

Tackling Judicial Corruption in Afghanistan

Query:

“From a donor perspective, what are the options for addressing judicial corruption in Afghanistan?”

Purpose:

“The objective is:

- Primarily to help the donor’s Afghanistan team understand the key issues and identify the key entry-points for approaching anti-corruption programming in Afghanistan’s judicial sector;
- It is also to provide the Afghanistan team with pertinent information about corruption in Afghanistan’s judicial sector;
- And (if possible) to learn about anti-corruption projects/programs in Afghanistan that are currently underway (or have been undertaken) by specific donors, and to learn from their experiences.”

Content:

- Part 1: Context of Assessing Corruption in Afghanistan
- Part 2: Forms of Corruption in Afghanistan’s Judicial Sector
- Part 3: Challenges and Opportunities for Addressing Judicial Corruption in Afghanistan
- Part 4: Lessons Learnt from Other Donor Supported Projects
- Part 5: Further Readings

Part 1: Context of Assessing Corruption in Afghanistan

State of Corruption in Afghanistan

Poorly qualified civil servants, ineffective control systems and a weak judiciary and legal enforcement have led to a culture of impunity, generating violence, corruption and predatory behaviour, ultimately undermining reconstruction and peace building efforts in Afghanistan.

Both the CPI and the World Bank Institute’s Governance Indicators rank Afghanistan among the countries whose public sectors are perceived the most vulnerable to corruption. A survey of the Afghan people conducted in 2006 by Integrity Watch Afghanistan further confirms that public perception of corruption as a national problem is widespread and has most likely increased in recent years. 72 % of respondents felt that their household was affected by corruption while half of the respondents reported having paid bribes in the last six months. Corruption is perceived to be particularly prevalent in the justice, security and customs sectors as well as in service delivery. Nearly 60 % of respondents considered that the time between

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2001 and now has been the most corrupt period in the last 50 years, compared to only 9 % who found that corruption was at the highest under the Taliban regime.

Corruption has multiple and deeply rooted causes in Afghanistan. In addition to the “usual” causes and forms of corruption, contextual issues generate forms of corruption that are specific to the Afghan situation. The booming of the opium economy, encouraged by the lack of security and the weakness of the state, is one of the greatest challenges facing Afghanistan in promoting effective governance, sustainable development and the restoration of the rule of law. Drug-related corruption is largely recognised as one of the dominant cause of corruption in the country. Counter-narcotics efforts provide opportunities for corrupt officials to extort enormous bribes from drug traffickers. The general context of insecurity is also detrimental to the development of licit economic activities and the importance of the informal sector generates further forms of illicit activities. Another source of corruption is also attributed to the large inflows of international assistance combined with the pressure to spend these funds quickly, both for humanitarian aid and for sustaining the international military forces present in the country. Last but not least, non-functioning institutions, the limited capacity of government as well as reported corruption in the justice sector itself seriously compromise the detection, prosecution and punishment of corrupt practices. (For a complete overview of the state of corruption in Afghanistan, please see the Anti-Corruption Road Map presented to the Government by a number of donor agencies: http://www.unodc.org/pdf/afg/anti_corruption_roadmap.pdf)

Government’s efforts against corruption to date

The Government of Afghanistan has taken various steps to address the problem of corruption in the country. Afghanistan signed the UNCAC in February 2004 and the ratification of the convention is in the process of being approved by Parliament. Government also established a General Independent Administration of Anti-Corruption (GIAAC), which is meant to be the lead agency against corruption, with a mandate to promote preventive policies, raise awareness and investigate alleged cases of corruption. In 2006, President Karzai gave the Attorney General the mandate to address corruption in the Public Sector, including in his own institution. A Special Unit has been established for this purpose. As a result, some public servants have subsequently been temporarily suspended and alleged corrupt leaders have been arrested. In August 2006, President Karzai also appointed high level leaders from various Ministries, Parliament and the Judiciary to a high profile Anti-Corruption Commission, with the mandate to develop an action plan to address corruption within the public sector. Although these various initiatives seem to demonstrate government will to tackle the problem, the need to have a more comprehensive and integrated framework for anti-corruption efforts has been emphasised by various stakeholders (Please see the above mentioned Anti-Corruption Road Map).

Part 2: Forms of Corruption in Afghanistan’s Judicial Sector

The establishment of an impartial, transparent and efficient justice system is a prerequisite to address corruption and restore the rule of law in the country. Courts must have the capacity to effectively detect, prosecute and sanction corruption cases while corruption must be addressed within the judiciary itself to restore the legitimacy of the formal justice system. Judicial corruption in Afghanistan is widespread, common knowledge and a recurring theme in all ongoing efforts to reform the judiciary. Problems of training, resources, corruption and political interference have so far undermined the credibility of the various justice institutions. Amnesty International’s report on the Afghan Judiciary published in 2003 provides a comprehensive picture of the state of the judiciary in this regard and identifies key areas of concerns that need to be addressed to restore public trust in Afghan courts. (Please see: <http://web.amnesty.org/library/index/engasa110212003>)

Judicial Appointments

There are strong indications that judicial appointments processes are marred with political manipulations and biases, including pressure from armed groups and warlords. Insiders attribute the appointment of unqualified judges to manipulations within the Supreme Court, a source claiming that only 20 % of the judges would be properly qualified.

Independence of the Judiciary

The independence of the Judiciary is guaranteed by the Afghan Constitution. In reality, the independence of the Afghan Judiciary is undermined by political, economic and individual interference from armed groups, public officials as well as private individuals. Forms of undue influence range from bribery, threats, intimidation and harassment to physical ill-treatment. Such pressures are commonly exerted on the judges, victims, witnesses or judicial personnel to ensure impunity to certain groups or individuals. AI documented cases where prosecutors were forced to drop murder case investigations or where public officials had been directly interfering with the decision-making processes in court. In some instances, the Police and the Army have been accused of interfering with the judicial function as well. There is also a widespread pattern of family members putting pressure on the courts or providing financial incentives to the judges to detain relatives rebelling against their wishes, especially in the case of forced marriages.

Judicial Corruption

Judicial corruption is widespread and affects every stage of the court proceedings. Judicial access and favourable decisions are granted in exchange for favours or money. The deposition of cases is commonly decided by bribes and those who pay bribes or have influential connections are released. Judges reportedly ask defendants for money; judges and prosecutors routinely accept bribes for not processing cases. Disappearance of evidence is not uncommon and detainees are frequently asked for money in return for their release. There was even evidence that a prosecutor was bribed by a wealthy business man to secure the arrest of his business competitors.

Insufficient Judicial Oversight

The Supreme Court has been criticised for the lack of transparency of its procedures for the discipline or removal of corrupt judges. In addition, due to logistical and financial constraints, the court has had no effective capacity to detect, investigate and prosecute cases of judicial misconduct, especially outside the capital city. Observers also raise the concern of the existence of an effective judicial oversight of the court itself and no appropriate functioning complaint mechanisms have been put in place to date. The new Supreme Court that has been appointed a few weeks ago could have a positive impact on addressing these various issues.

Terms and Conditions

Providing sufficient human, material and financial resources to the judiciary is a necessary component of a strategy to address judicial corruption. Low salaries combined with the high social status of judges make the judiciary particularly vulnerable to corruption risks and many judges attribute the problem of judicial corruption to economic hardship - low and irregular levels of salary payments. Beyond the level of resources allocated to the Judiciary, there is also a need to find a safe method of salary distribution to the provinces. In addition, judicial personnel operate under extremely difficult working conditions. Afghan Courts lack basic facilities such as premises, furniture or copies of legal texts, not least because libraries and legal collections have been destroyed or depleted by 25 years of conflict. As a result, the Judiciary is barely functioning in some parts of the country.

Part 3: Challenges and Opportunities for Addressing Judicial Corruption in Afghanistan

Challenges involved in addressing Judicial Corruption in Afghanistan

The challenges of addressing corruption in the judicial system are enormous. Some contextual issues specific to the Afghan situation need to be taken into account and addressed for judicial reforms to stand a chance of success.

Security and Outreach

Increasing security in Afghanistan appears to be a key condition for creating an environment where the Judiciary can operate independently. In a context where judges can be intimidated or bribed, the security of the Afghan Courts, judicial personnel as well as victims, defendants, lawyers and witnesses must be ensured to allow the courts to operate under “normal” conditions. The very fragile security situation in Afghanistan may also compromise the implementation of anti-corruption initiatives, as the Government lacks effective control outside Kabul. In certain areas, the rule of law is seriously undermined by the de facto rule of commanders or armed groups. Judicial reform must be linked with broader reforms that promote the restoration of the rule of law and security in the country.

Informal Justice System

Like the central government, the formal justice system has a weak presence outside the major cities and the public, especially in rural areas, heavily relies on informal and traditional justice mechanisms. Furthermore, as widespread corruption undermines the legitimacy of the formal justice system, traditional forms of delivering justice are gaining strength in many provinces. Local level administered justice is mainly based on codes of conducts, traditional laws and the Sharia. As a result, efforts by the international community to tackle judicial corruption must take into consideration the system of justice currently in place and ways to create a more accountable and standardised traditional justice system could be further investigated. Of enormous importance in an Islamic society is also to address the Islamic legitimacy of the formal judicial system. (Please see: <http://www.iht.com/articles/2006/08/28/opinion/edthier.php>).

Narcotics Trade

The fragile state-building process in Afghanistan is endangered by the expansion of the narcotics trade and its subverting impact on the law enforcement and security situation of the country. There is a general recognition that anti-corruption efforts must be combined with the fight against the narcotics trade and the Government’s efforts to tackle judicial corruption should also target public officials working in counter-narcotics institutions.

Capacity Building

Meeting the basic needs and priorities of the justice system may have an impact on containing judicial corruption. Like many Afghan public institutions, the Judiciary lacks sufficient human and organisational resources to effectively implement anti-corruption laws and reforms. There are few trained lawyers, very little physical infrastructure and no complete record of the country laws. Efforts against judicial corruption should ideally be accompanied by other measures aiming at increasing the capacity of the courts, increasing salaries, improving infrastructure, expanding the outreach to the provinces and increasing the quality and coordination of training, the latter being recognised by all stakeholders as a key component of judicial reform.

Opportunities in addressing judicial corruption in Afghanistan

There are also a series of ongoing initiatives and reforms that may provide key entry points to address judicial corruption in the country.

The Afghanistan Compaq and Afghan National Development Strategy (ANDS)

The Afghanistan Compaq and the Afghan National Development Strategy both recognise corruption as a major impediment to the reconstruction and development of Afghanistan. The Afghanistan Compaq was agreed at an international Conference held in London in January 2006. The Compaq identified three major areas of development for Afghanistan - security, governance and economic development. (Please see: <http://www.rolafghanistan.esteri.it/NR/rdonlyres/E534BE67-A528-4E31-BFDA-215F3CFAB4CB/0/AfghanistanCompactFinalFinal.pdf>). The Afghanistan Compaq makes explicit reference to the urgent need for “measurable improvements in fighting corruption” and promotes transparency and accountability in particular in the public administration, financial management, the justice sector and the flow of aid money. It also established performance benchmarks to be met both by the donor community and the Afghan government. Although the Compaq hasn't yet born the expected fruits, it provides legitimacy as well as a framework for concerted action of the various stakeholders in the area of judicial anti-corruption reforms and beyond. (Please see the International Crisis Group report on “Afghanistan endangered Compaq”, <http://www.crisisgroup.org/home/index.cfm?id=4631&l=1>).

Ongoing Judicial Reform

Although laws have been revised and professionals have been trained, there is a general recognition that the efforts of the Afghan Government and the international community to reform the judiciary haven't brought the expected results to date. A conference on “The Rule of Law in Afghanistan” took place in Rome last July, gathering key actors of Government and the international community with the aim of developing a coordinated strategy to reform Afghanistan's justice system. A set of justice sector priorities were agreed upon in this forum that both the Government of Afghanistan and the International Community committed themselves to implement. It is hoped that this process will allow the development and implementation of a comprehensive strategic plan to build a coherent and unified justice institution.

New Supreme Court

A new Supreme Court was approved by Parliament in August 2007, composed of a group of reformers who it is hoped will introduce a functioning system of checks and balances in the judicial sector. In his swearing-in speech, the new Chief Justice appointed by President Karzai, expressed his desire to build an effective justice system and tackle corruption. On the 21st July 2007, the Supreme Court adopted a new Code of Judicial Conduct, based on the internationally recognised Principles of Judicial Conduct and establishing ethical standards, which represents a critical step in fighting judicial corruption. This newly-appointed Supreme Court is opening a window of hope to bring a long-awaited change in the Judiciary that has been in place since the collapse of the Taliban regime. Support to the Court in the form of resources, political support and experienced judges, is likely to help the new Court make a difference. The inclusion of lawyers and judges from the Afghan Diaspora into the reform process may also be an option to investigate. (For further recommendations on the support to the new Supreme Court, please see: <http://www.iht.com/articles/2006/08/28/opinion/edthier.php>).

Ongoing Training Initiatives of Justice Officers

Various training programmes are in place to address education gaps and skill deficiencies within the Judiciary, with the view to establishing a trained and credible legal profession. The legal training systems and programmes provide an opportunity to systematically incorporate

corruption-specific courses within the curriculum of training institutions and develop the capacity of the Judiciary to detect, investigate and sanction corruption cases.

Part 4: Lessons Learnt from Other Donor Supported Projects

Examples of Donor Supported Initiatives

Addressing judicial corruption is a common feature of a number of broader donor supported anti-corruption interventions such as the programmes listed below:

- Major donors including the **World Bank, DIFID, UNDP, ADB and UNDOC** are working together on assisting the Government of Afghanistan to develop an Anti-Corruption road map laying out key areas for action. These joint efforts recognise the critical importance of ensuring that leadership remains in the hands of the Government while it receives strong support from international actors in a concerted and harmonised way. (Please see the above-mentioned Anti-Corruption Road Map: http://www.unodc.org/pdf/afg/anti_corruption_roadmap.pdf)
- **UNDOC in association with UNDP** is in the process of launching a project to strengthen the capacity of the Supreme Court and the Attorney General's Office to ensure the development of effective measures to fight corruption as well as monitor the implementation of UNCAC.
- The **UNDP Accountability and Transparency** project supports key ministries with internal integrity initiatives, supports the Government with the development of integrity system monitoring frameworks, awareness raising activities as well as capacity building of core integrity agencies to steer and coordinate the development of the anti corruption strategy.
- Bilateral agencies are also active in this area. For example, **Dfid** has financed a series of Corruption Risk Assessments in various sectors, ministries and departments while, among other projects, **NORAD** supports the newly-established civil society organisation Integrity Watch Afghanistan. (For more information on the Norwegian approach to corruption in Afghanistan, please see: <http://www.norway.org.af/norway/norway.htm>.)
- **International Development Law Organisation (IDLO)** has been particularly active in building the capacity of the judicial personnel. IDLO has provided training for over 1500 legal professionals, including judges, prosecutors, defence lawyers, Members of Parliament, civil servants and professors. Drawn from their experience in Afghanistan, IDLO has published lessons-learned from its programme on legal and judicial reform in Afghanistan and other post-conflict countries (Please see: <http://www.idlo.int/documents/dlu3.pdf>).

Recommendations

A number of recommendations emerge from the various donor supported initiatives tackling corruption in the Judiciary in Afghanistan.

- The legitimacy and local ownership of anti-corruption initiatives are key conditions for success. The international community has a crucial role to play in supporting locally owned reforms in a harmonised manner, while ensuring that the leadership remains in government hands. Donor coordination to support Government efforts is a continued concern for effective and targeted donor interventions.
- There is also a need to understand thoroughly the context in which technical assistance programmes are being implemented. Understanding social norms and values, accepted traditions and taboos in an Islamic context may help prevent resistance to change. Reform efforts should also explicitly deal with the internal tensions resulting from the fragmentation of the Afghan society.
- Although there is a general consensus on the importance of developing long term comprehensive strategies, it is also necessary to incorporate quick impact projects to

deliver tangible and highly visible (if modest) results to demonstrate that the situation is changing and reforms are ongoing. This is of special importance in enhancing the credibility of the Judiciary and restoring public trust in formal justice institutions.

- In its early stages, institution building in Afghanistan has tended to concentrate on the central government level. There is a growing recognition of the need to build functioning provincial level institutions, including the police, prisons and the Judiciary.
- There is a need for a comprehensive review of corruption in the Judiciary, to better understand the context, actors and dynamics of corruption, as well as assess vulnerabilities in the Judiciary.

Part 5: Further Reading

The Rome Conference on the Rule of Law's website provides very useful resource materials and a comprehensive list of links on the state of the Afghan Judiciary and key issues to address for judicial reform.

<http://www.rolafghanistan.esteri.it/ConferenceRol>

“Re-establishing the rule of law in Afghanistan” (Amnesty International report).

This report published in 2003 is one of the most comprehensive reports to date that provides data on the extent and forms of judicial corruption in Afghanistan.

<http://web.amnesty.org/library/index/engasa110212003>

“Afghanistan drug's industry” (UNDOC and World Bank, 2006)

This report provides a comprehensive picture of the structure, functioning, dynamics and implications of narcotics trade to inform counter narcotics policy.

http://www.unodc.org/pdf/Afgh_drugindustry_Nov06.pdf

“Peace building: Lessons from Afghanistan” (CMI Brief November 2005)

Though not specifically focused on corruption-related issues, this report provides a useful overview of the context and challenges facing reconstruction efforts in Afghanistan and make recommendations that can be applied to judicial reform.

<http://www.cmi.no/publications/2005/peacebuildingafghanistanweb.pdf>

“Expert Answer on Tackling Corruption in Post-Conflict Situations”

This Expert answer analyses the risks that corruption brings to post-conflict stabilisation efforts, outlines the challenges involved in tackling corruption in post-conflict countries and proposes priority anti-corruption measures for post-conflict situations.

<http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query126.pdf>

“Expert Answer on Islamic Approaches to Corruption”

Given the importance of taking into account the social and cultural context of anti-corruption interventions in an Islamic society, this expert answer may help provide background information on specific approaches to corruption to apply in an Islamic context.

<http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query137.pdf>

“Global Corruption Report 2007: Corruption in Judicial Systems”

The GCR 2007 provides a thorough analysis on how judicial independence and judicial accountability can be bolstered to tackle corruption in judicial systems. It includes case studies, empirical research as well as recommendations for practitioners, actors in the judiciary and civil society on how to fight corruption in the sector.

http://www.transparency.org/publications/publications/gcr_2007