

# The right to counsel as a safeguard of justice in Afghanistan: the contribution of the International Legal Foundation

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## **Abstract**

*In Afghanistan, rule of law projects have placed a heavy emphasis on rebuilding courts and law enforcement institutions. Little attention has been given to the critical element of defence, particularly criminal defence services for the poor. Yet, without defence lawyers, there can be no rule of law. This article examines the right to counsel in Afghanistan and the indispensable role that defence lawyers are playing in the development of the justice system, illustrated by the experience of the International Legal Foundation. By providing early and effective representation to their clients, lawyers ensure that Afghanistan's new laws and constitutional provisions protecting the rights of the accused are implemented.*

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By many accounts, the situation in Afghanistan today is bleak. Nine years after it was overthrown, a resurgent Taliban threatens to undermine peace-building efforts. The number of casualties on all sides is increasing. Corruption is rampant at all levels of government. Recent elections have been marred by violence and accusations of fraud. This article, however, focuses on a little-recognized achievement in the criminal justice sector: the increasing availability of early and effective criminal defence services for the poor. This has led to a reduction in the rate of arbitrary pre-trial detentions and increased fairness of judicial proceedings.

Though significant, the development of the right to counsel in Afghanistan has received scant recognition. Too often, critics have focused on the areas where Afghanistan's justice system does not comport with international fair trial standards, instead of on the substantial headway being made. This analysis is short-sighted. Without question, the reconstruction of Afghanistan's criminal justice system is still in its nascent stages. Nonetheless, progress has been made in establishing effective, high-quality criminal defence services for the poor, as exemplified by the work of the International Legal Foundation (ILF) – described here – and others.

The right to counsel has long been a part of the culture, history, and laws of Afghanistan.<sup>1</sup> However, nearly thirty years of war, insurgency, and Taliban rule prevented this right from taking root.<sup>2</sup> As a result, when the Taliban was overthrown in late 2001, defence lawyers were virtually non-existent. The vast majority of accused persons were too poor to hire a lawyer and there was no functioning legal aid system. A Legal Aid Department, created in 1989 under the auspices of the Supreme Court to provide indigent defence services, existed in name only.

To rectify this problem, the ILF, in 2003, with support from the Ministry of Justice and the Judicial Commission overseeing the reconstruction of the judiciary, launched the country's first defender office, the International Legal Foundation-Afghanistan (ILF-Afghanistan), and recruited and trained a new cadre of defence lawyers to represent the indigent accused. In 2004, Afghanistan's Grand National Assembly (the *Loya Jirga*) adopted a new constitution, which re-inforced the right to counsel as fundamental for all accused persons.<sup>3</sup> Today, with

- 1 Constitution of Afghanistan, 1964, Art. 26, available at: <http://www.afghan-web.com/history/const/const1964.html> (last visited 30 November 2010); Constitution of the Republican State of Afghanistan, 1976, Art. 31, available at: <http://www.afghan-web.com/history/const/const1976.html> (last visited 30 November 2010); Constitution of Afghanistan, 1987, Art. 41, available at: <http://www.afghan-web.com/history/const/const1987.html> (last visited 30 November 2010); Constitution of Afghanistan, 1990, Art. 41, available at: <http://www.afghan-web.com/history/const/const1990.html> (last visited 30 November 2010); Constitution of the Islamic Republic of Afghanistan, 2004, Art. 31, available at: [http://www.supremecourt.gov.af/PDFFiles/constitution2004\\_english.pdf](http://www.supremecourt.gov.af/PDFFiles/constitution2004_english.pdf) (last visited 30 November 2010).
- 2 While the right to counsel existed in theory, it was virtually ignored in practice until the post-conflict reconstruction efforts began and non-governmental organizations (NGOs) began to establish legal aid offices and train criminal defence lawyers. See UN Assistance Mission in Afghanistan (UNAMA), *Arbitrary Detention in Afghanistan: A Call For Action, Volume I: Overview and Recommendations*, 2009, p. 16, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=49d07f272> (last visited 30 November 2010), which states that: 'Engaging a defence counsel is a relatively new concept in Afghanistan'.
- 3 Constitution of the Islamic Republic of Afghanistan, above note 1, Art. 31.

seventy-three defence lawyers staffing thirteen offices,<sup>4</sup> ILF-Afghanistan remains the nation's primary provider of indigent defence services. Following the ILF's lead, the Ministry of Justice, and other local and international non-governmental organizations (NGOs), including Da Qanoon Ghushtonky, the Legal Aid Organization of Afghanistan, and Medica Mondiale, opened additional legal aid offices. The impact on Afghanistan's criminal justice system has been dramatic.<sup>5</sup>

This article examines the indispensable role that defence lawyers are playing in the reform and development of Afghanistan's criminal justice system. It demonstrates how defence lawyers – as guardians of due process – are essential to any fair system of justice. In particular, the article addresses the following key issues: (1) the historical, cultural, and legal roots of the right to counsel in Afghanistan; (2) the shift from a culture of passive defence lawyers to one of proactive lawyers who defend the rights of the accused; (3) defence lawyers' catalytic effect on the development of the criminal justice system; and (4) the many challenges facing Afghanistan in its efforts to provide free criminal defence services to the poor.

The observations and conclusions contained in this article draw heavily on the ILF's experience in Afghanistan from 2003 to the present.<sup>6</sup> Despite the growing focus on rule of law reconstruction in post-conflict settings, most rule of law reform projects have concentrated on strengthening the judiciary and prosecution, and the police services. There is little, if any, attention given to the critical element of defence. By focusing on the provision of criminal defence services for the poor, the ILF is attempting to redress this imbalance.

## The right to counsel in Afghanistan

On 4 January 2004, the *Loya Jirga* adopted a new constitution, guaranteeing the right to counsel to all accused persons from the time of arrest.<sup>7</sup> Article 31 of the Constitution of the Islamic Republic of Afghanistan provides as follows: 'Upon arrest, or to prove truth, every individual can appoint a defense attorney'.<sup>8</sup> This provision also explicitly mandates that the government must provide free counsel to the poor, stating: 'In criminal cases, the state shall appoint a defense attorney for the indigent'.<sup>9</sup>

4 As of 30 November 2010.

5 Other rule of law efforts in Afghanistan may not be as successful. On 24 September 2010, the *New York Times* reported that the United States had funded a US\$35 million campaign (which included kite-flying) 'to promote the use of Afghanistan's formal justice system'. Rod Nordland, 'Afghan equality and law, but with strings attached', in *New York Times*, 24 September 2010, available at: <http://www.nytimes.com/2010/09/25/world/asia/25kite.html> (last visited 30 November 2010).

6 The ILF is an international, non-governmental organization promoting fair and just criminal justice systems in post-conflict countries and regions in transition by establishing effective, quality criminal defence services for the poor. For further information about the ILF, see: <http://www.theilf.org>.

7 Constitution of the Islamic Republic of Afghanistan, 2004, above note 1, Art. 31.

8 *Ibid.*

9 *Ibid.*

While the inclusion of a right to counsel provision in Afghanistan's new constitution was momentous, it was not novel. Such a right to counsel has roots in Islamic jurisprudence and Afghan culture, and existed in earlier constitutions going back to 1964.<sup>10</sup> Further, Afghanistan acceded to the International Covenant on Civil and Political Rights (ICCPR) in 1983, without reservations, thus consenting to be bound by its provisions on the right to counsel.<sup>11</sup> This history is important because it has shaped current thinking that 'the purpose of representation, whether in civil litigation or crimes, is to vindicate the truth and facilitate justice'.<sup>12</sup>

In a *Hadith*,<sup>13</sup> the Prophet Muhammad suggested that a judge might mistakenly rule in favour of a more skilled, or educated, litigant and thereby cause an injustice.<sup>14</sup> Modern jurists understand this warning to be consistent with allowing an accused person who is incapable of adequately defending himself to enlist the aid of a lawyer to present his case.<sup>15</sup> Thus, the majority view in Islamic jurisprudence recognizes the right of the accused to have access to counsel in criminal cases.<sup>16</sup> Other scholars have noted that the contemporary Islamic system of criminal justice necessitates the assistance of a skilled specialist.<sup>17</sup> This reasoning, which focuses on the complexity of the legal system and vulnerability of the accused, is well established in other legal traditions as well.<sup>18</sup> It is axiomatic that, in

10 See Muhammad Abdel Haleem, Adel Omar Sharif, and Kate Daniels, *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, I.B. Taurus & Co, London, 2003, p. 90; see also the different constitutions, above note 1.

11 Afghanistan acceded to the ICCPR on 24 January 1983. See United Nations Treaty Collection, Status of Treaties, Chapter IV Human Rights, International Covenant on Civil and Political Rights, available at: [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited 30 November 2010).

12 M. A. Haleem *et al.*, above note 10, p. 90.

13 *Hadiths* are recorded life events of the Prophet Muhammad that serve as important tools for Islamic jurists interpreting the Qur'an and *Sharia* (Islamic law).

14 Allah's Apostle heard some people quarrelling at the door of his dwelling, so he went out to them and said, 'I am only a human being, and litigants with cases of dispute come to me, and someone of you may happen to be more eloquent (in presenting his case) than the other, whereby I may consider that he is truthful and pass a judgment in his favour. If ever I pass a judgment in favour of somebody whereby he takes a Muslim's right unjustly, then whatever he takes is nothing but a piece of Fire, and it is up to him to take or leave' (Sahih Bukhari, Vol. 9, Book 89, No. 292). The right to counsel may also derive from the Islamic 'Theory of protected interests', through the right of self-preservation (liberty, physical well-being): see Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction*, Greenwood Press, Inc, Westport, CT, 1988, p. 64. These interests grant every person the right to do what is in their power to safeguard their rights, including the right of a beneficiary to call on others to assist them in protecting their rights. See Osman Abd-el-Malek al-Saleh, 'The right of the individual to personal security in Islam', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System*, Oceana Publications, London, 1982, p. 83. The right to counsel is a necessary extension of self-preservation since 'it provides the accused with the means to establish innocence and to defend himself' (*ibid.*). Thus, the right to counsel is based on this penumbral right of assistance.

15 Awad M. Awad, 'The rights of the accused under Islamic criminal procedure', in M. C. Bassiouni, above note 14, p. 98.

16 There is some disagreement, specifically in the Hanafi School, as to whether some crimes categorized as *Hudud* (crimes against God) require a right to counsel, but the majority view holds this distinction to be irrelevant. See M. A. Haleem *et al.*, above note 10, p. 90.

17 O. A. al-Saleh, above note 14, p. 84.

18 The United States Supreme Court opinion in *Powell v. Alabama* (1932) established the right to counsel in capital cases and elaborated on the necessity of counsel: 'Even the intelligent and educated layman has

prosecuting crimes, the state has superior resources; it can rely on law enforcement to collect evidence on its behalf, and government prosecutors have experience and knowledge of the intricacies of criminal law and procedure. Without counsel, an accused is at a decided, and often insurmountable, disadvantage.

Consistent with classical Islamic jurisprudence, the informal traditional system also acknowledged the right to counsel in its criminal tribunals.<sup>19</sup> In most, if not all, provinces of Afghanistan, informal criminal tribunals permit that ‘any party to a dispute who does not feel competent to defend himself properly may have someone represent him until a decision is rendered’.<sup>20</sup> While in some circumstances this has increased the equality of the parties involved, in others it has reinforced existing social inequalities. In many parts of Afghanistan, because women are often considered not competent in these matters, they are represented by their male guardians.<sup>21</sup> This does little to advance their social position.

Building on this tradition, Afghanistan’s successive constitutions have recognized the right to counsel.<sup>22</sup> Afghanistan’s 1964 Constitution was the first explicitly to provide for the right to counsel, guaranteeing ‘[e]very person ... the right to appoint defense counsel for the removal of a charge legally attributed to him’.<sup>23</sup> The 1964 Constitution was suspended after a coup in 1973.<sup>24</sup> The new government promulgated a constitution in 1976, which also provided for the right to counsel.<sup>25</sup> After several years of Soviet occupation and a failed constitution created by a communist coup in 1980, the communist government reintroduced the right to counsel in the Constitution of 1987.<sup>26</sup> This constitution was quickly replaced after the Soviet withdrawal and an interim government proposed a new

small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect’. United States Supreme Court, *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

19 Natalie Rea, *Customary Laws of Afghanistan: A Report by the International Legal Foundation*, International Legal Foundation, 2004, p. 1, available at: <http://www.theilf.org/reports-ilfa-customary-laws.pdf> (last visited 25 January 2011).

20 *Ibid.*, p. 9.

21 A male guardian can be the woman’s husband, father, or, failing those, another male family member.

22 Article 51 of Afghanistan’s first Constitution, introduced in 1923, provided that: ‘every citizen or person appearing before a court of justice may use any legitimate means to insure protection of his rights’ (Constitution of Afghanistan, 1923, Art. 51). Arguably, this provision may have indirectly provided for the right to counsel based on the ‘Islamic theory of protected rights’; see O. A. al-Saleh, above note 14, p. 83.

23 Constitution of Afghanistan, 1964, above note 1, Art. 26.

24 J. Alexander Thier, ‘The making of a constitution in Afghanistan’, in *New York Law Review*, Vol. 51, Winter 2006–2007, p. 560.

25 ‘Every person has the right to appoint defense counsel for the defense of a charge legally brought against him’: Constitution of the Republic of Afghanistan, 1976, above note 1, Art. 31.

26 J. A. Thier, above note 24, p. 560. See also Constitution of Afghanistan, 1987, above note 1, Art. 41: ‘The accused has the right to defend himself personally or through an advocate’.

constitution in 1992, with an identical provision on the right to counsel.<sup>27</sup> Soon thereafter, civil war destroyed the government and the Taliban rose to power.<sup>28</sup> The Taliban government did not create a new constitution.<sup>29</sup>

In December 2001, shortly after the overthrow of the Taliban regime, a number of prominent Afghans met under United Nations auspices in Bonn, Germany, to decide on a plan for governing the country. These Afghan representatives signed the Bonn Agreement,<sup>30</sup> re-establishing the 1964 Constitution, which included the original provision on the right to counsel, as the interim constitution over a transitional government.<sup>31</sup> One of the primary responsibilities of the Transitional Government of Afghanistan was to create a new constitution, one that they succeeded in adopting in 2004.<sup>32</sup> Article 31 of the 2004 Constitution provides for the right to counsel and makes it compulsory for the government to provide free counsel to the poor.<sup>33</sup>

While a right to counsel provision existed in earlier constitutions, it had never been properly implemented in practice. Based on Afghanistan's prior track record, there was scepticism in the national and international community about whether the new constitutional guarantees contained in Article 31 of the 2004 Constitution could finally deliver a meaningful right to counsel. Ultimately, the efficacy of this constitutional guarantee would depend on the cultivation of a culture of proactive defence lawyers. Unless and until lawyers fulfilled their roles as defenders, there was little likelihood that this right would carry through into practice, since effective advocacy is the surest way to achieve full-scale implementation of the right to counsel.

## Developing a culture of defence

In 2009, judges interviewed for an independent evaluation of ILF-Afghanistan stated that defence lawyers were 'working hard to keep the system and particularly the prosecutor and police in check'. According to one judge, 'At first the judges did not pay much attention to the defence and did not appreciate the role of defence lawyers in court. To be honest, they opened our eyes to the irregularities that existed in the judicial system'.<sup>34</sup>

27 'The accused has the right to defend himself personally or through an advocate': Constitution of Afghanistan, 1990, above note 1, Art. 41.

28 J. A. Thier, above note 24, p. 561.

29 *Ibid.*, p. 561.

30 'The "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions", otherwise known as the Bonn Agreement, was signed on December 5, 2001. The Bonn Agreement is a framework for transformation and stabilization of the Afghan political system' (*ibid.*, p. 566).

31 *Ibid.*, p. 561.

32 *Ibid.*, p. 566.

33 Constitution of the Islamic Republic of Afghanistan, 2004, above note 1, Art. 31.

34 Afghanistan Public Policy Research Organization, *ICDAA/ILF: Nationalizing Legal Aid in Afghanistan, External Review*, 2009, p. 11.

A culture of defence can exist only when all actors accept the basic concept that an innocent person may be wrongfully accused, prosecuted, and convicted. Procedural protections provided by law, such as the right to be produced before a court promptly after arrest, are essential to protect the innocent and avoid miscarriages of justice. Ideally, in a fully balanced system, a competent lawyer acts to level the playing field. Where no culture of defence exists and defence lawyers play a passive role, a culture of guilt prevails. In such an environment, defence lawyers ignore procedural rules and do not seek to have them enforced, resulting in arbitrary detentions and, in many instances, wrongful convictions. In a culture of guilt, defence lawyers are ignorant, indifferent, or, worse, pass judgement on the accused.

In a justice system that weighs in favour of the prosecution, unskilled defence lawyers often seek the application of procedural protections arbitrarily, basing their actions on their own personal values and subjective belief in their clients' innocence or guilt. As a result, the authorities have no incentive to 'play by the book', since failing to do so rarely carries any negative consequences. Illegal detentions can become the norm rather than the exception. Because the system focuses on conviction and punishment, rather than the process of uncovering individual guilt or innocence, authorities cast a broad net, enmeshing the innocent and guilty alike in the criminal justice system. The rich, whether innocent or guilty, have the resources to pay their way out; the poor, whether innocent or guilty, are often detained without recourse.

Establishing a fair and just criminal justice system requires constructing or reconstructing a culture of proactive defence advocacy. Only once defence lawyers come to recognize that any person can be the victim of abuse of authority will they begin to appreciate their critical role in protecting their clients' rights and begin systematically to apply new legislation. Through their efforts, the changes intended in the legislation will begin to take hold. The right to counsel is not intended to protect the guilty; rather it is the most basic element in ensuring the right to a fair trial and, therefore, in protecting against the arbitrary exercise of authority.

Before NGOs began to open legal aid offices in Afghanistan in 2003, the role of defence lawyers within the justice system was limited. The few lawyers there played a largely passive role, mitigating their clients' sentences and pleading for mercy, but rarely fighting to prove their clients' innocence. ILF-Afghanistan's Country Director, Shabir Ahmad Kamawal, worked as a defence lawyer before joining the organization in 2006; like others, he engaged in the typical practice of lawyers at the time. Instead of defending a client in court, lawyers would have the accused, or their family, explain the case to them and then write a defence statement on their behalf, without any hope that it would persuade the judge or affect the verdict. In addition, defence lawyers were not used to interviewing clients or witnesses, nor would they ever visit a crime scene. Rarely would defence lawyers even attend a trial.

Adding to the problem, Afghanistan's justice system was ill-prepared to accommodate the evolving role of defence lawyers. As judges were unaccustomed to lawyers appearing in their courts, they had difficulty understanding their role

and responsibilities.<sup>35</sup> Defence lawyers were routinely denied access to their clients in jail. In many instances, they were also deterred from presenting a defence in court. Consequently, the ILF's first objective in Afghanistan was to train lawyers to take a more proactive role in the defence of their clients. At the same time, it acted to educate the Afghan justice community more broadly about the role of counsel.<sup>36</sup>

While the ILF ultimately succeeded in instilling a culture of proactive defence advocacy in its Afghan staff lawyers, the change was gradual, occurring over several years of international mentorship. For the first four years of ILF-Afghanistan's operations, experienced international criminal defence lawyers provided individual case-by-case mentoring to ILF-Afghanistan's staff lawyers. The international lawyers offered legal and technical expertise and assisted with the day-to-day representation of clients, including shadowing local lawyers at court appearances. This expert day-to-day mentoring resulted in major improvements in the practice of lawyers in Afghanistan, shifts in lawyers' assumptions about their role in the justice system, and the establishment of a true culture of defence where none previously existed.

As Mr. Kamawal recalls, 'my colleagues and I were gradually transformed as we saw how proactive advocacy could make a difference in our client's cases'. Once, while defending a murder case, he was surprised to hear the prosecutor admit that he was making a very strong argument on his client's behalf. The judge was so astonished that he made sure the court reporter noted the prosecutor's admission. Mr. Kamawal remembers reflecting at the time on the change that had occurred: 'While before I would sit in an office and write defence statements that I knew would have no effect, now I was in court convincing even the prosecutor of the correctness of my arguments. For the first time, I felt I was making a real difference'.

Perhaps most significant to the establishment of a culture of defence, ILF-Afghanistan's lawyers were taught by their mentors to question the government's evidence in every case. As an illustration of the obstacles that the ILF faced when it opened its first public defender office in Kabul, out of all of the female candidates interviewed for staff attorney positions, the ILF could only find one applicant who would agree to represent a woman accused of

35 In its January 2009 report, *Arbitrary Detention in Afghanistan*, UNAMA noted that: 'Coupled with the presumption of guilt, [the] lack of familiarity with the function and purpose of defense counsels appears to create hostility toward the right to defense counsel by the police, prosecutors and Courts, as demonstrated by the consistent failure to inform detainees of their rights to defense counsel and limitations placed on defense attorney's [*sic*] access to investigation, proceedings, and documents' (UNAMA, above note 2, p. 16). While it is true that many police, prosecutors, and courts continue to impede the right to counsel in Afghanistan, the UNAMA report fails to take into consideration the many improvements that have been made since the reconstruction effort began.

36 See *ibid.* The UNAMA report incorrectly generalizes that 'engaging defense counsel is seen as a sign of guilt, rather than a critical protection against abuse of power and arbitrary detention'. While undoubtedly many individuals still believe this to be true, Afghanistan's defence providers have made enormous progress in educating the justice sector, as well as ordinary citizens, about the important role of defence lawyers in the justice system.



adultery.<sup>37</sup> None of the other women interviewed could fathom how a woman could be wrongfully accused of this crime.

ILF-Afghanistan's first case illustrates the effectiveness of the ILF's mentorship model: after finally obtaining access to the detention centre in Kabul, one of ILF-Afghanistan's staff lawyers met with her first client, a young man accused of adultery. Adultery in Afghanistan is defined as the engagement in any consensual sexual activity outside of marriage.<sup>38</sup> The young man told his lawyer that he was married to the woman in question; according to the prosecutor, the couple were not married. The lawyer, assuming her client's guilt, planned to seek mercy from the judge. She did not initially question the government's assertion and so dismissed her client's claim of marriage. When asked by her international mentor about investigating her client's story, she said: 'Why? It's in the [prosecutor's] file. He is not married'. She could not comprehend that the prosecutor might not have the correct facts. However, after her mentor convinced her to investigate the case independently, she discovered that her client had been entirely truthful. The mullah who performed the marriage testified to that effect. This proved to be a transformative event for the lawyer. One year later, when the same lawyer was representing another client in court, the judge began to berate her for representing an 'infidel'. The lawyer proudly and courageously replied to the judge: 'Everyone has the right to counsel'.

In another case, ILF-Afghanistan's client was charged with stealing a car out of the parking lot of the Ministry of Foreign Affairs. The client insisted that he was innocent, telling his lawyer that the parking lot of the Ministry had a security camera. His lawyer was sceptical but, with encouragement from his international mentor, he requested the security tape. The tape clearly showed that the alleged stolen car had not, in fact, been taken and that ILF-Afghanistan's client had driven out of the parking lot in his own car.

## Defence lawyers as catalysts for reform

In 2002, the ILF conducted a detailed assessment of Afghanistan's criminal justice system to determine: (1) the rights of accused persons under Afghan law, and (2) the extent to which these rights were being implemented in practice. This assessment revealed gross and systematic violations of the rights of the accused during all stages of the criminal process. Without access to counsel, people languished in detention for months or years without charge or trial. Drug addicts were

37 Under the Afghan Penal Code of 1976 that is currently in force, 'A person who commits adultery ... shall be sentenced to long imprisonment': Afghan Penal Code, Art. 427, published 7 October 1976 (15 Mizzan 1355 AH) in the *Official Gazette*, No. 347. English translation available at: <http://www.lexadin.nl/wlg/legis/nofir/oeur/lxweafg.htm> (last visited 30 November 2010).

38 The legal definition of adultery in Afghanistan comes from the Hanafi school of *Sharia* law: Adultery (*Zina*) is any sexual act between a man and a woman who are neither married nor have a slave/master relationship. See *Sharh-e Fatehull Qadeer*, Vol. 4, p. 138; *Bahrull Raiq*, Vol. 5, p. 3; *Badaye ull zaye*, Vol. 7, p. 33.

imprisoned to force them to overcome their addiction. Debtors were imprisoned to force them to pay their debts. Some never had their day in court. Time limits for detentions were rarely applied. Many were not released when sentences expired.<sup>39</sup>

Defence lawyers play an indispensable role in the criminal justice system. By providing early and effective representation to their clients, they ensure that laws and constitutional provisions protecting the rights of the accused are implemented meaningfully and effectively. Their presence provides a vital oversight mechanism that prevents arbitrary detention and mitigates torture and other abuse by law enforcement authorities. Lawyers also protect the right to defence, endeavouring to avert wrongful conviction. Indeed, a defence lawyer is so fundamental to the right to a fair trial that the deprivation of one virtually ensures the prospect of indefinite detention and almost certain conviction.

A good defence lawyer in the courtroom is one of the best ways to improve judicial practice. By consistently citing the statutes that protect their clients' rights and challenging the prosecutor's evidence and arguments, these lawyers forced courts to become more vigilant, adhering to constitutional provisions and procedural rules and taking time to review the defence lawyers' evidence carefully. Periodically sending judges for national and international training will never have as great an impact; the consistent presence of well-trained, well-resourced defence counsel is far more efficacious.

Over the last seven years, defence lawyers in Afghanistan have advocated successfully for more effective enforcement of laws that protect the rights of accused persons. Since 2003, ILF-Afghanistan has provided representation to more than 16,000 indigent Afghans accused of crimes. Given the high number of accused persons subjected to arbitrary and prolonged pre-trial detention, ILF-Afghanistan prioritized their representation. This early intervention has had an impact: since 2007, early representation has resulted in the pre-trial release of an increasing number of the organization's clients from detention.<sup>40</sup> From 2007 to 2009, the number of ILF-Afghanistan clients released from pre-trial detention increased from 13% to 23% (see Figure 1).<sup>41</sup>

Legal rights take on meaning when they are argued in the context of a case. Two days after the 2004 Constitution was adopted, ILF-Afghanistan began seeking the release of people who had been imprisoned for failure to repay a debt. While the text of the provision concerning debt may seem clear and its meaning unambiguous, the judiciary initially resisted implementing the new law because of the traditional existence of debtors' prisons. This practice might have quietly

39 During the initial pilot phase of the ILF's project in Afghanistan, the ILF's Executive Director, Natalie Rea, and two Afghan lawyers studied Afghanistan's criminal laws and practices in the country's detention centres and courts.

40 Owing to differences in early case-tracking methods, complete data on pre-trial release vs. detention are not available for years 2003–2006. During that time, ILF-Afghanistan represented roughly 900 clients. Pre-trial detention statistics for cases handled in 2010 will be reported on the ILF's website, [www.theilf.org](http://www.theilf.org), in January 2011.

41 In 2007, ILF-Afghanistan represented 1466 clients, of whom 196 were released from pre-trial detention. In 2008, 964 of 3971 clients were released pre-trial; in 2009, 1101 of 4879 clients were released pre-trial.

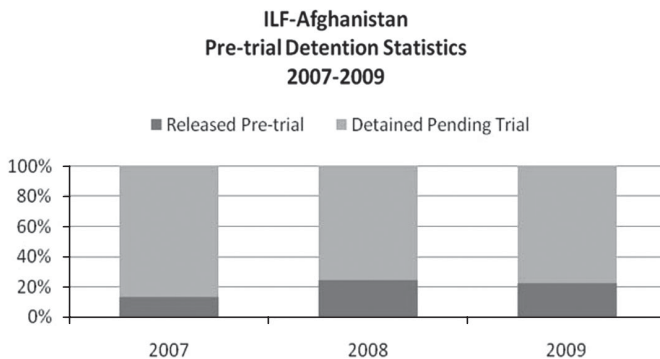


Figure 1: ILF-Afghanistan pre-trial detention statistics, 2007–2009. ‘Released pre-trial’ includes release on bail, release on guarantee, pre-trial dismissal, and release on presidential decree or release by special commission.

continued if not for a lawyer’s intervention. Arguing that Article 32 of the new Constitution prohibits debtors’ prisons,<sup>42</sup> ILF-Afghanistan successfully convinced courts to order their clients’ release. The first case argued by ILF-Afghanistan on this issue involved a man who had been convicted of fraud, sentenced to a term of imprisonment of four months, and required to repay the debt. By the time that ILF-Afghanistan met this client, he had been incarcerated for over six months because he could not afford to repay the debt. In the context of this case, the court had to agree with ILF-Afghanistan’s argument. The man had to be released because he had served his custodial sentence and was unlawfully being held for his debt only, in direct violation of the Constitution.

Similarly, as soon as Afghanistan’s new criminal procedure code, known as the Interim Code of Criminal Procedure (ICCP), was enacted, ILF-Afghanistan began to assert its clients’ new rights.<sup>43</sup> The ICCP guarantees fundamental rights essential to a fair trial, including the presumption of innocence<sup>44</sup> and prohibitions against arbitrary detention.<sup>45</sup> Additionally, it emphasizes procedural rules such as time limitations on pre-indictment detention,<sup>46</sup> a defendant’s mandatory right to be present at certain phases of the proceedings,<sup>47</sup> and rules excluding illegally

42 ‘Debt shall not curtail or deprive the freedom of the individual’: Constitution of the Islamic Republic of Afghanistan, 2004, above note 1, Art. 32.

43 The Afghanistan Interim Code of Criminal Procedure for Courts, or Interim Code of Criminal Procedure, available at: <http://www.asianlii.org/af/legis/laws/icc175/> (last visited 30 November 2010), was enacted in 2004.

44 ‘From the moment of the introduction of the action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent’ (*ibid.*, Art. 4).

45 *Ibid.*, Art. 6.

46 ‘When the arrest performed by the Judicial Police is sanctioned ... the arrested person shall be released if the Saranwal has not presented the indictment to the Court within fifteen days from the moment of the arrest ...’ (*ibid.*, Art. 36).

47 ‘The suspect and the defense counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial’ (*ibid.*, Art. 38(2)).

obtained evidence.<sup>48</sup> Importantly, the ICCP shifted the focus to the rights of the accused. Over time, ILF-Afghanistan used these new provisions of the ICCP to persuade judges to take a more active role in legal proceedings, both by advocating for the rights of their clients in individual cases and by conducting training workshops for judges.

One of ILF-Afghanistan's first challenges under the ICCP was to the illegal pre-indictment detention of its clients. The ICCP limits the period in which a prosecutor can file an indictment to a maximum of thirty days (twice fifteen days) and requires the release of the detainee if the deadline is not met.<sup>49</sup> When the ICCP was enacted, prosecutors and police contested this provision, arguing that they would not be able to investigate a case in so little time. Sympathizing with law enforcement, the judiciary initially turned a deaf ear to any defence argument for release under this provision. Since, historically speaking, judges had little power over the prosecution, courts were accustomed to acquiescing to the demands of prosecutors.

Although ILF-Afghanistan ultimately convinced the courts to release their clients when indictments were not filed within the thirty-day period, progress was slow. On one occasion in 2004, the judge considering the motion for release turned to the international lawyer mentoring at ILF-Afghanistan and asked: 'Do you think he is guilty?' The international lawyer answered that the client was presumed innocent. The judge insisted: 'That is not the question; the question is, do you think he is guilty?' Though not successful in that case, ILF-Afghanistan lawyers continued to file motions until the courts began to accept their analyses and arguments and to release detainees if the indictment deadline was not met. The impact of ILF-Afghanistan's applications for their clients' release led to prompt investigations, timely indictments, and/or early release.

Early representation also ensures a minimum of supervision over investigative procedures. The ICCP gives counsel the right to be present during investigation; Article 38 provides, in part, that 'defense counsel has the right to be present at all times during the interrogation of the suspect', and '[t]he suspect and the defense counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial'. If the investigative activities are conducted in the absence of the accused and/or his defence counsel, the evidence is insufficient on its own to prove a fact.<sup>50</sup>

While the law clearly provides distinct rights for defence counsel, judges, police, and prosecutors were reluctant to accept that a defence lawyer should do anything other than participate as a passive observer. When ILF-Afghanistan

48 'The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the Court cannot base its judgment on it' (*ibid.*, Art. 7).

49 *Ibid.*, Art. 36.

50 See *ibid.*, Art. 55: '[t]he records of the testimonies of the witnesses as well as of the expert exams, collected during the investigative phase, can have the value of evidence as basis for the decision only if it results that the accused and/or his defense counsel were present during the operations and were in a position to raise questions and make objections'. See also *ibid.*, Art. 7.

lawyers began visiting crime laboratories with their international mentors and questioning the testing methods, their role became clearer and judges started to take notice. For example, in drug cases, ILF-Afghanistan lawyers argued that there was no system to ensure that the drugs being tested had been in the custody of the accused, making a positive test meaningless to his or her innocence or guilt. They repeatedly contested the evidence at trial and the courts eventually agreed. As a result, cases were dismissed, clients released, and testing procedures improved.

In addition to the individual and systematic impact on the lives of the many poor Afghan defendants that they serve, defence lawyers also play a crucial role in developing the rule of law in Afghanistan. They frequently provide expert commentary on proposed laws related to criminal matters and legal aid services, and have remained vigilant against attempts on behalf of the legislature to erode the rights of accused persons and limit the role of lawyers. Recently, the UN Office on Drugs and Crime (UNODC) has been leading efforts to draft a new criminal code. Afghanistan's law enforcement agencies, long dissatisfied with the ICCP, have advocated the inclusion of provisions that would curtail many fundamental rights of the accused, including the right to counsel.<sup>51</sup> Initially, defence lawyers were not involved in the drafting process. When they became aware of this new draft, the Afghanistan Independent Bar Association insisted on defence lawyers having a voice, and has since worked with the defence bar to draft provisions that ensure adequate protections for the rights of the accused.<sup>52</sup>

While defence lawyers have affected many significant reforms, many challenges remain. Recently, lawyers practising in the anti-narcotics' courts went on strike because of government interference with their work. One of ILF-Afghanistan's lawyers was arrested for representing Guantánamo detainees. While the Afghanistan Independent Bar Association has been vigilant to protect its members, these incidents indicate an enduring hostility to protecting the rights of the accused. Furthermore, many accused persons lack access to competent counsel. In many areas of the country, there are still no indigent defence providers.

51 For example, the chief of the Afghan Attorney General's Office (AGO), concerned about messages being passed between defence lawyers and their clients that were 'against the national interest', proposed to limit the rights of detainees to speak with their lawyers. See Proposed Criminal Procedure Code, April 2009, Art. 5, Sec. 11, fn. 11 (English translation by Justice Sector Support Program and UNODC). The Afghanistan Independent Human Rights Commission objected to any limit to the right of lawyer-client confidentiality. As the AGO was in the minority, the draft was changed to guarantee suspects and accused persons 'The right to communicate freely and confidentially, orally or in writing with his counsel and without the authorities listening to or reading such communication' (*ibid.*, Art. 5, Sec. 11).

52 The Afghanistan Independent Bar Association sent an email to UNODC on 27 July 2009 voicing its concerns about the draft law. Subsequently, the President of the Bar Association met with UNODC, who agreed to provide them with a copy of the draft law. Furthermore, as a result of these discussions, UNODC invited the Bar Association to a conference in Austria on 27 October 2009 to share its views. The Bar Association sent an official letter to all provinces about the fact that the draft law was eroding the rights of lawyers, and instructed all defence lawyers to review the draft law and give their views. Information obtained from conversation between ILF-Afghanistan staff and the President of the Afghanistan Independent Bar Association, 29 November 2010.

## Towards a government-funded public defender system

Afghanistan must ensure that the poor have equal access to justice by establishing, in the long term, a nationwide, government-funded indigent defence system. The ultimate goal of this system should be to ensure that high-quality legal representation is provided to every man, woman, and child, regardless of their financial circumstances. Without high-quality criminal defence services, particularly for the poor (who constitute the majority of defendants in any criminal justice system), there is no check against arbitrary and abusive treatment by authorities and no one in the courtroom to protect the rights of the accused.

Until recently, Afghanistan's government-run legal aid centres were largely ineffective. In 1989, the Afghan government established a Legal Aid Department under the Supreme Court.<sup>53</sup> The purpose of this department was to provide criminal defence services to the poor; however, for many years it did not actually represent any clients, existing in name only.<sup>54</sup> After the fall of the Taliban, the Legal Aid Department began accepting cases, but it employed few lawyers, all of whom provided largely passive representation. They did not visit clients in detention centres, investigate cases, or actively defend their clients. In 2008, the Legal Aid Department was transferred to the Ministry of Justice.<sup>55</sup> Beginning in 2009, the World Bank agreed to fund the expansion of the Ministry's legal aid centres, with the requirement that the Ministry had to professionalize staff and increase pay in order to ensure quality.<sup>56</sup>

The Afghan government has expressed a commitment to develop an effective indigent defence system by: enacting a constitutional provision mandating that it provide free counsel to the indigent accused,<sup>57</sup> granting permission to NGOs to set up legal aid offices, and, more recently, itself establishing legal aid centres that provide meaningful defence services to the poor. In a 2005 policy paper, entitled *Justice for All*, the Ministry of Justice expressly stated the government's obligation to build a legal aid programme:

Afghanistan needs a legal aid program. Legal aid in criminal cases is mandatory under the Constitution. It is a practical necessity if the state justice system is to

53 See website of the Afghan Ministry of Justice: <http://www.moj.gov.af/?lang=en&p> (last visited 30 November 2010).

54 See Ele Pawelski, 'Defining justice in Afghanistan: development of a national legal aid system', in *Windsor Review of Legal and Social Issues*, Vol. 27, 2009, p. 195: 'Afghanistan has had a short history of defence lawyers, and only nominal government legal aid services'. See also UNODC, Afghanistan, *Afghanistan: Implementing Alternatives to Imprisonment, in Line with International Standards and National Legislation*, 2008, p. 53: 'The Supreme Court has a legal aid office but it has been extremely inadequate'.

55 See website for the Afghan Ministry of Justice, above note 53.

56 Information obtained by ILF-Afghanistan staff during a January 2009 meeting with a Deputy Minister of the Ministry of Justice and the head of the Ministry of Justice Legal Aid Office in Kabul.

57 Constitution of the Islamic Republic of Afghanistan, 2004, above note 1, Art. 31.

have any role at all in protecting the rights of vulnerable people. Skilled legal aid lawyers will accelerate justice reform.<sup>58</sup>

In recognition of its limited resources, both human and financial, the Ministry of Justice also detailed in this policy paper a national strategy for implementing its obligation to provide counsel for the poor:

To be meaningful, legal aid must be available first at the Primary Court level. It could initially be made available in serious criminal ... matters. The Government foresees a small number of resources (either state employees or private lawyers when they exist) in provincial capitals, with one legal aid person in larger districts.<sup>59</sup>

While it is important for the Afghan government to recognize the practical and economic limitations to establishing a full-scale indigent defence system, concerns about money or lack of qualified defence lawyers should not be used as an excuse to limit the right to counsel. Rather, the government should prioritize its use of resources and continue to promote the growth of the defence bar.<sup>60</sup>

The international community should assist this effort by investing in legal aid projects, but be wary of infusing too much money. While, in the short term, Afghanistan needs international donors to fund indigent defence, too much aid can be problematic, as it can lead to corruption and a system that is unsustainable in the long term. In structuring and funding legal aid programmes, donor agencies and NGOs must keep in mind that the Afghan government's resources are finite and that legal aid expenditures will only constitute a small portion of the national budget.<sup>61</sup> The international community can also play an important role in educating the government about the fundamental nature of the right to counsel and encouraging it to spend as much on defence as is spent on prosecution.

Donor agencies and NGOs can play a further important role in ensuring that the Afghan government's legal aid programme maintains the high standard set by NGOs' legal aid programmes. This will require a solid investment of human and financial resources, as well as training and mentoring by existing legal aid organizations. If government-provided public defence is underfunded and/or ineffective, it will reflect negatively on the government's ability to provide high-quality defence

58 Government for the Islamic Republic of Afghanistan, Ministry of Justice, *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan*, Kabul, May 2005, p. 10, available at: <http://www.rolafghanistan.esteri.it/NR/rdonlyres/B0DB53D0-A1F9-468E-8DF0-3F485F1959A7/0/JusticeforAll.pdf> (last visited 30 November 2010).

59 *Ibid.*

60 As of 23 November 2010, there were 964 lawyers, including 152 women, registered with the Ministry of Justice (phone conversation between ILF-Afghanistan and the Afghanistan International Bar Association).

61 The US budget for indigent defence services is also small: 'The state and federal governments together allocate over half of their criminal justice spending to the investigation and prosecution of crimes but only about two percent to indigent defence' (Kyung M. Lee, 'Reinventing Gideon v. Wainwright: holistic defenders, indigent defendants, and the right to counsel', in *American Journal of Criminal Law*, Vol. 31, Summer 2004, p. 373).

representation to the poor and will further erode public confidence in government services.

Moreover, an effective public defender system must be developed with local involvement. It is critical that the Afghan government, donor agencies, and NGOs work together to develop and implement a strategy for local ownership over the indigent defence system. For example, it would be unwise to open duplicate public defender or legal aid offices in provinces already being served while other regions go without any. One way to ensure that a national public defender programme is developed in the most effective manner is for the government to collaborate with NGOs that are providing direct services and monitoring problem areas for themselves, and progressively to transfer responsibility to the government for overseeing the national programme. Using this model, ILF-Afghanistan is currently working jointly with the Ministry of Justice to establish public defender offices.

## **Conclusion**

While Afghanistan unquestionably faces enormous challenges ahead, it has made progress in strengthening the rights of accused persons and the role of defence counsel. Without question, defence lawyers have been catalysts for the incremental progress currently being made in Afghanistan's criminal justice system. The next step is to invest in the development of a fully functioning national indigent defence system, with the full-scale support of the Afghan government and the international community. Unless and until Afghanistan and the international community establish an effective indigent defence system, there is little guarantee that the country's criminal justice system will protect the right of the accused to a fair trial.