



**International
Legal Assistance
Consortium**



ILAC Report

Afghanistan, February 2003

ILAC is a global organisation, established and based in Sweden. ILAC is a consortium of NGOs throughout the world with experience in providing technical legal assistance in post-conflict situations. ILAC's more than 30 member organisations represent over 3 million judges, prosecutors, lawyers and academics.

Report from a visit to Afghanistan 11 – 20 February 2003

1. Introduction

This report is the result of a visit to Afghanistan 11 – 20 February 2003 at the invitation of the EU Special Representative to Afghanistan, Mr. Francesc Vendrell. The purpose of the visit was to explore if the recently initiated judicial reform work would offer any opportunities for involving ILAC's member organisations in the implementation of reform projects. During the visit I met with the major players in the judicial system as well as with representatives of the international community, which are involved in the reform work. For a list of meetings, see Appendix A. Mr Vendrell's office, and particularly his Senior Advisor for Human Rights and Gender Issues, Ms. Inger Axell, provided invaluable logistic support and gave me access to a wide network of important contacts. In addition, she served as a very valuable interlocutor and source of knowledge.

The narrative parts of the report are based on interviews and perusal of various written materials.

2. The Judicial System

2.1 Legal Framework

The Afghan constitution of 1964 provided for a division of powers, an independent judiciary and a number of basic civil rights, which were, for a period, largely upheld by the courts. Codes of criminal and civil procedure were adopted in the late sixties and early seventies. However, the state of war which has to varying degrees existed continuously from the late seventies until the fall of the Taliban in November 2001 has resulted in a gradual collapse of the judicial system. The various extremist regimes have also systematically destroyed law-books, collections of legal gazettes and other compilations of legal acts. As a result, very few courts today have access to even the main laws and regulations.

The legal framework in Afghanistan consists traditionally of three separate components: secular law, Islamic law and customary law. Since most secular laws and statutes have been lost or destroyed, courts today apply predominantly Islamic law. In the rural areas, customary law prevails.

2.2 The Bonn Agreement

According to the Bonn Agreement, the applicable legal framework until the adoption of a new constitution is:

a) the 1964 Constitution "to the extent that its provisions are not

inconsistent” with the provisions of the Bonn Agreement and with the exception of those provisions related to the monarchy, the executive and the legislative bodies; and

b) existing laws and regulations to the extent they are not inconsistent with the provisions of the Bonn Agreement or international legal obligations to which Afghanistan is a party, or with those applicable provisions of the 1964 Constitution, “provided that the Interim Authority shall have the power to amend or repeal those laws and regulations”.

In interpreting the Bonn Agreement, one fundamental difficulty is to establish the substance of “existing laws and regulations”, given the systematic destruction of legal materials, which has taken place for many years.

2.3 The Judiciary and the Courts

The Bonn Agreement provides that “the judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan and such other courts as may be established by the Interim Administration. The Interim Administration shall establish with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”

On the level below the Supreme Court, there is the High Central Court of Appeal, which hears appeals against judgements from the provincial courts. Each of the 32 provinces is supposed to have a Provincial Court, whose main function is to exercise appellate jurisdiction over decisions made by primary courts. In 1980, there were about 220 primary courts and 28 provincial courts. The numbers today are uncertain. Furthermore, it is far from clear to what extent the courts that do exist are really functioning. There appear to be very few, if any, public trials. Fundamental issues, such as the procedure for appointing judges, their training and degree of independence as well as what laws they apply remain unclear. As an illustration, according to the 1964 Constitution the Supreme Court shall consist of nine judges. In reality, the number today is said to be 137. Very few of the judges have any legal training. Most are said to have been recruited from religious schools.

2.4 The Attorney General

According to the 1964 constitution, the office of the Attorney General (Saranwali) was placed under the executive branch. During the Soviet influence in the eighties, the nature of the office was transformed and elevated in accordance with the Socialist model of the “General Procurator”, which is supposed to serve the triple function of a prosecutor, a watch-dog in relation to other government offices and a trustee for the needy. During the Taliban, the office was dismantled, but the Interim Authority has revived

it, in a fashion similar to the Communist model. Thus, inspite of the absence of any constitutional basis, the office of the Saranwali today occupies a position in the legal system on the same level as the Supreme Court or the executive branch. It reports directly to the President. According to the Deputy Attorney General, the work force of the Saranwali is today approximately 7 000. Of these, roughly 2 000 work in the area of national security. Also according to the Deputy Attorney General, the Saranwali has the power to investigate and review decisions by both the Supreme Court and the Ministry of Justice.

Despite the strong position of the Saranwali, its investigative authority is unclear. Criminal investigations are normally carried out by the police, which is under the authority of the Ministry of Interior. It is doubtful whether the Saranwali has the authority to lead those investigations. The chain of command in criminal investigations needs to be sufficiently established. According to the Deputy Attorney General it is not uncommon that parallel investigations are carried out by the Saranwali and the police. In a conventional constitutional model, the Supreme Court is the highest authority in the judicial branch. The prosecutorial services may be located either under the executive branch, under the authority of the Ministry of Justice or as a separate authority under the judicial branch. It appears that the present position and power of the Saranwali are not compatible with a conventional constitutional model.

Since the office of the Attorney General sees as one of its functions to protect the rights of the accused, the office sees little need for an increased role in the criminal procedure for an independent lawyer.

2.3 The Legal Profession

As a consequence of the fact that open trials are extremely rare, trial lawyers as we know them do not exist. But there is a small number of attorneys (around 100 in the whole country, less than 20 in Kabul), who provide legal services to the public. This service consists mainly of drafting documents or providing legal advice in the preparation of a criminal defense. Lawyers who provide legal services to the public are required to be licensed by the Ministry of Justice. Such licences are to be renewed annually. Although there is a law from 1972 which guarantees an accused the right of a public defender, this law is not applied. There is no program for legal aid. There seems to be no right for arrested criminals to receive visits by lawyers.

There seems to be one association, which organizes the bulk of the Afghan lawyers. The Lawyers Association of Afghanistan claims to have around 2000 members country-wide. The comparatively large membership is explained by the fact that it organizes not only lawyers in private practice, but also government employees and corporate lawyers. The organisation

was established in 1985, closed down during the Taliban regime 1996 – 2001 and only recently re-established. Its resources are obviously very small. It occupies a very primitive, unheated office in a partly bombed-out building. It enjoys some support from UNHCR for organizing seminars for returning refugees, in order to inform them of their legal rights. The Lawyers Association of Afghanistan is proud to point to its former membership of the International Bar Association (IBA). The organisation plans to hold an Annual General Meeting in April or May, to which it intends to invite also those Afghan lawyers, who are not members. The AGM will be financed by UNHCR.

3. Judicial Reform Activities

In April 2002, Italy was designated as the lead donor country for judicial reform. Reform work has been delayed partly because of problems in forming the Judicial Commission, prescribed by the Bonn Agreement. A first attempt was made in May 2002, but that commission was dissolved in August, as result of infighting and inefficiency. A new Judicial Commission was finally established on 2 November 2002. The objective of the Judicial Commission is to “rebuild the justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions”. According to the decree establishing the Judicial Commission, its purpose is to develop “a comprehensive program for the reform of law with the close coordination of the Supreme Court, the Ministry of Justice and other relevant organs”.

After the establishment of the second Judicial Commission, the reform process appears to have gathered speed. A preliminary draft for an ambitious “Workplan of the Judicial Commission” has been prepared in January 2003, with international assistance. This workplan consists of four parts: 1) Law Reform 2) Surveys, Infrastructure and Training 3) Legal Education and Awareness and 4) Structure of Judicial Institutions. Each part consists of a number of projects and a time plan for the implementation of each project. The “Workplan” does not yet include any budget for the proposed projects.

So far, plans for judicial reform remain largely on the drawing board. Any substantial reform work will have to be preceded by a needs assessment regarding legal framework, physical infrastructure and training. Security problems in the territory outside Kabul still present serious difficulties for the implementation of such an assessment.

In addition to Italy, as the leading actor, a number of international organisations are also planning to involve themselves primarily in the following aspects of the judicial reform work:

- UNAMA – coordination, survey on infrastructure and human resources
- UNDP – institutional support to the Judicial Commission, survey on

applicable laws, survey on infrastructure and human resources, capacity building, rehabilitation of the physical infrastructure, publication and distribution of legal texts

- UNICEF – juvenile justice
- UNODC – criminal justice, juvenile justice
- IDLO – survey on applicable laws, capacity building, technical assistance on drafting techniques, publication and distribution of legal texts
- USAID (in cooperation with Asia Foundation and Bearing Point) – Institutional support to the Judicial Commission, survey on infrastructure and human resources, capacity building, rehabilitation of the physical infrastructure, technical assistance on drafting techniques.

4. Possible Projects for ILAC Member Organisations

As previously mentioned, the Bonn Agreement prescribes the creation of a justice system “ in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.” Obviously, the integration of these different components into one unitary system will not be an easy task. However, any judicial system in accordance with international standards and the rule of law will have to include an independent bar and mechanisms to safeguard the rights of the accused to legal representation of his own choosing.

The fourth part of the draft “Workplan” of the Judicial Commission, i.e. the part dealing with the “Structure of Judicial Institutions”, contains outlines for projects to establish a bar association and to design a public defender/legal aid program (Appendix B). None of the organizations involved in legal reform appears to have included any such projects in their programs. The suggestion that ILAC would try to identify one or more of its members as implementors of such projects has met with very positive reactions from both the Afghan and the international actors.

5. Establishment of a Bar Association

Work to establish a bar association could start immediately. The draft Work Plan envisions the Judicial Commission to establish a working group on this subject. Ideally, the implementing organisation should be part of this working group. In the meantime, before this group is being set up, it should be assessed whether the already existing Lawyers Association of Afghanistan could serve as an embryo for a future bar. Part of this assessment could be to attend the AGM in April or May to get a better sense of the quality and organizational basis of this association. This event could also be used to familiarize Afghan lawyers with the functions of the independent counsel. (Both the concept of the independent criminal defense lawyer and the principle of equality of arms are virtually unknown among Afghan lawyers.) Further steps could be to help the organisation set up a

secretariat and to establish communications with its members, to develop by-laws and disciplinary mechanisms, routines for collecting membership fees etc. Assistance could also include developing standards for a bar exam and continued legal training. Eventually a Law on the Bar would have to be drafted.

The costs for such a project would not be overwhelming. One or two experts would have to spend an estimated total time of six to eight weeks in Kabul. This time should probably be divided up into two or three visits. The experts would assist in creating the organizational framework, such as by-laws, disciplinary mechanisms, admission requirements etc. They could also provide some basic training on universal principles of fair trial and due process. (Further capacity building could hopefully be provided within the framework of the national judicial training center, which is also a project within the “Work Plan” of the Judicial Commission.) Funds would also be needed to set up a secretariat, for office equipment and probably also temporarily for staff salaries. Judging from similar projects a very preliminary budget for the period until 1 March 2004 could look like this:

Office equipment USD
PC etc 3 000
Copying machine 2000
Salaries 3 000
Production of newsletter 1 500
Seminars (expenses) 3 000
Fees experts 25 000
Expenses experts (travel, lodging etc) 15 000
Total 52 500

6. Public Defender/Legal Aid Scheme

Better protection of the rights of the accused is an urgent need in today’s Afghanistan. Although Afghan courts very rarely conduct open trials and allow counsel into the court, the legal basis for such practice is already in place. Until a new code of criminal procedure has been introduced, the old code, based on the progressive 1964 Constitution, is still in force. It should also be pointed out that Afghanistan is a signatory to the 1966 International Covenant on Civil and Political Rights. Also in the short term it is likely that lawyers provided with the necessary professional and economic resources could make a significant difference.

A project establishing a program for public defenders and legal aid could be developed in parallel with the project concerning the bar. Training of public defenders could be carried out under bar programs of continued legal education, with international experts as teachers. However, the cost of a public defender/legal aid program is very difficult to calculate. While the cost for training public defenders can be estimated, the cost for – and the extent of - a legal aid program will have to depend on the available funds and not the demand of services. Experience regarding legal aid programs

clearly shows that in any society the demand for such services will always vastly exceed the means available. As a consequence, prior to setting up a budget, one must first explore the funding possibilities.

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