

## Afghanistan: The rule of law

THE RULE OF LAW IN AFGHANISTAN IS FRAGILE, but is slowly being brought to life. The Bonn Agreement of 2001 began the process, focusing on political institutions and procedures, emphasizing the reform of Afghanistan's justice system, and authorizing the creation of the Afghan Interim Administration. The Afghanistan Compact, signed in early 2006, followed up on that initiative by signalling a political agreement between the Afghan government and the international community to work toward a series of benchmarks of progress in the areas of security, reconstruction and development.

And yet, in late 2007, primary indicators are disheartening. Some observers state that the rule of law in Afghanistan has not improved since the overthrow of the Taliban in December 2001. Many point out that security and freedom from corruption – key elements in fostering the rule of law – are nowhere near a reality in a country that has been ranked in the second or third lowest percentile for control of corruption by the World Bank Institute.<sup>1</sup>

### Governance

**The legislative and executive branches.**<sup>2</sup> The presidential and parliamentary elections held in 2004 and 2005 represent one benchmark of relative success in establishing a legitimate rule of law. Contributing to this positive step, Canada provided support and guidance for more than 26,000 polling stations; security and equipment for voter registration; assistance for education campaigns; training for election officials, candidates and parties; and funding for experts to monitor the elections. The Canadian International Development Agency provided over \$30 million for election support activities.

However, although the Afghan Parliament enjoys a certain degree of popular legitimacy, it remains a weak and fragmented institution lacking in real functional capacity. Reportedly, many parliamentarians are former war lords or criminals, and a large percentage are barely literate. The legislative process

is moving slowly, and although an annual legislative plan was finally put in place in 2007, there is a general need for a more organized legislative process to clear the backlog. Canada has been making efforts to improve this situation by, among other things, building the capacity of staff and parliamentarians and supporting parliamentary outreach and public information.

One of the problems facing Parliament is the absolute divide between the executive and legislative branches. Legislators cannot sit in Cabinet, and the executive branch in many ways seems to ignore the legislature. In some instances, the executive branch has passed laws that the National Assembly has not reviewed, despite a legal requirement for all laws to be approved by Parliament without undue delay. Lack of clarity about the role of the Office of Administrative Affairs, which was intended to be a liaison between the executive and legislative branches, has only served to worsen the legislative bottleneck.

Another issue of concern is the apparently unclear and limited role of the elected provincial councils. These councils are intended to participate in the elimination of customs that are contrary to Afghan and sharia law or human rights, in the reduction of drug trafficking and in conflict resolution. They are also to participate in provincial developmental planning and the monitoring of other provincial governance institutions, such as law enforcement. Yet the councils' specific mandates remain undefined: there is no clear framework or consultative mechanism for them to meet with populations as mandated, and there is no legal obligation on provincial governance institutions to meet with the councils. As such, their influence remains marginal.

**Government.**<sup>3</sup> The Afghan government also faces significant problems with respect to capacity and legitimacy. The World Bank Institute ranked Afghanistan in the bottom eighth of countries with severe governance problems, and the Economist Intelligence

Unit gave the country a zero in the functioning government category. In 2007, many ministries and provincial offices remain non-functional, with little skilled capacity and few clear terms of reference and rules or procedures. Corruption is said to be widespread across a government in which many officials are reported to be former war lords. Patronage, misuse of public funds, abuse of public land management, and corruption in the privatization of state-owned enterprises seem to abound.

There is little to counteract such corruption. Other than non-state actors, the Afghanistan Independent Human Rights Commission (AIHRC) is the only government institution with independent accountability and monitoring functions. Established in 2002, the AIHRC has eight regional and three provincial offices, but remains understaffed and under-resourced. Nonetheless, pressure from the international community has resulted in the removal of some prominent human rights offenders from various ministries, and President Karzai has launched a number of anti-corruption initiatives. Of these, the Anti-Corruption Commission has not yet produced any tangible results, and the Senior Appointments Mechanism – intended to ensure a transparent mechanism for senior-level appointments – has made little progress. A public administration reform process has also been established to improve the performance of ministries, agencies and civil servants, but has had limited success and is accused of being slow and superficial in a context where the ministries have limited capacity to implement reform.

To help build governance capabilities, Canada has provided the Afghan government with a 15-member Strategic Advisory Team made up of military and civilian personnel, and has contributed more than \$33 million since 2001 toward improving the democratic process. This has involved contributing significantly to the Afghanistan Reconstruction Trust Fund, which helps to reimburse day-to-day operations of government; providing funds to the Afghan Independent Electoral Commission, which is revising electoral law, establishing procedures and infrastructure for future elections and training election staff; providing funds to strengthen the capacity of senior officials; and providing funds and working with the United Nations Development Programme (UNDP) to enhance the capacity of the Ministry of

the Interior to design and regulate sub-national governance systems and improve public service delivery in the provinces.

This last area of assistance is particularly important, as many commentators note the weak regional influence of an overly centralized government. While Kabul and the northern and western regional state agencies operate in development mode, agencies remain very weak in the southern and eastern regions. Capacity-building has been limited in these regions, whose governments remain under-equipped and understaffed, and where former militia leaders exert considerable control. In response, Canada has assumed responsibility for the Provincial Reconstruction Team in Kandahar, which focuses its efforts on security, governance and development, including police training and the provision of essential services. The 330-person team is made up of diplomats, development experts, police, military staff and political advisors.

### **The justice system**

In 2001, the Bonn Agreement created an independent Afghan Judicial Reform Commission to rebuild the justice system by reviewing structures and functions, facilitating law reform, strengthening resources, expanding legal aid, and promoting access to justice. However, the Commission was dissolved in June 2005, having achieved only limited success. That same year, the UN Assistance Mission in Afghanistan and the UNDP developed “Justice for All,” a framework for Afghanistan’s justice sector. Approved by the Afghan Cabinet, this framework outlined a plan for coordinating future reform efforts and donor investments.

Beyond these larger reform initiatives, one of the key milestones in the justice sector was the adoption of Afghanistan’s Constitution in January 2004. But a constitution must be supported by specific laws, and the slow progress of new legislation in Afghanistan remains a significant obstacle. Legislative delays in Parliament aside, the Department of Legislative Drafting faces severe backlogs because of an enormous lack of human and financial resources, and of infrastructure, including a lack of professional legal translators. The Ministry of Justice has begun prioritizing laws for review and passage by Parliament, and Cabinet has approved a program of drafting, re-

vision, enactment and implementation of key legislation, including a Criminal Procedure Code, a Code of Conduct for Public Servants, and a Code of Civil Procedure; ultimately, however, the justice system stands in need of human and material resources for it to establish real legitimacy.<sup>4</sup>

**Transitional justice.**<sup>5</sup> Another serious problem for the justice sector is the climate of impunity that is said to prevail. The high visibility of some government officials with links to human rights violations in the past is currently undermining Afghan faith in the justice system and government. Many see President Karzai as an ineffective leader who has been overly conciliatory to war criminals.

To deal with this situation, in December 2005 the government adopted an Action Plan on Peace, Justice and Reconciliation that elaborates several approaches aimed at achieving peaceful coexistence and cooperation among former combatants and affected civilians, healing for past injustices, and the reintegration of citizens into society. The Action Plan is working toward an acknowledgement of the suffering of the Afghan people, credible and accountable state institutions, truth-seeking and documentation, the promotion of reconciliation and national unity, and accountability mechanisms.

Unfortunately, the political will for transitional justice appears to be almost non-existent in Afghanistan, and the Action Plan has stalled. Some say it has been undermined by the March 2007 adoption of an amnesty law that prohibits the government from independently prosecuting individuals for war crimes committed in conflicts over the last decades. Victims may still bring accusations forward, but it is they, not the prosecutors, who bear the burden of proof.

**The court system.**<sup>6</sup> In 2001, its physical infrastructure in disrepair and with few qualified judges to carry the system forward, Afghanistan faced an urgent need to reconstruct its judicial system. Since then, the situation has improved and has taken concrete shape in the form of a Supreme Court with nine judges appointed by the President and subject to approval by the lower house of Parliament; a Court of Appeal for each province; and primary courts that will eventually be expanded to include one for each district. A number of specialized courts also deal

with national security, property issues, military issues and narcotics. The Supreme Court is responsible for the administration and oversight of this system, for judicial appointments (with presidential approval), and for ensuring the consistency of Afghanistan's laws with sharia law and the Constitution. Safeguards have also been built into the law to protect judicial independence and to ensure the transparency of court proceedings.

Yet, the court system remains far from adequate and is generally inaccessible to the public as a result of long delays and the expense of bringing cases to court. The system lacks sufficient resources and an adequately trained staff. Only 11.6% of judges have a university law degree, and only 56.7% had completed any judicial training prior to their appointment. Construction or rehabilitation is needed in 97.8% of Afghanistan's court facilities, and there is a severe shortage of professional resources – such as access to Afghan laws and Supreme Court decisions and to textbooks. As a result, many decisions are based on personal opinion alone.

Gender equity is also an issue. Currently, only 3% of judges are female, and women are frequently denied equal access to the justice system because they are unable to register for cases themselves.

Lack of security and rampant corruption also detract from the legitimacy of the court system. Judges are often unable to enforce decisions and complain of threats and of the interference of officials and military commanders with decisions. Some judges have even been murdered. Salaries are inadequate; most judges in the provinces earn \$35 to \$50 a month – less than the average police officer and certainly not enough to support a family. This situation has contributed to numerous allegations of bribery and corruption.

Outside the judiciary itself, Afghanistan's legal aid system is struggling, having no government funding and an insufficient number of professionals to provide services. The Office of the Attorney General also lacks resources, trained prosecutors, and adequate equipment and physical infrastructure.

Canada has contributed significantly to capacity-building for judges and lawyers, working on legal education issues, providing legal training for new graduates and contributing funding to the International Development Law Organization, which is

training judges and prosecutors, assisting in the establishment of the legal aid system, and developing benchbooks for judges.

However, the formal court system continues to lack legitimacy for average citizens, who generally turn to more informal mechanisms to resolve disputes.

An estimated 80% of legal claims are dealt with by traditional mechanisms called *jirgas* (or *shuras*), which citizens generally consider to be faster, fairer and more comprehensible, affordable and accessible, and less corrupt. Jirgas may be standing or ad hoc bodies that use customary laws to settle, in a communal manner, disputes ranging from property issues to (less commonly) murder. Decisions usually call for reconciliation between the parties, compensation, social ostracization of the offender, marriage between families to settle the dispute, or burning of the offender's house. Such decisions may be appealed to a second and third jirga.

Even the courts appear to be encouraging individuals to resolve their civil dispute through jirgas, offering to endorse their decisions provided they are consistent with sharia and Afghan law. Despite the advantages of alternative dispute resolution, there is concern that jirgas are not the perfect solution. Because of custom and tradition, jirgas are less accessible to women, and their decisions are not always consistent with the rule of law and human rights. The burning of houses may be falling into disuse, but many women have been forced into marriages as a result of jirga pronouncements. In some parts of the country jirgas are dominated by military commanders, and some decisions are enforced by brute force. No mechanisms are in place to monitor the actions, and ensure the accountability, of traditional dispute resolution.

**Law enforcement agencies.**<sup>7</sup> Created in April 2003, the Afghan National Police (ANP) operates under the Ministry of the Interior. The ANP is composed of the Afghan Uniformed Police (who conduct day-to-day policing), the Afghan Border Police, the Afghan National Civil Order Police, and the Counter Narcotics Police of Afghanistan. In 2007, the target size of the force was increased from 62,000 to 82,000 and, by July, over 71,000 rank-and-file police had received training. Of these, only one-third of a

percent are women; however, the numbers of women are on the rise.

In addition, the Afghan National Auxiliary Police (ANAP) force was formed in mid-2006 on a temporary basis to help the ANP with counter-insurgency operations. Now made up of 11,270 members, the ANAP was designed to be a community-based police force with little training; however, many commentators note that the ANAP is essentially made up of local militias whose presence is undermining attempts to legitimize the ANP itself.

As it is, the legitimacy and quality of the ANP is very low. The force faces a severe lack of infrastructure and equipment, police are unfamiliar with laws they enforce, and many are reportedly illiterate, making training and the work of law enforcement difficult. Some estimate that fewer than 30% of ANP recruits can read and write.

Most serious is the fact that the ANP is generally held to be one of the most corrupt institutions in Afghanistan. In 2003, the force was built from existing personnel, also incorporating former military commanders and militias. The Ministry of the Interior currently employs the highest number of officials with links to militias of any government ministry. The ANP's links to the drug trade are also well documented; some analysts estimate that 80% of the force is involved. The explosion of the drug trade in Afghanistan is one indication that law enforcement in this area is not working. Finally, in November 2004, the AIHRC stated that 15% of human rights violations reported had been perpetrated by the police (claims related to torture, theft and failure to prosecute murder cases). Ultimately, the state lacks effective authority over the ANP, within which, it is reported, officers lack discipline, political interference and bribery are commonplace, and there is no internal accountability mechanism.

International assistance to the ANP has targeted facilities, uniforms, training, pay, appointments, and better systems and structures at the Ministry of the Interior. As a result, salaries have risen from \$16 to \$70 a month, but the temptation for corruption persists, as this is still not a living wage. In October 2007, Canadian troops began distributing police salaries in cash directly through Canadian mentors, to ensure delivery. In general, Canadian assistance and contributions to the Law and Order Trust Fund have

focused on mentoring, training, funding salaries, strategic reform at the Ministry, building police facilities, gender issues orientation, providing equipment and uniforms, and institutional development. Canada is a member of the European Union Police Mission in Afghanistan, a team of 160 experts who train, mentor, monitor and advise the ANP.

Yet, despite improvements, the Afghan police continue to inspire fear rather than confidence and security in their communities. This situation is eroding trust in the government on a broad scale, as most people's contact with the government is through their local police force.

**Corrections.**<sup>8</sup> Prisons in Afghanistan are administered by the Ministry of Justice and are another area of significant concern. One prison is located in each province, although half are merely rented properties, and most are in need of real physical improvements to raise them to international standards. Reports abound as to the inhumane treatment of prisoners and the deplorable conditions of prisons, many of which are overcrowded, lack heat in winter, and have rudimentary toilet facilities. Prisoners complain of torture, and many receive inadequate food and health care, while female prisoners are often detained with their dependent children. Pre-trial detainees are also often held well over the legal time frame for processing cases. Currently, there are as many detainees as prisoners in prison, which means that the prison population is rising dramatically and putting an increasing strain on resources.

The AIHRC reports that the correctional system is improving. New facilities are being built, wardens and police have been arrested for torture, cases are being processed faster, and there is better lighting, more beds, clean drinking water, and more timely medical care. Canada is contributing to this process, and has deployed two Correctional Service Canada officials as advisors to provide training and mentoring, as well as advice on rebuilding and reform of the prison system.

**Transfer of detainees by Canadian Forces.** In the past year, considerable controversy has arisen with respect to Canada's handling of detainees captured by the Canadian Forces. As Canada is operating on Afghan territory, in December 2005 the

Canadian Forces signed an agreement<sup>9</sup> with the Afghan Minister of Defence stating that detainees captured by Canadian Forces would be handed over to Afghan authorities. This agreement stated that detainees transferred by Canadian Forces must be treated humanely and in accordance with standards set out for prisoners of war in the Geneva Conventions, and must not be subject to the death penalty.

The agreement also outlined the right of the International Committee of the Red Cross to visit detainees as well as the parties' obligation to notify the Red Cross upon transferring a detainee. Unlike similar agreements signed by countries such as the Netherlands, Canada did not negotiate a provision to allow Canada to verify the treatment of transferred detainees.

In response to allegations of mistreatment, two inquiries were launched in February 2007. The Canadian Forces instigated a Board of Inquiry to investigate the treatment and processing of detainees by Canadian Forces. It was alleged that Canadian military police failed to safeguard the well-being of three detainees apprehended in Kandahar in April 2006 and to properly investigate the cause of various injuries that may have been sustained by them while in Canadian Forces custody. The probe was to be coordinated with a criminal investigation led by the Canadian Forces National Investigation Service. The Military Police Complaints Commission also launched a public interest investigation into complaints regarding the transfer of detainees by Canadian Forces Military Police; however, in June 2007, the Commission announced that this investigation would examine the situation only up to the point when the transfer occurred and would not investigate what happened afterwards.

In the midst of this controversy, the Canadian government asked the AIHRC to monitor the situation of detainees captured by Canadian Forces; in May 2007, the Canadian and Afghan governments signed a supplemental agreement<sup>10</sup> for the transfer of detainees, citing more stringent criteria for the treatment and supervision of detainees and outlining the right of Canadian authorities and the AIHRC to access and monitor them.

In October 2007, 15 prisoners were executed in Afghanistan, breaking a six-year moratorium (with one exception) on the death penalty. The Canadian

government is currently seeking assurances that none of these prisoners had been transferred to Afghan authorities by the Canadian Forces.<sup>11</sup>

## Conclusion

The rule of law in Afghanistan is tenuous, and current indicators are not encouraging. However, Afghanistan is emerging from decades of conflict and regime change, and it must be recognized that effective rule of law is difficult to foster and that improvements are slowly but surely being made. This process will take time and significant effort on the part of local and international communities. Valuable initiatives are underway. Currently in an interim stage, the Afghanistan National Development Strategy is Afghanistan's road map for democratic state-building, setting out priorities and mechanisms for security, governance, rule of law, human rights; and economic and social development. In July 2007, states attending the Rome Conference on Rule of Law in Afghanistan reached a consensus on the need for a national justice program in Afghanistan and the development of a monitoring and evaluation system for the justice sector. Donors committed \$360 million over five years to justice reform and the rule of law, and Canada announced \$30 million in funding to train judges, prosecutors and informal dispute resolution leaders; construct ANP facilities; enhance the presence of Correctional Service Canada; and provide support for a mechanism to ensure that justice programs are effectively implemented in provinces. Each of these projects is a step in the right direction – creating a framework and solid grounding for the future of real rule of law in Afghanistan.

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## SOURCES

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