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Reestablishing the Judicial System in Afghanistan

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**State- and Security-Building
Lessons from Afghanistan**

LISD Working Paper

Liechtenstein Institute on Self-Determination
at Princeton University (LISD)

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J Alexander Thier¹

I. Introduction

Two recent events illustrate the key challenges in establishing a competent, independent, and accountable judiciary in Afghanistan. Only 10 days after the close of Afghanistan's Constitutional Convention, Afghanistan's Supreme Court violated the word and spirit of Afghanistan's new constitution. Without any case before the court, and based on no existing law, the court declared on January 14, 2004 that a performance by the Afghan pop singer Salma on Kabul television was un-Islamic and therefore illegal. The video featuring the modestly dressed Afghan woman singing about rural life was recorded in the 1970s. "We are opposed to women singing and dancing as a whole and it has to be stopped," said the deputy chief justice, Fazl Ahmad Manawi.² This ruling is consistent with past behavior of the court and its chief justice, Mawlawi Fazl Hadi Shinwari, an Islamic fundamentalist and former head of a religious school in Peshawar. Last year he tried to ban cable television and coeducation. Although appointed by former President Burhanuddin Rabbani in the chaos that gripped Kabul in Fall 2001, Mr. Karzai has kept Justice Shinwari on the bench, giving him virtually unchecked appointment powers. He has put scores of unqualified mullahs on the bench at all levels, and has created a "fatwa council" in the Supreme Court to issue religious edicts – an entity with no legal basis. The court's intervention underscores one of the greatest threats to stability and democracy in Afghanistan: a renegade judiciary bent on imposing its fundamentalist interpretations of the Koran rather than enforcing Afghan law.

The second story concerns the travails of the Chief Justice of the Provincial Court of Herat, Mullah Khodaadad. As Chief Justice of the courts in Herat, Mullah Khodaadad labors under the heavy-handed rule of Ismael Khan, the de-facto ruler of western Afghanistan. In 2002, Khodaadad told me about a murder case in a nearby village. The perpetrator was convicted by the eye-witness testimony of several villagers. Two days after his conviction, he was released – by order of Ismael Khan. Khodaadad complained of intimidation and lack of independence. In 2003, Khodaadad was hit by a car, an act many suspected was political violence. Then, factional fighting erupted in Herat in March 2004 during which Ismael Khan's son, a central government Minister, was killed and the central government-appointed military commander chased out of the province. Following the fighting, supporters of Ismael Khan burned down Khodaadad's house.

Afghanistan is, for the moment, set on a course of nation-building that promises to create, security, government, and the rule of law. Its new constitution creates a blue-print for a

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² "Woman singer angers Afghan judges." BBC News, January 14, 2004.

modern Islamic state, replete with a powerful central government; checks and balances between its President, bi-cameral legislature and independent judiciary; neat administrative boundaries and elected provincial councils. A national army and national police force will provide security, with a court house in every district to enforce the law and protect citizens' rights. The problem, of course, is that none of these things yet exists.

Reestablishing a legitimate justice system in this context presents enormous, if not insurmountable, challenges. Every aspect of the picture of a functioning judiciary is presently absent. There are few buildings to house judges, prosecutors, attorneys, police, prisoners. There are equally few skilled professionals to fill the buildings. There is no communications infrastructure, no files, or libraries. It remains unclear which laws are in force – but even those approved by Kabul aren't in the hands of officials in the provinces. Fundamentally, a political culture that respects the rule of law is also missing. Shinwari and Ismael Khan remain the rule, rather than the exception.

This paper first discusses the current situation in Afghanistan, including ongoing security issues and the status of state institutions. It then focuses specifically on the state of the judiciary, its legal and historical underpinnings. Finally, the paper addresses the key challenges in building a justice system in Afghanistan, and the role of the international community in this process.

II. Security and State-Building in Afghanistan

The international community is making a significant investment in the future of Afghanistan.³ Over two years into the intervention there, the return on investment is much less than what it should be. The primary reason is continued and growing insecurity throughout the country. If the security environment is not improved soon, support among both Afghans and the international community for the political and physical reconstruction of the country will wane. Simultaneously, forces opposed to the international intervention and the government in Kabul will be emboldened.

Building functioning, legitimate, and accountable state institutions is essential to re-establishing a stable and prosperous Afghanistan. These institutions must exist at the central, provincial, and local government level. At present, there is not a coherent set of institutions functioning in Afghanistan that is able to meet the basic requirements of a state: to provide security, to enforce the law, to deliver services. The Afghan Transitional Administration (ATA) lacks the personnel and physical infrastructure needed to carry out these functions. The U.S. and its partners are working with the ATA to develop national institutions, and to weaken those elements that challenge the primacy of the state. However, insecurity is the greatest impediment to the successful creation of a state apparatus in Afghanistan.

³ By the end of 2003, the U.S. has spent an estimated \$30 billion on military intervention, and more than \$1 billion on humanitarian and development aid in Afghanistan. The international community has spent an additional \$1.5 billion on aid. For more information on aid commitments and disbursements, see "Analysis of Aid Flows to Afghanistan." Transitional Government of Afghanistan. April 2003. The international community has committed an additional \$8.2 billion in aid over the next three years.

Political and security control of most of Afghanistan remains atomized, with both existing military and civilian resources in the hands of regional power-brokers, commanders, and a nominally pro-ATA bureaucracy. Acts of terrorism and attacks against the Coalition and the Afghan Government by anti-government forces remain a daily reality. Most of the country, including key ministries in Kabul, remains under the sway of volatile factional forces. Despite pro-government rhetoric, these forces continue to undermine stability, acting with impunity and contempt for the ATA and its international backers. Many areas are simply not safe enough for Afghan and international officials to carry out their duties. These setbacks are also expensive, creating 'insecurity inflation' for reconstruction projects. At the same time, Afghan citizens are unable to organize or freely participate in activities required to recreate a functioning, representative political system. Confidence in government and the rule of law requires that discrete daily interactions between citizen and state are secure. Until key areas throughout the country are made secure, the state-building project in Afghanistan will continue to founder.

The State of the State

There is dramatic difference between the legal structure of the government and de facto authority throughout the country. The current legal structure of the government is derived from the 1964 constitution as amended by the Bonn Agreement of December 2001. This structure was affirmed with few changes in the new constitution ratified in January 2004. Under this arrangement, Afghanistan is a highly centralized state. The current government in Kabul consists of an executive, a judiciary, and several quasi-independent national commissions, including the Judicial Reform Commission, the Civil Service Commission, and the Human Rights Commission. The executive comprises the offices of the President and at least 26 ministries. The President and his cabinet remain the lone law-making authority, which is exercised through the decree power, until parliamentary elections can be held. The military and police forces of the country are under the command of the Ministries of Defense and Interior, respectively. The judiciary is an independent branch controlled by the Supreme Court. The 34 provinces that make up the country are administrative sub-divisions of the central state, with no independent political or legislative authority. Provincial governors are appointed by the President, and most government staff in the provinces are directly subject to the line authority of the central government ministry for whom they work. Each province is sub-divided into districts, which are governed under the same basic set-up.

In reality, political, military, and administrative control of the existing government apparatus is highly atomized. Thirty years of upheaval and war has fractured control of the remaining government infrastructure. Significant strides in institution-building were made in the mid-20th century, but the government in Kabul was never able to fully penetrate the rural areas. Central government and provincial institutions were slowly built and a trained civil service implemented programs and maintained order in major towns. Traditional leadership structures often controlled decision-making in more isolated regions and tribal areas. Following the 1979 Soviet invasion, central government control

quickly receded to Kabul and key regional centers. Throughout the countryside, resistance groups destabilized the central government and governed their most secure areas.

Following the collapse of the Soviet-backed government in 1992, the *mujahideen* parties and renegade government militias took over, dividing the country into a series of autonomously-governed warring fiefdoms. During this period, the state apparatus was divided among the regions. During the Taliban period, the role of remaining government offices and international assistance diminished. Taliban authority was largely focused on imposing order, and did little otherwise to govern.

When Taliban authority receded throughout the country in late 2001, an array of factions and local leadership structures reassumed control of the countryside. Several of these factions, notably Jamiat-i-Islami (Rabbani/Ismael Khan), the Shura-i-Nizar (Masood/Fahim), Hezb-i-Wahadat (Khalili/Akbari), and Jumbish-i-Milli (Dostum) relied on long-standing organizational structures and foreign support to retake their previous domains. Some areas, especially in the South and East, are controlled by local ruling councils, a combination of tribal leaders and militia commanders. In most cases, authority relies upon a loose confederation of military commanders whose allegiance to higher authority is proportional to the strength of the regional powerbroker.

The factional leadership has once again assumed control of existing administrative, financial, and military resources in their areas of operation. Military and police, the civil service, customs and taxation, relations with foreign powers are the primary tools of state control. So long as these tools remain outside of the definitive control of a unified government, the government will lack legitimacy and remain at risk.

The Security Situation

Afghanistan is facing three inter-related security problems: 1) Taliban, al Qaeda, and their supporters; 2) factional militias; and 3) drug-traffickers and other criminal elements. Each presents pernicious security and governance problems, hindering state formation and extending the need for international military forces for years. Each relies on support from external state and non-state actors. Combined, these forces could destabilize the fragile balance that prevents a relapse into wider civil war. A broader Afghan conflict could overwhelm international military forces, ceding Afghanistan back to its pre-Taliban chaos and embroiling international forces in a fractious conflict. The status quo, however, also presents hurdles to progress. Confidence in government and rule of law are based on discrete, daily interactions between citizens and the state. So long as impunity goes unchecked, citizens, civil servants, and politicians will continue to serve military, rather than legal authority.

Most critically, all three elements creating insecurity have a longer-term view of their involvement in Afghanistan than is evident in the international community. Afghanistan has been through five significant regime changes in the last 30 years, all supported to some extent by external forces. Based on past experience, Afghan factions and civilians

have little reason to believe that the current government or its international backers will be around for long. It is critical for the U.S. and its partners to realize that the role of foreign actors in the last 30 years of conflict has created enormous distrust of the stated intentions of those foreign actors. The Soviet invasion, the U.S. abandonment of Afghanistan following the collapse of the Soviet Union, the civil war supported by countries in the region, the Pakistani backed Taliban, and al Qaeda have all demonstrated that foreign intervention serves the interests of foreign backers, not of the vast majority of Afghans. There is already a strong belief among Afghans that the U.S. presence serves some broader U.S. interest to control the region, oil, and Islam. Furthermore, having experienced 30 years of deliberate disinformation campaigns, the Afghans have little cause to believe information provided by any party. Thus, the only valid means of convincing Afghans of the intentions of the Government and its foreign backers is to physically demonstrate those intentions – through the provision of security, aid, and successful representative politics.

III. The Judicial System

Afghanistan's has a mixed civil law and Sharia-based formal legal system. This system has emerged and evolved in the last 120 years, since the creation of the bureaucratic state. The state legal system interacts with a deeply-rooted system of customary law and practices. This non-state system is comprised of tribal custom and "folk sharia" – local conceptions of Islamic law. These three bodies of law: state law, sharia law, and customary law, overlap in subject matter, and each provides challenges of implementation for the other two.⁴ Due to the significance of the sharia in both the state and non-state systems, the clergy straddles both.

Historical Overview

From the 1880's until the 1960's, Afghanistan essentially had a dual judicial system. A system of sharia courts headed by clergy handled areas of law such as criminal law, family and personal law laid down in the sharia. A separate system of government courts handled state law issues, such as those relating to commerce, taxation, and civil servants. As the body of state law grew, so did the writ of the state courts, until competition emerged as the courts battled over substantive jurisdiction.

In 1963, the long-serving King Zahir began a process of reform intended to democratize Afghanistan by increasing the power of the elected government, establishing separation of powers between the branches of government, and reducing the role of the monarch and

⁴ A book written in 1900 states:

"The law of Afghanistan in the present day [1900] may be easily placed under three headings; (1) those of Islam; (2) those of the Amir, which are based upon Islamic laws, the opinions of the people, and the Amir's own personal views and ideas; (3) Customary laws of the various tribes. In all criminal and political cases, practically the chief part of the law has been made by the Amir, and so in cases as to the Government revenue. But the rest, Islamic law is the general rule. Thus very little is left to custom." Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*, 1900, cited in Amin Tarzi, *The Judicial State: Evolution and Centralization of the Courts in Afghanistan, 1883-1896*, Doctoral Thesis, New York University, 2003, p. 173.

royal family in the affairs of state. In 1964, a new constitution that had been drafted and debated over a year was ratified by a Loya Jirga.

The new constitution made three significant changes to the judicial system. First, Art. 97 declared the judiciary an “independent organ of the State” which “discharges its duties side by side with the Legislative and Executive Organs.” Second, the constitution created a unified judicial system, assembling the disparate parts of the old system into one hierarchical structure with a Supreme Court at its apex. Third, the constitution created a unified system of laws. For the first time, the constitution and statutes created under the constitution were legally dominant. The basic principles of the *sharia* were to serve as a guide to the legislature, but the judiciary was proscribed from applying the *sharia* except when “no provision exists in the Constitution or the laws for a case under consideration.”⁵ Even then, judges were only required to follow the basic principles of Hanafi jurisprudence.⁶

[IF SPACE] *These reforms created a model for a secular court system. However, several things stood in the way. Most judges in the legal system were trained in the sharia not in Afghan law and procedure. There was also a dearth of attorneys. In order to rectify this problem, the law faculty at Kabul University was improved, and competitive exams introduced for entrance into the judicial civil service. In 1968 a judicial training program was initiated which required new judges to take an additional year of practical coursework and training in the judicial system. In a few years, the ranks of the judiciary, even at the highest levels, has shifted in favor of those with formal training in state laws and the legal system. In the late 1960s, the Afghan legal community consisted of about 1200 people, of which 715 were judges, 170 prosecutors, and 100 lawyers.*⁷

The legal system also required significant codification in order to occupy the field of applicable law with state law. From the mid-60s to the mid-70s a codification drive bore fruit. New comprehensive codes of criminal law, criminal procedure, civil law were passed, as well as laws pertaining to civil servants, taxation, and investment. Unfortunately, these laws were passed almost exclusively by decree. [IF SPACE] *In 1973, the cousin of King Zahir, Daoud, overthrew the King and declared Afghanistan a Republic. Afghanistan’s fledgling democracy was nipped in the bud, with the newly established parliament dismissed, and executive control over the judiciary restored. During Daoud’s reign, the project of secularization was pushed forward, and the penetration of the courts into the countryside was strengthened by the backing of the autocratic executive. The role of the court as a check against state authority, however, was eliminated.*

⁵ Constitution of Afghanistan, 1964, Art. 102.

⁶ Kamali argues that the primary purpose of this reform was not to deviate from the *sharia*, but rather to improve the “legality” of the system. Kamali believes that the changes in the system were made to ensure that people could not be deprived of fundamental rights due to the indeterminacy of the *sharia*. Such indeterminacy violates the notion, first articulated in the 1789 French Rights of Man, that no act can be a crime unless a law exists at the time criminalizing the act – a principle also known by the latin *nullen crimen sine lege*. See Kamali, 21.

⁷ Kamali, 207.

The structure of the Court system was determined by the 1967 Law of the Jurisdiction and Organization of the Courts. The 1967 law has largely remained in force, and it reflective of the structure of the formal court system (on paper at least) through the present.⁸ This law lays out a four-tiered system of courts: a Supreme Court, a Central High Court of Appeals, Provincial Courts, and Primary Courts at the district level. Within these courts, there are specialized benches to handle different areas of law such as criminal law, civil law, personal law, and commercial law.

[IF SPACE] *The Supreme Court of Afghanistan has had an unusual structure. The highest court, composed of nine constitutionally-mandated justices, is the managerial body for the court system, also known as the Supreme Council of the Judiciary. This body has very few judicial responsibilities, for example deciding questions of jurisdiction, venue, extradition, impeachment, and the constitutionality of laws.⁹ Actual appellate review of most cases before the court is conducted by the relevant diwan, or bench, on the Supreme Court. These benches, also referred to as the courts of cassation, are each headed by one of the Supreme Court Justices, and peopled with at least four other judges. The diwans of the Supreme Court can only review the law, and not the facts, with which the case is concerned.*

The Current Judicial System

The Bonn Agreement reinstated those provisions of the 1964 Constitution pertaining to the judiciary. By law, Afghanistan's judicial system during the two-year transitional period to a new constitution was largely the system created in the New Democracy period between 1964 and 1973. In fact, the judicial system was not re-established as a system during this period. Lacking infrastructure, trained personnel, and a clear body of applicable law, the semi-functioning courts remained quasi-independent, subject to local authority.

The court system is led by Fazel Hady Shinwari, the former head of a *madrassa* (Islamic religious school) in Peshawar, and an ally of the Saudi-backed fundamentalist militia leader Abdur Rassool Sayyaf. Under his guidance the court has appointed scores of non-university trained Muslim clerics to all levels of the court system. Shinwari has failed to follow the 1964 Constitution and applicable laws, exceeding the constitutionally allowed number of judges on the Supreme Court and creating a *fatwa* council to issue extra-judicial religious proclamations.¹⁰ The lower registers of the court system are largely outside the direct control of the Supreme Court. The Court has limited administrative authority in the provinces, and has even less 'legal' authority – in the sense that it does not cast an legalistic or intellectual shadow over the judiciary as a whole. Most judges

⁸ As discussed below, the question of whether the 1967 law or some later modification remains in force is still unanswered. A new law on the organization and jurisdiction of the courts has been drafted and will be passed, according to the new constitution, before the end of 2004.

⁹ Research thus far has failed to unearth a single case since 1967 in which the Supreme Court has exercised the powers of "judicial" or constitutional review – "abstaining from the application of laws repugnant to the provisions of the Constitution" – granted in the 1967 law.

¹⁰ Shinwari's Supreme Court has attempted to ban cable TV, co-education, and women singing on television, not by ruling on a case before the court, but rather by simply declaring them "un-Islamic."

have not received training or legal materials to help them in their work. Interviews with judges throughout the country shows that they do not have books indicating the applicable law – nor do they apply those laws even where they do have access.

The other institutions of the legal system include the Ministry of Justice, the Office of the Prosecutor General, and the Bonn-mandated Judicial Reform Commission. At present, relations between these four institutions are quixotic at best and hostile at worst. The Ministry of Justice – the preeminent legal institution under past regimes – has lost its authority and prestige. The power of prosecution was removed from the Ministry under Communist rule and placed into the hands of the Prosecutor General. These divided power centers have been maintained, however this division is rejected by the Ministry, and relations between the offices are acrimonious. Ideological and factions divisions also pervade the relationship between the Ministry and the Supreme Court.

The first step in the justice sector was for the government to appoint a Judicial Commission, as required by the Bonn Agreement, “to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”¹¹ A 16-member independent Judicial Commission was formally established in May 2002. It was, however, dissolved four months later. Political tension among members, the lack of a clear agenda and the impression of undue conservatism among some in the ATA seem to be the main reasons for the dissolution of this body. There was reportedly strong competition and recrimination between the Ministry of Justice and the Supreme Court, as both wanted to control the appointment of judges, and the Ministry of Justice wanted to control the Attorney-General’s Office. As a result of the heavy involvement of these two entities, the Commission was reportedly not sufficiently independent of the government to be effective.¹²

In November 2002 a second commission was appointed by decree.¹³ This Commission, renamed the Judicial Reform Commission, included a diverse and well-credentialed membership – professional rather than partisan. The Commissioners included three former Supreme Court justices, one former Minister of Justice, two former Attorney’s General, and four law professors. They were drawn from each of the key institutions in the justice sector in an attempt to balance interests. Despite the high quality and relative non-partisanship of the Commission, it was born into a rancorous environment. The Commission was accused of being too fundamentalist, too liberal, of being composed only of Afghans living abroad, of being controlled by one ethnic group or another. In truth, the members spanned the spectrum from conservative to liberal, and while several had been outside the country for some years, most had served in various Afghan government regimes over the past 40 years. The most accurate criticisms of the Commission membership (and its senior staff) are that they lacked modern management skills, and that they all possessed a typical Kabul-centric view of Afghanistan.

¹¹ Bonn Agreement, Art. II (2).

¹² Johnson, et al. 25.

¹³ The decree appointed 10 members, including only one woman. Shortly thereafter, two additional member were added to improve the Commission’s ethnic and gender diversity.

The new constitution has largely left the 1964 constitutional structure of the judiciary intact, with one significant additional power: the explicit grant of the power of judicial review to the Supreme Court. Article 121 states, that the “Supreme Court on the request of the Government or the Courts shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law.” When read together with Article 3 of the Constitution which requires that “no law can be contrary to the beliefs and provisions of the sacred religion of Islam” the court has the power to strike down laws and treaties on the basis that they are contrary to the “provisions” of Islam.¹⁴ Such authority can create a grave danger that an unelected body of clerics can overturn laws produced through the democratic process, as with the infamous Council of Guardians in Iran.

Significant aspects of the structure and jurisdiction of the judiciary under the new constitution have yet to be determined. Will the Supreme Court wield greater judicial powers, or continue as a more administrative than judicial body? A new law on the Judiciary is already in draft form, prepared by the Judicial Reform Commission. The Central High Court of Appeals is not functioning at present and is likely to be eliminated altogether in the coming reform process. The system will likely be streamlined into three tiers, and an expanded primary court will be placed in every provincial center so that all claims are first heard at the District Primary court level, and that the Provincial Courts will only function as courts of appeals. The new Constitution requires the President to issue the new law by decree before the end of 2004.

The Question of Applicable Law

Applicable law in Afghanistan is difficult to determine due to the numerous regime changes since 1964. A new constitution in 1964 was superseded by new constitutions or basic laws in 1977, 1980, 1987, 1990, 1992 (proposed). Each of these regimes passed laws. The Bonn Agreement also recognized all existing law and regulations, “to the extent that they are not inconsistent with this agreement or with international legal obligations... [.]” Some laws, especially from the Taliban era, were clearly inconsistent with these requirements. However, many of the laws passed over the years of upheaval are inconsistent with each other, but not with the constitution, international law, or the Bonn Agreement.

In addition to the lack of clarity about the controlling law, many judges do not have access to legal texts and/or simply apply their version of *sharia* law to many disputes. Under Afghan law, the application of *sharia* has been allowed only in a very narrow segment of cases when no Afghan law exists. The current application of *sharia* however extends to many areas covered by Afghan law. Uncertainty about what constitutes

¹⁴ “Beliefs and provisions of the sacred religion of Islam” replaced the far more general “basic principles of the sacred religion of Islam” which was the formulation in Article 64 of the 1964 Constitution, and which was in the draft 2004 Constitution until last minute changes at the Loya Jirga. The use of “provisions” suggests an interpretative capacity based more on *sharia* and less on a shared and evolving notion of Islam’s basic principles.

applicable law may explain part of this, but also seems to stem from training and orientation rather than from confusion about applicable law. In effect, the judiciary does not have access to laws at present due to a lack of education and materials.

IV. Prospects and Challenges

Reconstructing and reforming Afghanistan's devastated judicial system faces two fundamental challenges: the deep political and socio-cultural impediments to establishing an effective judiciary, and; the incapacity or unwillingness of the Afghan government and the international community to implement effective programs. Although the second problem is more easily resolved, it is equally responsible for the failure to achieve any real success in the first two years of post-Taliban reconstruction.

Judicial Independence and Judicial Responsibility

In Afghan history, there is neither practical experience with judicial independence in the state system, nor a political ethos to support it. The judiciary has been structurally independent, on paper, for a total of 11 years. In reality, it has never been independent in an institutional sense. Judicial independence is most clearly defined when the judiciary is needed to serve as a check against another government power. However, the judiciary has been seen as an extension of executive authority, not as an entity to challenge the authority. Thus far, the King or executive has held a trump in most cases, especially the important ones. There has been an ongoing struggle between the clergy-dominated judiciary and the executive over the application and codification of *sharia*. In the brief period between 1964 and 1973, the court system was only beginning to form as an independent entity, and never exercised challenges to executive or legislative authority, such as judicial review of a law. In the one case in the early seventies that might have tested this power - a dispute between the legislature and the executive concerning budgetary authority - the King intervened and the dispute was resolved.

The barriers to judicial independence seem to have political and religious rationales as well. The head of an Islamic state has the duty to administer the *sharia*, and is therefore the highest judicial authority under Islam. The head of state delegates judicial jurisdiction, *wilaya*, to the *qazi*, who then administers justice. This jurisdiction can be also removed. Therefore, "a consequence of the doctrine of *wilaya* in Islam is total lack of separation between the judicial and executive powers."¹⁵

Judicial responsibility is an equally critical element of a functioning judiciary. Judges must also be the faithful and neutral arbiters of the law. They must know the law, respect it despite personal misgivings, and apply it fairly. At present, Afghanistan's judiciary enjoys a degree of independence at the central level due to the weakness of the executive

¹⁵ Kamali, *Law in Afghanistan*, 209. This structural issue continues to limit Afghan perceptions of judicial independence. For example, a prominent member of the Afghan judicial establishment argues that non-Muslims cannot be judges in Afghanistan. The primary reason is not due to the need to apply *sharia*, but rather because the judge is an extension of the head of state, and the head of state has to be a Muslim according to the constitution, then the judge must also be a Muslim.

authority – but judicial responsibility is gravely lacking. The judiciary has had a free hand with appointments, and has challenged executive policy through use of extra-judicial pronouncements on the legality of activities it deems un-Islamic. This judicial activism is in line with the long-term struggle by the clergy to dominate the judiciary and the application and interpretation of law. The lack of religious credentials among President Karzai and many in his transitional administration has left the government open to potentially damning charges that they are not sufficiently Islamic. The fundamentalist groups jockeying for power in the post-Taliban political landscape have seized upon the judiciary as an institution they could control and use as a pulpit. However, in the countryside judges complain of constant pressure from local power-holders to conform to their will, regardless of the law. For example, the chief judges of the provincial courts of Herat and Nangrahar both complained of convicted criminals being released at the whim of local and regional power-brokers in 2002.¹⁶ As discussed above, the Chief Judge of Herat has been the target of violence.

Creating an independent and responsible judiciary, as required by Afghanistan's new constitution, is a process likely to take decades. The judiciary must begin a long battle for legitimacy, for only once it is trusted as a non-partisan institution will it have the support to become genuinely independent. This requires creating systems of oversight and transparency. Judicial procedures and decisions must be clear, public, and based on law. Fundamentally, this process requires judicial leaders who share this vision. International support to legal education and bureaucratic management now will help pave the way for a better system in the future. Although such contributions will not ensure success, the failure to provide them virtually ensures failure.

Reconstruction

International aid to the justice sector in Afghanistan has thus far been largely dysfunctional. The dysfunction was not for lack of a strategic vision – significant effort has been made to view the sector as a whole and to establish the coordinating bodies and mechanisms to implement that strategy. Rather, implementation has been piecemeal at best owing to rivalries, limited resources, and poor coordination of Afghan actors and donors.

The need for a coordination mechanism for reconstruction of the judicial system was foreseen even in the harried days of the Bonn Agreement. Establishing the rule of law – ultimately the keystone of the Agreement's framework – requires a judicial system that can protect rights and correct wrongs. A Judicial Reform Commission, as described above, was conceived to “rebuild the domestic justice system.” In its founding decree, the Commission was given an expansive mandate, and the first task of the Commission and its partners was to develop a program for implementation. The Government of Italy, agreed in April 2002 to take the lead in strengthening the judicial and penal systems and administration of justice. As lead nation, Italy was expected to take a lead in funding activities, raising funds from other donors, and aiding the Afghan authorities to coordinate activities in the sector.

¹⁶ Interviews conducted by the author, September 2002.

Italy hosted a judicial summit in December 2002 to discuss overall plans for the sector. At this meeting, the key Afghan actors, including the Supreme Court and the Ministry of Justice, publicly agreed to the leadership of the JRC in the sector, and donors committed approximately \$30 million to activities to rebuild the justice sector.¹⁷ These commitments, however, remained vague, and it was up to the JRC to establish specific priorities and programs. With technical expertise from the Asia Foundation, funded by USAID, the JRC conducted consultations with all relevant actors and produced a Master Plan for the sector in January 2003. The Master Plan laid out proposed programs over the life of the Commission, in four categories: Law Reform; Surveys, Physical Infrastructure, and Training; Legal Education and Awareness; the Structure of Judicial Institutions. Within these categories, the Master Plan identified 30 individual projects to achieve objectives over an 18-month period.

Thus, in early 2003, with a clear Afghan authority, a lead donor, some initial pledges, and a strategic framework for initial rehabilitation, work was to begin. Almost immediately, these best laid plans began to go awry. The work on the Master Plan was hurried, and several important actors, especially the Supreme Court and the Government of Italy did not feel that they had sufficient opportunity to give input to the final draft. Particularly galling for the Italian Embassy, which was funding the JRC salaries and offices, was that the plan had largely been written by American consultants. The Italian Ambassador publicly welcomed the document in a coordination meeting hosted at their Embassy, but in private they expressed their displeasure to the JRC leadership. The plan, however, had been adopted by the JRC and approved by the Afghan Government during the national budget process. Pressure by the Embassy was seen as a threat to Afghan leadership in the sector.

These initially minor strains paled in comparison to the deep enmity between the Afghan institutions. Lack of capacity and severe divisions between the permanent Afghan justice sector institutions has made coordination of the sector impossible. The Judicial Reform Commission was mandated by President Karzai to coordinate law reform and reconstruction of the judicial system – a mandate that drew authority and control of foreign assistance away from the permanent institutions. The JRC was meant to set policy and priorities for the sector – and in practice determine where donor funds would be directed. From the start, the JRC had neither the capacity, the funding, nor the political cover to undertake this significant task, nor implement critical reforms. Without intervention from the Presidency, a turf war between the Supreme Court, the Ministry of Justice, the Office of the Prosecutor General, and the JRC continued unabated.

The vast majority of funding for activities in the justice sector has come from Italy, the United States, and Germany. Italy has a Justice Project, tied to the Embassy and

¹⁷ Press Briefing by Manoel de Almeida e Silva, Spokesman for the Special Representative of the Secretary-General on Afghanistan, 26 January 2003.

Cooperazione Italiana. This office is responsible for oversight of the Italian funded projects, and for policy. For instance, this office has been key in establishing the Gardez Justice project, a justice sector rehabilitation project integrated with the U.S. military presence in that region. The Italian Justice Project has also drafted a new interim criminal procedure law which it plans to introduce through the Gardez Justice project and Italian-funded training programs. Italian funding thus far has primarily gone to four projects: training for judges and prosecutors undertaken by the International Development Law Organization (IDLO); funding for the UN Development Program (UNDP) to pay salaries and expenses of the Judicial Reform Commission and construct courts; funding to UNODC for prison construction; and funding to rehabilitate the High Court of Appeals in Kabul.

The United States is contributing to the justice sector primarily through three projects funded by USAID. The Asia Foundation and Management Systems International (MSI) provide technical assistance to the Judicial Reform, Constitutional, and Human Rights Commissions. This assistance is in the form of foreign experts to assist in law reform, coordination of activities in the sector, training, and courthouse design. By seconding experts directly to these Afghan government institutions, the Asia Foundation managed to have significant input during a formative process for these institutions, while also ensuring that decision-making was ultimately led by Afghans. MSI and Ronco were also contracted to build several court facilities.

The UN Assistance Mission to Afghanistan (UNAMA) also supports the justice sector in an advisory capacity to the government, but has no implementation responsibilities. UNAMA has supplied corrections and civilian police experts to assist the prisons and police projects. UNAMA also has a Rule of Law section, but failed to fill key senior posts for most of 2003.

Individual foreign assistance projects have yielded results, but overall coordination and cooperation in the justice sector has been lacking. The disjointed Afghan leadership in the sector was exacerbated by weak coordination on the international side. The Italian government, the lead country, has maintained distance from the Afghan institutions. Rather than support Afghan-led decision-making, the Italian effort has preferred to choose and implement its projects with limited consultation. JRC efforts to coordinate the sector without Italian support were unsuccessful, and the relationship between the JRC and the Government of Italy soured – leading to an unsuccessful Italian effort to have the Commission disbanded altogether.

Similarly, USAID was more interested in delivery of concrete assets, like buildings and numbers of individuals trained, than in establishing an institutional basis for the justice sector. Factional tensions and competition for limited resources are an unvarying element of state-building work in post-conflict situations. Progress in difficult environments is essential to make use of the “easy” projects, such as new buildings – yet the fundamental work of institution-building often takes a backseat to concrete deliverables when funding decisions are made. Ultimately, the U.S. and the UN, occupied with other issues such as the constitution, creation of a national army, road-building, and disarmament placed a

low priority on reestablishing the judiciary, and no political capital was spent to put the sector on track.

Conclusion

Rebuilding Afghanistan's judiciary presents a conundrum found in many post-conflict situations. A functioning judicial system is crucial to creating a legitimate, stable government. Yet creating a competent judiciary takes many years – and therefore tends not to get priority treatment in the immediate post-conflict period. True judicial reform has been delayed in Afghanistan. The work of the international community thus far has focused on providing band-aids to a thoroughly destroyed system.

It is time for the Afghan government and the international community to re-focus their efforts to resurrect a judicial system for Afghanistan. As time passes and forces become entrenched, this work will only become more difficult. At present, the real judicial system of Afghanistan today is not the formal court system, but rather an informal system of tribal or village councils. These councils, a venerable Afghan tradition, have risen to fill the void – handling every sort of issue from property disputes to murders. Local traditional institutions provide a valuable service, and should be harnessed to improve the delivery of justice for Afghans throughout the country. But the work of establishing local and national institutions under legal government authority must also press ahead.

The work of rebuilding the judicial system must take place simultaneously at the national and local levels. At the national level, the permanent justice institutions are in serious need of both reform and resources. Programs must be introduced to systematize the courts, ensure merit-based advancement, and provide oversight. The highest level of the judiciary should be re-appointed and approved by a parliamentary committee, to ensure that basic standards are met. At the local level, assistance should focus on establishing “pockets of competence” – judicial institutions in key provincial and district centers that function properly. This limited number of locations should be resourced with proven staff, buildings and communications resources. Once functioning, these pockets would establish their legitimacy and draw in citizens from other districts. They could also liaise with traditional mechanisms to ensure that disputes resolved in those forums protect individual rights. Eventually, the number of pockets should increase – as both demand and resources increase.

Afghanistan's devastated judicial system has to be re-built brick-by-brick, judge by judge. Any plan which attempts to tackle everything at once is bound to fail – with limited resources dissipated rather than concentrated. Instead, long-term thinking must be coupled with short-term objectives to set the process in the right direction. This effort, however, will require a far more cooperative effort than the Afghans and the donors have yet been able to muster.