary bureaucracy that Afghanistan could not afford to finance.<sup>44</sup> Some participants also voiced concern that a proposal to "integrate" informal justice institutions into the formal justice system would abolish the former's informality—eroding its efficiency, cost-effectiveness, flexibility, and sense of popular ownership that underpins its legitimacy. In short, local informal justice institutions would become part and parcel of the state apparatus that many Afghans view as either incompetent, or corrupt, or both.

However, this hybrid model does not suggest the integration of ADR (especially *jirga/shura*) into the state justice system. Instead, it proposes the establishment of institutional links between the two that build on existing realities, so that the outcomes of non-state dispute resolution mechanisms are monitored and recorded. Also, the proposed model suggests specific limits to the kind of disputes that these institutions would have the jurisdiction to resolve. Otherwise, the processes, rituals, proceedings, and in most cases outcomes and enforcement mechanisms are not modified. One of the important strengths of these institutions is that they operate flexibly to resolve disputes within the social and cultural contest in which they occur.

... This hybrid model does not suggest the integration of ADR (especially *jirga/shura*) into the state justice system

However, in order to achieve these goals, there is need for a legal and regulatory framework which provides general guidelines for smooth coordination of relationships between the formal and informal justice institutions. The framework should define the jurisdiction of ADR, and describe the operational aspects of the model.

Although the abovementioned conference raised the above and other legitimate concerns, a consensus recommendation was reached that proposes a variation of the hybrid model of state and non-state justice institutions presented in this chapter. Indeed, at the end of the conference, Afghanistan's Deputy Minister of Justice - Dr Hashimzai - proposed that his Ministry and international partners form a working group to help take the proceedings of the conference forward. Specifically, the working group would help to translate key ideas of the conference into policy and action. The opportunity presented by this decision should be grasped within the framework of the preparations of the Afghanistan National Development Strategy, to be completed by mid-2008. In particular, consideration should be given to the drafting of a new benchmark on strengthening the interface between state/non-state rule of law institutions that can inform the development of the justice sector strategy in late 2007.

In support of this reform initiative, a further ANDS rule of law benchmark is proposed:

*By mid-2008, a pilot project will be initiated in at least five provinces to test the applicability of the Hybrid Model of Afghan Justice. By mid-2009, a comprehensive review of lessons learned will be conducted. By 2010, based on the conclusions reached from the review, a national rollout of the model could be undertaken.*

The hybrid model proposes constructive and complementary interaction between the formal district courts, ADR institutions,

and the Human Rights Unit. A professionally supervised and regulated system involving state and non-state justice institutions would make justice more widely accessible, efficient, cost-effective, and humane. Furthermore, it would provide a channel of communication between the state and the Afghan people, which would, in turn, result in greater solidarity and confidence in the new political order. However, before rolling out the proposed hybrid model of state and non-state justice institutions across the country, it should first be field tested in select pilot provinces.

#### STAFFING AND COSTS

As mentioned earlier, the ADR and HR pillars would be headed, separately, by qualified Afghans who have relevant experience and higher educational qualifications in law. The head of the ADR pillar will be supported by one assistant, one driver and one support/service staff while the HR office will be supported by one support staff (driver). The entire team will be would be paid according to government Civil Service Reform salary scale (see annex I for details). The ADR office would be based at the district level, whereas the Human Rights office is to be based at province/regional level; both will have their own transport facilities. Consideration would have to be given to security requirements as well. While the total costs for one unit/year are estimated at US\$ 66,840, the total costs for the pilot project in five provinces (ten districts) are estimated at US\$ 515,000. The nationwide costs for one year is estimated at US\$ 14,000,000, and US \$ 40,000,000 for five years (as annex VI indicates in detail).<sup>45</sup>

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Reform of Afghanistan's justice sector requires innovative approaches grounded in local realities. The ANDS development process currently underway provides an important opportunity to move from thus

*The hybrid model proposes constructive and complementary interaction between the formal district courts, ADR institutions, and the Human Rights Unit*

*The ANDS development process currently underway provides an important opportunity to move from thus far piecemeal and inadequate reforms toward a comprehensive sector strategy for justice in Afghanistan*

far piecemeal and inadequate reforms toward a comprehensive sector strategy for justice in Afghanistan. The current ANDS and Compact framework requires a more explicit and detailed recognition and strategy for the interface between formal and informal justice institutions. Formal justice systems in Afghanistan currently suffer from a lack of capacity and legitimacy for reasons detailed throughout this Report. At the same time, informal justice mechanisms, and especially *jirga* and *shura*, currently carry the bulk of justice sector activity in the country. However, these systems have serious shortcomings in some areas, most prominently in their adherence to national, international, *sharia* and human right norms and laws. Despite these problems, interaction between the formal and the informal systems of justice already takes place in many areas, and building on these links constitutes a constructive way to

both improve informal justice while responding to the constraints of the formal system.

The development of a system that formalized the linkages without co-opting informal justice institutions can help reduce the challenges facing both systems while taking on board some of the advantages of each. Such a system should be oriented towards monitoring and if necessary regulating informal systems not by courts themselves, but through an independent accountability mechanisms - the Afghanistan Independent Human Rights Commission. While there are numerous challenges to such an approach, failure to move forward on the relationship between formal and informal justice in Afghanistan will have serious consequences for justice itself and for the legitimacy of the fledgling Afghan state at this point in its development.

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# Human Development Indicators: data, methodology, and issues

The UNDP has developed four human development indices for reporting on in its global Human Development Report. These are the Human Development Index (HDI), the Gender-Related Development Index (GDI), the Human Poverty Index (HPI-1 for developing countries and HPI-2 for selected OECD countries), and the Gender Empowerment Measure (GEM). This annex provides a brief introduction to these indices, and how they are constructed. For more detailed information, the reader should consult Technical Note 1 in the global Human Development Report 2006.

The broad outlines of the four indices are shown in Box 1, together with the values of the various indicators for Afghanistan. The methods used for calculating the HDI and the GDI are set out in Box 2, and the methods used for calculating the HPI and GEM are described in Box 3. In practice it was only possible to calculate three of the indices; GEM could not be calculated because of an absence of key data.

## HUMAN DEVELOPMENT INDEX (HDI)

The HDI, the most important of the four indices, is a summary measure of human development. It measures the average achievements of a country in three basic dimensions of human development:

- A long and healthy life, as measured by life expectancy at birth.
- Knowledge, as measured by the adult literacy rate (with two-thirds weight) and the combined primary, secondary and tertiary gross enrolment ratio (with one-third weight).
- A decent standard of living, as measured by GDP per capita in purchasing power parity (PPP) terms

in US dollars (see Annex 4 for the definition of PPP). Here, income serves as a proxy for all the other dimensions of human development that are not reflected in a long and healthy life and in knowledge.

The indicators for these three dimensions are measured in different units - years, percentages, and dollars - and cannot therefore be combined directly. It is first necessary to create indices for each of the dimensions. This was done by the HDR office at UNDP headquarters by examining the values of indicators for all countries, and then establishing minimum and maximum values (goalposts) for each indicator.

The performance in each dimension is expressed as a value between 0 and 1 by applying the following general formula:

$$\text{Dimension index} = \frac{\text{actual value} - \text{minimum value}}{\text{maximum value} - \text{minimum value}}$$

The HDI is then calculated as a simple average of the dimension indices. The method of doing this calculation is shown in Box 2.

In the case of Afghanistan, there are difficulties with each one of the indicators used in constructing the HDI. Many of

TABLE 1

### Goalposts for calculating the HDI

	Minimum Value	Maximum value
Indicator		
Life expectancy at birth (years)	25	85
Adult literacy rate (%)	0	100
Combined gross enrolment ratio (%)	0	100
GDP per capita (PPP US\$)	100	40,000

....

## Summary of indicators used in constructing the four human development indices

Index	Dimension	Indicator	Sex	Value	Year	Source/Comment
HDI – Human Development Index		Afghanistan HDI = 0.345				
	A long and healthy life	Life expectancy at birth (years)		43.1	2005	UN Population Division, WPP 2006
	Knowledge	Adult literacy rate (%)		23.5	2005	MRRD, NRVA 2005
		Gross enrolment ratio (%) (primary, secondary, and tertiary levels)		59.3	2005	Calculation based on CSO, ASY 2006
	A decent standard of living	GDP per capita (PPP US\$)		964	2005	Derived from Penn World Tables 6.2
GDI - Gender-related Development Index		Afghanistan GDI = 0.310				
	A long and healthy life	Life expectancy at birth (years)	F	43.0	2005	WPP 2006
			M	43.1	2005	WPP 2006
	Knowledge	Adult literacy rate (%)	F	12.6	2005	MRRD, NRVA 2005
			M	32.4	2005	MRRD, NRVA 2005
		Gross enrolment ratio (%) (primary, secondary, and tertiary levels)	F	41.8	2005	Calculations based on CSO, ASY 2006
			M	73.7	2005	
	A decent standard of living	Estimated earned income (PPP US\$)	F	478	2005	Based on NRVA
			M	1428	2005	2005 & other sources
HPI-1 - Human Poverty Index (for developing countries)		Afghanistan HPI = 62.3				
	Deprived of:					
	A long and healthy life	Probability at birth of not surviving to age 40		0.419	2005	WPP 2006
	Knowledge	Adult illiteracy rate (%)		76.5	2005	MRRD, NRVA 2005
	A decent standard of living	Population without sustainable access to an improved water source (%)		68	2005	MRRD, NRVA 2005
		Children underweight for age (% of under 5s)		50	2005	CSO, ASY 2006
GEM - Gender Empowerment Measure		Afghanistan GEM cannot be calculated because of an absence of data				
	Political participation and decision-making	Share of parliamentary seats	F	91	2005	
			M	259	2005	
	Economic participation and decision making	Share of positions as legislators, senior officials and managers	F			
			M			
		Share of professional & technical positions	F			
			M			
	Power over economic resources	Estimated earned income	F	478	2005	Based on NRVA
			M	1428	2005	2005 & other sources

these difficulties relate to the fact that there is a lack of accurate knowledge about the size of the population and its distribution in terms of age and sex. This issue is discussed in more detail in Annex 5.

CSO figures of the total population and its distribution by age and sex have been used in preparing the human development indicators, but in the case of life expectancy the estimates provided by the UN Population Division have been preferred, since they are based on extensive research of available data.

For estimating adult literacy, we are fortunate in having available the recent figures obtained from the NRVA survey of 2005. Obtaining accurate literacy data is difficult in Afghanistan, because of the cultural context in which surveys are conducted. In the NRVA survey the head of household (nearly always a male) was asked whether each household member could read. The NRVA team acknowledges that this method of assessment is not fully reliable. In addition, the interviewee (usually the head of the household) was asked to perform a small literacy test (using a flash card) as well as a simple arithmetic test. Two boxes were provided on the questionnaire for recording the outcome of these tests. Similar tests were applied to the female household member who was interviewed for the female sections of the questionnaire.

For calculating the gross enrolment ratio, the numerator should be fairly reliable. It comes from the student data collected by the Ministry of Education and published in the Afghanistan Statistical Yearbook. The denominator is more of a problem. It is the estimate of the population aged 7 to 23, which corresponds to the years covered by primary school (7-12), secondary school (13-18), and tertiary level (19-23). The estimates provided by CSO have been used for this calculation, but they appear to be too low, especially for students at the younger ages.

Although per capita GDP data is available in the CSO Statistical Yearbook and in other places, no PPP estimates are currently available from the World Bank for

Afghanistan. For countries that do not have a PPP estimate provided by the World Bank, the HDR office recommends the use of the PPP estimates from the Penn World Tables of the University of Pennsylvania. The latest figure shown there (in the column headed *cgdp*) is for 2004, and this figure has been adjusted upwards to provide an estimate of \$964 for 2005. In arriving at this figure, two corrections were made. Allowance was made for the fact that the value of GDP in Afghanistan increased (according to CSO's Statistical Yearbook) from US\$ 5733 million in 2004 to US\$ 6852 million in 2005. Allowance was also made for the fact that the Penn World Tables assume a population in 2004 of 30.133 million, whereas the CSO figure for 2005 is 23.598 million.

It should be noted, however, that even this figure of \$964 does appear to be on the low side. A more realistic estimate would probably be somewhere between \$1,000 and \$1,500. A major international project (known as the International Comparison Program) is underway to provide PPP estimates for many countries, but unfortunately Afghanistan is not participating in the ICP. Further information about the ICP is given in Annex 5 of this present report.

Using the data set out in Box 1, the calculations produce an HDI figure of 0.345 for Afghanistan in 2005. This is very similar to the earlier estimate of 0.346 contained in the Afghanistan HDR for 2004. Afghanistan is not included in the 2006 HDR rankings (which were based on 2004 data), but if it was included it would probably be placed in 174<sup>th</sup> position, with only four countries below it.

## **GENDER-RELATED DEVELOPMENT INDEX (GDI)**

While the HDI measures average achievement, the GDI adjusts the average achievement to reflect the inequalities between men and women in the same three dimensions as for HDI. It uses the same indicators as the HDI, except that the GDP indicator is changed to earned income, so that separate estimates can be obtained for males and females. The details of the calculation are set



## Steps involved in calculating the HDI and GDI

### Steps in calculating the HDI

The three indices (for life expectancy, education, and GDP) are calculated as described in the text. To obtain the index for the dimension represented by GDP, the country value and the goalpost values are replaced by their logarithms in the calculation of the GDP index. This procedure of taking logarithms is very common when trying to analyze any type of financial data; it reduces the effect of extreme large values, while maintaining variation between values at the lower end of the distribution.

$I_1$  = Life expectancy index

$I_2$  = Education index, where it is obtained by adding two-thirds of the adult literacy index to one-third of the combined gross enrolment index.

$I_3$  = GDP index

The HDI is the simple arithmetic average of these three indices:  $HDI = \frac{1}{3}(I_1 + I_2 + I_3)$

### STEPS IN CALCULATING THE GDI

The calculation for the GDI is very similar to that for the HDI, but with extra steps along the way. First, the life expectancy index and the education index are calculated in the same way as before, but separately for females and males. In doing this, slightly different goalposts are used for males and females in the case of life expectancy, to take account of the fact that life expectancy for females is on average about five years more than that for males. The minimum and maximum values are taken as 27.5 and 87.5 years for females, and 22.5 and 82.5 years for males.

Once the separate life expectancy indices have been calculated for females and males, they are combined into one index, known as the equally distributed index. For any index, the general formula used is:

Equally distributed index =  $1 / \{(\text{female population share} / \text{female}$

index) + (male population share / male index) }

A similar equally distributed education index is calculated, using the education index for females and males.

In the case of the income index the calculation is exactly the same, except that the first steps are more complicated, and involve three stages. The value of GDP per capita (PPP US\$) is multiplied by the total population to give the country's total GDP in PPP US dollar terms (denoted by  $Y$ ). Then the female share of the wage bill is estimated. Because this information is not directly available, it is estimated indirectly, using the ratio of the female non-agricultural wage to the male non-agricultural wage and the female and male percentage shares of the economically active population. Where data on the wage ratio are not available, a value of 75 % is used. The female share of the wage bill,  $S_f = \{(W_f / W_m) * (EA_f)\} / [\{(W_f / W_m) * (EA_f)\} + EA_m]$  where  $W_f / W_m$  is the ratio of female to male non-agricultural wage and  $EA_f$  and  $EA_m$  are the female and male percentage shares of the economically active population.

In calculating female and male earned income, we assume that the female share of the wage bill is equal to the female share of GDP. Then the estimated female earned income (PPP US\$),  $Y_f = S_f * Y / N_f$ , where  $N_f$  is the total female population. Similarly the estimated male earned income (PPP US\$),  $Y_m = (Y - S_f * Y) / N_m$ , where  $N_m$  is the total male population. The dimension indices for male and female income are calculated, using logarithms, and the equally distributed income index is then calculated as indicated in the formula above. The final step in getting the GDI is to calculate the unweighted average of the three equally distributed indices shown above: those for life expectancy, education, and income. Further background information on the steps involved in calculating the HDI and GDI can be found on page 393 of the global HDR for 2006.

out in Box 2. One noteworthy feature is that, in the case of life expectancy, a different set of goalposts is used for males and females, since in most countries (though not in Afghanistan) females tend to live longer than males. The minimum and maximum goalposts are 27.5 and 87.5 years for females, and 22.5 and 82.5 years for males.

In calculating the GDI for Afghanistan, certain problems arose. When calculating the gross enrolment ratio (GER), there was a difficulty with the data for the tertiary sector, in that the sex breakdown was only shown for the higher sector (universities, etc.). There was no sex breakdown shown for other institutions. Accordingly those institutions were not included in the GDI analysis. The effect of their exclusion on the overall results will be minimal, since they represent such a small fraction of the total student population at all three levels of education. *The CSO figures have been used for estimating the denominator of the GER*, but it seems probable that their figures are an underestimate of the true numbers of young people in the student ages (7-23).

For estimating male and female daily wage rates, the only information available was that found in the NRVA dataset. Figures were available for wage rates of unskilled construction workers and those making handicrafts. Since no information was available on the numbers of such people, the simple average of the two wage rates has been used. Similarly, there is no current data available to use as input for the indicator on economic activity, and so the estimate is based on past data. The World Bank's World Development Indicators report for 2006 reports that females represented 28.4 percent of the labour force in 1990, while the 2004 Afghanistan HDR used an estimate of 30 percent. We also have used 30 percent.

The GDI for Afghanistan is 0.310. This is slightly higher than the figure of 0.300 shown in the 2004 Afghanistan HDR. There are only 136 countries ranked for GDI in the 2006 global HDR. The bottom two places

were occupied by Niger with a GDI of 0.292 and Sierra Leone with a GDI of 0.317. If Afghanistan had been included in the list, it would probably have come between the two.

However, care must be taken in interpreting the meaning of the GDI. The Reader's Guide and Notes to Tables section in the 2006 global HDR gives some useful background information about the GDI, based on the results of an evaluation of the indices. It emphasizes that the GDI is not a measure of gender inequality. Rather, it is a measure of human development that adjusts the HDI to penalize for disparities between women and men in the three dimensions of the HDI. The method used to calculate the GDI implies that it will always have a lower value than the HDI. To obtain a measure of gender inequality requires comparing the GDI with the HDI, using either the absolute difference or the ratio between the two as an indicator, rather than using the GDI alone.

Given the difficulty in interpreting the GDI in its present format, the global HDR for 2006 suggests that a more intuitive way to present gender-related differences in the human development indicators would be to create a separate HDI for men and for women. Using the 2005 data for Afghanistan, this would yield an HDI of 0.402 for males and 0.261 for females. There is clearly a long way to go to establish gender equality in Afghanistan.

## **HUMAN POVERTY INDEX (HPI-1)**

Whereas the HDI measures average achievement, the HPI-1 measures the extent to which people are deprived of the three basic dimensions of human development captured in the HDI:

- deprived of a long and healthy life - vulnerability to death at a relatively early age, as measured by the probability at birth of not surviving to age 40.

- deprived of knowledge - exclusion

from the world of reading and communications, as measured by the adult illiteracy rate.

- deprived of a decent standard of living - lack of access to a basic standard of living, as measured by the unweighted average of two indicators: the percentage of the population without sustainable access to an improved water source, and the percentage of children under five who are underweight for age.

The method of calculating the HPI is set out in Box 3. The calculation is fairly straightforward, and there were no serious problems with the data sources. The calculation for the 2004 HDR had used a figure of 60 percent for the percentage of people without sustainable access to an improved water source. That figure was taken from the MICS 2003 report, but the subsequent Best Estimates report from UNICEF suggests (p.49) that the estimate is too low, and they recommend that the best estimate for 2003 would have been 77 percent. For this HDR a figure of 68 percent is used, based on the results of the NRVA 2005.

The exact source of the estimate for the last indicator (children underweight for age) is not known, but the CSO Statistical Yearbook reports fairly similar figures for earlier years from known sources, so we can be reasonably confident about this figure.

There are two HPI indexes. HPI-1 is for developing countries, and HPI-2 is for more developed countries. There are 102 countries that are ranked for HPI-1 in the 2006 global HDR report. Since this index measures deprivation, a country should aim for as low a score as possible. Mali is at present at the bottom of table with 60.2. Afghanistan has an HPI of 62.3, which would place it at the bottom of the list below Mali.

## **GENDER EMPOWERMENT MEASURE (GEM)**

In contrast to the GDI which is concerned

## Steps involved in calculating the HPI and GEM

### STEPS IN CALCULATING THE HPI-1

The calculation of this index is straightforward, because all the indicators can be expressed in percentage terms, and there is therefore no need to use 'goalposts' to normalize each indicator. The indicators are:

- $P_1$  = Probability at birth of not surviving to age 40 (times 100)
- $P_2$  = Adult illiteracy rate
- $P_3$  = Unweighted average of: % of population without sustainable access to improved water source and % of children who are underweight for age.

First,  $P_3$ , the simple unweighted average of the two standard of living indicators, is obtained. The life expectancy indicator is multiplied by 100 to turn it from a probability into a percentage. Then the three indicators are combined, not by taking the simple average, but by taking the average of the cubed values, and then taking the cubed roots. The formula is:

$$\text{HPI-1} = \left\{ \frac{1}{3} (P_1^3 + P_2^3 + P_3^3) \right\}^{1/3}$$

The purpose of using cubes of the indicator values and then taking the cube root is to give greater weight to the dimension in which there is the most deprivation. The choice of power is arbitrary, but the global HDR 2006 recommends the use of a value 3 (i.e. cubes, taking the average of three cubes, and then taking the cubed root), since this gives additional but not

overwhelming weight to areas of more acute deprivation.

### STEPS IN CALCULATING THE GEM

The steps involved in calculating the GEM are very similar to those involved in calculating the GDI.

First the equally distributed equivalent percentage (EDEP) is calculated for parliamentary representation, in just the same way that it was done with life expectancy for GDI. The only difference in this case is that the ideal value for male and female representation is 50 %, and so the value obtained is indexed by dividing the value obtained by 50.

Similarly for the two indicators of economic participation, the EDEP values are obtained and then both indexed to 50. The indexed EDEP for economic participation is then the simple average of these two indexed EDEPs.

For the indicator of power over economic resources, earned income (PPP US\$) is estimated for women and men separately and then indexed to the goalposts as for the HDI and the GDI. For the GEM, however, the income index is based on the unadjusted values, not the logarithm of estimated earned income.

Having obtained the EDEP values for the three dimensions of GEM, the simple average is then taken to give the value of GEM.

with women's capabilities, the GEM focuses on women's opportunities. It captures gender equality in three key areas:

- political participation and decision-making power, as measured by women's and men's percentage shares of parliamentary seats.
- economic participation and decision-making power, as measured by two indicators - women's and men's percentage shares of positions as legislators, senior officials and managers, and women's and men's percentage
- shares of professional and technical positions.
- power over economic resources, as measured by women's and men's estimated earned income (PPP US\$).

It is not possible to calculate the value of GEM for Afghanistan. Data is available for the first and third of the key areas mentioned above, but no data is available on the second key area (economic participation). Nevertheless, for completeness the method of calculating the GEM is set out in Box 3.



# Generating statistical indicators for the Human Development Report

*In the efforts to produce the four indicators needed for the HDR, a large number of basic indicators are required. Obtaining some of these indicators is particularly difficult in the case of Afghanistan. 1999 This annex presents some of the main data used for these indicators. The first part of the table highlights the difficulties in measuring the size of the Afghan population. It is hardly surprising that estimation of the size of the population is difficult, since there has never been a complete population census. In addition, the tremendous turmoil of the last 20 or 30 years has resulted in large movements of people around the country, and into and out of it, and all estimates of population size must therefore be treated with caution. The difficulties are well illustrated by the estimates of the total 2006 population. When work on these indicators began, two estimates of the 2006 population were available - the CSO estimate of 24 million, and the UN Population Division estimate of 31 million (from WPP 2004). It is unlikely that there is any other country in the world where the UN estimate differs by almost 30 percent from the official government estimate. Towards the end of this*

current work, a new estimate of 26 million became available from the UN Population Division, based on their newly released WPP 2006. This sharp reduction in the official UN estimate means that the UN and the Government estimates are only 2 million apart in 2006, and only 1 million apart in some of the earlier years.

The sharp reduction in the estimated population is also linked to a change in another key variable for our indicators - life expectancy. The UN had been estimating a life expectancy of 47 years, but the latest WPP 2006, released in March 2007, shows a sharp reduction in the UN estimate of life expectancy in Afghanistan, down to about 43 years. In preparing the Afghanistan HDR, a decision was made to use official government estimates for all population figures in Afghanistan, but to use the new UN estimate for life expectancy.

Considering the fact that there is so much uncertainty about the key basic statistic of population size, it is hardly surprising that differing estimates are produced for many of the other indicators, especially when they depend on some aspect of population for their calculation.

TABLE 1

Data for denominators	Unit	2001	2002	2003	2004	2005	2006	Source / Comments
(CSO) Total population (mid-year)	Thousands	19 911	21 800	22 191	23 178	23 598	24 076	CSO, Afghanistan Statistical Yearbooks
- All								
- Male	Thousands	10 253	11 212	11 429	11 866	12 073	12 317	CSO, Afghanistan Statistical Yearbooks
- Female	Thousands	9 658	10 588	10 763	11 311	11 525	11 759	CSO, Afghanistan Statistical Yearbooks
Annual growth rate implied by figures above	%		9.1	1.8	4.4	1.8	2.0	
Estimated population aged 15 and above - All	Thousands	10 758	11 904	12 118	12 656	12 728	12 993	CSO, Afghanistan Statistical Yearbooks
- Male	Thousands	5 604	6 192	6 312	6 553	6 599	6 733	CSO, Afghanistan Statistical Yearbooks
- Female	Thousands	5 154	5 713	5 807	6 103	6 129	6 260	CSO, Afghanistan Statistical Yearbooks

TABLE 2

Data for denominators	Unit	2001	2002	2003	2004	2005	2006	Source / Comments
(UN WPP 2006) Totql population (mid-year) - All	Thousands	21 414	22 214	23 115	24 076	25 067	26 088	UN Pop. Div., WPP 2006, medium variant, published March 2007
- Males	Thousands	11 094	11 507	11 974	12 472	12 985	13 512	UN Pop. Div., WPP 2006, medium variant, published March 2007
- Females	Thousands	10 321	10 706	11 141	11 605	12 083	12 575	UN Pop. Div., WPP 2006, medium variant, published March 2007
Annual growth rate implied by figures above	%		3.7	4.0	4.1	4.0	4.0	
Estimated population aged 15 and above - All	Thousands	11 355	11 801	12 272	12 769	13 292	13 842	UN Pop. Div., WPP 2006, medium variant, interpolated
- Male	Thousands	5 904	6 136	6 380	6 637	6 907	7 191	UN Pop. Div., WPP 2006, medium variant, interpolated
- Female	Thousands	5 451	5 665	5 892	6 132	6 385	6 651	UN Pop. Div., WPP 2006, medium variant, interpolated
(UN WPP 2004) Total population (mid-year) - All	Thousands	24 724	25 912	27 231	28 574	29 863	31 082	UN Population Division web site, medium variant, WPP 2004
- Male	Thousands	12 755	13 367	14 047	14 740	15 404	16 032	UN Population Division web site, medium variant, WPP 2004
- Female	Thousands	11 969	12 545	13 184	13 835	14 459	15 049	UN Population Division web site, medium variant, WPP 2004
Annual growth rate implied by figures above	%		4.7	5.0	4.8	4.4	4.0	
Estimated population aged 15 and above - All	Thousands	13 178	13 811	14 541	15 259	15 978	16 660	UN Pop Div website, medium variant, WPP2004, interpolated
- Male	Thousands	6 803	7 129	7 505	7 875	8 246	8 596	UN Pop Div website, medium variant, WPP2004, interpolated
- Female	Thousands	6 375	6 682	7 036	7 384	7 732	8 064	UN Pop Div website, medium variant, WPP2004, interpolated
Note: Mid-year: UNPD - 30 June, CSO-20 Sep								
( WPP 2006) Life expectancy - All	Years	41.9	42.0	42.4	42.7	43.0	43.3	Approximate average of the two rows below
- Male	Years	42.0	42.1	42.5	42.8	43.1	43.4	UN Population Division, WPP 2006 — personal communication
- Female	Years	41.9	42.0	42.4	42.7	43.0	43.3	UN Population Division, WPP 2006 — personal communication
(WPP 2004) Life expectancy - All	Years	45.9	46.0	46.2	46.5	46.8	47.2	UN Population Division web site, plus interpolation WPP 2004
- Male	Years	45.7	45.8	46.0	46.3	46.6	46.9	UN Population Division web site, plus interpolation WPP 2004
- Female	Years	46.2	46.3	46.5	46.8	47.1	47.4	UN Population Division web site, plus interpolation WPP 2004
(CSO) Life expectancy - Male	Years	45		45	47			CSO, Afghanistan Statistical Yearbooks
- Female	Years	44		44	45			CSO, Afghanistan Statistical Yearbooks
( WPP 2006) Life expectancy - All	Years	41.9	42.0	42.4	42.7	43.0	43.3	Approximate average of the two rows below
- Male	Years	42.0	42.1	42.5	42.8	43.1	43.4	UN Population Division, WPP 2006 — personal communication
- Female	Years	41.9	42.0	42.4	42.7	43.0	43.3	UN Population Division, WPP 2006 — personal communication
(WPP 2004) Life expectancy - All	Years	45.9	46.0	46.2	46.5	46.8	47.2	UN Population Division web site, plus interpolation WPP 2004
- Male	Years	45.7	45.8	46.0	46.3	46.6	46.9	UN Population Division web site, plus interpolation WPP 2004
- Female	Years	46.2	46.3	46.5	46.8	47.1	47.4	UN Population Division web site, plus interpolation WPP 2004



TABLE 3

Data for denominators			Unit	2001	2002	2003	2004	2005	2006	Source / Comments
(CSO) Life expectancy	- Male	Years	45			45	47			CSO, Afghanistan Statistical Yearbooks
	- Female	Years	44			44	45			CSO, Afghanistan Statistical Yearbooks
Primary school enrolment (gross)	- All	Number	556 426	3 083 434	3 781 015	4 780 438	4 282 921			Afghanistan Statistical Yearbooks
	- Male	Number	556 426	2 063 603	2 466 547	3 633 235	2 750 523			Afghanistan Statistical Yearbooks
	- Female	Number	0	1 019 831	1 314 468	1 147 203	1 532 398			Afghanistan Statistical Yearbooks
Secondary school enrolment (gross)	- All	Number	247 535	621 801	405 484	645 028	639 298			Afghanistan Statistical Yearbooks
	- Male	Number	247 535	469 669	306 079	486 126	487 869			Afghanistan Statistical Yearbooks
	- Female	Number	0	152 132	99 405	158 902	151 429			Afghanistan Statistical Yearbooks
Enrolment in tertiary education (gross)	- All	Number	7 870	22 943	30 121	36 786				'Ministry of Higher Education Students Teachers'
	- Male	Number	7 870	22 943	25 659	28 796				'Ministry of Higher Education Students Teachers'
	- Female	Number	0	0	4 462	7 990				'Ministry of Higher Education Students Teachers'
Number of higher education students	- All	Number	9 020	22 717	30 539	39 514	39 354			Afghanistan Statistical Yearbooks
	- Male	Number	9 020	22 717	24 470	31 224	30 546			Afghanistan Statistical Yearbooks
	- Female	Number	0	0	6 069	8 290	8 808			ASyS (2001 & 2002 – females zero, Min of Education)
Total students: primary, secondary, higher	- All	Number	812 981	3 727 952	4 217 038	5 464 980	4 961 573			Summation of three totals above
	- Male	Number	812 981	2 555 989	2 797 096	4 150 585	3 268 938			Summation of three totals above
	- Female	Number	0	1 171 963	1 419 942	1 314 395	1 692 635			Summation of three totals above
Religious education	- All	Number	98 000	22 716	38 251	40 662	39 523			Afghanistan Statistical Yearbooks
Technical schools	- All	Number	503	1 846	1 733	2 105	3 559			Afghanistan Statistical Yearbooks
Vocational and high schools	- All	Number			2 922	2 647	5 833			Afghanistan Statistical Yearbooks
Health institutes	- All	Number			2 710	1 908	1 991			Afghanistan Statistical Yearbooks
Teacher training institutions	- All	Number			6 141	6 597	12 608			Afghanistan Statistical Yearbooks
Statistical discrepancy					- 7 967	0	+ 3 996			
Total students in primary, secondary, tertiary		Number			4 260 828	5 518 899	5 029 083			Afghanistan Statistical Yearbooks
Estimated pop of primary age (7 to 12)	- All	Thousands				3 640	3 706	3 781		Based on CSO single year estimates for 2006 & 2007
	- Male	Thousands				1 890	1 923	1 962		Based on CSO single year estimates for 2006 & 2007
	- Female	Thousands				1 750	1 784	1 820		Based on CSO single year estimates for 2006 & 2007
Estimated pop of primary age (7 to 12)	- All	Thousands		3 977	4 297	4 561	4 828			UNICEF, Best Estimates, p. 53 (2005 projected figure)
Estimated pop of secondary age (13 to 18)	- All	Thousands				2 758	2 808	2 865		Based on CSO single year estimates for 2006 & 2007
	- Male	Thousands				1 468	1 493	1 524		Based on CSO single year estimates for 2006 & 2007
	- Female	Thousands				1 290	1 314	1 341		Based on CSO single year estimates for 2006 & 2007
Estimated pop of tertiary age (19 to 23)	- All	Thousands				1 935	1 970	2 010		Based on CSO single year estimates for 2006 & 2007
	- Male	Thousands				1 003	1 020	1 041		Based on CSO single year estimates for 2006 & 2007
	- Female	Thousands				932	950	969		Based on CSO single year estimates for 2006 & 2007
Est. pop of primary, sec., tertiary age (7-23)	- All	Thousands				8 333	8 485	8 656		summation from above
	- Male	Thousands				4 360	4 436	4 526		summation from above
	- Female	Thousands				3 973	4 048	4 130		summation from above

TABLE 4

Data for denominators	Unit	2001	2002	2003	2004	2005	2006	Source / Comments
Gross enrolment ratio (primary) - All	%				131.3	115.6		Using CSO figures
- Male	%				192.2	143.0		Using CSO figures
- Female	%				65.5	85.9		Using CSO figures
Gross enrolment ratio (secondary) - All	%				23.4	22.8		Using CSO figures
- Male	%				33.1	32.7		Using CSO figures
- Female	%				12.3	11.5		Using CSO figures
Gross enrolment ratio (higher) - All	%				2.0	2.0		Using CSO figures
- Male	%				3.1	3.0		Using CSO figures
- Female	%				0.9	0.9		Using CSO figures
Gross enrolment ratio (prim, sec, tertiary) - All	%				66.2	59.3		Using CSO figures
Gross enrolment ratio (prim, sec, higher) - All	%				65.5	58.5		Using CSO figures
- Male	%				95.2	73.7		Using CSO figures
- Female	%				33.1	41.8		Using CSO figures

Note: Enrolments in the non-university sector are not included when calculating the rates, since the sex of students in these institutions is not known.

TABLE 5

		NICS 2003			NRVA 2005				Source
	Unit	Rural	Urban	Total	Kuchis	Rural	Urban	Total	
Literacy rates: Adults 15+ - All	%	22.2	44.0	28.7	4.5	18.2	53.8	23.5	
- Male	%	36.1	59.9	43.2	6.3	27.7	63.9	32.4	
- Female	%	8.1	28.1	14.1	2.4	6.4	42.3	12.6	
Literacy rates: Youth (15-24) - All	%			34	5.9	25.6	63.6	31.3	
- Male	%			50	6.1	35.7	70.5	39.9	
- Female	%			18	5.6	11.6	55.4	19.6	
		Note: Kuchis were not surveyed							

TABLE 6

Data for denominators	Unit	2001	2002	2003	2004	2005	2006	Source / Comments
GDP at current prices (Afghan currency)	Billions	145.9	196.6	233.3	272.7	338.5		CSO ASY Table 7.2
Exchange rate (US \$ to Afghani)		55.73	44.78	48.95	47.57	49.41		CSO ASY Table 7.2
GDP at current prices (US dollars) excluding opium	Millions		4 390	4 767	5 733	6 852		CSO ASY Table 7.4
GDP at constant prices (2002/03) (Afghan currency)	Billions		196.6	224.7	245.9	281.6		CSO ASY
Real GDP growth	%		28.6	14.3	9.4	14.5		CSO ASY
GDP per capita (PPP US\$) as reported	PPP US\$	428	547	626	632			Penn World Table Version 6.2 , but using old population estimates
GDP per capita (PPP US\$), adjusted for population	PPP US\$	536	683	777	791	964		Adjusted to reflect WPP 2006 population estimates. Figure for 2005 projected.
CPI-national index value at start of year (March)	Index				100.0	110.9	119.7	This national index (six cities) began in March 2004
- annual inflation rate (national)	%				9.9	8.2		As reported by CSO in ASY (sum of 12 month-on-month changes)
- annual inflation rate (national)	%				10.9	7.9		As calculated from March of that year to the following March
- Kabul index at start of year (March)	Index			96.0	106.1			
- Kabul index at start of year (March)	Index				100.0	115.1	125.8	CSO, ASY and website. The Kabul index was rebased in March 2004
- annual inflation rate during year (Kabul)	%			10.5	15.1	9.3		As calculated from March of that year to the following March



## Provincial indicators

This annex presents some relevant data at the provincial level. Table 1 contains some educational indicators: two measures of literacy - adult and youth literacy - taken from the NRVA survey of 2005; and the ratio of girls to boys at the primary and secondary level. This latter is the best way to present the data, since it does not require us to make any assumptions about the distribution of the population in each province. Attempts to calculate enrolment ratios by province in some cases leads to gross enrolment ratios so far in excess of 100 as to be impossible.

Tables 2 and 3 provide various statistical indicators by province that come from the 2003 MICS. Table 2 concentrates on health indicators, while Table 3 gives other social indicators.

Tables 4 and 5 provide some background data that are likely to be useful in any discussion of the rule of law. They highlight some interesting contrasts between provinces. There is an average of 370 persons per police officer in Afghanistan. (If the special police are excluded, and if the kuchi population is not counted, this rate would become 470 persons per police officer as shown in Table 4.) In the case of judges, the national average for the total population of Afghanistan is 21,317 persons per judge.

These national averages conceal considerable variations across provinces, as indicated in the summary table below. The detailed figures can be seen in Table 5.

A few patterns are clear. Nuristan, Panjsher and Kapisa come in the top five for their rates of police officers and judges, while

Daykundi comes in the bottom five on both measures. Uruzgan is among the top five in terms of police officers, but in the bottom five for its rate of judges. Kabul is among the top five for its number of judges, but this is hardly surprising, given the importance of the city of Kabul itself in the judicial system. Kabul does not come in the top five for police officers, but it needs to be remembered that the special police (many of them based in Kabul) were excluded from the provincial calculations.

In the case of the detention and conviction figures, perhaps the most notable feature is the very small number of females who have been detained or convicted.

TABLE 1

	Rate of persons per police officer	Rate of persons per judge
<b>National average (including Kuchis)</b>	370 persons per police officer	21,317 persons per judge
<b>Best-off provinces</b>	Nuristan (177 persons)	Panjsher (6,800)
	Panjsher (220 persons)	Kunar (9,300)
	Farah (288 persons)	Nuristan (9,700)
	Uruzgan (318 persons)	Kabul (11,600)
	Kapisa (326 persons)	Kapisa (12,500)
<b>Worst-off provinces</b>	Daykundi (1348 persons)	Kandahar (76,200)
	Hirat (867 persons)	Hilmand (60,200)
	Faryab (858 persons)	Uruzgan (59,400)
	Sari Pul (846 persons)	Paktika (52,700)
	Ghazni (781 persons)	Daykundi (48,900)

*Note: The Kuchi population and the number of special police are both taken account of in calculating the national average, but not for the provinces. See footnote to Table 5.*

TABLE 2

**Education indicators**

Province	Youth literacy rates (%)			Adult literacy rates (%)			Girls as % of boys		
	NRVA 2005 (Ages 15-24)			NRVA 2005 (Ages 15+)			Ministry of Education 2005		
	Male	Female	Both	Male	Female	Both	Primary	Sec.	Both
<b>Afghanistan total</b>	<b>40</b>	<b>20</b>	<b>31</b>	<b>32</b>	<b>13</b>	<b>24</b>	<b>56</b>	<b>32</b>	<b>52</b>
Urban	71	55	64	64	42	54			
Rural	36	12	26	28	6	18			
Kuchi	6	6	6	6	2	5			
<b>AFG excluding kuchis</b>	<b>42</b>	<b>21</b>	<b>33</b>	<b>34</b>	<b>13</b>	<b>25</b>			
Badakhshan	46	27	38	34	14	25	90	51	84
Badghis	12	5	9	12	4	9	24	8	24
Baghlan	40	14	29	28	9	20	69	18	60
Balkh	58	35	49	48	24	37	74	53	71
Bamyan	49	7	32	37	5	24	74	18	67
Daykundi	29	13	21	25	6	16	53	21	51
Farah	30	12	22	22	7	15	46	19	43
Faryab	28	17	24	23	10	18	69	27	66
Ghazni	60	26	46	45	11	29	48	29	44
Ghor	26	4	17	25	3	15	31	7	29
Hilmand	9	1	6	6	1	4	7	3	7
Hirat	45	30	39	37	18	29	80	74	80
Jawzjan	46	22	35	37	15	27	63	32	59
Kabul	73	56	65	68	45	57	77	55	71
Kandahar	23	3	13	22	3	13	23	4	21
Kapisa	62	26	47	46	15	32	38	13	32
Khost	52	7	36	38	3	23	19	1	16
Kunar	49	16	33	47	8	27	57	6	50
Kunduz	45	21	35	29	12	22	65	23	59
Laghman	28	3	19	19	2	12	63	10	53
Logar	31	9	21	27	5	17	39	4	33
Nangarhar	48	16	34	41	10	27	62	13	55
Nimroz	44	10	29	25	4	15	59	42	58
Nuristan	25	9	18	22	5	14	61	8	59
Paktika	3	0	2	3	0	2	16	2	16
Paktya	36	16	30	22	5	15	29	1	26
Panjsher	50	22	38	40	10	27	54	7	41
Parwan	61	21	44	45	11	30	54	12	45
Samangan	21	8	14	21	4	13	49	30	47
Sari Pul	18	5	12	17	4	11	47	16	45
Takhar	24	10	18	17	5	12	65	39	62
Uruzgan	7	1	4	14	0	7	8	1	8
Wardak	43	8	28	33	5	21	31	2	26
Zabul	0	1	0	2	0	1	10	2	9

NRVA 2005 - National Risk and Vulnerability Assessment Survey 2005. The figures for Afghanistan excluding the Kuchis have been estimated, using CSO information on age/sex distribution.

Sources:

Girls as a % of boys: These rates were calculated from detailed figures supplied by the Ministry of Education.

TABLE 3

## Provincial health indicators, 2003

Province	Percentages												
	BCG	Polio	DPT3	Measles	ARI Prev	ARI Help	Diar Prev	Skilled birth	Antenatal	Contraception	FP Know	Home del	Vit A
<b>National</b>	<b>60</b>	<b>50</b>	<b>30</b>	<b>76</b>	<b>19</b>	<b>29</b>	<b>30</b>	<b>14</b>	<b>16</b>	<b>10</b>	<b>28</b>	<b>89</b>	<b>86</b>
Badakhshan	78	60	39	85	32	30	29	2	4	2	4	100	97
Badghis	21	33	5	57	41	27	45	12	1	1	16	100	95
Baghlan	20	31	8	50	33	12	40	6	4	7	8	98	59
Balkh	59	51	25	72	21	29	37	8	8	9	27	96	95
Bamyan	43	30	3	67	35	30	38	8	7	6	51	98	84
Daykundi	-	-	-	-	-	-	-	-	-	-	-	-	-
Farah	58	57	27	78	13	30	25	12	6	25	57	97	92
Faryab	54	46	33	68	24	34	34	2	10	5	6	98	71
Ghazni	65	44	17	75	13	24	13	7	14	3	21	94	56
Ghor	46	13	8	52	19	43	23	9	1	1	4	97	84
Hilmand	52	16	4	86	3	37	8	2	6	2	23	98	91
Hirat	71	63	48	80	16	24	25	24	24	35	60	88	93
Jawzjan	43	64	21	79	29	46	49	9	10	3	6	90	93
Kabul	82	74	59	88	18	39	32	46	52	22	45	53	91
Kandahar	40	58	24	74	16	35	26	16	18	16	62	87	91
Kapisa	26	67	17	77	27	32	40	12	14	12	28	97	81
Khost	77	14	25	72	16	23	48	18	15	2	6	82	76
Kunar	81	72	61	92	14	14	22	3	3	1	21	99	91
Kunduz	40	31	16	43	12	15	30	6	14	7	26	97	52
Laghman	84	51	46	84	17	43	25	3	20	8	47	86	90
Logar	87	76	53	95	18	14	33	9	27	12	20	92	95
Nangarhar	83	84	68	88	8	31	34	22	23	7	39	78	93
Nimroz	65	42	31	70	19	27	22	7	10	14	39	95	89
Nuristan	47	44	20	69	21	24	34	1	2	1	7	100	65
Paktika	69	27	12	80	21	19	32	5	3	1	16	99	96
Paktya	68	48	38	68	18	11	28	9	6	3	20	97	89
Panjsher	-	-	-	-	-	-	-	-	-	-	-	-	-
Parwan	45	63	20	68	21	21	37	4	6	7	11	98	86
Samangan	36	51	11	81	30	16	31	29	5	4	5	98	84
Sari Pul	46	46	17	83	23	21	28	0	2	4	22	100	89
Takhar	54	30	11	84	23	13	35	1	4	1	4	99	93
Uruzgan	21	10	5	51	19	9	28	6	1	4	18	100	69
Wardak	84	50	21	79	7	50	25	11	10	5	25	94	91
Zabul	48	29	8	53	7	18	28	1	1	2	10	100	80

Source of data: UNICEF, *Best Estimates of social indicators for children in Afghanistan*, May 2006

All data shown here come from MICS 2003

Abbreviations: BCG - Proportion of under-fives immunized against tuberculosis  
 Polio - Proportion of children 12-23 months of age immunized against polio by first birthday  
 DPT3 - Proportion of children 12-23 months of age immunized against DPT by first birthday  
 Measles - Proportion of under-fives immunized against measles  
 ARI Prev - Percentage of children 0-4 years with an acute respiratory infection (ARI) in the last two weeks  
 ARI Help - Percentage of children 0-4 years with ARI in the last two weeks taken to an appropriate health provider  
 Diar Prev - Percentage of children 0-4 years with diarrhoea in the last two weeks before the survey  
 Skilled birth - Proportion of births attended by skilled health personnel  
 Antenatal - Proportion of women aged 15-49 years attended at least once during pregnancy by skilled health personnel  
 Contraception - Percentage of married women aged 15-49 years currently using contraception  
 FP Know - % of ever-married women aged 15-49 years who have heard of any method for delaying or avoiding pregnancy  
 Home Del - Percentage of deliveries of mothers during the last two years that took place at home, not in health facility  
 Vit A - Proportion of children 6-59 months of age who received a high dose vitamin A supplement in the last six months



TABLE 4

Table 3: Provincial social indicators, 2003

Province	Percentages													
	Iodized salt	Water	Fixed Place	Prop child	TFR	Women HH	No Radio	Disability	Child bride	Child labour	Birth reg	Attend Boy	Attend Girl	Attend All
<b>National</b>	<b>15</b>	<b>40</b>	<b>44</b>	<b>56</b>	<b>6</b>	<b>3</b>	<b>33</b>	<b>3</b>	<b>43</b>	<b>24</b>	<b>6</b>	<b>67</b>	<b>40</b>	<b>54</b>
Badakhshan	2	21	52	55	6	4	47	2	57	5	2	75	71	73
Badghis	9	26	79	53	5	2	49	4	63	39	1	37	2	21
Baghlan	1	7	76	56	7	3	50	4	62	30	2	83	61	72
Balkh	1	40	40	57	6	3	33	4	46	32	1	82	61	72
Bamyan	4	8	60	57	6	4	52	7	66	40	1	60	31	46
Daykundi	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Farah	59	47	78	58	7	2	43	3	55	11	3	55	19	37
Faryab	2	16	49	53	5	6	50	4	52	33	1	63	42	52
Ghazni	2	39	25	57	5	3	25	2	35	28	2	54	28	41
Ghor	12	16	97	54	7	2	58	1	64	10	1	64	21	44
Hilmand	57	67	25	60	7	1	19	1	30	30	2	26	10	19
Hirat	50	46	23	58	6	2	28	1	41	25	7	80	68	74
Jawzjan	1	13	53	52	5	3	49	3	33	27	13	68	27	49
Kabul	31	74	21	54	6	6	18	3	36	18	21	86	67	77
Kandahar	9	74	12	59	7	2	13	1	47	25	1	54	20	39
Kapisa	3	22	38	56	5	2	28	1	43	25	13	81	49	67
Khost	5	53	33	56	7	1	37	1	42	30	2	63	14	42
Kunar	1	43	30	57	8	1	39	3	60	8	2	77	49	64
Kunduz	1	16	52	58	6	2	49	1	50	18	1	57	37	47
Laghman	1	52	84	58	8	1	32	5	26	30	1	71	55	64
Logar	3	61	60	58	6	6	26	1	29	37	27	71	25	48
Nangarhar	2	58	78	55	7	2	21	1	35	16	3	68	40	55
Nimroz	94	29	65	57	7	3	57	1	45	18	3	43	35	39
Nuristan	7	19	76	58	6	2	53	4	46	25	2	38	33	36
Paktika	3	31	77	59	7	1	24	1	44	40	3	61	6	36
Paktya	2	42	23	56	7	1	23	2	27	12	14	75	17	50
Panjsher	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Parwan	5	22	30	54	7	3	37	9	47	17	18	84	30	57
Samangan	30	12	75	55	7	5	58	3	49	30	1	68	44	58
Sari Pul	2	7	67	56	6	3	54	2	51	34	0	64	25	44
Takhar	1	19	49	54	6	4	40	1	44	34	1	65	41	54
Uruzgan	2	16	78	60	6	2	38	2	42	37	0	26	11	19
Wardak	7	55	11	57	6	3	24	4	51	25	2	74	26	52
Zabul	1	41	55	55	6	1	21	2	35	29	3	55	1	32

Source of data: UNICEF, *Best Estimates of social indicators for children in Afghanistan*, May 2006

All data shown here come from MICS 2003. In 2003, Panjsher was still part of Parwan, and Daykundi part of Uruzgan.

Abbreviations:

- Iodized salt - Proportion of the households consuming adequately iodized salt.
- Water - Proportion of population who use piped water or public tap/standpipe or tube well/borehole or protected spring/well/rainwater
- Fixed place - Percentage of children aged under five who are not using a latrine or whose faeces were not disposed in latrine, fixed hole or other fixed place
- Prop child - Percentage of the total population that is under 18 years of age
- TFR - Number of children that would be born per woman if she were to live to the end of her childbearing years and bear children at each age in accordance with prevailing age specific fertility rates
- Women HH - Proportion of heads of household that are women
- No radio - Percentage of households with no radio as reported by the respondent
- Disability - Children aged 1-4 years with at least one type of disability
- Child bride - Percentage of women 20-24 years of age that were married before they were 18 years old
- Child labour - proportion of children aged 5-14 years involved in child labour activities
- Birth reg - Proportion of children aged 0-59 months whose births are reported registered
- Attend - % of children in age group officially corresponding to primary schooling, divided by total pop. of same age group

TABLE 5

## Number of police, judges, houses of detention, detainees, and convicted persons, by province, 2006

Province	Police	Judges	Houses of Detention <sup>1</sup>	Detainees			Convicted persons <sup>2</sup>		
				Male	Female	Total	Male	Female	Total
<b>Total in provinces</b>	<b>46972</b>	<b>1107</b>	<b>229</b>	<b>3988</b>	<b>62</b>	<b>4050</b>	<b>5185</b>	<b>177</b>	<b>5362</b>
Badakhshan	2307	41	25	270	3	273	28	0	28
Badghis	614	10	5	65	0	65	30	0	30
Baghlan	1553	50	15	228	0	228	18	3	21
Balkh	2015	52	11	126	6	132	142	16	158
Bamyan	575	18	3	8	0	8	40	1	41
Daykundi	290	8	1	68	0	68	20	0	20
Farah	1488	9	6	79	0	79	93	0	93
Faryab	979	24	8	62	3	65	83	3	86
Ghazni	1331	31	6	93	0	93	36	1	37
Ghor	856	20	4	115	0	115	8	0	8
Hilmand	1872	13	10	237	2	239	94	1	95
Hirat	1783	46	15	400	31	431	690	35	725
Jawzjan	1011	26	9	34	2	36	178	9	187
Kabul	7896	265	5	471	0	471	2652	69	2721
Kandahar	2560	13	5	382	5	387	274	12	286
Kapisa	1151	30	5	31	2	33	27	0	27
Khost	1135	23	4	39	0	39	30	0	30
Kunar	1107	41	8	21	0	21	27	0	27
Kunduz	1374	32	6	171	0	171	166	7	173
Laghman	782	25	4	27	0	27	32	2	34
Logar	790	23	3	44	0	44	31	0	31
Nangarhar	2912	72	13	141	2	143	158	3	161
Nimroz	375	7	4	31	0	31	60	0	60
Nuristan	710	13	3	0	0	0	0	0	0
Paktika	795	7	3	118	0	118	2	0	2
Paktya	950	24	5	60	0	60	14	0	14
Panjsher	592	19	4	26	0	26	6	0	6
Parwan	1556	36	5	137	3	140	31	5	36
Samangan	680	24	5	31	2	33	63	3	66
Sari Pul	559	11	4	34	0	34	17	0	17
Takhar	1665	45	16	197	1	198	80	7	87
Uruzgan	933	5	2	160	0	160	4	0	4
Wardak	1079	37	5	23	0	23	46	0	46
Zabul	697	7	2	59	0	59	5	0	5
<b>Special police</b>	<b>16813</b>	(not included in the total police figure above)							
Border Police	7713								
Reserve Police	349								
Central Department	3100								
Central Battalions	2122								
Highway Police	1649								
Security Battalions	1880								

Footnotes: 1. Only active houses of detention are included here.  
2. There is one jail in each province

Sources: Data on police from Ministry of Interior  
Data on judges from Checchi  
Data on houses of detention, detainees, and convicted persons from the Prisons Department.

TABLE 6

**Rates of settled population per police officer and per judge, and detainees and convicted persons per 100,000 settled population, by province, 2006**

Province	Settled population ( 000s)			Population per police officer	Population per judge	Detainees per 100,000 population			Convicted persons per 100,000 population		
	Male	Female	Total			Male	Female	Total	Male	Female	Total
<b>Total</b>	<b>11301</b>	<b>10797</b>	<b>22098</b>	<b>470</b>	<b>19 962</b>	<b>35</b>	<b>1</b>	<b>18</b>	<b>46</b>	<b>2</b>	<b>24</b>
Badakhshan	410	395	806	349	19 700	66	1	34	7	0	4
Badghis	215	206	420	684	42 000	30	0	16	14	0	7
Baghlan	391	372	763	491	15 300	58	0	30	5	1	3
Balkh	549	524	1073	533	20 600	23	1	12	26	3	15
Bamyan	192	187	379	659	21 100	4	0	2	21	*	11
Daykundi	201	190	391	1348	48 900	34	0	17	10	0	5
Farah	220	209	429	288	47 700	36	0	18	42	0	22
Faryab	429	412	840	858	35 000	14	1	8	19	1	10
Ghazni	532	509	1040	781	33 500	18	0	9	7	*	4
Ghor	299	287	586	685	29 300	38	0	20	3	0	1
Hilmand	402	381	782	418	60 200	59	1	31	23	*	12
Hirat	783	762	1545	867	33 600	51	4	28	88	5	47
Jawzjan	230	222	452	447	17 400	15	1	8	77	4	41
Kabul	1586	1485	3072	389	11 600	30	0	15	167	5	89
Kandahar	508	482	990	387	76 200	75	1	39	54	2	29
Kapisa	189	186	375	326	12 500	16	1	9	14	0	7
Khost	250	238	487	429	21 200	16	0	8	12	0	6
Kunar	196	186	382	345	9 300	11	0	6	14	0	7
Kunduz	424	409	833	606	26 000	40	0	20	39	2	21
Laghman	194	184	378	483	15 100	14	0	7	16	1	9
Logar	169	163	332	420	14 400	26	0	13	18	0	9
Nangarhar	646	616	1262	433	17 500	22	*	11	24	*	13
Nimroz	71	68	139	371	19 900	44	0	22	85	0	43
Nuristan	64	62	126	177	9 700	0	0	0	0	0	0
Paktika	189	180	369	464	52 700	62	0	32	1	0	*
Paktya	239	229	468	493	19 500	25	0	13	6	0	3
Panjsher	67	64	130	220	6 800	39	0	20	9	0	5
Parwan	284	277	561	361	15 600	48	1	25	11	2	6
Samangan	168	160	328	482	13 700	18	1	10	38	2	20
Sari Pul	242	231	473	846	43 000	14	0	7	7	0	4
Takhar	422	406	828	497	18 400	47	*	24	19	2	10
Uruzgan	153	144	297	318	59 400	105	0	54	3	0	1
Wardak	258	248	506	469	13 700	9	0	4	18	0	9
Zabul	132	126	258	370	36 900	45	0	23	4	0	2

Sources: The denominators for the rates come from Table 4.

The special police are not included in any of the rates. If included, the national rate becomes 346 persons per police officer. If the Kuchi population is also allowed for, the national rates become 370 persons per police officer (if special police included) or 502 persons per police officer (if special police excluded), and the rate for judges becomes 21,317 persons per judge.

For ease of reading, and because the provincial population estimates are themselves rounded, the rates of population per judge have been rounded to the nearest hundred of population.



# Glossary of statistical terms

**ANTENATAL CARE:** Proportion of women aged 15-49 years who were attended at least once during their pregnancy by skilled health personnel.

**ARIPREVALENCE:** Percentage of children under 5 years of age with an acute respiratory infection (ARI) in the last two weeks.

**ARI HELP:** Percentage of children under 5 years of age with an acute respiratory infection (ARI) in the last two weeks who were taken to an appropriate health provider.

**ATTENDING SCHOOL:** see enrolment ratio, net.

**BIRTH REGISTRATION:** The proportion of children under 5 years of age whose births are reported as registered.

**BIRTHS ATTENDED BY SKILLED HEALTH PERSONNEL:** The percentage of deliveries attended by personnel (including doctors, nurses and midwives) trained to give the necessary care, supervision and advice to women during pregnancy, labour and the postpartum period; to conduct deliveries on their own; and to care for newborns.

**CHILD BRIDE:** Percentage of women aged 20-24 years that were married before they were 18 years old.

**CHILD LABOUR:** The proportion of children aged 5-14 years involved in child labour activities.

**CONSUMER PRICE INDEX (CPI):** An index used to measure changes in the cost of acquiring a fixed basket of goods and services. The index was originally only for Kabul, but in March 2004 price collection was widened to five other cities and a new national index produced. See Annex 5 for more information.

**CONTRACEPTION:** Percentage of married women aged 15-49 currently using contraception.

**DETAINEES / CONVICTED PERSONS PER 100,000 POPULATION:** Obtained by dividing the number of detainees / convicted persons in a particular area by the total settled population in that area, and then multiplying by 100,000.

**DIARRHOEA PREVALENCE:** Percentage of children under 5 years of age who have had diarrhoea in the last two weeks.

**DISABILITY (CHILDREN):** The proportion of children under 5 years of age with at least one type of disability.

**EARNED INCOME (PPP US\$), ESTIMATED:** Roughly derived on the basis of the ratio of the female non-agricultural wage, the female and male shares of the economically active population, total female and male population, and GDP per capita (in purchasing power parity terms in US dollars, see PPP). For details of this estimation, see Annex 1.

**EDUCATION LEVELS:** Primary education provides the basic elements of education at such establishments as primary and elementary schools. Traditionally it covers a six-year period, and the official school age is taken as being from 7 to 12 years of age. Secondary education covers the next six years of schooling, in middle school (levels 7 to 9) and high school (levels 10 to 12). The official school age is taken as being from 13 to 18 years of age. Tertiary education refers to education at such institutions as universities, teachers colleges and higher level professional schools - requiring as a minimum condition of admission the successful completion of education at the second level or evidence of the attainment of an equivalent level of knowledge. The official age for tertiary education is taken as being from 19 to 23 years of age inclusive. In Afghanistan the term higher education refers only to the university sector.

**ENROLMENT (GROSS):** The total number of students enrolled in a particular level of the educational system (primary, secondary, tertiary) at a given time.

**ENROLMENT RATIO, GROSS:** The number of students enrolled in a level of education, regardless of age, as a percentage of the population of official school age for that level. The gross enrolment ratio can be greater than 100% as a result of grade repetition and entry at ages younger or older than the typical age at that grade level. See education levels.

**ENROLMENT RATIO, NET:** The number of students within the official age range for a particular level of education who are attending that level, as a percentage of the population of official school age for that level.

**FAMILY PLANNING KNOWLEDGE:** Percentage of ever-married women aged 15-

49 years who have heard of any method for delaying or avoiding pregnancy.

**FERTILITY RATE, TOTAL (TFR):** The number of children that would be born to each woman if she were to live to the end of her child-bearing years and bear children at each age in accordance with prevailing age-specific fertility rates.

**GDP (GROSS DOMESTIC PRODUCT):** The sum of value added by all resident producers in the economy plus any product taxes (less subsidies) not included in the valuation of output. It is calculated without making deduction for depreciation of fabricated capital assets or for depletion and degradation of natural resources. Value added is the net output of an industry after adding up all outputs and subtracting intermediate inputs.

**GDP (US\$):** Gross domestic product converted to US dollars using the average official exchange rate.

**GDP PER CAPITA (PPP US\$):** Gross domestic product (in purchasing power parity terms in US dollars) divided by mid-year population. See PPP.

**GDP PER CAPITA (US\$):** Gross domestic product in US dollar terms divided by mid-year population.

**GENDER EMPOWERMENT MEASURE (GEM):** This index focuses on women's opportunities, and captures gender equality in three areas: political participation and decision-making power, economic participation and decision-making power, and power over economic resources. See Annex 1

**GENDER-RELATED DEVELOPMENT INDEX (GDI) :** An adjustment of the HDI (see below) to reflect the inequalities



between men and women in the three dimensions measured by the HDI. See Annex 1

**GIRLS AS A PERCENTAGE OF BOYS:** An index used to reflect the different experiences of boys and girls. Obtained by dividing the number of girls in a particular category (e.g. primary schools) by the number of boys in the same category. An index of 1 would imply that there were an equal number of boys and girls in that category.

**HOME DELIVERIES:** Percentage of deliveries of mothers in the last two years that took place at home, not in a health centre.

**HUMAN DEVELOPMENT INDEX (HDI):** A summary measure of human development, reflecting a country's achievement in three basic dimensions of human development: a long and healthy life, knowledge, and a decent standard of living. See Annex 1

**HUMAN POVERTY INDEX (HPI-1):** Measures the extent to which people are deprived of the three basic dimensions of human development captured in the HDI (see above). A similar but slightly different index, HPI-2, is used for the most developed countries. See Annex 1

**ILLITERACY RATE:** The converse of the literacy rate. Obtained by subtracting the literacy rate from 100.

**IMMUNIZATIONS (BCG, MEASLES, POLIO AND DPT3):** The proportion of children under 5 years of age immunized against BCG (bacille Calmette-Guerin, the vaccine against tuberculosis) and measles, and the proportion of one-year old children (i.e. 12-23 months) immunized against polio and against DPT3 (the third dose of diphtheria and tetanus toxoid with

pertussis vaccine) by their first birthday.

**INFLATION RATE, ANNUAL:** The change over a period of 12 months in the cost of acquiring a fixed basket of goods and services.

**IODIZED SALT:** Proportion of households consuming adequately iodized salt.

**LIFE EXPECTANCY AT BIRTH:** The number of years a new-born infant would live if prevailing patterns of age-specific mortality rates at the time of birth were to stay the same throughout the child's life.

**LIFE TABLE:** Shows, for a person at each age, what is the probability of their surviving to their next birthday. Life tables are usually constructed separately for males and females, because of their different mortality experiences.

**LITERACY RATE, ADULT:** The percentage of people aged 15 and older who can, with understanding, both read and write a short, simple statement related to their everyday life.

**LITERACY RATE, YOUTH:** The percentage of people aged 15-24 who can, with understanding, both read and write a short, simple statement related to their everyday life.

**POPULATION GROWTH RATE, ANNUAL:** The average annual exponential growth rate for the period indicated.

**POPULATION, SETTLED:** The total population of the country, but excluding the kuchis (nomadic population).

**POPULATION, TOTAL:** The mid-year de facto population, which includes both the settled population and the kuchis (nomadic population).

**POPULATION PER POLICE OFFICER / JUDGE:** Obtained by dividing the settled population in an area by the total number of police officers (excluding the special police) in that area, and by the total number of judges in that area.

**PPP (PURCHASING POWER PARITY):** A rate of exchange that accounts for price differences across countries, allowing international comparisons of real output and incomes. At the PPP US\$ rate, PPP US\$1 has the same purchasing power in the domestic economy as \$1 has in the United States.

**PROBABILITY AT BIRTH OF NOT SURVIVING TO AGE 40:** A measure that is calculated from a country's life table, and is symbolized by  ${}^{40}q^0$ .

**RADIO,NO:** The proportion of households with no radio, as reported by the respondent.

**SANITATION FACILITIES, IMPROVED, POPULATION WITH SUSTAINABLE ACCESS TO:** The percentage of the population with access to adequate excreta disposal facilities, such as a connection to a sewer or septic tank system, a pour-flush latrine, a simple pit latrine or a ventilated improved pit latrine. An excreta disposal system is considered adequate if it is private

or shared (but not public) and if it can effectively prevent human, animal and insect contact with excreta.

**UNDERWEIGHT FOR AGE, CHILDREN UNDER AGE 5:** Includes both moderate underweight, defined as more than two standard deviations below the median weight for age of a reference population, and severe underweight, defined as more than three standard deviations below the median weight.

**VITAMIN A:** Proportion of children 6-59 months of age who received a high dose Vitamin A supplement in the last six months.

**WATER SOURCE, IMPROVED, POPULATION WITH SUSTAINABLE ACCESS TO:** The share of the population with reasonable access to any of the following types of water supply for drinking: household connections, public standpipes, boreholes, protected dug wells, protected springs, and rainwater collection.

**WOMEN HEAD OF HOUSEHOLDS:** The proportion of heads of household that are women.

**YEAR:** Afghan Government figures use the Afghan year, which starts in mid-March.



## Some critical issues in the building of statistical capacity

Earlier reports (such as the 2004 Afghanistan Human Development Report, pages 263-266, and the Millennium Development Goals Country Report 2005, pages 120-123) have highlighted many of the issues concerned with statistical capacity building in Afghanistan. Rather than repeat the same points again, we shall focus here on two key aspects of statistical work that have an important bearing on the calculation of the Human Development Index: population and price statistics.

### POPULATION STATISTICS

The importance of the forthcoming census has already been discussed (see Box XX in Chapter YY). Without a reliable base of population statistics, it will be difficult to provide reliable indicators in many fields of statistics. The population census will provide a very detailed description of the distribution of the population, classified by a large number of characteristics. At the particular time when the census is taken (July 2008), we shall have a complete picture of Afghanistan's population. One important ingredient of a good census is having a well-designed census form. The HDR team has been able to make some constructive input to the design of the form, with some of their suggestions for changes to the form being taken on board by the census team.

But the census only provides a picture at one point in time. What is also required is the ability to project the population forward, so as to get an accurate idea of what the distribution of the population is likely to be one year ahead, five years ahead, and so on. This kind of information is vital for the planning of schools, health facilities, and many other amenities in the community.

Having a good idea of the size of various sections of the population is also essential for planning certain activities, such as parliamentary elections or the annual campaigns to immunize children under the age of one.

At present the CSO is relying on the information collected during the 1979 Census, supplemented by the detailed information collected in the pre-census listing of 2003/04. This latter exercise enabled the CSO to make substantial revisions to their estimates of the total population in each province, and in each division within provinces. Having established the likely size of the population, and its approximate age distribution, the CSO simply apply a fixed annual percentage growth (currently around 2 percent) to the population in every age group to arrive at their estimates for the succeeding year.

A particular problem concerns the nomadic population, known as Kuchis. These people move around with their animals, in order to find good grazing areas and water. Their number is not known, but traditionally it is always assumed that they number about 1.5 million. They are included in the CSO and UN population estimates shown in Annex 2. They are sometimes included in surveys (such as NRVA 2005) and sometimes excluded (such as MICS 2003).

While this approach is understandable, given their lack of information, the method used takes no account of possible changes in fertility, mortality or migration. The CSO method assumes a stable population structure for Afghanistan, but the

Afghanistan population is far from stable. The estimates of age distribution provided by CSO pose tremendous problems for data analysts, since there are clearly far more children in Afghanistan at present than the CSO figures would suggest. The result is that any attempt to calculate an indicator like enrolment rate runs the risk of obtaining estimates far in excess of 100 for some areas. UNICEF and WHO report similar problems with the estimates of the under-one-year population. Their experience is that the number of very young children is very much larger than the CSO figures suggest.

All government agencies make use of the CSO population estimates for their planning work, and some of the international agencies working in Kabul also try to use the government figures. But the headquarters of the international agencies rely on the population estimates provided by the United Nations Population Division, who provide population estimates for every country in the world. Their estimates are the end-product of a very detailed study of all census and survey data available from each country, and their estimates are obtained by modelling changes in the size of the population, based on assumptions about likely fertility, mortality and migration. Obviously in the case of Afghanistan, the availability of data is rather limited, but the UNPD makes the best use it can of what data is available.

The UNPD estimates are published in World Population Prospects, which is revised every two years. The WPP 2006 estimates were posted on the website in March 2007. The projected population for Afghanistan in 2006 is shown as about 26 million, whereas under the old WPP 2004 the population was estimated at 31 million. The UN estimate is now much closer to the official government estimate of about 24 million. Discrepancies between UN and government estimates pose serious difficulties for users of the data, some of whom use the UNPD figure while others use the CSO figure. It is a particular problem for the global Human Development Report, which in general relies on data supplied by the UNPD and other international

statistical agencies.

Fortunately we were aware of this change in the UN estimate, since we had been in direct communication with the team at UN Population Division. We were provided with background information about the change, including the fact that UNPD has decided to change the underlying model life table that they use for Afghanistan (from CD-South to CD-West), in order to take better account of the much higher than expected adult mortality for both sexes. As a result, overall life expectancy has been reduced from the old estimate of about 47 years to about 43 years.

The need to make these changes highlights the difficulty of estimating the size of the population in Afghanistan. It also emphasizes the critical importance of the forthcoming census. For future statistical work, closer cooperation between the CSO and the UNPD would be beneficial. The CSO has access to considerable information about what is happening to the structure of the population in Afghanistan, while the UNPD has specialized demographic skills that are not available at CSO. The modelling of the population is really the only sensible way to attempt to make population projections, and both CSO and UNPD would benefit from each other's knowledge and contributions in helping to prepare the best possible set of estimates.

## PRICE STATISTICS

The CSO produces an annual set of national accounts, according to the principles set out in the 1993 UN System of National Accounts (SNA). These GDP estimates are constructed in Afghanis (Af) in terms of both current and constant prices. Using the CSO population estimates and the current rates of exchange, they provide information on Afghanistan's GDP per capita in US dollars. While this information is useful, it does not provide the complete picture if we want to compare per capita GDP between countries, because one US dollar spent in

Afghanistan can buy much more than one US dollar spent in the United States. What is required is the calculation of the Purchasing Power Parities (PPP), which is the rate of exchange that accounts for price differences across countries, allowing international comparisons of real output and incomes. The PPP between any two countries can be defined in formal terms as the rate at which the currency of one country needs to be converted into that of the second country to ensure that a given amount of the first country's currency will purchase the same volume of goods and services in the second country as it does in the first.

A major international programme is currently underway to obtain PPP estimates for more than 150 countries. As part of it, the World Bank is coordinating the International Comparison Program (ICP) for more than 100 developing countries. This involves helping countries to collect relevant price data, and then compiling detailed expenditure estimates and calculating PPPs. Unfortunately Afghanistan is not participating in the

present round of the ICP. Afghanistan would do well to participate in any future activities organised under ICP. For the Afghanistan HDR we have made use of the PPP estimates shown in the Penn World Tables produced by a team at the University of Pennsylvania.

Afghanistan produces a regular monthly Consumer Price Index (CPI). Initially this was confined to prices in Kabul, but data collection has now been expanded to cover five other major cities as well (Herat, Jalalabad, Mazar, Khost, and Kandahar). The new national CPI was first published in April 2004. At present the annual inflation estimates are obtained by summing all the individual month-on-month percentage changes over a year. A better method would be to calculate the year-on-year change in the value of the index. With the Afghan year commencing in mid-March, the inflation rate for 1384 (2005/06) will be obtained by dividing the CPI index for March 2006 by the CPI index for March 2005, subtracting 1, and then multiplying by 100.





## Estimated cost for hybrid model

Item description	10 districts in five provinces (pilot project) one year	Nationwide (365 districts) One Year	Nationwide (365 districts) Five Years
Personnel	134,300.00	4,840,000.00	25,000,000.00
Operations	307,000.00	8,495,000.00	13,000,000.00
Others	73,700.00	665,000.00	2,000,000.00
<b>Total</b>	<b>515,000.00</b>	<b>14,000,000.00</b>	<b>40,000,000.00</b>





The Center for Policy and Human Development (CPHD), based at Kabul University campus, is an independent policy research institution. A modern facility with a Human Development Resource Center accessible to students, faculty, and researchers, the CPHD also organizes a lecture series, a capacity building programme, and an international faculty and student exchange program. Visit us online at: [www.cphd.af](http://www.cphd.af)

The Afghanistan Human Development Report 2007, produced by CPHD, is the first study of its kind to define the distinct traditions, yet firm linkages between the rule of law and human development. This Report highlights key challenges to the expansion of the rule of law in Afghanistan and proposes bold new approaches that bridge modernity and tradition in the search for social justice, including:

- A detailed review of progress towards Afghanistan's Nine Millennium Development Goals for the year 2020, all central to creating conditions conducive to the rule of law.
- Major threats to the rule of law, such as personal insecurity, past human rights violations, injustice towards women and children, the narcotics trade, corruption, and land disputes.
- A hard-hitting analysis of why the judiciary, police, and legislature are failing to respond to these threats and to meet the changing needs of Afghan citizens.
- Extensive consultations and a groundbreaking national survey, which suggest that the far majority of Afghans access affordable justice through traditional justice bodies viewed by a majority as practical and legitimate.
- A visionary and transitional "hybrid model of Afghan justice" that realistically combines the features of all relevant systems-old and new, Islamic and positivist-for the promotion of the rule of law and human development.



Engaging traditional rule of law institutions should not be viewed as a panacea to resolve immediately the multitude of complex problems discussed in this Report. It must become, however, an integral component of the Afghanistan National Development Strategy and related efforts to move towards an effective, modern system of justice. The Report concludes that only when Afghans secure their rights and uphold their responsibilities will justice prevail and the country and surrounding region build the foundations for a durable peace.