



Building a post-war justice system in Afghanistan

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Abstract. This paper examines key dimensions of justice in post-war Afghanistan. These are *shari'a* (Islamic law), traditional institutions of informal justice (*jirga*), the Afghan interim legal framework, and human rights principles. It is argued that despite their apparent incompatibility, these various dimensions of justice could be integrated within a coherent framework of a new justice system in post-war Afghanistan – a framework that would promote interaction between local institutions of informal justice and a district level court of justice, on the one hand, and between these two and a proposed human rights unit, on the other. On the basis of this analysis, an experimental model of a system of justice is proposed, which integrates local *jirga* and human rights units into the existing formal justice (based on *shari'a* and positive law) and law-enforcement institutions. This experimental model provides a multi-dimensional framework that both reflects the cultural and religious values of Afghan society, and at the same time, has the capacity to draw on human rights principles. It is maintained that the model has the capacity to deliver justice expeditiously and in cost-effective ways; it also has a strong potential to act as a channel of communication between ordinary people and a modern participatory state in post-war Afghanistan. However, in order to test the applicability of this model in the real world, it needs first to be thoroughly discussed among Afghan and international legal experts as well as among ordinary Afghan people, and then piloted in selected districts in Afghanistan.

Introduction

The formal justice system of Afghanistan has been influenced, to varying degrees, by Western (mainly French) legal thought and moderate Islam, radical Marxism, and by radical interpretations of Islam. These influences, by and large, reflected the values, ideologies, and politics of the various governments that Afghanistan has witnessed since its emergence as a politically organised society. In the 1950s and 1960s, the justice system was modernised and state law, rather than *shari'a*, became the primary source of the justice system. After the military coup in 1978, the Marxist government attempted to introduce a Soviet-style judicial system, but these changes were rejected before they took root. The subsequent *mujahedin* regime of 1992–96 declared *shari'a* as the basis of the state, and this was further entrenched by the *taliban*'s regime. While most of these regimes have partly used their systems of justice as tools for achieving their political goals, they have nevertheless contributed to the richness of Afghan legal culture; there is much within these

different doctrines and approaches that could be fruitfully used and integrated in a post-war justice system.

It is also important to mention that, as the formal Afghan justice system was elitist, corrupt and involved long delays (Wardak, 2002a; ICG, 2003b), many Afghans avoided contacts with it. As a result, many Afghans – particularly in rural areas – continued to use traditional institutions of informal justice such as *jirga*, *maraka*, and *shura* (see footnotes 1 and 2 for a distinction between these concepts). Although the practices of these traditional institutions of popular justice sometimes conflicted with Afghan legal norms and with international standards of human rights, they nevertheless resolved tribal and local conflicts expeditiously and in cost-effective ways (Wardak, 2002b).

Since the establishment of the Afghan Interim Administration in December 2001 (and later the Afghan Transitional Authority), and the reinstatement of the 1964 Afghan Constitution and “existing laws”, there has been a new emphasis on the need to incorporate international human rights principles into Afghan justice institutions (Decree on the Establishment of Afghan Judicial Commission, 2002). The increasing involvement of the international community and the UN in the social, political and economic reconstruction of Afghanistan appears to necessitate the compatibility of the Afghan justice system with international standards and principles of human rights.

In this paper, key dimensions of the post-war justice system in Afghanistan are examined. These are: *shari’a* (Islamic law), traditional informal justice (*jirga*), “existing laws” (interim legal framework) and human rights principles. On the basis of an analysis of the interrelationships among these, an experimental integrated model of post-war justice system in Afghanistan is proposed. However, first, it is important to place the subject of examination in this paper in the general context of Afghan society and nearly a quarter of a century of conflict in the country.

The Afghan context

Afghanistan is a land-locked country that lies at the crossroad between South and Central Asia. To the North and Northwest of the country lie the former Soviet republics of Uzbekistan, Tajekistan, and Turkmenistan; to the South and East is Pakistan; to the West of Afghanistan lies Iran and to its North-East is China. It is this strategic geo-political location of Afghanistan that has made it both a cross-road between civilizations and a battlefield between competing global and regional powers.

The total population of Afghanistan is estimated to be between 20–25 million, composed of various ethnic and tribal groups, most of whom have

lived together in the country for centuries. These include Pashtun, Tajik, Hazara, Uzbek, Turkmen, Aimaq, Baluch, Brahui, Nuristani, Pashaie, Pamiri, Kirghiz, Qizilbash, Mongols, Arabs, Gujars, Kohistanis, Wakhs and Jats. Among these, the Pashtuns constitute the largest ethnic group (estimatedly around 50% of the total Afghan population), followed by Tajiks, Hazaras and Uzbeks (Dupree, 1980; Canfield, 1986; Glatzer, 1998; Wardak, 2004a).

Although these various Afghan groups are generally distinguishable from one another by their members' distinct language (or accent) and ethnic origin, for generations trade and commerce, universities/colleges, government institutions and cross-regional employment opportunities have pulled thousands of Afghans from different ethnic/tribal backgrounds to live and work side by side. Furthermore, inter-marriages, service in the national army and police, and participation in shared cultural, religious and social activities have strengthened citizenship at the expense of ethnic/tribal affiliations in urban centers and cities. This interaction among Pashtuns, Tajiks, Hazaras, Uzbaks, Turkmen's and other Afghan ethnic and tribal groups has resulted in a cultural fusion among various Afghan ethnic and tribal cultural traditions at the national level. The richness of Afghan national culture owes much to this centuries old multi-cultural fusion.

However, since the Soviet military intervention in Afghanistan in 1979, the country has been used as battlefield between competing global and regional powers and groups – a battlefield between the former Communist USSR and the Capitalist West (mainly the USA) in the 1980s; in the 1990s a battlefield between Pakistan, the Arab Gulf countries, on the one hand, and Iran and Russia on the other; and more recently a battlefield between foreign Muslim extremist groups and a right-wing US administration. In this process of rivalry, Afghanistan's main immediate neighbours infiltrated deep into Afghan politics. With competing interests in the country, they created their client factions/warlords and sponsored them militarily, financially and politically. The factions gradually became so dependent on their foreign sponsors that they saw Afghanistan's interests through the eyes of these foreigners. These neighbours also exploited Afghanistan's existing ethnic and religious composition and justified their interventions on the grounds that they had common religious and ethnic ties with their clients. Thus the armed conflict (which continued for several years even after the defeat of the former Red Army) resulted in the extensive destruction of Afghanistan's economic, political and social infrastructure. The Western world, particularly the USA, which lured the Soviets to invade Afghanistan (Breziniski, 1998; Cooley, 2002), and strongly supported the Afghan *mujahedin* – Islamic warriors – almost completely abandoned the ruined country after the Red Army was defeated.

The destruction of the country's economic infrastructure, particularly, provided opportunities for foreign players and their client Afghan warring factions to exploit the situation, seeking their strategic goals and sectarian interests at the expense of the Afghan population. The almost total collapse of the Afghan pre-war economy gradually resulted in the emergence of a "war economy" (Rubin, 1999; Goodhand, 2003) – economic conditions that mainly centred on the manufacturing, repair, use and smuggling of weapons and ammunition, on the one hand, and on the smuggling (and production) of illicit drugs and national treasure on the other. The nearly a quarter of a century long conflict also resulted in a generation of young people who were largely deprived of the opportunity of gaining educational qualifications and other useful skills. This "war generation" of thousands of young people has been deeply traumatised by the war – many lost their parents, relatives and homes. The various factions were able to recruit their fighters from amongst this war generation, so that the conflict in which they had a stake continued. Fighting for one or other warlord provided these young men with a source of income, social status, and a way of channelling their energies. More importantly, this situation provided the opportunity for foreign Muslim extremist groups – mainly the *al-qa'ada* – to use Afghan soil as headquarters for terrorist activities against other nations. There now exists an increasingly convincing body of evidence, which links the Afghanistan-based *al-qa'ada* to the 11 September terrorist attacks on New York's Twin Towers and on other targets in the United States.

In the wake of the US-led military campaign in Afghanistan that resulted in the collapse of the Taliban regime, the Bonn Agreement of December 2001 was signed among the representatives of Northern Alliance warlords, pro-Zahir Shah (former King of Afghanistan) technocrats/intellectuals, and two other small Afghan groups that were mainly based in Pakistan and Iran. Although the four anti-Taliban groups did not consult (or represent) the people of Afghanistan, the Bonn Agreement which was signed in a rush, did open the possibility of a new participatory political order for Afghanistan. It provided a framework of state formation processes that aimed at the eventual creation of a "broad-based, multi-ethnic and fully representative" government by 2004. The Agreement, which resulted in the establishment of the Afghan Interim Administration in December 2001, raised hopes among many Afghans that there was an opportunity to end warlordism in Afghanistan and to rebuild the country's social, political and economic institutions. However, the reinstatement of most warlords as key political and military leaders in the post-Taliban administration, and the US government's emphasis on the "war against terrorism" rather than on rebuilding Afghanistan, has spread disillusion among many Afghans about the prospects of lasting peace. The US's military and

financial support for warlords, who may cooperate in hunting down remnants of the *taliban* and *al-qa'ada*, continues to be a major obstacle to the development of national participatory institutions in Afghanistan, and therefore, a major source of increasing instability in the country.

Despite this, the people of Afghanistan still expect the patriotic Afghan leaders/forces and the fair-minded international players to help them lay down the foundations of participatory institutions and lasting peace in the country. Most Afghans see the deployment of the International Security Assistance Force (ISAF), economic reconstruction plans, and the UN-led political stabilisation process in Afghanistan as a unique opportunity for rebuilding their country and for its re-integration into the global community. These efforts may, for the first time in the past 25 years, provide common ground between the interests of the international community and the interests of the ordinary Afghan people. Central to political stabilisation and to the re-building of social and political order in Afghanistan is the establishment of an effective system of justice in the country. In this paper, key dimensions of a post-war justice system in Afghanistan are identified and discussed. One of the most important of these is *shari'a*.

Key dimensions of post-war justice in Afghanistan

I: Shari'a (Islamic law)

As the overwhelming majority of the people of Afghanistan are Muslim, Islamic teachings and *shari'a* permeate various spheres of life in Afghan society. Thus, *shari'a* has strongly influenced the development of Afghan justice since the emergence of Afghanistan as a politically organised society. The population of Afghanistan is mainly divided by their religious following into an estimated 80–85% of *sunnis* and 15–20% *shei'ite*. The overwhelming majority of *sunnis* in Afghanistan are followers of the *hanafi* school; Afghan *shei'ite* are, by and large, followers of the *ja'afari* jurisprudential school.

Shari'a is an Arabic word, which means “the path to follow”; it is also used to refer to legislation, legitimacy, and legality in modern Arabic literature. However, *shari'a* in a jurisprudential context means Islamic Law. The primary sources of *shari'a* are the *quran* and the *sunnah*. The first refers to the holy book of Islam, and the second to the statements and deeds of the Prophet Mohammad. However, relatively small portions of the verses of the *quran* and the contents of the *sunnah* include legislative material (Lippman et al., 1988). Taken together, the two do not seemingly provide answers to all types of legal issues. However, the *quran* and the *sunnah* do lay down general principles as well specific rules that are subject to interpretation and analysis. Thus,

after the death of the Prophet Mohammad, the *caliphs* (leaders of the Muslim community) and the *sohaba* (the Prophet's associates) appointed consultants to help in the correct interpretation of the *quran* and the *sunnah* and in the extraction of rules (for new situations) that seemingly did not exist in the two primary sources of *shari'a*. As a result, *qiyas* and *Ijma* were added as secondary sources of *shari'a*.

Qiyas, in the context of Islamic jurisprudence, means analogical reasoning. That is, cases and questions not seemingly answered by the primary sources are deduced from similar original cases in the *quran*, or in the *sunnah* through a process of reasoning by analogy. This process was handled only by those Islamic jurists who met strict criteria relating to their knowledge, piety and personal integrity; they were also required to fulfil very strict conditions for the kind of cases that were handled by *qiyas*.

The fourth source of *shari'a*, *ijma*, means the consensus of Islamic jurists on a ruling. When qualified Islamic jurists reached a unanimous agreement on solution to a specific new problem, their opinion became binding with absolute authority. In this way the outcomes of both *qiyas* and *ijma* were transformed into statements of divine law. This has, in turn, resulted in the documentation and compilation of hundreds of cases and books that are used, today, as references in Islamic jurisprudence (Wardak, 2004b).

In the process of the consolidation of the Afghan state institutions, particularly in the early 20th century, the *hanafi* school (alongside traditional customary laws) provided the basis of the Afghan justice system. This version of the *shari'a* existed in symbiotic relationships with Afghan customary laws and with *sunni* "folk Islam" that generally reflected the cultural, social and economic realities of every day life of the overwhelming majority of the people of Afghanistan. *Ulama* (Islamic scholars) interpreted this version of Islam and the *shari'a* and also worked as *qadi* (judge) in state courts (Olesen, 1995). However, in order to have control over the *ulama* and over their interpretation of Islam and *shari'a*, the government established the official institution of *jami'at -al- ulama* (society of Islamic scholars/jurists) and the state-funded Islamic *madrasas* of *dar -al- o'lume arabi* and *abu hanifa* in Kabul. While *jami'at -al- ulama* members who were paid very handsome salaries endorsed the government policies, the two official *madrasas* trained students of Islamic theology and jurisprudence as *qadi*, or state judges.

In the 1950s and 1960s, as Afghanistan's political, economic and cultural relationships increased with the rest of the world, the rulers started to modernise the Afghan justice system in line with those of the Western world. The justice model that Afghan rulers chose to adopt resembled closely the Egyptian model, which was strongly influenced by the French and Ottoman legal systems (Kamali, 1985). In order for the modern Afghan justice system

to be run by professional judicial personnel, the faculties of Islamic Law and of Law and Political Science were opened at Kabul University. Thus, the graduates of *dar -al- o'lume arabi* and *abu hanifa* were only eligible to work as judges after they had studied modern positive laws as well as Islamic jurisprudence at the Faculty of *shariat*. Similarly students at the *qazayee and saranwali* (judiciary and prosecution) branch of the Faculty of Law and Political Science were trained to work as judges mainly in the commercial and administrative sections of the Afghan judiciary. In addition, from the early 1960s all these graduates had to do a nine-month legal training course (including 3 months on-the-job training) called *kadre qazayee*. Some working legal professionals/judges and lecturers at the faculties of Islamic Law and Law were also sent to the USA and Egypt for further legal training. This modernisation process was also accompanied by the codification of many Afghan laws in the 1960s and 1970s.

This process gradually resulted in the relative secularisation of the Afghan justice system, especially in the areas of criminal law, commercial law, and general civil law. Thus state law, rather than *shari'a* became the primary source of the justice system. Nevertheless, *shari'a* remained a secondary source. As Article 69 of the 1964 constitution states: "... In area [s] where no such law exists, the provisions of the *Hanafi* jurisprudence of the *Shariaat* of Islam shall be considered as law." While this justice system appears to have reflected a balance between Islamic *shari'a* and modern legal norms, its administration involved long delays, bribery and corruption. Many Afghans, particularly in rural areas, avoided contact with state judicial institutions (Wardak, 2002a).

After the 1978 military coup, the Afghan Marxist government attempted to introduce the (former) Soviet-style judicial system in line with its socialist ideological, political and economic goals. However, since the Marxist totalitarian regime was at odds with both Islam and Afghan traditions, the whole system of governance and its judicial reforms (decrees) were massively rejected. After the collapse of the last Afghan Marxist government, the *mujahedin* government (1992–1996) declared *shari'a* as the basis of their "Islamic State of Afghanistan". Despite the fact that the various *mujahedin* groups, which formed the government interpreted Islam in conflicting ways, most of them attempted to impose a totalitarian theocracy of which *shari'a* laws were part and parcel. The *taliban's* theocratic regime (1996–2001) imposed an even more regressive version of *shari'a* much of which reflected their ignorance of *shari'a* as well of a system of justice.

Despite the over (or under) emphasis on the role of *shari'a* in Afghan state institutions by different political regimes, it remains as an important constituent element of post-war Afghan justice. This is recognised by the Bonn

Agreement (2001:3), which emphasises that the Afghan Judicial Commission and the UN shall “rebuild the [Afghan] domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.” Past experiences, indeed, show that it is only that version of *shari’a* that is in harmony with Afghan cultural traditions, existing legal norms and fundamental principles of human rights that can make important contributions to a credible post-war justice system in Afghanistan.

II: Customary law and jirga

The role of the Afghan central government and its formal institutions of justice (courts, police, corrections etc.) in maintaining social order in Afghan society has always been limited (Wardak, 2002a; ICG, 2003b). This particularly applies to rural Afghanistan, where it is estimated that over 80% of the Afghan population live. In some southern and eastern parts of the country, formal institutions of justice have no (or just nominal) existence, and yet there exist a reasonable degree of social order in these areas.

A great many potentially serious disputes, relating to domestic violence, divorce, inheritance and marriage are normally settled within the “private” sphere of the Afghan extended family without the involvement of local/tribal or state institutions (Wardak, 2002a). They are dealt with on the spot before becoming a “public” problem, and a burden on other societal institutions. However, those disputes that are considered “public” are resolved by public institutions at local and tribal levels. The main institution that has traditionally operated as a mechanism of dispute settlement (at village and tribe levels) is *jirga/maraka* among the Pashtuns and its approximate equivalent – *shura*¹ – among the non-Pashtuns of Afghanistan (Carter and Conner, 1989; Farhadi, 2000; Gletzer, 1998; Hashemi, 2000; Malekyar, 2000).

The term *jirga* according to the Pashto Descriptive Dictionary (1978: 1272) is an original Pashto word, which in its common usage, refers to the gathering of a few or a large number of people; it also means consultation according to this source. The word *jirga* is also used in Persian/Dari. According to *ghyathul-lughat* (1871: 119) it is derived from *jirg*, which means a “wrestling ring”, or “circle”, but is commonly used to refer to a gathering of people. Other scholars believe that the word *jirga* originates from Turkish, where it has a very similar meaning (Faiz-zad, 1989: 5).

*Jirga*² in every day practice refers to a local/tribal institution of decision-making and dispute settlement that incorporates the prevalent local customary law, institutionalised rituals, and a body of village elders whose collective decision about the resolution of a dispute (or local problem) is binding on the parties involved (Wardak, 2002b). Those on the *jirga* combine “traditional authority” (based on personal qualities, social status, and leadership skills) as

well as “competent authority” (based on the individual’s recognised expertise and skills), which play a central part in achieving a *prikra* (ruling) that is satisfactory to both parties.

One important form of tribal *jirga* is *nanawate*, which means seeking forgiveness/pardon and the obligatory acceptance of a truce offer. This happens when the tribal *jirga* makes a *prikra* (decision) that relatives of the *par* (guilty party) send a “delegation” to the victim’s house. This consists of a group of people that include elders, a female relative of the offender holding a copy of the holy *quran*, and a *mullah* (Muslim priest), alongside the offender’s other close relatives (and sometimes the offender himself) who bring a sheep and flour to the victim’s house. The sheep is often slaughtered at the door of the victim’s house. Once inside the house, the delegation seeks pardon on behalf of the offender. As it is against the tribal code of behaviour to reject a *nanawate*, the victim’s relatives pardon the offender and the two parties are reconciled. This reconciliation is called *rogha*. Thus unlike formal state justice, which often labels offenders as different, evil, and excludes them from the community, *nanawate* reintegrates them into the community. Existing criminological knowledge suggests that reintegrative social control is, by and large, more effective in reducing crime than disintegrative social control, normally exercised by formal state institutions (Braithwaite, 1989).

The main reasons that Afghan people have preferred *jirga/shura* to formal justice is because the former is conducted by respected elders with established social status and the reputation for piety and fairness. In many cases, the disputants personally know the local elders and trust them. In addition, in the context of *jirga/shura*, elders reach decisions in accordance with accepted local traditions/values (customary law) that are deeply ingrained in the collective conscience of the village/tribe – they have a profound existence in the collective mind of the village and in the minds of its individual members. Also unlike state courts, *jirga/shura* settle disputes without long delays and without financial costs. Illiteracy plays an important role in discouraging people from using the formal courts – the overwhelming majority of Afghans are unable to make applications, read/understand the laws or complete the paper work.

However *jirga/shura* has its own problems: in some cases of murder *jirga* may recommend *badal* (direct vengeance), or the marriage of a woman from the *par*’s tribe to the victim’s close relative. Although these practices have become increasingly rare in recent years (Johnson et al., 2003), the first punishment is in direct conflict with the Afghan state laws, and the second one is a clear violation of fundamental human rights. In addition, *jirga/shura* is generally a male-only institution; it can also be excessively influenced sometimes by powerful elders. More importantly, in areas where warlords exercise direct control over the population, *jirga/shura* decisions are influenced

(or undermined) by those with guns and money. However, by incorporating *jirga/shura* into the new justice system, it would conform to the norms of the national legal order of post-war in Afghanistan. This would, in turn, help to make this traditional patriarchal institution more inclusive of both men and women. But a pre-requisite for all this is a secure social environment where, *jirga/shura* and the justice system as a whole could operate without any illegitimate influence by warlords.

III: Interim legal framework and the current justice “system”

The Afghan Interim Administration (AIA) that was established as a result of the Bonn Agreement in December 2001 inherited a justice system devastated by the 25 year-long civil conflict in Afghanistan. However, under the Bonn Agreement, the 1964 Afghan constitution and “existing law” were reinstated with some important modifications. In effect, this constitution and the “existing laws” currently provide an interim legal framework for Afghanistan. This “framework” represents a mixture of *shari’a* and positive laws that were enforced until the Marxist coup d’état in 1978.

Under the Bonn Agreement, the establishment of an independent Judicial Commission of Afghanistan was authorised. It was envisaged that the Commission (with the assistance of the UN) would provide the opportunity for Afghanistan’s best legal scholars and practitioners to review and reform the Afghan domestic Justice system. However, in view of the vastly devastated state of the post-war Afghan justice “system”, much of it needs rebuilding and even building from scratch. The Judicial Commission, which has a huge and complex task ahead of it, currently focuses on four major areas of Afghan justice system and legal order:

- a. law reform;
- b. assessment and development of technical, logistical and human resources;
- c. review of the structure and functions of the justice system and the division of labour among its various components;
- d. legal aid and access to justice

Despite the formal reactivation of the formal Afghan justice “system” throughout the country, it is far from prepared to deliver justice. It is a hugely devastated institution. The devastation not only includes extensive damage to buildings, office furniture, official records, and essential office equipment, but also includes the lack of qualified judges and other justice personnel. Importantly, it is highly fragmented, with little or no interaction among the judiciary, the police, the prosecution, and the prison/correction service (Amnesty International, 2003a; Johnson et al., 2003; UNDP, 2002). One of the main reasons for the lack of co-operation between the judiciary and the police is that the latter consist predominantly of Northern Alliance militia who

are highly dependent on, and more loyal to their factional patrons than to the national Afghan Interim Administration. The police, in many ways, are merely an extension of the Northern Alliance's militia, who mainly represents Afghan Tajiks; they have no (or little) basic understanding of policing, and most of the people they police have no trust in them (Amnesty International, 2003a; Johnson et al., 2003).

In addition, corrective regimes and rehabilitative programmes for both adult and young offenders do not currently exist in Afghanistan. Although *dar -al- ta'adeeb* (juvenile correctional institution) is nominally functioning in Kabul, the institution has neither the necessary facilities nor the professional personnel to deal with the serious personal and social problems that Afghan young rule-breakers face today. Thus, the current fragmented Afghan justice "system" is highly ineffective and dysfunctional; it does not operate as a system at all.

Similarly, the Afghan prison/correction "service" has only a very basic existence in the main urban centres; it has no existence at all in many rural districts and some provincial centres (Amnesty International, 2003b; Johnson et al., 2003). Although the prison service in Kabul was recently transferred from the Ministry of the Interior to the Ministry of Justice, its personnel has not changed. Many of the inmates are political prisoners who live in very overcrowded conditions and are fed by their relatives and friends. The situation in the prisons is particularly serious in Sheberghan and Herat. (Amnesty International, 2003b; Physicians for Human Rights, Report January 28, 2002). The sources report that these prisoners are treated in inhuman ways, and many of them suffer from illnesses related to malnutrition and overcrowding; dozens have died since their surrender to the US-led Northern Alliance forces in November 2001.

However, Afghanistan has a large body of codified laws including the 1975 Afghan Civil Code, the 1976 Criminal Codes, the amended 1973 Law of Criminal Procedure, and the 1973 Law of Police. Although these laws are currently implemented, they need some important modifications. In addition, as stipulated in the 1964 constitution, in areas where no law existed the *hanafi* school of *shari'a* is considered as applicable. These various laws, which currently provide the interim legal framework, are to be used as an important element of post-war justice system in Afghanistan.

IV: Fundamental principles of human rights and transitional justice

The past 25 years of war have badly brutalised Afghan society as a whole. During this period, serious abuses of human rights and war crimes (by all sides of the conflict) have taken place. These include massacres, looting of houses and property, rapes, revenge killings, illegal imprisonment, the tor-

ture and murder of prisoners/POW and assassinations of political opponents (Amnesty International Annual Report, 2002; *Newsweek* 26 August Issue, 2002; Rubin, 2003). These abuses of human rights continue to be committed by those with guns and money, many of whom currently occupy very important political and military positions in the country (Amnesty International, 2003; human rights Watch Report, April 2002; human rights Watch Report, October 2002; human rights Watch Report, July 2003). This legacy of war, poverty, and religious fanaticism have particularly affected Afghan women, who have suffered from both cultural and structural inequalities (and violence) in Afghan society for centuries. The persistence of this situation over the past quarter of a century has produced a “culture of human rights abuses” – patterns of behaviour and practices that are justified and even positively sanctioned in the shadow of warlordism in Afghanistan.

The gravity of this situation has long been recognised by Afghans, the UN and international human rights organisations. While, conformity of post-war justice to “international instruments ratified by Afghanistan” was emphasised by the Bonn Agreement, the issue of past crime was not. The Bonn Agreement (2001: 3), which authorised the establishment of an independent human rights Commission for Afghanistan says: “The Interim Administration shall, with the assistance of the United Nations, establish an independent human rights Commission whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions”. But the Agreement that was concluded in a rush and under heavy pressure from the US and its rediscovered allies in the war against terrorism – the Afghan warlords – remained silent with regard to past crimes and a mechanism for investigating them. The need for this was more clearly reflected in the secretary-general’s report to the Security Council in December 2001, which stated that “The Afghan people and their international partners must 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” (C/2002/1157, para 83). However a mechanism for addressing crimes of the past, and the role of the “international partners” was not clarified. Several months later, Mary Robinson, the former United Nations High Commissioner for human rights, raised the issue more explicitly and proposed that dealing with past crimes needed to be part and parcel of the process of reconstruction and institutional reform in post war Afghanistan:

We know well from past experience, in Afghanistan and elsewhere, that sustainable peace, reconciliation, reconstruction and development cannot be built upon a foundation of impunity. . . . There can be no amnesty for perpetrators of war crimes, crimes against humanity and gross viol-

ations of human rights. Just as has been the case in Sierra Leone, East Timor, Cambodia, the Former Yugoslavia and Rwanda, so it must be the case for Afghanistan. When we speak of accountability, we refer to an Afghan-led and owned process that has different elements. These are justice, truth telling, reconciliation and institutional reform. . . All these elements are indispensable. (Robinson, 9 March 2002)

The lack of political will on part of key international players and the Afghan warlords who dominate the Afghan Transitional Authority means that this valuable advice has yet to be translated into action. One of the most obvious vehicles for implementing this advice is the Afghan Human Right Commission. However, since the birth of the Commission (about two years ago), it has had neither the power nor the resources to accomplish most of the tasks it was assigned. The Commission's work-plan to establish regional offices and "working groups" in the main centres of Afghanistan has only been partially implemented. Even the "working groups" that have been established are largely ineffective. The ICG's (International Crisis Group) recent report (2003: 14) says that: "The working groups – which were to include human rights education, monitoring and investigations, women's human rights, and transitional justice – have been largely ineffective, hobbled in part by changed assignments for individual members." This raises serious questions about the independence of the "Independent" human rights Commission of Afghanistan. Indeed, the problem for Afghanistan is that many of those accused of human rights violations and war crimes are key figures in the Afghan Transitional Authority and military power-holders in various regions of the country. Thus, it is not surprising that since the installation of Afghan Interim Administration and its successor, the Afghan Transitional Authority, vast-scale human rights violations have taken place (Amnesty International, 2003a; Amnesty International, 2003b; human rights Watch Report, October 2002; human rights Watch, June 2002; human rights Watch, July 2003).

Changing the "culture of human rights abuses" needs, as Mary Robinson proposed, concrete inter-institutional efforts with strong and long-term support and commitment by the intentional community. Co-ordination of the activities of the Afghan Human Rights Commission, justice, educational institutions, at local and national levels, is particularly important. As will be discussed later, with the collaboration of Afghan educational and civil society institutions, the justice system can play an important role both in successful investigation of past abuses of human rights and in effective prevention of future violations.

Normative location of key dimensions of post-war justice

What has been so far described would seem to indicate that the establishment of a new justice system in post-war Afghanistan is a complex and multi-dimensional process. Post-war Afghanistan needs an integrated framework of justice that reflects the interplay between *shari'a*, local/tribal institutions of informal justice, the Afghan interim (formal) legal framework, and fundamental principles of human rights. The normative locations of the key dimensions of post-war justice system in Afghanistan are illustrated in Diagram 1 below.

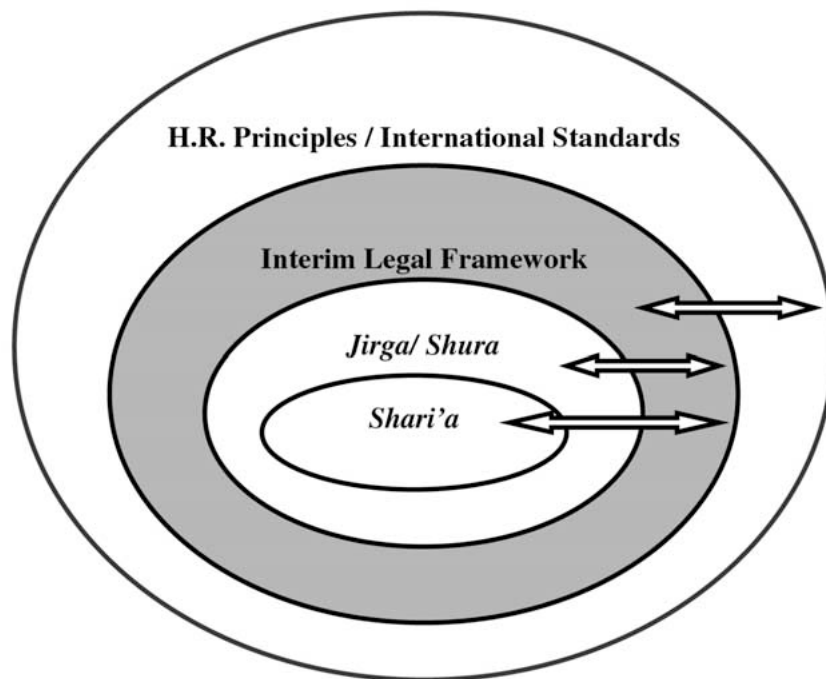


Diagram 1. Normative location of key dimensions of post-war justice in Afghanistan.

Diagram 1 above, shows that as Islamic *shari'a* permeates different aspects of Afghan society, it constitutes the innermost part of post-war justice and social order in Afghanistan. What is meant by *shari'a*, in this context, is its non-sectarian popular version that is not only part and parcel of the belief system of the overwhelming majority of the people of Afghanistan, but also strongly influences the social and cultural life of Afghan society. This version of Islamic teachings and *shari'a* is understood by local people and is closely tied to their daily lives. In order to interpret *shari'a* in ways consistent with the spirit of Islam as well as with the demands of the 21st

century, a new body of *jami'at -al- ulama* (society of Islamic scholars/jurists) needs to be established. Comprising Afghanistan's best, well-reputed and truly independent Islamic scholars/jurists (both *sunni* and *shei'ite*), the new *jami'at -al- ulama* would also need to be advised by international legal experts – both from Muslim countries and the Western world. Final decisions made and *fatwas* (religious decrees) issued by the Afghan *jami'at -al- ulama* would have a binding effect on all (Muslim) Afghans. This would ensure that *shari'a* is interpreted prudently and in the Afghan context. This would in turn, help strengthen the validity of a moderate and non-sectarian interpretation of *shari'a* at the expense of those “imported” and used by extremist Islamic groups for their own political agendas.

The non-sectarian popular version of *shari'a* has, over the centuries, closely interacted with the institutions of *jirga/shura* and existed in symbiotic relationships with them – the two have influenced one another significantly. Despite the opposition of the Afghan theocratic and Marxist regimes to traditional mechanisms of dispute settlement, *jirga/shura* has been widely used as the main alternative to the formal Afghan justice “system”. More recent empirical evidence shows that *jirga/shura* is very commonly used in the resolution of conflicts in the current post-war situation in Afghanistan (Johnson et al., 2003; UNDP, 2002; ICG, 2003b). This further confirms that the two internal dimensions of post-war justice in Afghanistan – popular Islam and *jirga/shura* – are located at the heart of the normative order of Afghan society and are central to its justice system. This point is recognised by the Bonn Agreement (2001: 3), which advises the Afghan Judicial Commission and the United Nations to rebuild the post-war Afghan domestic justice system in accordance with “Afghan legal traditions” among other things. The phrase “Afghan legal traditions” in the context of the Bonn Agreement is elaborated by UNAMA (2002: 5) in this way: “The issue of Afghan legal tradition refers to the customs, values and sense of justice acceptable to and revered by the people of Afghanistan. Justice, in the end, is what the community as a whole accepts as fair and satisfactory in the case of dispute or conflict, not what the rulers perceive it to be.” Indeed, justice that is imposed by the state is likely to remain “justice on paper”.

With regard to the external dimension, as Afghanistan is increasingly integrated into the international community, the post-war Afghan justice system must be sensitised to international norms and the fundamental principles of human rights. This dimension can no longer be completely separated from the normative order of Afghan society in the 21st century – Afghanistan, today, is as much part of the emerging “global culture” as any other nation in the world. There would, however, be a degree of tension/conflict between some aspects of *shari'a* and *jirga/shura* and the Western conception of hu-

man rights principles. This issue relates to the broader discussion about the “clash of civilisations” or “dialogue of civilisations”, which is beyond the scope of this paper. However as mentioned earlier, finding solutions to such tension/conflict would be the responsibility of Afghan *jami’at -al- ulama* assisted and advised by international legal experts in the West and in the Islamic world.

In the current situation, it is the Afghan interim legal framework which is the centre of gravity. Located in the middle of the Afghan normative order, it has the formal authority to act as a medium of communication between the demands of the external and internal dimensions of post-war justice in Afghanistan – between the demands of the moral order of the Afghan society and the requirements of living in an increasingly “globalised” international community. It is the future popularly approved Afghan constitution and other laws (the “existing laws” in the interim period) that would define the role and limits of Islamic *shari’a* within a formal legal framework. Likewise, informal local/tribal institutions of informal justice would need to be in harmony with the goals of the Afghan national state, its legal order and general principles of human rights. However, no attempt should be made by formal authorities to codify customary law; *jirga/shura* must continue to function as a genuinely local institution representing local people and their values/interests. This is to ensure that local people have the ownership of the justice system and are able to apply customary laws flexibly in various local contexts within which different conflicts are resolved.

In the same vein, it is also the interim legal framework (and future popularly approved Afghan constitution/other laws) that has the responsibility to define human rights in ways that do not violate the cultural and religious sensibilities of the people of Afghanistan. A degree of conflict does exist between the ways some human rights are defined by the Universal Declaration of human rights and the ways they are understood in an Islamic cultural context (An-Nai’im, 1990). This conflict will not be resolved by a unilateral imposition of a single set of standards by the state and its international supporters. The “universal” would need to be legitimised and properly understood within the “particularistic” and culturally relative context of Afghan society at grass roots level. Reaching final decisions about such issues would be mainly the responsibility of the Afghan *jami’at -al- ulama* and human rights Commission. Post-war Afghanistan would need to learn from the experiences of other Muslim nations, where human rights principles are integrated, to certain degree, into their domestic laws. This analysis of the interrelationships among the various dimensions of post-war justice in Afghanistan is further translated into an integrated model.

Towards an integrated model of a post-war justice system

The examination of the key elements of post-war Justice in Afghanistan, above, shows that a reinstated pre-war Afghan justice system (or a superficially reformed one) will not have the capacity to face the challenges of the post-war situation and meet the demands of the 21st century. It points to the need for the development of a new post-war model of justice – an integrated multi-dimensional model that represents Afghan cultural traditions, religious values, legal norms, and at the same time has the capacity to draw on human rights principles. Thus, an experimental model is proposed, which is illustrated in Diagram 2.

Diagram 2 shows that the post-war justice model proposes the establishment of *jirga/shura* and a genuinely independent human rights units alongside the existing court of justice (based on *shari'a* and positive law) and their integration into the overall system of justice at district level. The *jirga/shura* unit would be staffed by one or two full-time paid co-ordinators based in a fully equipped local office with a *jirga* hall. These local officers would replace *amer -e- hoquq* (law officer) who is closely connected with the formal justice system and has a reputation for corruption. *Jirga/shura* would be conducted by around half a dozen elected local elders with expertise in traditional dispute settlement and/or legitimate social influence. The elders would be paid only an honorarium (in form of consultancy fees) and travel expenses; the expenses of hosting *jirga/shura* would also be paid from the public purse. Although not illustrated in the diagram, above, *jirga/shura* would also advise the district administrator in issues relating to local governance.

As Diagram 2 illustrates the *jirga/shura* unit would mainly deal with minor criminal, and all types of civil incidents at district level. In the case of civil incidents, people would have the choice to start their cases with either *jirga/shura*, or with the district court of formal justice. However, all serious criminal cases would be dealt with exclusively by the district court of justice, and those cases that *jirga/shura* fail to resolve satisfactorily would be referred back to the formal process of the district justice system. The referral would be based on a joint decision by *jirga/shura*, district judge and the district administrator. While paper work and official procedures must be kept to the minimum, the final *prikra* (ruling) should be communicated to both the district court of justice and the human rights unit to ensure that it is in line with national legal norms and with accepted principles of human rights. In this way, *jirga/shura* would not only significantly reduce the workload of the court of justice; more importantly, the use of this traditional local/tribal institution of dispute settlement would empower ordinary people to have ownership of the justice processes.

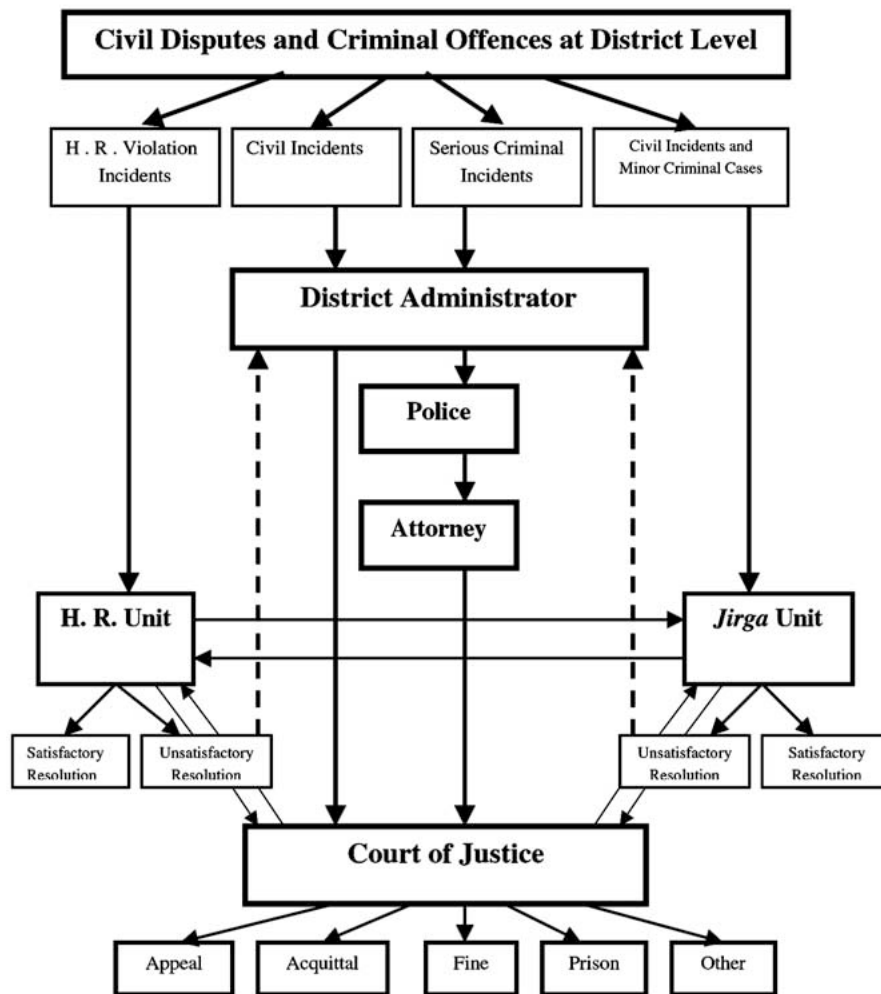


Diagram 2. An integrated model of a post-war justice system (District level) in Afghanistan.

In addition, the processes, rituals and outcome of *jirga* as a traditional tribal/local Afghan institution resemble closely the spirit, values and principles of “restorative justice” – one of the most recent paradigms in modern criminology and criminal justice. Although the phrase – “restorative justice” – is defined differently in different social contexts, it proposes a community based model of justice that places special emphasis on the restoration of dignity, peace, and relationships, between offenders and victims; it provides restitution to victims and promotes the reintegration offenders into the community (Braithwaite, 2002a; Braithwaite, 2002b; Braithwaite, 2003; Bottoms, 2003;

Hudson, 2003; Johnston, 2001; Van Ness, 2003). The theory of restorative justice, which emphasises informalism and community involvement, is increasingly translated into practice in different parts of the world, especially in Australia, New Zealand, Canada, and South Africa (Daly, 2003; Morris and Maxwell, 2003; Roberts and Roach, 2003; Skelton, 2002).

The human rights unit, on the other hand, would be run by two full-time truly independent, highly educated and well-reputed officials based in well-equipped local offices. In order to counter-balance the male-dominated *jirga* unit, these officers should mainly be female (as far as practical in the current situation). In the short term, the unit's officials would act as ambassadors of human rights, and their role would be mainly educational. Liasing closely with district level educational institutions, the human rights officials would prepare educational and human rights awareness materials, and disseminate them in culturally sensitive ways. They would also organise lectures and seminars given by leading nationally recognised human rights activists and other Afghan personalities. However, soon after the district human rights unit is fully established at the local level, it would have the power to pro-actively investigate serious past human rights abuses and war crimes; it would liase closely with the Independent Afghan human rights Commission, compiling serious past human rights abuses and war crimes and reporting them to the Special Court of human rights of Afghanistan (or Truth Commission) that Afghanistan would need to establish. The unit would also be the first point of receiving new cases/complaints of human rights abuses, including issues relating to domestic violence (mainly violence against women) and dealing with them in culturally sensitive ways. In addition, the human rights unit would advise the district administrator about local human rights issues, and would have the authority to monitor human rights violations by local government officials as well. It is important to emphasise that the human rights unit must be totally independent from the state, warlords and other political factions. Otherwise, it will become an ineffective body, and even an instrument in the hands of those with guns, power and money for staying in positions of power.

The Diagram further illustrates complex interrelationships between the district court of justice, *jirga/shura* and human rights units: as mentioned earlier, while the final *prikra* (ruling) of *jirga/shura* should be reported to both the district court of justice and to the human rights unit, the latter two would consult the former for its mediatory role in cases that need diversion from the formal justice processes. Likewise, *jirga/maraka* and human rights units would consult the court of justice about cases that may need to be dealt with in more strictly legalistic ways within the criminal justice system. A positive and constructive interaction between the state and local civil soci-

ety institutions would provide an integrated inter-agency justice system that is effective, accessible and humane. However, such a system of justice is part and parcel of the processes of democratisation, institutional reform (and building), disarmament, and the establishment of the rule of law in post-war Afghanistan. It can only, therefore, successfully operate in a social and political environment where the rule of law prevails, not the rule of gun and money.

Conclusion

What has been discussed in this paper shows that despite the historical fragmentation and the current devastated state of the Afghan justice system, Afghanistan has a rich legal culture that could partly be used as a basis for rebuilding a new post-war justice system. This legal culture also provides important lessons for Afghans to avoid repeating the mistakes of past rulers of the country who mainly used their systems of justice as an instrument of state control. An unfortunate consequence of this has been the development of justice systems that have been elitist, inaccessible and corrupt, which alienated ordinary people from the state and its formal institutions of justice. This further resulted in the huge lack of communication between the Afghan state and ordinary people, which further widened the “culture gap” between cities and rural areas in Afghanistan. Thus, it has not been a coincidence that ordinary people, especially in rural Afghanistan, have traditionally preferred not to use formal justice institutions for the resolution of their disputes.

The integrated model of post-war justice system in Afghanistan proposes inter-institutional co-ordination between the Afghan formal justice system, informal justice, educational, and human rights institutions. It is argued that the incorporation of *jirga/shura* into the formal justice system would not only simplify the justice process for ordinary people, more importantly it would enable them to have its ownership. This, it is maintained, would make the justice system more widely accessible, cost-effective, and expeditious. Likewise, addressing issues relating to the vast violation of human rights during the past 25 years of brutal war and challenging the existing “culture of human rights abuses” effectively, need inter-institutional co-ordination. The creation of a truly independent human rights unit, and its incorporation into the justice system is an effective way of creating awareness about human rights, accounting for past crimes, and preventing future violations of human rights,

More importantly, this inter-institutional interaction between the local justice, executive, educational, and civil society institutions would provide an important channel of communication between the state and ordinary Afghan citizens. This would gradually result in the inclusion of women and those

without guns and money into the political, economic and cultural life of the Afghan society. These processes would further pave the way for the gradual replacement of a “culture of human rights abuses” in Afghan society by a culture of respect for human rights and the rule of law. Indeed, communication plays an important role in social integration (Habermas, 1987) and in strengthening social solidarity (Durkheim, 1984) that Afghanistan badly needs today. However in order to test the applicability of this model in the real world, it first needs to be thoroughly discussed among Afghan and international legal experts and ordinary people, at grass root level, and then piloted in selected districts in Afghanistan.

Notes

1. Carter and Connor (1989: 9) operationally define *shura* in this way: “A *shura* is 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.” This description would seem to indicate that *shura* and *jirga* are fundamentally very similar Afghan informal (non-state) mechanisms of conflict resolution that operate in varying social and tribal contexts.
2. *Jirga* and *maraka* involve very similar processes and the main constituent elements of the two are not fundamentally different from one another. Therefore, the concepts are often used interchangeably. However, the fact that *jirga* deals with serious and important conflicts within the tribe (or between tribes) such as murder, disputes over land, mountain, jungle/woods, and the fact that it operates at a higher level of tribal formation, its social organization is more structured. *Maraka*, on the other hand, mostly deals with civil and relatively less serious criminal matters at local village (or inter-village) level, and therefore, it is loosely structured and its related rituals are not as elaborate as those of a tribal *jirga* are.

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