

# **Alternatives to Imprisonment in Afghanistan**

**A Report by the International  
Centre for Prison Studies**

**February 2009**

**International Centre for Prison Studies**

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## **Foreword**

This report on the potential for alternatives to prison in Afghanistan draws on contributions from many individuals and organisations to whom thanks are due.

At ICPS Vivien Stern, Helen Fair, Andrew Coyle and Nefeli Dardanou have all worked on the report. We are grateful to those who attended the roundtable in London: Vivien Andrew, Tomris Atabay, Denise Bradshaw, Mary Cunneen, Paul English, Professor Julio Faundez, Sophie Goodrick, Natalie Rea, Dr Rani Shankardass and Dr Ali Wardak. I would also like to thank those who gave up their time during my visit to Kabul in February 2008: Deputy Attorney General Samedi, Dep Chief Justice Bihar Scott Gracie, Linda Garwood, Michael Hartmann, Katherine Blanchette, Ray Micklewright, Damien Krauss Bob Gibson, Michael Rummels, Gary Peters, Martin Lau and Knut Hagen.

Rob Allen  
Director, International Centre for Prison Studies  
February 2009

## Summary

1. Providing assistance to strengthen the rule of law in Afghanistan, given the history and socio-economic situation, is likely to be a complex task. When it is a multi-lateral effort with states and intergovernmental organisations also playing a role the complexities multiply. Inevitably therefore there has been:
  - duplication of effort
  - lack of co-ordination between and within organisations
  - inordinate speed in the introduction of new systems
  - too little Afghan involvement
  - substantial spending on inappropriate prison facilities that are not used
2. In the haste to re-establish a formal justice system too little attention has been given to seeing criminal justice in its social and development context and little planning has been done for the consequences of decisions taken.
3. The outcome is that whilst some positive developments have taken place, a range of problems has been created. Rapid increases in the size of the inadequately trained police force and the introduction of new criminal laws and a comprehensive counter-narcotics law without planning for their impact has led to an increase in cases coming before the courts. Legal representation is still not widely available so many defendants are imprisoned without having been represented. The result is a rapidly increasing prison population of detainees about whom there is little information. Many are adjudged to be lesser offenders from the poorer section of society. Should the rate of increase continue at the present rate, the prison population in 2010 could in theory reach 110,000.
4. This rapid increase means the buildings are not available to house detainees in conditions approximating even remotely to basic international human rights standards. During the preparation of this report, information was published about serious disturbances at Pul-i-Charkhi prison. Riots and infectious disease epidemics can be the result of rapid and unplanned rises in prison populations. The National Justice Programme draft of February 2008 which aims to introduce some coherence into the development of the justice system is therefore welcome but other steps need to be taken urgently if the penal system in Afghanistan is not to spiral downhill into a situation where human rights abuses are rampant, the prisons become a breeding ground for criminal gangs and the inherent strengths of those parts of the Afghan justice system that survived the 30 years of turmoil are lost for ever.
5. The system has within it elements on which a more positive future can be built. However, a sense of urgency is necessary. Prison populations can rise very rapidly when imprisonment suddenly becomes available as a disposal not just for those convicted of serious offences but also for those at the margins of society, people without relatives to arrange their release, or those who need welfare and medical attention rather than punishment. Finding ways of limiting the growth of the Afghan prison population should therefore be a high priority.

6. To achieve this it is necessary to look at alternatives to prison in its widest context rather than in the narrow sense of measures which courts can impose instead of pre-trial detention or short custodial sentences. The framework for implementing alternatives needs to consider:
  - limiting the circumstances under which suspects can be arrested and held in pre-trial detention
  - reducing the length of time suspects are held in pre-trial detention
  - ensuring proper, affordable legal or paralegal representation is available to all defendants
  - finding ways of reducing delay in the criminal process
  - ensuring prisoners are released no later than their due date
  - introducing measures to release from prison during their sentence those lesser offenders whose imprisonment is related to the failure of a relative to produce the money for recompense to the victim
  - finding responses to health or welfare problems outside the criminal justice process
  - developing a functioning early release system for more serious offenders
  - encouraging the use of the traditional system as an option for cases that do not reach an agreed threshold of seriousness
  - mobilising a civil society movement concerned to improve the workings of the penal system
  - putting in place special measures for women and juveniles
7. We consider it is important to ensure that as much use as possible is made of existing opportunities for diversion from prison such as bail for detainees, fines for convicted offenders and conditional release for those sentenced to prison. We have serious reservations about whether Afghanistan is at a stage in its development where formal alternative sentencing options such as community service or community based supervision could be implemented or be cost-effective.
8. The level of legal knowledge is low and understanding of the Western system is not widespread. Much more activity should be taking place to spread information, legal education and understanding of the formal justice system, the limitations of prison and the benefits of alternative sentencing options.
9. Large numbers of disputes are currently dealt with in traditional and informal systems of justice, including matters which involve criminal offences. Opinion within Afghanistan is sharply divided about aspects of the jirga and shura systems but in the short to medium term it is likely that they will continue to play an important role and in any event they provide accessible and enforceable mechanisms of dispute resolution including potential for reconciliation.

# Report

## Section One

### Justice reform in developing and post-conflict countries – the context

*Justice reform generally concentrates primarily on providing support to the formal institutions of the justice sector. However, reform is slow, and problems exist within the institutions that in some cases may take many years or generations to resolve. Moreover, reform efforts have usually consisted of top-down technocratic initiatives and many have not taken into account the social and cultural specificity of the particular context in which they operate<sup>1</sup> Ewa Wojkowska, Doing Justice: How informal justice systems can contribute, 2006.*

### Rule of law reform

10. The reform of the justice system in Afghanistan can draw on the experiences of the past 20 years in ‘rule of law’ reform in various regions of the world and in different socio-political contexts. There is considerable support in the international community for the spread of what is called ‘the rule of law’. A useful definition comes from the World Bank: ‘While defined in various ways, the rule of law prevails where (i) the government itself is bound by the law, (ii) every person in society is treated equally under the law, (iii) the human dignity of each individual is recognized and protected by law, and (iv) justice is accessible to all.’<sup>2</sup>
11. The impetus for rule of law reform comes from a number of sources. A commercial perspective sees the need for the law to protect investors or there will be no investment. From a development perspective a framework of law to govern land rights and property is necessary for development to take place. A good governance perspective sees the rule of law as essential to control corruption, hold governments to the law and protect the rights of citizens against the arbitrary power of the state. The human rights argument is that rights of individuals cannot be protected unless there is a functioning system of law to protect them.
12. Much has been done by Western states unilaterally and by inter-governmental bodies, to try and reform justice systems in developing and transitional countries<sup>3</sup>.

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<sup>1</sup> Wojkowska, E. (2006). *Doing Justice: How informal justice systems can contribute*. Oslo: UNDP. P.12

<sup>2</sup> Quoted in Golub, S. (2003). *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*. Washington DC: Carnegie Endowment for International Peace. P.7

<sup>3</sup> See Carothers, T. (ed) (2006). *Promoting the Rule of Law Abroad: In search of knowledge*. Washington DC: Carnegie Endowment for International Peace, Samuels, K. (2006). *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*. Washington DC: World Bank.  
and Golub, S. (2003). *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*. Washington DC: Carnegie Endowment for International Peace.

*... Western nations and private donors have poured hundreds of millions of dollars into rule-of-law reform, but outside aid is no substitute for the will to reform, which must come from within. .... Meanwhile, donors must learn to spend their reform dollars where they will do the most good – and expect few miracles and little leverage in return.*<sup>4</sup> Thomas Carothers, *Promoting the Rule of Law Abroad: In search of knowledge*, 2006.

13. In the case of Central and Eastern Europe rule of law reform has been undertaken as part of the accession process to the Council of Europe and for some states in order to qualify for EU membership. This reform process has been successful in many respects. Accession to the Council of Europe treaties, particularly the Convention on Human Rights, has led all countries to stop using the death penalty, reform their criminal procedure codes to ensure fairer trials, reform their prison systems within the framework of the European Prison Rules (as far as resources have allowed) and work towards an independent judiciary.<sup>5</sup>
14. Efforts in other regions of the world by Western interests to promote the rule of law have been much less successful. In Latin America, work to change the trial process has produced some benefits but the judicial and prison systems still operate on the edge of legality and function badly. In North Africa and the Middle East some small efforts are nibbling at the edges of systems which are riddled with human rights abuses.
15. In the poor countries of Asia and in Sub-Saharan Africa justice systems are grossly defective. There is no country in Sub-Saharan Africa, except South Africa, that has a criminal justice system which meets minimum standards of justice and makes an effective contribution to maintaining the rule of law<sup>6</sup>. Even in South Africa where the legal system is much admired corruption in the prison system is rife.<sup>7</sup>

#### **Attempts at justice reform can have unintended consequences**

16. The lessons of the past two decades suggest that justice reform in poor countries especially in a situation of post conflict can be very challenging. When the formal system of policing, courts and penalties is corrupt attempts at reform may just succeed in strengthening the potential for corruption or in increasing the flow of arrested people into overcrowded brutal prisons where they can wait for years for their cases to come to court.

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<sup>4</sup> Carothers, T. (ed) (2006). *Promoting the Rule of Law Abroad: In search of knowledge*. Washington DC: Carnegie Endowment for International Peace. P.4.

<sup>5</sup> See Murdoch, J. (2006). *The treatment of prisoners: European standards*. Strasbourg: Council of Europe and Carothers, T. (ed) (2006). *Promoting the Rule of Law Abroad: In search of knowledge*. Washington DC: Carnegie Endowment for International Peace. Pp8-10.

<sup>6</sup> See US State Department Country Reports on Human Rights Practices, Amnesty International Country Reports, Human Rights Watch Country Reports.

<sup>7</sup> Jali Commission (2005). *White Paper on Corrections in South Africa*. Pretoria: Department of Correctional Services.

17. Supporting justice system reform in ways that improve rather than worsen the lot of the poor is even more challenging. In poor countries it is poor people who suffer most from the lack of security caused by crime and the impunity that the rich and powerful enjoy since poor people cannot afford to buy protection. Poor people also suffer most from ill-functioning justice systems since they cannot bribe the police, pay a good lawyer or buy a place in a less crowded cell in prison. Rule of law reform programmes aim to improve the lot of poor people but they achieve limited success when they unintentionally reinforce an existing unjust system.

### **Counter-narcotics legislation**

18. Counter-narcotics laws that criminalise possession and use have created considerable problems in criminal justice systems round the world<sup>8</sup>. In countries where poor people have no access to medicines or painkillers substances that have been used for generations become illegal under counter narcotics laws and there are no affordable substitutes available. Whole swathes of a country's population are criminalised. This criminalisation fills the prisons of the world with people at the lowest level of drug activity, leaves the higher level of the market untouched and further impoverishes poor people.

19. In its 2007 Annual Report the UN International Narcotics Control Board notes that, in dealing with drug crime, forward-looking states have become 'more focused on problem-solving... instead of being focused on punishment alone' and 'more interdependent and collaborative in working with other authorities, agencies and communities affected by cases'. The Board welcomes these responses as 'more proportionate, particularly [towards] certain lower level offences committed by drug abusers.'<sup>9</sup>

20. The House of Commons Select Committee on International Development noted problems with the law in Afghanistan. '*Children involved in the harvest, through their contact with the crop, develop an addiction. In addition, in the absence of readily available alternative medication, it is often used as an analgesic and even to tackle teething problems in babies.*'<sup>10</sup> It is suggested in Afghanistan that there are 1 million drug addicts and treatment facilities are minimal.<sup>11</sup>

21. Thailand had a policy of imprisoning low-level drug offenders which led to a high use of imprisonment. However after a change in policy the number of

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<sup>8</sup> See Klein, A. Day, M. and Harriott, A. (eds) (2004) *Caribbean Drugs: From Criminalization to Harm Reduction*. London: Zed Books; Schiraldi, V. and Zeidenberg, J. (2003) *Costs and Benefits? The Impact of Drug Imprisonment in New Jersey*, Washington D.C, Justice Policy Institute; and Shankardass, R.D. and Haider, S. (2004) *Barred from Life Scarred for Life: Experiences of Women in the Criminal Justice System*. Gurgaon: PRAJA

<sup>9</sup> International Narcotics Control Board (2008). *Report of the International Narcotics Control Board for 2007*. New York: UN. P.5.

<sup>10</sup> House of Commons International Development Committee (2008). *Reconstructing Afghanistan. Fourth Report of Session 2007-08*. London: The Stationery Office. Para 128

<sup>11</sup> Atabay, T. and English, P. (2008) *Afghanistan: Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation*. Vienna: UNODC.

prisoners has gone down from 254,070 in 2002, to 165,316 in 2007. The Director General of the Thailand Department of Corrections attributes much of the reduction to the effects of a new law on rehabilitation for drug addicts. He says: 'The new law holds 'drug addicts' as patients who cannot help themselves, not as criminals as the old law. Therefore, it aims to cure and rehabilitate drug addicts in the community or in drug rehabilitation centers rather than confining them in prisons'.<sup>12</sup>

### **Taking a wider approach**

22. Building on the lessons of two decades of attempts to support the rule of law in a range of countries, a set of approaches has been developed which do not just aim to improve the performance of state institutions. Based on an understanding that change does not just call for new resources but primarily for new attitudes they also work to strengthen civil society so that more people ask for justice. These approaches spread knowledge and understanding of the law throughout society, and create some capacity to monitor the state system and hold it to account. The development of a functioning law enforcement system based on police, courts, and penalties needs to be balanced with the development of a legal aid system available to all who cannot pay and strong civil society institutions to work to mitigate the injustices that can result.

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<sup>12</sup> International Corrections and Prisons Association (2007) *Keynote of Mr. Wanchai Roujanavong, Director General of Thailand Department of Corrections on the Opening Ceremony of the 9<sup>th</sup> ICPA AGM & Conference, Monday 22 October 2007, Bangkok, Thailand.*

## Section Two

### Bringing change to Afghanistan

*Because Afghanistan is emerging as a modern state in a society still anchored in traditional values, the simplistic approach of replicating existing systems of rule of law that evolved elsewhere cannot work here<sup>13</sup>. Afghanistan Human Development Report 2007, UNDP.*

### The socio-economic background

23. Afghanistan is a very poor country, placed 174th out of 178 in the Human Development Index. The literacy level is 50% for men and 20% for women and the average life expectancy is below 44 years.<sup>14</sup> Only one in three people have clean drinking water and life expectancy is 43<sup>15</sup>. It has suffered many years of war. This is a very challenging environment in which to introduce a formal, state-wide justice system based on written texts, record-keeping, databases (and a regular supply of electricity) and all the appropriate protections for the rights of suspects, defendants and prisoners that accompany such systems in the West.

*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<sup>16</sup>. J. Alexander Thier, Reestablishing the Judicial System in Afghanistan, 2004*

### Reforming the justice system

*Reform of the justice sector has also been slow. A reformed justice sector would be less vulnerable to corruption and more capable of tackling corruption in other sectors.<sup>17</sup> Reconstructing Afghanistan, report of the House of Commons International Development Committee 2008*

24. The legal system in Afghanistan has evolved over the past 120 years. During the years from 1963 to 1978 changes were brought in to

<sup>13</sup> United Nations Development Programme (2007). *Afghanistan Human Development Report 2007*. Islamabad: UNDP. P. vi.

<sup>14</sup> Statistics taken from CIA World Factbook

<http://www.umsl.edu/services/govdocs/wofact2003/geos/af.html>

<sup>15</sup> Brown, G. (2007). Statement by the Prime Minister on Britain's future strategy in Afghanistan, 7 December 2007.

<sup>16</sup> Thier, J.A. (2004). *Reestablishing the Judicial System in Afghanistan*. Stanford: CDDRL. P.2.

<sup>17</sup> House of Commons International Development Committee (2008). *Reconstructing Afghanistan. Fourth Report of Session 2007-08*. London: The Stationery Office. Para 97.

modernise the legal system<sup>18</sup>. However the process stopped during the many years of disruption and war.<sup>19</sup> Since the Bonn Agreement in 2001 considerable resources have been devoted to introducing a national, formal law system. Courts are being rebuilt, the judiciary trained, the police reformed<sup>20</sup> new prisons built and old prisons refurbished. A Euro/American prison system is being superimposed on the remnants of a Russian-based system<sup>21</sup> and the responsibility for the prison system was transferred from the Minister of the Interior to the Ministry of Justice in 2003<sup>22</sup> in line with international good practice<sup>23</sup>.

25. The National Justice Programme acknowledges that the criminal justice system falls short of minimally acceptable standards. Despite “numerous efforts directed at prison reform...overcrowding and other deficient conditions remain problematic and need to be addressed for instance by consideration of alternative sentencing schemes.”<sup>24</sup>
26. Readers of this report will be familiar with the difficulties that have been encountered. A number of papers and reports suggest that there has been considerable duplication of effort and a failure to co-ordinate activities between organisations and within organisations. Attempts have been made to introduce quite new and culturally unfamiliar ways of working very quickly. There is a feeling that Afghans have not been as involved as they should have been in all decision-making and questions have arisen about how large sums of money have been spent, for instance on high-tech prison facilities that are not being used.<sup>25</sup>

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<sup>18</sup> Lau, M. (2003). *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*. Geneva: International Commission of Jurists. P.29-30.

<sup>19</sup> Ibid. p.6.

<sup>20</sup> Wilder, A. (2007). *Cops or Robbers? The Struggle to Reform the Afghan National Police*. Kabul: AREU.

<sup>21</sup> Report from a UK roundtable participant recently involved in advising on prison reform in Afghanistan, 21 February 2008.

<sup>22</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>23</sup> The Council of Europe strongly recommends to member states that the Ministry of Justice, where it exists, is the most appropriate parent department for prison administration and since the end of the 1980s the Council has required all new accession states to transfer prison administration to this department. Also see the accompanying commentary to Rule 71 of the European Prison Rules: It is important that there should be a clear organisational separation between the police and the prison administrations. In most European countries the administration of the police comes under the Ministry of the Interior while the administration of prisons comes under the Ministry of Justice. The Committee of Ministers of the Council of Europe has recommended that ‘There shall be a clear distinction between the role of the police and the prosecution, the judiciary and the correctional system.’ (Recommendation N° R (2001)10, The European Code of Police Ethics).

<sup>24</sup> Islamic Republic of Afghanistan (2008). *National Justice Programme: Afghanistan National Development Strategy*. Kabul: Islamic Republic of Afghanistan. P.6.

<sup>25</sup> United Nations Development Programme (2007). *Afghanistan Human Development Report 2007*. Islamabad: UNDP.

27. It is suggested<sup>26</sup> that the process has been unhelpfully dominated by meeting targets, for example, increasing the number of police, the number of arrests, the volume of new laws, the capacity of the prisons. Quality and relevance have been put into second place. It is also suggested<sup>27</sup> that there is confusion in the minds of some as to whether the prisons are part of the civilian criminal justice system or belong to a militarised security system. Such confusion is not helpful to the public understanding or to the staff working in the prisons.
28. It may be also that there are misunderstandings that come from a different view of law and of justice. Discussions during the field visit and the roundtable indicated that the role of the victim was much greater in Afghan views of justice. For example it was pointed out that if a criminal case goes through the formal system and the perpetrator is imprisoned, the victim may not feel the matter is adequately settled and may seek some recompense once the perpetrator is released from prison. The actions of the State in taking on the responsibility for punishment may not be meaningful to the victim.
29. Those promoting the rule of law reforms are working with the hope that a well-functioning criminal justice system will become an effective tool against the problems of violence, corruption and narcotic production and sale that plague the lives of ordinary people. Such a hope is not likely to be fulfilled in the short term. The Select Committee on International Development reported that ‘Afghanaid told us there is a definite lack of faith in the justice system and this is reflected in the latest human rights report on Afghanistan by UNDP’<sup>28</sup>. They also reported that ISAF told them ‘There were only 1,500 prosecutors, many of whom were not properly educated and their pay was so low that they were often open to bribery’<sup>29</sup>. A sense of realism about the time-scale of the implementation of these changes is necessary.

*In Afghan history, there is neither practical experience with judicial independence in the state system, nor a political ethos to support it*<sup>30</sup>. J. Alexander Thier, Reestablishing the Judicial System in Afghanistan, 2004

### **Emerging problems**

30. In the short term, the introduction of rule of law reforms in poor countries can bring a series of practical problems. It seems that these problems are also emerging in Afghanistan.

*Vested criminal interests exploit the high levels of personal insecurity to acquire more resources and power. They also preclude the Afghan judiciary from operating independently, free of intimidation, and in accordance with the*

<sup>26</sup> Information provided by contributor to ICPS roundtable on Afghanistan with extensive experience of researching the justice system there, 21 February 2008.

<sup>27</sup> *ibid*

<sup>28</sup> House of Commons International Development Committee (2008). *Reconstructing Afghanistan. Fourth Report of Session 2007-08*. London: The Stationery Office. Para 120.

<sup>29</sup> *Ibid*. Para 121.

<sup>30</sup> Thier, J.A. (2004). *Reestablishing the Judicial System in Afghanistan*. Stanford: CDDRL. P. 10

### **A rising prison population**

31. As in other countries where justice reforms are introduced rapidly, the number of prisoners is increasing faster than are the resources to look after them humanely. The number of prisoners has increased as follows:

<b>Year</b>	<b>2001</b>	<b>March 2005</b>	<b>March 2007</b>	<b>Oct 2007</b>	<b>Dec 2007 (provisional)</b>
<b>Population</b>	600	5,500	10,400	10,604	12,400

32. An increase of 300 prisoners per month was reported to the Rome conference in July 2007. The prison capacity in October 2006 was estimated at 7,421<sup>32</sup> though it is not clear what measure (i.e. how much space per prisoner) was used for estimating this.

33. The increase in the number of prisoners between 2006 and 2007 was 107 per cent. Accurate prison population projections are very difficult to make. England and Wales publishes projections every year giving three possible figures – high, medium and low for seven years. Even with this breadth of projection the projections need to be revised every year. With this caveat it is worth considering the figures in the table below which show what the prison population would be by 2010 if this yearly rate of increase continued at the present level.

<b>Year</b>	<b>2001</b>	<b>2006</b>	<b>Oct 2007</b>	<b>Dec 2007</b>	<b>2010</b>
<b>Population</b>	600	6,000	10,604	12,400	109,985*
<b>Rate per 100,000</b>	1.9	19	33	38	316

*\*The figure for 2010 shows what the prison population would be if it continued to increase by 107% a year as it did between 2006 and 2007.*

34. A comparison with neighbouring countries may be useful. These rates are:

<sup>31</sup> United Nations Development Programme (2007). *Afghanistan Human Development Report 2007*. Islamabad: UNDP. p.7.

<sup>32</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC.

Iran	222
Pakistan	57
Tajikistan`	149
Turkmenistan	489 (estimated figure)
Uzbekistan	184

35. This imprisonment rate would put Afghanistan way out of line with other countries in the region, apart from Turkmenistan, well above the West European norm and much higher than the other countries in the Middle East and North Africa (figures below), all countries which have problems with prison overcrowding or bad prison conditions or both.<sup>33</sup>

Country	Imprisonment rate per 100,000
Algeria	127
Jordan	104
Lebanon	168
Libya	209
Morocco	161
Saudi Arabia	132
Syria	58
Yemen	83

These statistics were taken from World Prison Brief *Online* at 31 March 2008. Statistics are not necessarily from the same year but represent the most recent figures available.

36. What accounts for this increase in the number of prisoners? Often such a rapid rise is caused by lop-sided criminal justice reform. The number of police is increased and it is suggested in their training that it is good performance to make a large number of arrests. Law reform increases the number of criminal offences for which imprisonment is available. The reform of the courts so that cases can be processed reasonably quickly is more complicated and takes longer than putting more police on the streets. The increase in prison capacity to hold the large number of pre-trial detainees and sentenced prisoners does not proceed at the same pace either. The result is more arrested people, often people whom it is easy to arrest because they are obvious targets such as small thieves or drug users. Such people are not able to pay for a way out, either licitly, through finding a lawyer and getting bail, or illicitly, through a bribe<sup>34</sup>.

37. This may be part of the explanation for what is happening in Afghanistan. It was suggested to us that the prison population has increased because there are too many police in relation to the number of lawyers and that the meeting of targets had a role.

<sup>33</sup> Since this report was written, UN figures suggest the figure 12,500 in December 2008.

<sup>34</sup> See OECD (2007). *OECD DAC Handbook on Security Sector Reform*. Paris: OECD.p.189.

38. In a situation of poverty like Afghanistan the potential for making some money out of imprisonment will also play a part. Corruption is widespread in prison systems through-out the world, particularly where prison staff are very poorly paid. Once people are in prison there is money to be made by not letting them out until they have paid. This too seems to be happening in Afghanistan and may account for some people staying in prison when their sentence has expired, waiting for the right piece of paper to get them out (although in fact the law does not require this).
39. Such rapid increases in the prison population cannot be accommodated in prisons that meet the most minimum international human right standards. As in the systems of most poor countries of the world the prison conditions in Afghanistan are bad, very bad or sometimes life-threatening. The buildings are in a serious disrepair and many prisoners are held in rented buildings. Where there are no facilities for women they may be kept in the private homes of district officials<sup>35</sup>. A new women's prison opened in early 2008 but at the time of the field visit it had not yet been used. Rebuilding and refurbishment programmes are in train but the funds provided are regarded as quite inadequate. Transport is not available to take prisoners to court or to hospital<sup>36</sup>. Treatment in prison is reported to fall below international human rights standards.

*In Canada, the Harper government is under sustained attack in the House of Commons for allowing Canadian-captured prisoners to be mistreated by their Afghan jailers...  
No country involved in Afghanistan wants to be labelled a torturer. Last fall, Canada stopped handing over prisoners to the Afghan authorities, a day after an Afghan arrested by Canadians was determined to have been beaten by prison guards with an electrical cable. In fact, the Canadian Press has reported recently that Canadian troops have virtually stopped taking Afghan prisoners.  
Last month, Defence Minister Peter MacKay said that Canada's troops would not hand over prisoners to Afghan authorities until the Canadian military feels that there have been some improvements in the Afghan prisons. Montreal Gazette, 5 February 2008*

40. Who are the people in prison? Are the prisons holding major and serious criminals, whose incarceration is necessary and justifiable for public protection? The facts are difficult to establish. A report in the Times newspaper indicated that 278 people convicted under the Counter-Narcotics law were in prison, including five border police sentenced to 16-18 years each in October for transporting 123kg (270lb) of pure crystal heroin in an official vehicle<sup>37</sup>. However, as in poor countries generally, most of those in prison are

<sup>35</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>36</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>37</sup> Page, J. (2008) Wanted for empty prison: some convicted Afghan drug barons. *The Times*, 23 February 2008.

the poor, the unwanted, and the unlucky, for example the taxi driver who killed a poor farmer's donkey in a road accident and was not able to raise the money for compensation because his family was far from Kabul<sup>38</sup>, the petty thief serving five years for stealing a bicycle<sup>39</sup>, the lowest level of operators in the drug trade. A very small study of 27 first offenders in Pul-i-Charkhi showed that 93% were poor or very poor and four out of five had not been legally represented at their trial.<sup>40</sup>

41. It is also suggested that some prisoners are held because they are unable to pay the consequential or complementary monetary penalty fine that accompanied the prison sentence. It is claimed by some that prisoners cannot leave without authorisation from the court or saranwal and there is some confusion about the correct procedure. The law says that the Attorney General should be informed that a prisoner is due to be released 15 days before the release date. If the Attorney General registers no objection then the prisoner can automatically be released. In practice, it is likely that a high number of prisoners are being held beyond their due date.<sup>41</sup>
42. Information is available on the characteristics of the women in prison. It shows that they are not serious or dangerous criminals. The number of women in prison rose from 86 in December 2004 to 304 in October 2007, of which many were imprisoned with their children<sup>42</sup>. According to a UNODC report 'The numbers are expected to grow further, as the capacity of the formal justice system is developed and the rule of law prevails over traditional justice mechanisms. Currently the majority of female prisoners are being held for violating social, behavioural and religious norms.'<sup>43</sup> There is a shortage of women prison staff to look after the women prisoners.<sup>44</sup>
43. This basis for the imprisonment of women for violating social norms seems not to have changed since 2002 when, according to Martin Lau, the Ministry of Women's Affairs told him that most women were detained for a variety of offences related to family law such as refusing to live with their husbands, refusing to marry a husband chosen by their parents, or for having run away from either the parental or the matrimonial home.<sup>45</sup> The NGO Gender Action for Peace and Security report is quoted by the Select Committee: 'there is little access to justice for women in Afghanistan, they are poorly represented within

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<sup>38</sup> Example provided by contributor to ICPS roundtable on Afghanistan, 21 February 2008 and also reported in UN report 1 December 2008.

<sup>39</sup> Information from UK Prisons Adviser

<sup>40</sup> Atabay, T. and English, P. (2008). Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation. Vienna: UNODC. Para 15.

<sup>41</sup> Information provided by contributor to ICPS roundtable on Afghanistan, 21 February 2008 and also reported in UN

<sup>42</sup> Atabay, T. and English, P. (2008). Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation. Vienna: UNODC P.5.

<sup>43</sup> Ibid p.5

<sup>44</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>45</sup> Lau, M. (2003). *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*. Geneva: International Commission of Jurists. P.25

the police and formal justice sector institutions, they have little representation in the informal or traditional dispute resolution mechanisms and the Ministry of Women's Affairs operates at a low capacity and with minimal influence on government policy.<sup>46</sup>

44. It is reported that the courts face a backlog of cases<sup>47</sup> and thus the numbers in pre-trial detention continue to grow.

### **Non-custodial sentences and alternatives to detention**

45. As in many countries, non-custodial sentences are provided for in the legislation but there are difficulties with their use. Currently, supervision by the police (Interim Criminal Procedure Code, Articles 86.3, 87 and 88<sup>48</sup> and fines, suspended sentences and treatment options for the mentally ill and drug addicted (the Penal Code) are all in theory available. Conditional release from prison is provided for in the Interim Criminal Procedure Code but there is only a cursory reference to it in the Law on Prisons and Detention Centres (see Annex 3). The decision to grant early release is made by judges who determine the conditions that must be followed.
46. When drug offences are being dealt with, the counter-narcotics law replaces the Penal Code and defendants are tried in a special court. However, it is suggested that not all courts in the provinces are using the counter-narcotics law<sup>49</sup>. Under the counter-narcotics law the fine is not available as a penalty, there is the possibility to add a large fine to imprisonment, and the sentencing is mandatory. Under the narcotics law sentences cannot be suspended. The one alternative to prison provided in the law is treatment, but after treatment the addict may then be sent to prison.
47. Such measures are very difficult to implement in poor countries where the infrastructure is weak and so far in Afghanistan little progress has been made to counterbalance the growth in custodial sentencing by encouraging police, prosecutors and judges to divert minor offenders from the prison system.
48. Alternatives to pre-trial detention are particularly important because waiting time for trials can be long and prison conditions for pre-trial detainees especially bad. Whether suspects can be held pre-trial and for how long depends very much on the provisions of the criminal procedure law, where the power to make decisions about detention lie and what the characteristics of the investigatory process are. So far these matters are far from clear and there are

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<sup>46</sup> House of Commons International Development Committee (2008). *Reconstructing Afghanistan. Fourth Report of Session 2007-08*. London: The Stationery Office. Para 124.

<sup>47</sup> United Nations Development Programme (2007). *Afghanistan Human Development Report 2007*. Islamabad: UNDP. P.8.

<sup>48</sup> United Nations Office on Drugs and Crime (2007). *Afghanistan: Female prisoners and their social reintegration*. New York: UNODC. P.6.

<sup>49</sup> Information provided by contributor to ICPS roundtable on Afghanistan who recently carried out a large research study in Afghanistan, 21 February 2008

many inconsistencies.<sup>50</sup> The proportion of pre-trial prisoners has apparently grown to 50 per cent of the total (reported in May 2007)<sup>51</sup>. The proportion of pre-trial prisoners in developing countries is often 50 per cent or higher but this high proportion reflects a failure in the system to deal with cases speedily enough. The average proportion of pre-trial prisoners in West European countries is 28 per cent.<sup>52</sup>

### **Juveniles in the system**

49. The treatment of juveniles is of particular concern because of their vulnerability and the potential for abuse. It is reported that in January 2008, 455 juveniles were in prison, of whom 437 were still not yet sentenced and 18 had been sentenced. It was suggested to us that most juveniles are imprisoned for theft.<sup>53</sup> In 1994 Afghanistan ratified the Convention on the Rights of the Child which requires children to be held separately from adults and for custody to be used as a last resort and for the shortest possible time. The best interests of the child should be the priority in all actions involving children. A Juvenile Code was adopted in 2005 which embodies many of the requirements of the Convention and sets out possibilities for diverting a juvenile from custody. Further work is underway on regulations for the closed and open rehabilitation centres which will in due course provide alternatives for juveniles outside prison.
50. An analysis of 104 juvenile cases where the sentence had been confirmed showed that over half would have been eligible under this code for a non-prison sentence. However, there is currently only one day rehabilitation centre recently constructed in Kabul by UNICEF which is not yet operational<sup>54</sup>. Work is underway to establish the criteria by which juveniles will be selected for attendance at the centre. There are also concerns about the ability of children from different parts of the city to travel safely to the centre.<sup>55</sup>
51. The infrastructure to provide the alternatives to custody set out in the Code are not in place and no training on the new Code has been provided to prosecutors and judges. The Code is exemplary but the requirements it sets down require people to operate it with high levels of literary and legal education, extensive legal representation, and a range of facilities. No country as poor as Afghanistan has a functioning system remotely like the system predicated in the new Penal Code.

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<sup>50</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC

<sup>51</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>52</sup> Figure taken from World Prison Brief Online at 31 March 2008. [www.prisonstudies.org](http://www.prisonstudies.org)

<sup>53</sup> Information provided by contributor to ICPS roundtable on Afghanistan who recently carried out a large research study in Afghanistan, 21 February 2008

<sup>54</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC. p.6.

<sup>55</sup> Information given by UNODC in personal correspondence with Rob Allen.

52. Currently juveniles are still being held in adult prisons<sup>56</sup> and much needs to be done to ensure their safety and the establishment of proper facilities for children. There is a closed rehabilitation centre in Kabul where 78 boys and 20 girls were held instead of being in prison but such centres are not available outside the capital.

### **Justice sector a lower priority**

53. One reason for these emerging problems, it is suggested, is that justice sector reform has not received the funding priority that it should have had when compared with the police and the army. The Ministry of Justice expenditure including prisons is apparently three per cent of the total expenditure on security<sup>57</sup>. The House of Commons International Development Committee in its 2008 report recommends the UK Government should provide increased funding for the justice sector<sup>58</sup>. Within the justice sector the prison system is the poor relation. Apparently a police officer is paid \$70 a month (figure reported in May 2007) and a prison officer \$40. Salaries are sometimes not paid. The annual prisons budget in 2006 was \$10m and in the following year it was \$9m<sup>59</sup>.

### **The traditional justice system**

*While remaining committed to universal principles of human rights and Afghan laws, we believe that a more collaborative relationship between the state and traditional justice bodies can help make justice and the rule of law more readily available to Afghans.<sup>60</sup> President Karzai in Afghanistan Human Development Report 2007, UNDP.*

54. In recent years there has been more interest shown in informal justice systems by those involved in law and justice reform. Whereas in the past there was a tendency to concentrate on the police, courts and prisons and assume that the justice sector embraced just these, it is now accepted that, in many parts of the world, most people do not use the formal justice system to settle their disputes or to resolve crimes against them. Western systems based on written laws were not the norm in many regions of the world, and yet a form of order and access to justice prevailed. A major difference between the Western and these customary systems was however the approach, which aimed more to restore

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<sup>56</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC. P.73.

<sup>57</sup> Ibid p.9.

<sup>58</sup> House of Commons International Development Committee (2008). *Reconstructing Afghanistan. Fourth Report of Session 2007-08*. London: The Stationery Office. Para 100.

<sup>59</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>60</sup> United Nations Development Programme (2007). *Afghanistan Human Development Report 2007*. Islamabad: UNDP. P.v.

harmony and reinforce social norms than to establish the facts in order to hold a perpetrator to account by imposing a sanction.<sup>61</sup>

*Pashtun norms of criminal law are based on the notion of restorative justice rather than on the notion of retributive justice relied upon in Western and international law. Rather than being sent to prison for a wrong committed, the wrongdoer is asked to pay Poar, or blood money, to the victim and to ask for forgiveness<sup>62</sup>. International Legal Foundation, The Customary Laws of Afghanistan, 2004.*

55. In non-state systems the emphasis falls on the social usefulness of the outcome more than on the correctness of the procedures. The emphasis is on the interests of the group and the community rather than the individual and the aim is to restore social harmony. The process of reaching a decision involves wide consultation and, often, public participation. Enforcement is secured through social pressure and a wide acceptance of the legitimacy of the process<sup>63</sup>.

56. Informal systems have the advantage of accessibility. They are conducted in a language the participants can understand without the need for interpreters. They are speedy. They are affordable and are therefore the systems mostly used by the poor.

*In post-conflict countries, where formal mechanisms may have completely disappeared or been discredited, informal systems of dispute resolution may be crucial to restoring some degree of law and order, and they may be all that is available for many years. Ewa Wojkowska, Doing Justice: How informal justice systems can contribute, 2006<sup>64</sup>.*

57. There has been considerable international interest and research into the traditional justice system in Afghanistan. Many commentators support its maintenance and development whilst others are vehemently opposed.

*The traditional Afghan civil society offers a model that is different from the western one of formally organized institutions outside the purview of state authority. It is rather one of autonomous, locally based structures of community authority. It is a longstanding characteristic of the Afghan polity, noted by historians, anthropologists, and political scientists alike, that the exercise of central government's power is dependent upon an arm's length relationship and equilibrium with local structures of community authority. United States Agency for International Development, Afghanistan Rule of Law Project: Field Study of*

<sup>61</sup> See Department for International Development (2004) *Non-state Justice and Security Systems*. London: DfID, and Penal Reform International (2001). *Access to justice in sub-Saharan Africa*. London: PRI

<sup>62</sup> The International Legal Foundation (2004). *The Customary Laws of Afghanistan*. New York: ILF. P.10.

<sup>63</sup> See Wojkowska, E. (2006). *Doing Justice: How informal justice systems can contribute*. Oslo: UNDP, and Penal Reform International (2001). *Access to justice in sub-Saharan Africa*. London: PRI.

<sup>64</sup> Wojkowska, E. (2006). *Doing Justice: How informal justice systems can contribute*. Oslo: UNDP. P.5

58. It is reported that the non-state system of resolving disputes and conflicts is used by 80 per cent of the population though there is no data on the level of its use in particular to deal with criminal matters<sup>66</sup>. It is also reported that there are working links between the state and non-state systems and that Government officials send cases to the informal system, even cases of murder<sup>67</sup>.

59. At the Rome Conference in 2007 the World Bank representative said:

*'As a matter of priority, then, we need to put in place trusted systems for the arbitration and resolution of disputes — be they commercial, contractual, property-based or criminal.*

*But in taking on this challenge I urge pragmatism: let us avoid a rush to import 'best practice' solutions. Best-practice is usually local. In Afghanistan, traditional models of village decision-making are proving capable of partnering with the state to deliver local infrastructure. Our efforts in the justice sector need to build on the institutions that Afghans know; the institutions that they use and trust. We need to combine improvements in the formal justice system with the informal justice sector which undoubtedly will remain significant in Afghanistan for quite some time to come.*

*Rapidly establishing a modern court system that is trusted by Afghans in more than 360 districts will be extremely difficult.'*<sup>68</sup>

60. At the Rome Conference a recommendation was accepted that there should be 'the development of a national policy on the informal justice system.'<sup>69</sup>

61. However, whilst there is official acceptance that the reform of the traditional system should run alongside the reform of the formal system the continuation of the traditional system meets considerable opposition from some. There is widespread agreement that it is discriminatory towards women. The UNODC report on women in prison for instance notes that the formal system is welcome because 'the alternative of meting out justice to women in the

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<sup>65</sup> United States Agency for International Development (2005). Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies. Washington DC:USAID. P.4.

<sup>66</sup> See United Nations Development Programme (2007). *Afghanistan Human Development Report 2007*. Islamabad: UNDP. P.9 and The International Legal Foundation (2004). *The Customary Laws of Afghanistan*. New York: ILF. P.4.

<sup>67</sup> .United States Agency for International Development (2005). Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies. Washington DC:USAID. P.11.

<sup>68</sup> World Bank (2007) *Draft World Bank Statement, Rome Conference, July 3, 2007*.

<sup>69</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

traditional justice system, as it currently operates, is a much less desirable prospect<sup>70</sup>. In answer to this some proponents argue that the formal system can also discriminate against women<sup>71</sup>.

*Women are discriminated against in all spheres of life in Afghanistan. Those that are imprisoned are not only victims of their social and economic circumstances, but also of an unfair criminal justice system, where males and patriarchal principles dominate. United Nations Office on Drugs and Crime. Afghanistan: Female prisoners and their social reintegration, 2007.<sup>72</sup>*

62. The traditional system as it currently operates enshrines a number of deficiencies that have been noted by commentators.

It involves some unacceptable practices such as settling a dispute by offering a female relative in marriage, although it is claimed that this is rare nowadays. It can be taken over by powerful elements in a community.

*However, it (the traditional system) is often staffed by ill-educated decision makers, relies on an unclear set of authorities and sources of law, can be inordinately and improperly influenced by local power, wealth or armed presence, and perpetuates norms and practices that are extremely detrimental to women. In all these liabilities, however, it is not alone, and the formal government courts suffer from all of them also, and to much the same degree. United States Agency for International Development. Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies 2005<sup>73</sup>.*

63. There are suggestions that the informal system has been taken over by powerful 'local commanders and armed men'<sup>74</sup>, and that the traditional elders who conduct the dispute resolution have allied themselves with the local commanders.<sup>75</sup> Martin Lau said on the field visit that the High Court in Peshawar was full of cases of people from Pashtan areas trying to escape the jurisdiction of jirgas.

<sup>70</sup> United Nations Office on Drugs and Crime (2007). *Afghanistan: Female prisoners and their social reintegration*. New York: UNODC. P.6.

<sup>71</sup> Penal Reform International (2001). *Access to justice in sub-Saharan Africa*. London: PRI. And Wojkowska, E. (2006). *Doing Justice: How informal justice systems can contribute*. Oslo: UNDP. P.6.

<sup>72</sup> United Nations Office on Drugs and Crime (2007). *Afghanistan: Female prisoners and their social reintegration*. New York: UNODC. P.6.

<sup>73</sup> .United States Agency for International Development (2005). *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies*. Washington DC:USAID. P.9.

<sup>74</sup> The International Legal Foundation (2004). *The Customary Laws of Afghanistan*. New York: ILF. P.53. and United States Agency for International Development (2005). *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies*. Washington DC:USAID. P. 13.

<sup>75</sup> The International Legal Foundation (2004). *The Customary Laws of Afghanistan*. New York: ILF. Pp54, 58.

5. Concerns were raised about the informal justice system which currently deals with a large percentage of conflicts, especially in rural areas. The informal justice system presents a number of serious legal and human rights problems which require significant review and modification in order to ensure the protection of all citizens, especially women. Some participants suggested that the informal justice system should be gradually replaced by the formal system. Others noted that the formal legal system does not recognise any decisions made within the informal system. Still others suggested that this system might be appropriate for some types of conflict resolution, especially in civil matters. M. Cherif Bassiouni, *The Need for a Comprehensive Strategy for Justice Sector and Rule of Law Reform in Afghanistan*, 2007.

64. There is little agreement on whether the justice reform programme should include the reform of the traditional system to bring it into line with international standards although all the official documents, including the latest of 24 March 2008 say they should. One argument against recognition of the informal system is that those who operate the system would expect to be paid, and once they were paid, corruption would play a part. Another is that when the informal system is recognised and linked in some official way to the formal system, and the formal system is distrusted, does the informal system lose some of its legitimacy by being so linked.
65. The Technical Advisory Group for Women and Children recommended to the Rome Conference that \$1m should be devoted to ‘monitoring, review, redress and accountability mechanism to keep the informal justice operational within the formal legal system and to eliminate abhorrent practices.’<sup>76</sup> Some have argued that a pluralistic approach to justice is the only realistic approach at this time.
66. The US Institute of Peace suggests in its study of state and non-state dispute resolution in Afghanistan that the ‘...government may wish to identify two types of crimes: those where prosecution is essential, and some recourse to community mechanisms may also be an important part of the process (e.g. murder); and those where prosecution may actually be avoided in favor of a community-based process approved by the court/prosecution (e.g. petty theft).’<sup>77</sup>
67. There are few examples of other jurisdictions with a cut-off point defining which cases should be dealt with informally. In some parts of Malawi where informal systems are prevalent and their development has been supported by DFID the police advised local chiefs who deal with cases that those cases where blood has been spilled should be handed over to the police to

<sup>76</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>77</sup> US Institute of Peace, *The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan*, 2007 p. 23

investigate.<sup>78</sup> In Palestine the informal system tends to deal with cases below the level where hospital treatment is needed.<sup>79</sup>

68. In taking forward the informal system therefore it seems reasonable to give it a place in dealing with minor crime, including lesser assaults, and also to take into account that the process only has validity where all parties to it accept the procedure and the legitimacy of the outcome.
69. The view expressed by a senior US official involved in justice reform seems to set out the most practical course.

*'I don't know anyone that thinks that TDR, as it is practiced in many places in Afghanistan or elsewhere in the world, is an adequate protector of womens' rights, or the rights of any minority, for that matter. However, I am also unaware of many places in Afghanistan where the formal justice does so, either.*

*The TDR system is here, it has been here for hundreds of years, and it is going to stay here for many more years, especially while the formal justice system continues to be corrupt and discriminatory and until we can make a reasonably fair and affordable formal system accessible to the rural population.<sup>80</sup>*

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<sup>78</sup> *Final Report for DFID Malawi, Review of Current Approaches to Penal Reform, Vivien Stern, July 2006, unpublished.*

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<sup>79</sup> ICPS Mission Report 2007

<sup>80</sup> Personal correspondence with Rob Allen.

## Section Three

### Introducing alternatives to prison

*Afghanistan is not ready for alternatives. The security situation is too poor, and until it is better alternatives could not be considered. We need a harsh response. Without it a boy who steals a hen will become a violent gangster.*  
Deputy Attorney General Samedi at a meeting during the field trip.

70. The prison population has doubled in the past year. To replace the provincial prisons that are rented or severely dilapidated is estimated to cost \$37.2m. The annual salary bill for the existing 3,800 prison staff is \$9m and the number of staff probably needs to increase substantially, probably to double the current numbers<sup>81</sup>. It is hard to justify the expenditure of such sums in the current situation.
71. According to UNODC the cost of one prisoner per year is estimated to be \$708. Although this is not high by international standards it compares with \$75 spent per year on a student and \$5-6 per person on a basic health package<sup>82</sup>. Imprisonment is therefore an expensive option and the arguments for using it minimally are strong when there are so many other demands on the national budget.

*'The international aid field of law and development focuses too much on law, lawyers, and state institutions, and too little on development, the poor, and civil society.'* Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, 2003.

72. In this report we are looking at alternatives to prison in the widest sense. We are considering alternatives to bringing people into the criminal justice system when it is unnecessary or undesirable for social or welfare reasons. We are considering alternatives to the formal court process and considering a structure for the criminal justice system that ensures that prison is not used unnecessarily and disproportionately for the vulnerable.
73. For prison not to be overused and for Afghanistan not to end up as many poor countries do with prisons full of poor people, prisons so under-resourced that death rates are high, prisons which make no contribution to the security of the country or to its conformity with its human rights obligations, measures should be considered to filter as far as possible entry to prison at the pre-trial and sentencing stage and to facilitate an early exit when appropriate.

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<sup>81</sup> International Secretariat of the Prison Working Group and the Central Prisons Department (2007). *Rome Conference Afghan Prison Update*. Conference on the Rule of Law in Afghanistan. Rome, 2-3 July 2007.

<sup>82</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC. P.9.

## International experience on introducing alternatives to prison sentences

74. The time is not right for the creation of new sentencing options in the law, nor the establishment of a department of the Ministry of Justice dedicated to supervising the convicted people sentenced to alternatives to prison on the lines of a probation or criminal justice social work service. In England and Wales this work is done by a probation service centrally managed by the Ministry of Justice. In Scotland the same work is done by a department of the social work services provided by local authorities. The introduction of a range of alternative sentences does not often lead to a reduction in the use of imprisonment even when this is the objective. The sentencing patterns in England and Wales over the past 20 years make this clear.
75. The table below shows how the percentage of those sentenced to imprisonment can increase at the same time as the use of alternatives such as community service and probation increase, but at the expense of fines, not at the expense of imprisonment.

### Males aged 21 and over sentenced for indictable offences in England and Wales 1980-2002, by types of sentence (%).

Year	Discharge	Fine	Probation	Community Service	Combination Order	Immediate prison
1980	7	52	5	4		17
1981	8	49	6	5		18
1982	8	47	6	6		19
1983	9	47	6	7		19
1984	9	45	7	7		20
1985	9	43	7	7		21
1986	10	41	7	7		21
1987	10	41	8	7		21
1988	10	41	8	7		20
1989	12	43	8	6		19
1990	13	43	8	7		17
1991	15	39	8	8		18
1992	17	37	9	9	0	18
1993	18	38	10	11	2	18
1994	16	36	11	11	2	20
1995	15	34	11	11	3	24
1996	14	33	11	10	3	26
1997	14	32	11	9	3	26
1998	14	32	11	9	4	27
1999	13	31	11	9	3	28
2000	13	28	11	9	3	30
2001	14	27	12	9	2	30
2002	14	26	12	8	2	30

Home Office Criminal statistics, England and Wales, annual volumes, 1980-1998 and 2000<sup>83</sup>

<sup>83</sup> Method of data collection in 2003 so later figures are not easy to compare.

76. Many countries have in their law the possibility of sentencing a convicted person to community service or unpaid work for the benefit of others. It is a disposal with many advantages. It is publicly popular, not expensive to implement and the work done can bring some benefit to society. Deputy Chief Justice Bihar of the Supreme Court said on the field visit that he considered that it would be better for some of those serving short prison sentences to be undertaking unpaid work cleaning up cities instead.
77. However, there is no example in the developing world, and few in the developed world<sup>84</sup>, where the introduction of community service has effectively substituted community service orders for prison sentences. A scheme that achieved this in Zimbabwe (see section four page 32) was set up under very exceptional circumstances and is no longer functional for obvious reasons. Similar schemes introduced in Uganda, Kenya and Malawi were not generally successful. There is no current example of a successful community service scheme in any developing country that operates as a viable alternative to prison.
78. In a developing country setting the problems are numerous. The potential for corruption in administering community service orders is substantial. For example offenders can pay others to do the work for them; supervisors can put the offenders to work on projects in which they have a financial interest, and there are problems in establishing a service that would not discriminate against women. There are also cultural implications. The shame of being seen carrying out such a penalty might be too great for it to be viable<sup>85</sup>. It is hard to see how it could be applicable to women in Afghanistan. The cost of establishing a scheme as part of the justice system would be substantial. There would be costs of supervision and arrangements for what to do when an order is breached. New legislation would be needed.
79. However the principle of paying back to the community that is the basis of community service orders is a strong one in the traditional Afghan system and the reforms of that system<sup>86</sup> would incorporate some of the spirit behind the idea of community service in the West without the attendant difficulties.
80. It is often suggested that there should be established a specific professionalised service such as a probation service to supervise offenders, where that supervision is a sentence of a court and used in a case where a prison sentence would have been a possibility. There is no evidence that the introduction of such a service in a society where it is not culturally acceptable is feasible or effective. There are no examples of the successful introduction of such a service in a country as poor and as fragmented as Afghanistan. The costs would be substantial. In its draft report on implementing alternatives the

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<sup>84</sup> See Stern, V. (2002). *Developing alternatives to prison in Central and Eastern Europe and Central Asia*. Budapest: COLPI.

<sup>85</sup> Suggestion provided by contributor to ICPS roundtable on Afghanistan, 21 February 2008

<sup>86</sup> Stern V. (1999). *Alternatives to prison in developing countries*. London: ICPS.

UNODC reaches the same conclusion about community service and probation supervision<sup>87</sup>.

81. There could be advantages in establishing a programme of support for NGOs and other civil society organisations to become involved in the criminal justice system and take on some of the functions that are performed by probation and criminal justice social work services in other contexts, such as dealing with the welfare problems of offenders, providing advice and support in dealing with the criminal justice process, assisting with providing facilities where those inappropriately placed in prison can be moved to, linking offenders to the agencies that can help them.
82. Fines are an important element but there are problems about their extension. Collecting fines can be difficult and we are aware of the large numbers of those incarcerated in the prisons of the developing world whose offence is not being able to pay a fine of very small value but which is quite beyond the means of the offender. The system of fines in Afghanistan is already problematic and adds to the levels of imprisonment since many penalties consist of a fine and imprisonment as well. Furthermore the fines can be so high that the imprisoned person cannot pay them without further illegality. In addition as explained above many prisoners are not released from prison although their sentence has expired because it is believed they can be kept in if they still have outstanding fines to pay or an official has to check whether they still have outstanding fines to pay. However, it would be beneficial to resolve these anomalies so that the fine can play a more useful part in the system and bring in some money for the government.

### **Reducing pre-trial detention**

83. It is a characteristic of countries in the process of reform to see the numbers in pre-trial detention rise rapidly and defendants spend long periods waiting for trial, sometimes longer than the sentence for the offence in question. There are human rights implications in the use of pre-trial detention since all pre-trial prisoners must be presumed innocent until found guilty. The international human right instruments require that pre-trial detention should be used sparingly and there should be a presumption in favour of not holding suspects in detention pre-trial.
84. The number of pre-trial detainees in a country is affected by several factors. The pre-trial prisons are filled by the actions of the police and the prosecution. The police arrest suspects who are then detained. Subsequently some of them will be convicted and sentenced to prison. If the police are judged by how many suspects they arrest rather than by their overall contribution to public safety they may spend their time arresting many small time offenders rather than looking for the perpetrators of serious crimes.

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<sup>87</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC. P.88.

How long people are held in pre-trial detention depends on:

- the speed of the police or prosecutor's investigation
- the capacity of the system to transport defendants from prison to court
- the workload in the courts and the resources available to conduct trials
- the availability of legal advice and public defenders for pre-trial detainees.

85. In countries where corruption is a factor, those with money will pay to avoid pre-trial detention and suspects with no money will be detained. In some countries transport to get defendants to court is only available to those who can pay and indigent defendants may stay in prison longer.

## Section Four

### Learning from experience – some case studies from other jurisdictions

86. In this section we have collected some examples of work done on alternatives to prison in other jurisdictions that have some similarities with Afghanistan although we accept entirely that the conditions in Afghanistan are unique.

#### Community service as an alternative to prison

##### ***Case study - The Zimbabwe Community Service Scheme***

*A community service scheme was established in Zimbabwe in August 1992. The establishment of the scheme followed research which was carried out into the composition of the prison population. The study showed that 60 per cent of those in prison were serving sentences of three months or less. It was safe to assume they were minor offenders, either imprisoned for lesser offences or because they had failed to pay a fine. Based on this information the community service scheme was introduced.*

*In the first four years after the scheme was implemented around seventeen thousand prisoners participated in community service and nearly 90% of them completed the work successfully.*

*Because finances were limited, the scheme began without paid staff. Instead, a National Committee was established consisting of members who had other jobs. The Committee consisted of High Court Judges, the Chief Magistrate, the Secretary of Justice, Legal and Parliamentary Affairs, the Commissioner of Police, the Commissioner of Prisons, the Director of Public Prosecutions, and others. The purpose of the Committee was to formulate policies and oversee the smooth implementation of the scheme. The National Committee drew up guidelines to ensure that community service was used as an alternative to prison rather than as an additional sentencing option. When magistrates passed a prison sentence of less than 12 months, they were required to explain why community service was not used. The court staff would make the orders, ensure that the offender was placed and check that the order was completed. The supervision of the offenders would be carried out by the heads of the social agencies involved; schools, hospitals and old peoples' homes. The organisation of the scheme locally would be under the aegis of a District Committee on Community Service chaired by the District Magistrate. Eventually funding for some paid staff came from the EU and ODA (now DfID)*

*The Zimbabwe model had a number of features that aroused world-wide interest. These included:*

- *The key role of the judiciary*
- *The committee structure, which ensured the involvement and commitment of all those whose co-operation was necessary for the successful operation of the scheme*

- *The priority that was given by those establishing the scheme to inform the public, consult them about the introduction and operation of the scheme and win public support*
- *The maximum use of existing staff and volunteer resources to ensure that only small amounts of new expenditure were needed*
- *Effectiveness in preventing the prison population from rising above current levels*

Vivien Stern, *Alternatives to Prison in Developing Countries*, 1999.

87. The lesson from the Zimbabwe scheme is that for an alternative to custody to be introduced and to function as a genuine alternative, getting people out of prison rather than adding to the number of people under orders of the court, many pre-conditions are necessary which are not found in most environments. The project was initiated and run by the judiciary and rarely does the judiciary become involved in this way. Court administration was at a level that enabled the local magistrate's courts to manage the scheme on their patch. Civic awareness was at a high enough level for the staff of hospitals and schools to see the social benefits of taking on the supervision of an offender on community service. None of these pre-conditions are currently in place in Afghanistan and indeed they are not available in other developing countries either.

#### Providing legal aid and advice

##### ***Case study – Timap for Justice***

*Timap for Justice is a joint venture of the Open Society Justice Initiative and the Sierra Leone National Forum for Human Rights which have set up a para-legal service. When it was set up there were only 100 trained lawyers in the country*

*Timap's paralegals address justice problems that arise between people and the authorities, such as corruption in government services, as well as disputes between individuals, including instances of domestic violence and failure to pay child support. The paralegals use mediation, advocacy and community organizing to resolve such problems. Their efforts are complicated by Sierra Leone's dualist legal structure, which features both a formal legal system of courts and lawyers based on the English model, and a customary system based on traditional approaches to justice. Timap's paralegals apply their knowledge of formal law and their familiarity with local customs to navigate between the two legal systems.*

*After a needs assessment process, five chiefdoms were selected, three in Bo District in the south and two in Tonkolili District in the north. Thirteen paralegals, all of whom have at least a secondary school education, were recruited and hired from the chiefdoms where they now work. Before starting work they received training in law, the workings of government, and paralegal skills. The directors continue to train and supervise the paralegals as the work goes on.*

*Timap's paralegals are laypeople, and more than half have only a secondary school education. For most of them, this work is their first exposure to law. For the designation "paralegal" to have meaning, then, and for their association with the law not to be empty, Timap believes it is paramount that the paralegals receive continuous supervision and training from lawyers.*

*The attorney-project directors spend more than half of every month travelling among the program's eight offices, reviewing paralegals' handling of cases, working directly with selected clients, and providing training on pertinent areas of the law or the workings of government. On the other hand, formal law and government represent only a part of the resources upon which Timap draws. Indeed, the paralegals have greater expertise than do Timap's directors with regard to the customary law and institutions in their own localities; they also best understand the clients' needs and limitations.*

*The paralegals use diverse methods to tackle individual and community problems. For individual problems (a woman beaten by her husband, or a juvenile wrongfully detained), they provide information on rights and procedures, mediate conflicts, and assist clients in dealing with government and chiefdom authorities. For community problems (the prevalence of domestic violence in the community, or a police practice of detaining juveniles with adults), they engage in community education and dialogue, advocate for change with both traditional and formal authorities, and organize community members to undertake collective action. In a small number of cases, chosen either because the injustice is particularly severe or because of the possibility of legal impact, the directing lawyers provide direct legal representation or high-level advocacy.*

*In Sierra Leone cases are rarely appealed from the customary to the statutory system. However, when customary court decisions are unjust, Timap for Justice may seek recourse in the formal system. Community oversight boards, appointed by community members and approved by the program directors, monitor the paralegals' work to ensure that the program is serving the needs of the chiefdom.*

Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 2006.<sup>88</sup>

88. The lessons from the Timap for Justice project are that legal services can be provided in the absence of enough trained lawyers, as indeed the work of the International Legal Foundation in Afghanistan has also shown. The project also shows how the formal and informal systems can be seen as equal and legitimate parts of the justice system and there can be interchange between the one and the other. Timap has found a way of raising the standards in the customary system which seems to be successful.

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<sup>88</sup> Maru, V. (2006). *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, in *The Yale Journal of International Law*, Vol.31, no.2.

## Reducing inappropriate pre-trial detention

### ***Case study – Camp Courts in Bihar, India***

*In Bihar, India, judicial officials periodically visit prisons to review cases and dispense rulings on the spot. These “camp courts” only handle matters involving “small time offenders.”*

*Prior to the camp courts, over 12,000 pre-trial prisoners were “lodged in various jails of Bihar, waiting to be tried for minor offences.” Many had been “languishing for more time than the sentences” when the local high court “directed jail authorities to organize camp courts in the State’s jails to hasten the disposal of minor cases.” ... “Judicial magistrates and executive magistrates of respective districts” preside over the camp courts. Before each session, a superintendent of the local prison submits a list of prisoners eligible to participate.*

*The Bihar camp courts convene on the last Saturday of every month. The camp courts have been highly effective at reducing the backlog of “simple bailable criminal cases and other simple compoundable cases of criminal nature.” For example, at camp courts “held all over the state on [one] Saturday, at least 5,383 petty criminal cases were disposed of in a single day.”*

*Good practices in reducing pre-trial detention, Penal Reform International, 2003<sup>89</sup>*

89. It is very common for prisons in a poor country to be full of ‘simple, bailable criminal cases’. The Bihar project is one way of dealing with this, providing access to justice and reducing unnecessary imprisonment. Other methods include paralegals going into prisons to assist detainees in making their case for bail and the prison governor being given the power to review cases and release those who should not be being held.

## Improving the situation of women

### ***Case study – Justice for women in Yemen***

*Oxfam is working in Yemen to improve women’s access to justice. They work with local partner organisations to raise poor women’s awareness of their legal rights, to provide legal aid and counselling, and to support female prisoners.*

*The Women’s National Committee (WNC) promotes dialogue with decision makers to ensure justice for women. One problem they addressed was that of women prisoners who had completed their sentence but were forbidden to leave prison unless a male guardian collected them. The WNC put pressure on the Ministry of Interior and got the rule changed. The Yemeni Women’s Union, supported by Oxfam in five districts, has 36 volunteer lawyers who provide free legal support to poor women in prisons,*

<sup>89</sup> From *Good Practices in Reducing Pre-trial Detention*, Penal Reform International, 2003

*courts and police stations. As a result, 450 female prisoners were released in 2004 and 2005. According to a report from December 2007: 'There is not a single woman in prison after the completion of their detention period', Mutaher Ali Naji, general manager of Sanaa Central Prison, said. 'We release them when they have served their sentence period and they are free to go where they want. There are shelters that women can go to after being released from prison or for those women who have no home to go to, among them the centre for women in Aden and the GTZ shelter.'*<sup>90</sup>

Elham Hassan, Women unjustly detained in prisons. *Yemen Observer*, 17 December 2007

90. The Yemen project shows the importance of getting lawyers into prisons as well as courts and police stations to divert them from prison. The establishment of shelters is also needed so that there is somewhere for the diverted women to go.

### Transforming the traditional system

#### ***Case study – access to justice in Bangladesh***

*The Bangladesh Legal Aid and Services Trust (BLAST) is the largest legal aid organisation in Bangladesh. It was established in 1993 and is registered as an NGO with the NGO Affairs Bureau of the Government of Bangladesh. BLAST's mission is to make the legal system accessible to the poor and the disadvantaged. In addition to its legal aid services BLAST has become involved in making the shalish system of village mediation less discriminatory against women. In its Annual Report 2006 BLAST describes this process:*

*The "access to justice" for rural Bangladeshi women is seriously limited. It is fair to state that poor women in rural Bangladesh would have no access to formal institutions of justice if it were not for the activities of a handful of NGOs... if a poor woman wanted to access justice, it is unclear how she would do so, and who she would go to. The formal courts are largely inaccessible. They are commonly perceived to be corrupt and, hence, costly; take far too long to deliver justice; their procedures are not transparent; and the forms of justice they deliver are often contrary to local norms... The quasi-formal dispute resolution services at the Union Parishad level (the lowest tier of local government) is a considerably more accessible institution. The Arbitration Council and the Village Courts are UP institutions that resolve civil disputes. However, these institutions have become largely non-functional. The locally elected UP representatives prefer to conduct dispute resolution through shalish, a traditional and informal village level institution, rather than through the more rule-bound Arbitration Councils and Village Courts. The informal shalish has been in existence in South Asia for at least 2,500 years. It is better understood as a process than an institution. A group of respected village leaders (matbars) congregate at the request of one of two*

<sup>90</sup> Hassan, E. (2007). Women unjustly detained in prisons. *Yemen Observer*, 17 December 2007.

*disputing parties, to resolve their dispute. The main aim of the shalish is restorative rather than retributive.*

*These processes are, by and large, the preferred source of justice for most rural Bangladeshis. They offer speedy and cheap resolutions. Their procedures are largely transparent and there are fewer chances for fraud, as the community is more likely to know the true events. They are also more in tune with the traditional values of justice held by most villagers. However, our survey found that 51% of respondents thought that the shalish did not provide justice for the poor and for women. [Therefore] an ongoing BLAST action research project ...began in 120 villages in the six divisions of Bangladesh. 12 PNGOs implemented the village-based projects. Prominent village residents who are generally involved in shalish and the locally elected representative are formed into a Nagorik Odhikar Committee (4 men and 2 women). A further six local educated and professional women and the locally elected woman member are organized into a Nari Shohayota Dol. A social communication strategy focusing on gender relations and human rights which included folk theatre, music events, video events, films, and uthan boithoks – was implemented in each village. The social communication issues were centred on women’s rights, gender relations, and related legal issues. The most important impact of our program has been an increase in the tendency of women to seek justice in response to rights violations. This increase, in turn, is tied to several important village level changes in the effective demand and institutional supply of justice that can also be attributed to the program.*

*Program activities have made the traditional village shalish more gender-sensitive and pro-poor. The NOCs, composed of traditional shalishkars, have played an important role. The increased participation of woman in TDRs is a direct success of this program. The emergence of Nari Shalishkars from amongst the women members of the NOC has been a remarkable success. Safia Begum, a nari shalishkar in a village in Comilla, told us the following about her participation in the local shalish:*

*If my arguments during shalish are logical and reasonable, then they are well received by everyone. I might make a mistake. If I do, and the other shalishkars can reasonably explain to me why I am mistaken, I don’t mind. But, if I make a reasonable point, and they still don’t accept it, I protest strongly and demand that they listen to me. As a result, everyone accepts my arguments. The effective demand for justice amongst women has also risen due to increased awareness about the law, knowledge about the availability of pro bono legal aid, and challenges to patriarchal norms and values; which, in turn, have been brought about (to a significant degree) by our program activities.’*

*The activities of BLAST have been supported by DFID for several years and a further programme of support is being considered.*

*BLAST Annual Report 2005-2006.<sup>91</sup>*

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<sup>91</sup> Bangladesh Legal Aid Service (2007). *Annual Activities Report 2005-2006*. Dhaka: BLAST. P.5.

91. The activities of BLAST show how much activity can be undertaken by a well-run and well-supported NGO. BLAST works at all levels where legal help and legal education is needed. Its work to increase the role of women in the traditional 'shalish' system is a model that is well worth study.

Transparency, public education, public involvement

***Case study – public education in Cambodia***

***LICADHO Cambodian League for the Promotion and Defence of Human Rights***

*LICADHO is a national Cambodian human rights organization. Since its establishment in 1992, it has been at the forefront of efforts to protect civil and political and economic and social rights in Cambodia and to promote respect for them by the Cambodian government and institutions.*

*Amongst its activities it runs a Monitoring Office which investigates human rights violations and assists victims with the legal process. Specially-trained staff also monitor 18 prisons to assess conditions and ensure that pre-trial detainees have access to legal representation. The Medical Office provides medical assistance to prisoners and prison officials in 18 prisons, as well as providing medical care and referrals for victims of human rights violations.*

*In addition, LICADHO conducts advocacy at the national level to bring about reforms, and works with other local and international NGOs to influence the government. LICADHO regularly produces comprehensive reports and briefing papers, and is one of the main sources of information on human rights in Cambodia.*

*Licadho publishes reports about Cambodian prisoners which keep prison conditions in the public eye and highlight abuses. The latest such report, published in March 2008, tells the story of one mother and her child in prison and draws attention to the corrupt system which led to the woman's imprisonment and the harshness of the prison conditions in which she and her child live.<sup>92</sup>*

**Prison conditions in Cambodia: The story of a mother and child, Licadho 2008**

92. Licadho is an example of a very competent organisation that spreads information about legal rights and legal abuses using accessible methods of communication.

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<sup>92</sup> Licadho (2008). *Prison conditions in Cambodia: The story of a mother and child*. Phnom Penh: Licadho.

## Section Five

### Suggestions for measures to reduce the use of imprisonment in Afghanistan

93. The reform of the justice system seems to have taken place within the world of legislation, law enforcement, detection, conviction and punishment on the assumption that the basis for a formal justice system is already in place. This is understandable given the constraints. If, however, there is to be a functioning system in Afghanistan more account will need to be taken of the wider social environment, the strengths and weaknesses of existing institutions, the levels of corruption, the availability of electricity, possible unintended consequences of new laws and new institutions, the opportunity costs of various forms of spending and the importance of access to justice for the population as a whole.
94. There would be advantages in taking a way forward that tries to shift the direction of travel and establish some structures, plans and functioning programmes that could:
- slow the rise in the prison population
  - ensure greater justice for those going through the system
  - enable money to be used more wisely for the betterment of the people of Afghanistan
95. Since justice reform in Afghanistan is going to take a long time (all commentators agree on this) actions need to establish the basics of a sustainable system that will continue to deliver over time. It takes time for ideas to take hold and for organisations to grow. BLAST in Bangladesh (see case study, section 4) developed over ten years. The legal aid work depends on expanding legal training which will be a slow process.
96. Any proposals for Afghanistan need to take account of the realities that are part of justice systems in poor countries. Corruption is deep-rooted and will not be easily curbed. Prisons are likely to be used as a repository for the poor and the unfortunate and for unsolved social and health problems. Tolerance of the idea of alternatives to prison is likely to be limited and needs nurturing through public education and debate.
97. The controversy over whether the traditional justice system should be supported or not will continue to rage, but in the meantime the system is there. It is familiar to the people. It is deemed to be reformable by a number of commentators and it is affordable. It is also worth noting that some Western systems are moving towards an interest in a form of justice which is more community-oriented and less formal. For example the Secretary for Justice, Jack Straw, said in a recent speech “...the courts need to understand better the problems of that community. They need to have contact with the community. They need to respond to the community.”

Over time, and following from the success of where it is already common practice, I would like to see many more district judges and magistrates playing an active role in community discussions. 'Community engagement' is what the Lord Phillips, the Lord Chief Justice has called for, and something for which he has my full support.'<sup>93</sup>

98. Affordability is a very important consideration. The formal system of courts with fully legally trained personnel and properly resourced and managed prisons is highly costly for any poor country. It is hard to justify in any terms a huge increase in imprisonment when the country is so poor, particularly when the international community is aiming at prisons which are in conformity with international human rights standards. The figures in paragraph 79 comparing the cost of a year's imprisonment with the cost of a year's basic health care are especially telling.
99. We echo the concerns of others (for example the UNODC) about the effects of the counter narcotics laws. Any changes in the operation of this law to ensure its emphasis to concentrating on the major players and moving to treatment options or non-custodial penalties for the addicted and the small players would benefit the people of Afghanistan and save precious resources.

### **Policy directions**

100. Reform of the justice system in Afghanistan needs to be seen in the wider context of the development of Afghan society.

*'Today's heavy emphasis on judges, lawyers, and courts is analogous to what the public health field would look like if it mainly focused on urban hospitals and the doctors staffing them, and largely ignored nurses, other health workers, maternal and public education, other preventive approaches, rural and community health issues, building community capacities, and nonmedical strategies (such as improving sanitation and water supply).'*<sup>94</sup> Stephen Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative*, 2003.

101. The balance of the expenditure on justice reform is skewed too far in the direction of enforcement and prosecution and the attention of the donor community seems to be similarly skewed.

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<sup>93</sup> Speech by The Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice at the Royal Society of Arts on public confidence in the criminal justice system, 26 March 2008.

<sup>94</sup> Golub, S. (2003). *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*. Washington DC: Carnegie Endowment for International Peace. P.6.

102. The UK Government's approach as set out in the *National Security Strategy of the United Kingdom*<sup>95</sup> calls for 'concerted, sustained, and integrated effort across security, politics and governance, and economic development' (4.41).
103. The counter-narcotics law of 2005 passed by Presidential decree is being reviewed and has been under consideration by the Afghan parliament for over a year. A reform of this law is highly desirable based on an analysis of its impact so far on the narcotics export business and on the small time smugglers and users who are caught up in its operations. There is as far as we know no evidence from any jurisdiction in the world that such laws make a major impact on the narcotics trade. However they can add to violence, increase corruption and make the prisons less manageable. They can also lead to the incarceration of many sick and addicted people whose drug addiction leads to needle-sharing and the spread of HIV/AIDS<sup>96</sup>. The Counter-Narcotics law should not apply to juveniles and this should be clarified<sup>97</sup>
104. A shift in the relationships at the national governmental level is desirable. The health and welfare ministries should be more involved in the discussions about the justice system reform, the implications and costs for them of imprisoning more socially marginalised people and the role for them in providing for the mentally ill people in prison and the drug addicts, the women and the juveniles. We understand mental health facilities are woefully inadequate, with provision only available in Kabul and Herat<sup>98</sup>.

## Annex 1

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<sup>95</sup> Cabinet Office (2008) *The National Security Strategy of the United Kingdom: Security in an interdependent world*. London: The Stationery Office.

<sup>96</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC. P.5.

<sup>97</sup> Atabay, T. and English, P. (2008). *Afghanistan: Implementing Alternatives to Imprisonment in line with International Standards and National Legislation*. Vienna: UNODC . Para 6.

<sup>98</sup> Information provided by contributor to ICPS roundtable on Afghanistan, 21 February 2008

## **Legal Provisions Relating to Alternatives to Prison for Adults**

1. The **Penal Code 1976** sets out six principal punishments

- Execution.
- Continued imprisonment 16-20 years
- Long imprisonment 5-15 years
- Medium imprisonment 1-5 years
- Short imprisonment 1 day -1 year
- Cash punishment (fines) (Art 97)

2. Cash penalties are not permitted in felonies, unless the law has clearly stipulated (Art 110)

3. Consequential and Complementary punishments are also applied, involving deprivations of rights and privileges and confiscation (art 112-120)

4. Security measures can also be imposed including Quarantine in relevant hospitals, prohibition of movement and residence in certain areas, deprivations of rights, debarment from professions. (art 121-140)

5. Punishments can be reduced on grounds of extenuating circumstances and compassion (art 141-147)

6. Crimes whose punishment is imprisonment of up to two years or cash fine of up to twenty four thousand Afghanis can be dealt with by a suspended sentence. (art 161-166)

7. The Code allows for general and special amnesties.(art 170-171)

8. A person convicted of public drunkenness can be sent to hospital rather than prison (Art 352)

### **Interim Criminal Code for Courts 2004**

1. Gives saranwal and police key roles in executing sanctions alternative to imprisonment and fines (Art 86/87)

2. Allows saranwal to defer prison sentence of pregnant women and parents of children when both sentenced (Art 89)

3. Requires saranwal to transfer mentally ill prisoners to medical centre (Art 89)

4. Allows Courts to order conditional release at three quarter point of sentence after at least nine months; and after at least 15 years of a life sentence (Art 90-93)

### **Criminal Procedure Code 1965 (as amended)**

1 Prosecutors can issue temporary release on bail – certain offences exempted

### **Law of Prison and Detention Centres 2005**

1. If the file of an accused is not completed in nine months, the prison administration must notify the court or attorney 15 days before the end of the period. If there is no reply, the accused person shall be released. (Art 20.4)
2. The prison administration does not have the right to keep a prisoner for a longer period than his sentence term. (Art 50)

### **Counter Narcotics Law**

If a doctor certifies a person is addicted, the court may exempt him from prison and fine and require an addict to attend a detoxification or drug treatment centre. (art 27)

## **Costs of Prison and Alternatives**

1. Information about the costs of prison is difficult to obtain. It is reported that spending on prisons account for 70% of the Ministry of Justice budget.
2. The UNODC estimates the annual MoJ costs per prisoner at \$708 USD. Dividing the 2007 prisons budget of \$9 million by the year end population of 12,400 gives a similar unit cost of \$725 per prisoner.
3. If unit costs remain the same, and the prison population increases at the rate of increase from 2006-2007, the prisons budget would rise to more than \$77 million by 2010.
4. The lack of systematic data about prisoners makes it difficult to estimate the numbers potentially eligible for alternative options.
5. UNODC studies of juveniles found almost half of those under sentence were serving 2 years or less (about 20% under a year); a small pilot study of adult male first time offenders found that 1 in 3 were serving sentences of two years or less. A study of women found that only 5% were serving 2 years or under. The 2 years or under group is in theory eligible for suspended sentences
6. As for untried detainees, there is little data about the extent to which bail is applied for and refused.
7. In addition to running costs there is a major programme of capital investment in prisons and the uplifting of staff pay and conditions. The cost of 31 new prisons is estimated to be \$37.2 million.
8. While further work is clearly needed on the scope for alternatives the costs suggest an urgent need for some investment in the infrastructure of alternatives.

## **Annex 3**

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