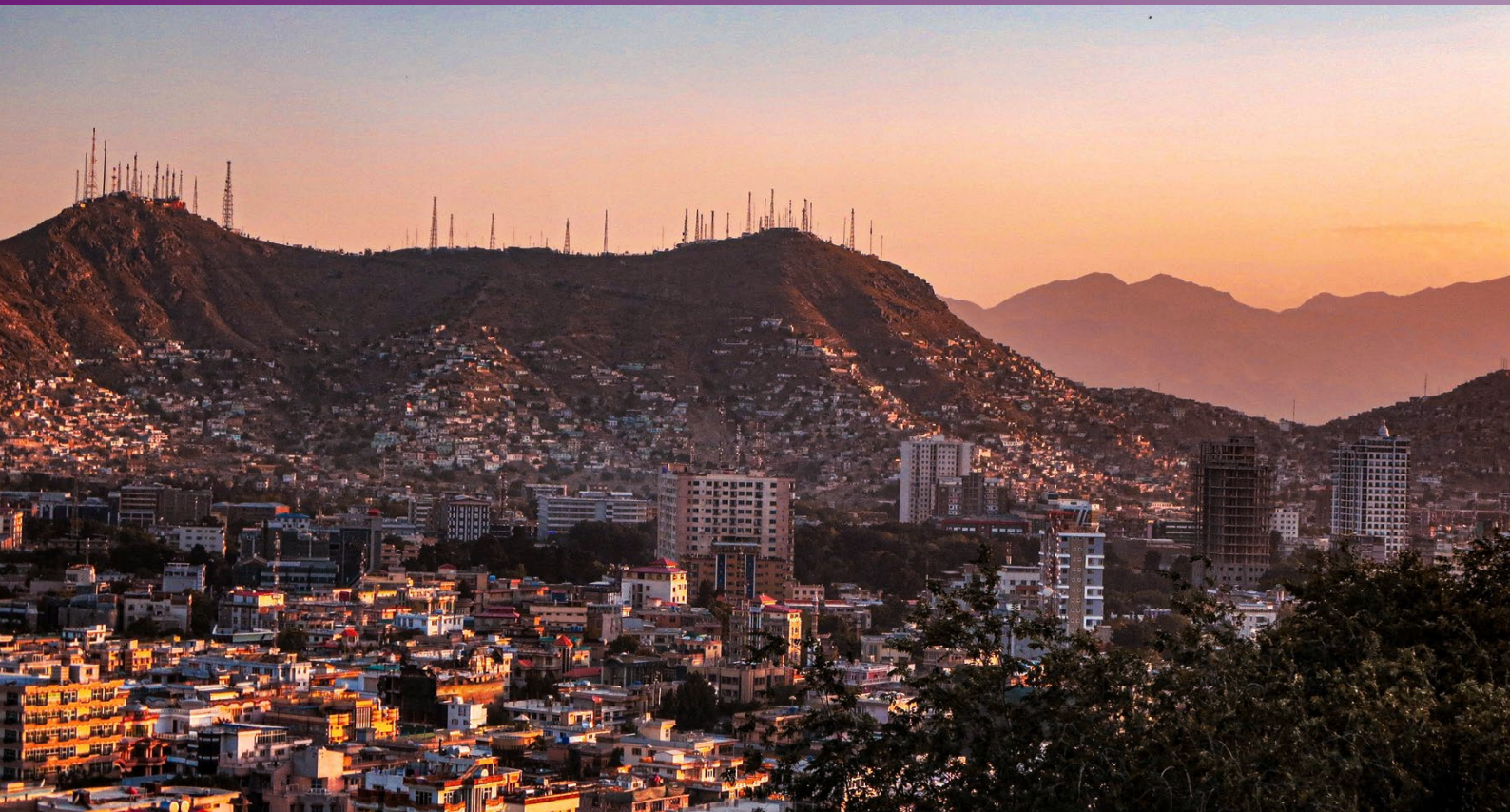

ILAC Rule of Law Report 2023

Justice Matters: A Status Report on Afghanistan Since the Taliban Takeover

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International
Legal Assistance
Consortium



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Forward

The International Legal Assistance Consortium (ILAC), an international non-governmental consortium of organizations and experts, celebrated our 20th anniversary in 2022. Established to help coordinate and support the efforts of legal professionals to rebuild justice institutions in conflict and post-conflict countries, ILAC initially engaged in Afghanistan as early as 2003. Members of ILAC recognize the importance of recommitting our efforts to support Afghan legal professionals, especially those who remain in country and continue to work toward justice and human rights today.

Over the past two decades, several of ILAC's member organizations helped support legal professionals in Afghanistan after the fall of the Taliban regime in 2001. Considerable progress was made as a new Constitution was adopted, law schools were open, the older legal professionals were allowed to reenter their legal roles, and a younger generation – male and female alike – was trained in the rule of law and actively took positions as prosecutors, lawyers, judges, legal aid workers and researchers.

ILAC members were key in supporting our Afghan colleagues in fighting for these reforms. For example, the International Bar Association worked with lawyers beginning in 2002 to help establish the Afghan Independent Bar Association by 2008. The International Association of Women Judges worked closely to encourage, support and train women judges as they were first brought back onto the bench beginning in 2002 and then established the initial Afghan Women Judges Association by 2003. And the International Legal Foundation established the country's first legal aid office more than 20 years ago and continues today to provide legal aid services to poor and marginalized Afghans.

In August 2021 with the fall of the Islamic Republic of Afghanistan and the rise of a new Taliban regime, much of this progress came to a halt. Practicing male and female judges were thrown off the bench, and especially female judges, lawyers, and prosecutors faced serious and continuing threats on their lives. In response, ILAC organizations and individual members rallied to provide help, safety, and security for many of these courageous Afghans who fled into exile and are now in countries around the world, whether still in transit or resettled, and to support the Afghan legal professionals who remained in the country.

The reality now at the end of 2022 is that many of the same challenges that existed during the first decade of the Islamic Republic of Afghanistan still exist or have reappeared – the challenge of assuring qualified and independent judges and lawyers, the challenges of adequate court facilities at all levels of justice, and a functioning system of justice in all its components. Yet, because great progress had previously been made, the potential is there. The groundwork was set and lawyers, legal aid workers, judges and civil society workers were trained and committed to working hard to make that progress work. Many of those individuals remain in Afghanistan and need to be supported in their efforts to push back against the challenges and setbacks that have occurred and may continue to occur under Taliban rule.

This report helps identify the state of justice and inroads for international support in Afghanistan even amidst the changing dynamics in the country at the end of 2022. The challenges impeding research in Afghanistan are significant. As ILAC was finishing its report, the Taliban officially banned women from attending universities and working at non-governmental organizations. Thus, this report is a current snapshot of the justice system as it is operating now with a primary focus on lawyers who remain in Afghanistan and were available to respond to ILAC's inquiries (25 male and 5 female).

ILAC intends for this report to be an initial step in our renewed focus in Afghanistan in 2023 and beyond. It is not easy for the international community to truly know the status of the current Afghan justice system. Nevertheless, ILAC and its members will continue to strive to provide the best knowledge and assessment possible so that the international community – UN, international organizations, individual governments, non-government organizations, and even individuals – understand the need to prioritize support for rule of law and human rights in Afghanistan. Further, ILAC will highlight the role of civil society organizations and human rights defenders engaging in informed and realistic efforts to fight for justice in Afghanistan now and into the future.

Joan D. Winship

ILAC Honorary Lifetime Member
Executive Director (Ret.), International Association of Women Judges

Executive Summary

Contrary to many popular assumptions, the courts in Taliban-ruled Afghanistan are currently operational, albeit with irregular procedures and without the use of clear legal authorities. Under these difficult conditions, Afghan lawyers are nevertheless finding ways to advocate on behalf of their clients. These lawyers are achieving concrete results including release from detention and reduction in punishments. Two conclusions are fundamental to this report: (1) the role of defense lawyers in Afghanistan today is a meaningful one, even under the severe constraints in which they must work, and (2) the ability of Afghan women to access the justice system remains severely constrained and in some cases is altogether denied.

During the 20 years of its existence, the Islamic Republic of Afghanistan created a functioning plural legal system, made up of sharia law, statutory laws and customary norms. The legal system incorporated various relevant international standards, including basic human rights protections. The criminal justice system, while far from perfect, attempted to provide basic due process standards. It was characterized by a trained, professional judiciary, a functioning prosecution service, and an active defense bar. Women were integrated into the judicial system at all points in many provinces of Afghanistan, including in the roles of judge, prosecutor and defense lawyer. There was an independent bar association and substantial progress was being made to provide legal aid services to the poor and marginalized.

The Taliban takeover in August 2021 has had devastating effects on the country and created tremendous challenges for the people of Afghanistan. In spite of this, the Afghan people have shown remarkable resilience. Notably, Afghan lawyers and civil society groups have persevered in their work and callings, including women lawyers and activists. In spite of increasing restrictions, they continue to fight for human rights and the rule of law, in some instances with notable outcomes.

In the immediate aftermath of the August 2021 takeover of Afghanistan by the Taliban¹, the existing legal system was effectively dismantled. Shortly after they assumed power in Kabul, the Taliban leaders announced that all laws of the Republic were nullified, all judges were removed from their jobs, the independent bar association was shut down, and all women were told to stay at home.

The intervening sixteen months have seen the Taliban slowly attempt to fill this legal vacuum. Courts have been reopened in provinces across the country, and an entirely new crop of madrassah-educated, all-male judges has been appointed from the ranks of the Taliban themselves. In addition, a cadre of muftis (religious-educated elders) have also been formally introduced into the legal system, charged with the role of investigating and reviewing cases, and also advising judges on how to rule and what punishments to deliver.

The role and function of the prosecutor has been dissolved. Some basic procedural and organizational rules have been issued by the Supreme Court, along with a handful of decrees on specific substantive matters. In general, however, the relevant law to be applied continues to simply be denoted as sharia (as interpreted by Hanafi jurisprudence) leaving to individual judges the complete discretion to interpret sharia principles as they see fit. As a result of the

¹ Various terms are currently used to describe the present rulers of Afghanistan. The UN uses the term “the *de facto* authorities.” The Taliban themselves use the title Islamic Emirate of Afghanistan. For purposes of brevity and clarity, we have opted simply to use the common colloquial term, Taliban, for this report.

lack of clarity as to applicable laws and training of judges, there remain significant gaps in both substantive and procedural law, and inconsistencies in the application of legal and judicial measures. The day-to-day operations of the courts remain haphazard and vary greatly from one region to another. Court schedules and trial procedures are irregular and at the discretion of the individual judge. There are many reports of substantial case delays.

Male lawyers are slowly resuming their functions in society. After abolishing the independent bar associations, the Ministry of Justice has adopted procedures for re-licensing lawyers. The overwhelming majority of those who have sought such re-licensing have obtained it. These procedures are only available for men. Women continue to be excluded from the opportunity to renew their licenses or appear in court (though there are exceptions reported in a few provinces where women have been able to appear in court with their former licenses).

Private lawyers have begun to appear in Taliban courts on behalf of their clients. Some civil society legal aid organizations also are reportedly providing legal services. The experience of lawyers who have appeared in Taliban courts varies greatly. In some cases, they have had difficulty even finding when and where the court is meeting, or have been denied the right to fully participate in the proceedings. In other situations, however, defense lawyers have been able to advocate successfully on behalf of their clients, for example, obtaining releases from detention, acquittals, reductions in punishments and other relief.

Access by women to the courts and to full participation in the justice system remains greatly restricted. Women may only appear in matters in which they are a party, and in many cases, must then be accompanied to court by a male family member (or simply send a male relative in their place). Testimony of women is not always permitted and even if it is, is generally given less weight than testimony of a man. Women may not appear in court as lawyers or judges. And even the very laws that are applied often explicitly provide that women will be treated differently than men.

The vacuum created in the absence of a well-functioning legal system means that many disputes and other matters are being resolved through informal mechanisms. These include traditional *jirgas*² and meetings of community elders. Imams are also called upon to adjudicate disputes. In some cases, these informal adjudications are being registered with the courts.

Of particular concern, there are widespread reports that many matters are being resolved through the extrajudicial actions of the police and the other security services.³ As one interview respondent in Kabul bluntly noted, “most cases are decided in police stations.” Police actions include enforcement and execution of extrajudicial remedies, such as infliction by non-judicial actors of those punishments dictated under *hadud*⁴ ordinances. Other types of punishments are also frequently decided on and delivered directly by the police or security services. Most detention decisions since the Taliban takeover are also being made by the police or security services without any judicial review.

2 Pashtun term meaning council of leaders.

3 See, e.g., United Nations Assistance Mission in Afghanistan (UNAMA) report, “Human Rights in Afghanistan, August 15, 2021–June 15, 2022,” at p. 3 (“Since mid-August 2021, UNAMA HRS has documented persistent allegations of extrajudicial killings, arbitrary arrests and detention, and torture.”)

4 The Arabic language term *hadud* refers to a group of Pakistani laws (codified in the 1970s) that criminalize certain behaviors deemed to be in violation of the injunctions of Islam. These include fornication, adultery, blasphemy and the consumption of alcohol. The *hadud* ordinances also specify punishments, including whipping, stoning and imprisonment. The ordinances are particularly well-known by the general public throughout Pakistan and Afghanistan.

Assessment Methodology and Parameters

The objective of this project was to assemble a “snapshot” picture of the current state of the criminal justice system and other dispute resolution processes that are now functioning within Afghanistan under the Taliban regime. To do this, the ILAC assessment team developed a comprehensive and standardized survey to be used for interviewing Afghan defense lawyers who have remained in the country, and who are in a position to have first-hand experience with and knowledge of current conditions. In selecting and developing a methodology for that survey, the drafters relied primarily on relevant rule of law and judicial sector assessment tools, including those that have been developed by the U.S. Agency for International Development (USAID), specifically USAID’s *Guide to Rule of Law Country Analysis: the Rule of Law Strategic Framework*, and by relevant UN agencies, specifically UNODC’s *Criminal Justice Assessment Toolkit—Access to Justice: Legal Defence and Legal Aid* (2006). Both assessment tools have been extensively field tested.

The survey was then carried out inside Afghanistan by Afghan interviewers during September and October 2022.⁵ A total of 30 in-depth interviews were conducted. Five of the 30 respondents interviewed were women. The lawyers interviewed all had experience practicing law under the legal system of the Islamic Republic of Afghanistan⁶, as well as first-hand knowledge of conditions in the legal system under the current Taliban regime. The lawyers had handled a wide range of cases, including criminal, civil and family matters. Some had also previously worked as prosecutors. In an effort to be as representative as possible, the interviews were conducted with lawyers from 20 of Afghanistan’s 34 provinces, representing all geographic areas of the country. While all participants were assured that measures would be taken to camouflage their identity, it is possible that some informants may have self-censored or limited their responses.

In sum, most of the information contained in this report is based on those first-hand reports from Afghan lawyers actively working inside the country in the criminal justice system. It is important to recognize that the report reflects the individual experiences and perceptions of the interviewees, and that those perceptions will continue to evolve as a very fluid situation continues to change. Secondary sources were also consulted as relevant to further clarify background points.

Gender Considerations

The disparate treatment of women under the contemporary Afghan justice system underlies all aspects of the administration of justice in the country. Indeed, the restrictions placed on women mean that a majority of the population is often simply denied full access to justice. Accordingly, rather than simply include a separate subsection in this report cataloging matters of gender impact, we have chosen to ‘mainstream’ gender concerns, by considering gender impacts and issues at every instance where we had relevant information or data. We believe this results in a more holistic approach to the presentation of how women have been affected under the current system of Taliban administered justice.

Glossary

- **IAWJ**: International Association of Women Judges
- **ILAC**: International Legal Assistance Consortium
- **MOJ**: Ministry of Justice
- **UNAMA**: United Nations Assistance Mission to Afghanistan
- **UNDP**: United Nations Development Program

⁵ All interviews were conducted in Dari, and then translated into English. The quotes appearing in this report, therefore, are in translation from the original statements.

⁶ See Glossary. The Islamic Republic of Afghanistan was the governmental regime functioning from 2002 until August 2021.

Afghan Chronology

- **August 2021 to present:** the Islamic Emirate of Afghanistan (Taliban)
- **2001–2021:** Islamic Republic of Afghanistan
- **1996–2001:** the Islamic Emirate of Afghanistan (Taliban)
- **1992–1996:** Afghan Civil War
- **1978–1992:** People’s Democratic Republic of Afghanistan (Soviet client state)
- **1973–1978:** Republic of Afghanistan (President Mohammed Daoud Khan/autocratic one-party state)
- **1933–1973:** Kingdom of Afghanistan (King Mohammed Zahir Shah)

Background

Afghanistan has a rich legal history. The legal system of the most recent prior regime, the Islamic Republic of Afghanistan, was a “mixed” or plural system, using a combination of Islamic, statutory and customary laws, and also incorporating relevant international standards. There was a comprehensive body of statutory and regulatory laws, governing both civil and family law, and criminal matters. Underlying the entire system was the Afghan Constitution, which articulated the supremacy of Islamic law in Afghanistan, stating succinctly that “in Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution.” The primary source of law was sharia based. The court system was developed, and women were represented on the judiciary. The same was true of the legal profession. Legal education was available for both men and women.

Civil cases were primarily handled under a sharia system, though there was also a code of civil procedure. A new penal code came into effect in 2018 and a criminal procedure code was revised in 2014. These reflected sharia law principles and also incorporated relevant international human rights standards. For example, codes were written to incorporate protections for women, reflecting international legal protections including protections of women’s rights. An Elimination of Violence Against Women law decreed by then-President Hamid Karzai in 2009 and reconfirmed by then-President Ashraf Ghani in 2018 also separately defined and penalized various types of violence against women.

Independent defense lawyers have been a vital and integral part of the Afghan legal system since the early days of the Republic. Beginning in 2003, civil society organizations began to establish legal aid organizations to represent poor and marginalized accused persons, and train new Afghan lawyers to engage in proactive defense lawyering. It was clear from those earliest days that defense lawyers would need their own independent bar association and that there was a need for laws clarifying and defining their role and legal status. An independent bar association was established in 2008, and a Law on Advocates was passed in 2009, creating, inter alia, standardized procedures for the licensing of lawyers. Legal education opportunities also increased throughout this period, and clinical legal education (and functioning legal aid clinics) were introduced at the state universities. The number of women and men enrolled in legal education institutions increased rapidly. As they graduated from law and sharia faculties, the number of defense lawyers rapidly increased. Women were widely represented in the legal professions.

In 2008, the Legal Aid Department was transferred from the Supreme Court to the Ministry of Justice (MOJ). Beginning in 2009, the World Bank agreed to fund the expansion of the MOJ’s legal aid centers, with the requirement that the MOJ had to professionalize

staff and increase pay in order to ensure quality. This support came to an end in 2017, but by that time, the government had increased funding for legal aid. Civil society organizations also continued to expand legal services across the country. Some of these were devoted specifically to handling cases involving legal issues faced by women.

By 2013, the right to legal representation had been recognized in courts across the country and, as a result of lawyers' proactive defense advocacy, many criminal cases were being resolved more fairly. Significant barriers to legal aid remained, however. There was almost no access to legal aid at the arrest or detention phase, and most poor defendants only received access to legal aid, if at all, once their case went to court. In response to these conditions, one civil society legal aid organization focused on placing "duty lawyers" in police stations who could provide legal advice and assistance from the time of the arrest. This duty lawyer project was initially started in Helmand and Kandahar provinces and was expanded nationwide by 2015. By 2019, 60% of their cases had defense representation from the police stage and were working with the MOJ to try and expand the program nationwide. The impact of this meant that there was much more identification of and challenges to violations of rights at the police stage—for example, wrongful detentions and instances of police brutality.

By August 2021, there were over 2,900 active defense lawyers licensed by the Afghan Independent Bar Association, of whom at least 750 were women. There was a constitutional right to legal representation. Actors in the legal system were generally well trained, with an understanding of the application of the law. Legal aid was provided by civil society organizations, private lawyers and a legal aid department within the MOJ. There was an active array of civil society organizations providing the vast majority of legal aid services across the country. In 2019, substantial reforms were being made to the government legal aid system aimed at expanding its reach and improving its effectiveness. A new National Legal Aid Policy and Legal Aid Regulation were adopted, and an independent Legal Aid Commission was established to oversee the legal aid system. Of significance, the Legal Aid Regulation called for the establishment of a fund that was intended to provide financial support for a mixed model legal aid delivery system that included civil society organizations and private lawyers.

After 20 years of operation, the Republic also had a well-functioning judiciary, with women judges serving on the bench. There were effectively nine separate courts functioning in Afghanistan by 2021: general criminal and civil courts, as well as specialized courts dealing with public security, trade and business, family issues, counter-narcotics, anti-corruption, and the elimination of violence against women. There was also a special tribunal addressing issues surrounding detainees at the Bagram Air Force Base. Women had served in the position of chief judge at various courts, including the counter-narcotics and anti-corruption courts.

Nevertheless, it must also be noted that severe challenges also plagued the criminal justice system of the Republic, including lack of resources, delays, corruption, and abuse and discrimination against women. Many areas of the country were poorly served by the system, and access to justice remained limited for many disadvantaged communities.⁷

⁷ Many qualified observers have written about the problems plaguing the justice system under the Republic. For example, Mehdi J. Hakimi, of Stanford University, wrote in 2021 that "a widening gap emerged between the *de jure* rules on paper and the *de facto* practice of contempt for judicial independence. This was evinced, *inter alia*, through interference [by the government] with judicial proceedings and sanctions, selective enforcement of court decisions, weaponization of the AGO, poor security protections for judicial personnel, and negative perception of the bench's independence." See "The Judiciary and Rule of Law in Afghanistan," *Judicature* (Duke University) 2021.

I. Introduction: Before the Taliban Takeover in August 2021

Respondents to this assessment survey describe a pre-Taliban judicial system which, while not perfect, reflected basic accepted international standards of justice, due process, and the rule of law:

- . *“In the previous government, the judicial system was a legal system, and the parties to the lawsuit in criminal matters were given the rights that were provided by the law. The judges had enough experience, and the judicial system was an orderly system with a process of examining and handling cases. There were regular administrative structures, there was a justice system and there was cooperation by the parties.”*
- . *“During the Republic regime, the defense lawyer was given time to defend his client in the court hearing. Also, the defense lawyer was given the opportunity to be present during the preliminary investigation and taking of statements by the prosecution. The legal and judicial authorities treated defense lawyers with good behavior. Defense lawyers could interview their client in a completely safe place, the majority of clients valued the defense lawyer as the basic element for a fair trial, the defense lawyer had access to the case file documents, and principles of a fair trial had been institutionalized to a large extent. Legal complaints made by defense lawyers were processed by justice and judicial organs.”*
- . *“In the previous regime, people’s access to legal aid was good, and fair trials and the protection of people’s human rights were institutionalized to some extent.”*
- . *“In the prior regime, the judges had enough education and professional experience. They had complete knowledge of defense advocacy and defense lawyer. Their behavior with defense lawyers was very respectful. The law was implemented while addressing cases and the proceedings of the courts were on time and according to principles.”*

There were also strong institutional protections for women’s rights under the Republic; for example, as noted above, there was a court specifically charged with addressing issues involving the Elimination of Violence Against Women law; as one lawyer noted,

- . *“In the previous government, I worked as a defense lawyer, and the cases were handled in the best way, because women’s voices were heard and their problems were addressed. I have handled cases of violence against women [and] children and [in the] Court for [Elimination of] Violence Against Women. [T]hat [court addressed] problems of violence against women and their family problems. But with the arrival of the Islamic Emirate the prosecution of violence against women disappeared and women’s rights have been completely violated.”*

Legal aid efforts in 2021 were reported to be primarily devoted to representing defendants (male and female) in criminal cases, but there were also an increasing number of programs devoted to providing legal aid services for women and juveniles in family law and civil cases.

The State of Justice since August 2021

Shortly after the Taliban takeover of Afghanistan, the Supreme Leader announced, in a meeting with the Taliban provincial governors, that the laws of the Republic were no longer valid and were effectively annulled. He also ordered relevant authorities to review the laws of the Republic to see what was in conflict with sharia, and to report back to him on the matter.⁸ Further decisions were to then be made on validity of those laws (this process is reportedly ongoing). His statements were recorded and publicly released, and a Taliban spokesperson subsequently confirmed the Supreme Leader's statements via Twitter. The matter was widely reported in the national and international press.⁹ The immediate effect of the Supreme Leader's statements was to create a legal vacuum and leave a degree of ambiguity and uncertainty as to what laws and procedures might actually continue to apply (i.e., which laws would be found to be sharia-compliant) and which would be annulled. As UNDP succinctly noted in their report *One Year in Review* (September 2022), "The Justice system has in large part been dismantled."¹⁰

Other statements made by the Supreme Leader or through his spokesman also had serious implications for the role of women in society, namely that women must stay home for an indefinite period until there can be assurances that there are proper separate facilities for them. The implications of these statements were sweeping for the role of women in society, including their role in the judicial system, whether as judges, lawyers, litigants or witnesses. As the UNDP report further noted, the dismantling of the justice system has worked to "the disproportionate disadvantage of women both in limiting their access to justice and reducing their employment." As was more plainly noted by the UN Special Rapporteur on Afghanistan, Richard Bennett, in his Statement of 26 October 2022 on the Situation of Human Rights in Afghanistan, "women have been erased from public life and their civil, political, economic, social and cultural rights disregarded." There are reports, however, that the situation may have been different from province to province, and that in some areas of the country women lawyers were able to work outside the home and even represent clients in court. These opportunities likely disappeared in December 2022, when the Taliban released decrees banning women from universities and working for non-governmental organizations.

The effective legal vacuum quickly had a numbing effect on the judicial system, and the courts have only gradually resumed functioning over the past 16 months. The experiences of the Afghan lawyers who have begun practicing in these courts and who have had to grapple with this unfolding situation has been varied, difficult, and radically different than under the prior regime. Those lawyers provide an important voice; they express serious concerns about the current situation, noting at this point in time the lack of clear procedure, due process, defined legal standards, or rights protections. The following were typical of their responses:

- . *"It doesn't feel like the justice and judicial system exists. Whatever the Taliban officials want, they do at their will. There's no law and no proper working procedure."*
- . *"There isn't a specific and clear or legal sharia based justice and judicial system. Taliban courts do not address the cases based on standards and laws. Judicial hearings are unstandardized and illegal and verdicts are issued without fair trials. Courts, in the absence of defense lawyers and in absentia of the accused issue their verdict."*

⁸ See, e.g., Aljazeera, August 23, 2021, "Explainer: The Taliban and Islamic Law in Afghanistan."

⁹ See, e.g., The Washington Post, August 19, 2021, "The Taliban Says It Will Rule Under Sharia Law. What Does That Mean?"

¹⁰ As the United Nations Assistance Mission in Afghanistan (UNAMA) recently noted in its report, "Human Rights in Afghanistan, August 15, 2021–June 15, 2022," at p. 35, "as the law review process continues, both pre-existing law as well as Islamic law, and newly developed directives . . . are being applied by justice sector actors, leading to a lack of clarity regarding the applicable legal framework on matters of both procedure and substance."

- . *“The justice and judicial system of [the] Islamic Emirate is not organized and systematic. Case files are not processed in a standardized and legalized way; and due process is not considered. They terminated professional and expert people from their duties and instead hired unexperienced individuals.”*
- . *“There is no organized system, and there are no legal documents in the judicial system. Because the Supreme Leader clearly stated that we do not need man-made laws or statutory laws, the status of the penal code and other laws are still not clear. Their judicial institutions rely on non-conventional jurisprudence, and the role of the public prosecutor has become devalued.”*
- . *“It hasn’t been a good experience. Fair trials are not being implemented; neither the rights of accused and suspect [protected].*
- . *“In the judicial system after the Taliban came into power, there is no fair trial, no protection of the basic rights of the people. And people do not have access to legal aid and counseling, and some court decisions are addressed through informal justice.”*

An only slightly more optimistic note came from a respondent who said that “most of the judges want to apply justice, but they make decisions that are far from justice due to lack of understanding. From the day that justice and judicial organs started to operate during the Islamic Emirate until now, I am busy as a lawyer.”

II. The Courts

After the initial Taliban take over, the courts were physically closed and locked down. The Taliban told **all** judges and prosecutors of the Republic not to come to work. As was covered in press reports, significant numbers of judges from the prior regime have demonstrated in Kabul over their dismissal and uncertain status.¹¹ Ultimately, the judges decided amongst themselves not to let the Taliban selectively call any of them back. Indeed, some judges were called back by the Taliban, but declined to return to their courts. Given that judges are not easily able to meet as a group under current circumstances, communications among themselves remains limited. Today, there continues to be no carry-over of judges from the Republic under the Taliban. While there are a few very isolated instances of reports of a handful of individual instances of male judges being called back in limited or temporary roles by the Taliban, these are unconfirmed and if they have occurred, extremely rare. It should be noted that because of threats to their lives and families, many of the former women judges have fled the country when possible or gone into hiding, moving even daily from place to place¹².

The Taliban were slow to turn their attention to judicial administration. It was not until about four or five months after the takeover that some court administrative staff (including the judges’ clerks, or “writers”) began to be called back to work. After the Taliban officials learned the relevant administrative information, some of these administrative staff members were again dismissed.

¹¹ See, e.g., RFE/RL Radio Azadi (online), March 20, 2022, “Hundreds of Fired Afghan Judges Demand Jobs, Pay from Taliban-Led Government; Tolo News (online service), March 2, 2022, “Former Judges Hold Protest Over Their ‘Uncertain Fate.’”

¹² The International Association of Women Judges (IAWJ), an ILAC member, has been working to help Afghan women judges find relocation in countries around the world. As of November 2022, the IAWJ still had 70 women judges they were helping to work through the process of seeking security and legal emigration opportunities, even as these women judges faced ongoing threats within Afghanistan. See for example in membership Letter from Justice Susan Glazebrook of the Supreme Court of New Zealand and current President of the IAWJ, *IAWJ Insights: The Official Newsletter of the International Association of Women Judges*, November 2022, *President’s Letter*, at pages 2-3.

To some extent, a Taliban judicial system was already in operation prior to the August 2021 takeover—operating in those parts of Afghanistan already under Taliban control.¹³ In 2018, well prior to the Taliban takeover of the entire country, the Taliban issued a directive on the “*Structure and Responsibility of the Court of the Islamic Republic of Afghanistan*” for use by courts in those territories they controlled. The document consists of two parts, with 132 individual articles. One part addresses the organizational structure of the courts and the other part addressed their operations. The document also provides parameters for judicial appointments. It is unclear how widely this decree has been circulated and to what use it is actually being put. Only one respondent, from Kabul, actually referred to this directive in describing the current operation of the courts (characterizing it as “recent” guidance on “court operation and proceedings prepared by the Chief Judge of the Supreme Court, Mr. Sheikh Abdul Hakim Haqani”).

In spite of that 2019 directive and other statements from the Supreme Court, the degree to which courts actually are functioning varies significantly by region. As one informant characterized the situation, “the current [organizational] structures of the courts are not [legally] proper and precise, but are similar to the previous government, [but] without legalized structure.” For example, in Kabul, the basic court structures are reported to be similar to the previous criminal and civil courts; they include the three expected levels: a primary court, appeals court, and the Supreme Court of Afghanistan. Primary courts are reported to have criminal, civil, and public security divisions.¹⁴

Other regions also report that the courts are operating with functional divisions. In Jawzjan it was reported that cases are processed in four divisions: Civil and Public Rights, Public Security, Criminal and Traffic. In Badakhshan it was reported that there is a director of the primary court who is the general director of the courts in Badakhshan province, and there is one judge in the Criminal division, another in the Civil division, and a judge in the Records Department. In Ghazni’s city courts, there were reported to be three functioning divisions (Civil division, Public Security division, and Criminal division). And in Daikundi province it was reported that “the city primary court consists of four divisions: Criminal, Civil division, Public Security, and Traffic Crimes.” Likewise, the appellate court in Daikundi was reported to consist of three divisions: General Criminal, Civil, and Public Security. It does not appear that any of the specialized courts that existed under the Republic are currently functioning. One respondent specifically observed that “[court] divisions like Elimination of Violence Against Women are terminated.”

Each court normally has a judge who is the “director” and is the equivalent of the chief judge for that court or district. At the provincial level, there is also normally a provincial “court director” who is the equivalent of the Chief Judge of the province and who is responsible for the overall administration of the courts for the province.

The courts are, for the most part, using the existing courthouse facilities, but there are also numerous reports of court hearings being held in police stations, in mosques, in prosecution offices and in prisons. A number of respondents noted that, at present, the courts are not physically set up to accommodate the presence of women; these limitations obviously act to restrict women’s access to the courts (in any capacity) and, therefore, to legal redress.

¹³ See “How the Taliban Justice System Contributed to Their Victory in Afghanistan,” by Adam Bacsko, October 26, 2021, in “Items: Insights from the Social Sciences” (Social Science Research Council).

¹⁴ The Public Security courts, along with a specialized prosecution service, were first created in the period from 2009–2011 (under the National Directorate of Security) thus largely removing these matters from the courts of general jurisdiction. The public security courts reflected the broader governmental concerns with public and national security matters, in response to the ongoing Taliban insurgency, as well as ISIS threats. The public security courts handled all matters touching on national security, including matters arising from the insurgency and fighting against the government.

The courts are closed to the public, and in some cases closed to parties and their lawyers

The conduct of trials and proceedings in Afghanistan today appear, in most cases, to be closed to members of the public; only the parties to the dispute and their representatives (and in some cases, their relatives) may attend proceedings or court sessions. In a handful of regions it was reported that court hearings are open to the public. One respondent simply noted that while the courts are open to the public in that region of the country, most people “aren’t willing to go [unless] they are part of the case.” Other respondents noted simply that “hearings are conducted in secret.” Even more troubling were many reports of proceedings or portions of proceedings being closed to the parties themselves, and to their lawyers.

III. Judges

As noted above, there has been a complete and systematic removal of judges of the prior regime. They have been replaced in nearly all instances by members of the Taliban who are not judges in the conventional sense of the word. It also needs to be noted that they are all male. The following characterizations are typical of the survey responses we received from lawyers still working in Afghanistan:

- . *“Judges are the Jihadist Taliban members who are mostly not aware of jurisprudence and sharia Law. Most of them are illiterate.”*
- . *“They are absolutely not professional and even don’t have enough information about sharia Law and how to apply it.”*
- . *“Judges are all members of the Taliban. I can only say that they are extremely unprofessional and do not know the judicial system. Most of them do not understand or know basic issues.”*
- . *“Judges of Islamic Emirate are not professional and do not understand the judicial system properly. Mullahs are hired who absolutely do not know what justice and the judicial system is. They are people who came to the justice sector from war-zones and graduated from religious schools (madrassahs). Law doesn’t have much value for them and they don’t have legal knowledge nor do they understand anything about justice and judicial system. They do not have background in the sharia based law.”*
- . *“They are unprofessional people and do not have the knowledge of judiciary. They only to some extent understand sharia law matters, but they don’t know how to apply them.”*

Some judges are reported to be powerful political figures. The new judges are all reported to come out of the traditional madrassahs, and have very limited education. Despite various Taliban and Supreme Court directives, there does not appear to be any specific or consistent process for the appointment of judges. To many observers the process appears totally random. In some cases, the new judges appear to have actively sought out their positions. Appointments are often based on “connection and friendships.” As one respondent stated, “they were appointed based on their connection and experience with the Emirate. . . judges are determined based on the relationships they have with high-ranking government officials.” Judicial appointments go to those who had had “active membership in the Jihad/war against the previous government.” One respondent noted the new “judges are all people who themselves or their relatives had relations and cooperated with the Taliban in the past.”

Persons appointed as judges may also have taught in madrassahs or religious schools, and may have titles reflecting their religious qualifications or roles, such as mullah, imam, *mawlawi* (religious clerics), or *akhond* (a religious title for persons who do not actually have a role in the mosque but whom provide religious guidance). Some respondents suggest that the motivation for seeking a judicial appointment reflects the opportunities that judges have to profit from corruption and bribery. There is anecdotally reported to be more bribery of judges now than before, and some respondents have noted, as evidence of ongoing corruption, the large houses that some judges now possess. One more generous respondent noted that “they look pious. And people are satisfied with their decisions to some extent.” Several respondents suggested that the new judges do in a few cases actually have a background in sharia law.

The typical madrassah education received by many of the current Taliban judicial appointees lasts from one to ten years, is often “informal” (meaning outside any government organized school system), and is roughly equivalent to a primary school level of education. Much of the madrassah learning consists of rote memorization of the Quran and Hadiths¹⁵. Often, these texts are memorized in Arabic, a language which the madrassah students most likely do not actually speak or understand. Many of the judges were assessed by respondents as being functionally illiterate. Their education certainly would not have included any specialized training on sharia law or legal concepts, nor would it involve any exposure to legal or judicial systems. As one respondent noted, “in 30 judges, one of them knows or understands sharia jurisprudence.” Another stated that “whatever they studied in the madrassah was religious education, they were not trained about the justice and judicial system.” A respondent from eastern Afghanistan noted “judges do not understand or know basic issues, like they can’t differentiate *hadd* and *tazir* crimes.”¹⁶ There are only a few reported exceptions to this general trend; one respondent noted that some Taliban judges have already been long functioning in their roles in areas already controlled by the Taliban prior to August 2021. Additionally, there were some appointments of judges who had previously served in that role in the prior Taliban regime (the Islamic Emirate established in 1996, and falling in 2002). As one respondent noted, “Some of them are from the first regime of Islamic Emirate as the Taliban grew and their courts resumed, they are still working.”

We identified only two situations in which judges from the Republic were still working in any judicial capacity at all: In Mazar-i-Sharif, it was reported that a few judges from the former regime are working in the civil (records) section of the courts, and in Kabul it was reported that judges from the prior regime are currently still functioning in very limited roles on civil and family court matters.

Except in Kabul, there is no report of any training or instruction being given to the new judges (one Kabul respondent noted that there were currently workshops for new judges being conducted by Taliban officials, and one respondent from a southern region stated that the Supreme Court was offering one month and 15-day seminars for judges).

Current information from respondents in Kabul and a few other regions is a bit more specific on how judicial appointments are actually made. As noted above in the discussion on courts, there are pre-2021 Taliban directives which purport to outline procedures for judicial appointments. Some Kabul respondents confirmed that judges are appointed through issuance of a written decree of appointment by the Chief Justice of the Supreme Court. Other Kabul respondents stated that the selections are based directly on decrees of the Supreme Leader of the Islamic Emirate, but noted they had not actually personally seen such decrees.

¹⁵ The hadiths are records and accounts of the words and actions of the Prophet.

¹⁶ The terms *hadd* and *tazir* refer to two distinct kinds of offenses under the *hadud* ordinances (see footnote 1, above). A greater standard or proof is required for *hadd* crimes, which are more severe (with harsher punishments), and there is more discretion in punishment for lesser *tazir* crimes.

As is widely reported, the Taliban government does not allow women to work in fields other than education and medicine. Consequently, no women judges were retained and no women judges have been appointed. Women have also been largely banned from non-judicial positions at the courts as well. As noted by a respondent from northern Afghanistan, “even female writers [i.e., clerks] were terminated from the court and instead male ones are hired. All positions are taken by males.” Another respondent noted, however, that “women who worked as writers at the court [were] not terminated [but] are at home; they also receive salaries.” Only in one northwestern province did a respondent report that women can work both in court and in non-trial matters, but with restrictions.

The Role of Muftis in the Judicial Process

The increasing role of the “muftis” in the operation of the judicial system presents a new and potentially complex development; indeed, it is impossible to fully explain the role of the judge in Taliban Afghanistan without also describing the role of the mufti. A “mufti” is a senior Islamic scholar. The title would normally be conferred by a leading madrassah, either in Afghanistan or Pakistan, or directly by the Taliban leadership, on a senior religious scholar with at least twenty to twenty-five years of Islamic education. As a result, muftis are men typically over 50 years of age.

In June 2022, it was announced by the Attorney General’s office that the Supreme Leader had ordered that muftis would take a more active role in the judicial process, acting as direct advisors to the judges.¹⁷ Several months prior to this, in March 2022, it had been ordered that prosecutors would cease operations, cease their investigations and refer all pending matters directly to the courts.¹⁸ While it would not be accurate to say that the muftis are directly assuming the role of prosecutor, they are performing some functions previously undertaken by prosecutors, including undertaking investigations, interviewing suspects and accused, reviewing cases and recommending findings and punishments to the judge. Muftis are now being appointed directly by the Chief Judge of the Supreme Court to these new roles in the judicial process; these are actual appointments with accompanying appointment documents and salaries. The only other written guidance specifically defining the role or jurisdiction of the mufti in the legal process is contained in a document entitled the *Judicial, Administrative and Legal Rules of the Islamic Emirate*, which was issued by the Taliban in 2014 for use in those parts of the country then under their control (these Legal Rules are described in more detail below in part IX of this report).

The mufti is intended to take an active pre-trial role, in some ways replacing the prosecutor, but there are also numerous reports from respondents of the mufti actually participating, along with the presiding judge, at court hearings and proceedings. As one respondent noted, “the structure of the courts is managed with a judge, a mufti and a writer.” Another respondent (from a region near Kabul) noted that “the court director [i.e., judge] gets the fatwa decision from the mufti and then issues the judgement.” One respondent went so far as to describe the mufti as “someone who graduated from madrassah/religious school and he is called the judge in the court.” The same respondent stated that the judges are now “the assistants of the mufti.”

In a very loose analogy, it might be suggested that the mufti is currently functioning in something like the role of an investigating judge in some civil law systems. While the role is still very much in flux as the Taliban legal system continues to evolve, it is increasingly clear that the muftis may well become the most important actors in the entire judicial process.

¹⁷ The role of the mufti in judicial proceedings was also referenced in earlier judicial rules issued by the Taliban, notably, the *Procedural Principles of Legal Courts* Procedural Principle of Legal Courts, published in May of 2014 by the directorate of the Supreme Court of Islamic Emirate of Afghanistan. Those rules outline scope of work of both judge and mufti.

¹⁸ Circular Letter No. 12, March 24, 2002, “Courts Shall not Rely on Prosecution and Administrative Investigation”

There are now reports from lawyers who have had one-to-one engagements with muftis, in which the lawyer was called on to effectively advocate on behalf of their client directly with the mufti. For example, a lawyer whose client has been detained might bring the matter to the attention of the mufti, seeking a review or reconsideration of a detention. Such a petition commonly occurs in situations where clients are simply lingering in detention. Often the particular matter is not even known to the mufti; the mufti can decide to take up review of the matter presented to him by the lawyer. The mufti can, for example, interview the defendant who is in custody, find there is no case for the arrest, and order release. A mufti can also investigate further—he might inquire why someone was even put into custody. The mufti can inquire in to whether the police were at fault, whether the detention was unlawful from the start, and even who was responsible for initiating the unlawful detention. Lawyers in some regions have been particularly successful in seeking review of cases in which women have been detained; this is important because a mufti has the power to directly interview women who are in custody.

It is also important to note that the formal introduction of the role of the mufti into the judicial process is something that did not exist in the courts under the Republic. While there were mufti advisors in the Republic at the national level, their role was to advise the government on major issues involving a need for Islamic guidance. Finally, it must be kept in mind that this development is a highly fluid one, and it is not clear that every court or division has a mufti yet assigned.

Court Staffing

Court staff were not actually terminated when the judges from the Republic were, though they were initially told to remain at home. Since then, some male court staff have been recalled to work. These are mostly the judges' clerks (sometimes referred to as "writers"). The clerks may or may not be trained as lawyers. Their responsibilities are to take care of court administration, take notes during proceedings and assist with drafting the judge's decisions and decrees. Women who worked for the courts have not been called back to work, though there are some reports that they continue to technically remain on the payroll.

Case Delays and Backlogs

Many respondents noted that case processing was very slow, which they often attributed to the lack of training and experience of the new judges. For example, a respondent from southeast Afghanistan reported that in most of the district courts, "not a single case has been decided for months." The respondent further observed "there's a rush on courts which causes more work load on them too. Matter[s] have not been resolved or decided upon for months and then are denied. When a lawyer speaks about the delay, he faces opposition; lawyers are even given warnings about this." Similarly, a respondent from a region near Kabul noted that "no court or other justice and judicial organ is bound by legal deadlines. The mass of cases has increased and they are not addressed within the identified time. In my view, the functioning of the judicial system is very slow at the moment."

IV. Resolving Disputes Outside the Courts: Use of Non-Judicial Actors to Resolve Legal Matters

Given the complete removal of the Islamic Republic's judges, the nullification of its laws, and the general turmoil characterizing the judicial system, it is unsurprising that many people are using traditional and informal mechanisms to resolve their disputes or legal issues. Likewise, the rise in extrajudicial activity by the police and security services means that many criminal matters brought to the formal justice system are never even adjudicated by the courts.

Informal Justice Systems

There are a number of non-judicial actors and venues currently involved in resolving significant numbers of legal matters (including a wide range of criminal, civil and family matters). This reflects the current ambiguities and uncertainties surrounding the operation of the formal court system. As one respondent noted "the justice and judicial system did not recover as it was expected; instead it paralyzed the system. In the beginning, many people used to go to the courts, but now it is gradually losing its status, and justice is not applied." According to the respondent, this situation led people to solve their cases "through local elders and by the customs and traditions" reflecting the belief in "tradition having a special status in the Afghan community." A respondent from northern Afghanistan, for example, noted that "most of the cases, we can even say that more than fifty percent, are resolved through ethnic meetings and local elders. If the courts are unable to make a decision, the cases are referred to the Council of Scholars, and the Council of Scholars makes the final decision."¹⁹ A respondent from a region near Kabul reported that civil cases were often referred to "the local elders, imams and village governors if the parties accept." It is reported that in rural areas and villages, the tribal *Jirgas*, communal elders, and imams play the main role in hearing and resolving disputes. In southeastern Afghanistan, it was noted that religious schools and madrassahs act to reconcile [disputes] between people. Sometimes elders are given the right to decide." A respondent in eastern Afghanistan reported that, "local actors are operating in the informal justice system and are resolving people's disputes." A separate respondent from that region noted that "lots of cases are solved through non-judicial justice." Yet another respondent from that area stated "at the moment, informal justice is more valued; generally, legal cases are mostly referred to Imams and local tribal elders." Similar reports of cases being resolved by non-judicial elements came from other regions in Afghanistan, as well.

Extrajudicial Case Resolution by Police

Of equal or greater concern are reports that the lack of a well-functioning courts system is driving a large number of criminal matters to be resolved directly by the police. A Kabul respondent noted that "most cases are decided in police stations." A separate Kabul respondent stated that "the police have complete authority. There are lots of cases in which the police decided." Indeed, one Kabul respondent described how the 'local committees' [these are informal committees of local government officials, mullahs and elders] "process minor cases in the district in coordination with the relevant police station." A respondent from eastern Afghanistan reported that in "some cases, when courts are not aware or informed, police do reconcile among people." A respondent from northern Afghanistan noted that "police stations mostly play the role similar to the court." Elsewhere, respondents reported that police can decide or resolve cases on their own. In the northeast it was noted that "some cases like traffic accidents and assault and battery, or larceny etc. are absolutely not referred to the court. Some [persons] are fined and released in the relevant districts/

¹⁹ Within Afghan traditions, a council of scholars (ulema) is a traditional grouping of religious scholars with a high level of knowledge about sharia law

stations by the police.” Similar conclusions about the role of the police in resolving criminal matters were reached by the UN Special Rapporteur on Afghanistan, who noted in his October 7, 2022 Report to the UN Human Rights Council that “crimes such as theft or assault are often dealt with by security forces without involving prosecutors or judges.”

There are some indications that the role of the police in resolving criminal matters may begin to recede as the courts become more operational; in one central province, a respondent noted that “In the beginning of Taliban government, police had the authority to investigate and solve the case, but now they don’t have the judicial authority. . . now only courts decide.” Similarly, in the north, it was noted that resolution of matters by the police without going before a judicial officer “is less now, but it was a lot in the beginning.”

Other components of the government also act in a quasi-judicial function. One respondent reported that “the morality police [from the Ministry of Religious and Sharia Enforcement] conduct arbitrary court trials.” Another noted that the “Islamic Emirate also has organs like the prevention of vice and promotion to virtue or granting authority to the reconcilers.”

There are many reported instances of severe extrajudicial remedies, including enforcement of punishments for violations of *hadud*²⁰ ordinances, being enforced directly by the police, security services and other government actors without judicial (or even quasi-judicial) proceedings and the high standard of proof required. These punishments can be harsh (including whippings, beatings and stonings), and commonly extend to violations of the *hadud* ordinances governing dress, beards, and the wearing of the hijab. Even more serious are the continued reports of extrajudicial killings, as outlined in detail in the report from United Nations Assistance Mission to Afghanistan (UNAMA), “Human Rights in Afghanistan, August 15, 2021–June 15, 2022,” at pp. 13–17. The UNAMA report also documents, in substantial detail, instances of torture being used on detained persons.

V. Police and Security Services

As with the judges, the police from the prior regime have in almost all instances been replaced with by Taliban appointees. Some administrative and technical staff of the police from the prior regime have also gradually been called back. A number of respondents noted that women continued to be employed by the police.

As noted above, respondents report that police have sweeping authorities: “police make decisions about cases without having a defined legal basis; There are cases that can be decided by the police without going before a judicial officer.” Another respondent bluntly noted that “most cases are decided upon in police stations by taking a bribe.”

In addition to the police, many criminal matters are handled directly by the Taliban’s intelligence services. These include components of the Ministry of Interior, but also the new National Director of Security. The Taliban intelligence services open their own investigations, and can detain at will and without limit on duration. Their activities vary by region, but in many places, their cases are effectively handled outside the regular criminal justice system. These agencies may in some cases, eventually send the matter to a court.

²⁰ See footnote 4, above.

VI. Prosecutors

Prosecutors in the Republic reported directly to the Attorney General. Following the Taliban takeover in August 2021, all of the prosecutors were initially fired. This reflects both the Taliban distrust of the previous regime but also the fact that the institution of prosecutor did not officially exist in the judicial structures used by the Islamic Emirate. However, there was initially no specific Taliban directive officially abolishing the office of the Attorney General (or its prosecution service). No one got a termination notice, and, at least in some cases, prosecutors and other employees of the Attorney General's office have continued to be paid.

By late 2021, a few male prosecutors were being called back to work—for example, at the Attorney General's office in Kabul. Numbers are not precise, but an estimated 20–25% of the prosecutors returned to work there. The lack of a functioning prosecution office in large swaths of the country, however, led to significant challenges for the courts and the operation of the judicial system generally; it meant that the case investigations were not being completed, case files were not being created or provided to the courts, and no one was appearing for the government to present cases before the courts. The result is that in many criminal cases, there is no investigation file—or at best an incomplete one, coming directly from the police—being presented to the judge.

As noted above, this trend towards gradual resumption of the work of the prosecution services was effectively halted in early 2022 by the Supreme Leader's directives. The first of these was issued in March 2022, in the form of a Circular Letter issued by the Supreme Court stating that “Courts Shall Not Rely on Prosecution and Administrative Investigation.”²¹ The second was the above-noted announcement of the Attorney General in June 2022 ordering that prosecutors cease operations. In both cases, the directives were based on explicit directions from the Supreme Leader to the respective entity.

The fact that the Attorney General's office has not actually been abolished reflects ongoing review by the Taliban leadership of the organizational structures of the judicial processes. It is reported that there are discussions within the Taliban government as to whether the Attorney General's office will remain independent or be consolidated with the Ministry of Justice, as well as a larger discussion sorting out the role of the prosecutor. The obvious deficiency arising from the complete abolition of a prosecutorial function is that there is no one left to properly assemble investigative files or present them to the court.

The Status of Prosecutor from August 2021 to June 2022

Prior to the announcements by the Supreme Court and the Attorney General in spring 2022, there had been a gradual resumption of the work of the prosecution services in some areas of the country. In Kabul, there was reported to be some functioning of the prosecutor's office, staffed with a few of the former male prosecutors who were recalled, but primarily with new members of the prosecution appointed by the Taliban. Unsurprisingly, the latter were reported to be hired based on their Taliban connections and/or their active participation in the war against the previous regime. As was the case with Taliban-appointed judges, most were *mawlawis* (religious scholars). They are reported to not have legal backgrounds or legal education. Nor do there appear to be any established procedures, standards or criteria for their selection or appointments. As was noted by one respondent from the eastern provinces, “the background of most of them is Talib or being an ideologist and supporter of Taliban.”

²¹ Circular Letter No. 12, March 24, 2022.

The legal and operational status of both the prosecution offices and the individual prosecutors remained unclarified during this period and varied substantially from region to region and court to court. In many regions it was reported that case files, when they exist, are actually being prepared and forwarded to the court directly from the police or the intelligence services. For example, in one region of northern Afghanistan, a respondent noted “I would like to mention one case [involving] the smuggling of narcotics, which led to the arrest of all the passengers; the matter should have been referred to the [prosecutors], but on the contrary, the intelligence department assumed the jurisdiction of the investigation. It remained with them for more than forty days and the relevant prosecutor demanded that the file be assigned to the prosecution’s office as a matter of jurisdiction, but the intelligence department did not allow the prosecutor to have legal authority for the file. Finally, the prosecutor transferred the case to the relevant court, which again did not abandon the intelligence department’s management of the case.” In a separate region, one respondent reported on an instance where the judge simply refused an indictment prepared by the prosecutor and sent the matter to the police officer for review. A respondent from a region near Kandahar neatly summarized the situation prior to June 2022: “the previous government’s structure of prosecutors is the same and they continue their work. However, their authority is unknown so far.” All of these cases reflect the uncertain status and role of the prosecutors.

In other locations it was reported that the prosecution service simply never resumed functioning. One respondent from a northern province stated that the “Taliban have destroyed the prosecution organ and they have told the prosecutors not to come to court, with the result that the prosecutor is not present for the court hearings.” A respondent from eastern Afghanistan noted that “the work of prosecution has been suspended until further notice. Most prosecutors were terminated from their duties. In the beginning, the investigation was done by the prosecutors, the indictment was also prepared, it had a summary of the case, but the judges did not pay attention to the prosecution’s documents. According to an employee of the prosecutor’s office, they submitted 60 cases to the courts, [but with one exception] the cases were all returned.” Finally, there are some reports that many former prosecutors are now working as defense lawyers.

VII. Ministry of Justice

Under the Republic, the Ministry of Justice (MOJ) did not have a direct role in the judicial processes, and to-date that continues to be the case under the Taliban. The MOJ contains a legislation department, which reviews all new laws, including ones sent for review from other ministries; a law department responsible for representing the government in civil cases; a department responsible for issuing law licenses; and a legal aid department. As Taliban officials in agencies and departments across the government carry out the process of reviewing old laws to determine if they are consistent with Islamic law, the MOJ may take on a potentially important role given its overall responsibility to review laws sent from the other ministries. It is reported that significant numbers of male MOJ employees (perhaps 40–50%) have returned to work at the ministry since August 2021.

The roles of both the MOJ and the Attorney General’s office may be further modified in the coming months, as there are ongoing reviews of their status. Among other things, there is an ongoing discussion of whether to bring the Attorney General’s office back under the MOJ. A Taliban commission was appointed in late 2021 within the Kabul’s “Leadership Office” addressing the status of laws and the organization of the legal and judicial agencies. Their work was to also include review of the constitution, the criminal and civil procedure codes.

VIII. Lawyers

Re-Registration of Lawyers by the Taliban

During the Republic, lawyers were required to be registered by the Afghan Independent Bar Association, which also set professional standards. In the immediate aftermath of the takeover the registration process for lawyers completely broke down. The Afghan Independent Bar Association was taken over directly by the Taliban in November 2021, and the new Advocate Regulation abolished its role in certifying lawyers or advocating for the profession.²² Under the new processes, lawyers are required to be registered by the MOJ's Bar Association Department. As one respondent clarified, "the Bar Association of Defense Lawyers was independent in the previous government, but with the start of Emirate, it was embedded into the MOJ, and all assets of the association of defense lawyers were confiscated." Lawyers' groups were vocal in arguing to the MOJ that the law on lawyer registration did not violate sharia law or principles—and were ultimately successful in having the MOJ agree that the laws on lawyer registration are not in contradiction with Islamic law. Nevertheless, it took some time for the MOJ to take over the process. This resulted in delays and obstacles to re-registration of lawyers. That has gradually settled down, and a number of lawyers who were surveyed report that they and their male peers have been able to successfully re-register with the MOJ.

The process for renewing law licenses was described in straightforward terms by a Kabul respondent as follows: "In the first stage, each defense lawyer who has the previous license files an application/motion to the MOJ for getting a license. Then on a specific day the evaluation is taken. After successfully passing the evaluation, the person is entitled to receive a license." The tests being given by the MOJ reportedly focus on questions from the Quran and Hadiths and are characterized by respondents as consisting of "mostly religious questions." A respondent from southeastern Afghanistan noted that "after [the MOJ] started the process of renewing licenses to former defense lawyers, many defense lawyers got licenses, and for now, all male defense lawyers are considered to be part of the Taliban's legal and judicial system. I participated in many cases, that are processed by the present judicial system." A respondent from central Afghanistan noted that "those who have an advocacy license from Ministry of Justice can function. Currently, the MOJ issues defense advocacy license after passing the test prepared by them." Elsewhere, the process was described simply as "the defense lawyer is obliged to take the test again and clear the tax." A review of national estimates sourced by Afghan civil society organizations indicates many lawyers (over 1500) have applied to the MOJ to renew their licenses. Of these, most (over 1300) have been able to renew. Only about 80 failed the exam for registration, and they can take it again.

The opportunities which are described for seeking re-licensing only apply to men. As a respondent from northern Afghanistan bluntly noted "defense advocacy licenses of women defense lawyers are not renewed." There are no clear procedures at all for the licensing of female lawyers. It is reported that at present, the MOJ is simply not doing anything *vis-a-vis* re-registration of women lawyers. Their status remains ambiguous. There is no actual announced prohibition on women being lawyers, and no actual order saying women cannot be re-licensed. As was noted by one respondent, the ability of women to work as lawyers "is different according to provinces. For example, in Herat province women can work as defense lawyers, but in other provinces like Helmand they can't." There are isolated reports of women lawyers actually appearing in court on legal matters. Respondents report that MOJ officials take the position that procedures for licensing women as lawyers are still being worked out. As one female respondent noted, "we must wait till the second notice, so I remain at home, only providing legal consultations from home for the clients who are calling us."

²² See, Report of the UN Special Rapporteur on Afghanistan to the UN Human Rights Council, October 7, 2022, at page 14.

Other lawyers paint the re-licensing process as more complicated and more fraught with obstacles. One respondent noted that only “a limited number of defense lawyers of the previous government are allowed. Only sharia faculty or madrassah graduates are given licenses after a test. All authorities and activities of the defense lawyers are currently under control of Taliban and monitored by the Ministry of Justice.”

Further, there are reports that some lawyers were not applying for licenses under current conditions. The obstacles to re-registration include (1) the necessity of traveling in person to Kabul to apply, (2) the fact that only men are now allowed to apply, (3) the need to remain in Kabul while the process is underway, which could take two weeks or more, and (4) the current bureaucratic complications. In general, however, the re-licensing procedures seem to be working and most male lawyers who actively seek re-licensing have been successful. In some provinces (Herat, Helmand, Jalalabad) there are also reported to have been informal arrangements worked out to allow lawyers to continue to handle cases.

Practicing Law Under Current Conditions

Obtaining a license to practice law does not ensure that defense lawyers will be given the full ability to adequately represent their clients or even necessarily have physical access to court proceedings. A number of respondents expressed frustration with their current abilities to practice their profession. One respondent noted that “defense lawyers who even have a license from MOJ are not given the defense right--neither oral nor written,” and further noted that the accused “are not given the right to have a defense.” A respondent from eastern Afghanistan noted that “the situation of lawyers is getting worse day by day. Unfortunately, lawyers are not given time in the current judicial system.” Another lawyer from that region simply noted that “the defense lawyers are not treated well in the courts, especially in criminal matters, but recently there has been some progress.” And a respondent from a northern province noted that lawyers are not allowed to talk, “it’s not a fair trial.” Lawyers in Helmand and Kandahar also report having very little access to the court proceedings. They note that there has been greater ability to work on civil and family matters, such as marital rights, children, and property. They also note the ongoing need for advocacy in these areas.

Some women lawyers continue to find ways to work, in some cases overcoming significant obstacles. There are reports in some regions that women have been able to continue to work in legal aid organizations and law offices. There are even reports from a few locations (Herat and Balkh) of women continuing to appear in court. More common are reports that women continue to function as lawyers in all respects except for actually handling court appearances. Women are reported to work in “advisory” or “consulting” roles by drafting documents and providing legal advice to parties or to male colleagues on legal matters.

Is there a right to legal aid?

Under the Republic there was a Constitution, Legal Aid Regulation and a Law on Advocates. Among other things, these laws clarified the rights of lawyers to participate in the legal process, including on behalf of indigent accused persons, and to access the case file and the client. These are still referenced in practice. Lawyers are still relying on these laws in some provinces (as noted above, the new Advocate Regulation largely retains much of the Law on Advocates).

In most situations, Taliban judges are at least acknowledging the rights of parties to be represented by a lawyer, if such lawyer appears with or on behalf of the party. This falls short, however, of acknowledging that unrepresented defendants in a criminal matter actually have a right to such a lawyer. As one respondent noted, “If someone wants to hire [a lawyer], he or she can, but there aren’t free legal aid providers.” Another noted that there is a right

to a lawyer, but “legal aid providers are not given a chance in cases.” A Kabul respondent noted that “most suspects completely do not have access to defense lawyers.” Yet another respondent noted that “to teach the accused about his/her fundamental rights is impossible.” But another respondent from an eastern province noted more optimistically that “recently, a number of legal aid cases were represented and having a defense lawyer is optional.”

Non-Lawyers Functioning as Legal Representatives

It was widely reported that non-lawyers and persons without any legal training may appear and represent parties in court proceedings. This practice was also common under the prior regime. In some instances, respondents noted such representation was restricted to relatives of the parties or to civil matters only. At least one respondent noted this practice was permitted based on sharia legal precepts.

IX. The Law

The Application of Sharia Law

The current “absence of law” is one of the most serious challenges facing the country. While the current Taliban government professes to follow sharia law, this term is subject to a range of interpretation, and only refers to the guidance contained in the Quran and the hadiths themselves. While such guidance can be adapted to innumerable situations, these adaptations and applications of sharia law often will, in practice, be subject to the understanding and limitation of the person applying it. Further there are many different interpretations of sharia law meaning different persons may understand and apply sharia legal principles in different ways (in Afghanistan, the preference has been to follow the Hanafi school of sharia interpretation).²³ This, in turn, means that without clear codes of procedure or clear laws, there may be many inconsistencies in application. Even legal systems that are firmly rooted in sharia law, in countries such as Saudi Arabia or Iran, still rely on an array of legal codes that provide (at least on paper) some consistency and predictability in the application of the law.

To be clear, there currently are no sharia based “codes” per se that are being used in Afghanistan, i.e., no set of standardized procedural rules or substantive statutes that police, judges and lawyers can turn to define criminal acts or the procedures to be used to process cases involving such acts. The same is true for civil matters.

Taliban Decrees

As has been referenced above in this report, the Taliban are gradually issuing “decrees” and “circular letters” on various matters. “Decrees” come directly from the Supreme Leader; “circular letters” are from the relevant ministries or other authorities. To-date, more than 20 such decrees and letters reportedly have been issued. These include, for example, the aforementioned directive from the MOJ on licensing of defense lawyers, an order articulating the requirement for the wearing of the hijab (and specifying punishments for failure to

²³ “Hanafi” jurisprudence refers to one of the four major schools of Sunni Islamic legal reasoning and repositories of positive law. See “The Hanafi School,” Professor Christie S. Warren (William & Mary School of Law), Oxford Bibliographies. Hanafi jurisprudence has been characterized by Afghan respondents as “the preferred interpretation of sharia law in Afghanistan.” According to Professor Warren:

Hanafi doctrines have always been considered among the most flexible and liberal in Islamic law, including in the areas of criminal law, treatment of non-Muslims, individual freedoms, marriage and guardianship, and ownership and use of property. Hanafi jurisprudence was officially adopted by the Ottoman Turks in the sixteenth century and codified in the *Mejelle*. It remains the most influential school in the world today and is used in Jordan, Lebanon, Pakistan, Syria and Turkey. *In Afghanistan, Hanafi jurisprudence acts as a residual source of law in the absence of explicit codes or constitutional provisions* (emphasis added).

comply)²⁴, a prohibition of hiring relatives or friends for governmental offices²⁵ and a prohibition for collecting money from court petitioners seeking redress from the courts.²⁶

Sources of Law Being Applied Today in Afghan Courts

Unsurprisingly, the sources of law and procedure currently being used vary widely across the country from one court to the next. In central Afghanistan it was reported simply that in most cases “decisions/verdicts are made based on jurisprudence and Islamic Sharia law.” A respondent from a northern province described that situation as follows:

“There are texts of the Hanafi jurisprudence which the judges and defense lawyers use. All matters are processed based on the Hanafi jurisprudence, but there isn’t a specific law or code. It’s all old books, the topics are taken from different book volumes and from different pages which caused problems for themselves and the visitors.”

Another respondent characterized the situation there rather differently:

“There is no law to identify the direction of case, and the position of parties is not identified according to any law. Every court has its own proceedings without having a legal procedure. There isn’t specific and clear or legal and sharia based justice and judicial system; each court decides based upon their guess and issue the verdict.”

Some respondents felt that judges even failed to apply sharia-based legal principles. For example, one lawyer noted that “the law is absolutely not implemented according to the sharia orders and punishments.” A lawyer from northeastern Afghanistan observed that “there aren’t any guidelines; the judge bases his decision on his own guess and thinking and questions from the suspect during the trial.” A respondent from a northern province stated “I have witnessed Taliban addressing cases. Their courts do not address the cases based on standards and laws.”

Elsewhere, respondents felt there was simply nothing being applied beyond the judge’s own beliefs or prejudices. As one respondent noted “in short, there are no codes, government directives, or any laws from the prior regime still applied or in use.”

In the absence of clear guidance, it is unsurprising that many respondents reported that judges and lawyers continue to rely on laws and codes from previous Afghan regimes, including the Republic, in their efforts to fill the void. Lawyers from Kabul noted that the “old laws are used in minor crimes punishments, and in other matters the Hanafi jurisprudence orders are used.” A second Kabul respondent noted that “laws and codes that were applicable in the previous regime are not abolished and all cases are processed based on sharia laws orders and Hanafi jurisprudence. Laws of the previous regime are not directly applicable, but in some cases they are used.” A respondent from an eastern province also noted that the previous laws are sometimes used. A respondent in the north reported that “in some provinces the previous Penal Code is used even though nullified by the Taliban’s government.” And in some cases, parties look even further back; one respondent, for example, noted that the laws being applied include “the last Royal (H.E. King Zahir Shah) Law of Afghanistan and laws from the *Mujalatul Ahkam* [an Ottoman Empire era text].” Such laws of the previous regimes are, of course, still available both in hard copy and online. As one scholar recently noted, “the fate of a huge number of laws and regulations in different areas including criminal law, criminal procedure, family law, juvenile law, and women’s rights is unclear. It can be concluded from

²⁴ Decree No. 556, April 16, 2022, “Observing the Hijab.”

²⁵ Decree No. 433, March 16, 2022, “Prohibition of Hiring Relatives or Friends in Governmental Offices.”

²⁶ Decree of February 27, 2022, “Prohibition of receiving Money for Petitions (or Courts’ Decisions).”

the Taliban's statements that they ignore the laws in most areas but selectively point to provisions or reference some laws such as banking law when it serves their interests."²⁷

Procedural Rules

The nullification of the laws of the Republic also extended to the procedural codes by default. As noted, this vacuum means judges are left to largely conduct proceedings as they see fit without any conformity to standard rules. Nevertheless, there are numerous reports that many courts are using the Judicial, Administrative and Legal Rules of the Islamic Emirate, a document that was drafted by the Taliban in 2014 (1435 in the Islamic calendar) for use in those parts of Afghanistan then controlled by the Taliban. The Judicial Rules are quite detailed, consisting of 12 sections divided into 278 individual articles. The Rules define the role of judge, judicial responsibilities, and case procedures. They address, among other things, court structure, how petitions are submitted to court, who can file a case, the duties of parties, jurisdiction of particular courts, what kind of evidentiary support is required in various types of cases, procedures, the conduct of the trial, time limits, the role of legal representatives, requirements for public court proceedings and public announcements of decisions, appellate procedures, the duty of impartiality of judges and court personnel, and the duty of recusal from cases with family members. As noted, judges and lawyers in some regions are reported to rely on and use the Rules, while in other regions, some judges are using procedures from the Republic, and in some regions, neither are being used.

Less often cited by respondents but also relevant and accessible for use is a separate set of rules also issued by the Taliban in 2014, entitled the *Procedural Principles of Legal Courts* and consisting of 12 sections divided into 260 individual articles. These Principles address many of the same issues as the Administrative Rules, but also clarify the right of a defendant to appoint a defense lawyer to appear on their behalf.

Also highly relevant is a document containing procedural guidelines issued by the Supreme Court of Afghanistan. Entitled *The Structure and Responsibility of the Court of the Islamic Republic of Afghanistan* and originally released in 2018, the document is addressed to all courts in Afghanistan and consists of two parts, divided into 132 articles. The first part addresses the organizational structure of the courts, and the second part addresses court responsibilities. Among other things, it provides a process for appointment of judges, outlines the role of the legal representative of the accused, and requires the court to make a record of the case. It prescribes the structure and number of judges for the judicial branch, including the Supreme Court, appeals court, primary court and military court. It explains the judicial branch's administrative structure and describes the Supreme Court's relevant financial issues and administrative documents and procedures. It also describes the judicial branch's educational affairs and activities. Finally, it explains the hierarchy of authority within the judicial branch, and addresses issues of judicial independence and the impartiality of judges.

At the time of this report, it is not at all clear that the Taliban procedural documents referenced above from 2014–2018 are being widely used or implemented. A few respondents referred to the procedural rules in passing but without elaboration. As one respondent noted, "There is one written document called courts rules, but their proceedings are not [conducted] according to that." Another noted there are written directives dealing with the operation of the courts, "like the administrative and legal rules of courts of Islamic Emirate, but in criminal matters no law is applied, instead proceedings are done based on Hanafi jurisprudence." Yet another respondent, from a region near Kabul, noted that "there are administrative principles of courts based on which the courts function, but most of these principles are violated by the courts

²⁷ Jurist, March 7, 2022, Mahir Hazim, "Going Back to Zero: How the Afghan Legal and Judicial System is Collapsing Under the Taliban Regime"

and are not considered.” It is also notable that the documents do not appear to specifically clarify the increased role of muftis in the judicial process, which will have significant potential consequences for nearly every aspect of the judicial process. Further, use of these documents does not yet appear to fully reflected in the current appointments of judges.

Finally, as noted, above, some judges are also using the Ottoman era *Mujalatul Ahkam* (also sometimes referred to as the *Mejelle*), a notable nineteenth century compilation and codification of Hanafi jurisprudence which includes procedural guidance. The *Mujalatul Ahkam* has been used widely across the Islamic world by many successor states to the Ottoman Empire, and is reflected in their current laws. Respondents report that some judges also reference famous fatwas, as well as some articles of the penal code of the previous government.

X. Procedures and the Conduct of Legal Proceedings

Case Filing

While prosecution offices were still open, criminal cases were still being submitted through them, but in most provinces cases are now submitted to the courts directly from the police, or from one of the various security organs such as the directorate of investigation and detection or the directorate of intelligence. Reports coming from the police often just have a one-page report, providing much less background than would previously have been included in a typical prosecution referral. Civil cases may be submitted by either the legal department of the MOJ or the aggrieved person directly.

Scheduling and Frequency of Court Proceedings

Many courts are not currently operating on any kind of schedule or calendar, which is clearly frustrating to lawyers and parties alike. One respondent stated that “the courts do not operate in a systematic manner, each court and judge hold meetings according to their personal will, and the days of the meetings are not known. Trials are conducted without formalities and cooperation, and there is no discipline.” A respondent from northern Afghanistan reported that the “courts operate, but do not have a specific day for trials. Any time that is good for them, they conduct the trial.” From near Kandahar, it was reported that: “They don’t have a special regular basis and neither are there regular days.” Even where there are regular days for hearings, it is reported that there is no consideration of the duration necessary for a particular case, leading to delays. Respondents in yet other locations also reported that there were no set days or times for hearings, rather scheduling was at the whim of the judge. But in some provinces, including Daikundi, Ghazni and Kabul, it was reported that the courts were holding regular schedules.

Procedure for Conducting Hearings

The actual hearing procedures vary greatly. As a respondent from northern Afghanistan noted, “every court has its own proceedings without having a legal procedure, meaning that judicial hearings are unstandardized and illegal and verdicts are issued without fair trials.”

As noted, above, the effective elimination of the prosecution service means that in most criminal matters, the judge does not receive an investigative file and at best may only have a cursory police report. At least in some districts, individual victims can also file a criminal complaint with the court; in this case it was reported that “the victim him/herself must prepare a criminal indictment or in order to initiate a criminal case.” In practical terms, this means the judges, for the most part, do not receive case files, but at most only a short police report or the complainant’s filing.

The parties to a case are generally permitted to be present for the entire process. This generally includes women if they are parties to the case. In some cases, women appearing in court may have to do so accompanied by a male family member, or mahram, meaning a male relative of the first degree. This was the case in a northern province, where it was noted that a woman who is a party would be expected to come with “one of her mahram and appoint him as her defense lawyer and she shall thus avoid coming to the court.” In another of the northern provinces, it was reported that the discrimination went further; the lack of a sharia mahram meant that a woman’s application would not even be considered by the court—in effect meaning access to the court for women could only be obtained through a male relative. In criminal cases in the same province, when a woman is the defendant, she may appear before the judge, but other persons are not allowed to enter the courtroom. The result of these restrictions, according to a respondent, is that “women are not given the necessary attention in terms of their rights.” It was reported in a region of eastern Afghanistan that women were simply “instructed to send their husbands or family members to follow-up the case.”

The lack of regular schedules, standardized rules, or case files obviously make it difficult for defense lawyers to prepare their cases. Lawyers in several regions noted that the courts make no effort to inform the lawyers of upcoming cases of their clients. Rather, lawyers must regularly go physically to the courthouses to find out what cases are being heard. As one respondent noted, “If the lawyer goes, he participates. If not, the court does not inform him.” Issuance of a case summons to the accused is haphazard; some respondents report that they are issued (“sometimes summons letters are written”) while others cite instances where verdicts are issued in the absence of a defense lawyer and with the accused themselves in absentia. Without access to case files and with little or no notice of the hearing, defense lawyers also have little time to prepare the defense of their case.

A lawyer from eastern Afghanistan described how he had four or five cases that he and his colleagues had been retained to defend. The lawyers went to the courthouse where the trial was supposed to be scheduled, but found the courthouse locked. They subsequently found the judge holding court at the local prison, but the lawyers were turned away because of their dress and appearance—they lacked sufficiently long beards, did not wear turbans, had the wrong shoes and were otherwise deemed not to be correctly attired. The only recourse for these lawyers was to go to the bazaar in order to correctly outfit themselves to appear before the judge.

The actual role of the defense lawyer seems to be imperfectly understood. In some courts, for example, the ability of the defense lawyer to challenge a ruling of the judge is restricted. The right of defense lawyers to conduct cross-examination is also reported to be restricted or prohibited in a number of courts. One respondent from a northern province noted that “only the court and judicial members ask the witness questions.” A respondent from a region near Kabul stated that “only the judges can ask questions from the witnesses.” A respondent from another region noted simply that the “lawyers are not allowed to speak.”

In one reported instance, the lawyers found the judge holding court in a mosque within the prison. There were over 300 detainees and 40 guards present. The judge announced that if anyone said anything he did not like, the person would be beaten with sticks. The lawyers nevertheless attempted to speak, but were questioned by the judge as to their identity and then told to “sit down”. The lawyers were not allowed to present any defense. In a separate instance in another province, a judge was reported to hold court hearings in the prison while holding a whip in his hand. He threatened the detainees and lawyers, as well as the prosecutors that if anyone made statements that were not acceptable to him, he would beat them.

Lawyers also find it difficult to even meet with women clients to prepare their case, a situation which is particularly compounded if the woman is in detention. Such situations undermine the quality of representation that can be provided to women.

It was almost universally reported that women are not allowed to appear in court as defense lawyers. This is the obvious result of Taliban rules that prevent women from having their licenses as lawyers renewed or otherwise participating in public life. Nevertheless, there are a few reports of women lawyers actually appearing in court. These exceptional situations were reported by respondents from western Afghanistan and from Kabul, who both noted this had been permitted in a few instances. As noted above, women also continue to work in the role of ‘counsel’—i.e., in a professional legal capacity but only as an advisor to the defense lawyer and his client.

There is no formal evidence code in use (aside from the general guidance on testimony provided by Hanafi jurisprudence). In the general absence of case files, evidence consists largely of testimony. A respondent from northern Afghanistan, noting the absence of any prosecution file, stated that “the judge bases his decision on his own guess and thinking and questions from the suspect during the trial.” Another respondent noted that “case file papers are not valuable for the judges, they mostly rely on witnesses and swearing.” In a northwestern province, it was noted that, “judges do not use case file papers.” A similar observation came from a province on the eastern border: “They [the judges] do not value case file papers so much.”

Women are generally permitted to testify in some courts, but their testimony is often given less credibility than that of a man. It was frequently noted that it would take the testimony of two women to provide the equivalent to that of one man. A respondent from Kabul noted that the testimony of a woman would be accepted in a family matter, but would not be accepted in case involving *hadud* ordinances. In some provinces it was flatly stated that women were either not permitted to give testimony, or only to give testimony on “their own matters.” One respondent from eastern Afghanistan noted that “as the presence of women is rare, women themselves do not dare to visit the courts for providing testimonies.”

There are inconsistent reports on whether written records or notes made during hearings are maintained. In a number of provinces, respondents noted that such records were made, but in several others respondents answered in the negative on this point. Still other respondents noted that records of proceeding were “sometimes” made.

Most respondents noted that the judge’s decision is announced at the hearing and made public, though there were some conflicting reports of instances where this was not the case.

The judgment may or may not be accompanied by a written decision. The issuance of written decisions was specifically noted in a number of provinces, while in others it was simply noted that “there may or may not be a written decision.” One respondent observed that while there are written decisions, they are given “without reasons,” and are “only one page.”

Several respondents noted that judges would apply additional clemency and mitigate verdicts where possible in cases involving women. A respondent from northwestern Afghanistan noted that “if a woman is party in a case, maximum clemency is used for them.” A respondent from Kabul noted that “women in some cases are considered for mitigation and clemency, [for example] in criminal or family matters women without guardians are considered for mitigation.”

Despite these challenges, many defense lawyers are able to persevere in representing their clients. Lawyers will often take the approach of seeking meetings with the judges (or muftis) to explain issues within the context of sharia law; for example, that a judge should consider

acquittal a proper remedy in cases where there is not enough evidence. Lawyers have also successfully argued and explained that if a judge gives excessive punishment, that judge will be answerable to God. The ad hoc nature of judicial hearings is well illustrated by a recent case reported by a respondent: A young girl, about age 13, was kidnapped. She and her kidnapper were arrested and returned. The judge sentenced both the girl and the kidnapper to be stoned. The lawyer who was asked to handle the matter went to the province in question; he was able to meet with the appellate court judges, and explain the relevant sharia law to the judges. Among other points, the lawyer was able to explain that Islam does not permit testimony from the child (aged 13) and that the “investigation” had relied on various aspects that were inconsistent with proper application of sharia law. The lawyer’s arguments were sufficiently persuasive to the appellate court, and the girl was ultimately released.

The experience of one lawyer in a northern city is instructive, even in its relatively mundane recitation, as to the existence of a functional justice system in which lawyers can effectively interact in a criminal case:

“I was assigned as a defense lawyer in a criminal murder case. The case was referred to the district court with the prepared indictment. Later, I prepared my defense statement and after that I was called for the hearing. I went to the hearing, first the prosecutor read the indictment and then I was given a chance to present my defense. I argued that in my defense that my client was not involved in the case. The hearing was scheduled for the next day to present my witnesses. Bringing the witnesses was very important. I brought other witnesses to the hearing the next day. A few days later, I was asked to come to the court to hear the verdict. They announced their verdict with the presence of my client. My client was not satisfied with the decision, I filed a petition on behalf of my client, and currently the case is in the appeal stage.”

XI. Detentions Without Trial or Judicial Review

Civil society organizations report that the number of people detained has steadily increased since the Taliban took over the country; there are estimates that there are now over 15,000 people in detention, including hundreds of women and children. According to data collected from informal sources, the majority of arrests and detentions are occurring in Kabul, Herat, Kandahar, Balkh, Ghazni, Helmand, Kunduz, and Nangarhar. In Kabul, it is estimated there are almost 2,500 people in detention while Herat and Kandahar each have approximately 2,000, and Nangarhar has approximately 1,000. Kabul and Herat reportedly have the largest number of female detainees, at over 100 each. There are also reports that Kabul, Helmand and Herat all have over 100 children detained, including a significant number of girls.

Under the laws of the Republic, police could arrest and detain a suspect for 72 hours, after which they were required to refer the matter to the prosecution department. The prosecutor had authority to extend detention for specified time periods (which varied depending on the crime involved). The prosecutor was then required to conduct the investigation and send the case to court within that specified time period. These limits on detention have now largely broken down—in part reflecting the absence of a functioning prosecutor in most regions. According to almost all respondents, the police now have the complete authority to hold the defendant in detention for as long as they deem necessary. As a respondent from a region near Kabul noted “the time [limits] that were previously determined in the laws for police, prosecution office, and the court, it’s now not considered.”

The practice of police detentions, effectively without any prosecutorial or judicial review, present a significant, ongoing and unprecedented human rights challenge in Afghanistan today. Most persons who are arrested go into such police detention, with no access to legal representation. There are no legal standards governing the detention decision and there

is no mechanism to challenge the detention. As one respondent in northern Afghanistan observed “currently, the [the police] are taking decisions of the person, whereas in the previous government the police did not have the authority of detention, only the prosecutor and the court took decision of detention.” Another respondent from that region noted that “the police have the authority of detention and custody” and that “the detention starts on upon becoming a suspect.” Yet another respondent stated that the police “don’t consider any standard and procedure. When a person is accused of a crime, they transfer him/her to the detention without investigating.” A respondent from eastern Afghanistan noted that “whenever they want the [police] arrest a suspect and whenever they want, they release him/her. There is no standard.” Reports from Kabul were similar.

In a few regions, lawyers did note that judges were making decisions on detention, once the matter was referred to them by the police, but again noted that such decisions were not based on any legal standard and were arbitrary. As a respondent from an eastern province noted, the courts “don’t have a specific standardized system for it because it’s more kind of a ‘desert’ court, arbitrary.”

One lawyer described a case which involved an attempted murder and in which the defendant was detained: “When the case came to the court, the person was in detention for four months, and the issue of detention period was not considered. The officials did not pay attention to the release motions or due date.”

Civil society organizations report that “huge” numbers of persons, including many women, remain in custody without any clear access to legal representation. Nevertheless, even in this climate, individual defense lawyers have been successful in getting individual clients out of detention, through appeals to both judges and muftis.

XII. Appeals

There are reports that in at least some provinces the appellate level courts are functioning. A Kabul respondent there noted that “there is appeal as it was before. People who are not satisfied with the primary court’s decision can request appeal within the legal timeline.” A second Kabul respondent, however, added a caveat that appeals were not allowed “except in circumstances that are stipulated by the legal rules of Islamic Emirate.” But a respondent from a region near Kabul noted that while appeals were possible in civil cases, they were rare in criminal matters. A respondent in northern Afghanistan was noted that an appeal could be made within 10 days through a printed motion.

There is evidence that the appeals process can be used effectively by trained lawyers. One respondent from a region near Kabul noted that he became involved in a criminal matter at the appeals stage and only after the client had been sentenced by the primary court to be stoned. He noted that “the decision was overruled based on my objection and was returned to the primary court. Then the primary court with consideration of the appeal court’s judicial ruling, decided again and altered its decision from stoning to imprisonment.”

In some provinces, however, it is reported that there are no functioning appellate level courts, and no option for appeal. A respondent from northeastern Afghanistan noted that “the decision of the primary court is the final decision.” A respondent from the north of the country simply observed that “appeal and special courts are available.”

XIII. Corruption

Reports of corruption within law enforcement and the judiciary during the Republic are well-documented and well-known. Some respondents noted corruption now continued under the Taliban. One noted that “in some places, cases are resolved by taking a bribe upon arrest. If a bribe is given, they release the person upon arrest.” In other instances, the charge might be reduced: “I personally saw the prosecutor change the charges from adultery into jay walking. Therefore, the case was dismissed.” Corruption also extends to judges. It was reported by one respondent that suspects are “released in the court based on bribes.” The same person noted an instance involving “release in a murder case [of the accused] by giving bribe to the judge.”

A respondent from another province reported that “there are some police commanders, detection and intelligence managers, and even the heads of the courts [who] have people outside the court who take money from people. There are judges who in one year bought lands, two three-story houses and modern luxurious cars.”

Recommendations to the International Community

Recognizing that many non-governmental organizations are on the frontline of efforts to fight for rule of law and human rights in Afghanistan, including the rights of women and girls, and that Afghan defense lawyers have been able to remain active participants in the legal systems that are now functioning under the Taliban, it is critical that the international community support their work and efforts. These non-governmental organizations and defense lawyers represent the main mechanisms for pursuing accountability by the Taliban on matters that include unlawful detentions, extrajudicial police actions, human rights violations, and discriminatory or unfair treatment of women and girls. Without these organizations and rights defenders, illegal and arbitrary actions and rights violations will only increase.

Accordingly, the following measures are recommended:

1. The international community should recognize that humanitarian assistance includes support to legal aid services in conflict-affected areas, or other efforts to address the legal needs of particularly vulnerable populations, including detainees.
2. Increased and long-term funding by international donors should be made available to directly support the work of non-governmental organizations working to advance justice and human rights, including the rights of women and girls, and to meet the legal needs of women and other vulnerable groups. The international community should recognize that restrictions put in place by the Taliban regime make short-term or project based funding more difficult to implement, and can put non-governmental organizations at risk. Support must necessarily be flexible given the many challenges they face, and should include the provision of long-term, core support to civil society organizations committed to providing legal aid services or otherwise supporting defense lawyers to defend individual rights. Flexible support is especially essential for the following:

- a. Women working for non-governmental organizations must be kept on payroll, understanding that they cannot currently work in public capacities, and organizations should be supported in their efforts to fight for incremental reforms.
 - b. Afghan defense lawyers should be provided with financial support to register with the responsible department within the Ministry of Justice, including costs for required travel to Kabul to take the licensing exam.
 - c. Afghan lawyers working to establish an independent lawyers union that will promote the independence of the legal profession should be supported.
3. Non-governmental organizations need to have contact with justice and judicial stakeholders and other government agencies to effectively fight for justice and human rights. Over the last year, such advocacy efforts have in some cases led to demonstrable results and have helped formulate policies in ways that promote better access to justice. It is important that the international donor community support such advocacy and recognize that sanctions regimes do not prevent these contacts.
4. Given the significant use of informal justice mechanisms, such as local councils (ulemas, shuras and jirgas), to resolve criminal matters, and concerns that they may deprive women and other marginalized persons of due process protections, international donors should provide lawyers, legal aid providers and non-governmental organizations with funding to engage such local councils, and strive to educate them on positive, sharia-based practices that will ensure access to justice for those most marginalized.
5. The human rights mandate of UNAMA enables it to continue to serve as an important source of current information on conditions within Afghanistan, including review of such matters as the state of the administration of justice, detentions, extrajudicial police actions, violations of the rights of women and other human rights violations. UNAMA authorities can also directly engage with Taliban counterparts on issues of human rights violations. It is important that this mandate be supported by the international community, and that UNAMA continues to be adequately staffed and funded.
6. The Special Rapporteur on the Situation of Human Rights in Afghanistan, independent from UNAMA, also serves as an important and expert source of information on the human rights situation in Afghanistan that makes recommendations on how to improve it while documenting and preserving a record of human rights abuses. It is important that this mandate be supported by the international community and renewed by the Human Rights Council in 2023.

About the Author

Christopher Lehmann is an American lawyer and a member of ILAC's Board of Directors. For the past 25 years Christopher has worked in international rule of law development with non-profit organizations and the US Government. Most recently, he was the Executive Director of the CEELI Institute, an NGO based in Prague (and an ILAC member) that is dedicated to advancing the Rule of Law and promoting justice sector reform, from 2014 until 2022. He previously served in a similar capacity as the Principal Deputy Director of the U.S. Department of Justice's Office of Overseas Programs (OPDAT), in Washington, D.C., where he managed justice sector reform programs across the world. His work at the Department of Justice included a tour as Resident Legal Advisor at the U.S. Embassy in Islamabad, Pakistan, and a decade-long tenure as an Assistant U.S. Attorney in the Eastern District of New York. He is a recipient of the Department of Justice's John Marshall Award. Christopher has extensive experience in implementing justice sector programs in South Asia; in addition to his long-term work in Pakistan, he has conducted assessments in Afghanistan, India and Bangladesh. He is a graduate of Washington University School of Law, in St. Louis, where he was an editor of the Law Review. Christopher is a member of the Council on Foreign Relations.

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