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سازمان بین المللی انکشاف حقوق

# **Criminal Law and Procedure in Afghanistan:**

## **Focus on Gender Issues**

2007

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## Abbreviations

AGO	Attorney-General's Office of Afghanistan
<i>Cairo Declaration on Human Rights in Islam</i>	<i>The Cairo Declaration on Human Rights in Islam, Adopted and Issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on 5 August 1990 / 14 Muharram 1411.</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>
<i>Constitution</i>	<i>Constitution of Afghanistan, 2004</i>
<i>Courts Law</i>	<i>Law Governing the Organization and Jurisdiction of the Islamic Republic of Afghanistan's Justice System, 2005</i>
CPC	<i>Criminal Procedure Code, 1965 (as amended)</i>
ICPC	<i>Interim Criminal Code for Courts, 2004</i>
ICCPR	<i>International Covenant on Civil and Political Rights, 1966</i>
<i>Penal Code</i>	<i>Penal Code, 1976</i>
<i>Rome Statute of the ICC</i>	<i>Rome Statute of the International Criminal Court, 1998, entered into force 1 July 2002</i>
UDHR	<i>Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948</i>

## Rules Governing Police and Prosecutors in Afghanistan

The *Constitution*, drafted by the Loya Jirga, represents the highest will of the people of Afghanistan (*Constitution*, Article 110). It defines the structure of the state:

- the state's authorities (executive, legislative and judicial), as well as its other independent institutions,
- the legal system (how laws are made, by which authority, according to which principles, and how they are applied and enforced), and
- the rights and obligations of citizens.

As such, the *Constitution* is the basis for the powers of the police, prosecutors and courts.

According to Article 134(1) of the *Constitution*, all powers of the police and prosecutors in Afghanistan are defined by legislation:

Discovery of crimes is the duty of the police and investigation and prosecution are conducted by the Attorney's Office in accordance with the provisions of the law.

The legislation governing the powers of prosecutors is the *Saranwali Law*, 1991. The legislation governing the powers of the police is the *Police Law*, 2005 (Official Gazette No: 862). Article 6 of that law re-states the principle at Article 134(1) of the *Constitution*: "The police shall perform its duties within their specified area of activity according to the provisions of the law." The provisions of these laws will be discussed further, below.

Note that the *Constitution* does not grant to police or prosecutors the ability it grants to the courts in Article 130 to make reference to Hanafi jurisprudence in limited circumstances. Article 130 refers only to courts:

While processing the cases, the courts apply the provisions of this Constitution and other laws.

When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.

The *Constitution* also sets out rights and liberties for the citizens of Afghanistan that constrain the state – including the police and prosecutors in the exercise of their duties.

The *Constitution* guarantees the fundamental right to life, liberty and human dignity of the citizens of Afghanistan (Articles 23 & 24).

Article 23 Life is a gift of God and a natural right of human beings. No one shall be deprived of this right except by the provision of law.

Article 24 Liberty is the natural right of human beings. This right has no limits unless affecting the rights of others and public interest, which are regulated by law.  
Liberty and dignity of human beings are inviolable.  
The state has the duty to respect and protect the liberty and dignity of human beings.

Chapter 2 (Articles 22-58) of the *Constitution* also specifies the rights and duties of citizens flowing from this guarantee: civil, political, economic, social and cultural rights.

According to Article 22 of the *Constitution*, these rights are guaranteed to all citizens, men and women, on the basis of equality and non-discrimination.

Article 22 Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited.  
The citizens of Afghanistan – whether woman or man – have equal rights and duties before the law

This principle is consistent with *shari'ah*. It is recognized at Article 1(a) of the *Cairo Declaration on Human Rights in Islam*:

[...] All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.

Regarding the principle of equality between men and women in Islam, Shakhul Adise Alhaj Qayzawat pow Abdul Hadi Shinwari, former Chief Justice of the Supreme Court of the Islamic Republic of Afghanistan, has stated:

It is mentioned in the Koran that human beings are created from the dust and none is better than another. We see that in the Islamic religion and the Muslim's holy book there is no difference between men and women regarding their rights, and they have been equal from the creation.

(Medica Mondiale, "The Role of the Judiciary in Safeguarding Women's Rights", A Conference of the Supreme Court of the Islamic Republic of Afghanistan, 22-24 February 2005.)

The principle of equality is also guaranteed in the constitutions of many other Muslim countries. It is, for instance, guaranteed at Article 40 of the *Constitution of Egypt*, Article 20 of the *Constitution of Iran*, Article 7 of the *Constitution of Lebanon*, Article 5 of the *Constitution of Morocco* and Article 25 of the *Constitution of Pakistan*.

The civil rights relevant to criminal prosecutions, many of which are also guaranteed in Afghan legislation applicable in this area, include:

- Freedom from arbitrary detention (*Constitution* Article 24; *ICPC* Articles 6, 35 & 36);
- Right to be presumed innocent (*Constitution* Article 25; *ICPC* Article 4(1));
- Right of the accused to be informed of charges against him (*Constitution* Article 31; *ICPC* Article 31(1));
- Principle that crime is a personal act (*Constitution* Article 26);
- Principle that there can be no retroactive jurisdiction (*Constitution* Article 27; *ICPC* Article 25(1); *Penal Code* Articles 2-3);
- Freedom from torture (*Constitution* Article 29);
- Freedom from compulsion to give testimony (*Constitution* Article 30; *ICPC* Article 5(4)-(7));
- Right to legal representation (*Constitution* Article 31; *ICPC* Articles 18-19) and related principle of privilege (*Constitution* Article 31) and rights of defense counsel to be present during interrogation, search etc. (*ICPC* Articles 32(3) & 38), to notification of deeds (*ICPC*, Articles 40-41), to access indictment and related file (*ICPC* Article 43);
- Principle that evidence collected in violation of protections is null (*ICPC* Articles 7, see also *Constitution*, 2004 Article 55);
- Right to be tried without undue delay (*Constitution* Article 31; *ICPC* Article 36(1));
- Right to privacy (*Constitution* Articles 37-38 & 40; *ICPC* Articles 32, 35 & 37);
- Right to an impartial tribunal (*ICPC* Articles 11 & 12, see also Article 10 re. abstention and disqualification of the Saranwal).

Police and prosecutors are also bound, in the performance of their duties, by the rights guaranteed in international treaties to which Afghanistan is a party.

Most legal systems, including international law and *shari'ah*, recognize a principle that entities are bound by the obligations they contract, a principle referred to as *pacta sunt servanda*.

At the international level, this means that states are bound by the obligations set out in treaties to which they are a party. This is a rule of customary international law, and therefore applicable to all states. This is recognized by the *Vienna Convention on the Law of Treaties* (1969), which notes “that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized” and provides at

Article 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

This principle is adopted in the *Constitution*, which provides at Article 7 that:

The state shall observe Charter of the United Nations, international treaties, international conventions that Afghanistan is a part to, and the Universal Declaration of Human Rights.

International human rights instruments relevant to criminal law and procedure that are binding in Afghanistan include:

- *International Covenant on Civil and Political Rights*, 1966 (ICCPR): acceded to on 24 January 1983. The ICCPR guarantees the fundamental right to life, liberty and human dignity (Articles 6, 9 & 10), and details the rights and freedoms that flow from this right in the civil and political sphere. The civil rights include freedom from torture (Article 7), the principles that an accused is innocent until proven guilty (Article 15(1)) and that there can be no retroactive jurisdiction (Article 15), and the array of due process rights (Article 14). Equality between men and women before the courts and equal protection of the law are guaranteed (Articles 14 & 26).
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW): signed on 14 August 1980, and acceded to on 5 March 2003. CEDAW elaborates on the principle of non-discrimination set out in other conventions. It sets out a general obligation on Afghanistan to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women”, which requires that Afghanistan appropriate legislative measures, including criminal sanctions, among other measures (Article 2). CEDAW also includes more specific provisions, for instance requiring Afghanistan to eliminate trafficking in women (Article 6), and to accord to women equality with men before the law (Article 15).
- *Cairo Declaration on Human Rights in Islam*: Sets out the principle of non-discrimination on the basis of sex (Article 1(a)) and equality before the law (Article 19(a)); the right to life and security of the person (Articles 2 & 18(a)); women rights (Article 6); the right to privacy (Article 18(b) & (c)); rights in relation to the criminal law, including the presumption of innocence (Article 19(b)-(e)); freedom from arbitrary arrest and torture (Article 20).
- *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 (UDHR): The UDHR is not a treaty. Arguably, it has become binding as declaratory of customary international law. Also, the *Constitution* provides that the state will abide by it (Article 7).
- *Rome Statute of the International Criminal Court*, 1998, entered into force 1 July 2002 (*Rome Statute of the ICC*): accession 10 February 2003. This sets up the International Criminal Court (ICC), and defines the crimes within its jurisdiction. Importantly, sexual violence – including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization – is defined not

an “offense against honor”, but rather as being a crime against humanity (Article 7) and a war crime (Article 8), as well as a form of torture and inhuman treatment. In relation to judges, the members of the ICC are to take into account the need for expertise in relation to violence against women or children (Article 36(8)(b)).

## Afghan Criminal Law - Substance

The substance of Afghan criminal law is primarily set out in the *Penal Code*.

The *Penal Code* is divided into two Books:

- Book I sets out “General Provisions” that apply to the prosecution of crimes defined in the *Penal Code* and in other laws. For example, Book I sets out:
  - The scope of the law: According to Article 1, it regulates *ta'zir* crimes and penalties.
  - The “principle of legality” (discussed below).
  - The applicability of the law from the point of view of place, persons and time (Section 1, Chapter 2).
  - The elements of crimes that must be proved by the prosecutor in order for an accused to be convicted (Section 2, Chapter 2), as well as defenses to crimes that the accused may argue (Section 2, Chapter 4 and Section 3, Chapter 1).
  - Principles relating to punishment, including types of punishment (Section 4, Chapter 1), and extenuating and aggravating circumstances (Section 4, Chapters 5 and 6, respectively).
- Book II defines the types of activity that constitute crimes – felonies, misdemeanors and obscenities – and prescribes punishments for those crimes.
  - Section 1 defines felonies and misdemeanors against the public interest, including crimes against the security of Afghanistan (Chapters 1 and 2); bribery (Chapter 3); crimes relating to the functioning of the justice system such as misleading justice (Chapter 25), false testimony (Chapter 27) and perjury (Chapter 28).
  - Section 2, which will be the focus of this training, defines felonies and misdemeanors against individuals – e.g.: murder (Chapters 1-3), beating an laceration (Chapter 5), *zina* and sexual assault (Chapters 8 and 9), robbery (Chapter 15).
  - Section 3 defines obscenities.

There are other Afghan laws that contain criminal provisions – e.g.:

- The *Law on Mass Media*, 2004 sets up the regulatory structure for the mass media in Afghanistan, and at Article 33, contemplates fines for those that violate the law.
- The *Counter Narcotics Law*, 2005 sets up a specialized criminal law framework for the prosecution of narcotics-related crimes, and specifically defines those crimes.

## General Principles

### Elements of crimes

According to the *Penal Code*, three elements must be present for an accused to be convicted of a crime – (i) the material element, (ii) the mental element, and (iii) the legal element.

**(i) the material element:** This is the action that a person takes that results in a crime.

For example, a person did something that causes the death of another person.

Book I: General Provisions  
Section 2: Crimes  
Chapter 2: Elements of Crimes

#### Part One – Material Element

Article 27      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.

Article 28 (1) A person shall not be held responsible for a crime which is not the result of his criminal action. [...]

**(ii) the moral element:** This is the criminal intention a person has in relation to his or her action. The action is taken with a desired effect.

#### Part Two – Moral (contemplative) Element – Criminal Intention and Mistake

Article 34: (1) Criminal intention refers to impelling the 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 the effect of an other 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 specific person or an unspecified person, be it dependent on any condition or related to some other matter or not.

Article 35: (1) Crime is considered intentional when the criminal intention is realized by its doer. [...]

**(iii) the legal element:** This is the legislative provision that defines the action as a crime and sets out a punishment. A person cannot be prosecuted for an act that was not defined by the law as a crime when the act was committed.

### Part Three – Legal Element

- Article 37: (1) The legal element of crime is the description of criminal acts and their punishments in the law.  
(2) The rule pertaining to legality of crime and punishment is explained in the provisions of articles 2 and 3 of this law.

Article 2: No act shall be considered crime, but in accordance with the law.

Article 3: No one can be punished but in accordance with the provisions of the law which has been enforced before commitment of the act under reference.

This principle is also set out at Article 27 of the *Constitution*.

Article 27: No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed.  
No person can be pursued, arrested or detained but in accordance with the provisions of law.  
No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of the offense.

The principle that there should be no retroactive criminal jurisdiction also exists in *shari'ah*. For example, it is revealed in the Qu'ran: "We never punish until we have sent a messenger" (Surat Bani Isra'il XVII:15). (Consider also Surat al-Nisaa IV:165; Surat al-Qasas XXVIII:59; Surat al-An'am VI:19; Sura al-Fatir XXXV:25.)

This principle is also set out at international law – for instance, at Article 15(1) of the ICCPR, which Afghanistan acceded to on 24 January 1983:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

The prosecutor must prove all three elements for the accused to be convicted. This is due to the presumption of innocence, guaranteed at Article 25 of the *Constitution*, as well as elsewhere in Afghan law – e.g. Article 4(1) of the *ICPC*.

#### *Constitution:*

Article 25: Innocence is the original state.  
An accused is considered innocent until convicted by a final decision of an authorized court.

#### *ICPC:*

Article 4 (1) From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

### **Defenses to criminal responsibility**

The *Penal Code* sets out a number of defenses to criminal responsibility. These include:

#### **Duress**

This defence is set out at *Penal Code* Book 1, Section 3, Chapter 1: “Penal Responsibility and its Obstacles”.

#### Part 1: Penal Responsibility

Article 65: Penal responsibility comes into existence when a person commits a criminal act by free will and in a state of healthy mind and senses.

#### Part 2: Obstacles to Penal Responsibility

##### Lack of Will

Article 94: A person who commits a crime under the influence of a moral or material force, repulsion of which is not permissible otherwise, shall not be considered responsible.

Article 95: 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.

The defense of duress (also known as the doctrine of necessity) also exists in *shari’ah*. It is revealed in the Qur’an:

Surat Al-An’aam, VI: 119:

When He (God) hath explained to you in detail what is forbidden to you, except under compulsion of necessity.

Surat Al-Baqarah, II:173:

But if one is forced by necessity, without willful disobedience, nor transgressing due limits, then is he guiltless.

The following *Hadith* is also attributed to the Prophet: “My nation is exempted from what they commit in error, in good faith, or what they have been coerced to do.”

Therefore, under both the *Penal Code* and *shari'ah*, an individual is not considered guilty of a crime, regardless of whether that individual has committed the act, if the following conditions are met:

- The act was committed under compulsion. The compulsion can be material – e.g. threat of use of force. It can also be moral – e.g. threat of non-physical harm, threat of harm to another, etc.
- The extent of the transgression was “necessary” to ward off the compulsion. Otherwise expressed, it did not go beyond “due limits”.

### **Self-defence**

This defence is set out at *Penal Code* Book 1, Section 2, Chapter 4, Part 3.

Article 57: Commitment of criminal act for the purpose of exercising the legitimate right of defence shall not be considered crime.

Article 58: Legitimate right of defence permits the threatened person to make use of any necessary means for the purpose of defending against any criminal act that poses a material loss or danger of life to the defender or someone else.

Article 59: (1) Legitimate right of defence 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 honour of the defender or someone else.  
(2) Legitimate right of defence extends to the end of danger and ends when it has disappeared.

### **Exercise of a legal right**

This defence is set out at *Penal Code* Book 1, Section 2, Chapter 4, Part 1.

Article 53: Commitment of a criminal act with good will for the purpose of exercising a right, which is granted to a person by the way of religious or other laws, shall not be considered a crime.

Article 54: Commitment of criminal act in the following instances is considered exercise of right:

1. In the punishment of son and student by father and teacher, provided the punishment is within the limits of religious and other laws.
2. In the performance of surgical operations or other medical treatments, provided that it is exercised in accordance with the technical principles of the medical profession at the consent of the patient or his guardian or legal representative. Performance of surgical operation in emergency cases is excepted from this provision.
3. In the performance of sportive games, provided it is exercised within the accepted rules and regulations of a sport.

4. In the instance of commitment of apparent felony or misdemeanor for the purpose of arresting the persons committing the said crime, in such a way as is regulated in relevant laws.

## Types of Crimes – Focus on Gender

### Physical violence, including domestic violence

“... the people should be informed about the rights of the husband. Some measures should be taken to inform the men that, according to Islamic and society, women are not properties of men, but men and women come to a union based on an agreement. Both have rights and obligations.”

Sayd Ahmad Jamal Mobarez, representative of the Ministry of Endowment and Islamic Affairs

### Domestic violence is a crime in Afghanistan

The *Penal Code*, sets out the crimes of murder, and beating and laceration, at Book II, Section 2, Chapters 1, 2 and 5.

#### Chapter 1: Murder

Article 394: If in a case of intentional murder the charge of “Qasas” is dropped or affected by one of two disqualifying reasons or lack of sufficient conditions, the murderer shall be sentenced, in the light of the circumstances, to a “Tazeeri” punishment in accordance with the provisions of this chapter.

Article 395: A murderer shall be sentenced to death in one of the following cases:

1. In case where the act is accomplished with malice premeditation, insistence and pursual. [...]
4. If the murdered is one of the roots of the murderer. [...]

Article 396: The offender of a crime of murder, in one of the following cases, in view of the circumstances, shall be executed or shall be sentenced to long imprisonment: [...]

3. In the case where the criminal commits murder in cases other than those specified under paragraphs 1 and 2 of Article 395 of this Law.

#### Chapter 2: Accidental Murder through Beating

Article 399 (1) A person, having the intention of killing someone, who beats, lacerates, administers harmful materials, or undertakes any other intentional act which is illegal, as a result of which the person against whom the crime has been committed dies, in view of the circumstances, shall be sentenced to long imprisonment. [...]

#### Chapter 5: Beating and Laceration

Article 407: (1) A person who intentionally beats and lacerates another such that some bodily member of the latter is cut, injured or defected, or that the 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.

(2) If commitment of the acts specified above causes the person against whom the crime has been committed to be deprived of his intellect, or if the acts are accompanied with prior insistence and pursual, the offender shall be sentenced, in view of the circumstances, to long imprisonment not exceeding ten years.

Article 408: (1) If beating or laceration causes inability to work or idleness of some bodily member for a period of more than twenty days, the offender shall be sentenced to short imprisonment of not less than three months, or shall be fined an amount not less than three thousand Afghanis and not exceeding twelve thousand Afghanis.

(2) If commitment of the acts mentioned above is accompanied by prior insistence and pursual the offender shall receive the maximum anticipated punishment for the crime committed.

Article 409: (1) In the case where beating and laceration does not cause defect or idleness of some bodily member, or causes inability to work of some bodily member for a period of less than twenty days, the offender shall be sentenced to short imprisonment, not exceeding six months, or shall be fined an amount not exceeding six thousand Afghanis.

(2) If the acts mentioned above is accompanied by prior insistence or pursual, the offender shall receive the maximum punishment for the crime committed.

These apply to violence against women, including to domestic violence.

### **Shari'ah does not provide a defense for men who "discipline" their wives**

There is no defense to these crimes for husbands who "discipline" their wives to the point of criminal violence.

Article 53 of the *Penal Code* provides a defense to criminal liability where the criminal act is committed "with good will for the purpose of exercising a right, which is granted to a person by the way of religious or other laws". However, there is no right under *shari'ah* for a husband to "discipline" his wife to the point of criminal violence.

It is revealed at *Surah 4, ayah 34* of the Qur'an:

Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard.

As to those women on whose part you fear “*nushuz*”, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for God is most high, Great (above you all).

*Surah 4, ayah 34* of the Qur'an does not give a man the right to “discipline” his wife to the point of criminal violence, for the following reasons:

- It is a principle of *shari'ah* that the Qur'an must be interpreted to be internally consistent. To interpret *surah 4, ayah 34* of the Qur'an as giving a man the right to “discipline” his wife to the point of criminal violence would be inconsistent with other verses of the Qur'an prescribing harmonious relations between spouses – e.g.:
  - 30:21 “And among His signs is this, that he created for you mates from among yourselves, so that you may dwell in tranquility with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who ponder.”
  - 2:187 “They (your wives) are your garment and you are their garment.”
  - 2:229 “[...] the parties should either hold together on equitable terms, or separate with kindness. [...]”
  - 4:1 “O mankind! reverence Your Guardian-Lord, Who created you From a single Person, Created, of like nature, His mate, and from them twain Scattered (like seeds) Countless men and women; Reverence God, through Whom Ye demand your mutual (rights), And (reverence) the wombs (That bore you): for God Ever watches over you.”
  - 4:35 “If you fear discord between the two (spouses), then send an arbiter from his family, and another from hers; if they wish to repair (the situation), God will reconcile them. For God has full knowledge and is expert in all things.”
- It would also be inconsistent with the Qur'anic precedent in the story of Job. When Job was being tested, his wife lost her faith and blasphemed. As a result, he took an oath to hit her as punishment. A dilemma was thus created: a prophet should not engage in violent and unworthy behavior towards his wife. On the other hand, a prophet may not violate his oath. The divine solution to this dilemma is expressed in verse 38:44 of the Qur'an. It instructs Job to satisfy his oath to hit his wife by “hitting” her with a handful of fragrant grass (or basil). The intent was to satisfy the promise without harming the wife.

38:44 “And take in thy hand a little grass, and strike therewith: and break not thy oath.” Truly we found him full of patience and constancy. How excellent in Our service! Ever did he turn (to Us)!

- It is inconsistent with the *hadith* of the Prophet (PBUH).
  - The Prophet is reported to have stated after the revelation of *surah 4, ayah 34* of the Qur’an: “Do not hit *ima’al-lah* (female servants of God).” On another occasion, he stated that those who hit their wives are not the best among the Muslims. On a third occasion, echoing various Qur’anic descriptions of ideal marital relations, he told the men: “The best among you, are those who are best towards their wives.” He added, “and I am the best among you in that respect.”
  - Prophet, in his *Khutbat al-Wadaa’*, said to men: “Be good to women; for they are powerless captives (*awan*) in your households. You took them in God’s trust, and legitimated your sexual relations with the Word of God, so come to your senses people, and hear my words ...”
  - The Prophet is reported to have once admonished a male audience: “Let not one of you whip his wife like a slave, then have sexual intercourse with her at the end of the day.” The Prophet is also reported to have asked of men: “How can one of you hit his wife like an animal, then he may embrace her?”
- It should be understood in light of the Qur’anic philosophy of gradual social change and in light of *asbab al-nuzul* (the reasons for revelation). *Surah 4, ayah 34* of the Qur’an was revealed in a society which had barely emerged from *Jahiliyyah*. Makkan men, as opposed to Madinan men, were particularly rough with their wives, and used to hit them. They carried this practice into Islam and were so violent that one night women complained about it to the Prophet. The Prophet, a Makkan, never raised his hand against anyone in his household. When he heard about the problem, he chastised Muslim men who dared hit their wives. Acting on his own, the Prophet prohibited the practice by allowing the wife the right to *qisas*. That very evening, the men complained loudly. They came to the Prophet and revisited the issue. They argued that his ruling allowed their wives to gain the upper hand. At that point, the Prophet sought and received a divine revelation which reflected the Qur’anic philosophy of gradualism – *surah 4, ayah 34*. It severely limited the circumstances in which a man could hit his wife, and therefore did not reverse the Prophet’s earlier ruling.
- Early Muslim jurists limited “hitting” to the symbolic the use of force. For example, the following rules were articulated:
  - The man may not hit the woman in the face or other vulnerable areas such as the abdomen, or hit so as to cause pain or harm (*dharb ghayr mubrah wala mu’ath-thir*).
  - The “hitting” must not cause fear in the wife.
  - The man may hit the wife only with something as gentle as a *miswak* (a soft small fibrous twig used as a toothbrush in the Arab Peninsula) or handkerchief.

- While the act of “hitting” is permissible in Islam, it is strongly disliked (*makrouh*). Abandoning it is preferable and more graceful (*ajmal*).

Women were also afforded remedies if these rules were broken:

- If hitting causes harm, the woman is entitled to damages.
  - Any “hitting” which is injurious or leaves a mark on the woman’s body is actionable as a criminal offense.
  - A woman abused physically or verbally is entitled to divorce from her husband.
- Also note that “*nushuz*”, which provides the grounds for hitting, does not mean disobedience, but rather something much narrower. In his famous *Khutbat al-Wadaa’*, the Prophet interpreted the word “*nushuz*”. The Prophet stated in that address, “You [men] have rights against women, and they have rights against you. It is your right that they do not bring someone you dislike into your bed, or that they commit *fahishah* (an act of adultery) *mubayyinah* (which is clear and evident to all). If they do, then God has permitted you to desert them in bed, and [then] hit them lightly. If they stop, you are obliged to maintain them.”

### “Honour killing”

Article 398 of the *Penal Code* prescribes a reduced sentence for murder in case of “honour killing”:

A person, defending his honor, who sees his spouse, or another of his close relations, in the act of committing adultery or being in the same bed with another and immediately kills or injures one or both of them shall be exempted from punishment for laceration and murder but shall be imprisoned for a period not exceeding two years, as a “Tazeeri” punishment.

Points to note:

- The circumstances in which an “honour killing” will be eligible for this reduced sentence rather than the sentences of death, long or continued imprisonment prescribed for murder at Articles 394 and following are very narrow:
  - The murderer must see the victim “in the act of committing adultery or being in the same bed with another”. Therefore, a murder committed based on only the rumor of adultery should receive the full sentence for murder.
  - The murder must be “immediate”.
- Murder in the cases contemplated at Article 398 is still a crime. It must be prosecuted: there is no discretion in the hands of prosecutors. Also, it is grounds for attest in appropriate circumstances – e.g. there is a danger that the perpetrator will commit further criminal acts.

### Discussion points

- Violence against women, including domestic violence, is widespread in Afghanistan. Do these crimes get prosecuted?
- If not, what are the legal, social or cultural barriers to such prosecution among the police, the prosecution and the judiciary?

### **Self-immolation**

Incidences of victims of forced marriage, domestic violence and other types of violence against women despairing of their avenues of escape and recourse, and therefore committing suicide, whether by self-immolation or other means, are increasing. (See Afghan Independent Human Rights Commission, “Why Self-Immolation”.)

This fact suggests, among other things, a failure of the criminal justice system to prosecute effectively cases of violence against women.

It should be noted that the suicide of the victim does not affect the obligation to prosecute and punish the crimes that lead to the suicide. These crimes must, according to Afghan law, be prosecuted – as battery (discussed above), rape, sexual assault, forced prostitution, *qazf*, forced marriage (all discussed below) or other, as appropriate.

As appropriate, the crime of instigation to suicide should also be prosecuted, under Article 397 of the *Penal Code*:

- Article 397 (1) A person who instigates another to suicide or, one way or another, assists someone in an act of suicide, shall be imprisoned for a period not exceeding seven year.
- (2) If, as a result of the instigation, the act of suicide has only been initiated, the offender shall be sentenced to short imprisonment.
- (3) A person who initiates an act of suicide shall not be punished.

### **So-called “morality crimes”**

#### ***Zina***

*Zina* (sexual relations outside of marriage) is a criminal offense in Afghanistan.

- The *ta’zir* offence of *zina* is set out at Chapter 8 of Book II, Section 2 of the *Penal Code*\*:

- Article 427: (1) A persons who commits adultery or pederasty shall be sentenced to long imprisonment.
- (2) In one of the following cases commitment of the acts, specified above, is considered to be aggravating conditions:
- a. In the case where the person against whom the crime has been committed is not yet eighteen years old.
  - b. In the case where the person against whom the crime has been committed is a third degree relative of the offender.
  - c. In the case where the offender is a tutor, teacher, or servant of the person against whom the crime has been committed or the latter has, one way or another, has authority or influence over the former.

- d. In the case where the person against whom the crime has been committed is a married woman.
- e. In the case where the offender deflowers a maiden.
- f. In the case where two or more persons have assisted each other in committing the crime or that the offenders have committed the act one after another.
- g. In the case where the person against whom the crime has been committed is affected by genital disease.
- h. In the case where the person against whom the crime has been committed becomes pregnant.

Article 428: If commitment of the act, specified under paragraph 1 of Article 427 of this Law, results in the death of the person against whom the crime has been committed, the offender in view of the circumstances shall be sentenced to continued imprisonment or death.

There is, though, a strong argument that the *ta'zir* offence of *zina* is unconstitutional, as it is inconsistent with the beliefs and provisions of Islam, as required by Article 3 of the *Constitution, 2004*.

- *Zina* is also one of the *hudood* offenses mentioned at Article 1 of the *Penal Code*, although the imposition of the prescribed punishment would be problematic vis-à-vis the *Constitution*.

Qur'an, 24:2:

The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes [...]

Note: The imposition of the prescribed punishment would be problematic vis-à-vis the *Constitution*.

Since the evidentiary requirements to prove the *hudood* offense – 4 witnesses – are prohibitively high, the crime of *zina* is usually prosecuted under Article 427, in its *ta'zir* version.

\* Note regarding legal reform:

As noted above, making an unsubstantiated allegation of *zina* is also a *hudood* offence – that of *qazf*. It is revealed at Qur'an, 24:4-5

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their testimony ever after: for such men are wicked transgressors [...].

There is, therefore, a strong argument that *zina* should not be punished unless the *hudood* evidentiary requirements are satisfied, and therefore that the *ta'zir* offence of *zina* set out at Article 427 is:

- Inconsistent with *shari'ah*
- Inconsistent with Article 3 of the *Constitution*.

False allegations of *zina* are frequently made against women by their families as a tool to manipulate them. The instrumental use of the offense of *zina* to manipulate women was exactly the “evil” that verse 24:4-5 was revealed to address.

The Federal Shariat Court of Pakistan has accepted the argument that the *ta'zir* offence of *zina* is inconsistent with *shari'ah* and therefore should be abolished. It stated in its judgement in the case of *Abdul Qayum and another vs. The State* (1991 P.Cr L.J 568), which is currently on appeal:

The prosecution agencies before putting people on trial for offences of Zina on flimsy allegations should be mindful of Injunctions of the Holy Quran and the message conveyed through the decisions from the early period of Pious Caliphs. The charge of Zina carrying a rigorous penalty of rajam or stripes should not be casually brought to court nor publicized. It shatters the foundation of a family whose female is accused of such a crime. Human weaknesses should rather be overlooked and ignored unless committed at public places and become a matter of concern from the society's point of view. It is most unbecoming of a stranger to peep into the house of others and show inquisitiveness for detecting the sins of others, who are neither related to him nor he has a public duty to publish and propagate the evils of sinners.

In order to save the society from lewdness the Holy Quran says:-

“Those who accuse chaste women but bring not four witnesses, scourge them with eighty stripes.” (24:4)

“Why did they not produce four witnesses, they verily are liars in the sight of Allah.” (24:13)

From the contents of these verses it is clear that unless there are four eye-witnesses on the commission of the offence of *zina*, no one should accuse any person of that and no publicity should be given to any act of obscenity even if a God-fearing man hits at any such ugly scene. This is such a serious matter in Shariah that as mentioned in the above quoted verses the Holy Quran has laid down that if anyone accuses another person without producing four eye-witnesses, he will be punished with eighty stripes and his evidence will not be accepted in future.

In this connection the famous judgement of Hazrat Umar about Mughirah Ibn Shu'abah, the Governor of Egypt may be quoted:-

“Three persons namely Abu Bakrah, Nafi'a and Shibl testified that Mughirah had committed adultery with a woman named Umme-e-Jamil. The fourth person named Zaid testified that the woman was not clearly visible and that he could not say definitely whether she was Umm-e-Jamil or not, and that he had only seen that the legs of a woman were lying on his shoulders and he has not seen more than that. On this Hazrat Umar released Mughirah and punished Abu bakrah,

Nafi'a and Sibl with eighty stripes." (Al-Mughni, Ibn Qudamah, Vol. X, pages 178 and 179 printed Cairo, Egypt)."

### **Rape and sexual assault**

There is no distinct offence of rape in Afghan law.\*

Rape can, however, be prosecuted as the crime of *zina* (sexual relations outside of marriage). As mentioned above, *zina* is an offence in Afghanistan.

Sexual assault shy of rape can be prosecuted under Article 429, which provides:

- Article 429: (1) 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.
- (2) In the case where the person against whom the crime is committed is not eighteen years old, or the person who commits the crime is one of the persons specified under paragraph 2 of Article 427 of this Law, the offender shall be sentenced to long imprisonment, not exceeding ten years.

*Shari'ah* recognizes the distinction between *zina* and rape. In the time of the Prophet and the four rightly-guided Khalifs, rape was, for instance, punished as *haraba* (the *hudood* crime involving a forcible taking of property), and a civil avenue of redress was available through the law of *jirah* (wounds).

This is illustrated by the following case that came before Khalif Omar bin Al-Khatab. A woman was brought before the Khalif. She had been in the desert, and tremendously thirsty. A shepherd offered her water, on the condition that she had sex with him. She submitted. Khalif Omar did not punish the woman for *zina*. On the contrary, he awarded her an amount of money from the treasury ("*Bit UlMal*") by way of compensation, as well as recognition of her being a victim. Importantly, the standard of proof applied in cases of rape was significantly lower than that applied in cases of *zina*.

\* Note regarding legal reform:

There is, therefore, a strong argument to be made based Article 3 of the *Constitution* (as well as those provisions setting out rights guarantees) that the penal law of Afghanistan should include a separate crime of rape.

### **Rape victims should not be prosecuted for *zina*.**

It would be legally incorrect because:

- A rape victim has engaged in sexual relations under duress. Duress is a defense to criminal liability under Articles 94 and 95 of the *Penal Code*.

- In certain circumstances, it may also be argued that the victim did not have the requisite intention in relation to the sexual act to satisfy the mental element of the crime of *zina*.
- It is also inconsistent with shari'ah to punish a rape victim for *zina*.

Articles 94 and 95 of the *Penal Code* set out the defense of duress:

In applying these principles to the question of whether a rape victim, or a woman who has been forced into prostitution, consider customary international law in relation to consent – e.g.:

- *ICC Rules of Procedure and Evidence* (2000), Rule 70: “Principles of evidence in cases of sexual violence”
  - (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;
  - (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
  - (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
  - (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.
- Jurisprudence of international tribunals in relation to consent in “coercive environments” – e.g. *Prosecutor v Kunarac* (ICTY, Appeals Chamber):
  - Rejects any requirement of resistance to demonstrate lack of consent, and notes that “in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.”
    - Brands as “wrong on the law and absurd on the facts” the arguments made that a rape victim should make obvious her lack of consent such that it is subjectively perceived by the assailant.

As customary international law, these principles bind the police, prosecutors and judiciary of Afghanistan.

### **Qazf**

Qazf is a criminal offence in Afghanistan:

- The *ta'zir* offence of *qazf* is set out at Article 436 of the *Penal Code* (read together with Article 437).

Article 436: (1) Defamation is the attribution of a certain incidence to someone else by one of the “public” means, such that if it were true, the accused would have been punished or degraded in the eyes of the people.

(2) If the conditions necessary for filing of “Had” claim are not present in a crime of defamation, or the claim of “Had” is dropped due to doubt or one way or another, the offender shall be sentenced to medium imprisonment of not more than two years and cash fine of not less than ten thousand and not more than twenty thousand Afghanis, or one of these two punishments.

– *Qazf* is also one of the *hudood* offenses mentioned at Article 1 of the *Penal Code*

Qur’an, 24:4-5

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their testimony ever after: for such men are wicked transgressors;- Unless they repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful.”

Note: The imposition of the prescribed punishment would be problematic vis-à-vis the *Constitution*.

### **Running away from home (“*farar az manzel*”)**

Running away from home cannot be prosecuted or punished in Afghanistan because:

- “Running away from home” is not a crime under Afghan law.
- Article 130 of the *Constitution* does not provide a legal basis for prosecution or punishment of activity that is not a crime under Afghan legislation but is a crime under *shari’ah*. Article 130 provides, in relevant part:

When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.

Article 130 sets out certain pre-conditions to a judge’s use of *shari’ah*, which are not met here:

- There must be “no provision in the Constitution or other laws regarding ruling on an issue”.
  - Both the *Penal Code* (Articles 2, 3, 21 and 37) and the *Constitution* (see below re. Article 27) clearly state that if activity is not criminalized by legislation, it cannot be prosecuted and punished.
  - Article 1 states that the *Penal Code* sets out *ta’zir* crimes.

These provisions constitute provisions in the Constitution and other laws regarding ruling on the issue of punishing activity that is not a crime according to legislation.

In the case of elopement, there are further provisions in the law:

*Penal Code*, Article 425:

A person who carries off a girl, who is eighteen years, at her own will from her parents' residence for the purpose of lawfully marrying her, shall not be deemed as having committed an act of kidnapping.

*Civil Code*, 1976, Article 80.

Anytime a wise girl of majority age marries without permission of her guardian, the marriage shall be binding.

- The decision must be “within the limits of this Constitution”.
  - Article 27 of the *Constitution* sets out the principle of legality: “No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed. No person can be pursued, arrested or detained but in accordance with the provisions of law.”\*
  - “Law” is defined at Article 94(1) of the *Constitution* as follows: “Law is what both Houses of the National Assembly approve and the President endorses unless this Constitution states otherwise.” Therefore, principles of Shari’ah do not constitute “law” within the meaning of the *Constitution*.

Therefore, it would not be “within the limits” of the *Constitution*, and specifically Article 27 to prosecute activity not criminalized by legislation.

- At any rate, “running away from home” is not subject to criminal sanction under *shari’ah*.

Also, Article 130 gives only judges the ability to apply Shari’ah in certain circumstances. Police and prosecutors do not have such an ability. Article 134 of the *Constitution* states that the police and prosecutors exercise their powers “in accordance with the provisions of the law”. Therefore,

- “Running away from home” cannot provide the basis for arrest.
- There is no way a prosecutor can file an indictment, meaning that, as a practical matter, there is no legal mechanism by which an accusation of “running away from home” can be brought before a judge.

### **Discussion points**

- Can the rape victim be committed for adultery or fornication? Consider *Penal Code* Articles 34-35, 65 & 94-95. See case study, below.
- Can a woman who is forced into prostitution be convicted for adultery or fornication? Consider *Penal Code* Articles 65 & 94-95. Consider also Article 430.
- “Running away” is not defined as a crime by the *Penal Code*. Can it still be punished as a crime? Consider *Penal Code* Article 1-3, 37 & 425; *Constitution* Articles 130, 27 & 94; *Civil Code*, 1976, Article 80. See case study, below.

- What can a victim of rape do in self-defence? Consider *Penal Code* Articles 57-61.
- If the rape victim has complained to the police of rape, but this is not proven, is she exposed to prosecution for *qazf*? Consider *Penal Code* Articles 13 & 436. No, this would be inconsistent with Afghan law because:
  - Filing a complaint of rape with the police or prosecutor is not one of the “public” means of making an accusation contemplated by Article 436? “Public” is defined at Article 13 of the *Penal Code*:

For the purposes of this law, the following instruments are considered “public”:

1. Speech is considered “public” when it is made in public gathering, public way or other place in such a loud voice, or broadcast by other means in such a way, that if any one were present in there he could have heard it.
2. Act is considered “public” when it takes place in public gathering, public way or other places in such a way that if any one were present there he could have seen it.
3. Painting, picture, film, writing, cipher and other instruments of exhibition are considered “public” when it is distributed to more than one person, or is put on display in such a way that if any one were present there he could have seen it, or is sold or presented for sale.

- The mental element of the offence is not present.

The following *sirra* illustrates a situation where the mental element of *qazf* is present. It is reported that a woman made a complaint to Khalif Omar, alleging that she had been raped. By way of evidence of this allegation, she presented a pair of her underwear, which she alleged to be stained with the semen of the rapist. Omar tested the evidence by placing the underwear on a hot, dry stone. The substance alleged to be semen “cooked”; it was revealed that it was egg white, rather than semen. This indicated that the woman had deliberately made a false allegation of rape, and that she had the requisite mental element to be punished for *qazf*.

- Is marriage an appropriate remedy in cases of rape? No, for a number of reasons:
  - The *Penal Code* clearly prescribes serious punishment for the rapist, including under Article 427.
  - Human Rights Committee, General Comment No. 28: “Equality of rights between men and women (Article 3)”, CCPR/C/21/Rev.1/Add.10, 29 March 2000.

24. Another factor that may affect women’s right to marry only when they have given free and full consent is the existence of social attitudes which tend to marginalize women victims of rape and put pressure on

them to agree to marriage. A woman's free and full consent to marriage may also be undermined by laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim. States parties should indicate whether marrying the victim extinguishes or mitigates criminal responsibility and, in the case in which the victim is a minor, whether the rape reduces the marriageable age of the victim, particularly in societies where rape victims have to endure marginalization from society. [...]

### **Trafficking and forced labor**

#### **Afghanistan has an obligation under international law to make trafficking a criminal offense**

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the *Palermo Protocol*) supplementing the *United Nations Convention against Transnational Organized Crime* (2000) defines "trafficking in persons" at Article 3:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

Trafficking of persons is distinct from smuggling of persons:

- Smuggling takes place with the consent of the travelers, whereas trafficking is accomplished through the use of coercion or deception, with the ultimate intent of exploiting the trafficked person.
- Smuggling involves the illegal crossing of international borders, and is therefore a violation against the state. Trafficking is a violation of the rights of the individual; the victims of the crime are the trafficked persons themselves.

The *Palermo Protocol* requires states parties to criminalize trafficking when committed intentionally (Article 5).

Afghanistan is not a party to the *Palermo Protocol*. However, Afghanistan is party to a number of treaties that require it to take measures to suppress trafficking in persons:

- CEDAW requires Afghanistan to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” (Article 6)

Expanding on Article 6, the Committee on the Elimination of All forms of Discrimination against Women (CEDAW Committee), in its General recommendation No. 19 under CEDAW regarding “Violence against women”, has stated:

15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.

Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that:

(g) Specific preventive and punitive measures are necessary to overcome trafficking and sexual exploitation;

- *Convention on the Rights of the Child* (1990): Ratification 28 March 1994.

Article 35 States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36 States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

- *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography supplementing the Convention on the Rights of the Child* (2002): Accession 19 September 2002.

Article 1: States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

Article 3: 1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

a. Sexual exploitation of the child;

- b. Transfer of organs of the child for profit;
- c. Engagement of the child in forced labour;
- (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;
- (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2; [...]

Afghanistan is also party to a number of treaties that require it to prohibit the various types of exploitation that are the goal of trafficking:

- United Nations *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (1949): Accession 21 May 1985.

Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community, [...]

Article 1: The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.

- International Labour Organization conventions:

*Abolition of Forced Labour Convention No. C105* (1957): Ratification 16 May 1963.

*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1957): Ratification 16 November 1966.

## **Measures must be taken to protect victims of trafficking in criminal prosecutions**

### **Trafficking can be prosecuted under Afghan law**

There is no criminal offence of trafficking in Afghan law. However, the recruitment and transportation aspects of trafficking can be prosecuted to a degree as kidnapping, and certain of the exploitation aspects of trafficking can also be prosecuted.

### **Recruitment and transportation**

The *Penal Code*, sets out the crime of “kidnapping” at Chapter 7 of Book II, Section 2, dividing the severity of punishment by the age of the individual kidnapped:

- Below 7 years:

Article 418: A person who, himself or through another, kidnaps a child, not yet seven years old, or someone who cannot look after himself, or leaves at large one of the persons mentioned in an uninhabited area, shall be sentenced to medium imprisonment, not exceeding three years.

- Between 7 and 17 years:

Article 420: (1) A person who, himself or through another, kidnaps, without coercion or fraud, a child not yet eighteen years old, shall be sentenced to long imprisonment, not exceeding seven years.

(2) If the kidnapped child is a girl, the offender shall be sentenced to long imprisonment, not exceeding ten years.

Article 421: (1) A person who, himself or through another, kidnaps with coercion or fraud, a child not yet eighteen years old, shall be sentenced to long imprisonment.

(2) If the kidnapped child is a girl, the offender shall receive the maximum anticipated punishment of the above paragraph.

Article 423: If the acts specified under Articles 420 and 421 of this Law are committed by a person who has influence or authority over the person against whom the crime has been committed, or if the former is charged with the responsibility of raising the latter, or if the former is a servant of the latter, or if a number of people are involved in the act, the offender shall be sentenced to long imprisonment, not less than ten years.

- 18 years or above:

Article 422: A person who, himself or through another, kidnaps someone who is eighteen years or over, shall be sentenced to medium imprisonment (from three to five years).

Article 424: A person who, himself or through another, kidnaps a woman who is eighteen years or over shall be sentenced to long imprisonment. In the case where the kidnapped woman is married, or act of adultery is committed with the kidnapped, the offender shall be sentenced to the maximum anticipated punishment.

“Kidnapping” is not defined by the *Penal Code*, although we know from Article 420 and 421 and kidnapping can occur with or without coercion or fraud. International law relating to trafficking, as well as the practice of other states in this regard, may provide further guidance in defining “kidnapping”.

### **Exploitation**

The types of exploitation covered by the international definition of trafficking “include, at a minimum, the exploitation of the prostitution of others or other forms of

sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” (*Palermo Protocol*, Article 3).

The offences of adultery, pederasty and violation of honour set out at Articles 427-429 of the *Penal Code* can be used to prosecute traffickers.

Trafficked women may be forced into marriage. While removing the possibility of *zina* prosecution, forced marriage is an offence under the *Penal Code*.

Article 517: (1) A person who gives in marriage a widow, or a girl who is eighteen years or older, contrary to her will or consent, shall be sentenced in view of the circumstances to short imprisonment.

The offence set out at Article 430 of the *Penal Code* is broad enough to cover forced prostitution and other forms of sexual exploitation where traffickers are not engaged in the act themselves.

Article 430: (1) A person who instigates a male or female, not eighteen years old, to delinquency or a person who instigates another to acquire a profession pertaining to delinquency, or assists another in this respect, shall be sentenced to medium imprisonment, not less than three years.  
(2) If the person committing the crime is one of the persons specified under paragraph 2 of Article 427 of this Law, or the act has been performed for the purpose of acquiring benefit, the offender shall be sentenced to long imprisonment, not exceeding ten years.

According to Afghan law, forced labor and employment of children under the age of 15 is illegal. The *Constitution* provides:

Article 49 Forced labor is forbidden.  
Active participation in times of war, calamity, and other situations threatening lives and public welfare is a national duty of every Afghan.  
Children shall not be subjected to forced labor.

However, the *Penal Code* offence in relation to the exploitation of forced or child labour, or slavery, which is set out at Article 516, is limited to situations involving fraud or deceit.

Article 516: A person who, through fraud or deceit, exploits or sells the working force of others or makes a transaction for the working force of others with foreign parties, in addition to compensation, shall be sentenced to long imprisonment.

A 2004 Presidential Decree mandates “the death penalty for child traffickers convicted of murder, and lengthened prison terms.”

### **Discussion points**

- Can a trafficking victim who is forced into prostitution be convicted for adultery or fornication? Consider *Penal Code* Articles 65 & 94-95. Consider also Article 430. See also case study, below.
- What if an individual initially consents to be taken away but then wishes to leave, and is forcibly retained for the purpose of exploitation? See case study, below.
- What is the appropriate sentence? Does the penal law allow for other remedies? For example, marriage is sometimes agreed as a “solution” in cases of abduction of girls. Is this permissible?
- How would your analysis of the situation differ if Afghanistan had laws fully implementing the *Palermo Protocol*?
- Can elopement be punished as trafficking? Consider *Penal Code* Article 425 and *Civil Code*, 1976 Article 80.

### **Legal reform**

The Presidential Decree “With regards to creation of a Combat Commission Against Smuggling Crimes and Illegal Trafficking in Persons”, 29 April 2003 creates an Inter-Ministerial Commission to address trafficking:

For the purpose of observing the global Anti-crime Convention organized by the United Nations and its respective protocols and also in view of the endorsement of the conference dated (26-28 February 2002) on Combat Against Crimes of Trafficking in Human Beings and their illegal transportation a commission consisting of the esteemed Ministers of National Defence, Foreign Affairs, Justice, Internal Affairs, Frontiers Affairs and Head of National Security is assigned [...]

Note that the Ministry of Women’s Affairs is not included.

By the decree, it appears that Afghanistan is undertaking to abide by the *Palermo Protocol*. Among other things, the Commission is charged with reform of Afghan law to be consistent with the *Palermo Protocol*, in particular:

- 3) Drafting a separate legislative document for return of trafficked Afghan nationals with dignity and honor with their employment facilities. [...]
- 6) Review of the effected laws in connection with Trafficking in Persons.

The Ministry of Justice has prepared draft laws in the area of trafficking and forced labour.

### **Forced and child marriage**

#### **Applicable Afghan law**

Marriage is defined by Article 60 of the *Civil Code*, 1976:

Article 60 Marriage is a contract which legalizes intercourse between man and woman with the object to establish a family, and it creates rights and obligations for both parties.

The *Penal Code* creates an offense of forced marriage:

- Article 517: (1) A person who gives in marriage a widow, or a girl who is eighteen years or older, contrary to her will or consent, shall be sentenced in view of the circumstances to short imprisonment.
- (2) If commitment of the crime specified under the above paragraph is for the purpose of “Bud dadan” (as a compensation for a wrongdoing), the offender shall be sentenced to medium imprisonment not exceeding two years.

Forced marriages, whether by way of compensation or otherwise, are also not permitted under Islamic law.

The issue of forced marriages is interlinked with child marriages. According to the *Civil Code*, 1976, child marriage is not permissible:

Article 70: Marriage shall not be considered adequate until the male completes the age of 18 and the female the age of 16.

- Article 71:1. Where the girl does not complete the age provided under Article 70 of this law, the marriage may be concluded only through her father or the competent court.
2. The marriage of a minor girl whose age is less than 15 shall never be permissible.

Despite this, child marriages do not appear to fall within the criminal provisions of the *Penal Code*. There may, however, be an argument that one who marries a girl in contravention of the *Civil Code* can be prosecuted for “instigation to delinquency” under Article 430 of the *Penal Code*.

Note that a marriage contracted without the consent of a guardian is considered valid by the *Civil Code*, 1976:

Article 80: Anytime a wise girl of majority age marries without permission of her guardian, the marriage shall be binding.

### **Obligation under international law to take measures to eliminate forced and child marriage**

Afghanistan is bound by the following international instruments to take measures to eliminate forced marriage. Note that this does not require elimination of arranged marriages, to which the couple may have fully and freely consented.

- *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948 (UDHR), Article 16(2): “Marriage shall be entered into only with the free and full consent of the intending spouses.” (The UDHR is not a treaty. Arguably, it has become binding as

declaratory of customary international law. Also, Article 7 of the *Constitution* required that the state abide by it.)

- ICCPR, Article 23(3): “No marriage shall be entered into without the free and full consent of the intending spouses.”
- CEDAW, Article 16:
  1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
    - (a) The same right to enter into marriage;
    - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent. [...]
  2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

The practice of forcing girls into marriage by way of compensation in bad not only violates the above principles, but also the fundamental principle that criminal liability is personal. This principle is set out at Article 26 of the *Constitution*.

It is also recognized in *shari'ah*. For instance, in the Qur'an, it is revealed: “No bearer of burdens can bear the burden of another” (XVII:15).

*The Cairo Declaration on Human Rights in Islam*, Adopted and Issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on 5 August 1990 / 14 Muharram 1411, provides at Article 19(c) that: “Liability is in essence personal.”

## Afghan Criminal Law – Procedure

Afghan criminal procedure law is primarily set out in the *Interim Criminal ICPC*. According to Article 98(3) of that law, however, the *Criminal Procedure Law*, 1965 also applies where it is not inconsistent with the 2004 law.

The laws governing the various institutions relevant to criminal justice in Afghanistan also contain criminal procedure provisions – e.g.:

- *Police Law*, 2005 (Official Gazette No: 862)
- *Saranwali Law*, 1991
- *Law Governing the Organization and Jurisdiction of the Islamic Republic of Afghanistan's Justice System*, 2005 (the “*Courts Law*”)

There are also other laws in Afghanistan that create specialized procedures for specific cases – e.g.:

- the *Counter Narcotics Law*, 2005,
- the *Juvenile Code*, 2005.

### **Arrest and detention**

#### **Applicable Afghan law**

The ability of the police and prosecutor to order arrest is strictly limited by legislation. This is clear from Article 134 of the the *Constitution* in relation to the powers of the police and prosecutors generally, and from Article 27(2) in relation to their powers of arrest.

Article 27(2): No person can be pursued, arrested or detained but in accordance with the provisions of law.

Article 134: Discovery of crimes is the duty of the police and investigation and prosecution are conducted by the Attorney's Office in accordance with the provisions of the law.  
[...]  
The structure, authority, and activities of the Attorney's Office are regulated by law.  
Discovery and investigation of crimes related to the armed forces, Police, and National Security officials are regulated by a special law.

Under Afghan law, an individual benefits from a number of rights that affect the ability of the police or prosecutor to detain a suspect or accused:

- the presumption of innocence – see e.g.

*Constitution*, Article 25:  
Innocence is the original state.

An accused is considered innocent until convicted by a final decision of an authorized court.

*ICPC, Article 4:*

From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

*Shari'ah*

Hadith of the Prophet (PBUH): "Remove punishment as often as you can; and set the accused free if he has a chance, because it's much better for the judge to be wrong in acquittal than to be wrong in punishment." "Avert hudood punishments by suspicions or doubts and if the accused has a way out, release him. It is better for the imam to pardon erroneously than to punish erroneously."

- the right to liberty

*Constitution, Article 24*

Liberty is the natural right of human beings. This right has no limits unless affecting the rights of others and public interest, which are regulated by law. Liberty and dignity of human beings are inviolable. The state has the duty to respect and protect the liberty and dignity of human beings.

*Qur'an 67:15*

"It is He who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the sustenance which he furnishes".

The prosecutor's ability to order arrest is governed by Article 35 of the *Code for Courts*:

Article 35: 1. In the course of the investigations activities the Primary Saranwal can order the arrest of the alleged author of a misdemeanor punishable by medium term imprisonment or felony and seizure of items and goods connected with the crime. [...]

According to the *Penal Code*:

Article 24 Felony is a crime whose doer is sentenced to death or continued imprisonment or long imprisonment.

Article 25 Misdemeanor is a crime whose doer is sentenced to imprisonment of more than three month up to five years, or cash fine of more than three thousand Afghanis.

Article 26      Obscenity is a crime whose doer is sentenced to imprisonment of 24 hours to three months, or cash fine of up to three thousand Afghanis.

Article 98:      Execution is the hanging of convicted person on gallows until death.

Article 99(2):   The duration of continued imprisonment is from sixteen to twenty years.

Article 100(1):[...] The duration of long imprisonment cannot be less than five years and more than fifteen years.

Article 101(2): The duration of medium imprisonment is not less than one year and more than five years.

Article 102(2): The duration of short imprisonment is not less than twenty four hours and more than one year.

Therefore, the prosecutor can only order the arrest of an individual alleged to have committed:

- a felony (a crime punishable by death, continued imprisonment or long imprisonment) or
- a certain type of misdemeanor: one punishable by medium term imprisonment (i.e. one to five years).

This means that prosecutors can, for instance, order the arrest of alleged authors of the following crimes:

- giving in marriage by way of bad (*Penal Code*, Article 517(2));
- beating and laceration that are either grievous or intentional (*Penal Code*, Articles 407-409);
- *zina* (both men and women) (*Penal Code*, Article 427),
- kidnapping (*Penal Code*, Articles 418-424),
- defamation (Article 436), etc.

They cannot order the arrest of:

- alleged authors of misdemeanors punishable by short imprisonment – e.g. forced marriage under Article 517(1) of the *Penal Code*;
- alleged authors of obscenities; or
- individuals who are not suspected of committing crimes.

The use of “can” rather than “shall” in this article means that the arrest is not mandatory. What considerations should the prosecutor take into account in

determining whether to order the arrest of an alleged author of one of the crimes mentioned in Article 35(1)?

A “Commentary” on the *ICPC* was written by Italian Judge Giuseppe Di Gennaro, former special coordinator for the Italian Justice Project Office (IJPO), who was also responsible for the drafting of the *ICPC*.

In relation to Article 35(1), the “Commentary” states:

What the law does not say but that, according to prevailing international standards, seems to be implicitly requested, are the criteria to be applied in relation to the behavior of the suspect.

For making the decision in question the Saranwal, and, at a certain extend, also the police, should make a predictive assessment about: a) risk of loss of genuine evidence for the attitude and propensity of the suspect to manipulate and distort the proofs; b) probability that the suspect flees when it can be anticipated that his presence at the trial is needed (art. 45); c) probability that the suspect, because of the characteristics of his personality and the circumstances, commits other crimes of the same or heavier gravity.

The penal process is not a static event, on the contrary it is a complex reality composed of a sequence of activities. During this continuum could happen that supervening elements or a redefinition of the charge suggest lowering the accusation and so bringing the charge under the level of seriousness indicated by the law as the threshold for permitting the arrest.

The same is to be said, if the above listed risk and probabilities cease.

In such events, it is mandatory for the Saranwal to review his decision and release the person.

Therefore, a prosecutor cannot order arrest unless both of the following conditions are satisfied:

- The individual is suspected or accused of the type of crime mentioned above, meaning that:
  - Running away from home or refusing to marry, which are not crimes, cannot provide a legal basis for detention.
  - Victims of crimes should not be detained against their will.
- There are compelling reasons to justify such detention prior to proof of guilt for that crime – e.g. the individual was caught in the act of crime, there is a risk of flight, there is a risk that the individual will interfere with the investigation. This should not be assumed as a matter of course.

Arrest by judicial police of an individual suspected of a crime is governed by Article 30 of the *ICPC* and Article 15 of the *Police Law*, 2005:

*Interim Criminal ICPC*, Article 30:

1. The judicial police shall arrest on their own initiative:
  - a) the offender who is caught in state of flagrante delicto of misdemeanors, punished by medium term imprisonment, or felony;
  - b) the person who is allegedly the author of a felony and there is risk of his disappearance.
2. In all other circumstances, the judicial police perform arrests only in execution of orders of the judicial authorities.

*Police Law, 2005, Article 15:*

In normal cases, the police may detain a person in custody if:

[...]

4. provided for by the law in other cases.

The period of detention can not be more than 72 hours.

The police must inform him of the reason and case as soon as the person is detained.

Judicial police can only make arrests in the following circumstances:

- on the order of the prosecutor (Article 30(2)),
- where the individual is caught in the commission of a felony or a misdemeanor punished by medium term imprisonment (Article 30(1)(a)), or
- where there is a risk of the individual's disappearance and that individual is alleged to have committed a felony (Article 30(1)(b)).

### **Protective custody**

There may be cases where taking women into protective custody is justified, in particular, given the lack of shelter capacity – e.g.: a woman has been raped and there is a fear she will be killed by her family, or a woman is suffering severe domestic violence.

Protective custody is permissible under the law, but subject to constraints:

- Article 53 of the *Law of Prisons and Detention Centres, 2005* allows heads of detention centres to provide “temporary shelter and protection”. It provides:

Heads of detention centers and prisons by the distinction of attorney general office after the permission of ministry of justice can provide temporary shelter and protection in detention centers and prisons to those who have been seriously threatened and their safety are at serious risk.

Constraints:

- Implied that the individual have sought such protection, and therefore be free to leave the facility.
- Authorization from AGO and permission from MOJ required.

- Article 15 of the *Police Law*, 2005 allows the police to take an individual into “protective custody”. It provides, in relevant part:

*Police Law*, 2005, Article 15:

In normal cases, the police may detain a person in custody if:

1. his life or physical body is in danger and can not be protected otherwise; in this case the police is duty bound to resort to action within the time slot stipulated in paragraph (4) of this article to avoid the aforesaid danger as much as possible.
2. his identification is not possible otherwise.
3. he intends to commit suicide; in this case the police is duty bound to bring him/her to the nearest local hospital within the time stipulated in paragraph (4) of this article.
4. provided for by the law in other cases.

The period of detention can not be more than 72 hours.

Constraints:

- Police must be taking action to avoid the danger to the detained individual, as required by Article 15.
- Limited duration: 72 hours.

### **Illegal arrest**

The *Penal Code*, 1976 imposes steep sanctions for illegal arrest.

Article 414: A person who, illegally and without the instruction of concerned authorities, arrests, detains, or prevents someone else from work, shall be sentenced in view of the circumstances to medium imprisonment.

Article 415: If arrest, detention, and prevention from work is accomplished by a person wearing, without right, official uniform or by a person who assumes a false attribute, or by a person presenting to other persons feigned orders of concerned authorities, to offender shall be sentenced in view of the circumstances to long imprisonment, not exceeding ten years.

Article 416: If arrest, detention, and prevention from work is accompanied by coercion, threat, or torture or if the person committing the crime is an official of the government, the offender shall receive the maximum anticipated punishment specified under Article 415 of this law.

### **Discussion points**

- Can an individual be detained for refusing to marry? For “running away”? Consider Penal Code Articles 2-3 & 37, and ICPC Articles 30 & 35.
- The prosecutor’s ability to order arrest is discretionary. When should this power be exercised? Consider *ICPC* Article 30, which suggests the aim of arrest.

- The right extends to “alleged authors” of certain crimes. What is the standard that should be applied to the reasonableness of the allegation?
- What criteria will a court use to determine the legality of detention and whether or not to extend this detention pursuant to Articles 6 & 36 of the *ICPC*?
- Can accessories or witnesses be detained?
- Can a victim of rape be detained for *zina*?
- What is the consequence of illegal detention for the prosecution of the case and for the prosecutor?

### **Applicable Afghan Law**

According to the *ICPC*, the prosecutor can release the detained individual whenever he deems that the deprivation of the individual’s liberty is no longer necessary.

When must the detained individual be released? Article 9(4) of the ICCPR states that: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

The *Constitution* provides at Article 31 that: “The accused upon arrest has the right [...] to be summoned to the court within the limits determined by law.”

Unlike under the *Criminal Procedure Law*, 1965 (as amended), under the *ICPC*, the prosecutor does not appear to be obliged to bring the detained suspect before the court to determine the legality of his detention. Instead, as discussed below, the legality of detention is addressed at the criminal trial.

Also, the *ICPC* does not address when the detained individual can be released on bail. According to the *ICPC*, the detained individual must be interrogated within 48 hours (Articles 34(2) & 35(2)). If this does not occur, presumably the detained individual must be released. Otherwise, the prosecutor must release the detained individual after 15 days, unless:

- An extension has been granted by a court, in which case the individual shall be released after an additional 15 days, or
- An indictment has been filed (*ICPC*, Articles 6 & 36).

Once an indictment has been filed, the fundamental rights set out in the *Constitution* – notably, the right to liberty set out at Article 24 – require that the trial be held without undue delay. Specifically, Article 14(3) of the ICCPR provides:

“In the determination of any criminal charge against him, everyone shall be entitled: [...] (c) To be tried without undue delay”. The *ICPC* does not set a specific time period within which the trial must begin.

Article 53(3) of the *ICPC*, which sets out the order of proceedings at trial, provides at paragraph (b): “When the accused is under detention the Court shall immediately

assess the legality of the arrest and order the liberation of the accused when realizes that the arrest was unlawful or not necessary”. The judge can order that detention be extended for two additional months (*ICPC*, Article 6(2)).

Although not explicitly stated in the *ICPC*, the accused should be released immediately if found not guilty at trial.

Detention can be extended for two months during an appeal to the Court of Appeals, and for five months during an appeal to the Supreme Court (*ICPC*, Article 6(2)).

### **Obligation to prosecute crimes**

#### **The prosecutor must prosecute all crimes; no discretion**

Article 22 of the *ICPC*, regarding “Institution of Proceedings”, requires the prosecutor to file an indictment where a crime has been committed. The prosecutor is also prohibited from staying a case. The only exceptions to this principle are those set out in the law.

1. The Primary Saranwal has the obligation to introduce the penal action for prosecution of all crimes, known directly by him or reported to him, committed in the territory of the District, unless otherwise expressly provided by law.
2. The Saranwal shall not dismiss or stay a case except as otherwise provided by the law.

The most important exception set out in the law is the situation where there is no “grounded evidence” of the crime. Here, Article 39 of the *ICPC* requires the prosecutor to dismiss the case:

1. At the conclusion of the investigations phase, if the Primary Saranwal deems that there is not grounded evidence dismisses the case.
2. The victim or higher Saranwal can file a complaint to the Court against this decision within ten days.
3. The Court, after having examined the case, can confirm the decision of the Saranwal or vice versa request him to lodge the indictment.

### **Afghan law imposes criminal liability on police and prosecutors for failure to address criminal activity**

Article 381 of the *Penal Code* imposes criminal liability on “official of public services, charged with the duty of discovering crimes and arresting offenders of crime, who neglects to inform the crimes made known to him” for failure to act:

- Article 381: (1) A person who has been legally charged with the duty of informing an official of public services of a matter and intentionally abstains from doing so (within the specified time limit), in view of the circumstances shall be sentenced to medium imprisonment, not exceeding two years, or shall be fined an amount not exceeding twenty four thousand Afghanis.
- (2) Any official of public services, charged with the duty of discovering crimes and arresting offenders of crime, who neglects to inform the crimes made known to him shall be punished in accordance with the provisions specified in the previous paragraph provided that in the said crime the filing of

the claim is not subject to complaint or the person committing the crime is the spouse, one of the roots or branches, brother or sister of the official of public services.

Prosecutors are charged with these duties by the *Saranwali Law, 1991* (for example, at Articles 12, 19 and 22) and are therefore exposed to medium term imprisonment if they fail to act in the face of violence against women. Police are also charged with the duties of discovering crimes and arresting offenders – by the *Constitution* (Article 134), the *Police Law, 2005* (at Article 5) and the *ICPC* (at Article 30). Therefore, police who fail to act in the face of violence against women are also exposing themselves to criminal liability in the form of medium term imprisonment.

### **International law imposes an obligation on states to address violence against women by all means necessary, including by enforcement of the criminal law**

CEDAW prohibits discrimination against women in all its forms. It sets out a general obligation on Afghanistan to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women”, which requires that Afghanistan appropriate legislative measures, including criminal sanctions, among other measures (Article 2).

The Committee on the Elimination of All forms of Discrimination against Women (CEDAW Committee) was set up under CEDAW to monitor its implementation. In its General recommendation No. 19 under CEDAW regarding “Violence against women”, the CEDAW Committee has clarified that:

- Discrimination against women “includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” (Paragraph 6)
- Violence against women includes family violence. (Paragraph 23)
- “Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.” (Paragraph 6)
- States parties to CEDAW “may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” (Paragraph 9)
- Therefore, “States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including [...] penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace”. (Paragraph 24(t))
- “Measures that are necessary to overcome family violence should include: (i) Criminal penalties where necessary and civil remedies in cases of domestic

violence; (ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member”. (Paragraph 24(r))

These obligations are reiterated in the *Declaration on the Elimination of Violence against Women*, adopted by the UN General Assembly on 20 December 1993 (Resolution 48/104).

Afghanistan is a State party to CEDAW. According to international law, as well as the *Constitution*, it is obliged to abide by these principles. This means that:

- Where there is an ambiguity in legislation, courts should interpret it consistently with CEDAW, as clarified by the CEDAW Committee.
- Where there is no ambiguity in legislation, it should be applied. For example, the *Penal Law* provisions relating to murder and beating apply to domestic violence. The law should not be restricted by courts.
- Where legislation clearly contravenes CEDAW, it should be amended. Indeed, there are proposals for legal reform in Afghanistan in the area of violence against women.

#### **Prosecutor cannot act without victim complaint in certain circumstances**

Another exception set out in the law to the rule that the prosecutor must prosecute crimes is where crimes are subject to complaint. In such cases, the prosecutor cannot prosecute the crime unless there has been a complaint. For example:

- Where the crime is one of the crimes set out at Section 2 of Book 2 of the *Penal Code* – “Felonies and misdemeanors against individuals”, which includes beating, *zina*, kidnapping etc. – and it is committed by one spouse against the other, or by an individual against another individual belonging to the “roots or branches” of his family.

Article 476: (1) In crimes, specified under the chapters of this Section, which harms the spouse or one of the roots or branches, filing of claim or other actions against them are not permitted, except on the basis of the complaint of the person against whom the felony is committed. Prosecution shall be dropped upon desistance of the person against who the felony has been committed.

(2) If the desistance is made after the final decision of the court, execution of the verdict shall be stopped.

(3) In cases where objects pertaining to the location of the crime have been brought under custody, by virtue of court verdict or concerned authorities, or lent to someone else or has become the interest right of someone else, provisions stated in this Article shall not be applicable.

- *Qazf* (*Penal Code*, Article 440):

Article 440: In a case of defamation no investigation, prosecution or filing of claim can take place without the complaint of the defamed.

- Forced marriage (*Penal Code*, Article 517).

Article 517: (3) Penal claims regarding the criminal offences mentioned in subsections (1)-(2) of this article can be filed when the victim complains.

## **Evidence and the investigation**

### **Types of evidence**

Article 37 of the *ICPC* suggests various types of evidence that may be relevant to an investigation, and that therefore the prosecutor must collect.

- Article 37
1. During the investigations phase the Primary Saranwal shall collect all relevant evidence which can substantiate a decision pros or cons the suspect.
  2. The collection of evidence is not restricted to particular forms or matters. The Primary Saranwal is free in selecting tools and modalities of proof.
  3. The following shall be considered as key tools:
    - a. Witnesses
    - b. Confrontations
    - c. Line up procedures
    - d. Inspections
    - e. Searches
    - f. Seizure
    - g. Expert exams and evaluations
    - h. Interrogations

It is clear from Article 37(2) of the *ICPC* that “[t]he collection of evidence is not restricted to particular forms or matters.” The prosecutor is “free” to select tools and modalities of proof. The various types of evidence enumerated at Article 37(3) are identified as “key tools”, not the only tools available. Confession and the use of torture.

Notably absent from the list of “key tools” at Article 37(3) of the *ICPC* is “confession”. In his “Commentary” on Article 37 of the *ICPC*, Judge Di Gennaro states:

In the list has not been included the confession. This omission is to be saluted as a remarkable advancement compared with the old concept of confession in the medieval inquisitorial systems. Confession was then the exclusive source of evidence. Collateral investigations were usually inexistent. The accused was presumed guilty and, in order to obtain his confession, heavy torture practices were used. The missed inclusion of confession in the list of key tools demonstrates that Afghanistan wants to align its criminal procedure system with those of advanced democratic Countries. In this context

confession is to be made in absolute psychological freedom and the self accusation of the offender takes the value of an important clue to be matched by other evidentiary elements for being corroborated as a full fledged proof.

The *ICPC* does not prohibit the use of confessions in criminal prosecutions. However, the suspect and accused are protected against any form of coercion to elicit a confession, and this is reflected in procedural requirements relating to the use of confessions at trial.

The use of torture for any purpose, including to elicit confessions from suspects, is forbidden by the *Constitution*:

Article 29: Torture of human beings is prohibited.  
No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest, detention or convicted to be punished.

In this regard, Article 5 of the *ICPC* clearly sets out the protections of the suspect and accused person:

Article 5 [...] 

4. The suspect and the accused shall not undergo intimidations or any form of physical or psychological pressure.
5. Their statements shall be made in a condition of absolute moral freedom.
6. The suspect and the accused have the right to abstain from making any statement even when they are questioned by the relevant police or judicial authorities.
7. The police, the Saranwal and the Court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent, right to representation at all times by defense counsel, and right to be present during searches, line-ups, expert examinations and trial.

The prohibition on the use of torture by police or prosecutors is backed up by the threat of criminal prosecution of those who violate the provision. The use of torture is a crime according to Article 275 of the *Penal Code*, which provides for severe punishment:

Article 275: (1) If the official of public services tortures the accused for the purpose of obtaining a confession, or issues an order to this effect, he shall be sentenced to long imprisonment.  
(2) If the accused dies as a result of torture, the person committing it shall be sentenced to the punishment of intentional murder as anticipated in this Law.

This is consistent with *shari'ah* and international law. For example, both the UDHR (at Article 5) and the ICCPR (at Article 7) provide that: "No one shall be subjected to

torture or to cruel, inhuman or degrading treatment or punishment.” The *Cairo Declaration on Human Rights in Islam* provides (at Article 20) that: “It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. [...] Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.”

Article 30 of the *Constitution* gives some guidance in relation to what confessions will be valid as evidence in court:

Article 30 Any statement, confession or testimony obtained from an accused or of another person by means of compulsion, are invalid. Confession to a crime is a voluntary admission before an authorized court by an accused in a sound state of mind.

It should also be borne in mind that the same principles relating to the use of evidence set out at Articles 7 and 55 of the *ICPC* will apply to the use of a confession. Therefore, for example, a confession signed by a suspect in the absence of his defense lawyer is invalid.

### **Medical examinations**

According to Afghan law, the conduct of surgical operations and other medical treatments would constitute a crime under the “Beating and Laceration” provisions of the Penal Code (Book 2, Section 2, Chapter 5). However, Articles 53-54 of the Penal Code set out an exception to this general principle where the individual has consented to the medical procedure. Articles 53-54 of the Penal Code also set out an exception where Afghan law provides powers to law enforcement officials.

Article 53: Commitment of a criminal act with good will for the purpose of exercising a right, which is granted to a person by the way of religious or other laws, shall not be considered a crime.

Article 54: Commitment of criminal act in the following instances is considered exercise of right: [...]

2. In the performance of surgical operations or other medical treatments, provided that it is exercised in accordance with the technical principles of the medical profession at the consent of the patient or his guardian or legal representative. Performance of surgical operation in emergency cases is excepted from this provision. [...]
4. In the instance of commitment of apparent felony or misdemeanor for the purpose of arresting the persons committing the said crime, in such a way as is regulated in relevant laws.

This means that medical examinations may be ordered by the prosecutor when the individual consents. If the individual does not consent, what powers does Afghan law provide to law enforcement officials?

Regarding the prosecutor's ability to order medical examinations, Article 37 of the *ICPC*, which speaks to the "Collection of Evidence", specifically contemplates "expert exams and evaluations". Presumably, the prosecutor's ability to order such exams is constrained by the requirement suggested at Article 37(1) that they provide "relevant" evidence.

Regarding the judicial police's ability to order medical examinations without instruction of from the prosecutor, Article 32(1)(c) of the *ICPC* contemplates the "inspections of persons". These inspections are allowed where the two conditions set out at Article 32(1) are met: First, it must be a case of "flagrante delicto". Second, there must be "grounded reasons to believe that urgent action is needed to preserve the evidence". Article 32(1)(d) also allows the judicial police to "[request] the assistance of experts for performing activities which require special professional qualification".

- Article 32: 1. In case of flagrante delicto and whenever there are grounded reasons to believe that urgent action is needed to preserve the evidence the judicial police can, on their own initiative, conduct preliminary investigations which include:
- a. personal frisks or searches of premises and other places;
  - b. seizure of objects and documents;
  - c. inspection of persons and places, taking photos;
  - d. requesting the assistance of experts for performing activities which require special professional qualification.

### **Evidence must be relevant**

Articles 23 and 37 of the *ICPC* set out the obligation on the prosecutor to collect all relevant evidence during the investigation.

- Article 23: 1. The Primary Saranwal performs the investigation activities by his own or making recourse to the collaboration of the judicial police.
2. The purpose of the criminal investigation is the establishment of the truth and in order to do so the Primary Saranwal shall extend his assessment to cover all facts and evidence relevant for establishing whether the crime has been committed and ascertaining who is responsible for it.
  3. In conducting the investigations the Primary Saranwal is duty bound to evaluate incriminating and exonerating circumstances equally and to respect the interest of the victims.

- Article 37: 1. During the investigations phase the Primary Saranwal shall collect all relevant evidence which can substantiate a decision pros or cons the suspect.

It is this information that will provide the basis for the indictment, and then the prosecutor's case at trial (*ICPC* Articles 39 & 53).

The *ICPC* reiterates the requirement of relevance specifically in relation to the admissibility of witness and expert testimony at trial.

- Article 51: 1. The Primary Saranwal submits to the Court the list of the witnesses and experts he wants to be heard together with the act of indictment, indicating the reasons of the relevance of their testimony and exams.
2. The accused and/or his defense counsel have the right to present their own lists of witnesses and experts indicating the reasons of the relevance of their testimony and exams.
  3. The Court can exclude those witnesses or experts that in its view do not appear material for the adjudication of the case.
  4. The Court, on its own initiative, can order the appearance of witnesses or experts who are not included in the above mentioned lists.

### **Discussion points**

- What is the relevance of consent to the prosecution of the rapist (*Penal Code*, Articles 427 & 429), and to a prosecution of the victim (*Penal Code*, Article 427)?
- Is evidence of violence necessary to establish lack of consent?

No, it is not. Customary international in this regard, by which Afghanistan (including Afghan prosecutors and courts) is bound, is reflected in the *ICC Rules of Procedure and Evidence*, Rule 70: “Principles of evidence in cases of sexual violence”:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

- Is evidence of prior sexual conduct relevant?

No, it is not. Customary international in this regard, by which Afghanistan (including Afghan prosecutors and courts) is bound, is reflected in the *ICC Rules of Procedure and Evidence*, Rule 71, which states that the ICC “shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness”.

- Is delay in notifying the police relevant to a determination of consent? No, it is not.

### **Obligation to respect the interests of victims.**

According to Article 23(3) of the *ICPC*: “In conducting the investigations the Primary Saranwal is duty bound to evaluate incriminating and exonerating circumstances equally and to respect the interest of the victims.”

We can look to the practice in other countries, and of international tribunals, for guidance regarding what this might involve – e.g.: the Victims and Witnesses Unit at the International Criminal Court was set up to provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses and victims who appear before the court (as required by Article 43(6) of the *Rome Statute of the ICC*; see also the *ICC Rules of Procedure and Evidence*). “Justice for All”, the 10-year justice blueprint developed by Afghanistan’s judicial institutions and approved by the Afghan Cabinet in October 2005, speaks to victim and witness assistance. At item 3.3, it states:

In a country rife with violence against women and children, it is essential to devise programs program to protect them from further victimisation when they are caught up in legal process. Equally, where intimidation by strongmen makes it difficult to persuade people to give evidence, there is a need to provide victims and witnesses with protection, and, in very serious matters, relocation.

Assistance should include in-court procedural protection such as screens and facilities at some courts for technical means (video links) for giving evidence out of court (e.g. for victims of rape, child witnesses, etc). There are many other steps which could be taken to improve witness assistance, both in and out of court, such as the allocation of trained social workers to counsel and explain court procedures; arranging travel; identifying needs for social assistance to compensate for loss of earnings; training police in risk assessment; arranging re-housing; referrals to specialist counselors where necessary; and providing waiting rooms for witnesses at court so they do not have to wait in the public areas. In the context of Afghanistan a witness assistance service should entail different levels of risk assessment and protection services, such as guards during the trial, temporary shelter in a safe house, and where necessary, re-location of witnesses for the most serious cases.

Like legal aid, this service must be made available first at the Primary Court level. The Government foresees a small number of resources (either state employees or private lawyers when they exist) in provincial capitals, with one person in larger districts. It will be particularly important to have female workers for this work. There should be at least one place in every province where women or children can be accommodated in a secure setting until they can find their own accommodation.

### **The interests of victims and witnesses must also be respected during the trial.**

This may involve closing all or part of a trial to the public. Article 52(2) of the *ICPC* provides that “Hearings are open to the public except when the court decides that all or part of it shall be run without the presence of the public for reasons of morality, family confidentiality or public order.” Article 128(2) of the *Constitution* allows

courts to conduct any part of a trial *in camera* if the security of the witness so requires. It permits courts to do so not only in situations provided in the law (as in Article 52(2) of the *ICPC*), but also “in situations in which the secrecy of the trial is deemed necessary”.

The law permits secrecy, and the interests of victims or women accused may require secrecy, in the following circumstances:

- A man is being prosecuted for rape or sexual assault, and evidence in relation to the victim is being presented.
- A woman is being prosecuted for *zina*. Secrecy in such a prosecution would be consistent with the injunction in the Qur’an not to falsely accuse a woman of sexual relations. It may also be required for the security of that woman.

Also consider international law and practice – e.g. *ICC Rules of Procedure and Evidence*, Rule 72.

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.
2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear *in camera* the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and 68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim.
3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70.

### **Testimony of women victims and witnesses**

- Are women asked to testify – e.g. are rape victims asked to testify against rapists?
- What weight is given to their testimony? Is corroborating evidence required as a matter of principle? Consider:

- What is the relevant Afghan law?
- What are the relevant principles of Hanafi *fiqh*? Should Hanafi *fiqh* be applied pursuant to Article 130 of the *Constitution*? Consider whether this would be “within the limits of the Constitution”, as required by Article 130 – e.g. would it be consistent with the guarantee of equality at Article 22, and the presumption of innocence at Article 25.

### Right to a defense lawyer

... female human right advocates are few and face prejudice from a predominantly male judiciary. A judge remarked to a female advocate during the trial of three women accused of *zina*, “You must be a bad woman yourself for wanting to defend those three bad women.”

(Amnesty International, “Afghanistan: Women still under attack – a systematic failure to protect; Afghanistan: Stop Violence against Women”, 30 May 2005.)

Consistent with international law (e.g. ICCPR, Article 14(3)(d); *Cairo Declaration*, Article 19(e)), Article 31 of the *Constitution* guarantees the right to a defense:

Article 31      Every person upon arrest can seek an advocate to defend his/her rights or to defend his/her case for which he/she is accused under the law.  
                     The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.  
                     In criminal cases, the state shall appoint an advocate for a destitute.  
                     The confidentiality of oral, written or telephonic communications between an advocate and his/her accused client are immune from invasion.  
                     The duties and authorities of advocates shall be regulated by law.

This right is also guaranteed under *shari’ah*, which understands the right to be based on the following hadith:

“Since I am only human, like all of you, I might, when litigants come before me to decide between them, rule in favour of the more eloquent of them. If I should thereby transfer to him what is rightfully his brother’s I warn him to take not that which is not his, or I shall reserve for him a piece of hell.”

“O ‘Ali! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favor of either party until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth.”

The right to a defense is further explained at Article 18 of the *ICPC*.

- Article 18: 1. Legal assistance to the suspect and the accused requires the service of a qualified professional.
2. To this end an official register is established in the Ministry of Justice where only persons with a university degree in law or sharia can be included.
  3. The suspect and the accused can be, in any case, assisted by a defense counsel of their choice.

Each suspect and accused is entitled to his own defense counsel. This is because they will have different and likely conflicting interests. If one defense attorney were to represent more than one accused, this would create a “conflict of interest”.

Article 31 of the *Constitution* protects the confidentiality of communications between an individual and his defense lawyer: “The confidentiality of oral, written or telephonic communications between an advocate and his/her accused client are immune from invasion.” This means that such communications cannot be shared with the prosecutor, and the prosecutor should not request that they be shared.

The right to a defense involves the right of the defense lawyer to be present at all stages of the investigation and prosecution. As set out in the *ICPC*, this includes the right to be present during “preliminary investigations” by judicial police (Article 32(3)), and at all other times during the interrogation of the suspect (Article 38(1)), during searches, confrontations, line-up procedures and expert examinations (Article 38(2)), as well as during the trial (Article 38(2)).

Article 32: [...]

3. Defense Counsel of suspect and accused has the right to be present in investigation and interrogation phases according to art. 38 of this code.

- Article 38: 1. The defense counsel has the right to be present at all times during the interrogation of the suspect.
2. The suspect and the defense counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial.
  3. In the investigation phase the Saranwal and the judicial police shall notify the suspect and his defense counsel of searches, confrontations, line-up procedures and expert examinations in order to allow them to be present. This duty can be waived only when there is an urgent need to conduct the said operations, which is defined as when it is a flagrante delicto crime or there is a fear of the loss of evidential facts.

The right of the suspect or accused, together with his defense counsel, to be present at all stages of the investigation and prosecution, involves a related right to be notified of these stages, which is detailed in the *ICPC*:

- Article 40: 1. During the investigations the judicial police and the Saranwal shall give notifications of the deeds to the suspect, to his defense counsel and the victim of the activities to be accomplished, to which they have the right to be present.
2. If there are no particular grounded reasons of urgency, the notification should be served at least three days before the performance of the activity.
  3. Reasons of urgency imposing a shorter period or absence of notifications shall be clearly mentioned in the record of the activities.

- Article 41: 1. When it has not been possible to identify any of the places indicated in article 17, the notifications shall be served on a defense counsel appointed by the police during their autonomous investigations, or by the Saranwal during his investigations.
2. The appointment of the defense counsel is made by the police and the Saranwal in a written form.
  3. In this case the defense counsel represents the suspect.
  4. The above indicated decision ceases to take effect at the end of the investigations.

- Article 42: 1. The Court immediately after having received the act of indictment, orders the notification of the deed indicating the day and hour fixed for the commencement of the trial.
2. The deed shall contain the name of the accused and the indication of the alleged crime with its factual circumstances in reference to the related law provisions and shall be served on the accused and his defense counsel, the victim and the Saranwal at least five days in advance.

The right of the accused to a defense also involves the right to review the file submitted in support of his indictment. This is set out at Article 43 of the *ICPC*:

- Article 39: 6. Together with the act of indictment the Primary Saranwal shall transmit to the Court the file containing all the deeds formed during the investigations, putting at the Court's disposal the seized items and goods.

- Article 43: The accused and his defense counsel are entitled to examine the documents contained in the file mentioned in the last paragraph of article 39 and the objects under seizure.

Article 31 of the *Constitution* provides for legal aid from the State. This right is more fully explained at Article 19 of the *ICPC*:

- Article 19: The suspect or the accused be financially unable to appoint a defense attorney are entitled to have a free defense attorney appointed for him or her in the following manner:

- a. The investigating Saranwal or the Court adjudicating the case, on the petition of the person, appoints a defense attorney for the destitute person from amongst the lawyers officially permitted to work as defense attorney.
- b. The person for whom an attorney has been appointed reserves the right not to accept the appointed defense attorney and to defend himself in person.
- c. The fees of the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.

Article 96 of the *ICPC* is a transitional provision, allowing recourse to an “educated person having some knowledge of legal issues” instead of a defense counsel until sufficient defense counsel are available.

- Article 96: 1. Up to when in the Country there will be not available a sufficient number of defense counsels, as established in article 18, the suspect or the accused can make recourse to the assistance of an educated person having some knowledge of legal issues.
2. To this end the President of each Court shall institute a list of persons having the qualities indicated in the previous paragraph following the indications for the Capital of the Ministry of Justice and for Districts and Provincial Courts of Government Cases Department.

## **Consequence of failure to respect law**

### **Invalidity of evidence gathered**

The general principle in relation to the violation of legal requirements is set out at Article 7 of the *ICPC*:

The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the Court cannot base its judgment on it.

This principle is specifically articulated in relation to the obligation to record the criminal proceedings. Article 2 of the *ICPC* requires all activities accomplished “in execution of the provisions of” the *ICPC* be recorded in written form by a public officer. According to Article 2(6), “lack of recording” of the activities of the police and the prosecutor “brings about the legal inexistence of the related activities”.

The principle is also articulated in relation to activities undertaken in the absence of defense counsel. As discussed above, the *ICPC* give the accused or his defense counsel the right to be present, ask questions etc. Article 55 states that if these rights are violated, “the related deeds have the sole value of clues” – i.e. any deeds related to “records of the testimonies of the witnesses as well as of the expert exams, collected during the investigative phase” without the “accused and/or his defense counsel [being] present during the operations and [being] in a position to raise

questions and make objections” cannot provide the basis on which the court decides in a prosecution.

The *ICPC* also provides recourse where its “procedural provisions” are violated. Where the individual acting as prosecutor did not have the requisite legal status, where a procedure has not been instituted by the prosecutor or where the prosecutor was not present when required, Article 15 provides that the procedure is null. In cases of other violations of the procedural provisions, the procedure may be denounced by the individual affected (e.g. the suspect or accused) as invalid if it results in distortions in decisions. Note that, according to Article 9 of the *ICPC*, a forgery can be denounced at any stage of the criminal proceeding.

### **Recourse against legal decisions**

The accused has a right to appeal the judgement or order of a lower court to the Court of Appeal (*Courts Law*, Article 33; *ICPC*, Articles 63, 66 & 68). The grounds for appeal include that the law has not been properly applied or a crime has not been properly defined (*Interim ICPC*, Article 66(2)(a)). Therefore, for example, if a conviction has been based on evidence gathered in violation of legal protections, the conviction can be appealed.

The accused also has a right to appeal the decision of the Court of Appeal to the Supreme Court, although only on more limited grounds (*ICPC* Article 71; *Courts Law* Article 26).

(Note that the prosecution also has a right of appeal (*ICPC*, Article 68).

**Case Studies**  
**Principle of legality and *farar az manzel***

Farida is 20 and Atiq is 23. They live in Jalalabad. They have both wanted to marry each other for over a year. However, Farida's family refuses; Farida's father, in particular, does not like Atiq, and wants Farida to marry the son of his employer. Farida and her father have had many fights about the question of her marriage, which usually end in him beating her.

Atiq was recently offered a job in Kabul. He invited Farida to come with him and she accepted. They recently left together for Kabul. Farida stayed with an aunt in Kabul for a week, until she and Atiq were married. They did not have sexual intercourse before they were married. They now live together in Kabul.

**Discussion points**

Has Farida committed any crimes? Consider:

- *Constitution*, Articles 27, 94 and 130
- *Penal Code*, Articles 2, 3, 21, 37 and 425
- *Civil Code*, 1976, Articles 60 and 80

Would your answer be different if Farida had not left with Atiq, but had simply gone to her aunt's house to escape her abusive father and avoid marrying his employer's son?

## Domestic violence and defense of “exercise of right”

A husband and wife disagree about whether their children should be allowed to watch Indian television. The husband believes that such programs will spoil the character and morals of their children. His wife disagrees; she believes that these programs will acquaint the children with other cultures, and that this will be beneficial to them. From the time that these programs have been airing on television programs, the husband and wife have had disagreements and verbal fights. One day, when the husband came home from work, he saw his children watching Indian programs on television in spite of his forbidding them not to watch. This day had been a very bad day for the husband at work. He was very furious with his wife when he discovered the children watching the Indian programs. His wife also became very angry and called her husband narrow-minded and a fanatic. This enraged the husband, who slapped her across the face with all his force. As a result her tooth was broken and her eye bruised.

### **Discussion points**

Has the husband committed a crime? Consider *Penal Code* Book II, Section 2, Chapter 5.

Does he have a defense? Consider:

- *Penal Code*, Articles 53 & 54.
- Qur'an, *surah* 4, *ayah* 34 and related *sunnah*, *hadith* and other interpretation.

Assume that the police has been notified of this incident by the hospital that treated the wife's injuries. What should the police (or prosecutor) do?

- Who should the police speak to?
- What else should they do – e.g. to preserve evidence that may be required in an eventual criminal case?

What can police do to prevent domestic violence in the community?

## Zina and duress

In 1994, 12-year-old Leila was married to Ali, who was 40. Ali was abusive. He beat her frequently, regularly drawing blood and leaving bruises. In 2002, Ali caused Leila to trip down some stairs, and she sprained her ankle. Leila met a woman named Farshida at the market who commented on her sprained ankle. Leila told Farshida about how she had been forced into marriage, and how Ali beat her. Farshida told Leila that she knew of a shelter for women where Leila could live to escape from her husband. Farshida said her cousin Firouz had a car, and that they could help her get there. Leila was hesitant, but agreed to go with Farshida. The next day they met at the market. Firouz picked them up in his car. It turned out the Firouz was not Farshida's cousin. He left her at the edge of the village, and took Leila to Kabul, where he lived. He forced her to live with him as a wife. She performed domestic services and he had sex with her. For the first six months, Leila tried repeatedly to escape. Firouz would find her and beat her. Eventually, she stopped trying to escape, and Firouz stopped beating her. Leila would not resist when he insisted on having sex, although she was deeply humiliated and upset by it. Ali was recently in Kabul, where he happened to see Leila and Firouz together. He has complained to the police.

### **Discussion points**

Can Leila be prosecuted for any crimes? If so, does she have any defenses to criminal liability? Consider:

]

#### *Penal Code*

Article 94: A person who commits a crime under the influence of a moral or material force, repulsion of which is not permissible otherwise, shall not be considered responsible.

Article 95: 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.

Can Farshida be prosecuted for any crimes?

Can Firouz be prosecuted for any crimes?

## Forced marriage

Freshta's parents committed her at the age of 3 to be married to Salahuddin. Freshta is now 19 years old. Salahuddin, who is 25, recently expressed that he wanted to conclude the marriage, and his parents agreed. Freshta's parents insisted that she be formally engaged to, and marry, Salahuddin, although Freshta insisted that she did not consent to this marriage. The local mullah has completed the ceremony on the insistence of her parents.

### **Discussion points**

- Have any crimes been committed?
  
- Would your answer be different if Freshta were 14 years old when the marriage was concluded rather than 19?

## Powers of Arrest and Detention

Rahim lives in Qaisar district of Fariab Province. He worked in bakery on a daily wage of 200 Afs. One day, when he came to work in the morning, he was arrested by the police under the charge of theft from the bakery. The owner of the bakery reported to the police that last evening, Rahim was the last person who left the Bakery and now he wanted police to arrest him. He said he had suspicion on Rahim as a few days ago, he asked for money to pay for the treatment cost of his father who was in Kabul.

The police kept Rahim in custody for 15 days before putting him at the disposal of the prosecutor. In the course of interrogation, police tried to get confession through different means such as slapping him on the face and leaving him in shackles for long hours. They repeatedly said to Rahim that if he did not give details about the theft, he might be punished for contempt of police. Rahim did not confess. The prosecutor also kept him in detention for two months. He claims Rahim may escape if released and that as Rahim is the only suspect, he cannot continue the investigation without him in the custody. The case is still pending and an indictment has not been filed to the court.

### **Discussion points**

Have the police/prosecutor acted according to law?

If not, what are the legal consequences for them?

## Powers of arrest, conduct of investigation in the case of rape

Mrs. Farshid has made a complaint to the police. She alleges that she has been raped. She told the police that two armed men entered her home one evening. Her husband and children were in Pakistan at the time, and are there still. Mrs. Farshid claims that one of the men raped her while the other man held a gun to her head, and then they traded places. Mrs. Farshid went to the police with her neighbor, who discovered her in a highly distressed state the evening of the attack, frantically washing herself, and finally convinced her to file a complaint two days after the attack. Mrs. Farshid brought with her the clothing she was wearing during the attack. The clothing is very slightly torn, and there is what appears to be semen on the skirt. She claimed that she hurt in her “private parts”. However, she exhibited no signs of violence or struggle: bruises, cuts etc. The police put Mrs. Farshid in prison as they suspected her of consensual *zina*.

### Discussion points

Did the police act correctly in putting Mrs. Farshid in prison? Consider the following provisions of the *ICPC*:

- Article 30: 1. The judicial police shall arrest on their own initiative:
- a) the offender who is caught in state of flagrante delicto of misdemeanors, punished by medium term imprisonment, or felony;
  - b) the person who is allegedly the author of a felony and there is risk of his disappearance.
2. In all other circumstances, the judicial police perform arrests only in execution of orders of the judicial authorities.

In cases where rape is reported, what should the police do:

- To respect the interests of the victim?
- To ensure that the evidence is preserved?

How will you conduct your investigation in this case? Consider the following provisions of the *ICPC*:

- Article 23 [...]
2. The purpose of the criminal investigation is the establishment of the truth and in order to do so the Primary Saranwal shall extend his assessment to cover all facts and evidence relevant for establishing whether the crime has been committed and ascertaining who is responsible for it.
  3. In conducting the investigations the Primary Saranwal is duty bound to evaluate incriminating and exonerating circumstances equally and to respect the interest of the victims.

- Article 37: 1. During the investigations phase the Primary Saranwal shall collect all relevant evidence which can substantiate a decision pros or cons the suspect.
2. The collection of evidence is not restricted to particular forms or matters. The Primary Saranwal is free in selecting tools and modalities of proof.
  3. The following shall be considered as key tools:
    - a. Witnesses
    - b. Confrontations
    - c. Line up procedures
    - d. Inspections
    - e. Searches
    - f. Seizure
    - g. Expert exams and evaluations
    - h. Interrogations

## Evidence gathering and virginity tests

Mabooba is a teacher at the local girls' school. Lately, the school has received threats from Taliban factions: "Close the school, which is abhorrent to Islam, or we will bomb it." Because of these security threats, the school has employed a local security company to guard the school premises as well as the teachers. All of the teachers, including Mabooba, are very grateful for this protection, and are therefore friendly to the guards. They chat with the guards before and after class, and frequently bring sweets to them.

One afternoon, Mabooba was walking home from the school alone. One of the guards approached her, took her hand, and asked her to marry him. Mabooba was distressed that the guard had taken her hand. She tried to run. The guard, upset at having distressed her, ran after her. Mabooba fell and ripped her dress.

Mabooba arrived at home, still greatly distressed. Her brother was at home, and asked what was the matter. She explained the situation. Mabooba's brother flew into a rage at the fact that the guard had dishonoured the family. He was convinced that the guard had forced her to have sexual intercourse, and that she was too frightened and ashamed to admit it. Mabooba's brother wants her to have a virginity test to prove nothing happened. Mabooba refuses to have a virginity test.

Mabooba's brother has made a complaint to the local police station, and insists that the police order a virginity test.

### Discussion points

Can the police order a virginity test?

Can the prosecutor order a virginity test?

In this regard, consider:

- Any unconsensual physical contact, including a doctor administering a test, or a police or prosecutor ordering a test, may be prosecuted under the "Beating and Laceration" provisions of the *Penal Code*.
  - Article 53 of the *Penal Code* provides a defense to individuals engaging in otherwise criminal activity pursuant to a legal right. Does the doctor, police or prosecutor have such a legal right?
  - Article 54 of the *Penal Code* provides a defense to doctors conducting medical treatments. However, these treatments must be consensual.
- So-called "virginity tests" consist of tests as to whether a woman's hymen is intact or not. As such, they cannot conclusively establish either that a woman has engaged in sexual intercourse (as the hymen might have broken due to some other cause) or that a woman has not engaged in sexual intercourse (as intercourse may not have broken the hymen).
- Therefore, "virginity test" evidence probably does not meet the standard for evidence of "relevance" set out at Articles 37 and 51 of the *ICPC*.

- *ICPC*, Article 32
  1. In case of flagrante delicto and whenever there are grounded reasons to believe that urgent action is needed to preserve the evidence the judicial police can, on their own initiative, conduct preliminary investigations which include: [...]
    - d. requesting the assistance of experts for performing activities which require special professional qualification.
- Rights *recognized* in the *Constitution* – e.g. dignity (Article 24) and privacy (Articles 37, 38 and 40).
- International law – e.g. Interpreting the right to privacy at Article 17 of the ICCPR, the *Human Rights Committee* has stated:

So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.