

2ND EDITION

AN INTRODUCTION TO THE  
CRIMINAL LAW OF  
AFGHANISTAN

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AFGHANISTAN  
LEGAL EDUCATION  
PROJECT

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LawSchool

An Introduction to the  
**Criminal Law of  
Afghanistan**

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## PREFACE

It is an understatement to say Afghanistan is facing critical challenges and hard transitions. The Afghan people face the immense task of rebuilding a country. Three decades of conflict have hurt Afghanistan, not only devastating the country's infrastructure, but also stunting the institutions that educate and cultivate new leaders. Most significantly, Afghanistan faces a dire shortage of qualified lawyers. This shortage will be keenly felt during times of transition, as the participation of skilled legal practitioners is crucial to rebuilding Afghanistan. These challenges, nevertheless, present an opportunity for the young citizens of Afghanistan to create positive change and become leaders for their country.

In response to these challenges and opportunities, Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007. The project is a student-initiated program dedicated to helping Afghanistan's universities train the next generation of Afghan lawyers. More broadly, ALEP hopes to train the next generation of leaders who will drive Afghanistan's reconstruction and recovery.

In 2007, the founding team members produced the project's first major work, *An Introduction to the Law of Afghanistan*. For its second major project, the team focused on an area of law critical to the national rebuilding efforts, criminal law. The creation of a properly functioning criminal justice system, rooted in the rule of law, is pivotal to the sustainable development of the country and its full integration into the international community. With these ideas in mind, the ALEP team has created a criminal law textbook that exposes its readers to every facet of Afghanistan's criminal law, from the attributes of crime, to the central role of Islamic Law, and from the substantive criminal laws, to the concepts of victims' and defendants' rights.

In the 2008-2009 school year, the ALEP team was composed of Stanford Law students Una Au, Raaj Narayan, Max Rettig, Scott Schaeffer, Anne Stephens, Eli Sugarman, and Geoffrey Swenson. The students were supervised by Erik Jensen, Co-Director of Stanford Law School's Rule of Law Program, and Larry Kramer, Stanford Law School Dean. The ALEP team is grateful for Dean Kramer's enthusiasm for this project, and would also like to acknowledge the support of Deborah Zumwalt, General Counsel of Stanford University and member of American University of Afghanistan's (AUAF) Board of Trustees.

ALEP is also delighted to continue its partnership with AUAF, and is particularly grateful for the support of AUAF's Chief Academic Officer, Dr. Athanasios Moulakis.

In the 2010-2012 school years ALEP team members edited and updated the Criminal Law textbook to produce this most up to date version, which is the Second Edition of the Criminal Law of Afghanistan.

This textbook consists of five chapters that will familiarize the reader with criminal law in Afghanistan. It is our sincere hope that the information and commentary in this textbook will help readers make the ethical and responsible decisions that will solidify the rule of law in Afghanistan, regardless of the careers they choose to pursue.

It should be noted at the outset that Islamic Law guides all aspects of Afghan criminal law, from the Constitution to the Criminal Code and its individual statutes. Therefore, this textbook would not be complete without a discussion of Islamic Law and its place in Afghanistan's criminal law. While we endeavor to expose students to some aspects of Islamic Law, this text should not be seen as conclusive on matters of Islamic Law or the Islamic faith, but rather an introductory understanding aimed at exposing issues rather than aimed at offending any particular believer.

The reader should be aware that there is a substantial divergence among scholars regarding the interpretation and punishment of crimes under Islamic Law. We do not seek to take part in this debate. Instead, we attempt to lay out a very basic overview of Islamic Law and its influence on Afghanistan's criminal law. We hope that by doing so, our readers will appreciate and further investigate this complex relationship, namely by studying many of the nuanced interpretations.

With this understanding, Chapter 1 familiarizes readers with the history of Afghanistan's criminal laws and introduces them to the major themes pursued throughout the text. The chapter considers three major topics in depth: the objectives of the criminal law, the sources of criminal law, and the history of criminal law in Afghanistan.

Chapter 2 discusses the basic elements of prohibited acts. In short, the chapter details the fundamental elements of crime, each of which must exist before a defendant can be found guilty. Among the elements required by law, this chapter evaluates (1) whether the action is classified as a crime when it is committed (the legal element); (2) whether the defendant's actions match those actions criminalized by the applicable code sections (the material element); and (3) whether the defendant possesses the requisite mental state when the crime is committed (the mental element).

Chapter 3 closely examines the consequences of criminal acts under the Penal Code and individual statutes. The chapter seeks to investigate the core values and principles underpinning criminal responsibility. The chapter also serves as a general primer on the most important limitations of criminal liability. Students will be able to critically examine how the Penal Code addresses problems stemming from criminal acts perpetrated by "legal persons," such as corporations or labor unions, in addition to those of "natural persons," or humans.

Chapter 4 is intended to help students critically examine the role of punishment. In particular, the chapter considers the current rules governing punishment and evaluates their place in society. The punishment process outlined in Chapter 4, of course, may differ in significant respects from the realities of crime and punishment as they exist in everyday life. A familiarity with the law, nevertheless, is important for both students and practitioners, even if the letter of the law is not always followed.

Chapter 5, finally, is devoted to a careful examination of Afghanistan's substantive crimes. It discusses the influence of Islamic Law and the crimes that are defined by its teachings, including hudud, qisas, and ta'azir. The great majority of the chapter looks at the positive law as it exists in the Penal Code and various statutes. The discussion highlights crimes against the state (bribery and corruption, drug cultivation/trafficking, terrorist financing, and money laundering), crimes against the person (homicide, assault and battery, robbery, kidnapping, and rape), and crimes against property (embezzlement, larceny, burglary, and fraud). Finally, the chapter examines how defendants contest charges of criminal wrongdoing, primarily through the use of defense lawyers.

We sincerely hope that you will enjoy studying, debating, and engaging with these materials, your fellow students, and the faculty of your University.

Erik Jensen  
Palo Alto, California  
November 1, 2009

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None of ALEP's projects would be possible without a network of dedicated friends and supporters. Stanford Law School Dean Larry Kramer (with whom Erik Jensen supervises the students) has provided strong support to the project, as has Ms. Deborah Zumwalt, General Counsel of Stanford University and member of AUAF's Board of Trustees. Stanford professor Robert Weisberg in particular lent his expertise to the development of this book.

ALEP is delighted to partner with the American University of Afghanistan. In particular, AUAF's Chief Academic Officer, Dr. Athanasios Moulakis, has been enormously supportive from ALEP's inception.

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## CHAPTER 1: AN INTRODUCTION TO CRIMINAL LAW

### I. INTRODUCTION

This textbook covers the breadth of issues in criminal law from elements of crimes to criminal responsibility to punishment. At the outset, it is important to know exactly what is meant by criminal law.

#### **Key definitions – What is *criminal law*?**

Criminal law, sometimes called penal law, concerns a body of regulations that define criminal actions. These criminal actions may be lawfully punished by the state. Criminal law is the body of law to which the police and the prosecutors refer when charging and trying a person for criminal conduct.

The study of criminal law is the study of society and the individuals who compose it. It offers an endless array of questions about law, morality, psychology, and public policy. Because criminal law mostly concerns the acts of individuals, the study of crime is not only the study of law but also the study of human behavior. Criminal law reflects society's judgment that a certain act is so bad a person may be deprived of their liberty, their wealth, their freedom, or even lose their life. Consequently, the application and limitations of criminal law warrant close scrutiny.

This textbook examines the criminal law of Afghanistan. It does not address criminal procedure (meaning how a person is arrested, charged, tried, and punished under the Criminal Procedure Code of Afghanistan). Rather, this textbook discusses the core components of criminal law: the elements of a crime, criminal liability, punishment, and crimes proscribed under Afghan law.

This chapter discusses three main topics: the objectives of the criminal law, the sources of criminal law, and the history of criminal law in Afghanistan.

### II. OBJECTIVES OF CRIMINAL LAW

Throughout the world, individuals who commit wrongful acts face punishment of one form or another. But why do societies choose to punish bad behavior? And how does society determine what form of punishment is appropriate? This chapter discusses four theories to justify punishing wrongful acts: *retribution*, *incapacitation*, *deterrence*, and *rehabilitation*.

#### **Reading Focus**

As you learn about the different theories of punishment, which ones seem the most just? Which one or ones do you think are the most important for criminal law and punishment in Afghanistan?

## **1. Retribution**

Retribution is understood as “deserving punishment.” This means that punishment for a crime corresponds to the criminal act. Because society has condemned the act in question as criminal, the individual who committed the act should be punished. However, retribution does not necessarily imply that the punishment should correspond exactly with the crime. Retribution does not always mean giving “an eye for an eye.” For example, a person who stabs another person does not necessarily receive a punishment of stabbing. Rather, the individual may be imprisoned for an amount of time which the judge, prosecutor, and society believe is equal to the pain caused to his victim.

When society codifies rules through the legislative process about what acts are criminal and therefore subject to punishment, the act of codification of rules helps express society’s conviction that the proscribed acts are too dangerous, too hurtful, and too immoral to be tolerated. Because this is society’s judgment, it also means that society bars prosecutors, judges, and prison wardens from committing the same type of crimes against the perpetrator of the original crime. That is, retribution is not meant to sanction private vengeance. Rather, it is based on the idea that people engaged in criminal activity deserve to be punished, and it is the mandate of society to formally set out the terms of the punishment.

Another important component of retribution is that punishment should not be disproportional to the severity of the crime. For example, a retributionist would hold that a woman who steals a loaf of bread from a bakery should not be put to death. Punishment that is greater than the crime is unjust because it is an undeserved infliction of pain or deprivation of liberty. At the same time, punishment should not be too little. If a man has stolen everything a family owns from their house and sold it for profit, a retributionist would argue that making the perpetrator pay a 500 Afghani fine is insufficient. Where punishment is too lax, it would mean the perpetrator benefitted from the criminal act.

Retributionists seek to determine how much punishment is the “right” amount of punishment. This is a difficult and subjective task. Because a person cannot be punished in the same way that he injured his victim, society must approximate the harm caused by the crime through imprisonment or monetary fines. The methods and types of punishment in Afghanistan are discussed further later in Chapter Four. The judge has substantial discretion to determine what kind of punishment is appropriate. While some articles of the Criminal Code give exact sentences for an offense, the majority provide guidelines requiring that punishment be either “not less than” or “not more than” a particular amount of time. Yet the question remains: if there are so many opinions on what constitutes a just punishment for a crime, why is the decision, at least at the outset, left to one judge and what he or she thinks is right?

### Discussion Questions

1. Though societies typically do not punish people in the same way that they injure their victims, Afghanistan allows people to be executed by the state under the death penalty. What is different about that situation than when someone physically injures another person?
2. How much discretion should judges have to determine punishment? What problems might arise if judges were not allowed any discretion?

### Activity

Write down the punishments—a prison sentence, a fine, or something else—that you think would be just for the crimes listed below. Compare your answer with those of your classmates and discuss how you arrived at your answers.

1. A man stabs his best friend to death because he heard the friend joking about how short the man was.
2. A woman steals medicine from a drug store to give to her son who is very sick.
3. A man who has no access to electricity and receives no other services from the government refuses to pay his taxes.
4. A woman pushes her son because he refuses to get out of bed in the morning and breaks his leg.
5. A man working at the Ministry of Water and Mines steals some of the money that he is supposed to use to pay companies that the ministry has hired to dig wells and mines.

In Afghanistan punishment is largely based on retribution. For example, many disputes in Afghanistan— from disagreements over land to criminal acts—are settled outside of the formal court system in local *jirgas* and *shuras*. The form of *jirgas* and *shuras* varies across Afghanistan, but there are several points of similarity. One is in the punishment for acts that would be considered criminal. Typically, community leaders punish the perpetrator of a crime in a manner that is equal to how they injured the victim. These punishments can differ significantly from fines or prison, but the idea remains the same: whomever has broken a written or unwritten law of the community is held to answer with a punishment equal to his act.

### Discussion Question

1. Read the following paragraph. Do you think this notion of restorative justice or retribution is more prevalent in Afghanistan?

2. “Pashtun norms of criminal law are based on the notion of restorative justice rather than on the notion of retributive justice relied upon in Western and international law. Rather than being sent to prison for a wrong committed, the wrongdoer is asked to pay Poar, or blood money, to the victim and to ask for forgiveness.... [F]orgiveness, or Nanawati, is a special custom for seeking apology and eliminating enmity. The custom is used in all Pashtun tribes, taking virtually the same form in every community.”<sup>1</sup>

Similarly, under the Hanafi school of classical jurisprudence, the idea of retribution is embedded within *qisas* classified crimes. Notice in the excerpt below how the punishment is tailored to the offense in different types of homicide cases. The result is that the punishment of death for killing another is limited in application to a narrow subset of homicide crimes.

“[C]lassical Islamic Law has sought to limit the use of the death penalty by 1) requiring a specific intent on the part of the murderer, 2) granting to certain family members the right to override *qisas* by accepting *diyya* (blood-money) or other compensation in lieu of the murderer's death, and 3) taking into account the status of the victim, and in some circumstances, the status of the murderer. All schools agree that *qisas* may be demanded only when the killing is unjust and the murderer acted intentionally. Many schools further restrict the possibility of *qisas* penalties for murder by distinguishing between varying degrees of intent: . . . the Hanafi school adheres to an elaborate classification of intent: in addition to deliberate and accidental, they distinguish homicides which are ‘quasi-deliberate‘ (*shabah amd*), ‘equivalent to accidental‘ (*jari majra al-khata*), and ‘indirect‘ (*bi sabab*), while permitting [retaliation] only for fully ‘deliberate‘ killings. The remaining orthodox schools recognize three degrees: deliberate, quasi-deliberate, and accidental. The careful parsing of degrees of intent and of the means of proving the same provide a judicial rein over the process of retaliation that limits the applicability of the death penalty.”<sup>2</sup>

Not all people subscribe to the retribution theory of punishment. The main criticism leveled against retribution is that retribution stems from a desire by the victim and society to hurt a person. Some argue that the impulse for revenge cannot be justified because it begins a cycle of violence among the accused and the society. Indeed, some critics call this quest for revenge a primitive trait that has no place in a modern society. In response to this criticism, retributionists argue that instead of encouraging revenge, retributive punishment ends the cycle of violence because it forces the offender to accept punishment commensurate to his act and the state enforces it.

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<sup>1</sup> International Legal Foundation, *The Customary Laws of Afghanistan*, 10 (2004).

<sup>2</sup> Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 *UCLA JOURNAL OF ISLAMIC AND NEAR EASTERN LAW*, 302-303 (2002).

## 2. Incapacitation

Another rationale for punishment is incapacitation. Under the theory of incapacitation, punishment is justified because it prevents an offender from re-offending or becoming a recidivist. The theory holds that individuals who engage in criminal conduct reoffend once they are released from prison or pay their fine. The most common offenses committed by habitual criminals are theft offenses: burglary, larceny, or robbery. The theory of incapacitation holds that punishment should be imposed to prevent the person from committing another crime against the public.

### Key definitions – What is *recidivism*?

Recidivism is the phenomenon whereby offenders who are punished and then released from prison continue to commit crimes. They are *habitual offenders* or *recidivists*.

The difference between retribution and incapacitation is not always clear. Retribution punishes the act committed (*retrospective*), while incapacitation looks to prevent the commission of the crime (*prospective*). Whereas retribution focuses on the severity and type of sentence to be imposed, the purpose of incapacitation is to prevent future wrongful acts. Under the incapacitation theory, punishment is almost always imprisonment (or some equivalent to imprisonment, such as house arrest). Imprisonment, the removal of an individual from society, is a proven way to prevent a criminal from reoffending.

Any length of imprisonment is justified under the incapacitation theory because the offender is likely to re-offend. Because the goal of imprisonment is to prevent the individual from committing wrongful acts, the duration of incarceration is dictated by the necessity of preventing future crimes. In other words, imprisonment must cease when there is no longer a danger that the offender will commit another crime. If the offender no longer poses a danger to the community, incapacitation is no longer being accomplished through imprisonment.

Determining whether an individual is likely to reoffend is extremely difficult. Several factors may help authorities make accurate predictions. For example, as the offender gets older, the chance of his committing another crime drops. Another example is psychological illness; as long as the individual's psychological illness remains untreated, there is a substantial likelihood that she will commit another crime.

Incapacitation has been criticized because it justifies imprisonment based on a prediction, however inaccurate, that an individual is likely to commit a crime at some unknown point in the future. Critics argue that incapacitation is too mechanical; rather than treating people as individuals, it is focused on probabilities. In other words, incapacitation can justify imprisoning people even where there is no reliable proof that they are dangerous.

### Discussion Questions

1. Make a list of factors that in your view can help predict whether a person will or will not commit another crime. Compare with a classmate and discuss.
2. What are methods of incapacitation other than imprisonment? Are these methods preferable to imprisonment? Why or why not?

### 3. Deterrence

The third rationale for punishment is deterrence. Deterrence holds that punishment is justified because the threat of sanctions for a particular crime will deter people from committing that crime. In other words, because people do not want to pay a fine, go to prison, or be put to death, they will not commit crimes.

There are two types of deterrence: *general* and *specific*. Specific deterrence applies to the potential criminal offender himself. If an offender is punished for past criminal action, he will be deterred from committing that crime again in the future because he will not want to suffer the same punishment again. General deterrence applies diffusely to society as a whole. When an offender is punished for committing a particular crime, the population will generally be deterred from committing that crime because they see another suffering punishment. For example, if would-be murderers see other murderers being put to death, they will be deterred from killing.

The deterrence rationale plays an important role under Islamic Law. Governments in Islamic countries have the authority to set punishments for certain crimes. These punishments are discretionary (*ta'azir*), and set for the purpose of deterring future criminal acts. Consider the following excerpt.

#### **The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law**

“While Islamic Law provided for the mandatory punishment of a narrow set of crimes, the vast majority of criminality was punished pursuant to the power of the government to formulate public policy. Such punishments were described as crimes subject to discretionary (*ta'azir*) punishments. The goals of these punishments were protection of the public, general or specific deterrence and/or reformation of the defendant. Accordingly, the legitimacy of such punishments was based not on fidelity to a revelatory norm, but rather upon the reasonable belief that punishment would improve the public welfare by achieving one of the aforementioned goals. For the same reason, al-Qarafi argued that there were sins whose secular harms were so inconsequential that they could not legitimately result in criminal punishment because crafting a penalty severe enough to deter the crime would render the punishment disproportionate to the harm resulting from the sin. At the same time, a punishment satisfying the proportionality requirement would be insufficient to deter the defendant from continuing to sin. Because the

predicate for applying discretionary penalties was determined by an empirical assessment of harm, this area of the law was entirely independent of theological expertise, and accordingly, legitimized rule-making for the vindication of public interests rather than the vindication of express revelatory norms.”<sup>3</sup>

Deterrence is also distinct from the retribution and incapacitation rationales for punishment. Retribution and incapacitation are both backward-looking. Retribution aims to punish the offender for the injury she caused the victim, while incapacitation aims to keep an offender out of the public so that he does not offend again. By comparison, deterrence aims to *prevent* crimes before they happen.

Like the other theories, the efficacy of deterrence is unclear. Some argue that people who commit crimes do not act rationally and therefore do not consider the punishment before committing a crime. Others believe that individuals likely to commit crimes irrationally discount the likelihood of being caught or brought to justice. Alternatively, if criminals do act rationally, they may take more pleasure in committing the crime itself than would be offset by the punishment. Thus punishment may have little effect on criminal behavior.

### **The Economic Theory of Law – A Brief Introduction and Application**

There are many ways to study law and to judge its effectiveness. Scholars can study law from a historical perspective, a political science perspective, even a literary perspective. One of the major fields of study in law is from an economic perspective. Many scholars study the law by applying economic theories, such as supply and demand and opportunity cost.

Deterrence can be viewed through an economic lens. Deterrence would be achieved if punishment raises the cost of crime to the point where the cost of committing the crime exceeds the gains made by the perpetrator. What does this mean? For example, let's say a man wants to steal a beautiful scarf because he knows his wife will like it. The scarf is expensive and costs 10,000 afghanis. However, the man also knows that if he were to be caught stealing the scarf, he would have to give it back, pay a 3,000 afghani fine, and go to prison for 6 months. Most economists would say that the man would be deterred from stealing the scarf because the penalty for the crime exceeds the payoff. This assumes that the perpetrator is sure to be caught. To get a true idea of the cost of the crime, you would have to discount it by the likelihood of the person being caught.

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<sup>3</sup> Mohammad Fadel, *The Theological and Ethical Roots of Public Reason in Islamic Law*, Canadian Journal of Law and Jurisprudence, vol. 21, pp.58-59 (2008).

Some scholars argue that for repeat offenders, the cost is even further discounted because individuals who already have spent time in jail are not as deterred by the threat of returning to jail. Therefore, how deterred a person is from committing the crime by the punishment imposed is remarkably difficult to discern in economic terms. The bottom line is that even very high penalties can deter less crime than we think they will because criminals think they are unlikely to be caught and because criminals often discount the severity of punishment.

### Discussion Questions

1. The legislature is considering a new law banning ice cream. How high would the punishment have to be for you to obey the law not to eat ice cream? How did you reach this conclusion?
2. Do you think that deterrence works? Does it work for people who have already committed a crime? Does the death penalty act as a deterrent to committing murder?

## 4. Rehabilitation

The final rationale for punishment considered in this chapter is rehabilitation. Rehabilitation holds that criminals should be punished because punishment helps criminals learn the error of their ways and return to society as improved people. Rehabilitation is one of the oldest justifications of the criminal law. It represents the belief people can fundamentally change for the better.

There are two types of rehabilitation: moral and intellectual. The theory of moral rehabilitation posits that the fact of imprisonment and punishment can set a criminal back on the right path. Because punishment is difficult to bear, it shocks the human conscience into realizing that crime is unacceptable in society. Moral rehabilitation can be supplemented through programs during imprisonment that help offenders realize why they have committed crimes, understand how their actions hurt others, and learn how to avoid committing wrongful acts in the future.

The other type of rehabilitation is intellectual. Some argue that criminals commit crimes because they do not have the skills to succeed in society without turning to crime. In many countries, prisoners have access to a variety of educational opportunities aimed at giving them the emotional and professional resources to be productive citizens upon their release. These types of educational opportunities could include dispute resolution skill building, learning a trade (such as bricklaying or carpentry), or teaching computer literacy. Under this theory, for instance, if a criminal has the ability to make a living and provide for his family after being released, he will not steal.

The most fundamental criticism of the rehabilitation theory is that it simply does not work. Critics argue that prison is a place where criminals learn from each other, rather than a

place where criminals learn how to become productive members of society. Because other offenders surround the convicted individual, there is often a culture in which it is acceptable, and in some instances even valued to have committed serious crimes.

Of course, not all people who commit a crime reoffend. Therefore, there is at least some merit to the idea that punishment helps individuals turn away from crime.

### **Discussion Questions**

1. Do you think rehabilitation works? Can people change? What kind of rehabilitation would make change possible?
2. Should public authorities help prisoners rehabilitate by offering classes in prison like those described above?
3. Do you think rehabilitation occurs in Afghanistan's prisons?

### **III. SOURCES OF CRIMINAL LAW**

There is no single source of criminal law in Afghanistan. Rather, Afghanistan's criminal law draws on several sources, many of which have binding force and require criminal sanctions for violations. It should be noted, of course, that Islamic Law guides all aspects of Afghan criminal law, particularly the Criminal Penal Code and its individual statutes. This section, consequently, will examine the four major sources of criminal law: the Constitution, Islamic Law, the Penal Code, and individual statutes.

### **Reading Focus**

As you read about the different sources of the criminal law of Afghanistan, be sure to notice where each derives its authority and binding force.

#### **1. The Constitution**

The 2004 Constitution of Afghanistan provides an important starting point for understanding the sources of criminal law. In Article 27 the Constitution delineates the principle of *nullem crimen sine lege*, or the legal element of crime. The legal element of crime will be discussed further in Chapter Two Section I, the Elements of Crime.

It is important, however, for the foundational principles of criminal law in the Constitution to be recognized as the overarching structure of Afghanistan's criminal justice system. Article 27 is excerpted below.

**Constitution of 2004 – Article 27**

No deed shall be considered a crime unless ruled by a law promulgated prior to the commitment of the offense.

No one shall be pursued, arrested, or detained without due process of law.

No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to the commitment of the offense.

Article 27 announces two important principles: the principle of legality and the principle of non-retroactivity of crime. First, as seen in the first clause of Article 27, a crime is not a crime unless the law of the country says it is. Therefore, a person cannot be prosecuted for actions unless those actions were punishable as crimes under the laws of Afghanistan at the time that he committed the actions. Article 2 of the 1976 Penal Code also states “No act shall be considered crime, except in accordance with the law.” This idea is echoed in the definitional or legal element of a crime discussed in Chapter Two Section I.

The second principle, known as the principle of non-retroactivity of crime, means that no ex post facto laws or punishments are allowed. The following is an example of an ex post facto or retroactive law: Imagine that in 2007, a man sells his goat to another man for 1000 afghanis. Then, in 2008, the legislature passes a law that says that a goat may not be sold without certification from the Ministry of Animal Husbandry that it is free of diseases. The penalty for selling the goat without this certification is a fine of 700 afghanis. Under the principle that no ex post facto laws may be imposed, the man may not be charged with violating the law passed in 2008 because his actions were not criminal in 2007, which was when he committed those actions. A law cannot be applied retroactively to punish conduct that was not criminal at the time of its commission.

The same prohibition against ex post facto laws applies to punishments. For example, imagine that the law was passed in 2006, rather than 2008, so that it was in force when the man sold the goat. Then, in 2009, a year after the man has been charged with selling the goat without the proper certification, the legislature passes a new law changing the penalty from 700 afghanis to 9000 afghanis. The man cannot be made to pay the higher fine because the penalty codified in the law at the time he committed the offense was only 700 afghanis.

The only exceptions to the rule of ex post facto laws are when a law has been amended to (1) reduce the punishment for an offense or (2) recategorize the offense as a lesser offense or (3) when the law has been amended to no longer consider the actions a crime under the law of Afghanistan. Article 21 of the Penal Code states this principle. An excerpt follows:

**Penal Code – Article 21**

A person committing a crime is punished in accordance with a law that is in force at the time of commitment of the act, except when before pronouncement of the final verdict a new law which is in favor of the accused comes into effect.

If a law comes into force after the pronouncement of the final verdict which does not consider the act for which the person committing it has been sentenced to a punishment, execution of the sentence shall be suspended and the penal effects based on it shall be removed.

### Discussion Questions

1. How does the principle of *nullem crimen sine lege* relate to the rule of law and democratic government?
2. Why must the state be the body that enforces criminal law? Why shouldn't victims themselves enforce harms that have been done against them?

## 2. Islamic Law

*“The Shari’a seeks to establish justice not only in its corrective and retributive sense of adjudicating grievances, but also in the sense of distributive justice, establishing an equilibrium of benefits and advantages in society.”<sup>4</sup>*

The primary source of criminal law in Afghanistan is Islamic Law. Under Islamic Law, discussed further in Chapter Five, there are three types of crimes: *hudud*, *qisas*, and *ta’azir*. In Afghanistan, Islamic Law dictates the punishments for *hudud* and *qisas* crimes. The Penal Code is accepted as defining the crimes and punishments that fall under the *ta’azir* classification of crimes. Indeed, Article 1 of the 1976 Penal Code states: “This Law regulates the ‘*Ta’zeeri*’ crime and penalties. Those committing crimes of ‘*hodod*,’ ‘*qassas*’ and ‘*diat*’ shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).”

This Penal Code provision’s specific deference to Islamic Law is intended to comply with Article 3 of the Constitution. The article states: “No law shall contravene the tenants and provisions of the holy religion of Islam in Afghanistan.”

### The Division of Criminal Law between Islamic Law, the Penal Code, and Other Laws

1. If an act is enumerated as a crime under both Islamic Law and the Penal Code, the provisions of the Penal Code will be implemented, as long as they do not contravene the tenants of Islam.

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<sup>4</sup> Mohammad Hashim Kamali, *Shari’ah Law: An Introduction*, 30 (2008)

2. If an act is a crime under the Penal Code, but not under Islamic Law, the Penal Code's provisions will be implemented.
3. If an act is not a crime under the Penal Code, but is a crime under Islamic Law, the provisions of Islamic Law apply.

Criminal charges based on both Islamic Law and the Penal Code are prosecuted in the Primary Courts. Therefore, it is extremely important that prosecutors, defense attorneys, and judges know both the law of the Penal Code *and* the provisions of the Hanafi school of Islamic jurisprudence. The substance of these sources of criminal law is discussed in detail in Chapter Five.

### **3. The Penal Code of 1976**

The current Penal Code was a product of President Daoud's codification campaign during the 1970s. And though the Penal Code was not considered the law of the state during the Soviet era, the civil war, and the Taliban rule, the Bonn Agreement restored it as the governing law of Afghanistan in 2002 due largely to its completeness and to its thorough description of criminal activity. While the process for rewriting the Penal Code is underway in the National Assembly, the 1976 Penal Code remains in force.

There are three main parts of the Penal Code. First, in Section One of the First Book, general principles of the application of the Penal Code are laid out, including Article 21 discussed above. Second, Sections Two, Three, and Four lay the foundation for what constitutes a crime, for the elements of a crime and criminal responsibility, and for what types of punishment are possible. Finally, Book Two dictates what actions constitute crimes within the law of Afghanistan. In its totality, the Penal Code gives a thorough accounting for all of the elements of criminal law.

#### **Reading Focus**

In your documents supplement, read the table of contents of the Penal Code in detail and then familiarize yourself with all of the sections by skimming the entire Code.

### **4. Legislative Acts**

The final source of criminal law in Afghanistan is laws passed by the National Assembly. The 1976 Penal Code technically falls into this category, as it was passed into law through the legislative process. Nonetheless, the Code is placed in its own category for this textbook; it is fundamentally different from other more recent criminal laws which have been passed by the legislature as stand-alone criminal prohibitions. Examples of this type of legislative enactment

are the Counter-Narcotics Law of 2004 and the Law Against Bribery and Official Corruption of 2004. Aside from laws that have been enacted through the legislative process, the President of Afghanistan also has the power to issue Legislative Decrees in accordance with the Constitution. These measures are interim in nature and are not considered ipso facto laws, but rather provisions issued by the President which cannot take the form of law unless they undergo the legislative process in the National Assembly. An example of this is the Law Against Bribery and Official Corruption.

### Discussion Questions

Many of the newest criminal laws in Afghanistan have been enacted by legislative decree. Why do you think this is? In general, why is it so difficult to amend the Penal Code?

## IV. HISTORY OF CRIMINAL LAW IN AFGHANISTAN

The final section of this chapter provides a brief overview of the content of criminal law and how criminal cases have been prosecuted in Afghanistan since the 1880s. Over time, the definitions of what constitutes a crime in Afghanistan have remained remarkably stable. The major change in criminal justice in Afghanistan occurred in the 1960s, when the adjudication of all crimes was consolidated in the Primary Courts.

As you read this section on the history of criminal law, think about how the administration of the criminal law has changed since the consolidation of the state of Afghanistan.

### 1. Origins of the Criminal Justice System in the Pre-Constitutional Era

The reign of Amir Abdu Rahman Khan is considered by many to have signaled the consolidation of Afghanistan into its current state. It was certainly the first time when a powerful central government in Kabul exercised control over the rest of the nation.

After Abdul Rahman Khan ascended to the throne in 1883, he declared that any cases of murder, theft, and injury that occurred before his reign would not be investigated. However, he did alert the people of Afghanistan that any and all crimes that occurred during his reign would be prosecuted to the fullest extent of the law. His precise words are quoted in the following excerpt:

“No one can engage in committing murder or initiating wrongdoing anymore. In the event that someone commits a crime or treachery, the *Shari’a* wrongdoing will immediately be punished according to the fatwa of religious scholars based on the commands of God and the prophet, and the crimes against the state will

either be punished by chastisement (*'uqubat*) and *yasa* [a term derived from the ancient Mongol code of law, but used in nineteenth century Afghanistan to denote capital punishment], or as required by forgiveness and benevolence.”<sup>5</sup>

The foundation of the criminal justice system during this time was the *Asas Quzat* or the Manual of Judges. This Manual was published five years after Rahman Khan's ascension to the throne. The Manual was the first instance in Afghanistan's history where Islamic Law was codified and enforced by the state. Moreover, the majority of crimes were those prescribed under the Hanafi school of Islamic jurisprudence. Custom also played a large role in the adjudication of cases at the local level. In addition, because of Abdul Rahman Khan's self-appointed title of *amīr al-mu'minīn* (امير المؤمنين) or *commander of the faithful* which conveyed both political and religious leadership as God's viceregent on earth, royal decrees gained a semblance of religious authority. One example of such a royal decree was the requirement that each person in the government pledge his loyalty to the amir. Any government official dishonest to the amir or to the state would be imprisoned or would have his estate confiscated. The requirement of loyalty is the source of the modern prohibitions of corruption and bribery.

The offenses specified in the Manual were divided into two categories. The first type were offenses that had specific punishments. The other types of offenses left the punishment and fines to the discretion of the amir. The amir retained this discretion because of his mandate to act as God's viceregent on earth. Amir Rahman Khan therefore retained the ability to interpret the laws and to adjudicate cases. In fact, he was the self-proclaimed final authority for any case that came before any court, and would personally hear appeals. The amir also had final authority over the imposition of capital punishment (death) and the over method of execution used.

At that time, the court that adjudicated most criminal cases was the local *mahkamah-yi shar'iyah* (the Islamic court). This court was located in every judicial district and was attended by a *qazi* (a religious judge). Several *muftis* (religious scholars) were assigned to assist the *qazi* to aid him in interpreting the law and rendering judgments. The religious courts were located either in a central mosque or in the *qazi's* house. They had jurisdiction over the vast majority of criminal actions. However, there were several crimes which required the offender to be sent to Kabul for trial, including counterfeiting, tampering with government records, forging evidence, forging seals for illicit use, and providing shelter for exiled dissidents.

The other types of criminal courts present in Afghanistan during this period were the *kutwali* primary courts (the criminal and police courts). These courts handled the adjudication of crimes against the state: the disruption of public order and endangering the welfare of the central authority. In Kabul, the head of the *kutwali* court, the *kutwal*, was in charge of a police force of more than 600 officers. The *kutwali* court was staffed by a *hakim* who acted both as judge and investigator.

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<sup>5</sup> Abdul Rahman Khan, Farman K-5 (translated by Amin Tarzi).

Thus, during the reign of Rahman, Afghanistan had a bifurcated criminal court system. Most of the cases were adjudicated according to Islamic Law, while the *kutwali* primary courts adjudicated a small minority of cases.

### Discussion Question

Do you think that having separate courts to adjudicate crimes against Islamic Law and crimes against the state is a good idea, or should one court adjudicate both types of crimes?

## 2. The Dual Court System: 1920-1964

The dual court system codified during the reign of Abdul Rahman Khan (Amanullah Khan) persisted during Afghanistan's early constitutional era. The 1923 Constitution expressly codified the system. According to Article 51 "the various types and hierarchy of courts are set forth in the law on the basic organization of the government of Afghanistan." This constitutional provision had the impact of keeping the dual system of criminal adjudication intact.

Even with their distinct jurisdictions, the division of labor between the Islamic courts and the primary courts was not clear. Secularly codified crimes, codified through decree by Amir Amanullah Khan, were typically crimes under Islamic Law as well. For example, the primary courts would normally hear cases related to theft of government money by government ministers. Theft, however, is also a crime under Islamic Law, over which the Islamic courts would have general jurisdiction. The overlapping jurisdictions led to a tug-of-war between the two courts as to (1) who could claim jurisdiction over the case and (2) whether one court could retry the person after the other court had issued its ruling.

One major innovation in the Constitution of 1923 was the creation of a high court that could adjudicate certain cases, rather than allowing the amir to have the final authority over criminal judgments. Its jurisdiction, however, was extremely limited. Under Article 56, this high court could only be temporarily convened to hold the trials of government ministers. In essence, the high court took away a large part of the jurisdiction of the primary courts—the courts that were originally charged with trying ministers. This third court made the jurisdictional tug-of-war even more complicated.

In both the primary courts and Islamic courts, nevertheless, a decision was immediately enforceable at the announcement of the judgment, unless it involved a death sentence. A death sentence had to be approved by an appellate court and then personally approved by the amir. In other cases, a defendant could only appeal sentences that resulted in corporal or a reputational punishment. In all cases, except trials of government ministers, the amir remained the final decision maker, and could decide the validity of criminal punishment.

The Constitution of 1923 also codified for the first time the important principle of *nullem crimen sine lege*, or the principle of legality. Article 21 of that Constitution stated: “In the courts of justice all disputes and cases will be decided in accordance with the principles of *Shari’a* and of general civil and criminal laws.” Although this principle is not stated as explicitly as it is in the 2004 Constitution, Article 21 was a significant development in Afghanistan’s law. It required that the adjudication of any case to be in accordance with recognized law. There was resistance to Article 21 in the 1923 Constitution because it reduced the power of traditional and local legal institutions to settle disputes in favor of formal Islamic Law or the criminal law of the state.

After the implementation of the 1923 Constitution the *ta’azir* crimes were codified. Significantly, this codification removed the discretion that the *muftis* and *qazis* had exercised over assigning punishments. Article 24 of that Constitution stated: “No punishment may be imposed on any person except as provided in the general penal code.” In the 1924 *Loya Jirga*, the *ulama* strenuously objected to this requirement because in their view it denied them the ability to consider the individual circumstances of the case, as is required by Islamic Law. For his part, Amanullah Khan argued that the fixed penalties achieved greater deterrence because a criminal knew what a punishment would be ahead of time.

Due to general disagreement with the codification of *ta’azir* crimes, the 1923 Constitution was amended to allow the *qazis* and *muftis* more flexibility in assigning punishments for a given crime. Article 24, as amended, declared: “No punishment may be imposed on any person except as provided in the general penal code. Except those punishments which are in accordance with the *Shari’a* and which are in accord with other public laws which are codified according to the rules of *Shari’a*.” The effect of this amendment was to expressly allow for non-codified punishments.

Under the reign of Nadir Shah, the principle of legality was further constricted. The 1931 Constitution stated in Article 19: “Punishments and other kinds of insults are prohibited. No one may be punished except by the order of the *Shari’a* and Islamic Constitution of Afghanistan.” It did not mention the requirement that punishments or crimes be codified before being imposed as Article 24 of the 1923 Constitution had done. Instead, it left the vast majority of criminal punishments to Islamic Law. Indeed, Article 87 of the 1931 Constitution stated “the judicial court is the place where ordinary claims pertaining to the *Shari’a* are dealt with.”

From 1923 to 1964, responsibilities continued to be divided between Islamic courts and primary courts. In addition, there was no comprehensive criminal code listing crimes declared by the state. Instead, there was a series of royal decrees which performed the function of individual legislative enactments.

### **3. The Unified System of Criminal Adjudication**

The 1964 Constitution under Zahir Shah marked the beginning of the current system of criminal adjudication. Three changes in the constitutional structure are particularly noteworthy for the criminal law of Afghanistan: an explicit acceptance of the principle of legality, the unification of the justice system, and the creation of a supreme court.

First, the 1964 Constitution took a greater stand on the principle of legality than previous constitutions. In fact, the principle of legality retains basically the same form in the current Constitution as it did in 1964. Examine Article 26 below.

**Constitution of 1964 – Article 26**

No deed is considered a crime except by virtue of a law in force before its commission. No one may be punished except by the order of a competent court rendered after an open trial held in the presence of the accused. No one may be punished except under the provisions of a law that has come into effect before the commission of the offense with which the accused is charged. No one may be pursued or attested except in accordance with the provisions of the law. No one may be detained except on order of a competent court, in accordance with the provisions of the law. Innocence is the original state; the accused is considered to be innocent unless found guilty by a final judgment of a court of law.

The 1964 Constitution therefore marks an explicit embrace of the principle of legality. This was due to the king's development of a comprehensive criminal code, because the code would provide a comprehensive listing of behavior that was deemed criminal.

Even more importantly, the 1964 Constitution unified the Islamic and primary courts into a single system of adjudication. The constitution began by delineating which courts constituted the judiciary:

**Constitution of 1964 – Article 98**

The judiciary consists of a supreme court and other courts, the number of which shall be determined by law. It is within the jurisdiction of the judiciary to adjudicate in all litigation brought before it according to the rule of law, in which real or legal persons, including the state, are involved either as plaintiff or defendant.

After creating the court system, the constitution then specified the law to be used in adjudicating cases:

**Constitution of 1964 – Article 102**

The Courts in the cases under their consideration shall apply the provisions of this Constitution and the laws of the State. Whenever no provision exists in the Constitution or the laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi Jurisprudence of the *Shariaat* of Islam and within the limitations set forth in this Constitution, render a decision that in their opinion secures justice in the best possible way.

In theory, stating that the laws of the state would be preferred over Islamic Law was a major change in the formal law of Afghanistan. In practice, however, this had little effect on the adjudication of criminal cases. Statutory laws still proclaimed that Islamic Law controlled the prosecution of *hudud* and *qisas* crimes, while the adjudication of *ta'azir* crimes remained the same as it had since 1923—in the hands of the state. Therefore, substantive criminal law in Afghanistan largely remained unchanged.

Another major innovation of the 1964 Constitution was the unification of the court system, which aimed to apply a single body of law. Specifically, the primary courts absorbed the functions of Islamic courts by serving as the courts of general or all-encompassing jurisdiction, and thus, handled all criminal cases in Afghanistan.

Another important development, as evidenced by Article 98 was the creation of a supreme court that had the final say over criminal punishments. The king held only a minor position in the criminal justice system; as articulated in Article 101: “The enforcement of all final judgments of the courts is obligatory except in the case of a death sentence where the execution of the court decision is subject to the King’s signature.” Article 101 also makes clear that the Supreme Court would assume the king’s previous role as the final arbiter of decisions. This is consistent with Article 89 which states that “[a]ll courts are free of any kind of intervention.” The court system was for the first time recognized as a separate and co-equal branch of government and free from the influence of the executive branch.

In 1965, the creation of a criminal procedure code standardized methods of arrest, investigation, detention, adjudication, and punishment. Although this text does not discuss criminal procedure, the criminal procedure code is an important element of the unification of the judicial system, and one that students of criminal law should be aware of.

While the 1977 Constitution, under President Daoud did not change the articles discussed above, the standardization of the criminal justice system was substantially completed. The most important product of this codification was the 1976 Penal Code, which remains the controlling criminal law in Afghanistan. As discussed above, the 1976 Penal Code covered all of the behaviors that were considered crimes in Afghanistan.

In the 1980 interim Constitution, the principle of legality and the unification of the primary courts remained in place. Particularly instructive is the fact that at the beginning of the communist era in Afghanistan under Babrak Karmal, all previous laws were suspended *except* the criminal justice system. The Constitutions of 1987 and 1990 similarly kept the criminal justice system intact.

#### **4. The Restoration of the Unified Court System**

After the rise of the Taliban, the criminal justice system dramatically changed. While the Taliban unified criminal adjudication under one court system, they invalidated all secular laws in favor of a very narrow brand of Islamic Law. To clarify their interpretation of the law, the

Taliban issued edicts which were posted to give notice to citizens as to which laws were binding. The 1976 Penal Code, like other laws, was dissolved.

Interestingly, the court system was formally recognized as the official arm of the Taliban government, yet it did not have a formal hierarchy. Instead, Islamic tribunals were placed in each village and town and adjudicated cases when policing forces brought alleged offenders to them. The police forces announced the evidence, and the judge rendered his decision. Many of these proceedings were not public, although some proceedings and punishments were conducted in public. In either case, the accused had no right to appeal, and the punishment was carried out immediately.

After the fall of the Taliban in 2001, the Bonn Agreement of 2002 restored the criminal justice system to the form once in effect in 1964. The primary courts were reconstituted and were given general jurisdiction over criminal prosecution. The 1965 Criminal Procedure Code and the 1977 Penal Code were reintroduced, and they continue to be binding today.

## **CONCLUSION**

Afghanistan's legal history has a significant impact on the country's current legal landscape, and many of the historical debates regarding the court system and the codification of law are relevant today. It is important to keep the theoretical bases for punishment and this legal history in mind when confronting the issues in this text.

## GLOSSARY

- ❖ Criminal Code of 1976: the source of criminal law in Afghanistan.
- ❖ Deterrence: the theory of criminal punishment that criminals should be punished to warn others not to commit the same or other crimes.
- ❖ Ex post facto laws: laws which are passed after a person commits an act and that cannot be used to prosecute that person.
- ❖ Incapacitation: the theory of criminal punishment that criminals should be punished to prevent them from breaking the law again.
- ❖ *Nullem crimen sine lege*: literally means no crime without law; a principle of the law of Afghanistan which states that no person may be prosecuted for a crime unless the behavior was publicly announced as illegal beforehand.
- ❖ Prosecutor: the lawyer employed by the attorney general's office that brings cases against people suspected of breaking the law.
- ❖ Recidivism: the fact that a criminal who has broken the law and has been punished continues to break the law.
- ❖ Rehabilitation: the theory of criminal punishment that punishment will teach criminals that their actions were wrong and prevent them from committing other crimes.
- ❖ Retribution: the theory of criminal punishment that criminals should be punished because they deserve it for breaking the law.

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## CHAPTER 2: CRIME

### I. INTRODUCTION

This chapter examines the fundamental elements of crime. The elements of crime serve as a framework to understand how specific crimes are written and applied. In particular, three key questions define the elements in any discussion of criminal actions, including (1) whether the action was defined as a crime at the time it was committed; (2) whether the defendant's actions match the actions criminalized by the applicable code sections; and (3) whether the defendant possesses the required mental state or intent when the crime is committed. In other words, these questions address (1) the legal element; (2) the material element; and (3) the mental element of a crime. Each element must exist before an individual can be found guilty.

Even if each element of a crime is satisfied, however, a crime need not be charged. Prosecutors have substantial discretion related to charging. In fact, prosecutors have the power to decide whether it is in the interests of justice and public policy to prosecute someone for a crime, and if so, what crime should be prosecuted. With such discretion, of course, comes a great deal of power—a prosecutor can determine the future of an individual's life, liberty, or property. The public interest pushes prosecutors, consequently, to act with the utmost care and remain unbiased at all times. Prosecutors represent the state, and they are responsible for placing people in jail, taking their property, or in some cases, taking away their lives.

A number of purposes lie behind criminal punishment, as discussed in Chapter One. If none of these purposes may be satisfied by prosecuting a particular act, then prosecution may be unnecessary. For example, an argument can be made that a man who has a dying child in need of medication, but who cannot afford the medicine, should not be punished for stealing the medication because he does not deserve the punishment, he does not need to be imprisoned to prevent harm, he will not be deterred by the punishment, and he does not need rehabilitating. The prosecutor's discretion, of course, will be particularly important in such situations.

#### Discussion Questions

1. Can you think of situations where it is appropriate not to prosecute someone for an act that is otherwise defined as a crime? For example, would you prosecute a widowed and unemployed mother who stole a loaf of bread to feed her infant son?
2. Would you prosecute a young man who picked up his father's gun and accidentally fired it, killing his friend?

After discussing the elements of crime, this chapter turns to the classification of crimes in the Penal Code. There are three major considerations in these classifications. The first is the duration of the offense. The second is whether the offense was a single offense or part of a repeated series of crimes. The third considers whether the intent to commit the crime was

momentary or continuous. These considerations are important not only because they affect the applicable punishment, but also because they determine how a prosecutor presents his case to the judge to prove the defendant guilty.

The third topic of this chapter is attempt. Attempt in criminal law considers when a crime is planned or begun, but is not brought to completion. Before an individual can be charged with an attempted crime, however, that person must have taken a “substantial step” towards the accomplishment of the crime, and not merely prepared for or intended to commit the crime.

The chapter then turns to group criminality, the commission of crimes in concert with others. Group criminality can include aiding a person in the commission of an offense or agreeing with them to commit an offense. For example, if a man decides that he wants to rob a hotel, and he asks his friend to drive him there, his friend can be guilty of aiding him in the offense.

Finally, this chapter details the role of excuses in criminal law. In certain circumstances, an individual is excused from punishment despite acting in a way that has been deemed criminal. Specifically, the concept of excuse in criminal law holds that even when an individual has committed a crime, they cannot legally be held responsible for the charge because the law excuses or in some way allows their behavior.

Although this chapter contains several challenging concepts, each of the topics is vitally important to understanding how criminal law interacts with an individual’s actions and thoughts, and how the law is ultimately applied.

## **II. ELEMENTS OF A CRIME**

An accused may not be convicted of a crime unless the prosecutor first proves that the legal, material, and mental elements have been satisfied. This section explains the components of each of these elements. As you read about each criminal element, consider what evidence you would need to successfully prove the crime. Also consider which elements are the most difficult to prove.

### **1. Legal Element**

<p style="text-align: center;"><b>Penal Code – Article 2</b></p>
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<p>No act will be considered a crime but in accordance with the law</p>
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The legal element of a crime is closely linked to the principle of legality, or *nullem crimen sine lege* (“no crime without law”). The principle of legality states that no act can be considered a prosecutable crime unless a law directly prohibits the action on the day it is taken.

The legal element of a crime requires a defendant's action be outlawed by the Penal Code at the time the act was committed. This requirement means that a prosecutor or judge can literally open up the Penal Code and find an article that states that an offender's actions are criminal and deserve a specific punishment. The practical implication of the requirement, however, also means that most actions that are NOT defined as crimes in the Penal Code are not criminal. For example, lying to one's spouse about breaking a dish is not committing a crime because there is no law in the Penal Code that criminalizes lying to one's spouse, despite the fact that it might be improper or immoral. On the other hand, if one is a witness in a trial and lies about a broken dish, he can be criminally punished because lying in an official court proceeding constitutes perjury under Article 389 of the Penal Code.

### **Legality: The Elements**

*Legislativity:* The power to make law rests solely with the legislature and all criminal law comes in the form of statutes, rather than judicial opinions.

*Leniency:* Judicial discretion is limited to interpreting crimes, not making them.

*Specificity:* Criminal laws should not be vague, and judges must avoid interpreting criminal statutes in arbitrary or unpredictable ways.

*Prospectivity:* Retroactive application of criminal laws must be limited in order to prevent legislation directed at particular people, or groups of people.

*Publicity:* Criminal laws must be publicized to give potential offenders time and opportunity to consider the criminal implications of future actions.

The principle of legality is primarily concerned with the concept of *notice*. Notice requires that an offender have the reasonable ability to determine whether or not his behavior is criminal. This does not literally mean that every offender must *actually* know or be told what is criminal. Instead, it means that if the offender *wanted* to learn what constituted a crime, he could do so by looking to the Penal Code. As is discussed in Chapter Three, ignorance of the law is not a criminal defense.

Even though *hudud* and *qisas* crimes are not specifically defined or described in the Penal Code, it can be argued that Islamic Law-based crimes also satisfy the legal element because, as a general matter, believers are obligated and bound to follow Islamic Law. Moreover, because the Penal Code explicitly refers to the implementation of *hudud* and *qisas* crimes it provides sufficient notice that individuals should consult Islamic Law and its provisions in order to determine what actions constitute crimes.

Interpretation and implementation of Islamic Law poses another issue. First, Islamic Law in general is often regarded as the province of jurists. This assertion is complicated because no generally agreed upon educational or professional criteria exist for qualifying as a jurist. This

lack of criteria means self-proclaimed jurists may not be sufficiently educated or qualified for the position. Moreover, there is often no unified interpretation of Islamic legal concepts and therefore interpretations vary widely. Second, specifically, under Article 130 of the Constitution of Afghanistan, Islamic Law under the Hanafi school of jurisprudence may be invoked in the absence of statutory or constitutional law on a particular subject. Because it is unclear when Islamic Law might be enforced or implemented, citizens face the prospect of legal uncertainty in laws changing without notice. Consequently, there is a question of whether the implementation of Islamic Law in Afghanistan provides sufficient notice to citizens.

### Two Views of Islamic Law and the Principle of Legality

1. [[[“The Qur’an states: ‘We never punish until We have sent a messenger.’ Also: ‘Never did the Lord destroy townships, until He had raised up in their mother (town) a messenger reciting unto them Our revelations.’ And: ‘tell those who disbelieve that if they cease . . . that which is past will be forgiven them. . . .’ In prohibiting certain forms of conduct, God ‘excepts what hath already happened. . . .’ And: ‘Allah forgiveth whatever . . . may have happened in the past, but whoso relapseth, All will take retribution from him.’ . . .]]]

“On the basis of these texts and the *hadith*, jurists have extracted the two fundamental components of which the principle of legality is comprised. The first is that no obligation exists prior to the enactment of legislation, and the second is that all things are presume[d] permissible. The application of those rules to the criminal law signifies that no punishment shall be inflicted for conduct which no text has criminalized and that punishment for criminalize[d] conduct is restricted to instances where the act in question has been committed after the legislation takes effect.”<sup>6</sup>

2. “The result of [not defining Islamic Law-based crimes in the Penal Code] contradicts the principle of the lawfulness of crime, or at the very least constitutes an exception. It is arguable that the punishment defined in [the *Hanafi* school of jurisprudence] contradicts Afghanistan’s commitment to human rights conventions (Article 7 of the Constitution) and those relating to the protection of human dignity (Articles 6, 24, and 29 of the Constitution).”<sup>7</sup>

## **2. Material Element**

<b>Penal Code – Article 27: The Material Element Defined</b>
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<sup>6</sup> Muhammad Salim al-‘Awwa, “The Basis of Islamic Penal Legislation,” in Bassiouni, M. Cherif, *The Islamic Criminal Justice System*, 134 (New York: Oceana Publications, 1982).

<sup>7</sup> Hossein Gholami, *Basics of Afghan Law and Criminal Justice* (Max Planck Institute, 2007).

An act or omission of an act contrary to the law, such that the act should result in a criminal effect and a cause relationship be established between the act and the effect, is the material element of crime.

The material element of crime requires that three factors exist: (1) act; (2) effect, and (3) causation, before an action can be found criminal.

### Act

The act is the physical motion or movements either taken by the criminal or attributable to him. Acting often takes thought and planning. Thus, the material element necessarily is closely tied to the mental element, discussed below. An act can be either an *action* or *inaction*. Inactions are also called omissions, or failures to act. In certain situations, the law punishes someone for not doing something, such as a parent intentionally failing to feed a child and causing the child's death. Inaction is punished when the party culpable for the omission had a duty to act in a certain way. A parent, for example, has a duty to care for his or her children in a reasonable manner.

It is important to note that an individual can act either with his own hands or by causing another person to take an action. An act is often direct: a husband takes a gun and shoots his neighbor whom he suspects of coveting his wife. However, the act can occur in far different circumstances. For instance, if the husband sees his neighbor riding his bike on the side of the road and he swerves his car into the car in front of him, causing the other car to run over the neighbor, the husband who intentionally caused the accident is criminally responsible, not the person who physically ran over the neighbor. That act of murder is attributable to the husband.

### **Discussion Question**

Can you think of three examples of *inactions* that would constitute a crime?

### Effect

The second factor of the material element is effect. The effect is the result of the act described above. It can be physical, such as the death of the bicyclist described above, or it can be merely monetary, such as when a government minister steals government money. The effect, most generally, is the outcome the Penal Code attempts to avoid

It is important to note that an effect, be it physical or monetary, must actually occur. Merely thinking bad thoughts is not enough to convict someone of a crime. As the section on attempt makes clear, thinking bad thoughts is not enough to convict someone of attempt either. There must be some external effect of a criminal act, not necessarily some injury to any party, but rather some sort of outward sign and movement that signals that the person has committed or is close to committing a crime.

## Discussion Questions

Why doesn't the law punish bad thoughts as crimes? What are some practical and moral reasons?

### Causation

The final component of the material element is causation. Causation is the relationship between the act and the effect. The act must cause the effect for the material element of a crime to be satisfied.

### Penal Code – Article 28

1. A person shall not be held responsible for a crime which is not the result of his criminal action.
2. A person whose criminal act partakes in [causing] the effect with the previous cause or concurrent with the act or after it shall be considered responsible, even if the person should not be cognizant of the effectiveness of his criminal act in [causing] the effect.
3. If the cause alone should be considered sufficient for producing the effect of crime, in this case the doer alone shall be considered responsible for his criminal act.

Criminal liability is imposed only if there is a clear link between an individual's act and the ultimate effect. The link is easy to identify when there is one man who walks into a bank and uses a gun to demand money. The teller at the window of the bank cannot be held responsible for the bank losing money, even though she actually gave the money away. The effect of the lost money is attributable solely to the robber.

The link between an act and an effect is often far more complex. For example, instead of merely walking up to the counter, demanding the money, and walking out with it, something else happens at the bank. When the robber gets to the window and demands the money while holding up a gun, the woman behind the counter is so scared and shocked that she has a heart attack and dies right there in the bank. Should the criminal be responsible for this death? Article 28(2) says that he should be. His criminal act (robbing the bank) is *concurrent* with the effect (the teller's death), even though he did not intend to cause a heart attack.

This forces one to consider how far out in time can you stretch the effect and still retain causation. For instance, consider a scenario in which instead of dying right there on the scene, the teller is taken to the hospital and dies later. The death still fits within Article 28(2) because the previous cause of her outcome, her heart attack, occurred at the time of the robbery. The concept of causation becomes far more complicated when time stretches out even further. What if the teller does not have a heart attack at the bank? Instead, she hands over the money and the robber leaves. She is still very scared and she goes home later that night worrying about what happened. Because she is scared and worried, she suffers a heart attack and dies later that night.

Should the criminal be responsible for this? Looking even further out into the future, it is difficult to make the case that the criminal should be responsible three years later, if the teller has a heart attack and dies as a result of the increased stress in her life after the robbery.

Causation in most criminal cases is much more straightforward. Most crime involves individuals victimizing other individuals with immediate recognizable consequences. Causation, however, cannot be taken for granted and is the final essential component of the material element of a crime.

### Discussion and Activity Questions

Read each of the following situations and decide whether you think there is sufficient causation between the criminal act and the effect to charge a person with the crime.

1. A man is angry with his neighbor for having the television volume up very loudly all the time. He goes over to the neighbor's house and punches him in the face. The neighbor is so badly injured that he goes into a coma and has to be hospitalized for one year. At that time, the neighbor dies. Should the man be convicted for murder?
2. A woman is upset with her son because he comes home late from school. One day when the son walks in the door late, she hits him in the head with a cooking pot. The son suffers brain damage. Because of the brain damage, her son loses some of his mental capabilities, is unable to work obtain employment. Fearing his mother, he ventures out on his own and begins to steal in order to feed and support himself. Should the mother be liable for these theft offenses?
3. A man decides that he is going to rob a local toy store. He walks into the store with a gun and orders the owner to give him the money in the cash register. While the owner is counting out the money, ten children come in from the street. They see the robber and decide to each grab several toys and run out of the store. The owner can do nothing to stop them. Should the armed robber be liable for the other thefts that occurred while he was robbing the store?

### 3. Moral Element

At its core, the moral element relates to the actor's state of mind or *mental state*. To commit a criminal act, the actor usually needs to act *intentionally*.

#### Article 34 – Penal Code: The Moral Element Defined

1. Criminal intention refers to the impelling will of the doer to commit an act which produced the crime, such that it should result in the effect of the intended crime or another crime.
2. Intention is sometimes simple and sometimes it is coupled with prior insistence.

3. Prior insistence refers to taking a firm decision before performing the crime in mind, provided that it is not the result of sudden rage and sensual excitement.
4. Insistence is considered a prior matter, regardless of whether the intention of the doer is directed to a specified person or an unspecified person, be it dependent on any condition or related to some other matter or not.

In most cases, an individual must intend to commit a crime before he can be punished. If a man sleepwalks and strangles his wife, he did not intend to commit the crime. If that is truly the case, he cannot be charged with intentional murder. The opposite of that situation is when a man plans to murder his wife and eventually does so. Such actions clearly constitute an intentional crime. As Article 34(3) explains, intent is satisfied if an individual plans how he will commit a crime and he eventually carries out that plan.

According to Article 25 of the Penal Code, crime is considered intentional in two circumstances: when the criminal intent is realized by the actor, even if only in anticipation of the crime, and when the actor is required to perform a duty and he refuses, resulting in a crime. In most cases, it is not enough for someone to *mistakenly* act in a criminal manner for her to be convicted of a crime. The Penal Code specifically recognizes that unintentional acts do not carry the same weight as intentional ones in Article 36.

**Article 36 – Penal Code**

A crime is considered unintentional when the effect of crime is brought about by its doer by mistake, regardless of whether the mistake is due to neglect, credulity, carelessness, or due to non-observation of laws, regulations, and orders.

Despite the general rule requiring intention, some unintentional acts are punishable criminally as *punishable mistakes*. In the case of homicide, Article 400 of the Penal Code states, a “person who has killed another due to negligence, remissness, carelessness, or non observance of rules and regulations, or . . . unintentionally” will be given up to a three-year sentence and fined up to 36,000 Afghanis. If one person kills another person accidentally, the law holds him criminally liable, even though he did not have the requisite intent to murder. The penalty for a mistaken murder, however, is much lower than it is for an intentional murder, and the death penalty is not to be imposed. It is important to note that punishable mistakes only exist where the Penal Code expressly provides that an individual should be punished for carelessness, unawareness, or lack of caution.

	<b>Moral Element</b>		
<b>Mental State</b>	Mistaken	Intentional	Intentional + Prior Insistence
<b>Is the actor criminally liable?</b>	Only if a statutory provision designates	When the actor realizes his criminal intent, or	Always, regardless of whether the intention is

	the actor's conduct as a punishable mistake	when the actor has a legal duty and fails to perform, effectuating a crime	in a specified or unspecified person
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### Islam and Intention

“Actions are to be judged by the intention behind them and everybody shall have what he intends.’ It shows that a man shall not be punished for *mere thought*. Because in Islam, a good thought is recorded as an act of piety and a bad thought is not recorded at all.”<sup>8</sup>

There are two distinct forms of intent, limited and unlimited intent. Limited intent exists when a person intends to commit a specific crime, typically against a specific person, i.e., the intent to rob a particular teller at a particular bank. Unlimited intent exists if there is no specified target of the criminal act. For example, a bombing in a crowded area typically has unlimited intent because it does not aim to kill any particular person, but merely to harm as many people as possible.

Intent, as discussed above, helps determine the extent of criminal responsibility. For instance, a man decides to rob a person on the street. He takes a cooking knife, covers his face with a scarf, and points the knife at a woman, saying “give me all your money or I will kill you!” The woman screams and looks very scared. The man decides that he does not want to scare the woman, says “sorry,” and walks away. No money ever exchanges hands. Is the man still guilty of a crime?

The law answers that question in the affirmative. So long as a person has formed the criminal intent and has begun the crime, he can be found guilty; even if he *abandoned* the crime. This doctrine is closely related to attempt, as you will see later in the chapter.

### Immediate and Probable Intention

There are two forms of intention as classified by time: immediate and probable. *Immediate intention* is the intention to commit a crime in the immediate future. An example of immediate intention is when a man raises a gun to another person’s head and is ready to pull the trigger. He has the immediate intention of killing the person.

Immediate intention can also begin further back in time. As long as the individual plans certain actions and the purpose of those actions is *solely* to commit a particular crime in the process, immediate intention exists. Immediate intention is, therefore, the clearest type of intention. It exists when an individual clearly intends to commit a crime.

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<sup>8</sup> Yahaya Yunusa Bambale, *Crime and Punishment under Islamic Law*, p.6 (Lagos: Malthouse Books, 2003).

### Examples of Immediate Intention

1. A woman has heard her neighbor commenting on how ugly her children are. The woman plans to poison the neighbor by putting rat poison in a loaf of bread she bakes for her. The woman bakes the bread with the poison and gives it to her neighbor.
2. A man is walking down the street with his wife and he sees another man looking at his wife intently. He decides to teach the other man a lesson, walks up to him, and slaps his face.

*Probable intention* is more complex than immediate intention. Probable intention involves situations where a criminal motive is not the primary motivation for a person's actions, yet the individual knows his acts will create a criminal situation. For example, a man hates his friend because the friend married the woman the man wanted to marry. The man decides to visit his brother and brings a knife with him. He doesn't intend to use the knife, but he wants it with him to feel powerful. He knows, however, that it is likely he will become upset while at his friend's house. As he predicted, he becomes upset, takes out the knife, and slashes his friend's face.

The man in the situation above did not go to the house with the intent of stabbing his friend, yet he put himself in a situation where criminal activity was likely to result. This is a situation of probable intent. Thus, he was aware of the potential criminal consequences of his act, but he accepted that risk and continued with his actions anyway. The law holds irrelevant whether the man came to the house intending to hurt his friend or not. Because he knew of the probable criminal consequences and completed the criminal act anyway, he is guilty of having the intent to commit the crime.

Probable intent often arises in situations where a person has formed a specific intent to commit one offense and during the commission of that offense another crime occurs. For example, if a person intends to beat up someone, but he also commits a robbery during the attack, he is guilty of two crimes. This is true even though the perpetrator did not originally intend to rob the victim.

Probable intention also supports the imposition of criminal liability when a person sets out to commit one crime but instead ends up committing another offense. For instance, consider a scenario where instead of beating the victim, the attacker actually beats the victim to death. The man came to commit the crime with the immediate intention of committing a battery, but he ultimately committed murder. The law holds that he should be liable for this murder because a criminal is liable for all criminal results that take place during the commission of an intentional crime.

In summary, under probable intention, if a criminal perpetrator intends to commit one criminal act, he is responsible for all the *reasonably foreseeable* criminal consequences of that act, whether he intended those crimes or not.

### Discussion Question

Do you think that probable intention conflicts with the general requirement in the Penal Code that every crime be intended?

### Review and Activity Questions

Consider the following crimes from the Afghan Penal Code and try to identify the legal, material, and mental element in each of these crimes:

Article 310: A person who forges one of the following items or being aware of their forgery uses or brings them into Afghanistan, shall be sentenced in light of the circumstances to long imprisonment: (1) law, Presidential Decree, decision of the Government and/or Prime Ministry's decree or the final decision of a court (2) State seal, seal or signature of the head of the state.

Article 354: A person who at the time of fire or other big incident, refuses to assist without proper excuse and in spite of the request of the official or public services, shall be sentenced to short imprisonment of no more than six months and cash fine of not more than six thousand Afghani, or one of these two punishments.

Article 407: A person who intentionally beats and lacerates another such that some bodily member of the latter is cut, injured or defected, or that person permanently becomes handicapped or that the latter is deprived of one of his senses, in addition to compensation, shall be sentenced to medium imprisonment of not less than three years.

### III. CLASSIFICATION OF CRIME

The Penal Code classifies crimes along several criteria. Classifications affect (1) how a particular action is charged, (2) when an act can be charged, and (3) what type of punishment is applicable. Classification is important in two other ways. First, the jurisdiction of the courts can vary according to what type of offense an individual is deemed to have committed. Second, the statute of limitations is different for each category of crime. The statute of limitations controls how long the state has to prosecute an offense. Often, the statute of limitations is longer for more serious offenses. This is in part to allow more time for discovery and investigation, but also because the state may have made a commitment to prosecute certain cases regardless of the passage of time, provided there is sufficient reliable evidence to prove the crime.

### Reading Focus

Think about the system of classification as you read about it. Do the classifications make sense? Can you think of another way of classifying crimes that you would find more helpful?

## **1. Based on the Legal Element**

Classification based on the legal element specifies the type of crime committed based on its severity. An individual may commit petty offenses, misdemeanors, or felonies. Petty offenses carry the lightest punishments, and felonies carry the heaviest punishments. The legal element of a crime is important for two reasons. First, as you will learn in the next section, an incomplete crime may often be charged as an attempt if the perpetrator has gone far enough into the commission of the offense. As explained below, however, only offenses that are classified as either felonies or misdemeanors can be charged as attempted offenses. Moreover, every felony or misdemeanor can be charged as an attempt crime, unless the Penal Code specifically provides that a certain offense cannot be charged as an attempt. Petty offenses, on the other hand, may never be charged as an attempt, unless the Penal Code specifically provides that a certain petty offense can be charged that way. The second reason the legal element (or severity) of a crime is important is because seizures and confiscations of property or money are permissible only in felonies and misdemeanors. Petty offenses allow for confiscation only when the Penal Code specifically provides for it.

### *Petty Offenses*

Petty offenses are the least serious category of crime in the Penal Code. Petty offenses carry a penalty of imprisonment of not less than twenty-four hours and not more than three months, and a fine of up to 3000 Afghanis. Petty offenses cannot be charged as attempt crimes unless the Penal Code specifically provides for it. Examples of petty offenses include mistreatment of domestic animals (Article 510), non-restoration or demolition of a dilapidated building (Article 503), and changing the direction of traffic signs (Article 498).

### *Misdemeanors*

Misdemeanors are the intermediate category of offenses. A misdemeanor entails imprisonment between three months and five years, and a minimum fine of 3000 Afghanis. Misdemeanors are subject to being charged as attempt crimes and may result in confiscation of a defendant's property. Examples of misdemeanors include: disclosure of a secret of another person (Article 445), kidnapping (Article 418), and beating and laceration (Article 407).

### *Felonies*

Felonies are the most serious of offenses in the Penal Code. They are offenses that result in imprisonment for a minimum of five years up to a life sentence or a death sentence. Incomplete felonies may be charged as attempt offenses and the defendant's property may be subject to confiscation. Examples of felonies include robbery (Article 447), murder (Article 395), and use of explosive materials to endanger the lives of others (Article 363).

## **2. Based on the Material Element**

Classification by the material element distinguishes crimes according to the scope of an individual's actions. In particular, the classification affects how many crimes, or offenses, a prosecutor can charge. A prosecutor must ask herself whether a defendant's activities constitute one crime or several distinct crimes.

### *Momentary and Continuous Crimes*

*Momentary crimes* are crimes that end right after they are committed. When a perpetrator physically hits someone in a battery, for example, the crime is over after he ceases to touch the person. The intention in this case is immediate and terminal. The perpetrator may renew his intent and commit the crime again, but that would constitute a separately chargeable offense. Momentary crimes may be charged individually as a new crime each time a person commits them because at the end of each crime, the perpetrator must again form the intent to commit another offense.

Momentary crimes are also called *simple crimes* by the legislature. A simple crime is a crime that has been completed after a single act or incident. This is the case in the vast majority of crimes: bribery, murder, robbery, larceny, battery, etc.

In contrast to momentary crimes, *continuous crimes* proceed over a longer period of time. Continuous crimes must have some lapse in time between first act and final act before they are deemed to have been committed. Poisoning is a classic case of a continuous crime. Because poisoning takes time to cause death, even if it is just a short time, it cannot be an instantaneous crime. Similarly, the use of a forged document is a continuous crime because the person must inherently possess the forged documents and then use them. This requires that the crime continue so long as the possession and intended use continue.

Continuous crimes are also called *habitual crimes* by the legislature. A habitual crime requires that a pattern of behavior be shown before charging the crime. Examples of this are prostitution and public corruption offenses. It is the overall pattern of criminal conduct that is important, not its individual bad acts.

### **Discussion Questions**

1. Is the distinction between momentary and continuous crimes clear? For example, if you were a prosecutor who had to charge and prosecute a case related to forged documents, would you charge it as a momentary offense or as a continuous offense?
2. A man is walking along a street in Kabul. He proceeds into the first shop, a store selling carpets. Once inside he pulls out a large knife and demands that the proprietor give him a small, but very expensive carpet. After the carpet salesman hands over his carpet, the robber walks out and goes into the next store: a small grocery store. He repeats his demand (this time for money) and receives money from the shop keeper. He continues down the block of shops, robbing each

store (a shoe store, an internet café, a kebab shop, a fabric store, and a bank). When he reaches the end of the block, he walks away. Are these seven separate robberies or one long robbery?

### 3. Based on the Mental Element

Criminal offenses are also classified by the mental element underlying the offense. The most important factor in this classification is the will or intent of the doer of the act or omission. In this regard, crimes are divided into two broad categories: (1) Intentional crimes and (2) Mistake crimes.

As discussed in more detail above, *intentional crimes* are crimes in which the will of the doer of the act or omission is explicitly expressed. *Mistake crimes* are crimes in which the will of the doer of the act or omission is implicitly expressed. For a more detailed discussion of both forms of crime, and the punishments they require, see the discussion of elements of crime above.

## IV. ATTEMPT

Attempt crimes are described as inchoate offense or incomplete offenses. *Inchoate* means something is not yet complete or fully developed. Therefore, the full effect of an inchoate offense cannot be known since it was never completed. All attempt offenses are inchoate offenses.

The Penal Code does not only punish complete offenses. It also attaches criminal liability to individuals who attempt to commit an offense. The Penal Code defines attempt in Article 29:

### Article 29 – Penal Code

Initiation of a crime is the starting of an act with the intention of committing a felony or misdemeanor, but whose effects have been stopped or offset by reasons beyond the will of the doer.

### The Five Key Steps of a Crime and Criminal Liability

1. Thought
2. Plan
3. Act
4. Attempt
5. Completion

There are three elements required for an attempt: (1) commencement of an act, (2) intent to commit a felony or misdemeanor, and (3) no criminal consequences have emerged. Each will be discussed in turn.

## 1. Elements of Attempt

### Commencement of an Act

The Penal Code defines commencement of an act in Article 29:

#### **Article 29 – Penal Code**

Only the decision to commit a crime or performance of preliminary works is not considered initiation of a crime.

Any offense that moves beyond the preliminary planning stages is sufficient to charge. Merely thinking about committing a crime is not enough; the Penal Code does not punish mere thoughts. It would be extremely difficult to prosecute someone for simply deciding to commit a crime—the criminal effort is still hidden in the individual’s conscience. Preparatory actions, moreover, are not considered a crime and are not punished. Such actions include lawfully gathering materials like weapons or financial information. Any act that goes beyond mere preparation of the crime and constitutes a *substantial step* toward the commitment of an offense can be prosecuted as a criminal attempt.

Importantly, there are some preparatory actions which themselves constitute crimes. These include the possession of weapons or ammunition without a license and manufacturing tools that can be used to forge money.

### Intent to Commit a Felony or Misdemeanor

Almost all crimes in the Penal Code require a specific intent before criminal liability can attach. Simply making a mistake that results in a crime is typically not enough. In the law of attempt, there *must* be the intent to commit a felony or a misdemeanor. There can be no mistaken attempt to commit a crime. Generally, society only wants to impose liability on people who intend to do bad acts and then carry them out. It is rare for liability to be imposed for a mistake, and this is certainly true when there is no criminal consequence.

The punishment of attempt is similarly straining on the criminal law. Generally people are only punished when they cause harm. Attempts, however, allow punishment before there is any negative effect, as long as the elements of attempt are satisfied.

As mentioned above, only misdemeanor and felony offenses can be punished as attempts, the reason: felonies and misdemeanors are more serious offenses and their attempted commission should be punished as a result of the danger they pose to society. Conversely, attempted petty offenses are not punishable because they are regarded as not serious enough to warrant criminal punishment as a means of deterrence.

### Desired Effect does not Materialize or is Prevented

The final requirement of attempt is that the consequences of the crime have not yet materialized. For example, a person who has the intent to rob someone can walk into a store, hold up a gun, and demand the victim's money. However, if he is stopped from committing the offense, say if there is a police officer in the store, he is still liable for attempted robbery.

The bad effects of a crime can either be prevented or they can fail to materialize. The effects can be prevented by any intervening force, or the desired effects may simply fail to materialize. These issues are discussed in more detail below.

## **2. The Question of the Impossible Crime**

There is one area of attempt law which continues to be contested. This is the question of whether a person can be guilty of attempt when the outcome they are seeking is impossible. Consider this situation:

A woman believes her husband may be having an affair with the woman who lives next door. She acquires a gun, planning to kill him when she finds him at the neighbor's house. About a week after she buys the gun, her husband tells her that he needs to run an errand and will be back in about an hour. He leaves the house and she can see through the window that he is heading in the direction of the neighbor's house. The wife quickly runs and grabs the gun and rushes over to the neighbor's house. When she gets to the door, she finds it unlocked and tiptoes into the house. She doesn't hear anything but she heads up to the second floor of the house towards the bedroom. She still does not hear anything as she slowly opens the bedroom door. She sees a large lump in the bed and believes it is her husband. She fires the gun into the lump on the bed. Instead of shooting her husband, she has accidentally shot a feather pillow. Her husband was not even in the house.

Should the woman above be guilty of attempted murder? She clearly had the intent to kill her husband. She certainly took steps to accomplish the killing beyond preparation, she fired her gun. Yet the result she sought, the death of her husband, was prevented because he was not even in the neighbor's house. This type of situation is called an impossible attempt.

The Penal Code punishes this kind of attempt like any regular attempt. Article 29 explains:

### **Article 29 – Penal Code**

Any action with the intention of committing a crime or misdemeanor, whose fulfillment is impossible due to factors related to the object of the crime or the instruments used, is considered initiation of crime provided that the belief of the doer of the act with respect to producing the criminal effect is not arising from mistake or absolute ignorance.

In any situation where the result of the criminal act is impossible due to a factor outside the perpetrator's control, he *may* be punished for an attempted act.

### Discussion Questions

Is it fair to punish someone even though there was no possibility that the crime could have been completed? Isn't this contrary to the principle that bad thoughts are not punishable? How is this scenario different than simply having a bad thought?

### 3. Punishment of Attempt

Attempt is punished differently than regular criminal activity. The punishment of attempt depends on the type of crime that was attempted: felony or misdemeanor. The table below explains how each of the categories of crime is punished for attempt:

Crime Category	Punishment for full crime	Punishment for attempted crime
Felony I	Death penalty	Life imprisonment
Felony II	Life imprisonment	Long imprisonment
Felony III	Long imprisonment	Medium imprisonment
Misdemeanor	Misdemeanor sentence	Half the sentence for the full crime
Petty offense	Petty offense sentence	Not punishable unless specified by the Penal Code

Attempt is generally punished less severely than a completed crime. Ostensibly, the disparity exists because the bad effect has not been produced and the perpetrator does not merit the full punishment for the crime.

### V. GROUP CRIMINALITY

Why does group criminality pose special threats to persons and property? Like many projects, criminal enterprises are often executed more effectively by individuals working together. Group crimes may be more dangerous for a number of reasons. Division of labor enables a greater number of perpetrators to be more efficient, become involved in more complicated criminal schemes, and commit an expanded scale of potential harm. Group activity offers a forum for mutual encouragement towards criminal behavior and increases the likelihood that the agreed upon crimes will be committed.

As a case in point, it would be impossible for one person to run an effective, profitable drug smuggling operation. A group of offenders would likely be much more successful at addressing all the logistical issues involved in such a large scale operation.

Given the dangers possessed by group criminality, the Penal Code provides some powerful tools for the state to combat it. In examining the state's power, however does the Penal Code provide sufficient means for the state authorities to prevent and deter group criminality? Or does it go too far in punishing mere thoughts by adopting an overly expansive approach to group criminality?

## **1. Aiding and Abetting**

Even in criminal situations where one individual is clearly the lead or principal actor, he or she is often supported by other individuals in criminal activity. Aiding and abetting, also known as complicity, is an expansive criminal doctrine that imposes criminal liability on individuals who help with the commission of a crime by another individual. That assistance, however, does not rise to the level of becoming a joint principal. In other words, individuals who aid another person's illegal act are accessories to that crime and as a result bear some responsibility for its commission. Thus, aiding and abetting is intrinsically a form of group criminality. Yet, unlike alliance discussed later in this chapter, guilt of aiding and abetting crime is derivative from the crime itself. The accomplice's guilt depends on the lead criminal or principal actually committing a crime, not just preparing for it.

Aiding and abetting falls into two primary forms: physical aid and psychological aid. *Physical aid* entails the aider providing tangible, material assistance towards the commission of a crime. Assume Asad robs a bank and his friend allows Asad to hide at his home to avoid the police after the robbery. The friend is now criminally liable for providing material aid. It is important to note that persons can be criminally responsible for aiding and abetting before, during, or after the commission of a crime.

*Psychological aid* involves the aider encouraging or reinforcing the lead actor's determination to engage in a criminal activity. For instance, consider a situation in which Asad is thinking about engaging in livestock theft and his friend supports the idea and offers suggestions on how to avoid being caught. If Asad follows through on stealing the livestock, his friend could also be subject to criminal liability.

Under Article 39 of the Penal Code, accomplice liability is delineated into three main categories: (1) when "he instigates a person to commit one of the acts comprising the crime and the crime takes place as a result of that instigation," (2) when "he enters into an agreement with another person to commit a crime and the crime takes place as a result of this agreement," and (3) when he "knowingly assists the principal offender in any way with respect to equipment, facilities or supplementary work for committing the crime and the crime takes place as a result of this assistance." Keep in mind that, unlike alliance, these forms of accomplice liability in the Penal Code require that an actual crime be committed.

When an individual faces accomplice liability, the consequences can be severe. From a practical standpoint, the accomplice is punished as if he were the principal actor. Under Article 41, an accomplice "shall be sentenced to the punishment of the crime in which he [h]as taken part unless the law stipulates otherwise" and he is not excused from liability if the principal

offender escapes punishment “for any legal reason.” Moreover, under Article 42, an accomplice assumes the criminal responsibility of the crime committed by the principal perpetrator, even if it is not the crime that had been previously agreed upon.

The rationale behind this law is that the crime committed is a foreseeable and probable consequence of the previously contemplated crime. For example, if Ameer receives assistance from Fateh in planning the theft of a valuable carpet from a local house, but once inside the home Ameer decides to steal an expensive clock, Fateh still faces accomplice liability under the Penal Code for the theft despite the fact that the carpet was not stolen. The rationale is that Fateh knew Ameer was engaged in a scheme to steal valuable goods. It was foreseeable that Ameer may choose to steal a different expensive item once inside the home even if he could not have known that the particular clock would be stolen.

When determining the causation of a crime, the Penal Code usually does not look beyond the last human agent responsible for the illegal act because causation becomes a very slippery concept moving back over time. Aiding and abetting criminal liability is different for most crimes articulated by Penal Code because it does not hinge on causation. Accomplices may bear responsibility even if the perpetrator would have committed the crime absent any encouragement or the aid provided was very minor. The rationale behind this extension of liability is that the accomplice has chosen to adopt the perpetrator’s criminal conduct as his own. Of course, the accomplice must still meet the legal (Article 37), material (Articles 27 and 28), and mental (Article 34) elements of the crime.

### *Review: The Law of Aiding and Abetting*

Before moving on to the next section, let us examine a hypothetical situation that tests the boundaries of aiding and abetting. Hassan seeks to possess a valuable sculpture in the collection of a local museum. He convinces Imran, a disgruntled security guard at the museum, to leave the back door propped open, so he can sneak into the museum and steal the sculpture undetected. Imran leaves the back door open as promised. On the way to the back of the building, Hassan notices an open window and climbs through it. He steals the painting and leaves. Is Imran an accomplice?

Probably not. Imran would contend that his aid to Hassan was completely ineffective and the theft in no way occurred as a result of his material aid. Thus, he cannot be convicted of being an accomplice. There is a significant likelihood that the court would accept this argument. However, the state may have an additional theory: Imran’s willingness to help may have offered encouragement for Hassan to follow through on the theft. Therefore, Imran’s words alone may be enough to constitute legally sufficient assistance under the Afghan Penal Code. Moreover, as we will see in the next section, the state prosecutor may be able to establish that Hassan and

Imran entered into an alliance and that one, or both of them, took concrete steps to further the alliance.<sup>9</sup>

## 2. Alliance

Alliance simply means an agreement between two or more natural persons to engage in a criminal act or commit a legal act through unlawful means at some point in the future. Independent of what actions are eventually taken in furtherance of the crime, the agreement to commit a crime itself constitutes a crime. Alliance raises some important questions. Why punish a crime that may never actually occur? How much progress towards criminal activity should be required before it is criminal? Does criminal alliance potentially unfairly punish mere speech or harmless posturing?

The scope of criminality covered under alliance statutes is far greater than those covered under attempted crimes addressed earlier. According to Article 49:

### **Penal Code – Article 49**

Alliance in crime is the joining of two or more persons in committing a specific or unspecific felony or misdemeanor, or joining in equipment, facilities or supplementary works of the said crimes, provided the alliance is regular and continuous, even if it has taken place at the formation stage of crime and for a short time.

Under Article 50, “even if the felony for which the alliance was made has not been initiated,” the very act of joining together with the intent of committing a crime is itself a crime. The punishment for alliance varies based on the severity of the crime contemplated by the conspirators. According the Penal Code, if the association seeks to commit a felony, the punishment is a maximum of seven years of imprisonment. For an alliance to undertake a misdemeanor, the Penal Code imposes a maximum of two years of imprisonment or a fine of 24,000 Afghanis.

### **Discussion Questions**

Do the Penal Code’s alliance provisions offer a sufficiently powerful tool for the state to maintain law and order? If authorities were unable to act until a crime actually occurred, would the state be forced to allow criminal acts to occur risking the safety and property of Afghans?

The Penal Code, however, also provides a limited abandonment defense for alliance. Specifically, Article 52 provides immunity for police informers provided that they inform the police before the crime occurs or the police have begun an official inquiry. This provision is

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<sup>9</sup> Richard G. Singer & John Q. La Fond, *Criminal Law: Examples and Explanations* (4th edition 2007).

designed to provide incentives for individuals to cooperate with the police in order to ensure criminal activity is stopped before it happens.

Generally, an organized alliance when carried to the point of an actual criminal act has more deleterious effects for law and order in society than an individual's illegal acts. Therefore, the formation of criminal gangs or groups is seen as dangerous and something that should be prevented, even where their activity does not lead to a crime actually being committed. If a crime is committed as a result of a previous agreement, the punishment may be correspondingly more severe. For example, Penal Code Articles 431(3) and 432(2) significantly increase the punishment for breaking and entering when criminals work in groups.

Alliance often presents unique evidentiary challenges since in many cases the desired criminal project was never completed. As a result, a judge may draw on direct forms of evidences like confession, testimony, and written correspondences to prove alliance, as well as circumstantial evidence.

Finally, it is important to distinguish between criminal alliance and consistency. Alliance is an agreement between two or more persons to break the law. A *consistency* refers to the existence of two criminal intents that act simultaneously towards the commitment of a crime without a prior agreement. While both are deserving of sanction under the Penal Code, alliance is subject to the increased punishment noted above for merely planning the crime. Of course, a perpetrator would also be subject to any sanctions stemming from successfully executed criminal activity.

#### *Review: The Law of Alliance*

Before moving on to the next section, consider the following scenario. Jawed and Momen are having dinner at a local restaurant. They invite Omar to join them for dinner. Over the course of conversation, it comes up that they all live in the same neighborhood. After dinner, they all agree to walk back to the neighborhood together. While walking, Jawed suggests taking a shortcut off the main street. Momen and Omar agree. Once they are off the busy street, Jawed assaults and robs Omar. During the assault, Momen places a rubbish bin in front of them so that no one from the street can see what Jawed is doing. Did Jawed and Momen engage in an alliance to assault and rob Omar?

Doubtful. An alliance requires evidence of an earlier agreement reflecting a common shared criminal purpose. True, an agreement does not necessarily require an express act of communication; a judge may infer the existence of a prior agreement from concerted activity. Yet, based on the facts, it appears Jawed's assault and robbery of Omar was a spontaneous decision that did not stem from an earlier agreement with Momen. Therefore, it seems unlikely that the court would determine an alliance existed. As a result both Jawed and Momen will likely escape punishment for alliance. Of course, because Momen acted with the apparent purpose of

aiding Omar's illegal activities, Momen can be punished as an accomplice consistent with Penal Code regulations.<sup>10</sup>

## **CONCLUSION**

This chapter has given you all of the information you need to analyze offenses in the Penal Code, apply them to situations you encounter, and prosecute offenses. These skills will be particularly important as you learn about the substantive crimes of Afghanistan, discussed in detail in Chapter 5.

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<sup>10</sup> Richard G. Singer & John Q. La Fond, *Criminal Law: Examples and Explanations* (4th edition 2007).

## GLOSSARY

- ❖ Continuous offense: a crime that must necessarily occur over a period of time.
- ❖ Felony: a crime for which the penalty is over five years of prison.
- ❖ Inchoate offense: a crime that has not yet been fully committed; includes attempt and conspiracy.
- ❖ Legal element: element of a crime which means that it is lawfully a crime within the written law of Afghanistan.
- ❖ Material element: element of a crime which involves the acts, either positive acts or omissions, required to punish someone for a crime.
- ❖ Mental element: element of a crime that concerns the intention of the person committing it.
- ❖ Misdemeanor: a crime with a minimum imprisonment of three months and not more than five years or a minimum fine of 3000 Afghanis.
- ❖ Momentary offense: a crime that occurs within one moment and need not endure.
- ❖ Omission: an act which is required but is not done, a failure to act which is punishable by law.
- ❖ Petty offense: a crime carrying a penalty of imprisonment of no more than three months and a fine of less than 3000 Afghanis.

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### CHAPTER 3: CRIMINAL RESPONSIBILITY



This Chapter examines the consequences for actions deemed criminal by the Penal Code with a focus on the core values and principles underpinning criminal responsibility. This Chapter also serves as a primer to the most important *limitations* on criminal liability. Students should critically examine how the Penal Code addresses the special problems stemming from criminal acts perpetrated by legal persons, such as corporations or labor unions, rather than natural persons. After completing the chapter, students should be able to explain what aspects of the Penal Code’s approach seem well-founded and make suggestions as to how the Penal Code may be improved.

Chapter Three begins with an overview of the nature of criminal responsibility under the Penal Code. It then addresses limitations on criminal responsibility with an emphasis on the justification provisions of the Penal code, specifically the excuses of insanity, minority, intoxication, necessity, duress, and emergency situation. Finally, criminal responsibility for legal persons (rather than natural persons) will be examined in some detail.

### **Reading Focus**

As you read this chapter consider the following questions:

What does it mean for the state to hold someone responsible for his or her actions? Is it important to have a written set of crimes with specific punishments for each crime? How detailed should the rules be? Should these rules be flexible, or should they apply unbendingly? How can uniform approach contribute to or detract from the pursuit of justice through the judicial system?

### **Key definitions – What is *primary criminal responsibility*?**

This chapter focuses on criminal responsibility with an emphasis on the principal offender. Consider the discussion in the previous chapter. What does it mean to be the principal perpetrator of a crime? The Penal Code stipulates that the defendant is a main perpetrator when: 1) “he alone or with the association of someone else commits a crime” and 2) “he intervenes in the commission of a criminal act in such a way as to intentionally commit one of the acts comprising the crime.”

Does a meaningful difference exist between the being a principal perpetrator and an accomplice? The Penal Code generally treats principal perpetrators and accomplices in the same manner. Is this approach justified?

## **I. CRIMINAL RESPONSIBILITY**

What does it mean to be responsible for a criminal act? Article 38 of the Penal Code sets forth the basic conditions for criminal responsibility. An individual qualifies as a principal perpetrator when: 1) “he alone or with the association of someone else commits a crime” and 2) “he intervenes in the commission of a criminal act in such a way as to intentionally commit one

of the acts comprising the crime.” The latter qualification assumes the *material element* has been distributed among two or more offenders. Thus, when each individual helps execute the elements leading to the crime, he or she qualifies as a principal perpetrator even if he or she did not commit all the crime’s remaining elements.

Yet, as will be discussed below, even when the conditions of Article 38 are met, under certain circumstances an individual may be justified in having committed an illegal act. As a result, they will not be culpable for an otherwise illegal act. However, before going into limitations on criminal responsibility, it is important to touch on two of the core principles of criminal responsibility. The first is the concept that ignorance of the law is no excuse for criminal behavior. The second is the principle of legal equality.

The legal system assumes people know the law, and that when they break the law they are doing so by choice. Thus, *ignorance of the law is no excuse*. This legal principle holds that a person who is ignorant of a law may not escape liability for violating that law merely because he or she was unaware of its content. The rationale for the principle is as follows: if ignorance were a valid excuse, a person charged with criminal offenses would merely claim he or she was unaware of the law in question to avoid liability, even though the person really did know the law. Thus, the law imputes knowledge of all laws to all people within a particular jurisdiction even if they have never actually seen the written laws, been told what the law is by a government representative, and even if they do not live in that jurisdiction but just happen to be passing through. It is unlikely for anyone, even with substantial legal training, to be aware of every law. Nonetheless, society does not require actual knowledge of the law because it would be nearly impossible to obtain convictions otherwise.

The principle assumes that the law in question has been properly published and distributed, even if it has not reached the eyes of every or even many citizens. For example, a law is effectively distributed by being printed in a government gazette, made available in public places, or made available for the general public to purchase at a reasonable cost. Finally, though ignorance may not exonerate an accused from a crime, it may be a factor in how a court decides to punish an offender.

Another foundational principle of the law is *equality before the law*. Simply stated, equality before the law means that each individual is subject to the same laws, with no individual or group having special legal privileges. This principle is perhaps best illustrated by Article 22 of the Constitution, which states that “[a]ny kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.” Afghanistan is also a signatory to Articles 1 and 2 of the Universal Declaration of Human Rights and Articles 2 and 3 of the International Covenant on Civil and Political Rights—all of which stress the need for equality before the law.

Without equality before the law, justice systems are intrinsically unfair. Individuals are never certain as to how they will be treated by the courts, and the same act may be punished in different ways with profoundly negative social consequences.

## II. LIMITATIONS ON CRIMINAL RESPONSIBILITY

Keeping in mind the two principles discussed above, consider whether conduct generally forbidden by the Penal code is ever legally acceptable. Imagine a village of 5000 people is threatened with destruction by a flooding stream. To save the town, Tariq diverts the floodwaters onto Zahir's farmland, destroying his entire crop. Consequently, Tariq has intentionally damaged someone else's property, albeit for the laudable goal of saving innocent lives and property. Should Tariq be held criminally liable for his conduct?

As we shall see, there are specific limits on criminal responsibility. These limitations, if applicable, might reduce an offender's criminal responsibility leading to a lesser punishment or even holding an offender completely free of criminal responsibility. Thus, the criminal law in Afghanistan recognizes that sometimes individuals should not be held criminally liable for their conduct even though the conduct satisfies all the requisite principles of liability. In these circumstances, we say the individual has a valid *affirmative defense* for his or her otherwise criminal actions.

These limitations on criminal responsibility or affirmative defenses can be divided into two theoretical categories: justification and excuse. *Justification* means that the conduct in question is desirable in that particular circumstance and there is no reason for punishment. *Excuse* is the idea that the defendant is not criminally liable for his unlawful conduct because he has a particular characteristic that excuses him.

It is important to note, however, that justification and excuse defenses are not the only defenses available to the accused. The other main category of defense—known as element-negating defenses—involves some variation of the argument that the prosecutor has not proven all the elements necessary to convict. These defenses can attack either one element of the charged crime, or many elements of the charged crime. Element-negating defenses tend to be more fact-specific than doctrinal, and therefore will not be discussed here in detail.

### 1. Justification

Under the defense of justification, a person is not criminally liable even though his act would otherwise constitute an offense. A justification sets forth an exception to the prohibition of committing certain offenses. For example, to intentionally commit a homicide would be considered murder. However, it is not considered a crime if committed in self-defense. There are four major categories of justifications: (1) exercise of one's legal rights; (2) the instruction of official authorities; (3) self-defense; and (4) necessity.

#### Exercise of Rights

In the abstract, a given act may have criminal attributes that society seeks to discourage. If, however, the act furthers a just outcome, it may not qualify as a crime under the Penal Code. For an organized and stable society it is necessary to establish and safeguard certain rights to be exercised in a manner consistent with established legal norms even if they are otherwise

criminal. Therefore, a parent may not be subject to criminal sanctions for preventing their child from leaving home for a certain period of time. Nor can a legally practicing dentist, assuming he is operating with the fully informed consent of his patient, face legal sanction even though his actions often result in an immense amount of pain for his patients. What exercises of rights are codified by the Penal Code?

#### **Penal Code – Article 54 (Summarized)**

Four valid situations involving the exercise of rights:

1. Parental discipline;
2. Medical operations;
3. Legal sporting activities;
4. Apprehending criminals while a crime is occurring.

The Penal Code recognizes that parents have a right to discipline their children through the use of reasonable force under certain circumstances. The punishments must be aimed at improving a child's behavior. Parents are not allowed to abuse their children or inflict excessive suffering. Under the law, only a child's father or the teacher may engage in legal punishments. The punishment should be within the framework of the law or Islamic Law. Thus, the use of force is a legitimate disciplinary technique in limited circumstances. Nonetheless, the Penal Code does not sanction the abuse of children by parents or anyone else.

Medical operations are not classified as crimes provided the operations occur with the informed consent of the patient or his or her legal representative. Moreover, the medical practitioner must uphold all relevant professional and ethical principles.

Harms stemming from sporting activities cannot be crimes provided the sport itself is legal and the rules of the games are being observed. Therefore, if football in Afghanistan is legal, and if one player hurts the other during the game in full accordance with the rules, he will not be criminally liable for that injury. On the other hand, if a player violently assaults a competing player on the field in violation of the rules of the game, the assault will be subject to criminal sanction under the Penal Code.

Finally, arresting perpetrators during a criminal act is a valid exercise of legal rights. Ideally, all criminal arrests would occur with the advanced permission of an authorized legal official. Where, however, the police are faced with criminals committing a crime and must make an arrest immediately, this requirement is waived if the accused are committing a felony or a misdemeanor and all applicable rules, most notably the Criminal Procedure Code, Police Law, and the Penal Code, have been followed.

#### **Discussion Questions**

1. Do you agree that these exercises of rights should be legally protected? Are they vulnerable to abuse as written or, alternatively, are they too narrow?
2. Are there any additional exercises of rights that should constitute valid defenses under the Penal Code?

### *Instruction of Official Authorities*

As in most governments and other large organizations, Afghanistan's administrative system operates as a hierarchy. A higher-ranking unit gives an order and a subordinate unit implements it. Government institutions, and broader social order, would likely soon collapse if orders were routinely disobeyed. As a result, the law regulates the relationship between superior and subordinate officials with a substantial amount of leeway in favor of implementing what appear to be valid orders. Consequently, when a high-ranking official issues a legal instruction and a subordinate official implements that instruction lawfully, no criminal liability results. For instance, when a superior military officer gives the order to commence shooting and a junior officer opens fire, no criminal liability results provided the order and its implementation are legally justifiable.

The issue of who is responsible becomes important when the superior's order is clearly or likely illegal. Article 56 of the Penal Code explains four instances in which a subordinate is exonerated from criminal liability after carrying out an illegal instruction from a superior.

### **Penal Code - Article 56 (Summarized)**

The act of a subordinate in implementing an illegal instruction from his superior is not a crime when:

1. An authorized official issued the instruction;
2. He possesses a good faith belief that he is obliged to implement the issuing official's orders;
3. The subordinate can demonstrate that he had a rational belief in the act's legality and could not know that the instructions were invalid; or
4. The law demands that order should be carried out and the subordinate lacked the right to protest.

In the circumstances contemplated by Article 56 of the Penal code, the superior official or the order-issuing body of the organization bears responsibility for the criminal action, not the subordinate official. Subordinates, however, do not have free rein to implement illegal orders. Article 56(3) stipulates that subordinates should check to make sure the instructions received are legal. When subordinates receive an illegal instruction, they are obligated to protest and refuse to obey the illegitimate order. If they still follow through on an illegal instruction, the law provides them with no protection from criminal prosecution. Is this fair? How extensive an investigation should subordinates be required to conduct?

Thus, the Penal Code provides official authorities significant leeway in carrying out their duties. At the same time, it is important to stress that nothing in the Penal Code or other relevant statutes excuses or enables state officials to abuse their positions of authority. Indeed, the Penal Code goes out of its way to make sure such clear abuses of power are unmistakably prohibited and subject to punishment.

### Self-Defense

Self-defense justifies an otherwise illegal act and works along the same lines as a necessity claim, which we will discuss further in the following section. In fact, it may help to think about self-defense as a type of necessity defense. Like necessity, self-defense is a justification defense. When otherwise illegal conduct is proven to be undertaken in a valid act of self-defense, the Penal Code considers that conduct lawful.

Despite the similarities between necessity and self-defense, it is worth examining the specific attributes of self-defense claims under the Penal Code. According to Article 57 of the Penal Code, an otherwise criminal act will not subject one to criminal liability if the defendant has a valid legitimate defense. When a police officer or other authorized government official cannot defend an individual who is in danger, that person has the right and even the obligation to defend himself as well as others in a similar situation. Article 58 further defines the parameters of self-defense by explaining the law “permits the threatened person to make use of any necessary means for the purposes of defending against any criminal act that possesses a material loss or danger of life to the defender or someone else.”

Articles 57 through 64 of the Penal Code discuss self-defense. Article 57 states the basic proposition: “commitment of a criminal act for the purpose of exercising the legitimate right of defense shall not be considered a crime.” After all, it seems absurd to punish a person for defending himself from an attacker. Still, not all claims of self-defense are valid. Article 59 states: the “legitimate right of defense comes into presence when the defender is assured by rational instruments and logical reasons that a danger of transgression is directed to good, life, or honor of the defender or someone else.” It is important to note that a person may invoke self-defense regarding actions protecting himself or other people.

Building on the rule outlined in Article 59, Article 60 explains the elements necessary for a sound claim of self-defense.

#### **Penal Code – Article 60 (Summarized)**

1. Defense should be against aggression and assaults;
2. Defense should be proportionate to the danger of the threat;
3. Defense should be the only way of removing the danger;
4. Defense should be concurrent with the attack of the opposite side;
5. Defense should be against an illegal and unjust act;
6. The defender should not have deliberately caused the criminal action of the opposite side.

Further limitations on valid self-defense claims recognize the state's unique role in providing for public safety. For instance, self-defense is not a valid claim when it is possible to obtain protection from public officials (Article 62). Likewise, self-defense does not justify the use of force against public officials "who carry out their duties in good intention, even if in the course of duty they go beyond the limits of their legal authority," except where a well-founded fear of death or serious injury exists (Article 63). The rationale behind these provisions is that widespread disorder could result if people routinely used force against state personnel.

A self-defense claim may also influence the court's sentencing. Self-defense can function as a mitigating factor even if the defendant's conduct does not meet all of the requirements of a valid claim under Article 60 of the Penal Code. This usually occurs when a criminal act starts out as an act of self-defense, but escalates into a full on criminal act because the defendant uses too much force to defend himself. Article 64 grants judges the power to reduce the punishment of someone who, in good faith, uses too much force in defense of himself or another. Consider a situation in which a man named Sadeed is robbed by someone who threatens to punch him if he did not hand over some money. Sadeed responds by pulling out a knife, at which time his attacker decides to flee. Sadeed proceeds to seriously wound his attacker. In this situation Sadeed will likely be punished. Yet, he will likely receive a significantly shorter sentence than if he had simply assaulted a random person. Consider the following examples as well.

### **Review – The Law of Self Defense**

Imagine Khalid is walking to the market when he is confronted by Qader. Qader pulls out a knife, forces Khalid into an alley, and demands money. Khalid pulls out a firearm and shoots Qader. The gunshot kills him. Is this a valid instance of self-defense? Most likely, so long as possession of the weapon is lawful. Khalid is an innocent victim of a serious, unprovoked violent attack, and there is no way to plausibly escape.

Now let us assume the same facts as above, but Khalid does not have a firearm. Instead, he wrestles the knife away from Qader and then stabs him to death. Is this a valid instance of self-defense under the Penal Code? Perhaps. Khalid clearly was under deadly attack, but since Khalid now has the knife, it is at least arguable that he could have safely retreated or that the force used was excessive. On the other hand, Khalid could have reasonably concluded given the circumstances that Qader would continue the pursuit, maybe even with another deadly weapon, unless Khalid stopped him.<sup>11</sup>

### **Discussion Questions**

1. What would a justice system look like in which otherwise criminal activity is never justified or excused, only mitigated? What concerns might be raised about an excessively lenient approach

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<sup>11</sup> Richard G. Singer and John Q La Fond, Criminal Law Examples and Explanations: Fourth Edition, (2007).

to justifications and excuses for criminal responsibility? Does the Penal Code strike an effective balance between leniency and responsibility?

2. Is the Penal Code's approach to exercise of rights, official instruction, and self-defense feasible given the current security and governance situation in the country? What changes, if any, would you suggest to how the Penal Code treats justifications for criminal activity?

### Necessity

The Penal Code recognizes that one must not simply accept criminality where it is present and hope the official authorities will get there in time. In the earlier hypothetical regarding Tariq destroying a farm to save a village, your intuition may have been that Tariq should not face criminal liability because his conduct was necessary to save life and property. If so, you are right—the law recognizes a defense called necessity. When an individual successfully presents a necessity defense, there is no criminal liability because the law recognizes that under the circumstances the conduct of the accused is not unlawful. Thus, necessity is the final justification defense.

Article 95 of the Penal Code states that “a person who for the sake of saving his own soul or good or the soul or good of someone else comes to face great and immediate danger, such as not to be able to ward it off without committing an act of crime, shall not be considered responsible provided that the person has not deliberately caused the said danger and that the damage to be avoided should be greater than the damage from the act of crime.” There are four essential elements to a necessity defense:

First, the defendant must show the harm he sought to avoid outweighed the danger of the prohibited conduct in which he engaged. In our hypothetical, this means Tariq must prove that the potential danger of the floodwaters reaching the village outweighed the dangers associated with flooding the farm.

Second, the defendant must show he had no reasonable alternative. If Tariq could have easily diverted the water elsewhere causing no damage, destroying the farm would not have been justified.

Third, the defendant must show that he ceased the prohibited conduct as soon as the danger passed. Thus, if Tariq had continued flooding the farm long after the threat to the village had subsided, this unnecessary conduct would not be justified.

Fourth, the defendant must show that he did not create the danger he sought to avoid. In other words, Tariq would not escape criminal liability for destroying the farm to save the town if, for example, he was actually responsible for the flood in the first place by destroying an existing dam further upstream that had long prevented the village from flooding.

It may also be helpful to understand necessity as a “choice of evils” claim. Someone (most often the criminal defendant) is threatened with serious harm and chooses (to the degree

that anyone makes a “choice” in such a situation) to inflict harm in a way that would otherwise be deemed criminal. If the harm the defendant actually inflicts is smaller, or at minimum not greater, than what would have occurred, notwithstanding that the harm inflicted would otherwise be prohibited, the defendant may have a valid claim of necessity. The defendant has chosen the “lesser evil.” In the hypothetical above, Tariq’s destruction of the farm to save the village could be seen as the “lesser evil.”

### Discussion Questions

Are the Penal Code’s justification provisions flexible enough to cover all the situations where it might be necessary to break the law? Or do they enable people to engage in unjustified criminal activity under the cover of not having a choice to act otherwise?

## 2. Excuse

As stated above, to be excused from criminal responsibility means that although an offender may have participated in a criminal act, the law states that he or she is not liable because the particular offender belongs to a class of people who are exempted from liability. Article 66 of the Penal Code states that a “hindrance to criminal responsibility is created due to the problem of understanding or due to lack of willingness.” Said another way Article 66 reflects the idea that if a court finds a valid excuse, then even though an offender might have committed a criminal act, he or she does not bear criminal responsibility. Unlike justification, in the case of excuse the conduct in question is still considered unlawful. The defendant is excused from criminal liability, however, because of the defendant’s status or mental state. Thus, we may say that justification is generally concerned with the circumstances of an offense, while excuse is generally concerned with the defendant and his ability to form the requisite intent.

The following sections will address five distinct excuse defenses: 1) insanity and mental disease; 2) intoxication; 3) maturity; and 4) coercion/duress

### Insanity

As stated above, the Penal Code assumes that individuals know the law and possess free will to make decisions about whether to engage in criminal activity. All the punitive theories described in Chapter One assume knowledge and choice. While in most cases the perpetrator’s capacity and decision to break the law is taken for granted, legal insanity is one of the few excuses that permits an examination into whether the defendant had the capacity to *know* the law or to *exercise* his or her free will. If the answer is no, then no criminal liability attaches under the law. Specifically, according to Article 67, “a person who, while committing a crime, lacks his senses and intelligence due to insanity or other mental diseases has no penal responsibility and shall not be punished.” Thus, insanity bars criminal liability. Of course, an insane individual may still be subject to civil restraints to prevent him from doing harm to himself or society at large.

The rationale behind Article 67 is straightforward: society does not want to punish a person who has no concept of what he did or why he is being punished. To do so would offend our notion of blameworthiness. For example, is the person really to blame, or is the illness to blame? Should we punish someone for being ill? As the medical community recognizes a number of different types of mental illness reflecting vast differences in severity, it is difficult to establish a uniform approach to mental illness.

Insanity is a condition where people cannot understand clearly the relations upon which social life is built and how their actions impact other people. In this way, part of the concept of insanity is cultural. However, a low level of intelligence may also characterize a mental disorder. A person with a mental disorder may not be able to understand all or part of the social norms.

While two individuals may be diagnosed with mental health disorders, the first may be high-functioning while the second is severely disabled. Is it right, then, to hold them to the same legal standard? Though the Penal Code provides circumstances where mental disorder precludes punishments, mental disorder is often not an absolute bar to criminal responsibility. Rather mental problems function as a mitigating circumstance under Penal Code Article 67(2). This provision, however, is still subject to the limitation in Article 67(3), which states that all moral offenses committed by people suffering from a mental disorder do not qualify as crimes punishable by law.

In many jurisdictions, courts rely on the assessments of mental health professionals to determine whether a defendant should be held criminally liable for his unlawful conduct. In Afghanistan, judges rule on the defense of insanity based on the available evidence. Often, this assessment focuses on the offender's cognitive capacity to understand the difference between right and wrong, and his capacity to act according to his understanding of that difference. If either capacity is lacking, the defendant will likely be found criminally insane and will not be culpable for his unlawful conduct.

An offender's mental state may also prevent or delay criminal liability after the crime has been committed even if the individual was not mentally disturbed at the time of the crime. As outlined by Article 44 of the 2004 Interim Rules of Criminal Procedure, if the defendant suffers from a mental illness that precludes him from presenting a defense during the trial process, the judge will stay (or halt) the trial. The defendant will then undergo a mental examination. If the examination finds the accused is indeed suffering from a mental illness that prevents him from offering a defense, the court will rule the defendant incompetent to stand trial. Consequently, the trial will be postponed until the defendant is in a mental state that allows him to stand trial.

Remember, however, that competency to stand trial is an examination into the defendant's mental state at the time of trial. Competency to stand trial forms a separate inquiry from that which seeks to determine the defendant's mental state at the time he allegedly committed the crime. Thus, while a defendant once judged incompetent may recover from his illness and eventually stand trial, a defendant found to be criminally insane when he committed a crime will never be held culpable for that crime. While the two conditions are distinct, they are

not mutually exclusive. A defendant may have been both insane when committing the criminal act and not mentally competent to stand trial.

### Discussion Questions

1. Should mentally ill individuals be immune to moral offenses?
2. How should the law deal with the vast range of mental illnesses? What is the top priority: protecting society, treating mentally ill people, or other considerations? How should those priorities be balanced? Does the Penal Code currently do a good job of balancing them?

### Intoxication

Alcohol and other drugs can have a significant impact on behavior by dramatically loosening social and moral inhibitions, impairing physical performance, and influencing judgments. The use of alcohol and other mind-altering substances presents real problems for the criminal justice system.

Apart from the formal requirements of the Penal Code, it is worth considering whether an individual should be held criminally liable, or liable to a lesser degree, for unlawful conduct committed while intoxicated. Intoxication is generally defined as a state in which a person's normal capacity to act or reason is inhibited by alcohol or drugs. Intoxication unquestionably affects an individual's mental state and thereby negates his or her ability to form the intent required for most crimes.

For many reasons, this situation creates a more vexing problem than the earlier question regarding the insane, even though an intoxicated person may be equally unable to form the intent necessary to be held criminally liable. Intoxication—whether by alcohol, narcotic substances, prescribed medication, or other means—can be *voluntary* or *involuntary*, whereas insanity is purely involuntary.

Criminal law acknowledges this very distinction. Article 68(1) of the Penal Code states: “A person who while committing a crime loses his senses and intelligence due to use of intoxicating or narcotic substances, and if this use is made by force or lack of knowledge, shall not be punished.” Thus, involuntary intoxication may form an absolute bar to criminal liability provided the intoxication is sufficiently intense.

The involuntary nature of the intoxication is the key component of a valid defense. When the individual or individuals perpetrating the criminal activity are voluntarily under the influence of drugs or alcohol, they are generally not excused for any criminal behavior. Indeed, the use of certain drugs or alcohol will likely constitute a crime in and of itself. Article 349 states: “A person who uses alcoholic or narcotic substances shall be sentenced to imprisonment of three to six months or cash fine of three to six thousand Afghanis, or both punishments, unless otherwise stipulated in the law.” Article 69(1) adds: If a person uses intoxicating or narcotic substances at

his own will and commits a crime, he shall be considered responsible and it will be assumed that he has committed the crime in a state of full sense and intelligence.” Moreover, demonstrated use of alcohol will likely make it more difficult to prove other defenses because most defenses require proof that the individual acted as a reasonable person would, which is significantly less likely under the influence of alcohol.

### **Discussion Questions**

1. While relatively clear in theory, involuntary intoxication raises some difficult issues in practice. How intoxicated must a person be before he or she is relieved of criminal responsibility? Should the conduct be excused completely or should only the punishment be reduced?
2. The law requires the defendant demonstrate the involuntary intoxication caused major impairment to his cognitive functioning. Is this fair assuming the defendant bears no blame for the intoxication and is likely a victim herself?
3. How aware must individuals be in the situations that lead to intoxication? For example, if a friend you trust hands you a beverage and you drink it unquestioningly and become intoxicated as a result, should that count as involuntary intoxication? Did you have a duty to inquire? These are difficult questions without clear answers and are likely highly context specific.

### Minority

Even young children can commit harmful anti-social actions ranging from mischievous acts, such as vandalism or petty theft, to the most serious crimes of rape or murder. Yet, children may not always be subject to punishment under the law. As noted earlier, Afghan law requires more than harmful conduct before it imposes criminal liability on an individual.

Knowledge of the difference between right and wrong is crucial to determining the existence of criminal liability for an individual’s unlawful conduct. Considering the behavior of young children, it is apparent that they often lack the intelligence, judgment, emotional maturity, and moral capacity necessary to make informed decisions rooted in a fully formed conceptualization of right and wrong. The Penal Code understands this reality and therefore, it features numerous provisions dealing with children, adolescents, and teenagers in the criminal justice system. These provisions however, superseded by the new Juvenile Code promulgated in 2005 (published in Official Gazette No. 846). Thus, our discussion in this section will focus on the most important provisions of the Juvenile Code.

At some point, an individual must accept full legal responsibility for his or her actions. According to the Juvenile Code, maturity begins at the age of eighteen. Thus, any person who has *not* reached the age of eighteen remains a child for legal purposes, and any criminal acts he or she is accused of must be treated according to the Juvenile Code, rather than the Penal Code. The Juvenile Code recognizes three classes of children: 1) non-discerning children (children

under age *seven*); 2) discerning children (children between ages *seven* and *twelve*); and 3) juveniles (children between ages *twelve* and *eighteen*). Children have different levels of responsibility depending on their category.

Juvenile Code Article 5 stipulates, “A person who has not completed the age of 12 is not criminally responsible.” The Article adds, however, that if a child’s conduct was the result of negligent parents, the parents may be obligated to compensate the victim or victims for any material loss caused by the child. This potential obligation is based on the idea that parents bear some responsibility for their children’s behavior, and individuals that suffer a loss deserve compensation.

In some cases age, particularly for young children, can function as an absolute bar to criminal liability. Juveniles above the age of twelve can be held criminally liable for their actions, but are afforded legal protections substantially greater than those available to mature offenders. Article 8 of the Juvenile Code holds that “confinement of a child is considered to be the last resort for rehabilitation and re-education of the child.” Thus, imprisonment is to be avoided when dealing with a juvenile offender even for quite serious crimes unless absolutely necessary. When confinement is deemed necessary “[t]he court shall consider minimum possible duration for confinement based on the provisions of this code.” In short, the Juvenile Code establishes a clear preference for rehabilitation and re-education through social services and juvenile rehabilitation centers. Article 7 explicitly states that “[c]ontemptuous and harsh punishment of [a] child, even if for correction and rehabilitation purposes, is not allowed” [sic].

The prison sentences given to juveniles should be considerably less than the sentence an adult convicted of the same crime would receive. Juvenile Code Article 39 states that prison sentences given to juveniles between the ages of twelve and sixteen may not exceed one-third of the maximum punishment prescribed in the Penal Code. Sentences given to those defendants between the ages of sixteen and eighteen may not exceed one-half of the Penal Code maximum. Furthermore, under Article 39 of the Juvenile Code, no child can be sentenced to continued (life) imprisonment or to death.

While criminal procedure is outside the purview of this textbook, it is worth noting that Chapters Two and Three of the Juvenile Code provide for separate rules of criminal procedure for cases involving children, with the goal of protecting children during investigation, arrest, and trial.

The Juvenile Code is undoubtedly a progressive piece of legislation. Yet, as with many areas of law, there is a significant gap between the law as written and how it is enforced when treating juveniles. A 2008 report from the Afghanistan Independent Human Rights Commission and the United Nations Children’s Fund, “Justice for Children: The Situation of Children in Conflict with the Law in Afghanistan,” found grave problems with the administration of juvenile justice. The Report notes that “monitoring visits by AIHRC have highlighted that many of the provisions laid out in the legislation have not been implemented and that two years after the adoption of the Juvenile Code many of the authorities in charge of its implementation are even unaware of the rules stipulated.” Moreover, the report finds that physical and verbal abuse of

children charged with crimes remains commonplace. For example, among juveniles involved in the justice system “48% reported being beaten and another 8% reported verbal abuse.” The juvenile justice sector remains poorly coordinated, and the widespread use of imprisonment is still common despite the Juvenile Codes limitations on prison sentences. What can be done to improve the administration of criminal justice for children and juveniles given Afghanistan’s severe resource constraints and fluid security situation?

### Discussion Questions

1. Do the Juvenile Code’s three age categories make sense? Does a twelve-year-old merit the same severity of punishment as a seventeen-year-old? Is a seventeen-year-old who commits arson really less culpable than an eighteen-year-old?

### Duress

Coercion is perhaps the most straightforward excuse defense. The Penal Code does not demand heroism in all situations. For example, should an individual be held criminally liable for theft when a gunman is holding a gun to his head and ordering him to steal? Most likely not. The Penal Code recognizes that people may be effectively forced to commit a crime against their will. People should not be expected to willingly die or suffer major bodily harm if it can be avoided, even if avoidance means committing a crime. Article 94 provides that “a person who commits a crime under the influence of a moral or material force, repulsion of which is not possible otherwise, shall not be considered responsible.” Indeed, from the perspective of the Penal Code, the criminal perpetrator behind the crime is effectively the person forcing the individual to act against his will, not the actor himself.

Generally, for a coercion defense to be successful in court, an individual must prove elements similar to those discussed in the earlier section on necessity. In fact, some legal scholars maintain that the two defenses are essentially equivalent, the only difference being that *coercion* covers situations where the source of the outside force is the action of another human being (or the result of that action), while *necessity* covers situations where the outside force is a physical force beyond the actor’s control. Do you agree with the view that they are essential the same?

Students should be a bit wary of this formulation because it blurs the important theoretical differences between justification and excuse defenses—necessity is usually defined as a justification defense while coercion is defined as an excuse defense—but thinking about it this way may be helpful if you have trouble distinguishing between necessity and coercion. For duress to excuse otherwise criminal activity, the threat must be: 1. obvious or imminent; 2. unlawful; and 3. made by someone who has no mental disorder. Moreover, there must be no other way to deal with the threat but by committing a crime.

### Review: The Difference between Duress and Necessity

Two key distinctions exist between duress and necessity. First, necessity does not require a threat of death or serious physical harm. Provided the defendant actually inflicts less damage than he or she was faced with, a claim of necessity is present. Therefore, if Jahid ties his goat to a fence during a fierce storm and in the process the goat damages the fence (but the goat would have died in the storm otherwise and resulted in a greater loss of value), he has a necessity defense to the charge of intentional destruction of property. Keep in mind that because Jahid acts out of necessity to protect a purely personal interest in this situation, he will still have to pay for the damage he caused. Nonetheless, because his actions were justified he will not be criminally liable. If Jahid were acting out of necessity in an *emergency situation* he would not be responsible for any damage.

Second, though necessity requires a comparative analysis between the injury threatened and the injury inflicted, there is no reason to restrict necessity exclusively to threats against life or person. Therefore, necessity may function as the default legal claim in instances where duress may not be appropriate. For example, if Aryan helps Hafiz steal money from a museum rather than have Hafiz destroy a priceless ancient artifact, Aryan does not have a duress claim since he was never in any danger. Nevertheless, Aryan may still possess a valid claim of necessity depending on how the court weighs the museum's loss of funds versus the loss of the artifact.<sup>12</sup>

### **3. Challenges to the Administration of Justice – Resource Constraints**

The section on juvenile justice noted that resource constraints are a major impediment to the effective administrative of justice for children laid out under the 2005 Juvenile Code. But the problem is not limited to juveniles. A lack of resources causes massive problems for the criminal justice system generally. While many parts of the government are operating under similar resource constraints, the problem is particularly notable when it directly affects issues of liberty and justice. For example, only a small fraction of suspects arrested every year receive the assistance of counsel guaranteed to them by the Constitution. The lack of qualified attorneys is part of a general shortage of lawyers. Available evidence suggests that the problem is even more profound for criminal defense lawyers. The legal justifications and rights discussed in this chapter and elsewhere mean little when defendants lack a qualified attorney to articulate their claims in court.

The lack of resources extends beyond the shortage of attorneys. The judiciary is in dire need of access to relevant legal research materials, updated laws, and important judicial opinions. For example, the Penal Code discussed throughout this textbook is over thirty years old and it fails to reflect important changes in how society and the state believe the criminal justice system should work given today's circumstances. Without access to current written materials, judges must rely on old laws (if available, which is often not the case) or simply on their own judgment

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<sup>12</sup> Richard G. Singer and John Q La Fond, *Criminal Law Examples and Explanation: Fourth Edition*, (2007).

and experience. Changing the written law does not necessarily change how justice is implemented. Indeed, it will be nearly impossible to effect legal reform if those entrusted with implementing the new system are not aware of the laws.

Though their efforts have been hindered by the fluid security situation in much of the country, international aid organizations continue to play a major role in judicial reform. Many judges have received training from international agencies. Foreign donors have helped build courthouses across Afghanistan. At the same time, the legal and academic communities in Afghanistan must play a prominent role in reform. Raising public awareness and understanding of the Constitution and laws may help reforms take hold. Furthermore, the government has a vital role to play in increasing confidence in the judicial system by working to eliminate corruption wherever it is found. If people do not trust the judicial system, the results it produces will face questions of legitimacy.

### **III. CRIMINAL RESPONSIBILITY OF LEGAL PERSONS**

Should legal persons, such as the government or companies, bear criminal responsibility? And if legal persons can bear criminal responsibility, what type of punishment should apply to them?

Some legal theorists posit that committing a crime is a quintessentially human act, so non-humans and legal persons cannot be convicted of a crime. Moreover, if reform functions as the primary goal of punishment, it is technically impossible to reform a legal person, only the individuals charged with controlling it. Yet, for the reasons noted below, this view is only accepted by a relatively small number of individuals.

Powerful reasons exist for making legal persons liable for criminal wrongdoing. Legal persons cannot be reformed per se. Yet, if a corporation is committing wrongdoing it certainly seems plausible that a severe punishment would deter future criminality. Legal persons play a vital role in almost every aspect of modern life. If the state lacked the power to punish malfeasance committed by legal persons, a huge loophole for organized criminality would exist. Although certain types of punishment, such as imprisonment and execution, cannot be applied to legal persons, other punishments can be applied easily, such as confiscation, fines, and forced closures.

The Penal Code provides for criminal liability for legal persons. According to Article 96, “Legal persons, except government organizations, offices and enterprises, will be held responsible for the crimes that their directors, heads and lawyers commit while performing duties on behalf of the legal persons.” Moreover, “The courts cannot convict a legal person and apply any punishment except a fine, confiscation and security measures defined in this law.” The Penal Code explicitly empowers judges to impose a ban on the activities of a legal person (and any successor organizations) or even force the organization to be dismantled (Afghan Penal Code Articles 135 and 136).

Consistent with the Penal Code's emphasis on not allowing legal persons to avoid or mitigate responsibility for wrongdoing, Article 96 (4) stipulates that convicting and punishing a legal person does not preclude charging the natural person who has committed the crime. Therefore, if a licensed vendor of a food services company is knowingly dealing in unsafe food that causes illness, his company will be fined. The vendor himself could also be jailed and subject to any other legal proscribed punishments for the act in question.

### Discussion Questions

1. Should legal persons be subject to punishment even if all the real persons responsible for the criminal act also face punishment? What is the best approach to regulation of legal persons' activities?
2. What are the advantages and disadvantages of the law allowing the establishment of legal persons?

### CONCLUSION

This chapter explained the nature and limitations of criminal responsibility in Afghanistan's criminal justice system. You should have critically examined (1) the circumstances under which an individual is held liable for a criminal act, and (2) the instances in which an individual will *not* be found liable, or will be punished more leniently, for an otherwise criminal act. Finally, this chapter has detailed how Afghanistan's criminal law addresses wrongdoing by "legal persons." Together, this information has given you the tools to think critically about all aspects of criminal responsibility, as well as the ways in which they can be improved.

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## CHAPTER 4: PUNISHMENT



What does it mean for the state to punish those individuals that commit crimes? Should all criminals that commit the same act, such as arson for instance, be treated the same? Are some types of arson worse than others? Should an individual's past behavior or state of mind during the criminal act influence the nature of the punishment received? Whatever your thoughts on the issue, there is likely a legal scholar somewhere who agrees with you. No uniform "correct" answer exists regarding the rationale for punishment, merely different schools of thought.

This chapter seeks to help students critically examine punishment for criminal wrongdoing. This chapter also serves as a primer to the most important rules about punishment promulgated in the Afghan Penal Code. Although this chapter addresses the core values and principles underlying Afghan criminal procedure, it is by no means comprehensive and should not be used as a substitute for a close reading of the Penal Code or the discussion of specific crimes in Chapter VI. This chapter is not a practitioner's guide. Rather, students and practitioners should also consult the Penal Code and other relevant material to determine what punishments should apply in a given circumstance. The punishment process outlined here may differ in significant respects from the realities of crime and punishment, but the emphasis is on what is required by the law even if the letter of the law is not always followed.

Punishment of criminal wrongdoing raises very significant legal, social, and moral issues. This section will begin by exploring the various forms of punishment envisioned by the Penal Code and then address how the Penal Code attempts to ensure just results and proportional punishments.

This chapter first addresses the application of principal punishments, then the subordinate and complimentary penalties. Finally, this chapter discusses the role of the informal justice in addressing criminal activity.

### **Reading Focus**

The government of Afghanistan may amend the Penal Code in the coming years because the current Code is over thirty years old. Which provisions of the Code are the most important? How effective is the Penal Code at furthering the varying objectives of criminal law, namely deterrence, incapacitation, retribution, and rehabilitation? Which punishments should be amended or deleted altogether?

## **I. PRINCIPAL PUNISHMENTS**

Punishments can be classified into three types: principal, subordinate, and complementary. A *principal punishment* is the main response or the reaction of law to a crime. For example, execution may be a principal punishment for a premeditated murder. (The consequences of a number of major crimes will be covered in greater detail in Section VI.) The exact punishment a defendant receives varies according to the particulars of the crime committed but the available punishments fall into broad categories outlined by the Afghan Penal Code.

## **Penal Code – Article 97 (Summarized)**

1. Execution;
2. Continued imprisonment [16 to 20 years];
3. Long imprisonment [5 to 15 years];
4. Medium imprisonment [1 to 5 years];
5. Short imprisonment [24 hours to 1 year];
6. Cash payment.

Articles 97 through 120 of the Penal Code describe the six main types of punishments in further detail. While it is unnecessary to cover each article here, it is worth highlighting that under Articles 100, 101, and 102, a person sentenced to long or medium imprisonment must perform reformatory work while incarcerated, while those sentenced to short imprisonment do not. Prisoners above sixty years of age are also exempt from work requirements.

### **1. Power to Set Sentences/Guidelines**

The code stipulates the punishments available for each crime. Yet, courts usually retain some discretion to tailor the punishment to the specific offense. The circumstances surrounding two crimes that technically fall in the same crime classification, for instance, may be quite different. The Penal Code may prescribe medium punishment for a particular crime. This merely tells the court the individual must be incarcerated between one year and five years. The court is responsible for the precise sentence. Similarly, the Penal Code typically sets either a minimum or maximum for the amount of a cash fine, leaving the precise amount of the fine to be determined by the court.

The Penal Code generally prescribes a punishment range, but leaves the exact punishment to the presiding judge's discretion. How does the court make this difficult decision? There are two criminal law theories that inform the sentencing decision: 1) the theory of aggravating and mitigating factors; and 2) the legal maxim that the punishment should fit the crime. While this still provides a significant amount of leeway in individual cases even despite similarities between cases, upholding these principles helps ensure that the outcome meets basic standards of fairness.

### **2. Discretion**

Legal professionals and laypeople alike share a widespread belief that the punishment given by the state should fit the crime committed. For example, an offender should not be sentenced to death for petty theft, nor should an offender be made to pay a small cash fine when convicted for a brutal double murder. The sentence should be sufficient to achieve the goal of punishment, but should not be excessive. This is a simple proposition in theory, but remarkably difficult to achieve in reality.

By prescribing appropriate sentencing ranges for specific offenses, and allowing deviation only in the presence of aggravating or mitigating factors, the Penal Code attempts to ensure that the punishment always fits the crime. Another advantage of statutory sentencing ranges is the standardization of punishment. Both of these provisions attempt to foster the larger concept of equality under the law discussed in the previous chapter. For example, if courts follow the Penal Code as required, an offender sentenced for arson in Herat will receive a punishment similar—if not equal—to an offender sentenced for arson in Kabul. Of course, this does not mean absolute equality will be achieved. Differences will inevitably exist in the defendant’s circumstances, the disposition of presiding court, the effectiveness of the defendant’s counsel, and a wide variety of other factors. Still, all sentences should be approximately equal for the same crime under the Penal Code.

### 3. Aggravating Circumstances

The theory of aggravating and mitigating factors relies on the proposition that specific facts surrounding an offense should influence the punishment of the offender. In other words, society and the Penal Code recognize that not all crimes of a certain type merit equal punishment. Take theft for example. Ishan’s act of stealing a single bag of rice may be very different from Jafar’s theft of an entire herd of cattle, and it would be unfair to punish them equally. Instead, punishment should consider the *manner* in which the crimes were committed and the *history* and *background* of the persons involved. Facts that increase the severity of punishment are called *aggravating* factors, while factors that decrease the severity of punishment are called *mitigating* (or extenuating) factors.

#### Penal Code - Article 148 (Summarized)

The general aggravating conditions deemed particularly contemptible:

1. When the motive of the crime is low and corrupt;
2. When the crime takes place in realization of weakness of the senses of the person against whom a felony is committed or his inability to defend himself;
3. When the crime is committed in a savage manner or the person against whom a felony is committed has been disfigured;
4. When an official of public services, making use of his official prestige and influence, commits a crime;
5. When, making use of the state of economic crisis, crime is committed.

The existence of any of these factors empowers a judge to substantially *increase* the punishment for the perpetrator. Articles 149-151 illuminate the severity of the punishments handed down under such circumstances.

Habitual criminal perpetrators, or recidivists, possess a distinct threat to society due to their demonstrated unwillingness to reform their behavior. Thus, the Penal Code generally treats them more harshly than first-time offenders convicted of the same offense. Article 152 defines a

recidivist as either “1) A person who has been sentenced to a punishment for committing felony and commits felony or misdemeanor after the issuance of final verdict and prior to the deadline fixed by the law for restoration of honor;” or “2) A person who has been sentenced for committing misdemeanor and commits a felony after the issuance of final verdict and prior to the expiration of the deadline fixed by law for restoration. While recidivists are subject to increased punishment, the Penal Code also establishes limits on the timeframe in which this counts as an aggravating factor—both at the beginning (crime must occur after the final verdict) and at the end (crime must occur before the restoration of honor).

Article 159 of the Penal Codes outlines the increased ramifications of recidivist criminal activity. The Code stipulates that when an individual is found guilty of “committing a crime and later is sentenced to punishments for committing another crime, both punishments shall be implemented one after another, even if the total period of imprisonment exceeds twenty years.” This provision removes the twenty-year limitation for multiple unrelated crimes in Article 158. In short, the principle of accumulating punishment applies because a recidivist bears liability for the accumulated punishments for all crimes he or she has committed.

Multiple crimes also function as aggravating circumstances in two ways: moral and material multiplicity. *Moral multiplicity* involves a single criminal act with multiple criminal titles. For example, assaulting a prominent citizen can be both an insult and an assault. According to Article 155 “the wrongdoer shall be sentenced to the punishment of the crime with the heaviest punishment; if the anticipated punishments are similar, he shall be sentenced to one of them.”

*Material multiplicity* stems from committing a variety of crimes. Sometimes it is possible that all multiple crimes are committed with one aim in mind. In such a case, according to Article 156, “the court shall order the anticipated punishment of each crime but stipulate the enforcement of only the heaviest punishment.” Related consequential and complementary punishments, however, still apply. When the multiple crimes are not interrelated, the court will define a punishment for each of them, and the punishments will take place in a way that will not hamper the possibility of the next punishment (Article 158).

For illegal acts punishable by imprisonment, the total period of incarceration cannot exceed 20 years unless the criminal qualifies as a recidivist under Article 159. In other articles, the Penal Code mentions other aggravating factors, such as using a weapon during a crime, committing a crime between the hours of dusk and dawn, and engaging in group criminality (Articles 431-432).

#### **4. Mitigating Circumstances**

The Penal Code recognizes that certain extenuating factors, known as mitigating circumstances, may justify *reducing* the magnitude of the punishment a criminal perpetrator receives. Penal Code Articles 141 through 147 address these issues. For example, Article 141 provides that “honorable motives,” “unlawful incitement of the person against whom the crime has been committed,” and judicial inference based on the totality of the circumstances, are three

valid mitigating factors. Other possible mitigating factors include efforts by the defendant to limit the crime's impact, whether the defendant has been forgiven by the victim, whether the crime constituted the offender's first offense, and whether the defendant has a history of public service or admirable service in the armed forces. Article 143 notes that in cases where the perpetrator faces potential execution, imprisonment may be substituted. In instances of crimes punishable by imprisonment, the length of the sentence can be decreased significantly.

If an individual, for instance, assaulted his neighbor after years of being beaten, insulted, and generally abused by that same neighbor, the presiding judge may view the victim's past behavior as a mitigating factor. In other words, the attack was not legally justified or excused. Still, in the interest of justice and mercy, the judge may determine the crime should not be punished as harshly as the typical assault case where the attacker acted with unprovoked malice.

### Discussion Questions

1. What are the advantages and disadvantages of a clearly identified and legislatively mandated theory of punishment?
2. As discussed in this section, one of the products of mandatory sentencing ranges is the standardization of punishment. Is this fair to defendants? In other words, should judges be allowed to institute punishments more or less severe than the sentence range if they believe it is necessary? Does the aggravating factor and mitigating factor system give judges the flexibility they need? Alternatively, does it give judges too much power?

## 5. Appellate Review

The trial courts' judgments are not necessarily definitive. The Penal Code recognizes that a variety of mistakes can be made during the criminal trial process. Thus, appellate court review is essential to ensure that the criminal justice system is as fair as possible. The International Covenant on Civil and Political Rights, to which Afghanistan is a signatory, provides for appellate review as a fundamental human right. Specifically, Article 14 (5) stipulates: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." To ensure Afghanistan's compliance with its treaty obligations and to help ensure more just judicial outcomes, the Afghan government established a system of appellate courts to review the decisions of lower tribunals. The appeals process also features some negative externalities. It can dramatically increase costs and provide for continued uncertainty. Further, the reviewing court often knows significantly less about the nuances of the case. Still, on the whole, an appeals process is essential for any fair system of criminal justice.

After a judgment is reached, both the government and the defendant's counsel have *twenty days* to file an appeal challenging the grounds for the decision and the sentence. If the accused remains in government custody, the court hearing the appeal has two months from the trial court's decision to hold any proceedings and reach a decision on the merit of the appeal. If the appeals court does not reach a decision within the 20 day timeframe, the defendant must be

released. In circumstances where the defendant is no longer in custody, the appeals court may take longer than 20 days.

### **Discussion Questions**

1. Is it fair that the defendant and the government have the right to appeal sentences? What are costs and benefits associated with this system?
2. Why are time limits important in the appeals process?

The Supreme Court serves as the court of final appeal. The prosecutor, defendant, and the victim of the charged crime all possess the right to file an appeal to the Supreme Court within 30 days of the appeals court's decision. Of course, very few cases ever make it the Supreme Court. The Supreme Court is limited to errors of law. Thus, the Supreme Court can only review inaccuracies in the lower court's application or interpretation of the relevant law or other legal improprieties, such as the admission of evidence that should have been excluded due to the government's violation of criminal procedure requirements. The Court cannot review disputed fact such as mistakes in the evaluation of facts or reliability of witnesses. The Supreme Court has three basic options: 1) it may accept the appeal court's verdict in its entirety; 2) it may accept the verdict with some modifications in reasoning; or 3) it may nullify all or part of the verdict and remand the case back to the trial court for further proceedings consistent with the Supreme Court's decision.

## **6. Alternatives to Traditional Punishments – Alternative Dispute Resolution**

Even at its best, the criminal justice process can be expensive, uncertain, and time consuming. Alternative dispute resolution (ADR) includes conflict resolution processes and techniques that fall outside of the government judicial process. While most commonly used for civil disputes, it also has potential for crime matters, particularly less serious crimes. Mediation and arbitration can offer quick, fair, and relatively inexpensive dispute resolution for participants, while significantly reducing case backlog and allowing courts to dedicate more time to the most important cases. Prior experience demonstrates that a mutually beneficial relationship between the formal court system and mediation can exist throughout the developing world. Equally important, such partnerships can offer a means of empowering individuals and promoting broader social change.

Not only has the public responded in an overwhelmingly positive manner to ADR in a variety of countries, but judges have responded with equal vigor by endorsing mediation and frequently referring court cases to community mediation. In societies such as Afghanistan, where the social fabric remains badly frayed, quick, legitimate, inexpensive, and effective resolution of disputes is vital to repair relationships and deliver social justice, particularly for disadvantaged individuals who all too often find the formal court system inaccessible or outright hostile.

A comprehensive Asian Development Bank study found promising results for ADR in a variety of developing and developed countries. The following describes the results of the study in Bangladesh. Note that the following describes the results of civil ADR, as criminal cases are almost always resolved in the court system. In the particular case of Afghanistan, where resources are scarce and government infrastructure is already stretched thin, it is important to contemplate the potential role of ADR in the formal criminal law system.

### **Alternative Dispute Resolution in Bangladesh**

Bangladesh presents a case of civil society pursuing alternatives to the courts, and of litigation playing a complementary role with respect to empowerment. Many Bangladeshi NGOs rely heavily on community mediation. They adapt *shalish*, a traditional form of mediation, to address family disputes, land issues, and other local problems. The Bangladesh study summarizes the rationale and nature of this approach: States are benefitted by widening the parameters of the machinery of justice by seeking to develop methods of dispute resolution that would ensure quality and accessibility. Confronted with various problems in accessing formal courts alternative mechanisms have evolved. The new methods of dispute settlement have many advantages, chief among them being informality, speed, absence of backlog, economy, privacy, harmony, and easy accessibility.

Currently, the most effective alternative method of dispute resolution seems to be NGO assisted community mediation, which offers a radical departure from judicial processes and the traditional *shalish*. This process encourages communication between parties, facilitates the identification of areas of dispute and controversy and assists the parties to achieve a resolution that is reached and defined by the parties themselves. As such, mediation is not coercive, but rather is a voluntary means by which parties can reach an accord. By encouraging parties to discuss their problems and to reach a compromise, mediation avoids the intractability and the one-sidedness that are inherent in legal actions.<sup>13</sup>

## **7. Prohibition against Double Jeopardy**

Now let us imagine that Asif has been charged with theft of some valuable jewelry. He is brought to trial. After a comprehensive and fair trial process, he is acquitted primarily due to lack of evidence. The verdict of “not guilty” is finalized and the appeals process runs its course. A month later, very clear evidence comes to light proving that Asif committed the crime that he was previously acquitted of committing. What should be done in this situation? Asif clearly committed an act worthy of stern punishment. At the same, time the judicial process has been exhausted and the verdict final.

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<sup>13</sup> Asian Development Bank, Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction, (2000).

While the outcome may be not satisfactory to you, Asif would most likely escape punishment—at least for the crimes for which he was initially charged and exonerated. Why? Because the Afghan government, like most states around the world, recognizes the prohibition against legal double jeopardy. The ban on double jeopardy stands for the proposition that no one should be tried or punished more than once for the same offense. The prohibition also recognizes that at some point the judicial process must end—even if the outcome is not as perfect as would have been hoped.

The logic behind the prohibition is simple: if a defendant is tried and acquitted and the appeals process has been exhausted, the government has no right to try him or her again in order to convict him. Accusing someone of committing a crime will disrupt his or her life, entail significant economic and personal hardship, and put his or her life and property in jeopardy. It is therefore proper that the government have a single opportunity to convict a defendant. To go beyond those proceedings would be unjust; no court case would ever be final, and individuals previously charged with crimes would live in constant fear of being charged with the same crime again and again until a conviction has been secured.

The principle, however, is not explicitly dealt with under the Constitution; the prohibition against double jeopardy is guaranteed by the government of Afghanistan’s binding commitment to uphold the International Covenant on Civil and Political Rights (ICCPR). Article 14 (7) of the ICCPR expressly forbids double jeopardy, stating: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

The Penal Code also features some related prohibitions dealing with judgments from foreign courts in Articles 19 and 20. It is worth noting, however, that Article 6 provides that courts are still allowed to force an individual to return “a good acquired through crime” to its owner (failing the original good, the perpetrator must instead return a good of equivalent value). The Penal Code also stipulates that “[a] person who inflicts a loss as a result of committing a crime shall be adjudged to compensation of the inflicted loss.” It is worth pondering whether these Penal Code provisions prevent miscarriages of justice by foreign courts or undercut the finality of foreign court judgments? Should all foreign court decisions be treated in the same way? How should foreign courts deal with Afghan court judgments that they might not fully agree with?

One final word of caution; even in the scenario outlined above, Asif may not completely escape punishment. Any related crimes that have since come to light or were not charged initially would still likely be subject to trial and potentially punishment. Thus, if Asif was not initially charged with trespassing and prosecutors later decided to charge him, he would likely still be able to face punishment for that crime (though not the theft for which he was originally charged).

### **Discussion Questions**

1. Is it right that a guilty person should avoid punishment merely because he was acquitted in a previous trial?

2. Why is the prohibition against double jeopardy important? What are the costs and benefits associated with it?

## II. SUBORDINATE/CONSEQUENTIAL PUNISHMENTS

Is it fair that certain provisions of the law should be applied based simply on the sentence received absent discretion in sentencing? While principal punishments are stipulated in the Code (though exact sentences may vary, as discussed above), convicted criminals may also be subject to consequential punishments. According to Penal Code Article 112, “[c]onsequential punishments are those to which the convicted person is subjected on the basis of provision of the law without its stipulation in the verdict of the court.” The rationale behind this provision is that anyone who has committed an act of a certain magnitude also deserves the related consequential punishments. Why would the Penal Code drafters want to make the loss of certain rights mandatory?

Perhaps the most important consequential punishment requires that individuals who have been “sentenced to continued or long imprisonment of more than ten years . . . also be deprived of” many important legal rights under the Penal Code. The suspended rights, under Article 113, include:

1. State employment;
2. Service in the armed forces;
3. Membership in parliament, municipalities, provisional and local councils;
4. Participation in elections as an elector;
5. Use of state titles;
6. Membership on the board of directors for banks and companies;
7. Executorship and trusteeship in transactions and claims;
8. Acting as a witness in contracts and transactions during the period of conviction;
9. Concluding contracts with state departments and/or obtaining concessions from the state;
10. Ownership of concession (license), editorship or chief-editorship;
11. Administration of goods and estate during the period of conviction, with the exception of dedication and will.

As long as the sentence is of sufficient duration (ten years), these stipulations apply regardless of the defendant’s individual circumstances. However, with permission of the judge, “deprivation from administration and possession of goods can be temporally lifted” in certain circumstances (Article 114). Does this provision risk undercutting the mandatory nature of the deprivation of rights? Or is it a reasonable accommodation based on the Penal Code drafters’ realization that they cannot foresee with certainty whether extenuating circumstances may exist for lifting the prohibitions? Does it make sense that only the restrictions on dealing with goods may be momentarily lifted?

The Penal Code also recognizes that property may still need to be administered by convicted individuals in some instances through a proxy process. Thus, Articles 115 and 116 provide details about how such a system should work in practice.

### III. COMPLEMENTARY PUNISHMENTS

Complementary punishments are prescribed for a convicted person according to the Penal Code. Article 117 of the Penal Code explains: “Complementary punishments are: 1) deprivation from some of the rights and privileges; 2) confiscation; 3) publicizing the ruling.” In contrast to principal and subordinate punishment, the judge has discretion about whether to authorize complimentary punishments.

Further, complimentary punishments are of limited duration. Under the terms of Article 118, which extends the *prohibitions* in Article 113 discussed above, a person subject to a substantial prison term may lose enumerated rights for at least one but no more than three additional years upon conviction.

All these roles involve important positions of public or private trust and authority. The Penal Code's prohibitions are based on the idea that an individual who has exhibited serious criminality cannot be trusted, at least temporarily, in certain roles—even if that person has served his or her prison term in full.

Article 119 provides more details about *confiscation* as a complementary punishment. Confiscation of “goods obtained through commitment of crime or used during the crime or procured for use in the commitment of crime” is allowed, even when not originally stipulated elsewhere in the criminal code, provided such confiscation does not “interfere with the rights of another person of good will.” The Penal Code attempts to ensure that criminals do not gain goods through illicit means or use materials to further criminal acts due to loopholes in the Penal Code.

Finally, *publication* may serve as a complementary punishment. After a verdict is finalized, the judge or attorney may request that the verdict be published (Article 120). The right to publication is limited. In crimes such as insult, abuse, and defamation, the victim must consent to the verdict’s publication to prevent the crime from causing further damage. Publication serves as a further deterrent to criminal activity. Furthermore, publication may play an important public safety role by informing communities about the criminal behavior of its members.

In all instances, the sentencing court possesses significant discretion in tailoring complimentary punishment to the nature of the crime. Thus, all complementary punishments are optional, and vary depending on individual circumstances, while principal punishments are mandatory.

### Discussion Questions

1. Think of the myriad of ways that convicted criminals are punished. What would happen if the court applied the rules with absolute uniformity to all individuals? What if judges just punished criminals as they saw fit independent of the Penal Code's requirements? How would such uneven application impact the substantive rights of defendants? How can a workable balance between uniformity and discretion be achieved?
2. What steps can, or should, be taken to ensure that lawyers and judges respect the Penal Code and other relevant laws while preserving the autonomy necessary to ensure that the punishment truly fits the crime?

#### IV. THE INFORMAL LEGAL SYSTEM

While this chapter focuses on punishment under the formal legal system, Afghanistan is a society defined by legal pluralism. In addition to formal written law, Afghanistan also has a robust assortment of informal (customary), and Islamic Laws. Informal institutions, most notably shuras and jirgas, play a crucial role in administering justice. Informed estimates suggest that as many as 90% of disputes are addressed through means other than the state judicial system. The formal system has been devastated by decades of conflict, and the informal system has addressed the pressing need for conflict resolution. For many Afghans, the informal system is often the sole avenue available for dispute resolution. Drawing upon local custom, tradition, and religious practices, these informal institutions have existed in Afghanistan for centuries and long predate the formal system.

Shuras (from Arabic meaning consultation) are local councils, either religious or secular, that are typically convened on an *ad hoc* basis to resolve disputes, or decide issues of community governance or resource management. The three principal types are: shuras of the ulama (Islamic scholars), shuras of elders, or shuras of local commanders. Jirgas are similar to shuras and more prevalent among Pashtun tribes. A jirga refers to a gathering of elders and other leaders who sit in a large circle to resolve a dispute or make collective decisions about an issue of community-wide importance. These informal institutions do not enforce the statutory civil or criminal laws of Afghanistan, but rather a combination of Islamic Law, customary tribal law, and the collective wisdom of elders.

“Informal” should not be conflated with “unsophisticated” or “unprincipled.” While local justice systems rely on oral tradition rather than written rules, the local processes often reflect a high degree of sophistication. This sophistication is visible in the decision-making processes of local systems, as well as the structures of those systems. In a typical jirga, for example, decisions are made according to well-developed understandings of morality and justice (such as *Pashtunwali*).<sup>14</sup> In some cases, an established system exists to appeal jirga decisions to a higher group of elders. Thus, Afghanistan's local adjudicatory systems share many of the “formalities”

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<sup>14</sup> *Pashtunwali* is an as a code of honor and non-written law the predates Islam and is followed by many Pashtun tribes living in Afghanistan and Pakistan.

of codified legal systems, and can rightly be viewed as institutions applying customary law. And while legal scholars may disagree as to the outcomes reached by the local adjudicatory systems—one major criticism is the manner in which women are treated by customary law—the dismissal of the local systems as primitive and crude is both inaccurate and unhelpful. After all, this type of law still governs the daily lives of most Afghans today, especially in areas outside the major cities. Given the challenges facing the operation of the formal legal system and the woeful state of the legal profession, the informal system seems set to dominate dispute resolution even in criminal matters—a domain where the state has sought exclusive authority for many decades.

The informal system provides some very real benefits. In areas where the Primary Court has a heavy case load and not enough judges, these alternative processes can help speed along the resolution of disputes in manner that is accepted by both parties and that preserves communal harmony. In some towns the Primary Court is not yet operating, so alternative processes are the only way for individuals to settle entrenched disputes. Many citizens of Afghanistan, especially in rural areas, turn to shuras or jirgas to resolve disputes because they are considered more fair, efficient, accessible, and cognizant of local values than the state system. Corruption, lack of accessibility, and slow response are three common complaints about the formal justice system. Finally, these alternative processes are community-based and can help solve disputes in a cooperative manner. The value of communal harmony is difficult to overstate in a land shaken by decades of conflict, especially in rural areas where individuals are heavily dependent on their neighbors for their daily livelihood.

Reliance on the informal system also produces certain significant negative externalities. Informal institutions do not possess the procedural safeguards, uniformity, and oversight present (at least theoretically) in traditional courts. They sometimes also suffer from a lack of transparency. Even more troubling, a 2004 Tufts University study found that “political armed groups, commanders, and militias have strategically targeted traditional and customary justice systems in some parts of rural Afghanistan in an attempt to exert control over local populations”—often with a high degree of success. While we are not aware of any comprehensive surveys of the operations of the informal system in the last five years, with the steadily deteriorating security situation over the last five years, there is little reason to suspect that the armed factions have less control. In fact, there is reason to fear that they have more.

While the informal system has played a vital role in helping to maintain Afghanistan’s delicate social fabric during decades of conflict, violence has taken a toll on the informal system. In other words, the problems of armed groups attempting to compromise the informal system is not new. The Taliban targeted the more traditional representative jirga system (at least for male Afghans) with its version of the shura system. This shift was part of a related change in which the operation of customary law was constricted by conservative clerics, often trained in Pakistan, before the Taliban implemented a flat ban on the use of customary law.

Despite protections supposedly offered by international law, the Constitution, Islamic Law, and various provisions of the criminal statutes of Afghanistan, many local systems still deprive women of equal protection under the law. While violence and abuse of women reached

its height under the Taliban regime, women have frequently been victims of abuse throughout recent Afghan history. Despite ongoing abuses, the current situation has improved women's rights in the vast majority of the country. As the United Nations Human Rights Council has noted, "women have made important advances in the spheres of education, employment, and political participation." Nevertheless, "they continue to confront discriminatory laws, attitudes, and practices." The systematic abuse women suffer as a result of customary law ranks among the strongest reason to favor the formal courts. At the same time, evidence suggests that that women may face systematic (though less extreme) discrimination within the formal court system as well.

On a more abstract level, the prevalence and popularity of the informal justice system has had decidedly negative consequences for Afghanistan's state-building efforts. The ability to rely on the informal system, despite the very real benefits, has hindered the efforts to construct a workable state outside the population centers. As Thomas Barfield explains, "the Afghan population has remained opposed to the state systems of justice, which they see as less an extension of the rule of law and more as an imposition of state." State-building efforts have further been hindered by the fact that Afghans have frequently associated the state and the legal system with rampant corruption and abuse of power.

Addressing this dilemma in a way that satisfies the concerns of both the state and local systems presents a major difficulty. One possible solution would be to adopt principles of the alternative system, mediation and collaboration, into the state system. Another possible solution is to "formalize" the local systems by explicitly recognizing them through statute, reforming their treatment of women, and giving them recognized competency to deal with certain types of disputes.

Many other methods of integrating the two systems have been proposed, but for all the proposals, little progress has been made towards integration. The continuing existence of two separate justice systems—three, if one considers Islamic courts as separate from the state courts—is an ongoing problem, and one that is unlikely to be resolved without a serious commitment from all stakeholders. Overall, the divisions between the different systems ensure that the judicial system in Afghanistan remains adrift and ambiguous.

### **Discussion Questions**

1. Do the benefits of the dual justice systems outweigh the costs? What is the best approach to reconcile the divergent systems?
2. Is there a way to increase the procedural protections afforded participants and ensure that all individuals receive the same treatment in the informal system while still respecting community norms? What reforms, if any, would you suggest to improve the operations of the informal justice system?

## **CONCLUSION**

In this chapter, we have discussed various aspects of punishment in the criminal justice system of Afghanistan. In particular, we have covered the three major types of punishments: principal, subordinate, and complimentary. You became familiar with some of the most important aggravating and mitigating circumstances and the idea that the punishment should fit the crime committed. Further, the chapter provided an introduction to the appeals process. Knowledge of these areas will provide crucial background for the forthcoming discussion of specific crimes. Most importantly, you were given the tools needed to critically examine the punishment of criminal wrongdoing in Afghanistan, as well as potential improvements to the system.

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## CHAPTER 5: SUBSTANTIVE CRIMES IN AFGHAN CRIMINAL LAW



Goran Tomasevic/Reuters

## I. INTRODUCTION

Suppose you are listening to a lecture and writing in your notebook. All of a sudden your professor stops speaking and asks you to leave the room. Taken aback, you ask the professor why you should leave. Your professor responds she does not allow students to write while she is speaking, and that the punishment for doing so is expulsion from the lecture. You state you have been taking notes in her class for weeks, but the professor replies she has just proclaimed a new rule and your punishment will put the rest of the class on notice. Are the professor's actions fair?

Now imagine someone in your community commits a brutal, high-profile murder. Understandably, there is tremendous public attention on the trial of the accused. Part of the intense scrutiny settles on the applicable murder laws, which the community feels are far too lenient. As a result, they lobby the legislature to enact a new law that will ensure the defendant is subject to a longer prison sentence than the sentence in force at the time he committed the crime. Is such a law legitimate?

According to basic principles of criminal law, neither the Professor's nor the legislature's actions are fair. Specifically, they would both violate the principle of legality. This chapter will begin with a short discussion of legality and its requirements, as well as the related concept of statutory interpretation. Together, we will examine the origins of valid law (who creates it? who defines the law?) and discuss how Afghanistan grapples with these issues.

Following these introductory points, the chapter will turn to the sources of criminal law. There are two primary sources of penal law in Afghanistan. The first is classical Islamic Law. The second is the statutory criminal law of Afghanistan, as embodied in the Penal Code and supporting statutes. The two strands interact in complex and important ways—their relationship is one of mutual influence as both define and punish many of the crimes we will discuss later.

The following sections will be devoted to a careful examination of substantive crimes. First, we will investigate the influence of Islamic Law and the crimes that are defined by its teachings, including *hudud*, *qisas*, and *ta'azir*. We will then spend the great majority of this chapter looking at the law as it exists in the Penal Code and various other statutes. We will look closely at crimes against the state (bribery and corruption, drug cultivation/trafficking, terrorist financing, and money laundering), crimes against the person (homicide, assault and battery, robbery, kidnapping, and rape), and crimes against property (embezzlement, larceny, burglary, and fraud). Finally, we will briefly examine how defendants contest charges of criminal wrongdoing through defense lawyers.

The goal of this chapter is to introduce you to the most important substantive laws, their elements, and their application to life in Afghanistan. By its conclusion, you should be aware of the major problems facing the Afghan criminal justice system, be able to identify the most prominent and widespread crimes, and be ready to ask critical questions about the drafting and application of certain laws.

## 1. Legality

In both of the scenarios described above, the principle of legality would preclude the action in question—expulsion from class or retroactively increasing punishment. Legality is meant to ensure that all laws are clear, ascertainable, and do not increase punishment retroactively. Specifically, legality limits the power of the state to act arbitrarily or to reach beyond its constitutionally defined boundaries. Although discussed in Chapter 1, it is important to return to the concept of legality here, as it will guide our discussion of each substantive criminal law.

In the context of criminal law, the principle of legality comprises several elements. Together the elements ensure that no individual is incriminated or punished unless there is a legal text that specifically defines both the crime and the punishment in question. Legality also means a judge may not punish a defendant unless the legally required evidence exists.

The various components are meant to guarantee citizens the right to *fair notice*. With notice, individuals can avoid criminal conduct if they so choose, while the state can punish those who chose otherwise and violate the law.

### Legality in Afghan Law

Legality is embodied in Article 27 of the Constitution. The Article states: “No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense.” It states further that: “No one shall be punished without the decision of an authoritative court taken in accordance with provisions of the law, promulgated prior to commitment of the offense.”

Islamic thought also espouses the principle of legality. Islamic Law prohibits arbitrary and unjust rules. Decisions and actions in an Islamic polity arise out of the commands of classical Islamic Law and its modern interpretation, not caprice. The *ulama* have unanimously held that heads of state and government officials are accountable for their conduct. They are bound by public law and the decisions of courts of justice, and they cannot create laws

This chapter will consider how the principle of legality is met through both Islamic and statutory law. The chapter not only introduces statutes that will assist you in your practice but will also teach some of the most prominent and important criminal offenses. In doing so, it is necessary to examine both Islamic Law and secular criminal law to provide a thorough, though by no means comprehensive, overview of substantive criminal law in Afghanistan.

## 2. Statutory Interpretation

In the sections that follow we will examine how Afghan criminal law satisfies the requirement of legality. One of the most fundamental ways of meeting this requirement is through carefully drafted laws. But the Penal Code and its supporting statutes are not always perfectly clear. They are often open to multiple interpretations and applications.

As a result, both judges and practitioners must interpret the meaning of laws and determine how they are to be applied. This process is known as statutory interpretation. Simply put, statutory interpretation is the practice of interpreting and applying legislation. For instance, what if a law states: “No vehicles on this land.” Would a child riding a tricycle be violating the law? The answer depends on the meaning attributed to the word “vehicle.”

The first step in statutory interpretation is to put ambiguous language into context. What was the law a response to? If the law had been passed to eliminate the use of pickup trucks on the land, “vehicle” seems to cover automobiles only. If, however, the law was intended to restrict bicycle activity on the land and to allow farmers unfettered access to the paths, the word may mean something wholly different. In making this determination one can examine the history of the legislation. Did it modify a previous Penal Code Article or law that was clearer, perhaps stating “no cars or trucks on the land?” If so, its history will be a clear indication of the meaning of “vehicle.”

If, however, the history of the law is unclear, it is the obligation of the judge or lawyer to posit a purpose behind the law. The use of hypothetical examples and analogies are useful in supporting one’s argument. In fact, attorneys (as well as judges) should attempt to give meaning to the words in a way that best accomplishes the social purposes of the act, as they see them. If you represent the tricycle-riding child, you can use ideas of fairness, to make a compelling argument that the law was not intended to punish children.

## **PART 1: ISLAMIC LAW SOURCES OF AFGHAN CRIMINAL LAW**

Islamic Law guides all aspects of Afghan criminal law, from the Constitution to the Penal Code and its individual statutes. Therefore, this textbook would not be complete without a discussion of Islamic Law and its place in Afghanistan’s criminal law. For purposes of this book, we have no intention of “taking sides” normatively or detracting from the important debates among Islamic Law scholars. Indeed, no portion of this book is meant to be disrespectful to any believer.

The reader should be aware that there is a substantial disagreement among scholars regarding the interpretation and punishment of crimes under Islamic Law. Indeed, the translation of the Qur’an itself can be a strong source of contention. Instead of taking part in these debates, this textbook attempts to lay out a very basic overview of Islamic Law and its influence on Afghanistan’s criminal law. We hope that our readers will appreciate and further investigate this complex relationship by studying many of the nuanced interpretations.

While codification plays an important role in defining and publicizing criminal law, all law in Afghanistan, including the Penal Code, strives for consistency with Islamic Law. As discussed below, it wasn’t until the 1930s that civil statutes began to emerge. And it wasn’t until the 1960s that the government of Afghanistan made any sustained efforts to codify the country’s criminal law. These efforts were at all times influenced and directed by the dictates of Islamic Law.

Even in the modern movement toward codification, there is an explicit recognition of Islamic Law. Article 1 of the Penal Code states: “This law regulates the ‘*ta’azir*’ crime and penalties. Those committing the crimes of ‘*hudud*,’ ‘*qisas*,’ and ‘*diat*’ shall be punished in accordance with the provisions of Islamic religious law (the *Hanafi* religious jurisprudence).”

The Constitution reserves a similar role for Islamic jurisprudence in the criminal justice system. Article 3 of the Constitution states “no law may be contrary to the beliefs and provisions of the sacred religion of Islam.” Very generally, these beliefs and provisions include the Five Pillars of Islam: belief (*Iman*), worship (*Salat*), fasting (*Sawm*), almsgiving (*Zakat*), and pilgrimage (*Hajj*).

Islamic Law has four principle sources. They are distinct yet related elements that manifest God’s will and represent the roots of jurisprudence. They are (1) the word of God himself in the *Qur’an*; (2) the divinely inspired conduct (*sunna*) of the Prophet; (3) reasoning by analogy (*qiyas*); and (4) consensus of opinion by qualified legal scholars in a given generation (*ijma*).

It goes without saying that a detailed analysis of Islamic penal law merits a textbook of its own. So while a comprehensive analysis of Islamic Law is beyond the scope of this chapter, it is important to understand the role of Islamic Law and its relationship with the criminal law of Afghanistan. The discussion that follows, therefore, is only meant to be an introduction.

### *The Origins of Islamic Law*

*Shari’a* literally means “a way to the watering place” or “a path to seek felicity and salvation.” The word appears only once in the *Qur’an*. The verse reads: “Thus we put you on a right way [*shari’atin*] of religion. So follow it and follow not the whimsical desire (*hawa*) of those who have no knowledge.” (45:18).

Because there was no Islamic penal law at the time of revelation, the *Qur’an* literally refers to belief in Islam. The principles and injunctions of the *Qur’an* are regarded as the highest source of guidance, a form of canon law for Islam which includes the totality of Allah’s commandments. According to Islamic thought, all other authority to make laws and render legal opinions flows from the *Qur’an* and its principles.

Following the death of Muhammad (PBUH), various schools of jurisprudential thought emerged, each with important differences in the ways they interpret Islamic Law. Today the Constitution of Afghanistan recognizes the *Hanafi* School of jurisprudence. This school was established upon the rules and *Qur’anic* interpretations of Abu Hanifa. The *Hanafi* School presently has one of largest followings of any jurisprudential school, with some estimating as many as one third of Muslims worldwide adhering to its teachings.

While there are nuances to the various histories of Abu Hanifa’s life, the legal perspective details that he was born in the city of Kufa (Iraq) and lived from 702 to 767 C.E. In his formative years, he studied under Hammad ibn Zayd, a renowned scholar of *Hadith*. As a

teacher himself, Imam Hanifa was one of the most highly respected scholars of his day, stressing the need to employ consultation, discussion, and critical analysis in order to solve legal problems. As a result, the *Hanafi* School is considered among the most humanitarian of all the jurisprudential schools, as it is lenient in its penal law and inclusive of non-Muslims.

The manifestations of Islamic Law are discussed in the next section, where we consider the substance of Islamic criminal laws, specifically those classified as *hudud* and *qisas*.

### Islamic Criminal Law

Under the *Hanafi* School of Islamic Law, crimes are classified in three ways: *hudud*, *qisas*, and *ta'azir*. Generally, Islamic criminal law is remarkably flexible in terms of punishments and enforcement. The notable exceptions are *hudud* crimes. *Hudud* offenses are deemed the most serious transgressions of Islamic penal law and, as a result, their enforcement and punishments are wholly inflexible.

Most of Islamic criminal law, however, remains open to the exercise of policy considerations and, as with *ta'azir* crimes, may even have discretionary enforcement. Unlike purely devotional matters, which are regulated by the text of the *Qur'an*, criminal punishments are more open to issues of public interest and legal reasoning. Indeed, Islamic Law has been interpreted to lay down basic rules and leave other facets of life to be regulated by secular legislation. In this way, Islamic Law leaves room for development of laws based on government interests, societal needs, and customs of the state.

## **I. HUDUD CRIMES**

*Hudud* crimes are the most serious crimes in Islamic penal law.<sup>15</sup> Because they are specifically mentioned in the *Qur'an*, the commission of a *hadd* offense is considered a transgression of the limits which God has placed on human behavior. Modern jurists interpret a *hadd* to represent a crime against the public interest and against the basic foundations of the state. Since *hudud* penalties are defined by the *Qur'an* and the *Sunna* of the Prophet, prosecution is mandatory and punishment must be imposed exactly as prescribed. Once proven guilty, a *hadd* offender cannot be subject to forgiveness or pardon.

Muslim jurists and Islamic scholars agree on five *hudud* crimes: (1) theft, (2) adultery, (3) highway robbery, (4) drinking alcohol, and (5) defamation, particularly with regard to accusations of un-chastity. Two other crimes are often included among the *hudud* offenses: apostasy and rebellion.

Despite mandatory penalties, the standard of proof in *hudud* cases is quite demanding. For most crimes, including adultery, witnesses must corroborate any claim before guilt can be

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<sup>15</sup> *Hadd* is the singular version of *hudud*.

established. Witness veracity is evaluated in terms of gender, community standing, the content of the statement, and the number of witnesses present.

Punishment for a *hadd* offense is only tempered when the accused repents prior to arrest. For instance, if a thief repents and returns stolen property before the sentence is executed, the *hadd* lapses.

### **Islamic Law and *Hudud* Crimes: A Commentary**

“Frequently, commentators criticize Islamic Law as a rigid, cruel and archaic law that employs corporal punishment regularly to deal with social problems. Typically, the attack on Islamic Law takes the form of stating the offense along with its severest punishment . . .

These types of criticisms are methodologically lacking. The rationale of the punishment, the recognized zone of harm, and the limitation of the punishment rarely appear in the typical criticism. For instance, Islamic Law employs a general deterrence approach in its fullest sense by prescribing tough punishment for offenses; however, the execution of the punishment is conditional upon fulfillment of a number of rigorous conditions that are difficult to meet. If these strict conditions are not met, the punishment ought to be commuted to a lesser punishment. Moreover, any doubt is sufficient to preclude the stricter, original punishment.

On the other hand, the Islamic legislature identifies a zone of harm different from other legislatures. Larceny offenses are an example. It is obvious that the legislature employs an escalating scale depending upon the amount of harm caused. The greatest social harm appears when actors kill in the course of stealing. In this case, the threat is not limited to the victim(s) but rather to the safety and security of the entire society. When the harm is limited to the actor and victim(s) . . . the tough punishment is not appropriate and the corporal punishment for theft is commuted to a lesser punishment. This analysis is an example of the jurisprudence overlooked by Islamic Law critics . . . .”<sup>16</sup>

### **Discussion Questions**

1. Do you agree with this analysis? Do the harsh punishments have deterrence value? What are the negative consequences of such harsh punishments? Do they matter?
2. Are there other ways a criminal justice system can deter crime? Education? Social welfare programs? Rehabilitation? What does each have to offer? What does each lack?

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<sup>16</sup> Hisham M. Ramadan, Larceny Offenses in Islamic Law, Michigan State Law Review (2006).

In the following sections we will evaluate the seven forms of *Hudud*, their elements, and the mandated punishments. It is important to think carefully about the scope of each crime and the tremendous burdens placed on victims.

## 1. Theft

Theft is an act of taking another's property without lawful claim to it. The *hudud* crime of theft is subject to the following conditions:

### Elements

To qualify for a *hadd* punishment, the thief must be a sane adult. If he or she is not an adult, a *hadd* punishment will not apply and *ta'azir* punishment will take its place<sup>17</sup>. Importantly, the thief must have committed the act voluntarily. If the act is committed under duress or because of hunger or emergency, a *hadd* punishment will not be inflicted. Similarly, the stolen property must have been lawful in and of itself. If the stolen item is unlawful like wine or pork, neither a *hadd* punishment nor *ta'azir* punishment is inflicted. If the property is taken from a non-Muslim, however, it must be returned or fully compensated, even if it is wine or pork.

Further elements include: (1) the stolen property must be owned by an individual. If the theft is of either common commodities or government property, a *hadd* punishment is not inflicted. (2) The item must have been in a place where people normally keep their property. Carelessness or negligence by the legal owner will negate a *hadd* punishment. And (3) the stolen property must be of a minimum value when stolen. According to the *Hanafi* School, punishment for theft cannot be inflicted unless the value of the stolen property is ten dirhams. Theft of paltry sums, including edibles, is not subject to a *hadd* punishment.

### Burden of Proof

Before an offense of theft can be punished, it must be proved by the testimony of two reliable male witnesses, or by a voluntary confession made by the accused. The confession must be spontaneous, voluntary, and made twice before a court. Importantly, the offense of theft must be reported to proper authorities by the victim. Until the actual victim formally complains, an offender cannot be prosecuted.

### Punishment

The prescribed punishment for theft appears in the *Qur'an*: "as to the thief, male or female, cut off his or her hands as punishment by way of example from Allah for their crime" (5:4). The *Hanafi* School holds that a first time thief should lose his right hand. A second time offender is to lose his left foot. In the case of further thefts, the thief will be imprisoned until he

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<sup>17</sup> *Ta'azir* crimes are discussed in more depth later in this chapter.

shows repentance. In addition to the punitive damages of amputation, stolen property is returned to the rightful owner, if it is available.

### Discussion Questions

1. Is the “value” of property determined subjectively or objectively?
2. One commenter has suggested that the punishment of amputation is “likened to amputating the limb that suffers from cancer to save the entire body . . . it is necessary to achieve its purpose.” Do you agree with this analysis? How else could the society deter and rehabilitate?<sup>18</sup>

## 2. Adultery and Fornication (*Zina*)

The offense of *zina* is most commonly interpreted as sexual intercourse between a man and a woman outside the legal relationship of marriage. The offense, however, also includes rape and adultery. Unlike other schools of Islamic Law jurisprudence, the *Hanafi* School does not include sodomy within *hudud* provisions.

Adultery and fornication are distinguished by the offenders’ marital status. If either party is married, it is adultery. If both are unmarried, it is considered fornication. The classification greatly affects punishment, with married persons receiving death by stoning and unmarried persons receiving flogging.

### Elements

Offenders of *zina* can only be punished if they are sane adults and the act is committed voluntarily. If a woman is forced to have sex, it is considered rape, though the burden of proof remains the same (discussed below). To qualify for any form of *zina*, the offenders must be Muslims. The *Hanafi* School applies *hudud* to Muslims only. Non-Muslims receive lashings for offenses like adultery or fornication. Finally, to qualify for adultery, the offenders must not only be legally married, but also have sexually consummated the marriage with their spouses.

### Burden of Proof

To convict a defendant of *zina*, the accusing party must provide (1) the testimony of four trustworthy (i.e., of impeccable character) male Muslims; (2) each witness must have been present at the time of the offense; and (3) the witnesses must have seen the actual act of penetration. There cannot be the slightest shadow of doubt regarding the veracity of the witnesses’ testimony.

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<sup>18</sup> Hisham M. Ramadan, Larceny Offenses in Islamic Law, Michigan State Law Review (2006).

*Zina* can also be proven by a confession, though confessions are also subject to rigorous standards. A confession of *zina* must be voluntarily made on four separate occasions before the court. The individual must be aware of the nature of the offence and of the prescribed punishment. An unmarried woman's pregnancy is circumstantial evidence only, and cannot stand as a confession in itself.

### Punishment

As mentioned above, punishments will vary depending on how an act of *zina* is classified between adultery and fornication. If the act qualifies as fornication, the punishment is 100 lashes. While some jurisprudence suggests an offender should serve one year in exile, the *Hanafi* School does not require exile, citing the applicable verse's language as support.<sup>19</sup> If the offense is adultery, offenders are subject to death by stoning. The distinction arises from the belief that married individuals have no reason to commit *zina*, since they have access to lawful sexual relations with their spouses. Because a similar opportunity is not available to the unmarried, their punishment is more lenient.

A rapist is punished with stoning to death if he is married, or was previously married. If the perpetrator is unmarried, he is punished with 100 lashes and one year in prison (originally exile). The rape victim will also receive damages as a means of compensation. The compensation is often calculated as her bride price, had she not been raped.

### **3. Highway Robbery**

We will discuss robbery in some detail in the section on crimes against the person, but generally stated robbery is the unlawful taking of money, goods, or other personal property by violence, intimidation, fear, threat, or extortion. There is divergence among jurists as to whether the offence can only relate to robbery on the highway or whether robbery in urban areas is also included.

### Elements

To qualify for punishment, an offender must be a sane adult. In the *Hanafi* School, that offender must also be a man, as women only qualify for *ta'azir* offenses of highway robbery. Further, the robbery must take place on the highway or outside towns and villages. Robbery within towns and villages does not traditionally qualify as a *hadd* offense because "rescue" is presumed to be available. Finally, the robbery must take place through the use of force, or the threat of force.

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<sup>19</sup> "The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the Last Day: and let a party of believers witness their punishment." Chapter 24, verse 2.

### Burden of Proof

Highway robbery is proved either by confession of the accused or the testimony of two reliable witnesses. Because highway robbery is an offense that almost necessarily takes place in the absence of any witnesses, the victims may act as witnesses.

### Punishment

Offenders convicted of highway robbery are subject to one of several punishments. Judges have some discretion to impose the punishment they think is most appropriate given the facts of individual cases. The available penalties include (1) crucifixion—if the offender kills the victim and takes property; (2) death—if the offender kills the victim but does not take property; (3) cutting off a foot and a hand—if the offender takes property with violence but does not kill the victim; and (4) exile—if property is not taken and the victim is not killed, but the road is made unsafe.

The *Hanafi* School specifies other details. For instance, capital punishment can be inflicted by the sword or by the gun. The *Hanafi* School requires that crucifixion take place with the offender alive, and subsequent to crucifixion, that offender is to be impaled by a javelin.

These punishments are harsh because highway robbery is considered one of the most atrocious crimes imaginable. It is believed to represent war against Allah and His Messenger. That war spreads mischief, horror, breaches of public peace, mutiny, sedition, and riotous tumult in the world.

## **4. Drinking Alcohol**

In early Islamic jurisprudence moderate consumption of alcohol was allowed and prohibition only applied to situations like prayer ceremonies.<sup>20</sup> Over time, that prohibition became total and absolute.<sup>21</sup> Today, Islamic jurists consider the prohibition to apply with equal force to the use of drugs.

The traditional reasons given to support the prohibition of drinking include: (1) it causes harmful effects on one's physical and mental well being; (2) it causes constant rivalry and friction between social groups, ultimately leading to destruction; (3) it causes neglect of religion, work, and family; and (4) it encourages extravagance, wastefulness, and luxurious living.

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<sup>20</sup> "O ye who believe! Approach not prayers with a mind befogged [or while you are drunk], until ye can understand All that ye say." (4:43).

<sup>21</sup> "O ye who believe! Intoxicants and gambling, [dedication of] stones, and [divination by] arrows, are an abomination, of Satan's handiwork: Eschew such [abomination], That ye may prosper. Satan's plan is[but] to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of God, and from prayer: Will ye not then abstain? Obey God and obey the Apostle, and beware [of evil]: If ye turn back, know ye that it is Our Apostle's duty to proclaim [the Message] in the clearest manner." (5:90-2).

### Elements

To be convicted of the *hudud* offense for drinking alcohol, an offender must be both a sane adult and a Muslim. If the offender is a non-Muslim, no crime is committed and the possession of wine as a form of property is allowed. Finally, the alcohol must be consumed voluntary. Involuntary consumption excuses the offender from any criminal responsibility.

### Burden of Proof

The crime of alcohol consumption can be established with the testimony of two reliable witnesses who saw the accused drink, or who could smell alcohol on the accused. Confession also substantiates a charge of drinking alcohol.

### Punishment

The penalty for drinking alcohol is eighty lashes. Each repeat offense also receives eighty lashes.

#### **Commentary: Alcohol Consumption as a Societal Problem**

“Mankind has not suffered any greater calamity than that brought about by the use of alcohol. If statistics were collected worldwide of all the patients in hospitals who, due to alcohol are suffering from mental disorders, delirium tremens, nervous breakdowns, and ailments of the digestive tract, to which are added the statistics of suicides, homicides, bankruptcies, sales of properties, and broken homes related to the consumption of alcohol, the number of such cases would be so staggering that, in comparison to it, all exhortation and preaching against drinking would seem too little.”<sup>22</sup>

#### **Discussion Questions**

1. Do you find this argument compelling? What are its merits?
2. Should all societies (even non-Muslim societies) treat alcohol consumption as a serious societal problem? Why or why not?
3. Should governments also use rehabilitation programs to aid those who consume alcohol?

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<sup>22</sup> al-Qaradawi, Yusuf, *The Lawful and the Prohibited in Islam*, 70 (1984; I.I.F.S.O., Kuwait).

## 5. Defamation

The crime of defamation is closely related to accusations of unchastity. An individual who levels a charge of unlawful sexual intercourse must be able to substantiate that claim by producing four eye witnesses.<sup>23</sup> False accusations related to theft, drinking, or other crimes do not fall under *hudud* defamation, but are eligible for prosecution under *ta'azir*. Both men and women can be punished for false accusations against a chaste individual of either sex.

The purpose of the defamation offense is to protect the integrity and good reputation of upstanding individuals and to deter the reckless leveling of false charges. The prohibition has the far reaching objectives, therefore, of protecting the traditional concept of family.

### Elements – the Offender, the Victim, and the Statement

Unlike most of the *hudud* offenses, defamation has a range of elements for accuser, accused, and accusation. First, the accuser must be a sane adult who voluntarily uttered slanderous statements. To fall within the scope of the prohibition, the accuser cannot be the father, grandfather, or great grandfather to the victim of the slander. Finally, an offender who utters the defamatory statements while drunk cannot be punished under *hudud* for the statement itself, though the underlying crime of drinking alcohol may be punishable under *hudud*.

Second, the victim of a defamatory statement must be sane, Muslim and “chaste.” Chastity refers to the possession of a pure and blameless character, including not having cohabitated with a member of the opposite sex, outside of the family, before marriage. The victim of the slander must also be in possession of his reproductive organs. If the slandered individual has, for some reason, lost his reproductive organs, the offender will only be punished with *ta'azir*. Finally, the victim must be publically known and identified, unless the offender addresses a congregation of people (i.e., “you are all adulterers”). *Hudud* applies in both instances.

Third, the actual accusation must satisfy certain elements. For instance, the accusation must be objectively unambiguous, clear in its terms, and directly and explicitly offered. If a defamatory statement is implied or insinuated, a *hadd* punishment is not imposed and a *ta'azir* punishment applies instead. In addition, the statement must be spoken in a language that is understood in the locality, though it does not matter if the statement is made publicly or in secret. Finally, if the defamatory statement is made by the husband or wife of the victim, the accusation can be substantiated without the use of witnesses. The spouse can utilize *lian* (double testimony) through which testimony is counted multiple times. To use *lian*, the spouse must take an oath invoking the curse of God upon them in the event that they are lying.

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<sup>23</sup> “And those who launch a charge against chaste women [or men], and produce not four witnesses to support their allegations, flog them with eighty stripes, and reject their evidence even after; four such men are wicked transgressors” (Chapter 24, verse 4).

### Burden of Proof

A defamation offense can be established with the testimony of two men. Both men must be sane Muslim adults. An admission by the offender can also prove the offense. Once an offender has confessed to the crime, that offender cannot withdraw or retract his admission of guilt.

### Punishment

An individual who raises a false accusation of unlawful sexual intercourse is punished with eighty lashes. In addition, anyone convicted of a defamation offense will no longer be considered a reliable witness in any other *hudud* cases—his or her evidence will be discounted on all future occasions.

## **6. Apostasy**

Apostasy is the rejection of Islam in favor of either another religion or atheism. The aim of this prohibition is to preserve the integrity of the Islamic faith and a core society of followers. Apostasy offenders are subject to severe punishments. Islamic Law regards the act as a complete withdrawal from the domain of Allah. More specifically, the rejection is viewed as a combination of blasphemy, heresy, and mockery of the Islamic community. Because many Islamic jurists consider Islam both a religion and a form of state, to leave the Islamic faith is considered tantamount to waging war against the Muslim nation.

### **Apostasy: Illustrative Examples in Afghanistan**

1. “The most recent example is the case of Parwiz Kambakhsh, who in January 2008 was sentenced to death for blasphemy in the northern Balkh province for circulating a document with opposing views about women's rights in Islam. A panel of three judges ruled that because the article he circulated was “blasphemous,” he must receive the death penalty . . . Kambakhsh reportedly did not have a lawyer or a public trial. Although an influential council of religious scholars has pressed for the execution to be carried out, others – including several human rights and other civic organizations and groups of journalists – have led protests in his defense.” In 2009, Kambakhsh lost his appeal to the Supreme Court but was released on presidential pardon.<sup>24</sup>

2. “In March 2006, Abdul Rahman, an Afghan citizen, was arrested and threatened with execution on the charge of changing his religion. His offense, according to a public prosecutor in Afghanistan, was “rejecting Islam.” Rahman was to face the death penalty if found guilty of apostasy. The prosecutor in the case called Rahman “a microbe [who] should be cut off and

<sup>24</sup> <http://www.cpj.org/blog/2009/09/amid-afghan-woes-kambakhsh-release-a-moment-to-cel.php>

removed from the rest of Muslim society and should be killed.” The judge overseeing the trial publicly affirmed that if Rahman did not return to Islam, “the punishment” would be “enforced on him, and the punishment is death.” Within a few weeks, in the face of a massive international outcry about the case, the court dismissed the charges against him, citing lack of evidence and suspicions about his mental state, but concerns about his personal safety forced him to seek asylum abroad.”

3. “In October 2005, Afghan journalist and editor Ali Mohaqiq Nasab was imprisoned after being found guilty of charges of blasphemy and “insulting Islam.” The purported “crime” of Nasab, editor of the journal *Haqooq-i-Zan* (Women's Rights), was to question discrimination against women and the use of certain harsh punishments under traditional Islamic Law, including amputation and public stoning. Although Nasab, who is also an Islamic scholar, was initially sentenced to two years of hard labor, the prosecutor in the case reportedly intended to seek the death penalty against him. In December, Nasab's term was reduced to a six-month suspended sentence, but only after he apologized to the court.”<sup>25</sup>

### Discussion Questions

1. What do you think about these examples? Are cases like these the exceptions, or are they the norm in Afghanistan?
2. Is it appropriate for courts to react to public or international pressure? Why or why not?
3. Compare these examples to the case study of Salman Rushdie on the next page. What do they share in common and how are they different? Are all the defendants equally culpable?

It is important to note that despite these strict interpretations, the Islamic tradition has never forced anyone to accept Islam against his or her will. However, once an individual enters the Muslim faith willingly and freely, Islamic Law mandates that he or she observe the rules and regulations of the faith. One rule is that no follower is permitted to leave the faith. Anyone who does so commits the crime of apostasy.

The crime of apostasy can be committed through words, deeds, or the failure to observe certain obligatory practices. These actions include: (1) contradicting or openly denying the fundamental teachings of Islam—the five pillars of Islam; (2) throwing the *Qur'an* in filth; (3) declaring that Muhammad (PBUH) is not the last Prophet; (4) abusing the legacy of Muhammad (PBUH) or any other prophet; (5) declaring any *hudud* crime lawful; and (6) declaring oneself a prophet of Allah or declaring the receipt of a revelation from Allah.

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<sup>25</sup> United Nations High Commissioner on Human Rights, Annual Report 2008 – Afghanistan, available at <http://www.unhcr.org/refworld/country,,USCIRF,,AFG,4562d8cf2,4855699b46,0.html>.

### **Apostasy: An International Case Study**

“In 1989 Salman Rushdie published the now notorious novel [*The Satanic Verses*] that presented a portrait of Islam and the Prophet Mohammed in a postmodern satirical style. The book was taken to be blasphemous and insulting throughout the Muslim world and among Muslim immigrants in Britain where it was published. Muslim outrage was expressed mainly through massive demonstrations and demands that Penguin Books withdraw the novel. Simultaneously, learned men of Islam debated whether Rushdie was or was not an apostate—and, if so, what the appropriate punishment for his transgression should be. In a fatwa, or legal opinion, the Ayatollah Khomeini declared Rushdie guilty of apostasy and therefore imposed the punishment of death, a judgment that has [impacted] the author ever since.”

### **Discussion Questions**

1. What was the appropriate punishment for Rushdie after the publication of his book? Did the Ayatollah have jurisdiction over Rushdie to issue the fatwa?
2. Should the fatwa carry any weight given the fact that Rushdie did not receive a fair trial regarding the charge, as is required by Islamic Law?
3. Does the fact that the book was banned in India, Pakistan, Saudi Arabia, Egypt, Somalia, Bangladesh, Sudan, Malaysia, Indonesia, Qatar, and South Africa change or effect your opinion in any way?

### *Elements*

Like the *hudud* offenses discussed above, to be guilty of apostasy, the offender must be a sane Muslim adult. In addition, the offending individual must have acted voluntarily. In considering an offense of apostasy, the offender’s state of mind is central. The accused must no longer consider himself a Muslim.

### *Burden of Proof*

The crime can be established with the evidence of two competent witnesses. These witnesses must be precise and explicit in showing that the accused is guilty by virtue of a specific act or declaration. A confession can also substantiate the act.

### *Punishment*

The punishment for apostasy is, in most instances, death. Prior to the imposition of any penalty, however, the accused will be given the opportunity to reconsider his position and repent to Allah. The period for repentance lasts for three days. Islamic jurists who support penalties of death find support for their position in the *Sunna*, where Muhammad (PBUH) stipulates (1) that anyone who changes religion should be killed and (b) that it is not permissible to kill a Muslim,

except for three distinct reasons, one of which is apostasy. The *Hanafi* School is unique in that it does not espouse the execution of female apostates, but rather requires imprisonment.

Some modern Islamic jurists have stressed that apostasy should not be punished by death. Their argument centers on the fact that the *Qur'an* does not contain any express provisions authorizing such compulsion. In fact, the *Qur'an* proclaims that “There is no compulsion in religion” (Chapter 2, verse 256). Moreover, the *Qur'an* does not provide any punishment for apostasy. Those opposed to death penalties also argue that the traditions of the Prophet, who ordered the death of certain apostates, were not intended for general application. Instead, they were responses to individuals capable of and intending to physically wage war against the Islamic state.

Given the divergence between the two camps, other punishments have been adopted and are intended to affect an offender’s civil status. For example, apostates can have their marriages annulled. Anyone punished in this way can re-unite with their spouse if and when they recant to Islam. Similarly, an apostate can no longer serve as a marriage guardian for his daughter unless he comes back to Islam. Third, an apostate loses the right to inherit property from relatives and those relatives also lose the right to inherit from him. The *Hanafi* School regards an apostate’s property as spoils for the community. These spoils are kept as part of the public treasury and are utilized for Muslim community interests.

Finally, children of an apostate are still considered faithful Muslims despite their parent’s action. If, however, they start to display tendencies of non-Muslim religious faith, the children will be brought back to Islam by force. If the children reach the age of adulthood without recanting their departure from Islam, they too can be put to death.

#### **Additional Information on the Rushdie Affair**

“[Despite the Ayatollah], other Muslim clerics, particularly those from the prestigious Al-Azhar University in Cairo, issued edicts disputing Khomeini’s legal conclusions and sentence. Rushdie was taken into protective custody by the British police, and thus began his more than one thousand days of hiding . . . At the end of March [1989], Abdullah Al-Ahdal, a leading Belgian imam who had defended Rushdie, was assassinated at the hands of one widely believed to be an Iranian fundamentalist. Meanwhile, Ayatollah Khomeini died and with him the possibility that his fatwa would be revoked.

On Christmas day 1990, moderate Muslim leaders in London announced that in their presence Rushdie stated the basic declaration of faith: there is no god but Allah and Mohammed is his prophet. He declared he did not agree with any statement in his novel that ‘insults the prophet Mohammed or casts aspersions upon Islam, or upon the authenticity of the holy [Qur’an], or that rejects the divinity of Allah’. . . As a gesture of his good faith, he agreed not to seek publication of the paperback (which would have been immensely profitable) or to authorize further translations. Rushdie said he accepted the basic tenets of Islam but would not promise to pray five times a day nor refrain from drinking alcohol . . .

By July 1991, [however] the Japanese translator of the [book] was murdered . . . and an attempt was made on the life of the Italian translator. Rushdie has since repudiated his reconciliation with the moderates, and the paperback was published in 1992.<sup>26</sup>

### Discussion Questions

1. Does this additional information change your thoughts on Rushdie and the charge of apostasy? What do you make of the widespread violence, particularly against non-Muslims?
2. What do you make of Rushdie's apology? If he hadn't repudiated his reconciliation, was his initial apology appropriately repentant? What of his refusal to pray and give up alcohol?

## 7. Rebellion

*Hanafi* jurisprudence defines rebellion as the refusal to pay allegiance to the state. The prohibition is intended to avoid instability and destruction in the socio-political system of the state, including its unity, progress, and existence. The prohibition against rebellion can be found in Chapter 16, verse 90 of the *Qur'an*: "Allah forbids all shameful deeds, and injustice and rebellion."<sup>27</sup>

### Elements

The *hudud* offense of rebellion requires offenders to actually use force and to have possessed the criminal intent of overthrowing the country's leader or head of state.

### Burden of Proof

Rebellion, unlike the other *hudud* offenses discussed above, does not have well defined provisions regarding the burden of proof. The difference may be a result of the offence's open, violent nature. As a result, the regular requirement of testimonial proof is not strictly required.

### Punishment

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<sup>26</sup> M.M. Slaughter, The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech, Virginia Law Review, Vol. 79, No. 1 (Feb., 1993), pp. 153-204.

<sup>27</sup> See also Chapter 43, verse 9-10: "If two parties among the believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of God; But if it complies then make peace between them with justice, and be fair: for God loves those who are fair and just. The Believers are but a single Brotherhood . . ."

Rebels are initially invited to repent for their actions and rejoin their community. If they choose to do so, their repentance is exculpatory and they are free from liability. The leniency is meant to induce warring factions into reconciliation. Only if either side rejects reconciliation will they be subject to an authorized penalty, such as death.

Other considerations include, first, that a head of state is presumed to have the right to fight back, though she cannot seek to exterminate the rebels. Instead, the leader is to subdue those rebels that confront state forces. Any rebels who withdraw from the seditious acts should be spared. Additionally, rebels should not be deprived of their property nor should their families be captured or abused.

Second, anyone who destroys property in the course of a rebellion must eventually pay indemnity for the destruction. However, rebels are not monetarily responsible for destroyed property if their rebellion is based on a legitimate interpretation of their religion.

## II. *QISAS* CRIMES

The second category of crime in Islamic Law is *qisas*. *Qisas* crimes deal with transgressions against the bodily integrity of another, including homicide, intentional physical injury, maiming, and unintentional physical injury.

The authority for *qisas* is found in various verses of the *Qur'an*<sup>28</sup> and has limited the vicious blood feuds that defined pre-Islamic Arabia, where feuding would pass from generation to generation. *Qisas* ended this practice by allowing the victim of a *qisas* offense to inflict the same injury on the wrongdoer as she received, but nothing more. As a result, *qisas* literally means “equality in retaliation.” For example, if Abdul maims Hashim’s right arm, Hashim may elect to have Abdul’s right arm maimed in the same fashion. Hashim cannot, however, ask for Abdul to be put to death, as this is a greater punishment than the original crime.

There are three conditions that govern when *qisas* retaliation can be exacted. First, the injury must be deliberately inflicted. Second, any *qisas* retaliation must be limited to the same part of the body that was injured by the offender. Third, *qisas* retaliations must be practical to inflict.

Unlike *hudud* crimes, *qisas* punishments are not mandated by the *Qur'an*. As a result, there is a strong tradition of victims, or their heirs in the case of death, remitting the retaliation. Instead of exacting death or mutilation on the wrongdoer, a victim can demand monetary compensation (*diyat* - literally “blood money”) from the wrongdoer. There are standardized tables that establish the appropriate compensation for various types of injuries. If the wrongdoer

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<sup>28</sup> “We ordained therein for them: Life for life; eye for eye; nose for nose; ear for ear; tooth for tooth, and wounds equal for equal. But if anyone remits the retaliation by way of charity it is an act of atonement for himself. And if any fail to judge by what God has revealed, they are wrong-doers.” (5:48).

is unable to pay, his relatives are expected to contribute. *Diyat* will also be used if a *qisas* offense is committed unintentionally.

*Qisas* allows victims and their families to serve in the unique position as decision maker with regard to punishment. They can determine if the wrongdoer should receive the same injury she inflicted, or if compensation is an appropriate substitute. Victims may also forgive an offender completely. In circumstances where a victim forgives an offender, either through the acceptance of *diyat* or total forgiveness, the wrongdoer must perform a *Kaffarah* to atone for his sins. The *Kaffarah* was traditionally performed by freeing a Muslim slave, but today is satisfied by fasting for two consecutive months.

## **1. Homicide**

As you will see in the subsequent section, the Penal Code addresses homicide with some depth. The Penal Code's provisions and punishments, however, only apply if *qisas* does not govern the offense, either because it is waived or because its elements are not satisfied. As a result, many homicides are exclusively subject to punishment under *qisas*, and you, as future practitioners, must understand how and when a murder falls into the realm of Islamic Law.

Homicides are among the most serious criminal offenses not classified as *hudud* crimes. When homicides fall under *qisas*, offenders do not have to be punished, because clemency or monetary compensation can be substituted for punishment. In such situations, different types of homicide entail different levels of monetary compensation.

### *Intentional Murder*

Islamic jurisprudence defines intentional murder as the planned and willful killing of another person through use of an implement or weapon, including guns, swords, spears, fire, sharp wood and the like. The punishment for such actions is retribution of an equal nature, i.e. the death of the offender without opportunity for the killer to repent. The *Hanafi* School requires that the murderer be killed by use of a sword and not killed in the same manner that the victim died.

If the victim's heirs waive retaliation, *diyat* is substituted and the culprit must perform *Kaffarah*, or payment. *Diyat* can also be substituted if the offender kills a minor or mentally handicapped victim out of self defense, or if the intentional murder was committed without the use of a weapon.

If *diyat* is substituted for any reason, the monetary compensation is more extreme than normal, and is meant to discourage others from committing similar crimes. The heavier form of blood money (*diyat mughallazah*) originally required compensation of one hundred camels, forty of which are pregnant. Subsequently, the form of compensation has evolved to include other forms of compensation like 1,000 dinars of gold, 12,000 dirhams of silver, 200 cows, 2,000 sheep, and 200 suits of clothing.

### Unintentional Murder

Unintentional murder is a mistake, accident, or indirect action on the part of the perpetrator that results in the death of the victim. Such crimes are not punishable by death, though they do require monetary compensation.<sup>29</sup> Such compensation was originally envisioned as 100 camels or some combination of 800 dinars of gold, 800 dirhams of silver, 200 cows, and 2,000 sheep.

### Murder by a Group

Islamic jurists are divided on whether murder committed by a group of individuals qualifies for *qisas*. Most importantly for your purposes, the *Hanafi* School requires that all identifiable members of the offending group be punished under *qisas*. The schools of Zuhari Ibn Sirin and Habib Abi Thabit suggest, however, that such murders do not fall under *qisas*, leaving punishment to secular law.

Interestingly, if it is impossible to determine who committed a particular homicide, collective responsibility applies to an entire community. For instance, if a dead body is found in a particular quarter of the city or on a boat, the inhabitants, passengers, or crew must swear fifty oaths of their innocence and ignorance regarding the death. If there are fewer than fifty individuals who can swear, the inhabitants are allowed to give the oath more than once. Those that refuse to swear will be imprisoned until they do so. Individuals who faithfully pledge their innocence are considered free from any liability under *qisas*, though they are still required to pay compensation to the decedent's heirs.

### Murder of a Son by a Father

The *Hanafi* School does not subject fathers who kill their sons to *qisas* punishment. This view is supported by three arguments. First, there is a *hadith* which states that “[n]o retaliation is due in cases of a father who kills his son.”<sup>30</sup> Second, the general purpose of *qisas* is to prevent homicides, an act which the father's love is presumed to prevent. The actual murder of a son, therefore, is presumed to have a valid justification. Third, there is a belief that because the father gave his son life through the act of conception, the son should not be the cause of his father's death.

## **2. Other Injuries**

For all *qisas* offenses other than murder, including intentional physical injury, maiming, or unintentional physical injury, retaliation is authorized under certain conditions. First, the

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<sup>29</sup> “And whoso kills a believer by mistake, he should free a believing slave and blood money should be paid to his people unless they remit it as alms.” Qur'an, Chapter 4, Verse 92.

<sup>30</sup> Karim, A.M.F., *Mishkat-ul-Masabih*, Vol. 11, Law Publishing Co., pp. 496-97.

injury inflicted must be deliberate. Second, any *qisas* retaliation must be limited to the same part of the body that was injured by the offender. Third, *qisas* retaliations must be practical to inflict.

When *qisas* crimes are committed, the retaliation authorized must be equal to the original injury inflicted. If retaliation is waived, the victim can receive compensation in other ways. For instance, if the victim loses a nose, all his teeth, two hands or feet, or a tongue, he is compensated with one hundred camels. Half of that amount is authorized when the victim loses a leg, a hand, or an eye. An even smaller portion of the blood money (1/20) is authorized for a group of injuries including the loss of a single tooth or physical injury that causes miscarriage of a pregnant woman.

### ***Qisas*: A Case Study**

“In December 1996, two British nurses were accused of murdering an Australian nurse in Damman, Saudi Arabia. Yvonne Gilford, the victim, had been found dead in her room, having been stabbed four times, hit with a hammer and smothered. Following investigations, Lucy McLauclan and Debbie Parry admitted to the murder, part of a lesbian affair gone wrong.

Based on the confessions, McLauclan was sentenced to eight years imprisonment and five hundred lashes. Perry was sentenced to death. Given the role of *qisas* under Islamic Law, Gilford’s relatives were given the responsibility of determining whether the death penalty should be enforced or whether financial compensation would be sufficient punishment. Though he initially favored the death penalty, Frank Gilford, the victim’s brother, eventually entered into a settlement agreement with the British nurses, accepting financial compensation in the place of death.

The nurses were imprisoned until 1998, when an act of clemency by the King of Saudi Arabia allowed them to return to Britain. Most of the compensation was donated to the Adelaide Hospital to develop a children’s ward in memory of Yvonne.”<sup>31</sup>

### **Discussion Questions**

1. Should an Australian, or any other foreigner, have the power to issue a death penalty in an Islamic state? What if the foreigner’s country outlaws the death penalty?
2. What problems exist in allowing family members, rather than impartial jurors or government officials, to decide an appropriate punishment? Do you agree with Frank Gilford’s decision in

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<sup>31</sup> Belinda Wells and Michael Burnett, When Cultures Collide: An Australian Citizen’s Power to Demand the Death Penalty Under Islamic Law, *Sydney Law Review*, vol. 22, no. 1, March 2000.

this case? Does it matter that both defendants claimed that their confessions were extracted through psychological and sexual coercion and that they were actually innocent?

3. Does it make sense that *qisas* authorizes the same compensation for victims who lose a single tooth and victims who lose an unborn child? Why is this?

4. Do you agree that fathers who murder their sons should not be subject to *qisas*? What about mothers who murder a son? What if a daughter is killed?

### III. TA'AZIR CRIMES

*Ta'azir* includes all crimes which are not included within *hudud* and *qisas* offenses. By definition, *ta'azir* means “to prevent,” “to respect,” and “to reform.” The elements and punishments for such crimes are determined by the state, and the imposition of any *ta'azir* punishment is at the discretion of the judge. It is important to note that *ta'azir* punishment cannot replace *hudud* or *qisas*, but in the *Hanafi* School it can be used as an alternative punishment when *hudud*'s demanding elements are not satisfied, or as an additional punishment. Taken collectively then, *ta'azir* punishments are intended to help deter crime and to reform offenders.

Though the state has a great deal of freedom to define *ta'azir* crimes and prescribe punishments, the power must be exercised within the spirit of the general rules of Islam and the public interest. Judges, similarly, have the discretion to impose multiple punishments for a single crime. Penalties under *ta'azir* include admonition, reprimand, threat, boycott, public disclosure, fines, seizure of property, imprisonment, flogging, and in some instances, death.

Under the Penal Code, *ta'azir* offenses are placed in one of three categories according to the crime's seriousness. The most serious crimes are classified as felonies, mid-level crimes as misdemeanors, and the least serious crimes as obscenities. As explained previously, felonies are crimes punishable by death, continued imprisonment (sixteen to twenty years), or long imprisonment (five to fifteen years). Misdemeanors are punishable by imprisonment ranging from three months to five years, or a cash fine of more than 3,000 Afghanis. Obscenities are crimes punishable by imprisonment ranging from twenty-four hours to three months, or a fine of up to 3,000 Afghanis.

## PART 2: CIVIL LAW SOURCES OF AFGHAN CRIMINAL LAW

As you will recall, the principle of legality requires that criminal offenses be clearly expressed and easily ascertainable. In Afghanistan, this requirement is almost uniformly satisfied through the enactment and publication of substantive criminal laws (i.e., statutes that define offenses and prescribe punishments for those offenses). The codification movement is a relatively recent phenomenon in Afghanistan. While statutes relating to Afghan criminal justice first emerged in the 1930s, there wasn't a concerted effort to codify Afghan criminal law until the 1960s.

The first major development in the modern codification movement was the adoption of a comprehensive criminal procedure code. The code standardized the criminal justice system by regulating investigation and adjudication, including detention, interrogation, search and seizure, evidence gathering and prosecution, the treatment of witnesses and the use of experts, and the right to appeal. Other developments of the 1960s included the introduction of additional substantive criminal law statutes (i.e., the 1967 Law on the Prevention of Hoarding) and institutional reforms (i.e., the 1967 Law of *Saranwali*).

In 1976, the government of Afghanistan satisfied many of the demands of the legality doctrine when it approved its first (and only) penal code. The Penal Code, published in Official Gazette No. 347, contains two books, eight sections, 523 articles, and remains in effect today as the most comprehensive source of criminal law in Afghanistan. The Code defines offenses and regularizes the applicable punishments, ranging from embezzlement to destruction of public buildings to defamation.

Since 2001 and the removal of the Taliban, Afghanistan has seen a new era of codification. Recent reforms in both criminal procedure and substantive criminal law have been codified in documents like the 2004 Law on the Campaign against Money Laundering and Its Proceeds, the 2004 Law on the Campaign against Financing Terrorism, and the 2006 Counter-Narcotics Law. These recent developments are a major part of codified criminal law in Afghanistan today, and will be examined throughout the remainder of this chapter.

This section of the chapter will look at specific crimes as they exist in Afghanistan. The analysis will focus on three distinct types of crime: crimes against the State, crimes against the person, and crimes against property. Under each of these broad categories there are several distinct crimes which will be considered. In each instance, we will discuss the law, its rationale, the problems it is meant to combat, and the ways in which it could improve.

## **I. CRIMES AGAINST THE PERSON**

### **1. Homicide - Murder**

Homicide is, broadly defined, the killing of a human being without justification or excuse. It is the quintessential result offense. Its central and distinguishing element is the proscribed result—the death of another human being. In most instances, homicide laws do not specify any particular conduct by which the death occurs. Rather, they are defined simply as causing the death of another person.

“Homicide” is a legally neutral term. Indeed, it can be innocent or criminal. For example, if the government carries out the authorized execution of a convicted felon, it is still homicide, though not criminal in nature. Criminal homicide too is not a monolithic concept. The Penal Code divides homicide into murder, with degrees of punishment for different types of actions, and manslaughter (accidental murder). Intentional and accidental murders are distinguished by the perpetrator’s intent, known by the legal term “malice aforethought.”

Malice aforethought is generally inferred to exist if a person who kills another possesses any one of the of the following states of mind: (1) the intention to kill a human being; (2) the intention to inflict grievous bodily injury on another; (3) an extremely reckless disregard for the value of human life; or (4) the intention to commit a felony during which the death results. Each of these mental states, in the absence of justification (e.g., self-defense), excuse (e.g., insanity), or mitigating circumstances (e.g., adequate provocation), exhibits extreme indifference to the value of human life. In the first state, intent to kill, the malice is clearly expressed.

It is important to recognize that any act of murder is first governed by Islamic Law. Article 394 of the Penal Code makes clear that intentional murder is first subject to *qisas*, and only if that charge is dropped by the victim's relatives or is disqualified in some way, will the defendant be sentenced in accordance to the Penal Code's provisions.

Though it is not defined in the Penal Code, murder is generally defined as the intentional killing of another human being without justification or excuse. In proving intentional murder, the defendant must be shown to have formed the actual intent to kill another person. This can be shown by demonstrating (1) that the defendant had a duty, which she deliberately refused to perform, and the death was the direct result; or (2) that the defendant understood the effects of his actions and still undertook them (see Penal Code Article 35).

The Penal Code indicates two distinct groups of murder. The first set, articulated in Article 395, includes acts which are premeditated, committed in the course of another crime, or so heinous as to require punishment by death. The second group does not require punishment by death, though a judge has discretion to impose the death penalty, or long imprisonment (five to fifteen years). As described in Article 396, these second tier murders include instances where (1) the killer had the intention of murdering only one person but his acts resulted in the death of more than one person; (2) the murder dismembers the victim's body; and (3) the killer commits a murder in circumstances other than those specified under paragraphs 1 or 2 in Article 395 (see below).

**Penal Code - Article 395 – Aggravating Factors Triggering the Death Penalty**

1. The act is accomplished with malice, premeditation, insistence, or pursuit;
2. The murder is accomplished by using poisonous, anesthetic, or explosive materials;
3. The murder is accomplished brutally, with low motivation, or for pay;
4. The murdered is one of the roots [family] of the murderer;
5. The murdered is an official of public services, murdered while performing duty or murdered as a result of his duty;
6. The murderer had the intention of killing more than one person and, as a result of his acts, all of them were murdered;

7. The murder is committed for the purpose of making preparation for, facilitation of or execution of committing a felony or a misdemeanor whose anticipated punishment is not less than one year, or for the purpose of escape or evasion of punishment;

8. The defendant is due to serve a sentence of long imprisonment and prior to the enforcement of the verdict initiates, or accomplishes a murder.

### Premeditation

As Article 395 suggests, the standard penalty for premeditated murder is death. To “premeditate” is to think about an act before committing it. It is unclear how much thought must go into the killing before it is considered premeditated. One school of thought suggests that there should be enough time for an individual to fully consider the act and to select the instrument of death. This can occur in a brief moment of thought, as long as there is any interval between the forming of the intent to kill and act. As a result, premeditation can be as instantaneous as successive thoughts of mind.

Another school of thought suggests there must be a more appreciable time for premeditation to be satisfied. While no specific time frame is indicated, it generally requires proof that the killer had enough time not only to form intent, but also to mull the killing over in his mind and give it a second thought.

### Murder in the Course of another Crime

Article 395 authorizes a penalty of death if a murder occurs in the course of a felony or a misdemeanor. The rule applies whether the defendant kills the victim intentionally, recklessly, negligently, or accidentally and unforeseeably. The use of a felony-murder rule (or misdemeanor-murder rule) is quite controversial. On one hand, the rule seems to eliminate the requirement of malice aforethought. On the other hand, the intent to commit a felony (or misdemeanor) can constitute the implied malice required by the law.

Despite its controversial nature, the law has a distinct purpose. Increased penalties for murder in the course of another crime deter negligent and accidental killings during the commission of felonies and misdemeanors. The enhanced punishment is intended to make criminals more careful. For instance, criminals may still commit crimes, but they will hopefully do so in a way that is less likely to cause death. Similarly, the increased penalty forces the criminal to pay his debt to society. The individual who murders in the course of another crime has a bigger debt to pay than the individual who does not take a life.

### Murder in the Defense of Honor

Intentional homicide committed in a sudden “heat of passion” and meant to defend one’s honor negates malice aforethought. In many countries this defense is available to a killer if four elements are met: (1) the defendant must have acted in heat of passion; (2) the passion must have

been the result of adequate provocation; (3) the actor must not have had a reasonable opportunity to cool off; and (4) there must be a causal link between the provocation, the passion, and the homicide.

Article 398 embodies each of these principles. According to the Penal Code, a man who sees his wife, or another close family member, in the act of committing adultery or sharing a bed with another individual is exempted from punishment if he immediately kills or injures his spouse and the third party. Though the defendant would be exempted from regular murder and laceration punishments, he would still be subject to a short term of imprisonment, two years or less, as a form of *ta'azir* punishment.

### **Murder in the Course of another Crime: Discussion Questions**

1. Murders occurring in the course of another crime have never been subject to increased penalties in France or Germany. England abolished a rule similar to Article 395 in 1957. And while a “felony-murder” rule *does* exist in the United States, it is regularly criticized for being too harsh on defendants.

What are the benefits of the rule? Should defendants be punished with death if they commit a misdemeanor that results in a murder? Can unintentional murders be deterred against? Should the death penalty be limited to crimes inherently dangerous to human life, and not cover simple misdemeanors?

2. Should Emad, a robber, be guilty of murder if Kamaal, a local store owner, dies from fright caused by a non-violent robbery? What if Kamaal has a heart condition?

3. Suppose that Emad, a robber, accidentally shoots Kamaal, a local store owner, in the chest during the commission of a robbery. Emad is arrested and charged with robbery and beating, and punished accordingly for those crimes. Ten years later Kamaal dies from a heart attack while unloading his latest shipment of goods. Doctors later determine the heart attack was a result of permanent damage to Kamaal’s heart produced by the original wound.

Should Emad be held responsible for this death? If so, would he be punished with death? If Emad had been an accomplice to the original crime, would the accomplice be guilty of murder and punishable by death?

4. Consider two pickpockets, Rafi and Tariq. Rafi puts his hand in a victim’s pocket and finds a wallet with two hundred Afghanis in it. Tariq puts his hand in another victim’s pocket and takes a wallet with the same amount of money, but his victim dies of shock from the experience. The property harm is identical—the loss of two hundred Afghanis. The culpability of Rafi and Tariq with regards to the thefts is identical.

Should Tariq be considered more culpable, however, because he caused a death? If so, why should he be more culpable if his *mens rea* is identical to that of Rafi, i.e., that of an intentional

thief? Does it violate ordinary concepts of proportional punishment to treat Tariq, an unlucky pickpocket, as deserving an equal punishment to that of an intentional, premeditated killer?

### Assisted Suicide

The Penal Code does not define suicide as a crime. Article 397(3) explicitly states that “a person who initiates an act of suicide shall not be punished.” If a third party instigates or assists a suicide, however, that third party is punishable for a crime.

The line between assisted suicide and murder is fine and not always clear. The divide often turns on whether the defendant actually participated in the final act. For instance, if Zameer gave Nadeem rope to help him hang himself, Zameer is guilty of assisted suicide (assuming that he gave Nadeem the rope with the purpose of facilitating suicide). However, if Zameer helps Nadeem balance himself so that he can put the rope around his neck, he may be guilty of murder.

According to Article 397, an individual who “instigates another to suicide or, one way or another, assists someone in an act of suicide,” will be guilty of a crime and imprisoned for a period of seven years or less. If a defendant instigates another to commit suicide, but the act of suicide has only been “initiated” (the act was started but was stopped before it was fully effectuated), then the defendant will only be sentenced to short imprisonment.

### Murder as a result of Assault

Under Article 399, if an individual beats, lacerates or administers “harmful materials” without the intention of killing another person, but that person dies as a result of harm, the offender will only be sentenced to long imprisonment. These crimes are subject to aggravating circumstances that can trigger increased (“continued”) imprisonment: (1) if the assault is perpetrated on a public service official, while he is performing his public duties or because of his service, and (2) if the assault is committed against a family member, particularly a child.

### **Discussion Questions**

Why does Article 399 exist? Isn't the assault (laceration, beating) a felony? If a death occurs in the course of the beating felony, shouldn't the offender be subject to death anyway (under Article 395 and murder in the course of another crime)? How can you explain this inconsistency in the law, or is this simply sloppy drafting?

## **2. Homicide - Manslaughter**

Most unintentional killings are known colloquially as involuntary manslaughter, though that phrase does not appear in the Penal Code. Involuntary killings embody recklessness and negligence. The difference between negligence and recklessness resides in the mind of the offender. A reckless individual is aware of a substantial risk, but chooses to proceed anyway. A negligent individual should have been aware of a substantial risk, but was not. For instance, if an

individual playfully fires a gun (that she knows has bullets) in the direction of another person, she is considered reckless. However, if the same person performs that act (shooting a gun in the direction of another) while believing that the gun is unloaded, she is considered negligent. As you recall from our earlier discussion, this is one of the rare instances that an involuntary act can be punished.

This concept is embodied in Article 400 of the Penal Code. An individual who kills another by mistake as a result of negligence, carelessness, or “non-observance” of rules is treated with great leniency. For instance, the individual who unintentionally killed another will be imprisoned, but not for more than three years, and/or is fined, but not more than 36,000 Afghanis.

If an individual unintentionally kills while violating his occupation’s safety principles, or as a result of drugs or alcohol, he can be sentenced to medium imprisonment of more than two years, and fined, but not more than 50,000 Afghanis. Similarly, if the defendant is merely negligent (as opposed to reckless), but the act results in the death of more than one person, the defendant is subject to medium imprisonment of three or more years. If the defendant both violates his occupation’s safety principles and accidentally kills more than one person, he is to be imprisoned for a period of seven or more years.

Finally, Article 400 stipulates that a person can be held responsible for accidental murder if he refuses to assist a person in need of help if he has the means and potential to do so. An offender of this provision can be sentenced to medium imprisonment of at least two years, and fined, but not more than 50,000 Afghanis.

### **Compare and Contrast: No Duty to Act – Accidental Death**

“As a general proposition [in Common Law countries like Britain], an omission or failure to act is not a basis for criminal liability. One classic illustration of no liability is a six foot tall expert swimmer who deliberately sits by the side of a five foot [deep river] thoroughly enjoying watching a four foot tall child drown. One reason commonly given for this rule is the difficulty of ascertaining at what point the danger to the rescuer becomes too great to hold him criminally responsible. Another reason is punishing those whose existence has added to human misery rather than those who have merely been neutral towards it. In our hypothetical, for example, the expert swimmer did not worsen the child’s plight, he simply failed to improve it.”<sup>32</sup>

### **Discussion Questions**

1. Do you find this argument compelling? Is it too difficult to determine when a rescuer’s danger is too great to hold him criminally liable? Was the onlooker simply neutral?

<sup>32</sup> Arnold Loewy, *Criminal Law in a Nut Shell*, pp. 157-162 (West Group, 2003).

2. What if the onlooker were the child's father, should he be criminally liable? Or what if the child had slipped on an object that the onlooker had left out, should the onlooker be liable if he doesn't help?

3. Are there problems with Article 400 requiring onlookers to aid victims? What are they?

### **3. Assault and Battery**

Assault is an intentional attempt, through force or violence, to cause injury to another. While physical contact is not an essential element of the crime, there must at least be a threat of violence or offensive contact. If the offense occurs through a threat, the threat must be for immediate injury, not injury in the future.

A related crime is battery. Battery is any wrongful or offensive physical contact with another. Typically, battery requires the offender to act intentionally and without the victim's consent. In some jurisdictions, any unlawful application of force can constitute a battery. For instance, intentionally spitting on another person can constitute battery.<sup>33</sup> Similarly, in some countries a doctor who performs an operation without first obtaining consent from the patient can be guilty of battery. In a unique provision, the Penal Code also penalizes battery that occurs from negligent or careless actions that result in physical injury (Article 412). For instance, imagine someone who is a very poor bicyclist. Despite her lack of skill, she attempts to bike down the street. In the course of the trip, she runs into another person, causing an injury to the third party. Under Article 412, the bicyclist could be charged with criminal battery, despite the lack of intent to cause harm.

Assault and battery are closely related, though ultimately distinct concepts. Assault is the beginning of an act, which will constitute battery when completed. Put differently, an assault will create some apprehension of imminent harm or contact. Battery is the actual contact. You may find it useful to think of assault as the threat of battery or an attempted battery. For instance, pretending to punch someone but stopping short of actually hitting him is an assault. Following through with the punch and contacting the person's face constitutes a battery.

Unlike other countries where any unauthorized contact is considered a physical injury, Afghanistan requires some form of tangible bodily injury to result from the battery to qualify as criminal. Indeed, the Penal Code defines battery as "beating and laceration" with the victim experiencing a cut, injury, permanent handicap, or loss of a sense (Article 407).

#### *Applicable Punishments*

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<sup>33</sup> United States v. Mase, 563 F.2d 322 (7th Cir. 1977).

An individual who inflicts such injuries (cut, injury, permanent handicap, or loss of a sense) is punished by medium imprisonment for up to three years. If the same act deprives a victim of his “intellect,” or if the act is undertaken with premeditation, the offender can be sentenced to long imprisonment for up to ten years (Article 407).

Less severe injuries, such as those that prevent the victim from temporarily using a body part for more than twenty days are punished by short imprisonment of three months or more and a fine of 3,000 Afghanis (Article 408). If a battery does not result in any defect and does not prevent the victim from using any body parts, an assailant is subject to a maximum punishment of six months in prison or a fine of 6,000 Afghanis (Article 409).

A battery can also occur if “harmful materials” are administered to another individual. The harmful materials must result in the inability to use a particular body part or loss of a sense. Presumably aimed at the use of poisons and drugs, the punishment for such actions is a monetary fine and medium imprisonment of more than three years (Article 411).

If a battery results from negligence, recklessness, or lack of skill in a particular action, an offender can be imprisoned for a period between three months and two years or fined an amount between 3,000 and 24,000 Afghanis (Article 412).

Aggravating circumstances and increased punishments occur when a battery is undertaken by more than one person or if a weapon is utilized. Such actions bring with them “the maximum anticipated punishment” (Article 410). A similar penalty is mandated for premeditation of battery. Described in the code as “prior insistence or pursuit,” any premeditation requires the offender to receive the maximum penalty authorized for that particular crime (Article 407-409). Finally, if a battery occurs in the course of a fight, both parties of the fight can be sentenced to medium imprisonment. If a party can demonstrate that the fight was not a result of his actions, the prison sentence can be replaced with a fine of up to 60,000 Afghanis (Article 413).

### **Discussion Questions**

1. Does the Penal Code consider the victim’s mental state in any way? Should it matter if she consented to the intentional act that resulted in the bodily injury? Are doctors at risk of criminal charges if a medical procedure results in some permanent handicap or loss of intellect?
2. Is it logically consistent to punish individuals who commit an intentional beating and laceration as well as those who commit such acts as a result of negligence, carelessness or lack of skill? Can you think of any justifications for this? Should Afghanistan follow the example of other countries and require a battery to be intentional?
3. Does the Penal Code criminalize assault in any way? Are there reasons why the government may only want to punish actual battery?

### Recent Developments

Throughout 2007, assault and battery were a central part of legislative discussion in Afghanistan. Beginning in early 2007, Afghan MPs and international organizations drafted a media law that guarantees free and independent media in the country. In May of that year, the Wolesi Jirga, the lower house of parliament, passed the legislation into law. The legislation secured the protection of journalists.<sup>34</sup>

The law was a largely a response to assaults and batteries against journalists who attempted to gain access to powerful individuals, made mistakes in their reporting, or took unauthorized photographs. Abdul Hameed Mubaariz, the former Deputy Minister of Information and Culture described the situation as: “if any journalist commits a mistake, such incidents should be reported to the Media Complaint Assessment Commission, if it is proven that the journalist has really committed a mistake, he/she should be referred to the prosecutor’s office, not that they are subject to assault and battery directly.”<sup>35</sup>

#### **4. “Highway” Robbery**

Robbery is the unlawful taking of money, goods, or other personal property by violence, intimidation, fear, threat, or extortion. An offender commits a robbery if, in the course of taking property from another (against his or her will), he uses some form of force. The offender must have a mental state of intent, knowledge, or recklessness. Traditionally, the act of robbery is not complete until the robber has reached a place of temporary safety.

It is important to note that robbery is a form of assault and not a form of larceny (discussed below). As a result, robbery is a crime against the person and not property. Robbery is distinguished from larceny by the use of force. Unlike another similar crime, embezzlement, robbery is property acquired without consent. As you will learn below, embezzlement involves the appropriation of property acquired through lawful means.

In many jurisdictions, armed robbery is a more severe form of robbery that involves the taking of property against the possessor’s will, by force, with a dangerous or deadly weapon. In these jurisdictions, armed robbery requires the prosecution to prove three distinct elements: (1) an assault occurred; (2) property was taken from a victim; (3) the defendant was armed with a weapon. Interestingly, Afghanistan’s Penal Code the crime of robbery only exists in the form of armed robbery. As stipulated in Article 447, the crime of robbery only takes place if an individual takes property with a weapon or an object similar to a weapon.

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<sup>34</sup> BBC World Service, Afghan MPs Pass New Mass Media Law (21 June 2007).

<sup>35</sup> Media Watch Report 29, Nai: Supporting Open Media in Afghanistan, *available at* <http://www.nai.org.af/spip.php?article30>

For the purposes of understanding robbery, weapons are widely understood to include items that are, by their very nature, capable of inflicting serious injury or death on another. Though not defined in the Penal Code, courts in other countries have held that weapons can include items that are displayed in ways that make them appear capable of causing serious injury or death, even if they cannot actually cause such harm (for instance, an unloaded gun or even a toy gun).<sup>36</sup>

### The Problem

Since 2007, Afghanistan has experienced a marked rise in armed robberies. In the province of Herat, for instance, there were twelve cases of armed robbery in September 2007 alone, a fifty percent increase from the same period in 2006.<sup>37</sup> Robberies are in part attributable to the influx of unemployed single men who, according to the Afghanistan Independent Human Rights Commission (AIHRC), are susceptible to crime. Many of these individuals have been deported from Iran, which deported at least 200,000 Afghans between 2006 and 2007.<sup>38</sup>

#### **Robbery in Afghanistan: Illustrative Examples**

February 2006: A group of armed men dressed as police robbed a vehicle carrying money from an international bank, injuring the car's armed guard. In the course of fleeing the scene the men killed two police officers.<sup>39</sup>

August 2006: Armed robbers, disguised as police, looted a bank van and injured a bank employee in broad daylight, all within the high security zone of Kabul.<sup>40</sup>

August 2007: Richard Adamson, a British security expert, was killed in the course of a robbery while he was driving through Kabul. He was carrying \$200,000 when robbed.<sup>41</sup>

#### **Discussion Questions**

1. Are the deaths from the February 2006 robbery part of the robbery offense?
2. Does the prevalent use of police uniforms suggest government collusion? If not, how do robbers gain access to the material? What can be done to limit this practice?

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<sup>36</sup> Commonwealth v. Powell, 433 Mass. 399 (2001).

<sup>37</sup> United Nations Office for the Coordination of Humanitarian Affairs, Afghanistan: Increasing armed robberies, abductions in Herat (25 September 2007).

<sup>38</sup> United Nations Office for the Coordination of Humanitarian Affairs, Afghanistan: Increasing armed robberies, abductions in Herat (25 September 2007).

<sup>39</sup> [http://news.bbc.co.uk/2/hi/south\\_asia/4729382.stm](http://news.bbc.co.uk/2/hi/south_asia/4729382.stm)

<sup>40</sup> <http://paktribune.com/news/Robbers-strike-again-in-high-security-zone-of-Kabul-152452.html>

<sup>41</sup> [http://news.bbc.co.uk/2/hi/uk\\_news/6948128.stm](http://news.bbc.co.uk/2/hi/uk_news/6948128.stm)

3. Is Article 447 too narrow in its conception of robbery (by requiring the use of weapons on a public route)? Can robbery occur without the use of a weapon or off a public route?

Robbery has major consequences for the economy in many provinces. In Herat, for instance, rising crime rates generally, but increased armed robberies in particular resulted in a decrease of approximately \$14 million in overall income between 2006 and 2007. AIHRC explains that “insecurity plunges people deep into poverty and vulnerability . . . [and may force them to] migrate to Iran and Pakistan if security does not improve.”<sup>42</sup>

The Law

**Penal Code – Article 447(1)**

Any person who takes position on a public route or such other places for the purpose of gaining possession of goods by means of overpowering with a weapon or an object similar to a weapon and commits one of the following acts shall be considered a robber:

1. Extortion of wayfarer
2. Acquiring other person’s goods by threat or coercion
3. Murder
4. Murder and acquisition of other person’s goods

As discussed above, robbery is defined by Article 447 of the Penal Code. According to the Article, the crime of robbery has two distinct requirements. First, the offender must take possession of another’s property by overpowering him with a weapon or similar object on a “public route or other such places.” The phrase “such other places” can be read to include other far and distinct places of public property. As described in the Penal Code, this physical limitation has its origin in Islamic Law, which strictly criminalizes highway banditry, and acts as its replacement when a *hadd* punishment cannot be enforced (Article 447(2)).

Second, a robber must also commit an act of extortion on the robbed wayfarer, acquire the stolen goods through threat or coercion, or murder the robbery victim (Article 447(1)). The drafting of Article 447 is exceptionally weak and, if not read carefully, can be confusing. As a practical matter, the article does not define coercion—is overpowering with a weapon a form of coercion as envisioned by the drafters? Similarly, section (4) is duplicative and unnecessary. Both murder and acquisition of another’s goods are already listed as condemned acts that can qualify an individual as a robber.

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<sup>42</sup> United Nations Office for the Coordination of Humanitarian Affairs, Afghanistan: Increasing armed robberies, abductions in Herat (25 September 2007).

Assuming an individual falls under the purview of the Penal Code, he is subject to a range of penalties. By merely acquiring property through the robbery, an offender is subject to long imprisonment (Article 451). If a murder occurs in the course of a robbery, an offender may be sentenced to death and the prosecutor does not need to prove any form of intent behind the murder (Articles 448–49). Finally, if any other form of crime occurs in the course of a robbery, the defendant can be fully punished for the second crime in accordance with the applicable provisions of the Penal Code (Article 453).

### **Exercise**

Critique Article 447 and suggest a revised draft of the Article. Consider the suggestions made above as well as the practices of other jurisdictions.

## **5. Kidnapping**

Kidnapping is the act of willfully seizing, confining, or taking another individual without authority of law. The actual carrying away of an individual is not a required element of the crime of kidnapping. Indeed, the involuntary detention of an individual is the true focus of the crime and can be satisfied without any transportation of the victim.

Broadly stated, the objective of kidnapping statutes is to secure the personal liberty of the citizens and residents of Afghanistan, and to provide them with the assistance of the law necessary to free them from unlawful restraint. In this way, kidnapping is similar to crimes of false imprisonment.

In many jurisdictions a distinction is made between abduction and kidnapping. Abduction is historically understood to be an unlawful interference with a family relationship, such as taking a child from his parent. Kidnapping, conversely, is only concerned with the taking or detention of another person against her will and without lawful authority, no matter what the relationship.

The Penal Code does not explicitly address the distinction between abduction and kidnapping. Instead, the Penal Code implicitly includes abduction offenses in its treatment of kidnapping, as evidenced by Articles 418 to 421 and Article 424, which all discuss interference with a family relationship (parent-child or marriage) as an act of kidnapping. This is not surprising, since kidnapping and abduction offenses are not mutually exclusive, even in jurisdictions that distinguish between the two. In their simplest terms, abduction and kidnapping can both be understood to criminalize the unlawful taking or detention of another person.

Though some countries take into consideration mitigating factors like whether the victim was released voluntarily in a safe place, the Afghan Penal Code does not offer similar provisions in its coverage of kidnapping. It is debatable whether this omission is advisable. By including mitigating circumstances, a penal code could incentivize kidnappers to release their victims and, as a result, to avoid the most severe punishments authorized. As the Afghan law is currently

written, there is no explicit incentive for offenders to voluntarily release victims before police rescue, victim escape, or full ransom payment.

### The Problem

Throughout Afghanistan, both in cities and provinces, kidnapping has become a major source of criminal activity. On average, a businessman is kidnapped at least once a week in the various provinces of Afghanistan. According to the Afghanistan International Chamber of Commerce, 173 businessmen were kidnapped across the country between 2005 and 2008. A number of them have been killed.<sup>43</sup>

Many kidnappings are motivated by money. Kidnappers in Afghanistan have generally sought ransoms for their hostages, sometimes demanding that the money be paid in a foreign country. This may be a sign that the kidnappings are connected to organized crime groups that have strong ties to criminals in other parts of Asia and Europe. Saeed Ansari, a spokesman for the Afghan Intelligence Service, describes the offenders as “criminal gangs [which] are linked to terrorists and militants who aim to destabilize Kabul and the provinces because kidnapping businessmen scares many into exile and damages the economy.”<sup>44</sup> Businesspeople and other individuals perceived to have significant amounts of money tend to be most at risk of kidnapping. Between 2006 and 2008, for example, more than 15 market traders from the Shazada market, Afghanistan’s main money exchange, were kidnapped.<sup>45</sup>

As a result of the kidnappings, well-to-do Afghans employ private security guards or, after successfully lobbying the Afghan Ministry of Interior, legally carry weapons of their own—adding more firearms to an already volatile situation. Other figures in the Afghanistan business community have left Afghanistan completely, relocating to countries like the United Arab Emirates. Collectively, these figures have taken tens of millions of dollars of much-needed investment capital with them, not to mention valuable commercial experience and entrepreneurial drive.

What is more troubling for Afghanistan is that both business leaders and kidnapping victims have suggested that government officials and Afghan security services are colluding in the crimes.<sup>46</sup> As evidence of the collusion, private citizens cite the frequency with which criminals wear police uniforms, carry police identification, and use police cars when carrying out an act of kidnapping. Others point to the failure to catch many kidnappers. Hamidullah Farooqi of the Kabul International Chamber of Commerce states: “Of course the security forces are

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<sup>43</sup> Martin Patience, Afghanistan’s Kidnapping Industry, BBC News (16 September 2008), *available at* [http://news.bbc.co.uk/2/hi/south\\_asia/7596224.stm](http://news.bbc.co.uk/2/hi/south_asia/7596224.stm)

<sup>44</sup> Jason Burke, Crime in Afghanistan: The Kabul police chief, the plague of kidnapping, and the meaning of fear, *The Guardian* (3 September 2008), *available at* <http://www.guardian.co.uk/world/2008/sep/03/afghanistan>

<sup>45</sup> *Id.*

<sup>46</sup> Martin Patience, Afghanistan’s Kidnapping Industry, BBC News (16 September 2008).

involved. At the very least there is collusion between the police and the criminals. At the worst the police are the kidnappers.”<sup>47</sup>

### **A Recent Example of Kidnapping: Taliban Kidnap 23 Koreans from Afghan Bus**

“Taliban insurgents . . . kidnapped 23 Korean Christians from a bus in Afghanistan . . . the biggest group of foreigners [ever] seized. The Taliban have increasingly turned to what Afghan officials call “terror tactics”—kidnapping, suicide attacks and roadside bombs [in an attempt] to demonstrate that the Afghan government is incapable of providing security to the people. . . . This incident happened in the Qarabagh district of Ghazni province, some 175km south of Kabul.”<sup>48</sup>

Foreign nationals residing and working in Afghanistan are also at risk of kidnapping. For example, 23 South Koreans were kidnapped (with two killed) in July 2007. In January 2008, an American woman was kidnapped in Kandahar while traveling without security.<sup>49</sup> The Pakistani Ambassador to Afghanistan, Tariq Azizuddin was abducted by Taliban forces in February 2008, and in November 2008, a French aid worker was kidnapped in Kabul. Other foreigners who work for nongovernmental organizations proceed with great care. In the years since, additional kidnappings have taken place.

### *The Law*

The Afghan Penal Code provides a list of punishments for individuals who engage in the crime of kidnapping, though the Code does not fully define the actual act of kidnapping. For instance, an offender who kidnaps a child under seven years old is subject to medium imprisonment of less than three years (Article 418). If the kidnapping victim is older than seven but younger than eighteen, the offender is subject to a punishment of long imprisonment, not exceeding seven years. If the victim is a female, however, the offender can be imprisoned up to ten years (Article 420).

If the act of kidnapping takes place with the use of coercion or fraud, the authorized sentence is long imprisonment. If a female is abducted with coercion or fraud, a convicted offender must receive the maximum applicable sentence under long imprisonment (Article 421). If a child between the ages of seven and eighteen is abducted by “a person who has influence or authority over the person . . . or if the [perpetrator] is charged with the responsibility of raising the [child]” the authorized penalty becomes long imprisonment of not less than ten years incarceration (Article 423).

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<sup>47</sup> Jason Burke, *Crime in Afghanistan*, *The Guardian* (3 September 2008).

<sup>48</sup> Taliban kidnap 23 Koreans from Afghan Bus, *Reuters* (20 July 2007), *available at* <http://www.reuters.com/article/topNews/idUSISL13294820070720>.

<sup>49</sup> Carlotta Gall and Taimoor Shah, *American Woman is Kidnapped in Afghanistan*, *New York Times* (27 January 2008), *available at* <http://www.nytimes.com/2008/01/27/world/asia/27afghan.html>

The abduction of an adult male over eighteen is subject to a penalty of medium imprisonment of three to five years (Article 422). If the kidnapping victim is an adult woman, an offender is subject to a punishment of long imprisonment. However, if the victim is married or some form of adultery is committed, the maximum penalty must be enforced (Article 424). The following chart provides a summary of different types of kidnapping offenses and punishments.

<b>Type of Kidnapping Offense</b>	<b>Kidnapper</b>	<b>Victim</b>	<b>Punishment</b>
Article 418	Any person	A child under the age of 7 or any person who cannot take care of himself	Medium imprisonment, not exceeding 3 years
Article 420(1)	Any person acting without coercion or fraud	A boy under the age of 18	Long imprisonment, not exceeding 7 years
Article 420(2)	Any person acting without coercion or fraud	A girl under the age of 18	Long imprisonment, not exceeding 10 years
Article 421(1)	Any person acting with coercion or fraud	A boy under the age of 18	Long imprisonment
Article 421(2)	Any person acting with coercion or fraud	A girl under the age of 18	Maximum long imprisonment
Article 422	Any person	An adult male over 18	Medium imprisonment of 3 to 5 years
Article 423	A person with influence or authority over the victim, a person charged with raising the victim, a servant of the victim, or if a number of people are involved in the act	A child under the age of 18	Long imprisonment, of at least 10 years
Article 424	Any person	A woman over the age of 18	Long imprisonment; if woman is married or act of adultery is committed, maximum anticipated punishment
Article 425	Any man who intends to lawfully marry the victim	A girl who is over the age of 16, and consents	No punishment

In each circumstance, if the victim of the kidnapping is physically injured, defined by a defective or lost bodily member, then the offender is subject to punishment in accordance with the provisions of the Penal Code covering deliberate lacerations (see Articles 407-13). Similarly,

if the victim is killed in the act of kidnapping or during the period of illegal detention, the offender can be charged with deliberate murder (Article 419).

The Penal Code provides defendants with an important affirmative defense. Individuals accused of kidnapping a female over the age of sixteen can refute the charge if they can show that their act of “carrying off” the girl was (1) undertaken with the consent of the girl and (2) was undertaken for the purpose of lawfully marrying her (Article 425).

Closely related to kidnapping is the Penal Code’s prohibition of illegal arrest and detention. An individual is guilty of illegal arrest and detention if she arrests, detains or prevents another individual from attending work (Article 414). Such acts are punishable by medium imprisonment. If an offender commits this act while wearing, without authority, the uniform of a government official or using falsified documents, she can be punished with long imprisonment up to ten years (Article 415). Other aggravating circumstances resulting in long imprisonment up to ten years include the use of coercion, threat or torture, or an illegal detention carried out by a government official (Article 416).

### **Discussion Questions**

1. Why are there increased penalties for the abduction of females? Does this represent a concern that sexual assault motivates abductions? Would a victim of such sexual assault need to meet the onerous burdens imposed by Islamic Law to prove the assault? Is this a good burden to impose on a victim of both kidnapping and sexual assault?
2. Why is there a marked difference in punishment for the abduction of children under seven and children between seven and eighteen? Should there be such a distinction?
3. Should there be increased penalties for the abduction of public officials and foreign nationals? Why or why not?
4. The Penal Code does not mention any aggravated punishments for kidnappings that seek ransom. Is this a deliberate omission or an oversight? Should offenders who seek ransom be punished more severely?
5. Should the Penal Code include mitigating factors to induce safe releases? Why or why not?

## **6. Rape and Violence against Women**

Rape is sexual intercourse against the will of the victim. The offense is undertaken by force, threat, or intimidation. It is important to note that a defendant’s mental state need only be knowing (aware of intercourse). A charge of rape, consequently, focuses on the mental state of the victim. It is from the rape victim’s perspective, not the assailant’s, that the presence of forceful compulsion is determined. The test is subjective and takes into account the victim’s

perception of the surrounding circumstances. Consider the following summary of an actual rape case in Afghanistan as you read this section.

### Reading Focus

“Sweeta . . . began to rock as she told her story. The details emerged in a monotone, her face expressionless. Last winter she had just stepped out of her house in Afghanistan's northern province of Jowzjan to fetch water from the well when a neighbor approached her. He told her that her father was ill and had been taken to the hospital. He offered her a ride. When she refused, he threw her into his car, his hand over her mouth so no one would hear her scream. He took her to a room in the nearby army garrison. ‘And then he took off his pants,’ she says. ‘He raped me.’ Sweeta is only 11 years old.”<sup>50</sup>

The Penal Code does not fully define (or even mention the word) rape. Article 429, however, criminalizes adultery that is conducted through violence, threat, or deceit. In many countries the requirement of violence is replaced by “force.” Such force can involve physical restraint, but may also include constructive force induced through fear. Deceit often refers to the impersonation of an individual’s spouse, and such acts constitute rape.

Generally, rape laws exist to combat the violent invasion of an individual’s personal integrity and dignity. An essential element of that dignity is the ability to consent to a particular act. Consent can be judged by whether the individual understands the nature and consequences of a proposed act and agrees to them. In some countries, consent must be actually and freely given without any confusion about the facts of the circumstances—for instance, a person who is intoxicated is not able to give consent, even if their becoming intoxicated constituted a criminal act in itself. The law of consent looks at the state of the situation objectively to determine whether it was possible for the perpetrator to receive actual consent. If not, the perpetrator is guilty of rape.

Read literally, Article 429 does not require a victim to verbally reject unwanted sexual advances, for example by saying “no” or “stop,” or to physically resist any unwanted sexual activity. Threat or deceit on the part of the perpetrator will negate any claim of consent. In fact, an individual who consents out of fear of a threat does not actually consent. Despite the absence of any physical force, a threat that paralyzes a victim’s will to resist does not legitimize the sexual act.

### The Problem

Women in Afghanistan continue to be victims of violence, despite protections promulgated under international law, the Afghan Constitution of 2004, and various Penal Code

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<sup>50</sup> Aryn Baker, Afghanistan’s Epidemic of Child Rape, *Time* (17 August 2008), available at <http://www.time.com/time/world/article/0,8599,1833517,00.html>.

provisions. Though official statistics are difficult to find, there is significant anecdotal information regarding domestic violence and, in particular, rape violence against women. More broadly, there are cases of arson and bombing at girls' schools to express disapproval of female education, sexual assault is reported to be common, and within the family, women have been known to suffer beatings, burnings, and even death at the hands of their family members.<sup>51</sup>

Perhaps more troubling, child rape is on the rise in Afghanistan's Northern provinces. Maghferat Samimi, head of the Afghan Human Rights Organization in Jowzjan, says that over a two month period in 2008 she interviewed nineteen victims from three Northern provinces. The youngest victim was two and a half years old.<sup>52</sup>

While statistics are unavailable, there is evidence that when the victims of rape seek the assistance of the formal justice sector, they are often further victimized by the criminal justice system. For example, women alleging sexual assault are often charged with adultery (a crime under the Penal Code), rather than seeing charges leveled against the perpetrator. In Lashkar Gah, Helmand province's capital, for instance, two-thirds of all female prisoners are being held for illegal sexual relations, but most are simply rape victims.<sup>53</sup> Women who escape an abusive home and seek assistance from the police also risk being arrested for "running away from home."

In many instances victims of sexual assault choose not to bring their cases to the attention of the government. Among the many influences on this decision, victims fear a life of scorn or death threats for exposing assailants.<sup>54</sup> According to government officials, only five rapes were reported between April and August 2008. These officials, like women's rights groups, recognize that the number of reported rapes probably falls far short of reality. Moreover, survivors of sexual violence often decide not to speak out because they fear being killed or ostracized by relatives for dishonoring the family and engaging in immoral behavior.<sup>55</sup>

In fact, women continue to be *victims* of "honor killings," and prosecution of these murders is rare. It is estimated that 60 to 80 per cent of all marriages are forced, and approximately 57 percent of women are married before the legal age of sixteen. Only an estimated five percent of these marriages are registered, keeping many of the unlawful acts away from formal legal domains.<sup>56</sup>

Compounding these problems is the reality that judges, prosecutors and police are often ignorant of human rights law and may be reluctant to apply it due to ingrained societal

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<sup>51</sup> Dilip Das (ed.), *World Police Encyclopedia*, 4

<sup>52</sup> Aryn Baker, *Afghanistan's Epidemic of Child Rape*, *Time* (17 August 2008), available at <http://www.time.com/time/world/article/0,8599,1833517,00.html>.

<sup>53</sup> Terri Judd, *The Afghan women jailed for being victims of rape*, *The Independent* (18 August 2008).

<sup>54</sup> The Associated Press, *Rape becomes a topic in Afghanistan*, *International Herald Tribune* (12 August 2008).

<sup>55</sup> Amnesty International, *Abduction and Rape at the Point of a Gun* (13 November 2004).

<sup>56</sup> United Nations Economic and Social Council, *Mission to Afghanistan, Integration of Human Rights of Women and a Gender Perspective: Violence Against Women*, pp. 7-8 (15 February 2006).

perceptions of how women should conduct their lives. Police, prosecutors, and the courts are more likely to “mediate instead of enforcing the law against the perpetrators.”<sup>57</sup> Non-judicial means are often applied to resolve violence against women. For instance, the police’s Family Response Unit, the Department of Women’s Affairs, and traditional councils of elders often return victims to their homes after a written promise from the perpetrator that he will desist from abusive behavior in the future.<sup>58</sup>

It does not help that women comprise only about five percent of all prosecutors and judges, and only 0.4 percent of the police force. This is part of a larger trend in which women experience “exclusion from formal and informal public policy and decision-making processes [as] women hold only nine percent of formal positions, well below the international benchmark of thirty percent.”<sup>59</sup>

Underlying each of these problems are traditional and cultural practices along with a narrow interpretation of Islamic Law. The United Nation’s High Commission on Human Rights explains that the problem “emanates from entrenched cultural attitudes and practices, the absence of female lawyers and judges, and the inability of many women to physically access the judicial system without a male escort.”<sup>60</sup>

While victims of sexual assault face incredible challenges and social stigma in bringing their cases to public attention, the government has recognized the need to combat rape. Beginning in 2008, the Interior Minister announced a crackdown on sexual assault, one of the first times the government has acknowledged the problem, as rape was long considered a private matter. President Karzai has also called for more action, stating that rapists should face “the country’s most severe punishment.”<sup>61</sup>

In August 2008 a female *shura*, or consultative council, was established in the province of Helmand in an effort to combat the imprisonment of abused women. The *shura* is composed of twenty influential women, mostly teachers, seeking to educate women of their basic rights. The project is aided by advisers for the Afghan Human Rights Committee, the Women’s Affairs Department, and the government’s legal adviser.

Like the enforcement of most Afghan laws, the government faces significant obstacles. President Karzai’s government currently has limited influence outside of the capital. Warlords often command private armies—and well-connected criminals, including rapists, can bribe their way out of prison and punishment. To combat these realities, the United Nations has encouraged

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<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.* at 7.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> High Commissioner for Human Rights, Report on the situation of human rights in Afghanistan on the achievements of technical assistance in the field of human rights, United Nations, 7 (21 February 2008).

<sup>61</sup> The Associated Press, Rape becomes a topic in Afghanistan, International Herald Tribune (12 August 2008).

President Karzai to endorse the National Action Plan for Women in Afghanistan (NAPWA).<sup>62</sup> The hope is that with the government's dedicated support, a new culture of equality and access to justice can be achieved.

### **Violence and Women: A Case Study**

“They were walking to school in the southern Afghan city of Kandahar, a group of teenage girls discussing a test they had coming up, when two men on a motorcycle sprayed them with a strange liquid. Within seconds a painful tingling began, and there was an unusual smell as the skin of 16 year old Atifa Biba began to burn. Her friend rushed over to help her, struggling to wipe the liquid away, when she too was showered with acid. She covered her face, crying out for help as they sprayed her again, trying to aim the acid into her face. The weapon was a water bottle containing battery acid; the result was at least one girl blinded and two others permanently disfigured. Their only crime was attending school. It was not an isolated incident. For women and girls across Afghanistan, conditions are worsening—and those women who dare to publicly oppose the traditional order now live in fear for their lives.”<sup>63</sup>

### **Discussion Questions**

1. What statutory laws were violated with this act?
2. What steps can be taken to confront and diminish instances of violence against women?
3. In what ways can the government ensure that women can access education and participate in civic life?

### *The Law*

As discussed above, the Penal Code does not use the word rape. Instead, crimes of a sexual nature are treated in a small, four article chapter titled Adultery, Pederasty, and Violation of Honor. As a preliminary matter, the chapter's first Article stipulates that adultery is only punished by the Penal Code if the conditions of *hudud* are not fulfilled or the Islamic Law charges are dropped (Article 426). You may recall from our earlier discussion of *zina* that adultery is literally defined as sexual intercourse between two individuals when either of the participants is married. Under *hudud* requirements, those guilty of adultery are subject to a punishment of death by stoning.

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<sup>62</sup> High Commissioner for Human Rights, Report on the situation of human rights in Afghanistan on the achievements of technical assistance in the field of human rights, United Nations, 7 (21 February 2008).

<sup>63</sup> Clancy Chassay, Acid attacks and rape: growing threat to women who oppose traditional order, The Guardian (22 November 2008).

If s *hadd* punishment is not enforced, the Penal Code authorizes a punishment of long imprisonment, absent any aggravating circumstances, for both convicted adulterers and those guilty of pederasty. Article 427 provides a long list of aggravating conditions which increase the applicable punishment to the maximum punishment available. Aggravating conditions are triggered when there is: (1) a victim who is under the age of eighteen; (2) a victim who is a third degree relative of the assailant; (3) an assailant who is a tutor, teacher, servant, or an authority figure for the victim; (4) a victim who is married; (5) a victim who is a virgin; (6) more than one assailant; (7) transmission of a genital disease; and (8) impregnation of the victim (Article 427). If an act of adultery or pederasty results in the death of the victim, an offender can be sentenced to continued imprisonment or death. The exact punishment is discretionary based on all the relevant circumstances (Article 428).

As discussed above, the Penal Code's closest equivalent to a rape prohibition is Article 429, which reads "a person who, through violence, threat, or deceit, violates the chastity of another (whether male or female), or initiates the act, shall be sentenced to long imprisonment, not exceeding seven years" (Article 429(1)). If the victim is under the age of eighteen or falls into any of the categories defined among the aggravating circumstances, the assailant is subject to long imprisonment of no more than ten years.

## II. CRIMES AGAINST PROPERTY

### 1. Larceny

Article 454(2) of the Penal Code defines larceny as the act of "secretly carr[ying] away the personal goods" of another individual. Larceny crimes only fall under the purview of the Penal Code if the conditions of a *hadd* theft, as discussed above, are not fulfilled. Because the *Qur'an's* conditions are not satisfied, there is doubt regarding the applicability of the punishment, or the punishment is in some way dropped. Only when *hudud* punishments do not apply are individuals punished according to Article 454(1).

The bulk of the Penal Code's treatment of larceny relates to punishment. Little attention is given to the elements of a larceny offense. In many jurisdictions there are two basic forms of larceny: (1) larceny by stealth, and (2) larceny by trick. As indicated in Article 454, the Penal Code covers larceny by stealth. More fully defined, larceny by stealth is understood to require the offender to take and carry away the personal property of another individual with intent to steal that property. It is important to note in most jurisdictions larceny has long been a means to protect possessory, not ownership, interest.<sup>64</sup> As a result, a thief can be the victim of larceny. Indeed, as long as a thief possesses a piece of property, it can be stolen from him. For example, if Haroon steals property from Tariq, and Hisham subsequently steals that property from Haroon, Haroon could initiate legal proceedings against Hisham for larceny.

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<sup>64</sup> 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 498 (2d ed. 1898) ("larceny involves a violation of possession; it is an offense against a possessor").

Larceny also includes the offense of extortion (see Article 464). Extortion entails the threat of force, or some other form of coercion, in the taking of personal property. Extortion differs from other varieties of larceny in that it involves some form of compulsion, even if it is only a threat, and not actual infliction of harm. Coercion is the compelling of another individual to engage in conduct which they have a legal right to abstain from by instilling a fear that they will suffer a permanent physical or economic injury. Extortion, as a result, is larceny plus coercion.

In some jurisdictions defendants have access to an offense-specific defense known as claim of right. It is an affirmative defense if a defendant (1) was unaware that the property belonged to another, or (2) acted under an honest claim of right to the property. For instance, if you take a book from the library thinking the book is yours because you left another copy of that book at the library several days prior, you will have a claim of right defense to any later acquisition of larceny.

The claim of right defense does not apply to all forms of larceny. For instance, extortion is a form of larceny, but many jurisdictions do not authorize the defense to such crimes. The exception is significant because extortion requires the threat of force or some other form of coercion and cannot easily be argued to be an honest mistake. Similarly, certain countries do not allow claim of right defenses for robbery, which is defined as forcible larceny. Since such forcible conduct is both a transgression against property and a risk to physical or mental well being, it is rarely excused with a claim of right defense.

### *The Problem*

All countries confront the reality of larceny theft. In the United States, for example, there were 6.6 million larceny thefts in 2007 alone. These thefts cost victims an estimated \$5.8 billion in lost property.<sup>65</sup> In Afghanistan, crimes like larceny are also a significant problem. Indeed, “a large portion of the Afghan population is unemployed, and many among the unemployed have moved to urban areas. Basic services are rudimentary or non-existent. These factors may directly contribute to crime.”<sup>66</sup>

### *The Law*

As defined in the Penal Code, individuals convicted of larceny are subject to an array of potential penalties depending on the conditions under which the crime was perpetrated. For example, Article 455 lists a number of aggravating factors including: (1) committing a larceny offense from “sunset to sunrise;” (2) larceny offenses involving more than one person; (3)

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<sup>65</sup> United States Federal Bureau of Investigation, *Crime in the United States (2007)*, available at [http://www.fbi.gov/ucr/cius2007/offenses/property\\_crime/larceny-theft.html](http://www.fbi.gov/ucr/cius2007/offenses/property_crime/larceny-theft.html).

<sup>66</sup> United States State Department, *Afghanistan Country Specific Information (16 June 1008)*, available at [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1056.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1056.html).

larceny offenses committed when the offender is carrying a weapon; and (4) larceny offenses committed at residences where access is achieved by climbing a wall, drilling a hole in the residence, breaking down a door, using forged keys, or presenting oneself as a military or police officer by wearing a uniform.

The exact sentence for an offense of larceny, including those listed above, will vary depending on the context of the crime and the severity of the aggravating factor. Among the most serious of the aggravating factors, threatening to use a weapon or employing “duress” in the course of larceny carries a sanction of long imprisonment. If any physical injury befalls a victim in such crimes, then the offender can be sentenced to continued imprisonment (Article 456). In a similar provision, Article 457 stipulates that if an individual commits larceny between sunset and sunrise while armed (or if his accomplice is armed) he will be subject to a sentence of long imprisonment.

Other, less severe, aggravating factors will trigger a penalty of medium imprisonment, which requires incarceration of not less than three years. These aggravating circumstances include: (1) committing a larceny theft in a place of worship, a residence or at the annex of a residence; (2) committing a larceny over the telephone or by telegraph; (3) trespassing by breaking through a wall or using forged keys; (4) committing a larceny for the purpose of inflicting damage on one’s employer; (5) committing a larceny while engaged in the profession of a porter, transporter, or driver (Articles 458- 459).

In cases where the defendant does not satisfy any of the aggravating conditions, or in cases where the value of the property appropriated through larceny is “insignificant,” the offender is subject to imprisonment between three months to two years. The exact sentence is at the discretion of the judge and depends on the particular goods appropriated (Article 460). No matter what the value, however, an individual convicted of larceny must return the goods appropriated, or, if the goods are no longer available, provide monetary compensation equal to their value (Article 463).

If a defendant is convicted of encouraging or initiating the act of larceny theft, she is subject to a punishment that cannot exceed half the maximum punishment allowed for actually committing the larceny theft. If a defendant is involved in the larceny offense as an accomplice, she is subject to the same punishment as the primary actor in the offense (Article 459 and Article 462).

Finally, Article 464 describes the punishments for extortion. An individual who uses violence, threat, or duress to acquire the signature, document, seal or fingerprint of another is subject to long imprisonment. If there is no gain to the offender and no loss by the victim, then the defendant is only subject to a punishment of medium imprisonment (Article 464). When the extortion is employed to extract money or other goods from a victim, the offender is subject to a punishment of long imprisonment of not more than seven years (Article 465).

## **2. Embezzlement**

Embezzlement occurs when an individual who has been entrusted with another person's property converts or claims that property as her own. The crime arises only when property is acquired lawfully, often in situations of employment, trust, or agency.

Conversion occurs when an individual treats property she has been entrusted to hold for someone else as her own, and uses it for her own purposes. When the prosecution has strong evidence that the offender committed a fraud or possessed criminal intent, there is less of a burden to show the element of conversion. Nevertheless, no matter how strong the showing of criminal intent is, there must be some showing of how the offender personally used the property of another.

The offense of embezzlement generally requires criminal intent, even if a statute defining the offense does not explicitly call for it. In some countries intent means the fraudulent purpose of depriving a victim of his or her property. This implied requirement is important because embezzlement statutes rarely require proof of intent. More often they call for a showing of an intentional act that results in misappropriation.

It is important to note that embezzlement does not require an offender to physically take property. The act of conversion can consist of failing to account for or to pay over money. Prosecutors must determine why the money was not paid out before charging embezzlement. If the failure resulted from ordinary delay, misfortune, or any number of other reasons, it is not a crime.

### The Law

Like many of the provisions found in the Penal Code, there is very little attention paid to the definition of embezzlement or its elements. Most of the embezzlement articles are concerned solely with the punishment of convicted embezzlers.

For instance, any public official who embezzles goods from the State or private citizens faces a punishment of long imprisonment, not to exceed ten years (Article 268(1)). If the government official is a government treasurer, collection agent, cashier, petrol official, sugar official, or food department official, she is subject to long imprisonment. If a public official is convicted and subsequently debarred from her profession (see below), she can regain employment with the government after the course of her punishment has run and her honor has been restored. (Article 268(2)-(3)).

Lighter punishments are prescribed for public officials who convert State funds (not money directly from private citizens), priced documents, or similar articles for their own benefit. Such acts are subject to medium imprisonment (Article 269). Similarly, if the public official has a duty to oversee contract revenues, international trade, or other State matters, and as a result of her position makes a personal profit, or seeks to make a profit, she is subject to medium imprisonment of no fewer than three years (Article 271).

When an official has a duty to oversee contracts and protect State interests, purposeful failure to uphold the fiduciary duty is an offense punishable by long imprisonment not to exceed ten years. If the criminal transgression only results in insignificant damages, the offender will receive a lesser sentence of short or medium imprisonment, as determined by the circumstances of the individual offense (Article 270).

In each instance, a convicted offender must also return all goods embezzled, pay a cash fine equal to the amount of the money or goods embezzled, and, if imprisonment is longer than three years, be debarred from her profession and separated from her official duty (Article 273).

### **3. Burglary**

An individual commits the crime of burglary if they unlawfully enter a building or occupied structure with the purpose of committing a crime. Occupied structures consist of any structure, place, or vehicle that has been adapted for overnight accommodation or for conducting business. Several factors determine if an occupied structure qualifies as a residence, including whether it is usually occupied by individuals at night, whether it is maintained as a dwelling, and how long it has been vacant. Whatever the structure is called, to be convicted of burglary, the defendant must have had the actual intent to commit a crime once she gained entrance to the structure.

In some countries, an offender cannot be convicted of burglary without actually “breaking and entering.” “Actual breaking” is some application of physical force, however, slight, to gain entry to the structure. It is important to recognize that “breaking” does not require any window or door to actually be broken open. Instead, merely pushing aside something that would ordinarily secure the premises, like a door, is sufficient to qualify as actual breaking. If entry is gained through some other means, like threat, fraud, or conspiracy, the defendant can still be guilty of burglary because they have constructively “broken” into the structure. No matter whether the breaking was actual or constructive, the entering of the structure must have been contrary to the wishes of the person who occupies that building.

Burglary laws have developed, in part, from conceptions of the importance and value of the privacy and the sanctity of home and profession. By criminalizing breaking and entering, the Penal Code attempts to protect Afghan citizens’ rights regarding their possessions, structures, and protected personal spaces (like the home).

Moreover, burglary laws recognize the dangers to personal safety when an unlawful breaking and entering occurs—i.e. the danger that an intruder will harm residents when conducting the intended crime or escaping, and the danger that residents of the building will react violently to the invasion. By criminalizing the conduct, the Penal Code seeks to deter the trespass and any other crimes intended within the structure.

#### *The Law*

The Penal Code addresses burglary in Articles 431-32. The title of the chapter is: Transgressions Against Others' Residence and Profession. The unlawful entering of a residence or place of profession with the intent of "dispossess[ing] the owner of the place by force," or committing some other crime, can be punished by medium imprisonment up to two years and a cash fine up to 10,000 Afghanis (Article 431(2)).

The authorized punishment increases to medium imprisonment of no less than two years if: (1) the crime occurs between sunset and sunrise; (2) the offender is carrying a weapon, either openly or concealed; (3) the crime is committed by two or more individuals; (4) the offender "assume[es] the attribute of [an] official of public services or claim[s] to render a public service;" (5) the offender employs any other false attribute to secure unlawful entry; and (6) access is gained to the structure through physical breaking through or climbing over of boundary structures (Article 431(3)).

If a burglary occurs at a place "restricted for keeping goods and [that place is] in possession of [goods] other than [those already] mentioned," the offense carries a punishment of short imprisonment over three months or a cash fine between 3,000 and 12,000 Afghanis. If this crime is committed by two or more people, or while carrying a weapon, the authorized penalty increases to medium imprisonment of up to two years and/or cash fine up to 10,000 Afghanis (Article 432).

#### **4. Fraud**

Fraud is employed to obtain property or services unjustly. This occurs when an individual intentionally misrepresents some fact, knowing of its false nature, in order to induce another to act to their detriment. In the United States, it is estimated that organizations lose approximately seven percent of their revenues to fraud each year; the United Kingdom loses approximately thirteen billion pounds to fraud each year.<sup>67</sup>

Fraud is particularly prevalent in areas that are experiencing economic recession or stagnant growth. Various pressures can induce fraud, including high unemployment rates, rising fuel, utility and food costs, and limited public services. Among the industries that are targeted by fraud schemes are construction and utility companies (raw materials are pillaged by thieves), insurance companies, banks (fraudulent checks and mortgages), and retail stores.

#### *The Law*

As defined in Article 469(1) of the Penal Code, fraud occurs when an individual uses "fraudulent means" or a false name, attribute, or information to induce behavior. The Penal Code is horribly vague on both definitions (particularly "fraudulent means") and mental element requirements.

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<sup>67</sup> Jim Marasco, Economic Hard Times: The Impact on Fraud, Fraud Matters Newsletter (Fall 2008).

For example, each of the five articles found in the Fraud chapter (Chapter 18) of the Penal Code refer explicitly to “persons” violating the act. Despite vague drafting, the mental element of fraud can be inferred from context. Indeed, offenders must have knowledge and intent for a particular action. Subsequently, the action will not qualify as fraud if it occurs as a result of mistake or accident. A defendant must know (or should have reasonably known) of the false nature of his acts. The prosecution must also show that the defendant intended the victim to rely on the misrepresentation, the victim did rely on the misrepresentation, and that the victim acted to his detriment, suffering damages, or transferring property.

False representations can take many forms. Some of the most common false representations include: (1) a false statement of fact, known to be false at the time it was made; (2) a statement of fact with no reasonable basis when it was made; (3) a promise of future performance made with an intent not to perform at the time of the promise; (4) a statement of opinion that is known to be false; (5) a false statement made by an individual claiming special knowledge of a subject matter.

### Forms of Fraud

There are a number of means by which individuals can deceive and misrepresent for personal gain. First, fraud can occur within a contractual relationship with the victim. When fraud occurs in a contractual relationship, the prosecutor must show that without the false statements the victim would not have entered the contract. “Contract” is used broadly in Article 469(2)-(3) and includes any signature, seal, or mark with fingerprint on a document relating to ownership of property or loans. Inducing such action is punishable by short imprisonment, not to exceed three months incarceration.

Second, fraud can occur through false representation. False representation occurs when a statement is false or misleading, or an omission makes other statements misleading. The misrepresentation must be of some importance, rather than a minor or trivial detail. False representations must be made deliberately with the intent to gain or cause loss to the victim (Article 469).

Common examples of false representation include the dishonest use of a credit or bank card when one knows they do not have the legal authority to use the card, or “phishing” schemes where mail is disseminated with false representations that it originates from a legitimate financial institution. As specified in Article 469 of the Penal Code, the punishment for false representation is short imprisonment not exceeding three months.

Third, fraud is often perpetrated by failing to disclose information. To constitute fraud, an individual must intentionally fail to disclose information which he is under some legal duty to disclose. The defendant’s deliberate omission must be intended to cause gain for himself or some loss to the victim. Common examples of fraud by omission can include, for instance, a lawyer’s deliberate omission of important information from her client that results in more legal expenses.

Fourth, fraud can occur by abuse of position. This form of fraud occurs when the defendant occupies a position of power. From this position of power, the defendant must have intentionally and dishonestly abused her position with the intention of creating personal gain. As described in Article 471(3) of the Penal Code, any “guardian, trustee, executor, or custodian” who abuses their position to expropriate property or money from their wards is subject to a punishment of long imprisonment, not to exceed seven years.

If there is no legal position of power, but a defendant uses the “need, incapacity or immaturity” of a victim to deceive him into some detrimental action, like transferring ownership of property, debt or other types of documents, an act of fraud is considered to have occurred. To qualify, the victim must have experienced a loss as a result of the defendant’s actions. If these elements are satisfied, then the defendant is subject to punishment of short imprisonment, though the sentence must be for more than three months” (Article 471(1)).

A final form of fraud occurs when bad checks are issued. To constitute fraud, an individual must knowingly issue a check that cannot be covered by means of cash or credit. Similarly, if a check is issued and all or part of the issuer’s checking account is liquidated so that the amount issued cannot be covered, the issuer can be charged with fraud. If either form of fraud is satisfied, the defendant is subject to punishment of short imprisonment or a fine of no more than 12,000 Afghanis (Article 472).

In addition to each of the forms of punishment described above, Article 473 of the Penal Code requires full compensation when the victim experiences a tangible loss (monetary or otherwise).

### **III. CRIMES AGAINST THE STATE (SPECIAL CRIMINAL LAWS)**

#### **1. Bribery and Corruption**

After 27 years of war, Afghanistan’s corruption is intimately linked to a culture of violence and the scarcity of basic necessities. Shop owners must pay bribes to connect to the electrical grid, employers must pay bribes to release employees from police custody, and victims of crimes are afraid to use the formal justice sector because it requires time and excessive amounts of money. A 2007 Integrity Watch Afghanistan survey states that nearly sixty percent of citizens think their government is more corrupt now than at any time over the past two decades. In the same survey, ninety-three percent of respondents believed that bribes must be paid for basic public services and administrative work. In fact, the average household pays an estimated \$100 in petty bribes every year—even though seventy percent of the families in Afghanistan live on less than \$1 a day.<sup>68</sup>

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<sup>68</sup> Lorenzo Delesgues and Yama Torabi, *Afghan Perceptions of Corruption*, (Integrity Watch Afghanistan, 2007).

Corruption is the abuse of public position for private gain. More fully, the Asian Development Bank defines corruption as “behavior on the part of office holders . . . [to] improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed.”<sup>69</sup>

In the short term, corruption undermines still nascent state institutions, threatens justice, and slows rule of law initiatives. Over the longer term, it will threaten the realization of sustainable economic development. In particular, corruption in Afghanistan has close links with the destabilizing forces of the drug industry and terrorism. As former United Nations Secretary General Kofi Annan described, “Corruption hurts the poor disproportionately—by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.”<sup>70</sup>

Nevertheless, Afghanistan’s recent history suggests that officials must actually be persuaded to enforce the law. The most notable example is smuggling, where imported goods are re-exported, petroleum is illegally imported, and lumber is smuggled to neighboring countries like Pakistan. Customs officials and border guards are ineffective in stopping these practices because they are underpaid and tend to lack the motivation to fully enforce the laws.<sup>71</sup> In fact, irregular business activities are incredibly profitable and provide great incentives for small-scale corruption.

Another negative consequence of pervasive corruption has been an increased number of people turning toward the extremist Taliban, which is seen as “clean” in comparison to many government agencies. While remembered for its harsh rule, the Taliban is also remembered for enforcing those harsh rules effectively—few officials took bribes, most of the country was stable, corruption was not condoned.<sup>72</sup>

### *Anti-Corruption Efforts*

The current government has taken a number of steps to combat widespread corruption. A major turning point came when Afghanistan became a state party to the United Nations Convention Against Corruption. In conjunction with the United Nations Development Programme, the government’s move was intended to combat corruption by signaling the importance and viability of efforts like the Accountability and Transparency Project, which encourages civil society and the media to help fight against corruption. Together, the parties are believed to be capable of facilitating broad public awareness and education initiatives regarding issues of corruption.

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<sup>69</sup> Asian Development Bank, Definitions of Corruption, *available at* <http://www.adb.org/documents/policies/anticorruption/anticorrupt300.asp>

<sup>70</sup> 2003 address on the adoption of the United Nations Convention on Corruption by the General Assembly.

<sup>71</sup> William Byrd, Afghanistan – State building Sustaining Growth, and Reducing Poverty (World Bank, 2005).

<sup>72</sup> Kim Barker, Pervasive Corruption Fuels Deep Anger in Afghanistan, Chicago Tribune (25 November 2008).

Effective anti-corruption efforts, particularly those championed by the United Nations to increase political accountability, focus on six distinct elements: (1) establishing clear laws and rules; (2) strengthening civil society's participation in government; (3) creating a competitive private sector in which individuals can make legitimate money and earn prestige; (4) instilling institutional restraints on power, be it through term limits or impeachment mechanisms; (5) ensuring an independent and impartial judiciary; and (6) improving public sector management, procedures, and training.

### The Law

The Law on the Campaign against Bribery and Administrative Corruption (Anti-Bribery Law) was adopted in 2004 and published in Official Gazette No. 838. It was passed in accordance with Articles 50 and 75(3) of the Constitution (“The state shall adopt necessary measures to create a healthy administration . . .” and “The government shall have the following duties: . . . to maintain public law and order and eliminate every kind of administrative corruption . . .”).

The Anti-Bribery Law's objectives include identifying the causes and motivations underlying corrupt behavior, promoting transparency in public offices, inspecting suspicious financial and economic activities of individual public servants or government offices, identifying perpetrators who have violated the law, and deterring others from acting similarly.

The Anti-Bribery Law is intended to supplement the bribery provisions of the Penal Code by establishing an independent enforcement mechanism. Specifically, the law established the Office for the Campaign against Bribery and Administrative Corruption. The office has the duties of proposing policy to stem corruption, enforcing the provisions of any Anti-Bribery Law, identifying the causes and reasons which create corruption, investigating affairs related to bribery and corruption, and holding training courses to promote professional capacity (Article 5). The office is endowed with power to announce suspects of bribery and official corruption, prosecute them, issue directives to stop the activities of offices where corruption has been found, review documents from government offices, and inspect financial activities of government offices (Article 6).

Despite the importance of the Anti-Corruption office, its size was quickly reduced from 380 employees spread throughout the provinces to 141 employees with no provincial offices. In July 2008, Afghanistan's anti-corruption bureau was shut down altogether. It was replaced with a new anti-corruption commission, the High Office of Oversight and Anti-Corruption. The commission includes representatives from several law-enforcement bodies and is thought to have more power than its predecessor. President Karzai chairs a monthly meeting of the commission.

Though the Anti-Bribery Law is an important step in the fight against corruption in Afghanistan, the law is incomplete in its coverage of bribery and corruption offenses. For instance, the law does not prohibit or define the basic offense of illicit enrichment, the law does not explicitly cover the private sector, obstruction of justice is not criminalized, and foreign public officials and international organizations (and their employees) are not covered by the law.

The law is also deficient because it does not contain a civil recovery provision or a clear compensation provision for affected institutions.

### Specific Provisions

The Penal Code provisions on bribery represent complimentary laws for the Anti-Bribery Law. For instance:

Article 254 of the Penal Code prohibits any public official from receiving any money, good, or service for his own benefit in exchange for the performance or omission of an official duty. The baseline punishments for bribery include a term of imprisonment between two and ten years and a fine equivalent to the bribe. Both the briber and any intermediary receive the same punishment (Article 255).

Article 256 states that if the purpose of a bribe is to facilitate or commit another criminal act, the bribe-taker and briber are eligible to receive a penalty equivalent to that of the underlying crime, in addition to the cash fine required by the law.

Article 258 states that if a government official requests something in return for the performance of his duty, receives external compensation for the completion of his duty, or withholds the performance of a duty in order to receive payment, she can be sentenced to medium imprisonment and a fine equal to the value of the bribe.

Article 260 states that if a bribe is not accepted by a public official, the individual offering the money is eligible for medium imprisonment and a cash fine between 12,000 and 60,000 Afghanis. Indeed, “invitation of the crime of bribery is considered as its [full commission]” (Article 266).

## **2. Narcotics Production and Smuggling**

In 2011 the cultivation of opium poppy in Afghanistan covered roughly 131,000 hectares and produced roughly 5,800 tons of opium.<sup>73</sup> This makes Afghanistan the world’s leading opium supplier, responsible for 90% of global supply.<sup>74</sup> These numbers are more significant when compared to opium cultivation in 1986, when 350 metric tons of opium was produced on 29,000 hectares.<sup>75</sup>

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<sup>73</sup> United Nations Office on Drugs and Crime, *2011 Afghan Opium Survey*, Oct. 11, 2011, *available at* <http://www.unodc.org/afghanistan/en/october/2011/opium-production-in-afghanistan-shows-increase.html>

<sup>74</sup> Tom Peter, *Afghanistan Still World’s Top Opium Supplier, Despite 10 Years of US-Led War*, *Christian Science Monitor*, Oct. 11, 2011, *available at* <http://www.csmonitor.com/World/Asia-South-Central/2011/1011/Afghanistan-still-world-s-top-opium-supplier-despite-10-years-of-US-led-war>.

<sup>75</sup> Cindy Fazey, *Responding to the Opium Dilemma*, in Robert Rotberg, ed., *Building a New Afghanistan* (Brooking Institute Press, 2007).

A principal fear of opium cultivation is that the sale of opium will support terrorist groups. Estimates place the annual revenue from the Afghan drug industry near 2.6 billion dollars (U.S.), or thirty-five percent of the country's gross domestic product. Government reports suggest that terrorist organizations have used these funds to pay new recruits and procure weapons.<sup>76</sup>

Though most opium is grown in small patches, representing only about twenty-five percent of any farmer's cultivated fields, opium represents a disproportionate part of a farmer's income. As a result, opium has become an integral part of the economy, accounting for 9% of GDP.<sup>77</sup>

### *Counter-Narcotics Efforts*

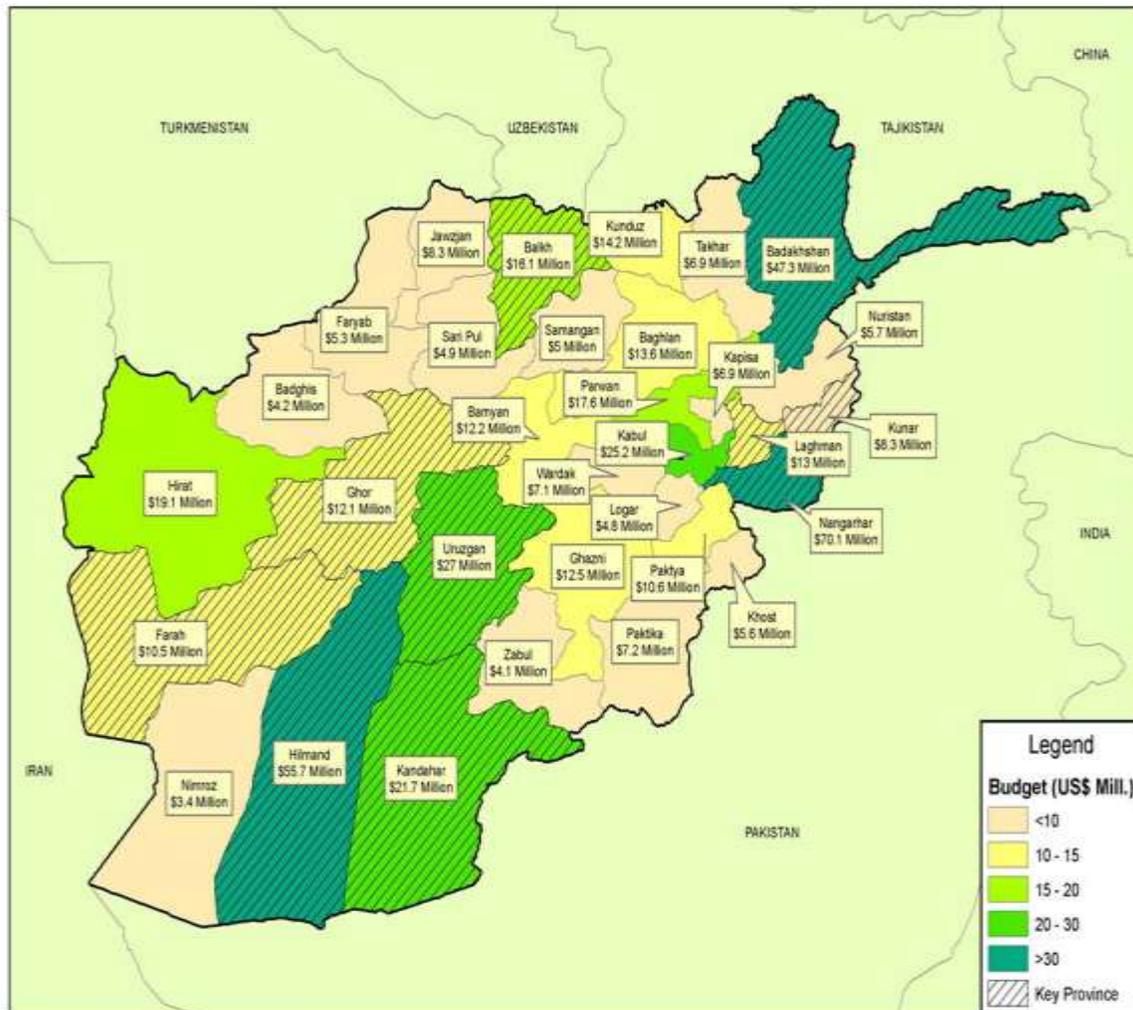
In addition to introducing new laws, the Afghan government and its international allies have begun to promote alternative crops for poppy farmers while enhancing efforts to eradicate and prohibit crops, labs, and storage facilities. But while crop eradication is an obvious goal, it is important to note that farmers themselves receive less than thirty percent of all profits derived from the drug trade. Distributors, wholesalers, and retailers take in the largest portion of drug money. The graphic on the following page represents efforts by the Afghan government and international actors to provide alternatives for farmers.

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<sup>76</sup> Hekmat Karzai, Strengthening Security in Contemporary Afghanistan: Coping with the Taliban, in Robert Rotberg, ed., *Building a New Afghanistan* (Brooking Institute Press, 2007).

<sup>77</sup> Peter, *supra* note 74.

## Alternative Livelihood Projects: A Graphical Representation of Dedicated Funds<sup>78</sup>



Efforts to curtail opium and other drug activities are principally administered by the Counter Narcotics Ministry and Counter Narcotics Police. Together, these institutions have a number of common objectives: build institutions, raise public awareness, promote alternative livelihoods, reduce demand, treat addicts, and build regional cooperation. The Counter Narcotics Police have three sections: intelligence, investigation, and interdiction. While these sections employ over 500 officers, the most effective team is the Afghan Special Narcotics Force, which was created in 2004 and can rapidly intervene with helicopters and commando-style raids.

<sup>78</sup> United Nations Office on Drugs and Crime, Alternative Livelihoods Projects Database, available at <http://www.unodc.org/pdf/afg/2005MappingAlternativeLivelihoodProjectsAfghanistan.pdf>

The use of special police forces has coincided with the introduction of the 2006 Counter-Narcotics Law. Published in Official Gazette No. 875, the law replaced an earlier counter-narcotics law from 2003. Like the Terrorism Finance Law, this law derives its legitimacy from Article 7 of the Constitution: “the state shall prevent . . . cultivation and smuggling of narcotics, and production and use of intoxicants.”

The law is primarily employed by the Criminal Justice Task Force (CJTF), established in 2005 through the efforts of Afghanistan, Britain and the United Nations, to prosecute narcotics offenses. CJTF is made up of Afghan police investigators, Afghan prosecutors, and both primary and appeals court judges that sit on the Central Narcotics Tribunal. Investigators will refer cases to prosecutors who have thirty days to bring an indictment. Between May 2005 and April 2007, CJTF was responsible for 852 investigations, 661 prosecutions, and 390 successful convictions.

Despite early gains in counter narcotics efforts, there are serious obstacles that still exist. The CJTF, for instance, is based in Kabul with little reach into the provinces. Moreover, CJTF has little communication with similar institutions in the provinces and its staff needs more comprehensive training. Communication and coordination between the various organizations is, not surprisingly, necessary for effective and efficient counter-narcotics efforts.

#### **Critical Commentary: The Effects of Criminalizing Drugs - An Economic Analysis**

1. “[Drug] prohibition is likely to lower marginal costs and raise marginal benefits to violence in an industry . . . because participants in the illegal drug trade cannot use the legal and judicial system, the marginal benefits to using violence to resolve disputes increases. . . . Additionally, the marginal cost of violent acts is likely to be smaller in a prohibited market than in a free market, because evading apprehension for one set of illegal activities—drug dealing—is complementary with evading apprehension for another set—initiating violence.”
2. “Still another effect of [drug] prohibition is increased uncertainty about product quality. Government quality regulation does not exist for illegal commodities, and buyers cannot complain about quality without incriminating themselves.”
3. “Available evidence is generally consistent . . . that increases in heroin prices are associated with increases in the rates of property crimes . . . [and] that increases in efforts to enforce [drug] prohibition are associated with increased rates of income-generating crimes.”
4. “Prohibition has a number of other likely effects. . . . The high prices caused by prohibition have increased the incentive to inject drugs (since this provides greater potency for a given

expenditure) and, combined with restrictions on clean needles, thereby furthered the spread of HIV.”<sup>79</sup>

### Discussion Questions

1. Do you find these effects compelling enough to justify decriminalization? Are they more or less important than the various problems that drug use and drug trafficking cause?
2. Are there ways the government can prohibit drugs and combat these effects? How?

### The Law

The objectives of the Counter-Narcotics Law are “to prevent the cultivation of opium poppy, cannabis plants, and coca bush, and prescribe penalties for persons engaging in these activities . . . [and] to regulate and control narcotic drugs, psychotropic substances, chemical precursors, and substances and equipment used in the manufacture, production, or processing of narcotic drugs.” The law also seeks to coordinate counter narcotics activities, establish health centers, and attract cooperation from national and international organizations (Article 2).

The Counter-Narcotics Law contains fifty-eight articles broken into eight chapters. Chapter 1 is dedicated to general provisions and a list of definitions relating to drug production, transportation, and use. Chapter 2 establishes a classification system for narcotics. Plants and substances are divided into four categories: (1) prohibited plants and substances with no medical use; (2) strictly controlled plants and substances with a medical use; (3) controlled plants and substances with a medical use; and (4) chemical precursors. Chapter 2 also establishes a Drug Regulation Committee, composed of medical, pharmaceutical, customs, and counter-narcotics experts, intended to regulate the categorization of drugs.

Chapter 3 regulates the licensing, cultivation, production, manufacture, trading, distribution, and use of the plants and substances described in Chapter 2. Licenses to deal in these matters are granted for one year and any license is subject to re-verification of the character and professional qualifications of the holder. An individual previously convicted of a narcotics or money laundering offense is not eligible to receive such a license.

Any enterprise or institution that is licensed to produce, hold or export narcotics must make an inventory of the plants and substances in their possession each year. These inventories are to be compared to the total quantities in stock at the time of their last inventory, to help

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<sup>79</sup> Jeffery Miron & Jeffery Zwiebel, *The Economic Case Against Drug Prohibition*, in Robert Kuenne, *Readings in Social Welfare* (2000).

understand the movement and distribution of drugs. Chapter 3 also indicates that the export and import of narcotics are subject to a state authorization of the Drug Relations Committee.

Chapter 4 embodies the law's penal sections, including description of the offenses and penalties. Among the most prominent of the offenses, the chapter deals with drug trafficking, drug manufacturing, drug-related corruption and intimidation, cultivation, and consumption.

Chapter 5 covers the adjudication of drug-related offenses. Special narcotics tribunals are intended to try the most serious narcotics cases. These cases are investigated and prosecuted by a Special Counter-Narcotics *Saranwal*, created by the Office of the Attorney General. Any investigating official is required to prepare a report on the seizure of illegal drugs, to keep records of enforcement efforts and to ensure that drugs do not reenter the market.

Chapter 6 contains provisions related to the detection, investigation, and prosecution of narcotics-related offenses. These rules supersede the Interim Criminal Procedure Code, and are critically important to any lawyer's practice. The chapter regulates all aspects of drug prosecution, from searching individuals and property, surveillance, informants, and undercover operations.

Finally, Chapters 7 and 8 regulate the Ministry of Narcotics and other security authorities responsible for enforcing narcotics laws.

#### Specific Provisions

##### **Penal Code - Article 16(2) – Drug Trafficking Penalties**

Whoever commits a drug trafficking offense involving the following quantities of opium or any mixture containing that substance shall be sentenced as follows:

1. Less than 10 grams, imprisonment for up to three months, and a fine of between 5,000 Afs and 10,000 Afs.
2. Between 10 grams and 100g, imprisonment between six months and one year, and a fine of between 10,000 Afs and 50,000 Afs.
3. Between 100g and 500g, imprisonment for between one and three years, and a fine of between 50,000 Afs and 100,000 Afs.
4. Between 1kg and 5 kg, imprisonment for between five and ten years, and a fine of between 500,000 Afs and 1,000,000 Afs.
5. Between 5kg and 50kg, imprisonment for between ten and fifteen years, and a fine of between 700,000 Afs and 1,500,000 Afs.
6. Over 50kg, life imprisonment and a fine of between 1,500,000 Afs and 5,000,000 Afs.

The statute's provisions on counter narcotics represent the most important substantive law on drugs. Here are summaries of each of the major provisions:

Article 16: Drug trafficking is the production, manufacture, distribution, possession, extraction, preparation, procession, offering for sale, purchasing, selling, delivery, brokerage, dispatch, transportation, importation, exportation, concealment, or storage of any illegal substance without a license. While the punishments for opium are severe, as seen below, punishment for drug trafficking in heroin or any other restricted drug are even harsher, with the trafficking of 5kg of heroin and 10kg of other fully processed drugs resulting in life imprisonment.

Article 19: The prohibition against drug manufacturing holds that (1) anyone who opens, maintains, or controls any form of property, (2) without authorization, (3) for the purpose of manufacturing processing, storing, concealing, distributing, or deriving income from any proscribed substance will be punished. If each of the elements is satisfied, the defendant is eligible for imprisonment between ten and twenty years and a fine of between 500,000 and 1,000,000 Afghanis.

Article 21: This Article covers drug-related corruption. The article establishes penalties for both public officials and those that seek to influence public officials. Under the law, any public official who accepts bribes, impairs an investigation or threatens another public official in order to facilitate a drug offense is seriously punished. For instance, any public official who accepts a bribe related to drug trafficking is sentenced to imprisonment for five to ten years and is fined an amount equal to twice the bribe. Intimidation by a public official is punished with five to eight years in prison and a fine of 500,000 to 1,000,000 Afghanis.

The intimidation or threatening of a public official in her official duties results in at least five to ten years in prison and a fine of 1,000,000 to 2,000,000 Afghanis. If the "public" is injured in some way, however, imprisonment increases to between ten and fifteen years and the maximum fine increases to 3,000,000 Afghanis.

Articles 25 and 26: These Articles are among the most important prohibitions in the Counter-Narcotics Law. Together, they prohibit cultivation of opium poppy and seeds, coca bush, and cannabis plants within Afghanistan. Individuals growing the plants are obligated to destroy the crops. If they fail to do so, only then are they punished with criminal penalties.

Unlicensed opium or coca bush cultivators are punished with a minimum of six months in prison and a fine of 10,000 Afghanis (if cultivation is less than 1 *jerib*—1953.6 square meters). For each additional 100 square meters over the 1 *jerib*, cultivators are sentenced to an additional month in prison and an additional fine of 5,000 Afghanis. Cultivators of cannabis are subject to similar penalties, though they are slightly more lenient. Article 26 also makes clear that the illicit cultivation of these crops will result in the destruction of the plants, without any form of compensation.

Article 27: The Counter-Narcotics Law also prohibits and punishes the consumption of illegal drugs. Possession of any prohibited drug results in a minimum of one month in prison and a fine of 5,000 Afghanis. Possession of heroin, morphine, cocaine, or opium results in higher sentences, ranging from 3 months to one year, and higher fines, ranging from 10,000 to 50,000 Afghanis.

The article also provides for treatment of dependent drug users. In fact, if a medical doctor certifies that an individual caught possessing or consuming drugs is addicted to the drug, the court has the discretion to exempt the individual from imprisonment and fine. In their place, the court can require the defendant to attend a drug treatment program. Based on the defendant's behavior and progress at the treatment center, the court can abrogate or extend the period of treatment or impose detention. The time spent at the treatment center counts toward the length of imprisonment.

### The Unintended Consequences of Fighting Opium: A Final Case Study



Teru Kuwayama (left); Veronique de Viguerie/WPN

“Sayed Shah has spent much of his life raising opium, as men like him have been doing for decades in the stony hillsides of eastern Afghanistan and on the dusty southern plains. It’s the only reliable cash crop most of those farmers ever had. . . .

When Shah borrowed \$2,000 from a local trafficker, [he promised] to repay the loan with 24 kilos of opium at harvest time. Just before harvest, a government crop-eradication team appeared at the family’s little plot of land in Laghman province and destroyed Shah’s entire two and a half acres of poppies. Shah took his case before a tribal council in Laghman and begged for leniency. Instead, the elders unanimously ruled that Shah would have to reimburse the trafficker by giving [Shah’s 9 year old daughter] to him in marriage.

[This trend is strikingly evident elsewhere.] In two of Nangarhar’s 22 districts . . . approximately half the new brides had been given in marriage to repay opium debts. The new brides included

children as young as 5 years old; until they're old enough to consummate their marriages, they mostly work as household servants for their in-laws."<sup>80</sup>

### Discussion Questions

1. What can the government do to stop the spread of “opium brides”? Should enforcement efforts be focused on growers or transporters? How would purely legal efforts be better or worse, particularly given the expansive definition of “trafficking”?
2. Should the government monetarily compensate poppy growers when they destroy their crops? Why or why not?

### 3. Financing Terrorism

After suffering a demoralizing 26,000 casualties over the course of a decade, the Soviet Union withdrew its troops from Afghanistan in 1989. The departure led to a vast power vacuum throughout Afghanistan, intense infighting among the various *mujahideen* rivalries, and the eventual rise of the Taliban in 1994. The war-weary population initially welcomed the Taliban’s promise of peace and stability. The reality of Taliban rule, however, was far from peaceful or stable. Narrow interpretations of Islam were brutally enforced and terrorist training was both financed and encouraged.

The presence of many “Afghan Arabs,” non-Afghan *mujahideen*, who had arrived in Afghanistan to fight the Soviets, played a critical role in the rise of the Taliban. Many of these foreign fighters had become politically radicalized during their time in the country. Some joined the Islamic Revolutionary Forces led by Nabi Muhammad, and would later become the senior leaders of the Taliban. Others became members of al Qaeda or joined radical terrorist operations in Bosnia, Chechnya, China, Kashmir, the Philippines, and Tajikistan.

The rise of the Taliban and the continued presence of Islamic radicals allowed Osama bin Laden freedom to direct a number of terrorist operations from the country, including the 1998 bombings of the U.S. embassies in Kenya and Tanzania, the October 2000 attack on the USS Cole, and the September 2001 attacks on New York and Washington, D.C. The safe haven in Afghanistan also allowed Bin Laden and his followers to finance and support *jihadi* organizations worldwide, both through finances and training for fighters and Islamist insurgencies.

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<sup>80</sup> Sami Yousafzai and Ron Moreau, The Opium Brides of Afghanistan, Newsweek (April 7, 2008), available at <http://www.newsweek.com/id/129577>.

The actual terrorist attacks were carried out at relatively little cost. The most expensive of the acts, the September 2001 attacks, cost only \$500,000. Nevertheless, global terrorist operations like those previously housed in Afghanistan require significant resources. Indeed, as terror networks expand in scope and grow in complexity, funds are necessary to provide for recruitment, training camps and bases, equipment, explosives and conventional weapons, forged identity and travel documents, intelligence gathering, communications among organizational components, bribery, and day-to-day maintenance expenses for terrorists and their families, both while deployed and when killed. Increasingly, terrorism also requires money for media operations, including television, radio, print, internet, and video recordings intended to incite enmity against foreign targets.<sup>81</sup>

The Taliban and its radical guests received a great deal of this financial support from either external or illegal sources. For instance, Pakistan provided \$6 million to pay the salaries of Taliban leaders in 1997 and \$30 million for the purposes of fuel, food, ammunition, military equipment, and spare parts in 1998.<sup>82</sup> Cotton and drug smuggling provided the Taliban with an additional \$75 million in 1997, as the Taliban imposed an opium transport tax of as much as 20 percent on each truckload. Even Saudi Arabia, Osama bin Laden's "enemy," formally recognized the Taliban regime and used *zakat* (alms for the poor) as a form of foreign aid for *salafist*-oriented organizations. In addition to these external sources, Osama bin Laden and the Taliban also raised money on their own, relying on the contributions of wealthy individuals throughout Afghanistan and the Middle East.

While terrorist operations in Afghanistan have decreased in comparison to their pre-2001 levels, Afghanistan's militants have continued to regroup and attack the Afghan government, the U.S. led-International Security Assistance Force (ISAF), and other internal targets. Foreign financial assistance and the opium trade continue to provide funds for terrorism in Afghanistan and, as a result, some terrorist training camps have reopened on the Pakistani-Afghan border. A reinvigorated and unchecked network of funding organizations has already begun to function as a new financial foundation for terrorism.

#### *Anti-Financing Efforts*

International efforts to halt terrorist financing grew significantly after 2001. The UN Security Council adopted a wide-ranging resolution demanding that countries take actions to suppress terrorist financing. The Financial Action Task Force, an intergovernmental body, subsequently provided a list of recommended strategies that has become the basis for many governments' efforts. These include legislation criminalizing terrorist financing, having financial institutions report suspicious transactions, increasing international cooperation in tracking down terrorist financiers, and ratification of the UN Convention on Financing Terrorism.

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<sup>81</sup>Rachel Ehrenfeld, *Funding Evil: How Terrorism is Financed – and How to Stop It* (Bonus Books, 2005).

<sup>82</sup>Thomas Johnson, Financing Afghan Terrorism, in Jeanne Giraldo and Harold Trinkunas (eds.), *Terrorism Financing and State Responses* (Stanford University Press, 2007).

In practice, these efforts have led thirty-four states to freeze at least \$93.4 million in assets by January 2006. The International Monetary Fund conducted forty country assessments regarding the capacity to combat terrorist financing, and has undertaken over 200 bilateral technical assistance missions to do so. The World Bank has also assessed compliance with counter-terrorism financing standards and has delivered technical assistance to countries in all developing regions.<sup>83</sup>

These efforts have faced significant challenges. Terrorist networks are aware of government efforts to slow their activities and they adjust accordingly. Terrorists in Afghanistan and elsewhere have increasingly relied on smuggling and counterfeiting to generate revenue that is hard to track in the formal system. Similarly, terrorists are relying more on cash and eliminating any traceable paper trail. Without high-functioning, transparent economies, regulation of the formal and informal financial/trade sectors is particularly burdened.

### **Prominent Sources of Afghan Terrorism Funding**

External governments;

Charitable organizations;

Legitimate businesses operating as fronts, providing employment for members, generating additional income and serving as vehicles to launder money;

The use of unregulated commodity markets;

Drug Trafficking, particularly of opium and heroin;

Money Laundering;

Extortion;

Smuggling;

Kidnapping.

### *The Law*

The Law on the Campaign against Financing Terrorism was adopted in 2004. It was passed in accordance to Article 7 of the Constitution, which provides that “The state shall

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<sup>83</sup> UN Action to Counter Terrorism, *available at* <http://www.un.org/terrorism/makingadifference.shtml>.

prevent all kinds of terrorist activities . . . .” The law was published in Official Gazette No. 839 and contains six chapters with thirty-four articles.

The law is intended to combat terrorism by cutting off terrorists from their financial supporters. In criminalizing the financing of terrorism, the Afghan government can prosecute those directly involved in terrorist activities and those who facilitate those actions.

Article 3 of the law defines the actual offense of financing terrorism as follows: “any person . . . who by any means, directly or indirectly, unlawfully and willfully, provides or collects funds and property, or tries to provide or collect funds and property, or provides or tries to provide financial or other services with the intention that they should be used or in the knowledge they are to be used, in full or in part, in order to carry out . . . any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or compel a government or an international organization to do or abstain from doing any act.”

It is important to note that participating in any of these activities as an accomplice is also criminalized, as is organizing, directing, or motivating others to commit these actions. Article 3 makes clear that no political, ideological, racial, ethnic, or religious explanation can justify the commission of or support for an act of terrorism.

If an individual is found guilty of the offense of financing terrorism they are subject to a punishment including imprisonment between five and fifteen years and a fine between 250,000 and 1.5 million Afghanis. Accomplices, facilitators, and assistants are subject to the same punishment (Article 4). When an agent or representative of a corporate entity is found guilty of financing terrorism, the corporate entity is subject to a fine between 1.5 million and 4.5 million Afghanis. The corporate entity may also be banned permanently from participating in certain business activities, ordered to close permanently, dissolved and required to publicize the judgment against them through mass media (Article 5).

In addition to these punitive punishments, the funds and property of the financier are confiscated (1) when they are used or intended for use in a terrorist act; (2) when they are obtained from the proceeds, derivatives, or exchanges related to the act; (3) if they are transferred to a third party, unless the new owner can prove it was paid for or that they were not aware of the origin of the funds; and (4) when they are mixed with legitimate funds or property, up to the extent of the offense committed. In the event that the property cannot be produced, confiscation of other assets matching the value, either belonging to the convicted individual or their spouse and children, is substituted (Article 8). Similarly, the President of Afghanistan can direct the funds and property of individuals and organizations financing terrorism to be frozen (Article 13).

<b>Penal Code – Article 17 – Jurisdiction of Afghan Courts in Terrorism Financing</b>
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The provisions of the Law against Financing Terrorism can be tried and punished in Afghanistan when:

The offense was committed in Afghanistan;

The offense was committed on board a vessel flying an Afghan flag or an aircraft registered in Afghanistan;

The offense was committed by a national of Afghanistan;

The offense was committed outside of Afghanistan, but the perpetrator is currently in Afghanistan;

The offense was directed against a national of Afghanistan;

The offense was directed against a Afghan government facility outside the country;

The offense is an attempt to compel the state to do or abstain from doing something;

The offense was committed by any person who resides in Afghanistan.

Any offense committed outside Afghanistan but still falling under Afghan jurisdiction requires a “specific” court to hear that particular case. This court is established by the Supreme Court of Afghanistan.

In addition to the provisions regarding domestic efforts to stop terrorist financing, the law also commits Afghanistan to cooperate with other states in combating terrorist financing. The Afghan government has agreed to help gather evidence, make detained individuals available to judicial authorities, carry out search and seizures, and provide relevant files and documents (Article 21). The Afghan government cannot refuse a request to cooperate unless there are specific deficiencies with the request or the offense is currently being adjudicated in Afghanistan. Not even bank secrecy is a sufficient ground to refuse compliance (Article 22).

#### **4. Money Laundering**

Closely linked to the law against terrorist financing, the Money Laundering Law was adopted in 2004. Published in Official Gazette No. 840, the law is intended to “prevent and prohibit the use of financial institutions or any economic activities for money laundering and for the financing of terrorism” (Article 1).

Money laundering is the concealment of money derived from criminal activity. Generally, money laundering is a process through which one conceals the existence, illegal source, or illegal use of income, and disguises the income to make it seem legitimate. Simply put, it makes dirty (illegal) money appear clean (legal), hence the term “laundering.” Money

laundering can also provide criminals and their enterprises with a steady cash flow and investment capital. When done successfully, criminals are able to distance themselves from criminal activity, avoid confiscation of funds when caught, and avoid attracting attention to their enterprise.

### Reading Focus

“The multi-billion dollar scope of worldwide money laundering poses a significant threat to countries on both a micro and macro-economic level. The tremendous wealth being legitimized by laundering allows criminal organizations to gain a large amount of economic power fairly quickly. Front companies . . . are the predominant means of laundering funds used by almost all criminal groups. As drug trafficking and other criminal organizations invest more in these businesses, their toe hold in the legitimate economy of a country grows, as does the economic, social and political influence of the criminal kingpins.”<sup>84</sup>

The process of money laundering is a dynamic three stage process that requires (1) placement, i.e. moving money and property away from the actual crime; (2) layering, i.e. disguising the trail of money to slow or eliminate any investigation; and (3) integration, i.e. making the money available to the criminal and his allies in the legal economy without revealing its origins. Money laundering can be carried out in several different ways, including the use of the financial system, physical movement of banknotes with cash couriers/smugglers, and the movement of value using methods such as the false documentation and declaration of traded goods and services.

While money laundering is related to and often interacts with terrorist financing, the two concepts are distinct. Terrorist financing, as discussed above, is the financial support, in any form, of terrorism. Unlike money laundering, the funds that support terrorists and their activities can be legitimate in origin. But like money laundering, terrorist financing networks work to conceal the source and ultimate use of the money and property.

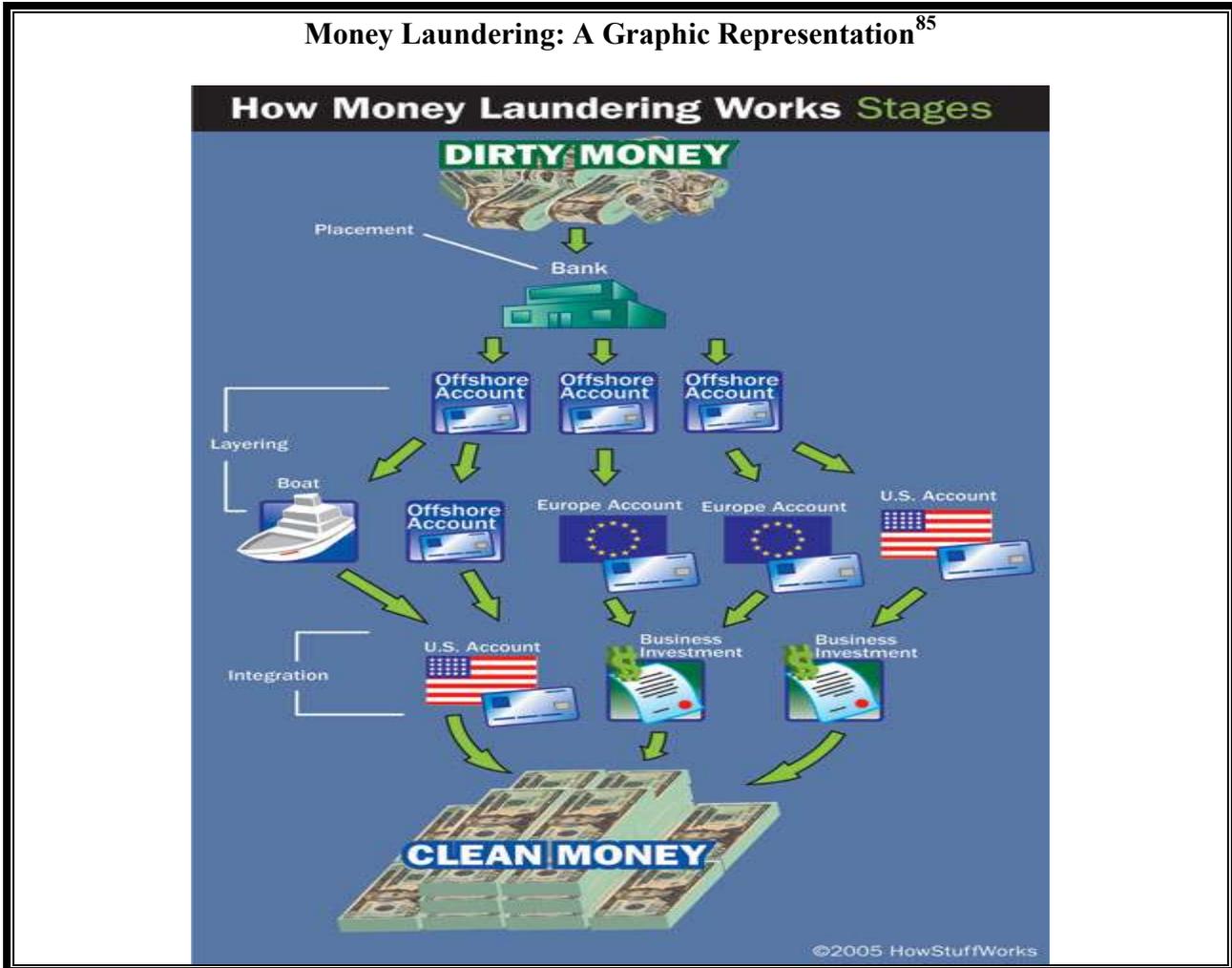
The laws that combat money laundering have several objectives, including maintaining confidence in the banking system, eliminating a form of complicity in other offenses like terrorism, imposing penalties on upper level offenders, cutting off the sources of criminal finances, and keeping professionals (lawyers, bankers, and accountants) away from corruption.

Ostensibly targeted at drug trafficking and terrorism, the money laundering law has a far broader scope, covering any individual who conceals, disguises, converts, transfers, removes from or brings into Afghanistan any funds or property derived from illegal acts or omissions. To better understand the money laundering process, study the following graphic representation.

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<sup>84</sup> Dr. R. E. Bell, Prosecuting the Money Launderers who Act for Organized Crime, 2.

## Money Laundering: A Graphic Representation<sup>85</sup>



### The Problem

Money laundering is particularly troublesome in Afghanistan because of the *hawala* (informal financial transfer) system. *Hawala* operates outside of, and parallel to traditional banking and finance channels in which personal connections facilitate the exchange of money without working through official financial institutions and their paper trails.

The system serves as both a vehicle for illegal money laundering as well as a benign system by which relatives abroad can transfer money to Afghans living in country. Separating the two sources can often be incredibly complex. Development and aid organizations have to be

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<sup>85</sup> Zafar Gondal, Handbook on Economic and Financial Crimes, IDLO.

incredibly diligent in their use of *hawala* to prevent their funds from intermingling with illicit transfers.<sup>86</sup>

In addition to the complexity of regulating the *hawala* system, efforts to combat money laundering are slowed by the globalization of financial systems. Terrorists and organized crime syndicates can gain access to financial systems through multiple entry points in many different countries. As a result, Afghanistan's efforts to combat money laundering can be undercut by weaknesses in corollary laws in other jurisdictions.

According to various estimates, the total money laundered around the world in 2001 ranged from \$500 billion to \$1.5 trillion, with much of that from the illegal drug trade.<sup>87</sup> In that same year an estimated seventy percent of the world's opium came from Afghanistan. In addition, Afghanistan, Iran, and Iraq had no regulations against money laundering in 2001, while Saudi Arabia and Pakistan had inadequate provisions. As a result, criminal operations and terrorist organizations faced little difficulty in finding banking facilities to launder their illegally derived property.

While Afghanistan has since adopted anti-money laundering legislation and has worked closely with other countries to combat the movement of illegally derived property, enforcement efforts still face serious challenges. Indeed, laundering efforts only need to be good enough to defeat the capacity of financial investigation skills and the burden of proof in any of the jurisdictions where the money travels. Moreover, reporting rates for money laundering and other economic crimes are considerably lower than for other crimes.

#### *International Anti-Money Laundering Efforts*

Afghanistan's Law on the Campaign against Money Laundering is only one part of a larger international effort to create a fully integrated web of anti-money laundering laws. For instance, the United Nations has a Vienna based Global Programme against Money Laundering (GPAM) which works to coordinate efforts and stop money laundering activities.

Other international agreements targeted at money laundering have included (1) the 1988 Vienna Convention, which established standards for mutual legal assistance, anti-money laundering legislation, and criminalization of drug trafficking; (2) the Basel Committee on Banking Regulations and Supervisory Practice; (3) the 1990 recommendations of the International Financial Action Task Force; (4) the European Union's Directive on Money Laundering; and (5) The Palermo Convention, which allows all serious criminal activities to serve as predicate offenses to money laundering.

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<sup>86</sup> Patrick Jost and Harjit Singh Sandu, *The Hawala Alternative Remittance System and its Role in Money Laundering* (Interpol General Secretariat, 2000).

<sup>87</sup> Jermyn Brooks, *Terrorism, Organized Crime, Money Laundering*, *International Herald Tribune* (30 October 2001).

While the international agreements guide countries in drafting their own legislation, they also provide a degree of “social” pressure on countries to meet internationally accepted standards and will impose formal sanctions on countries that fail to meet minimum anti-money laundering standards. States that fail to meet minimum standards do not receive certification for their financial centers, signifying that they are not fit international business partners.

### The Law

As indicated above, an individual is guilty of money laundering if they conceal, disguise, convert, transfer, remove from or bring into Afghanistan any funds or property that they know or have reason to believe was derived from illegal acts or omissions (Article 3). Importantly, the law does not require a prosecutor to show intent to promote, conceal or avoid the reporting requirements. Nevertheless, they must still show that the defendant knew the property was derived from some criminal activity and that the funds were in fact derived from such a specified unlawful activity. Article 3 allows knowledge or belief to be inferred from objective factual circumstances.

This law applies to certain institutions and professions. These include: (1) financial institutions, including non-resident institutions; (2) Da Afghanistan Bank; (3) individuals and institutions dealing in bullion, precious metals, and precious stones, if they have transactions over 1 million Afghanis; (4) lawyers, transaction guides, and accountants; (5) real estate agents; and (6) any other entities that are covered by regulation of Da Afghanistan Bank (Article 4).

To monitor the transfer of money, the anti-money laundering law requires that certain requirements be met in the transfer of money. First, any transfer exceeding 1 million Afghanis must take place with an authorized financial institution. That institution must provide originator information so that all parties involved, and the government, know the origin of the money (Article 5).

Second, any individual that enters or leaves Afghanistan with more than 1 million Afghanis must have reported the fact in writing to a police officer, customs officer or an employee of the financial intelligence unit. Failure to do so will result in a fine equal to the cash being carried. To determine if an individual who is about to board or leave any ship or aircraft or who is about to leave/arrive in Afghanistan is carrying this amount of money, individuals may be searched and any evidence of the act of money laundering may be seized (Article 6).

Like individuals, financial institutions have to meet certain obligations. These include identifying customers to the Financial Intelligence Unit when those customers are connected to a suspicious money transfer (over 1 million Afghanis, terrorism is suspected, there are questions about the customer’s identification data), refusing any anonymous accounts, and maintaining transaction records for a period of five years (Articles 8-16).

An individual convicted of the offense of money laundering is eligible for imprisonment between two and five years and a fine between 50,000 and 250,000 Afghanis. An unsuccessful attempt to launder money is punished as if the offense had been successfully committed.

Corporate entities convicted of laundering money are fined between 250,000 and 1.25 million Afghanis and can also be banned from certain business activities for a period up to five years, dissolved, or forced to publicize the judgment (Articles 46-50).

If the money laundering offense is perpetrated by a member of a terrorist organization or any other criminal organization, the punishment is increased to imprisonment between five and fourteen years with a fine between 500,000 and 2 million Afghanis (Articles 46-50).

### **Discussion Questions**

1. Is money laundering a law that affects ordinary citizens?
2. Who is the victim of money laundering? Is it enough that the law drains criminal actors of their financial resources?
3. Is the law under-inclusive by limiting the institutions and professions that are subject to its provisions (see Article 4)? Should the law only focus on the “facilitators” and not the active “criminals”?
4. Do you see a pattern in the types of offenses addressed by post-Taliban criminal statutes? Why were they enacted? Was the Penal Code sufficient in addressing these types of crimes?

### **PART 3: A FINAL CONSIDERATION – DEFENSE LAWYERS**

Throughout this chapter we have considered the various laws that are employed to secure convictions and maintain public safety. At the same time it is important to remember that defendants also have the right to representation and the opportunity to rebut the prosecutor’s charges. The primary means of avoiding conviction is through the efforts of a defense lawyer. Given the state of criminal justice in Afghanistan, the defense bar, despite its best efforts and intentions, falls short of many of its goals. It is, nevertheless, important to consider the general principles which protect the rights of defendants.

A defense lawyer, like other legal professionals, is an officer of the court and must participate in the search for truth. Successful defense attorneys attempt to reveal the truth by effectively presenting the defendant’s version of the events, a view that often clashes with the prosecutor’s version of a defendant’s actions. To be effective in this endeavor, the attorney must be devoted to her client’s interests and exert all of her applicable knowledge and ability. To this end, a defendant must be able to communicate with her attorney to ensure that the attorney can effectively counsel her client and be a meaningful advocate. Before becoming a defense attorney, a legal practitioner is required to take the following oath.

### **Reading Focus**

“Defense attorneys shall take the following oath after obtaining license:

In the name of God, the Beneficent, the Merciful. I swear by the Almighty God that I shall perform my job as defense attorney devoutly and honestly, shall not betray my client, keep job confidentiality, respect and observe principles of the holy religion of Islam and legislative documents of the Islamic Emirate of Afghanistan.”<sup>88</sup>

In an effective system, defense lawyers meet certain minimum requirements before they act as a defendant’s counsel. These include (1) competence—possessing appropriate legal knowledge, skill, thoroughness, and preparation for the task of defense; (2) freedom from conflicts of interest—not representing multiple clients that have adverse cases or any other form of political, financial, business, or property interest which will keep the lawyer from fully advocating; (3) ensuring the client has the opportunity to make critical decisions regarding the case; (4) confidentiality—the defense lawyer should not reveal information she receives during her professional relationship with the defendant, unless authorized by the client or falling into a limited number of exceptions; (5) communication—as mentioned above, the lawyer and defendant need to communicate to ensure truthful and meaningful advocacy; and (6) candor—all information, testimony, and evidence presented by the lawyer should be truthful.

These various professional responsibilities for members of the defense bar are part of a larger system of legal ethics. Put simply, legal ethics represent a code of conduct for individuals who practice law. They provide practitioners with guidance on client-lawyer relationships, duties as an advocate, and maintain the integrity of the legal profession. A viable system of professional responsibility and legal ethics is particularly important in Afghanistan where the criminal justice system is working to gain stability and legitimacy.

### **The Afghan Independent Bar Association: Efforts to Protect Defendants’ Rights<sup>89</sup>**

*Editors Note: Despite the dire state of criminal defense in Afghanistan, the Afghan Independent Bar Association is working to protect criminal defendants’ rights. One of their internal governing articles is the Advocates’ Law, which details certain responsibilities.*

Advocates’ Law, Article 13: Duties of Advocates

Advocates shall have the following duties:

- (1) To maintain client confidentiality;
- (2) To practice law with honesty and sincerity, respecting the dignity of all individuals;
- (3) To respect the orders of a court and/or other authorities;

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<sup>88</sup> Source: Article 27, Law Organizing the Affairs of Defense Attorneys, 1999.

<sup>89</sup> Afghan Independent Bar Association, Defense Attorney Rights and Duties.

- (4) To attend court hearings on behalf of his/her client;
- (5) To refrain from providing any kind of legal assistance to competing parties in the case;
- (6) To keep the client's documents and return them once the case is concluded;
- ...
- (15) To defend at least three criminal cases in each year, free of charge, upon confirmation of the Ministry of Justice

### The Law

Criminal defendants in Afghanistan, until recently, had the right to a defense lawyer as guaranteed by the Law Regulating the Affairs of Defense Attorneys (Article 2). As of this text's publication a new law governing the right to a defense lawyer was drafted but had not been translated into English.

To better understand the right to a defense lawyer we will consider the old law, which is illustrative of a criminal defendant's rights generally. That law, written by the former Taliban government, was published in Official Gazette No. 786 in 1999. Generally, a defense attorney's obligations are to file relevant motions or briefs and defend her client in accordance with the law (Article 4). Defense attorneys are appointed by a defendant after they file a "*Shari'a* official print form," unless the attorney is a family member, in which case no form is necessary.

To qualify as a defense attorney, an individual must (1) be a citizen of Afghanistan; (2) not have any felony convictions; (3) hold a degree from any official Afghan or foreign religious school, or from a faculty of *Shari'a* and law, or have at least ten years of professional experience; (4) be well known; and (5) be over the age of 25 (Article 6). Moreover, the attorney must also hold a license granted and governed by the Ministry of Justice (Article 8). Once fully licensed (Articles 8-16), an attorney can charge 80,000 Afghanis for work on a criminal misdemeanor case and 120,000 Afghanis for work on a criminal felony case (Article 24).

All defense attorneys are required to fulfill certain duties. For instance, a defense lawyer must (1) keep client information confidential; (2) perform her duties honestly and faithfully; (3) abide by the court's rules; (4) avoid representing other parties that may raise a conflict of interest; (5) participate in all stages of the investigation; (6) access the client while she is in detention; and (7) study a client's civil and criminal records (Article 23 and Article 25). Failure to complete these obligations may result in sanctions. Authorized disciplinary measures include oral corrections, warnings, and temporary disbarment for up to three months. If the defense attorney is a repeat offender, the court has discretion to permanently disbar them (Article 38).

### **Critical Commentary: Defense Lawyers in Afghanistan**

"Though Afghans have a legal right to defense counsel, defense attorneys are virtually unknown in Afghanistan. Even in criminal proceedings, defendants are almost never represented by

counsel. . . . A legal aid department within the Supreme Court is supposed to provide assistance to indigent defendants, but according to multiple sources, the office exists in name only. Understanding of the role of defense counsel is lacking as well. For example, a senior prosecutorial official said that a lawyer is only necessary for a defendant who is not literate.”<sup>90</sup>

### Discussion Questions

1. What is the proper role of a defense lawyer? Should there be a more active and accessible legal aid organization that provides lawyers to those that can't obtain their own?
2. How can the government attract talented lawyers to serve as defense counsel? Should they?
3. If a Defendant is convicted without counsel, is the conviction valid? Should it be? Would a defense lawyer make a difference? If so, how?
4. Is the right to a defense attorney a “positive right,” i.e. the government must provide the defendant with a defense attorney if she cannot afford to hire one on her own? Should it be?
5. Are the mandated attorney fees unreasonable? Does it make sense that the cost of hiring a lawyer for a felony case (120,000 Afghani) is greater than the punishment for a defendant caught with between 100g and 500g of opium (between 50,000 Afghani and 100,000 Afghani)? Why are such extensive fees authorized? Should the government pay this cost? Should the government only pay them cost when the defendant cannot afford it himself?

### CONCLUSION

This chapter has covered a tremendous amount of the substantive Afghan criminal law. Together, we have examined the sources of criminal law and how the two major influences, Islamic Law and civil law statutes, interact with each other. You examined the various sections of Islamic criminal law and were asked pointed questions about their scope and applicability. From there we embarked on a detailed examination of statutory criminal law and the major crimes against public interest, against the person, and against property. Together, the analysis, exercises, case studies, and discussion questions have introduced you to criminal law as it currently exists and has encouraged you to think about how both the law and your society can be improved.

As you embark on a new stage in your life, be it in other classes or as a professional, this textbook has prepared you to participate in the legal discourse of your society. For those of you who choose a career in the law, as a judge, prosecutor, defense attorney, police officer, or

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<sup>90</sup> United States Institute of Peace, Special Report: Establishing Rule of Law in Afghanistan (March 2004).

concerned citizen, you have a tremendous responsibility to uphold and apply the law. At the same time, you should recognize the serious challenges faced by the criminal justice system and vigilantly seek to correct these deficiencies. For those that choose another career, the analysis in this chapter is still important, as it has taught you your rights and responsibilities as a resident of Afghanistan. Together, every student who has completed this chapter can make real and important contributions to Afghanistan's development and the strengthening of its criminal justice system.



Moises Saman/New York Times

## GLOSSARY

- ❖ Acquitted: The person in whose favor a judgment has been issued.
- ❖ Actus Reus: The physical action of committing a crime.
- ❖ Consent: Occurs when a person permits, approves or agrees to something of their own free will.
- ❖ Convicted: Is the persons against whom a judgment has been issued.
- ❖ Decision: Is the judgment of the judge issued through such words as “I have decided that you . . . in the matter of . . . are bound” and explains his judgment as to whether the subject matter of the claim be dismissed or it should be submitted (for further proceedings); or “I have judged that you must not interfere with the defendant concerning the subject matter of the case.”
- ❖ Defendant: The party against whom the claim is filed.
- ❖ Intent: Refers generally to the state of an individual’s mind that directs their actions toward a specific act or object.
- ❖ Judge: Is the person who issues a judgment.
- ❖ Judgment: Is a decision issued by the judge through special words, in absolute and definite matter.
- ❖ Jurisdiction: The power, right, or authority to interpret and apply the law.
- ❖ Mens Rea: The state of mind that drives one to commit a wrongful act. This state of mind is often the key element in establishing criminal responsibility.
- ❖ Negligence: When an individual fails to act reasonably, based on their circumstances, and it causes an injury to another.
- ❖ Penal Code: A collection of written laws concerning crimes and their punishments.
- ❖ Plaintiff: The party who is asking the court for relief.
- ❖ Recklessness: When an individual creates a risk of injury to lives, safety or rights, recognizes that risk, but acts anyway. Recklessness is particularly evident if an ordinary, reasonable person would not have acted in the same manner.
- ❖ Victim: A person who is harmed or injured by another. Injuries and harms can be physical, monetary or emotional.

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