



Q10845. Researched and compiled by the Refugee Documentation Centre of Ireland on 10 September 2009

Afghanistan - Information on the availability of a fair trial

The 2008 *US Department of State Country Report on Human Rights Practices for Afghanistan*, under the heading 'Arbitrary or Unlawful Deprivation of Life' states:

"In November the government executed 16 prisoners. At year's end, approximately 85 additional cases of prisoners sentenced to death were pending President Karzai's review. The EU, UN, and numerous human rights NGOs have condemned executions, noting the lack of due process in the judicial system did not guarantee a fair trial." (US Department of State (25 February 2009) *2008 Human Rights Report: Afghanistan*)

Under the heading 'Arrest and Detention', the same report states:

"The press and human rights organizations reported arbitrary arrest in most provinces. There was little consistency in the length of time detainees were held before trial or arraignment. In a March 2007 report the UN Secretary General stated in many cases there was prolonged pretrial detention and suspects had not been given access to lawyers." (ibid)

The same report under the heading 'Denial of Fair Public Trial' continues:

"The law provides for an independent judiciary, but in practice the judiciary was often underfunded, understaffed, and subject to political influence and pervasive corruption. Pressure from public officials, tribal leaders, families of accused persons, and individuals associated with the insurgency, as well as bribery and corruption, threatened judicial impartiality. The Counternarcotics Tribunal in Kabul was an exception and international organizations reported no evidence of corruption or political influence by its officials. Other courts administered justice unevenly according to a mixture of codified law, Shari'a (Islamic law), and local custom.

The formal justice system was relatively strong in the urban centers, where the central government was strongest, and weaker in the rural areas, where approximately 75 percent of the population lives. Nationwide, fully functioning courts, police forces, and prisons were rare. The judicial system lacked the capacity to handle the large volume of new and amended legislation. A lack of qualified judicial personnel hindered the courts. Municipality and provincial authorities as well as judges had minimal training and often based their judgments on their personal understanding of Shari'a, tribal codes of honor, or local custom. Both judges and prosecutors were hampered by a lack of access to legal codes and statutes." (ibid)

The report then adds:

“Courts primarily decided criminal cases in major cities, although civil cases were often resolved in the informal system. Due to the undeveloped formal legal system, in rural areas local elders and shuras were the primary means of settling both criminal matters and civil disputes; they also allegedly levied unsanctioned punishments. Some estimates suggested 80 percent of all cases went through shuras, which did not adhere to the constitutional rights of citizens and often violated the rights of women and minorities. An NGO in Herat, however, reported shuras often treated women fairly in resolving civil matters such as divorce and custody cases” (ibid)

Under the heading ‘Trial Procedures’, the report continues:

“Trial procedures rarely met internationally accepted standards. The administration and implementation of justice varied in different areas of the country. Under the law all citizens are entitled to a presumption of innocence. In practice the courts reportedly convicted defendants after sessions that lasted only a few minutes. Defendants have the right to be present and to appeal; however, these rights were not always applied. Trials were usually public, and juries were not used. Defendants also have the right to consult with an advocate or counsel at public expense when resources allowed. This right was inconsistently applied. Defendants frequently were not allowed to confront or question witnesses. Citizens were often unaware of their constitutional rights. Defendants and attorneys were entitled to examine the documents related to their case and the physical evidence before trial; however, NGOs noted that in practice court documents often were not available for review before cases went to trial.” (ibid)

The report then continues further:

“In cases lacking a clearly defined legal statute, or cases in which judges, prosecutors, or elders were simply unaware of the law, courts and informal shuras enforced customary law; this practice often resulted in outcomes that discriminated against women. This included the practice of ordering the defendant to provide compensation in the form of a young girl to be married to a man whose family the defendant had wronged.” (ibid)

The 2009 *Amnesty International* International Report for Afghanistan, under the heading ‘Justice system’, states:

“Citizens lacked confidence in the formal justice institutions and regarded them as slow, ineffective and often corrupt. Most people, and in particular women, had difficulty accessing courts and legal assistance; most could not afford court fees or travel costs. Traditional jirgas and shuras (informal tribal councils), which operate outside the formal justice system and have led to violations of the right to fair trial, continued to handle an estimated 80 per cent of all disputes, particularly in rural areas.” (Amnesty International (28 May 2009) *Amnesty International Report 2009 – Afghanistan*)

This report continues:

“The trial proceedings continued of Afghan detainees from Guantánamo and Bagram transferred to the Afghan government for prosecution, but failed to meet national or international fair trial standards. The trials were undermined by serious flaws including lack of defence counsel and inadequate time to prepare a defence, the use of confessions obtained by torture and other ill-treatment and denial of the right to examine evidence and confront witnesses. A presidential committee was established in March to review trial complaints.” (ibid)

The *Freedom House* 2009 Freedom in the World report for Afghanistan, states:

“The judicial system operates haphazardly, and justice in many places is administered on the basis of a mixture of legal codes by inadequately trained judges. Corruption in the judiciary is extensive, and judges and lawyers are often subject to threats from local leaders or armed groups. Traditional justice remains the main recourse for the population, particularly in rural areas. The Supreme Court, composed of religious scholars who have little knowledge of civil jurisprudence, is particularly in need of reform.” (Freedom House (16 July 2009) *Freedom in the World – Afghanistan*)

A 2009 *United Nations Security Council* report under the heading ‘The situation in Afghanistan and its implications for international peace and security’ subheading ‘Human rights’ states:

“The widespread abuse of power by those in positions of authority, coupled with arbitrary detentions and the continued failure of the judiciary to respect fair trial guarantees or to operate in a just and independent manner, helps sustain the prevailing culture of impunity.” (United Nations Security Council (10 March 2009) *The situation in Afghanistan and its implications for international peace and security*, p.11)

This report continues:

“The resumption of the implementation of the death penalty is disquieting given manifest deficiencies in due process and fair trial guarantees. At least 16 prisoners convicted of criminal acts were executed by the State in November and December 2008. It is estimated that 110 prisoners remain on death row. Adequate procedural guarantees to protect the rights of those charged with capital offences are not in place; implementation of the death penalty therefore risks perpetuating injustice rather than addressing legitimate concerns about national and public security.”(ibid, p.12)

An article by Tobi Cohen for the *Sudbury Star (Ontario)* under the heading ‘Afghanistan moves closer to justice;’ reports:

“KABUL, Afghanistan _ Political prisoners turned over to Afghan forces by Canadian troops may now have another ace in their pockets when it comes to fair treatment.

In fact, all 10,000 prisoners languishing in Afghan prisons, many of whom ended up there under dubious circumstances, are a step closer to a fairer justice system, advocates say, after the country established its first bar association last week.

Seldom taken seriously by judges, prosecutors, police and prison guards who, in many cases don't understand their role, defence lawyers have frequently been brushed off or tossed out of courtrooms." (Tobi Cohen Sudbury Star (Ontario) (4 August 2008) *Afghanistan moves closer to justice*;))

This article continues:

"Since many Afghans are mistrustful of their government, which they often view as corrupt, the creation of an independent professional oversight body was imperative, said Alex Wilks, a legal specialist with the International Bar Association which, along with the Afghan government and other organizations, has been helping to set up the bar for the last four years.

"Now lawyers will be truly independent from the government," Wilks said. "Hopefully it will increase public confidence in the work of lawyers." (ibid)

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This response was prepared after researching publicly accessible information currently available to the Refugee Documentation Centre within time constraints. This response is not and does not purport to be conclusive as to the merit of any particular claim to refugee status or asylum. Please read in full all documents referred to.

Sources Consulted:

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