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ENSURING COMPENSATION FOR WRONGFUL IMPRISONMENT AND WRONGFUL DETENTION IN AFGHANISTAN

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ABSTRACT

As a Signatory to the International Covenant on Civil and Political Rights, Afghanistan is required to take steps to ensure compensation for wrongful incarceration and wrongful detention. The Constitution of Afghanistan also states that any person who suffers damages by the state should be compensated. However, Afghanistan has yet to adopt any laws to compensate individuals for wrongful imprisonment and wrongful detention. This article recommends Afghanistan adopt explicit legislation clarifying this right, modeling reforms based on the compensation statutes of the State of Washington in the United States and Iran.

To support this recommendation, this article begins by describing the problem in Afghanistan, illustrating the harms of wrongful detention and imprisonment by examining cases from recent years. The article then examines the Afghan legal framework, including international sources to which Afghanistan is bound, relevant provisions of the new Criminal Procedure Code, and related laws. Next, the article examines and compares compensation schemes under the laws of Iran and Washington State, identifying their strengths and how these schemes could serve as model legislation for Afghanistan. Finally, the article suggests

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how Afghanistan can adopt a clear and comprehensive law to ensure compensation for individuals wrongfully incarcerated and detained.

INTRODUCTION

Since 2001, thousands of Afghans have been wrongfully detained and imprisoned in Afghanistan.¹ Problems associated with investigations contribute to this problem, such as false confessions obtained by force and torture during interrogations. Additionally, the problem is exacerbated by a shortage of defense attorneys and an imbalance of power between defense attorneys and prosecutors in criminal proceedings. There is also a general lack of awareness regarding defendants' rights, including procedural protections existing in Afghanistan and international human rights laws designed to protect the accused. Finally, Afghan law enforcement officers and prosecutors are known to abuse their

1. AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION], *Citizens' Access to Justice*, 28, DALW 1391, [http://www.aihrc.org.af/media/files/AIHRC%20Report%20on%20Decree%2045%20\(English\)-final.pdf](http://www.aihrc.org.af/media/files/AIHRC%20Report%20on%20Decree%2045%20(English)-final.pdf) (Afg.) [hereinafter *Citizens' Access to Justice*]. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, AFGHANISTAN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, 9 (2015), <http://www.state.gov/documents/organization/253169.pdf> [hereinafter U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT]. U.N. Assistance Mission in Afghanistan, *Arbitrary Detention in Afghanistan: A Call for Action: Overview and Recommendations*, at 1-2 (Vol. 1, Jan. 2009), https://unama.unmissions.org/sites/default/files/advc_vol_english.pdf [hereinafter *Arbitrary Detention in Afghanistan*]. There is difference between wrongful imprisonment and wrongful detention. Wrongful imprisonment is the confinement of a person after being wrongfully convicted by a court. See DA JAZAA QANOON [PENAL CODE] Kabul 1355 [1976], arts. 99-103 (Afg.) (definition of imprisonment) [hereinafter AFGHANISTAN PENAL CODE]. Wrongful detention is the confinement of an accused person before the decision of court—if there is a fear that he or she will disappear before the hearing. CRIMINAL PROCEDURE CODE (Kabul 1393) arts. 4 § 28, 99 § 4 (Afg.) (definition of detention) [hereinafter AFGHANISTAN CRIMINAL PROCEDURE CODE]. So, imprisonment is a form of punishment while detention is not. Article 4(28) of the Afghanistan Criminal Procedure Code states that detention is the confinement of an accused person during preliminary investigation. *Id.* Under Articles 99, 100, 101, and 102 of the Afghan Penal Code, imprisonment is the punishment of a person who has been convicted by the decision of a court. See AFGHANISTAN PENAL CODE, *supra*, arts. 99-102. Thus, wrongful imprisonment is when a person is wrongfully convicted and consequently imprisoned by the court, and wrongful detention is when a person is arrested and unlawfully detained during preliminary investigation—prior to the final decision of court. See *id.*

power, often detaining and imprisoning suspects without following the law and presuming guilt over innocence. These problems are compounded by the ambiguities in, and general absence of, laws ensuring compensation for wrongful imprisonment and detention.²

As a Signatory to the International Covenant on Civil and Political Rights (ICCPR), Afghanistan is required to enact domestic laws to ensure compensation is provided to those wrongfully incarcerated.³ Additionally, Article 7 of the Constitution of Afghanistan (Afghan Constitution) requires adherence to all international treaties, agreements, and inter-state agreements to which Afghanistan is a party.⁴ Yet, Afghanistan has failed to adopt any such legislation to compensate individuals for wrongful imprisonment. As a result, many wrongfully imprisoned and detained individuals have not been compensated and face economic hardship as a consequence. The situation has caused negative collateral social effects, including decreased security in Afghanistan. Specifically, wrongly detained and wrongly imprisoned individuals have a tendency of joining militant groups seeking revenge against the government.

This article recommends that Afghanistan adopt legislation explicitly acknowledging the right to compensation for wrongful imprisonment and detention, and suggests combining language from similar legislation in Iran and the State of Washington in the United States to achieve that end. In support, this article begins by introducing the current problem in Afghanistan using recent cases to illustrate how wrongful detention and imprisonment lead to unjust results. This article then examines the Afghan legal framework, international treaties to which Afghanistan is bound, the relevant provisions of the new Criminal Procedure Code (CPC),⁵ and other related laws. Then, this article compares compensation schemes under the laws of Iran and Washington State. Finally, this article suggests procedures to guide Afghanistan in implementing the proposed reforms.

2. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 18.

3. International Covenant on Civil and Political Rights, arts. 9(5), 2(2), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force in Afghanistan January 24, 1983) [hereinafter ICCPR].

4. DA AFGHANISTAN ASSASI QANOON [THE CONSTITUTION OF AFGHANISTAN] January 26, 2004, art. 7 (Afg.) [hereinafter AFGHANISTAN CONSTITUTION].

5. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1.

I. BACKGROUND

According to reports from various human rights organizations, many Afghans have been wrongfully detained and imprisoned in recent years.⁶ In fact, many Afghans have been incarcerated for charges that are not crimes under present Afghan law.⁷ Law enforcement agencies in Afghanistan have a reputation for arresting individuals without cause, authority, due process of law, or other basic protections.⁸ For instance, the latest report by Human Rights Watch found that there are at least 200 hidden detention centers in Afghanistan.⁹ The report further reveals that most detainees in Afghan detention centers have been tortured in order to elicit a confession.¹⁰ Indeed, thirty-five percent of the 800 detainees interviewed showed visible signs of physical torture.¹¹ Unfortunately, most Afghan detainees are detained in these conditions for an indefinite period of time.¹²

Contrary to what these findings suggest, the Afghan legal system does provide protections for the accused, at least in theory. Afghan laws, particularly the Constitution¹³ and CPC, specify fair trial standards.¹⁴ For example, the Afghan Constitution states that a criminal defendant has the right to defense counsel from the moment of arrest.¹⁵ If

6. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, AFGHANISTAN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, 9 (2014), <http://www.state.gov/documents/organization/253169.pdf> [hereinafter U.S. STATE DEPT. AFGHANISTAN 2014 HUMAN RIGHTS REPORT].

7. *Id.*

8. *See Arbitrary Detention in Afghanistan*, *supra* note 1, at 4.

9. *See generally World Report 2016: Afghanistan Events of 2016*, HUMAN RIGHTS WATCH 5 (2016), <https://www.hrw.org/world-report/2016/country-chapters/afghanistan> [hereinafter *World Report 2016*]; *see also HRW: 200 hidden detention centers exist in Afghanistan*, ASIA NEWS (2016), <http://www.asianews.af/en/4808/>.

10. *See generally World Report 2016*, *supra* note 9.

11. *Id.*

12. *Id.*

13. *See generally* AFGHANISTAN CONSTITUTION, *supra* note 4, arts. 22-31 (Afg.).

14. *See generally id.* art. 31; AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1.

15. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 31.

he or she is indigent, the state shall provide a defense attorney at no cost to the defendant.¹⁶ The Afghan Constitution and CPC ensure a defendant's right to be presumed innocent until an authorized court finds the person guilty by a final verdict.¹⁷ The Afghan Constitution prohibits torture and considers any forced confession invalid.¹⁸ Criminal defendants also have the right to a speedy trial,¹⁹ and the right to be informed of the charge against them.²⁰ In addition, the Constitution prohibits arrest, detention, and prosecution without due process of law,²¹ and guarantees basic procedural rights.²²

Furthermore, the CPC declares that arbitrary detention is prohibited.²³ Article 7(2) of the CPC states that every accused person has the right to be free from arbitrary detention and arrest.²⁴ Moreover, the CPC also has many provisions regarding fair trials.²⁵ Indeed, the policy underlying the CPC, which can be found in Article 2,²⁶ states that the law strives for trials to be conducted fairly and in such a way that no criminal is left unpunished and no innocent person is punished.²⁷ It further states that the purpose of the CPC is to balance the rights of the accused, the convicted, and the victim.²⁸ These provisions include rights regarding the following: information regarding the charges against the accused and how to challenge them;²⁹ protection against arbitrary arrest

16. *Id.*

17. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 25; AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 4.

18. AFGHANISTAN CONSTITUTION, *supra* note 4, arts. 29, 30.

19. *Id.* art. 31.

20. *Id.*

21. *Id.* art. 27.

22. *Id.* arts. 25-31.

23. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, arts. 7 § 2 and 99 § 2.

24. *Id.* art. 7 § 2.

25. *Id.* at ch. 2.

26. *Id.* art. 2.

27. *Id.*

28. *Id.*

29. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 7 § 1.

and detention;³⁰ right to remain silent;³¹ right to a defense attorney;³² representation free of cost for indigent defendants;³³ a translator, if needed;³⁴ right to an open trial;³⁵ right to be present during trial;³⁶ right to confront one's accusers;³⁷ and, other related provisions ensuring a fair trial.³⁸

Additionally, Afghan law has several different provisions regarding the presumption of innocence. Article 4 of the Afghan Penal Code indicates, "Innocence . . . is the original state. The accused shall be considered innocent as long as he is not convicted by the final verdict of a competent court."³⁹ Article 5 of the CPC similarly states, "Presumption of innocence is the original state in which accused persons are innocent unless they are convicted by a final decision of a competent court. The prosecutor and judge cannot interpret ambiguity in the law against the accused or suspect."⁴⁰

Thus, the Afghan Constitution, the CPC, and other related laws guarantee standards for a fair trial. That is to say, Afghan laws have codified sufficient procedural protections. Furthermore, a careful analysis of Afghan laws as they are written shows they comply with international human rights laws.

However, a report on arbitrary detention in Afghanistan prepared by the Human Rights Team of United Nations Assistance Mission in Afghanistan (UNAMA) shows that Afghan authorities consistently fail to uphold human rights.⁴¹ The Afghan Local Police (ALP) and Afghan National Police (ANP) are not fully aware of their responsibilities to

30. *Id.* art. 7 § 2.

31. *Id.* art. 7 § 7.

32. *Id.* art. 7 § 8.

33. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 10.

34. *Id.* art. 11.

35. *Id.* art. 7 § 16.

36. *Id.* art. 7 § 17.

37. *Id.* art. 9.

38. *Id.* art. 7.

39. AFGHANISTAN PENAL CODE, *supra* note 1, art. 4 § 1.

40. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 5.

41. U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1, at 9.

protect arrestee's rights.⁴² In some cases, judges and prosecutors are known to misinterpret laws due to inadequate training.⁴³ Additionally, even when charges are dropped or detainees are exonerated, authorities sometimes keep individuals detained, reasoning that they will disappear before prosecutors can appeal the case.⁴⁴ Prison officials also lack knowledge of Afghan laws that state a person should not be kept in detention longer than the time specified by law.⁴⁵ This leads to officials denying prisoners release when they are due it.⁴⁶

II. FACTORS CONTRIBUTING TO WRONGFUL IMPRISONMENT

This section examines several facets of the Afghan legal system and criminal justice culture which explain why wrongful detention and imprisonment are so prevalent in Afghanistan. It covers issues such as: (A) lack of access to defense attorneys, (B) false confessions made under duress and torture, (C) the imbalance of power between prosecutors and defense counsel, (D) the presumption of guilt and abuse of power by law enforcement, and (E) the accused's lack of awareness of his rights.

42. *Id.* at 9.

43. U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1, at 15.

44. *Id.* at 10. Under Afghan laws, court decisions are not final, and only final decisions should be implemented. *Id.* at 14. Thus, when a court finds a defendant not guilty and the prosecutor does not accept the decision, he can file an appeal. *Id.* Prosecutors fear that if the court of appeals finds a person guilty and he or she is not in custody, the person could disappear and the court will be unable to implement the final decision. *Id.* Therefore, in most cases, if the trial court finds a person not guilty, the prosecutors do not allow the person to be released. *Id.*

45. The Afghan CPC explicitly states that prisons cannot keep a person in custody after completion of the period specified by law and urgently upon completion of the legal term of detention, dismissal of the detention order, or exoneration, authorities must release the detained person. See AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, arts. 99-103.

46. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 13.

A. The Lack of Access to Representation by Counsel

The high rate of wrongful imprisonment in Afghanistan is influenced by inadequate access to defense attorneys.⁴⁷ Currently, the Afghanistan Independent Bar Association has 3,102 licensed attorneys across the country.⁴⁸ According to the Afghanistan Independent Human Rights Commission Report, in 2012, Afghanistan had only 1,185 defense attorneys for the 25,000 prisoners and detainees nationwide.⁴⁹ Seventy-four percent of defense attorneys worked in the capital and larger cities, while only twenty-six percent worked in the twenty-nine provinces.⁵⁰ In 2012, there were no female attorneys in 19 of the 29 provinces.⁵¹ Consequently, most prisoners had no access to defense attorneys.⁵²

Other accounts observe that while many accused persons cannot afford legal representation, only 300 attorneys provide services for the indigent in Afghanistan.⁵³ This number is particularly small compared to Afghanistan's total population, which was 32.5 million in 2015, thirty-five percent of which were living in poverty.⁵⁴

Another contributing factor is that law enforcement officers do not inform the accused of their rights, including the right to an attorney,⁵⁵ despite being legally required to do so.⁵⁶ The right to a criminal defense

47. *Id.* at 11, 13. See also U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1.

48. Skype Interview with Said Khalid Sadat, Head of the Eastern branch of Afghanistan Independent Bar Association and Legal Advisor to the Ministry of Telecommunication (October 27, 2015).

49. *Citizens' Access to Justice*, *supra* note 1, at 28.

50. *Id.*

51. *Id.*

52. *Id.*

53. Sara Han, *Legal Aid in Afghanistan, Contexts, Challenges, and the Future*, AFGHANISTAN ANALYSTS NETWORK (2012), <http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/09/legalaid.pdf> [hereinafter Han].

54. *Afghanistan*, THE WORLD BANK DATA (May 14, 2016), <http://data.worldbank.org/country/afghanistan>.

55. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

56. Most of the rights of accused and suspected persons are stipulated under Article 7 of the CPC. Under Article 8 of the CPC, police are required to inform ac-

attorney is a relatively new phenomenon in Afghanistan,⁵⁷ and most Afghan citizens are unaware of their right to obtain counsel.⁵⁸ The 2009 UNAMA report noted that many Afghan Supreme Court justices do not favor access to defense attorneys for those who commit certain crimes, including crimes against the state.⁵⁹ Thus, many go without their right to representation.

B. False Confessions Made under Duress and Torture

Both the UNAMA and U.S. Department of State's reports on human rights reveal that torture contributes to the high rate of false confessions in Afghanistan.⁶⁰ Many defendants have confessed to crimes after the use of force and torture.⁶¹ Prosecutors bring cases against those who confessed without reasonable belief that the accused committed the crime.⁶² Moreover, of 199 cases studied in the northern provinces of Takhar, Kunduz, Baghlan, and Badakhshan, 166 defendants were not informed of their right to remain silent.⁶³ Rather, Afghan detention center officials commonly use force and torture to obtain confessions.⁶⁴

The UNAMA report also suggests authorities treat detainees inhumanely in order to compel confessions. The report states:

In the third district of Fayzabad, Badakhshan, a man accused of theft alleged that two policemen burned his hands with gunpowder to force a confession on February 1, 2007. On September 6, 2007, the police allegedly beat two men accused of theft in the Imam Sahib

cused persons of their rights at the time of arrest. In addition, the prosecutor is required to inform the accused person of his rights under Article 8 before the investigation. Similarly, the law requires all judges to inform the accused of their Article 7 rights before starting the trial. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, arts. 7, 8.

57. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16, 20.

58. *See generally* Han, *supra* note 53.

59. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

60. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 31.

61. *Id.* at 11, 13, 15.

62. U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1, at 10.

63. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 13.

64. *See World Report 2016*, *supra* note 9.

District of Kunduz to force confessions. The military prosecutor of the Nili, Daikundi District confessed to slapping two detainees who accused him of torture to coerce confessions of committing murder on June 24, 2007. In the Dand District of Kandahar, three men arrested on June 15, 2007 for links to anti-government elements allege that, in order to coerce confessions, they were beaten with rifle butts by police, threatened with handover to United States forces, and were beaten by Kandahar police before being transferred to the central [Ministry of Interior] detention facility on June 16, 2007.⁶⁵

The UNAMA report also indicates that other cruel acts of torture are used, such as electric shock, beatings, stress positions, and the like.⁶⁶ Of the 790 detainees interviewed by UNAMA, fifty percent reported that they were tortured and mistreated.⁶⁷ Of the fifty percent of detainees that reported torture, UNAMA was able to verify and confirm thirty-five percent of the claims.⁶⁸ Shockingly, detained children were similarly subjected to forced confessions during investigations.⁶⁹

UNAMA human rights officers have observed detention centers and interviewed detainees, allowing them to collect first-hand accounts of torture and cruel treatment.⁷⁰ From 2010 to 2011, UNAMA interviewed 273 persons detained by the National Security Department (NSD) and 117 persons detained by the ANP.⁷¹ The report found that one-half of the NSD detainees and one-third of the ANP detainees experienced torture, cruelty, or other humiliating and inhumane interrogation methods.⁷²

65. *World Report 2016*, *supra* note 9, at 37.

66. U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1, at 4.

67. *Id.*

68. Office of the U.N. High Commissioner for Human Rights, *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129*, at 13 (2015), http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf [hereinafter *OHCHR Detainees in Afghan Custody*.]

69. U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1, at 10.

70. *See generally* *OHCHR Detainees in Afghan Custody*, *supra* note 68.

71. *Id.* at 6.

72. *Id.*

In 2012, UNAMA reported that the torture of detainees remained a serious problem despite increased efforts of the Afghan government and the international community.⁷³ In 2013, the former President of Afghanistan, Hamid Karzai, issued a presidential decree to end the torture of detainees.⁷⁴ In February 2015, UNAMA and the Office for the Coordination of Humanitarian Affairs (OCHA) reported that even after the 2013 presidential decree, torture continued to exist and was once again increasing in Afghan detention centers.⁷⁵ The 2015 report found that thirty-five percent of detainees interviewed between February 2013 and December 2014 showed evidence of torture.⁷⁶ Although the 2015 report shows a fourteen percent decrease from previous reports,⁷⁷ it is a violation of international law that torture is still being used in Afghan detention centers.⁷⁸ Some detainees reported that the investigating authorities warned them they would face severe torture if they did not confess.⁷⁹ The Human Rights Watch report describes the forms of torture used, including beatings with iron cables and pipes, turning and pressing of sexual organs by different methods, threats of sexual assault, and other forms of torture.⁸⁰ The prevalence of these practices contributes to the high rate of false confessions in Afghanistan.

C. *The Imbalance of Power Between Prosecutors and Defense Counsel*

The imbalance of power between prosecutors and defense attorneys also appears to contribute to wrongful imprisonment.⁸¹ The adversarial system is relatively new to Afghanistan. It dates back to the 1960s and 1970s during the governments of Zahir Shah and Sardar Daud Khan—

73. *Id.* at 17.

74. *Id.* OHCHR *Detainees in Afghan Custody*, *supra* note 68, at 17.

75. *Id.* at 16.

76. *Id.* at 17.

77. *Id.* at 19.

78. *See generally id.* ICCPR, *supra* note 3, arts. 7, 9; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

79. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 13.

80. AZADI RADIO, *supra* note 9.

81. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

before the Soviet Union's invasion and the beginning of ongoing armed conflict in Afghanistan.⁸² But due to the low number of defense attorneys in Afghanistan, only a few people are aware of their presence and their right to representation. Moreover, defense attorneys have been marginalized since their role in the Afghan legal system was introduced.⁸³

Having a defense attorney is often viewed by courts and others as a sign of the defendant's guilt,⁸⁴ and defense counsel is not regarded as essential to protecting defendants against abuses of power.⁸⁵ Notably, prisoners themselves have a tendency to presume that the use of a defense attorney indicates guilt. The UNAMA report found that some prisoners felt that they did not need an attorney because they were innocent.⁸⁶ Although this situation is improving, some attorneys revealed that when they first started to work as defense attorneys they were denied information about trial dates, causing them to miss trials.⁸⁷ Some attorneys even reported witnessing judges mistreat other defense attorneys and some felt judges and prosecutors treated their presence as a useless element of the trial.⁸⁸

Even after the collapse of the Taliban in 2001 and the formation of the new Afghan government, defense attorneys were still treated as *persona non grata* in all parts of criminal proceedings.⁸⁹ They were not permitted to participate on behalf of their clients in pre-trial proceedings, such as interrogations.⁹⁰ Indeed, some law enforcement agencies explicitly refuse to allow defense attorneys to even be present.⁹¹ With respect to courtroom proceedings, in some instances, prosecutors became angry with defense attorneys when they were present in court.⁹²

82. Han, *supra* note 53, at 1.

83. Han, *supra* note 53, at 1.

84. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

85. *Id.*

86. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

87. Han, *supra* note 53, at 6.

88. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

89. Han, *supra* note 53, at 6.

90. *Id.*

91. *Id.* at 7.

92. *Id.*

Some attorneys who were permitted entry reported that they were not allowed to present their defense to the court.⁹³ Instead, the prosecutor read their statements for them.⁹⁴ The inability of defendants to challenge the accusations against them with the assistance of counsel creates an imbalance between the role of the prosecution and defense. This abuse of power by law enforcement officers, prosecutors, and judges perpetuates a system of wrongful detention and imprisonment.

D. *The Overbearing Presumption of Guilt*

Wrongful imprisonment may be so pervasive in Afghanistan, in part, because of a persisting legal culture that presumes guilt over innocence.⁹⁵ Although the Afghan Constitution, the CPC, and relevant laws establish that those accused are to be presumed innocent until a final verdict of guilty is delivered by an authorized court,⁹⁶ many cases of wrongful imprisonment are affected by the pervasive presumption of guilt.⁹⁷

The presumption of guilt is especially apparent in prosecutorial practices. UNAMA reported statements from police, prosecutors, and judges that “human rights hinder our work”⁹⁸ such as, having to inform detainees of their rights and to permit defense counsel’s participation.⁹⁹ The UNAMA report, in addition to others, suggest that these rights are seen as burdens because the prosecution does not contemplate that one accused of a morally reprehensible crime may in fact be innocent. In fact, this presumption may result in biased judges who neglect to preserve defendants’ procedural protections; ignore or fail to honor the

93. Han, *supra* note 53, at 7.

94. *Id.* at 6.

95. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 15.

96. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 25; AFGHANISTAN PENAL CODE *supra* note 1, art. 4; AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, arts. 5 §§ 1, 2.

97. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 15.

98. According to the U.N. Assistance Mission in Afghanistan report, some Afghan authorities ignore human rights because having to respect them prevents them from performing their duties. See *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

99. *Id.*

right to counsel; fail to investigate accusations of forced confessions; and, even detain convicted persons beyond the completion of their prison terms.¹⁰⁰

This presumption of guilt also works in direct contravention with the rule of lenity. The CPC provisions prohibit judges and prosecutors from interpreting ambiguity in the law in a way that is harmful to the defendant.¹⁰¹ It also prohibits treating ambiguous evidence adversely to the defendant.¹⁰² However, the number of those denied basic rights and ultimately wrongfully imprisoned evidences that this rule is not followed in practice.

E. The Lack of Awareness Regarding Individuals' Rights

Article 8 of the CPC affirms that police, prosecutors, and judges are required to inform the accused of their rights prior to the proceedings.¹⁰³ However, most individuals detained and imprisoned are unaware of their rights. The Afghan Constitution explicitly states that all defendants have the right to defense counsel; that the state must provide counsel for indigent defendants in criminal cases; and, that attorney-client communications are protected.¹⁰⁴ However, a majority of suspects and detainees do not have access to defense attorneys, and those who do are not represented effectively due the systemic issues discussed.¹⁰⁵ The defendants' lack of awareness of their right to counsel, the lack of financial ability to hire an attorney, and the shortage of defense attorneys combined were found to be the root of this problem.¹⁰⁶

100. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 31.

101. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 5 § 2.

102. *Id.*

103. *Id.* art. 8.

104. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 31.

105. *See generally* OHCHR *Detainees in Afghan Custody*, *supra* note 68; *see also*, *Arbitrary Detention in Afghanistan*, *supra* note 1.

106. The UNAMA findings show that 82.5% of defendants who were interviewed did not have access to a defense attorney. *Arbitrary Detention in Afghanistan*, *supra* note 1. Moreover, zero defendants had access to defense attorneys at all points in their criminal proceedings—from arrest to the court's final verdict. *Id.*

Additionally, a criminal defendant has the right to be informed of the charge against him or her¹⁰⁷ and the right to remain silent¹⁰⁸ as protection against arbitrary detention and arrest.¹⁰⁹ However, many Afghan judges, prosecutors, and police themselves are not fully aware of these rights.¹¹⁰ As a result, detainees are often not informed about why they have been arrested.¹¹¹

The lack of authorities' awareness and respect for the rights of those accused is shocking. Human rights advocates have found many cases in which prosecutors have filed indictments against individuals even though there was no reasonable belief that the accused had committed the crime.¹¹² Police have little training in criminal law, causing them to arrest people based on local customs and not formally recognized state crimes and not the actual law.¹¹³ In fact, police have been known to arrest people simply for practicing their cultural beliefs, despite such practices not being recognized as crimes under any Afghan laws.¹¹⁴ While all judges are trained in the law, legal education varies widely in Afghanistan, and many judges have very little knowledge of the rights and procedural protections for criminal defendants.¹¹⁵ As a result, the violation of criminal defendants' rights is pervasive in Afghan criminal proceedings. To remedy this problem, there has been some effort by the Afghan government, non-governmental organizations, and the international community to provide legal training to Afghan judges, prosecutors, and law enforcement officers.¹¹⁶ Nevertheless, these trainings have not reached a sufficiently broad portion of the population, nor have

107. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 31.

108. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 7.

109. *Id.*; AFGHANISTAN CONSTITUTION, *supra* note 4, art. 27.

110. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 13; *See also*, U.N. Assistance Mission in Afghanistan, *Arbitrary Detention in Afghanistan: A Call for Action*, at 23 (Vol. 2, 2009), https://unama.unmissions.org/sites/default/files/advc_-_vol_ii_-_english.pdf [hereinafter *Arbitrary Detention in Afghanistan 2*].

111. U.S. STATE DEPT. AFGHANISTAN 2015 HUMAN RIGHTS REPORT, *supra* note 1, at 9.

112. *Id.* at 10.

113. *Arbitrary Detention in Afghanistan 2*, *supra* note 110, at 23.

114. *Id.*

115. *Id.* at 20.

116. *Id.*

they compensated for the deep deficit of understanding regarding key concepts of criminal law and the procedural protections guaranteed to the accused.¹¹⁷

IV. THE PROCEDURE TO OVERTURN A WRONGFUL CONVICTION

Chapter 3-13 of the Afghan CPC describes how a person can request review of a court's final decision.¹¹⁸ For example, in the case of felony and misdemeanor offenses under Article 282, a person can request review of a court's final decision under the following circumstances:

1. If the accused was convicted of murder and afterwards, the individual who was allegedly murdered, is found alive;
2. If a person is convicted of committing a crime and afterwards another person is convicted of committing the same crime, and the 2 verdicts are contradictory, one of the 2 convicts will be acquitted if proven innocent;
3. If the witnesses or experts are found guilty and sentenced to punishment in accordance with the provisions of the law for false testimony or reports, or a verdict for forgery of documents that were presented during case proceedings, or in *Hodood*¹¹⁹ crimes, the witness revoked his statement willingly, provided that the revoked testimony affected the issued decision;
4. If the criminal court's decision was based on a civil court's decision and the civil court's decision has been voided;
5. If after the final decision, events happen or occur, or evidence is presented which was unknown during the trial or

117. *Id.* at 16.

118. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, ch. 3-13.

119. *Hodood* are crimes prescribed by Islamic law that have a fixed punishment and fixed means of proof. The judge, prosecutor, and even the president do not have the discretion to decrease or increase its punishment, or to pardon such crimes. The burden of proof for *hodood* crimes is difficult. Many cases need two to four witnesses or a confession from the alleged criminal. If the alleged criminal revokes his confession, or a witness revokes their testimony, the punishment will not be enforced. *See generally* Ahmad Gul Wasiq, ISLAMIC CRIMINAL LAW, Nangarhar University (2014) (Afg.).

not presented to the court, and these events and evidence would lead to acquittal;

6. If at the end of the judicial session the decision is issued without officially notifying the accused person; or
7. If during the trial, the convict was not given the right to appear in court or the right to defend himself.¹²⁰

In addition, the law stipulates the procedure for a request of review.¹²¹ Exonerees can submit a request for review to the Attorney General who will then present the request to the Supreme Court along with his written opinion on the merits of the case.¹²² The Supreme Court will then process the request.¹²³ If the person's conviction was announced in the media and the court finds him not guilty on appeal, the exoneration decision is published in the same media outlet at the government's expense.¹²⁴ However, surprisingly, the law does not mention compensation for the individual when the court finds him not guilty.¹²⁵ The law only provides for this publication of the exoneration.¹²⁶

V. THE BASIS FOR COMPENSATION FOR WRONGFUL IMPRISONMENT IN AFGHANISTAN

While compensation is mentioned in the Afghan Constitution,¹²⁷ and is implied in the CPC,¹²⁸ compensation for wrongful imprisonment is not expressly provided for in any Afghan law; and, there is no evidence that anyone has ever been compensated for wrongful imprisonment.¹²⁹ This section describes Afghan laws relating to compensation for wrongful imprisonment and detention.

120. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 282.

121. *Id.* art. 283.

122. *Id.*

123. *Id.* art. 284.

124. *Id.* art. 286.

125. *Id.* arts. 282-288.

126. *Id.* art. 286

127. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 51.

128. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, arts. 201 § 2 and 323 § 2.

129. As part of my research for this article, I interviewed several defense attorneys, judges, prosecutors, and law professors in Afghanistan, none of whom knew of

A. Compensation under Afghan Law

Both the Afghan Constitution and CPC contain a right to compensation in relation to detention. However, neither explicitly provides a right to compensation for wrongful incarceration. Under Article 51 of the Constitution, any person who suffers damages by an act of the Administration has a right to compensation and can file for compensation in court.¹³⁰ Although this Article does not explicitly provide compensation for wrongful imprisonment and detention, it suggests that the drafters contemplated compensation as an appropriate remedy for government wrongs.

The CPC explicitly provides compensation in at least two circumstances related to detention, but provides no compensation for those wrongfully convicted.¹³¹ Under Article 201(2) of the CPC, “An accused person can file for compensation against a private individual whose false claim caused damages to the accused.”¹³² Similarly, Article 323(2) states, “If a person has been exonerated by a court . . . the state will compensate the person for their days spent in detention, according [to] the daily income of the person, and for jobless persons, the court will specify the amount that a jobless person will be compensated accordingly.”¹³³

Unfortunately, the statutory definitions for “exoneration” and “innocence” complicate the analysis of who might be eligible for compensation. Article 4(26) of the CPC defines exoneration as “the condition in which the court orders the innocence of the accused and rejects the

a single case in which a wrongfully imprisoned or detained person was compensated. Furthermore, none of the judges had heard such a case, nor had any defense attorneys filed a case on behalf of a wrongfully convicted person. In addition, I also looked for evidence in reports and the literature. While the UNAMA, AIHRC, OHCHR, and U.S. Department of State reports all mention the problem of arbitrary detention in Afghanistan, none of the reports discuss the problem of compensation or lack of statutory provisions for compensation. In sum, it appears that people are simply not being compensated for wrongful detention in Afghanistan.

130. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 51.

131. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, arts. 201 § 2, 323 § 2.

132. *Id.* art. 201 § 2.

133. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 323 § 2.

accusation in the same case for the reason of lack of evidence.”¹³⁴ In other words, Article 4(26) does not recognize a person who was wrongfully convicted, sentenced, and later found not guilty, but rather limits exoneration and innocence to people who are accused and whose charges are dismissed before a conviction is rendered.¹³⁵ Although Article 282 indirectly ensures exoneration after conviction, and Chapters 3-13 (request for review of final decisions of the courts) explain that in certain circumstances the case could be reviewed upon request,¹³⁶ the CPC does not include exoneration after conviction in its definition of innocence in Article 4(26).¹³⁷ From Article 282 to Article 288, some provisions address review of final decisions of the courts, but no article addresses compensation if a person is proven to be innocent after review by the court.¹³⁸ The law only states that orders of exoneration should be announced at the expense of the state, but does not ensure compensation.¹³⁹

Thus, although these protections exist to prohibit arbitrary arrest and detention and, to a limited extent, to compensate for wrongful detention, no article provides compensation for those imprisoned as a result of a wrongful conviction.¹⁴⁰

B. Compensation under International Law

According to the Afghan Constitution, the state shall observe, *inter alia*, all international agreements to which Afghanistan is a party.¹⁴¹ As a Signatory to the ICCPR, Afghanistan agreed to ensure the enforcement of its provisions.¹⁴² Additionally, the Universal Declaration on Human Rights is legally binding on Afghanistan, as the Afghan Constitution expressly requires the state to observe it.¹⁴³

134. *Id.* art. 4 § 26.

135. *Id.*

136. *Id.* art. 282.

137. *Id.* art. 4 § 26.

138. *Id.* arts. 282-88.

139. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 286.

140. *Id.* art. 4.

141. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 7.

142. *See generally* ICCPR, *supra* note 3.

143. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 7.

The ICCPR expressly prohibits state parties from arbitrarily detaining and arresting individuals. Article 9(1) states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁴⁴

The ICCPR further states that any person who is a victim of unlawful detention or arrest must be compensated.¹⁴⁵ Article 9(5) states: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”¹⁴⁶ Moreover, the ICCPR requires states to ensure a remedy for violations of rights or freedoms recognized in the Covenant.¹⁴⁷ It also stipulates the requirement that a venue be created to bring these claims¹⁴⁸ where a remedy may be enforced if granted.¹⁴⁹ Additionally, under Article 14(6), any person who has a wrongful conviction reversed or pardoned has a right to compensation.¹⁵⁰ Finally, the ICCPR requires states to adopt legislation to protect all these rights within Article 2(2), which states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁵¹

Thus, as a state party to the ICCPR, and under its express provisions, Afghanistan is obligated under international law to enact laws that compensate for wrongful imprisonment and detention.

144. ICCPR, *supra* note 3, art. 9(1).

145. *Id.* art. 9(5).

146. *Id.*

147. *Id.* art. 2(3)(a).

148. *Id.* art. 2(3)(b).

149. *Id.* art. 2(3)(c).

150. *Id.* art. 14(6).

151. ICCPR, *supra* note 3, art. 2(2).

The UDHR contains similar provisions and likewise obligates Afghanistan to compensate victims for wrongful imprisonment and detention under the UDHR. Two provisions of the UDHR expressly protect against arbitrary detention and arrest.¹⁵² First, Article 9 of the UDHR prohibits unlawful arrest and detention.¹⁵³ Second, Article 8 states, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁵⁴ These obligations are binding on Afghanistan.

VI. COMPARATIVE PERSPECTIVES FROM THE UNITED STATES AND IRAN

This section analyzes and compares compensation schemes from the State of Washington in the United States and the Islamic Republic of Iran to create a model for legislative reform in Afghanistan. Each scheme provides some provisions that are useful in protecting against wrongful detention or imprisonment. However, each also has some inadequacies. Thus, the Afghan Government should seek to model a compensation scheme drawing on the strengths of both.

A. *Compensation Laws in the Islamic Republic of Iran*

Iran’s compensation scheme has provisions that protect against wrongful detention or imprisonment that serve as a good model. The 1979 Iranian Constitution has articles concerning the presumption of innocence,¹⁵⁵ the prohibition of arbitrary arrest and detention,¹⁵⁶ and compensation for wrongful imprisonment and detention.¹⁵⁷ For example, Article 32 of the Iranian Constitution prohibits arbitrary detention:

152. *Id.* arts. 8-9.

153. *Id.* art. 9.

154. *Id.* art. 8.

155. QUANUNI ASSASSI JAMHURI ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], art. 37 (Iran) [hereinafter IRAN CONSTITUTION].

156. *Id.* art. 32.

157. *Id.* art. 171.

No one can be arrested except in accordance with the rule and the procedures that are set by the law. In the case of arrest, the charge and the reason for the arrest must be immediately conveyed and communicated to the defendant in writing. The preliminary file must be submitted to qualified judicial authorities within twenty-four hours and the preliminaries for the trial must be set as quickly as possible. Anyone who deviates from this principle will be penalized in accordance with law.¹⁵⁸

This means that the law explicitly prohibits any detention that is not pursuant to the law.¹⁵⁹ Additionally, this provision ensures an arrestee's right to be informed in writing about the reasons for arrest and the right to a speedy trial.¹⁶⁰ It also states that violating these rights is a punishable act.¹⁶¹

The Iranian Islamic Penal Code (IIPC) also strictly prohibits arbitrary and illegal detention or arrest.¹⁶² Moreover, under Article 570, if any government official illegally deprives an individual of their liberty or Constitutional rights, the official will be imprisoned for a minimum of six months up to three years.¹⁶³ They could also be terminated from their current post and be deprived of holding any government job for three to five years.¹⁶⁴ Additionally, under Article 575, if any judicial official illegally arrests an individual, issues an illegal arrest warrant, illegally confines a person, or issues an illegal order of prosecution or conviction, he will be permanently dismissed from his position.¹⁶⁵ The law also stipulates that any official found guilty of these offenses cannot serve in any government position for five years.¹⁶⁶

158. *Id.* art. 32.

159. *Id.*

160. *Id.*

161. *Id.*

162. QANOOI MAJAZATI ISLAMI [ISLAMIC PENAL CODE] Tehran 1388 [2009], arts. 570 and 575 (Iran).

163. *Id.* art. 570.

164. *Id.*

165. *Id.* art. 575.

166. *Id.*

1. *A Brief History of the Iranian Criminal Procedure Code*

The first Iranian Criminal Procedure Code (Iranian CPC), originally called the Temporary Law of the Principles of Criminal Proceeding, came into force in September 1911 and was influenced by the French Criminal Procedure Code.¹⁶⁷ After the 1979 Iranian Revolution, Iranian laws were overhauled to be consistent with Sharia law.¹⁶⁸ However, the Temporary Criminal Procedure Code largely continued to apply after the Revolution, although it was amended in accordance with the new policies.¹⁶⁹ In 1999, a new Criminal Procedure Code replaced the Temporary Criminal Procedure Code.¹⁷⁰

Like the prior criminal code, the new code was flawed and did not comply with international fair trial standards.¹⁷¹ For example, the new code had no provisions regarding access to lawyers upon arrest, it restricted access to lawyers during pre-trial detention, and it did not limit the duration of pre-trial detention.¹⁷² While some amendments were enacted to ensure a fair trial, Iranian law still failed to meet internationally recognized fair trial standards.¹⁷³ Then, on June 22, 2015, Iran adopted yet another version of the Criminal Procedure Code (Iranian CPC).¹⁷⁴

2. *Compensation*

Although prior Iranian laws did not provide compensation for exonerates or those wrongfully arrested and detained, Article 171 of the Iranian Constitution and Article 575 of the Islamic Penal Law allowed

167. *Flawed Reforms, Iran's New Code of Criminal Procedure*, AMNESTY INTERNATIONAL, 18 (2016), https://www.amnestyusa.org/sites/default/files/flawed_reforms_-_irans_new_code_of_criminal_procedure.pdf [hereinafter *Flawed Reforms*].

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 18-19.

173. *Id.*

174. *Id.* at 19.

legislators to pass laws to allow for such compensation and restitution.¹⁷⁵

While not perfect, the Iranian CPC does ensure compensation for persons wrongfully detained during a preliminary investigation.¹⁷⁶ Both those who have been unlawfully detained and those convicted and found innocent are eligible for compensation.¹⁷⁷ The new CPC also ensures compensation for those who were wrongfully detained during preliminary investigations or trial and have been subsequently exonerated or had their charges dropped.¹⁷⁸

Related to this issue of compensation is liability for a judge who delivers a false or mistaken verdict.¹⁷⁹ Under Article 171 of the Iranian Constitution, if anyone is damaged financially or spiritually by fault of the judge, the judge will be responsible for compensating that person.¹⁸⁰ In either event, the law ensures the person compensation and the restitution of his reputation as well.¹⁸¹ Article 14 of the Iranian CPC describes eligibility for compensation and restoration of reputation in this manner:

The plaintiff can demand all financial, spiritual, and other realistic damages arising from the crime. Spiritual damages are mental injuries, and personal, family, and social defamation. Besides financial and material compensation, the court can order other kinds of restitution such as apology, publishing the [innocence] order in the press, or other kinds of restitution¹⁸²

175. Wahdani Amir, Yousaf, *Jibran Zian Bazadsh Shudagani Wa Mahkoomani Bigonah* ["Compensation of Wrongfully Detained and Convicted Persons"], ROZAMA IRAN, 1394 [2015], available at iran-newspaper.com/Newspaper/PagePDF/16006 (Iran) [hereinafter *Compensation of Wrongfully Detained and Convicted Persons*].

176. See generally *id.*

177. QANOONI AYEENI DADRASI KAIFARI [CODE OF CRIMINAL PROCEDURE] Tehran [2015] art. 255 (Iran) [hereinafter IRAN CODE OF CRIMINAL PROCEDURE].

178. *Id.* art. 255.

179. CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, *supra* note 155, art. 171.

180. *Id.*

181. *Id.*

182. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 14.

However, Article 256 of the CPC limits compensation in certain circumstances.¹⁸³ An individual is not eligible for Section 256(a) bars compensation “for individuals who are arrested due to their refusal to provide evidence, documents, and reasons showing their innocence.”¹⁸⁴ Section 256(b) bars compensation for those “who have made themselves the subject of suspicion and arrest by helping the offender to abscond.”¹⁸⁵ Article 256(c) bars compensation for individuals who “facilitated the conditions of their own arrest.”¹⁸⁶ Finally, Article 256(d) bars compensation for those who are “simultaneously detained for other reasons.”¹⁸⁷

The law also has a fixed timeframe within which to receive compensation.¹⁸⁸ An exonerated person should request compensation from the Provincial Commission of Compensation within six months after the exoneration order.¹⁸⁹ The Commission will then decide whether to compensate the person if it deems he qualifies for compensation.¹⁹⁰ If the Commission denies the request, then the person can appeal to the National Commission of Compensation within twenty days.¹⁹¹ The National Commission, comprised of a chief justice and two other judges from the Iranian Supreme Court, processes the appeal and makes a determination.¹⁹² All National Commission decisions are final.¹⁹³ The Iranian Ministry of Justice is responsible for enforcing both Commissions’ decisions by outlining the terms of compensation within three months, with ratification from the Iranian Chief Judge.¹⁹⁴

183. *Id.* art. 256.

184. *Flawed Reforms*, *supra* note 167, at 39; IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 256.

185. *Id.*

186. *Id.*

187. *Id.*

188. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 257.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* art. 258.

193. *Id.*

194. *Id.* arts. 260, 261.

Under Article 255 of the Iranian CPC, compensation is the state's responsibility to provide.¹⁹⁵ However, if wrongful detention is the result of another's perjury, fault of the judge, or bias, the person who caused the wrongful detention will be held liable.¹⁹⁶ In addition, under Article 260, the Ministry of Justice must establish a fund and allocate money from the national budget each year.¹⁹⁷ The Ministry of Justice is responsible for managing the fund and enforcing the National and Provincial Commissions' findings.¹⁹⁸

3. Critique of the Iranian Compensation Scheme

Iran's procedural laws provide a good model for Afghanistan's compensation laws in part because they outline specific funding sources and provide compensation for detainees of all crimes. However, the provisions regarding compensation and eligibility criterion are too narrow and ambiguous to satisfy international legal standards.

The current Iranian CPC brought about important human rights reform that groups like Amnesty International have applauded.¹⁹⁹ These provisions include providing compensation for persons wrongfully imprisoned.²⁰⁰ However, these same groups maintain that few persons receive compensation even when they are in fact eligible.²⁰¹ This is problematic under international law in the same way this issue is problematic for Afghanistan.²⁰²

International law requires restitution and rehabilitation.²⁰³ Recall under the ICCPR, every person who is a victim of arbitrary arrest or detention has an enforceable right to compensation.²⁰⁴ Thus, any person whose arrest or detention violates national law, national procedures, or international law must be compensated. Accordingly, *all* persons must

195. *Id.* art. 259.

196. *Id.*

197. *Id.* art. 260.

198. *Id.*

199. *See generally Flawed Reforms, supra* note 167.

200. *Id.* at 40; IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 255.

201. *See Flawed Reforms, supra* note 167, at 39.

202. *See* Section V.A.

203. *Flawed Reforms, supra* note 167, at 39; ICCPR, *supra* note 3, art. 8.

204. ICCPR, *supra* note 3, arts. 9(5) and 14(6.).

be compensated regardless of whether the person was merely accused, charged, acquitted, or exonerated. However, as Article 255 of the Iranian CPC suggests, only individuals who have been detained during preliminary investigations and then had their charges dropped, or those who are acquitted may be compensated.²⁰⁵ Those wrongfully convicted are not eligible for compensation under this law.²⁰⁶ Therefore, the Iranian system falls short, where compensation is determined by the outcome of an individual's trial, not the illegality of the government's action against her.²⁰⁷

Other aspects of the Iranian CPC work against a person's right to a fair trial as guaranteed in the ICCPR.²⁰⁸ As indicated above, Article 256 of the CPC limits the eligibility criteria for compensation by excluding the following persons, even when their right to liberty has been violated. On the surface, these exclusions seem appropriate. However, in practice, they threaten important procedural rights, such as the presumption of innocence and the right to remain silent.²⁰⁹ Thus, an individual's ability to receive compensation is conditioned on the compromise of other guaranteed rights. For example, a defendant may choose not to submit evidence or testify during the criminal proceeding—invoking his procedural right to remain silent.²¹⁰ But then authorities may deem him ineligible for compensation for failing to provide evidence and testimony proving his innocence.²¹¹

B. The United States: Washington State Compensation Laws

In the United States, compensation for wrongful imprisonment is available under federal law and the laws of twenty-four states.²¹² This paper focuses on Washington State for several reasons. For one, the

205. IRAN CODE OF CRIMINAL PROCEDURE Art, *supra* note 177, art. 255.

206. *Id.*

207. *Id.*

208. ICCPR, *supra* note 3, art. 14

209. *Flawed Reforms*, *supra* note 167, at 40.

210. *Id.*

211. *Id.* at 39.

212. Muhammad U. Faridi, Hillel Hoffman, Paul A. Montuori, *Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals*, 34 W. NEW ENG. L. REV. 1, 7 (2012).

process by which the legislature arrived at its compensation scheme is clearly articulated within the law itself, reducing the chance it may be misapplied.²¹³ In addition, the law allows compensation for individuals exonerated both by pardon or by the reversal or vacation of a felony conviction on the basis of significant exculpatory information.²¹⁴ The law also provides monetary and other types of compensation including transition and long-term support programs.²¹⁵ Furthermore, the law allows compensation claims to be brought up to three years after exoneration.²¹⁶

However, some aspects of the Washington law should be avoided by Afghan officials when designing a new compensation scheme. For example, in Washington, compensation is restricted to a limited number of imprisoned persons and no detained person can receive compensation.²¹⁷ Furthermore, Washington only compensates those exonerated on felony charges, not misdemeanors or other petty crimes.²¹⁸

1. *Legislative Findings*

Of the twenty-four states that provide compensation for wrongful imprisonment, only three explicitly articulate the legislative findings regarding the purposes and effect to be given to the compensation scheme within the law itself.²¹⁹ Indeed, prior to its enactment, in 2012 the New York City Bar Association's Capital Punishment Committee studied all the state compensation laws in the United States and extrap-

213. WASH. REV. CODE ANN. § 4.100.010 (West 2013).

214. *Id.* § 4.100.040.

215. *Id.* § 4.100.060.

216. *Id.* § 4.100.090, and 070.

217. *See id.* §§ 4.100.040 and 4.100.060 (requiring a conviction as a requirement for compensation).

218. *See id.* §§ 4.100.040 and 4.100.010.

219. Faridi, *supra* note 212, at 8.

olated changes that could be made to improve Washington's practices.²²⁰ Most of these proposed changes were integrated.²²¹ Before the enactment of these portions in Washington law, wrongfully convicted persons had no remedy for their damages.²²² However, now individuals have an enforceable right to compensation.

Under a provision titled "Intent," the legislature emphasizes the need for compensation for wrongful imprisonment:

The legislature recognizes that persons convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped of their lives and liberty, they are forced to endure imprisonment and are later stigmatized as felons. A majority of those wrongly convicted in Washington state have no remedy available under the law for the destruction of their personal lives resulting from errors in our criminal justice system. The legislature intends to provide an avenue for those who have been wrongly convicted in Washington state to redress the lost years of their lives, and help to address the unique challenges faced by the wrongly convicted after exoneration.²²³

According to the legislative findings, the main purpose for passing the Washington compensation law was as follows:

- The existence and recognition of the problem of wrongful imprisonment by legislatures;
- The recognition of hardship the wrongfully imprisoned have sustained;
- Recognition of the importance of the lives and right of freedom of wrongfully imprisoned as members of the society;
- Defamation in society as criminals;

220. In 2012, the New York City Bar Association Committee on Capital Punishment and Committee on Corrections prepared a report on the shortcomings and problems of all the state compensation statutes and recommended reforms. Although the Washington compensation law was not ratified at that time, many proposals suggested by the Committee were included in the law. *See generally id.*

221. *See generally id.* The Washington compensation law, enacted in 2013, includes many of the reforms proposed by the New York City Bar Association Committee in the 2012 report.

222. WASH. REV. CODE ANN. § 4.100.010 (West 2013).

223. *Id.*

- Lack of compensation despite the severity of the harm;
- The intention of legislatures to solve the problem by creating an avenue for exonerated persons; and
- The legislature's recognition of the problems that exonerated persons face upon return to society and their intention to address those problems.²²⁴

These legislative findings serve as a useful guide for those who must interpret the statute, particularly courts, agencies, lawyers and private parties.²²⁵ Moreover, they explicitly state that wrongfully convicted persons have been victimized, deprived of their liberty, and treated as criminals.²²⁶ Thus, it works to remind judges and officials of the person's innocence and dignity.

2. *Eligibility Requirements*

Under Washington law, like Iranian law, claimants must meet certain eligibility requirements to receive compensation for wrongful imprisonment.²²⁷ Additionally, not everyone is eligible to receive compensation solely because he or she was wrongfully convicted.²²⁸ Generally, several conditions must be satisfied for an individual to receive compensation for a wrongful conviction.

First, Washington law requires proof of actual imprisonment.²²⁹ To receive compensation, a person must be wrongfully convicted, consequently imprisoned, and have served all or part of his sentence.²³⁰ A person who is wrongfully convicted but not imprisoned is not eligible for compensation, as in circumstances where the individual is placed on

224. *Id.*

225. Faridi, *supra* note 212, at 9.

226. WASH. REV. CODE ANN. § 4.100.010 (West 2013).

227. WASH. REV. CODE ANN. §§ 4.100.010, 4.100.020, and 4.100.040 (West 2013).

228. Faridi, *supra* note 212, at 21.

229. WASH. REV. CODE ANN. §§ 4.100.010, 4.100.020, and 4.100.040 (West 2013).

230. *Id.* at § 4.100.040.

probation.²³¹ A person whose case or conviction is dismissed before actual imprisonment is also not eligible for compensation, even if the person serves time in detention because bail was denied.²³²

Second, compensation is only granted in the case of felony convictions and not misdemeanors.²³³

Third, a person seeking compensation cannot currently be serving time for any other crime.²³⁴ Also, during the period for which the person is seeking compensation, the person must not have been serving a concurrent sentence for a crime other than the erroneous felony conviction(s) that form the basis of the claim.²³⁵

Fourth, in many states, persons who have pled guilty or confessed to committing the crime are directly excluded from compensation even if the guilty plea or confession was false.²³⁶ However, in Washington a person is not excluded from receiving compensation solely because he was compelled to plead guilty or confess to committing the crime.²³⁷ The law specifically states a false confession does not amount to perjury or fabricating evidence.²³⁸

Nevertheless, Washington law does bar applicants who have engaged in any illegal act with respect to the charging document.²³⁹ For example, in *Newton v. State of Washington*, Newton was charged with first-degree burglary and resisting arrest.²⁴⁰ At trial, Newton was convicted, however, his conviction was overturned on appeal due to insufficient evidence proving intent to commit the crime.²⁴¹ Later, the court denied Newton's action for compensation for wrongful imprisonment

231. Faridi, *supra* note 212, at 10–11.

232. *Id.*

233. WASH. REV. CODE ANN. § 4.100.020 (West 2013).

234. *Id.* at § 4.100.040.

235. Faridi, *supra* note 212, at 1 and 16.

236. *Id.* at 13–15.

237. WASH. REV. CODE ANN. § 4.100.040 (West 2013).

238. *Id.*

239. *Id.*

240. *Isaiah Newton, Jr., v. State of Washington*, 369 P.3d 511, 515 (Wash. Ct. App. 2016).

241. *Id.* at 512.

because Washington law required the claimant to prove that his conviction was reversed due to “significant new exculpatory information.”²⁴² The court interpreted “significant exculpatory information” to require something more than appellate reversal itself.²⁴³ Rather, the court stated that “[t]he appellate reversal must be based on some new information” to qualify for compensation.²⁴⁴ In Newton’s case, the court of appeals reversed Newton’s burglary conviction based on the insufficiency of the existing evidence, not new evidence.²⁴⁵ As such, the court held that Newton was ineligible for compensation.²⁴⁶

3. Compensation

Unlike many other states, a person who is eligible for compensation in Washington may recover monetary damages, in addition to reimbursement of accrued child support payments, court costs, attorney fees, and other forms of compensation.²⁴⁷ In Washington, a person is eligible for compensation if her conviction was reversed or vacated and the accusatory instruments were dismissed on the basis of innocence, or on the grounds that it was not inconsistent with innocence.²⁴⁸

In general, claimants in the United States have two possible ways to establish their innocence and qualify for compensation: executive pardon or judicial determination.²⁴⁹ In Washington, a claimant may use either method to prove his innocence.²⁵⁰ Some states only allow a person to establish their innocence by executive pardon.²⁵¹ These states essentially require that the crime was either not committed at all or at least was not committed by the claimant.²⁵² In the case of an executive pardon, Washington requires the pardon to be certified by the officer

242. *Id.* at 513.

243. *Id.* at 515.

244. *Id.*

245. *Id.* at 516.

246. *Id.*

247. WASH. REV. CODE ANN. § 4.100.060(5) (West 2013).

248. *Id.* § 4.100.040(1)(c)(i)-(ii).

249. Faridi, *supra* note 212, at 18.

250. WASH. REV. CODE ANN. § 4.100.060 (West 2013).

251. Faridi, *supra* note 212, at 18.

252. *Id.* at 20.

who has lawful custody of the pardon, which should be affixed with the stamp of the Governor's Office, or the officer should certify it before it is offered as evidence of innocence.²⁵³ Alternatively, in states where judicial determination is also an option, as it is in Washington, the claimant must provide clear and convincing evidence of his innocence—a relatively high burden of proof.²⁵⁴

State laws also vary by the statute of limitations period provided for a victim to bring a claim for compensation. Some limit compensation claims to five years from the date of exoneration or release from prison,²⁵⁵ some limit claims to three years, most limit claims to two years, and a few have not identified a specific limit but depend on other methods to determine the appropriate time period.²⁵⁶ Washington has taken a position in the middle, in accordance with the recommendation by the New York City Bar Association Committee on Capital Punishment and Committee on Corrections, limiting compensation claims to three years.²⁵⁷

Despite the various limitations, Washington's compensation law has many advantages compared to compensation laws in other states and countries—especially Iran and Afghanistan. The advantages of Washington's compensation law include: it is grounded in legislative findings, it provides for various forms of compensation (such as reimbursement of accrued child support payments, court costs, and attorney's fees), it has flexible eligibility criterion, a three-year statute of limitations, and more inclusive qualifying methods of exoneration.²⁵⁸ Afghanistan should include these positive attributes in any compensation scheme that it adopts in the future.

253. WASH. REV. CODE ANN. § 4.100.060(2) (West 2013).

254. *Id.* Faridi, *supra* note 212, at 21.

255. *Id.* at 27.

256. *Id.* Alabama, California, Illinois, Iowa, Louisiana, Maine, Massachusetts, Ohio, New Jersey, New York, and West Virginia have a two-year statute of limitations. New Hampshire and Texas have a three-year statute of limitations. North Carolina has a five-year statute of limitations. Maryland, Oklahoma, Virginia, Wisconsin, and the District of Columbia do not specify a statute of limitations.

257. *Id.* at 33-34.

258. See generally *Compensation of Wrongfully Detained and Convicted Persons*, *supra* note 241; WASH. REV. CODE ANN. §§ 4.100.010–4.100.090 (West 2013).

4. *A Critique of the Washington Compensation Law*

Although Washington's compensation law is a good model compared to other states' compensation schemes, it has some problems that should be addressed. The main problem with Washington's compensation law is that not all wrongfully convicted and detained persons are eligible to receive compensation.²⁵⁹ Some other limitations of the Washington compensation law include the requirement that the claimant actually be imprisoned.²⁶⁰ As such, a person who is convicted but not imprisoned (such as probation) will not be eligible for compensation even though they were wrongfully punished. Another limitation is that only exonerees of felony crimes are eligible for compensation, making exonerees of misdemeanors and other crimes ineligible.²⁶¹ In addition, a person who is currently serving time in prison for a crime other than the one for which the claimant was wrongfully imprisoned is not eligible for compensation.²⁶² Furthermore, a court decision finding the claimant innocent or exonerated is not enough, he must prove by "clear and convincing" evidence that he was "actually innocent."²⁶³ These limitations bar many wrongfully convicted and detained claimants from collecting their rightfully owed compensation.

VII. DESIGNING A COMPENSATION SCHEME FOR AFGHANISTAN

Like Washington State and Iran, Afghanistan should reform its law to include articles that clearly define a compensation scheme appropriate under domestic and international standards. However, it should adopt a scheme more similar to Washington's, which clearly defines

259. The law explicitly states that compensation is only available to exonerees of felony crimes. *See generally* WASH. REV. CODE ANN. §§ 4.100.010–4.100.090 (West 2013). Additionally, only those who have been imprisoned and subsequently exonerated can file for compensation. *See id.* Thus, wrongfully detained and arrested persons cannot file for compensation.

260. WASH. REV. CODE ANN. § 4.100.010 (West 2013).

261. *Id.* at § 4.100.020.

262. *Id.* at § 4.100.040.

263. *See supra* text pp. 38-39.

eligibility, the procedure for bringing a claim, a schedule of compensation amounts, and other related issues.²⁶⁴

Afghanistan should use a combination of both the Washington and Iranian compensation models either by amending the Afghan CPC to explicitly articulate the issues of wrongful imprisonment, wrongful detention, and compensation, or by drafting a new law. Given the circumstances in Afghanistan and the generality of its CPC, the best solution is to adopt entirely new legislation. Adopting a new legislative scheme will attract the attention of the authorities, judges, prosecutors, lawyers and claimants who will all recognize the problem and the need for compensation. As previously discussed, authorities and even lawyers are not familiar with concept of compensation. Amending the CPC may reduce the legal vacuum, but it would fail to gain the necessary attention it deserves.

Some Afghan legislators will be skeptical about adopting a new compensation law, especially one modeled, in part, after United States law. These critics may assert that the United States is a diverse country that is culturally, religiously, politically, and economically different from Afghanistan. Thus, United States law cannot simply be transplanted into Afghan law. However, compensation for wrongful imprisonment is not a political or cultural issue, it is a human rights issue. Almost all countries are bound by the ICCPR, which requires signatory members to ensure compensation and take steps to enact compensation laws.²⁶⁵ Washington law, while not perfect, provides a good model when combined with aspects of the Iranian law. Issues such as the amount of compensation would, of course, need to reflect Afghanistan's circumstances and needs. Additionally, there are no cultural, religious, or social barriers to adopting such a law. In fact, compensation is not only required under international law, but is also consistent with

264. See generally *Compensation of Wrongfully Detained and Convicted Persons*, *supra* note 241; WASH. REV. CODE ANN. § 4.100.000 (West 2013).

265. See ICCPR, *supra* note 3, art 9(5), and 2(2).

Islamic law,²⁶⁶ provisions in the Afghan Constitution, and civil and criminal codes.²⁶⁷

Legislators may also criticize using Iranian law to model Afghanistan's compensation law because of Iran's alleged political intervention in Afghanistan, and differences in culture and religion between Afghanistan and Iran. Many members of the Afghan Parliament accuse Iran of supporting militant groups and provoking internal war and religious tensions in Afghanistan.²⁶⁸ In response to these critiques, reformers could argue that it is a normal practice of a legislature to look to countries that have similar policies or countries that have good laws. Iran is a neighboring Muslim country and, to an extent, is culturally like Afghanistan.

Although there might be criticism about using both the Iranian and United States compensation laws as a model for Afghanistan, these laws have undeniably created avenues for wrongfully imprisoned persons to receive the compensation that they rightfully deserve—avenues that currently do not exist under Afghan law. Indeed, each offers its own positive attributes worth emulating in the Afghan context.

266. Under Articles 3 and 130 of the Afghan Constitution, Islamic law is the fundamental source of the law. AFGHANISTAN CONSTITUTION, *supra* note 4. Under Article 3, no law shall contradict Islamic law. Under Article 130, the courts must refer to Islamic law if there are no provisions for an issue in the statutory laws. We have many provisions in Islamic law about compensation for damages. For example, in one hadith (a primary source of Islamic Law), the Prophet says, “*la darara wala dirara*,” meaning that: there should be neither harm “*darar*” nor reciprocating harm “*diraar*.” See Barakatullah Tayeb, *Fihi Qawaid [Rules of Jurisprudence]*, Sharia Faculty of Nangarhar University 56, 1393 [2014] (Afg.). Similarly, in one provision of Islamic jurisprudence, it is explicitly mentioned that damages should be compensated. It says “*Al dararu yuzal*,” meaning damages will be compensated. *Id.*

267. AFGHANISTAN CONSTITUTION, *supra* note 4, art. 51; MADANI QANOON [CIVIL CODE] arts. 776 and 777 (Kabul 1355) [1976] (Afg.).

268. Accusing Iran and other neighboring countries for inciting tension among religious and ethnic groups in Afghanistan is very common. The government claims it has evidence of Iran's interventions in Afghan affairs. International security forces in Afghanistan also accept Iran's intervention in Afghanistan's internal issues. As a result, some people and members of the Afghan Parliament are very suspicious towards Iran and its policies. Some people have even campaigned to boycott Iranian products. So, it is very possible that some members will not accept that Afghanistan will use an Iranian model of compensation as a guide. However, some Afghan law professors use Iranian books for teaching purposes. So maybe Parliament could be convinced to use Iranian law as a guide in adopting a new compensation law.

A. Legislative Findings

A new Afghan compensation law should explicitly provide legislative findings, as the Washington law does. Legislative findings and purpose statements can serve as valuable guidance to judges, lawyers, and claimants.²⁶⁹ While these kinds of statements are well modeled in the Washington compensation law, they are not present in the Iranian law. Only Article 1 of the Iranian CPC states that its purpose is to protect the rights of accused person.²⁷⁰ Nowhere else in the other 570 articles of the CPC does it further explain this purpose.²⁷¹

Like Washington,²⁷² the Afghan compensation law should articulate its purpose directly in the statute, including a description of the gravity of the problem. Washington's purpose statement only addresses the problem of wrongful imprisonment and recognizes the problems exonerates face upon return to society and the need to compensate them.²⁷³ Afghanistan should also articulate a policy statement about the effects of wrongful detention and arrest and the severity of the problem in Afghanistan. Since Afghan law enforcement authorities and judges have little to no experience in compensating for wrongful imprisonment, they may have a negative attitude toward such rights.²⁷⁴ As such, it is crucial to include the legislative intent and the severity of the problem. Moreover, such an inclusion might lead to a lesser showing of hostility toward individuals seeking compensation. The Afghan law should include a provision entitled "Legislative Intent." Such a provision could be drafted as follows:

The legislature recognizes that persons arrested, detained, convicted and imprisoned for crimes they did not commit have been uniquely victimized. Having suffered tremendous injustice by being stripped

269. Faridi, *supra* note 212, at 1, and 8.

270. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 1.

271. *Id.*

272. WASH. REV. CODE ANN. § 4.100.010 (West 2013).

273. *Id.*

274. As previously discussed in this article, some law enforcement officers, prosecutors, and judges have a negative attitude toward the rights of the accused. They may have a similar view toward a new compensation law. Thus, including the legislature's intent is necessary—the legislature's recognition of a problem will lead the mentioned authorities to take the new law seriously.

of their lives and liberty, they are forced to endure imprisonment and detention, and are later stigmatized as criminals. A majority of those wrongly detained, convicted, and imprisoned in Afghanistan have no explicit and accessible remedy available under the law to compensate them for the destruction of their personal lives resulting from errors in our criminal justice system and arbitrary treatment by law enforcement authorities. After being victimized by law enforcement and the criminal justice system, and having no avenue available for compensation, most of these individuals lose confidence in the state, and even become hostile towards the state. This situation has had a negative impact on society and national security. With this law, the legislature intends to provide an avenue for those who have been wrongly detained and convicted. Further, the legislature intends to address the lost years and months of these individuals' lives, and address the unique challenges they face after exoneration.

B. Compensation for Wrongful Imprisonment and Wrongful Detention

A big difference between Washington and Iranian law is that Washington only provides compensation for wrongful imprisonment, not for wrongful detention.²⁷⁵ The Iranian CPC only provides compensation for wrongful detention, not for wrongful imprisonment.²⁷⁶ Article 171 of the Iranian Constitution could be construed as providing compensation for wrongful imprisonment.²⁷⁷ However, the remedy is not specifically provided for, and certainly not in a unified compensation scheme aimed at arbitrary detention and imprisonment. As such, Afghanistan must use a combination of both compensation schemes.

Like Washington, the new Afghan legislation should clearly define wrongful imprisonment, wrongful arrest, wrongful detention, innocence, and other related terms. Some terms are already defined in the

275. WASH. REV. CODE ANN. § 4.100.041(a) (West 2013). Washington law explicitly states that the claimant must be convicted, imprisoned, and serve all or part of the sentence.

276. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 255. The Iranian CCP, on the other hand, states that compensation is available for those who were detained during preliminary investigation or trial and were consequently exonerated or had their charges dropped.

277. IRAN CONSTITUTION, *supra* note 155, art. 171.

Afghan CPC, but other important terms are missing or lack a clear definition resulting in the law being misapplied. If the law states that wrongfully imprisoned and wrongfully detained persons are innocent and eligible for compensation, the law should clearly define “wrongfully imprisoned,” “wrongfully detained,” and “innocent.”²⁷⁸

C. Procedure

First, the individual would have to establish her detention was wrongful. The avenues for establishing innocence in Afghanistan should mirror those to Washington. Under Washington law, a person can establish his or her innocence either by executive pardon or judicial determination.²⁷⁹ In Iran, a person can only establish his innocence via exoneration or the charges being dropped by judicial authorities.²⁸⁰ Afghanistan’s compensation law should have a provision similar to Washington because restricting compensation will not solve Afghanistan’s problem. If a person is exonerated by executive pardon but is not eligible for compensation, he may think that the state has discriminated against him and treated him unequally. This may lead him to seek revenge on the state by way of committing crimes. A person should have different methods available to establish his innocence and eligibility to receive compensation.

As to the forum in which a wrongfully detained or imprisoned person may seek compensation after establishing innocence, Afghanistan should model Iran’s system of specialized commissions. Under Washington law, a person must file a claim for compensation in the lowest level trial court of the country’s common judicial system, and would

278. For example, Article 4(26) of the Afghan CPC defines “exoneration” as “the condition in which the court orders the innocence of the accused and rejects the accusation for the reason of absence of evidence.” AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 4 § 26. The Article limits exoneration to a person who was accused and found not guilty but does not recognize a person who was wrongfully convicted and sentenced but later found not guilty as exoneree or innocent. *Id.*

279. WASH. REV. CODE ANN. § 4.100.060 (West 2013).

280. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 255.

have the right to appeal.²⁸¹ Under the Iranian CPC, a person has to request compensation from the Provincial Commission.²⁸² If the Commission rejects the request, the person can appeal to the National Commission.²⁸³ Afghanistan can use either model. However, due to the large number of wrongful imprisonment and wrongful detention cases, it would be better to establish specialized provincial and national commissions for compensation rather than referring these cases to the common court system. Currently in Afghanistan, hundreds of people have been wrongfully detained and imprisoned.²⁸⁴ As such, the courts would be overloaded with compensation cases. For this reason, it is better for Afghanistan to establish provincial and national commissions for compensation, like Iran.

Lastly, the Afghan law could follow the statute of limitations period provided for by Washington. Iranian law requires exonerates to request compensation to the Provincial Commission within six months of exoneration.²⁸⁵ The statute of limitations under Washington law for a compensation claim is three years after exoneration.²⁸⁶ The statute of limitations set by Iranian law is too strict and is unjust. The statute of limitations stipulated in the Washington law is more logical and fair. In the Afghan context, it is better to have a more flexible time frame like Washington. As discussed earlier, in Afghanistan, people and related authorities are not familiar with the rights of accused persons.²⁸⁷ Thus, people would hesitate to file for compensation immediately after being exonerated or released from detention. At least three years should be given to the person to file after their release.

Thus, with respect to the new law's procedural aspects, it could have provisions like:

- All persons who have been exonerated after detention or after actual imprisonment, or who have had charges against him dropped after preliminary investigation, can request

281. WASH. REV. CODE ANN. § 4.100.030050 (West 2013).

282. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 257.

283. *Id.* arts. 257 and 258.

284. *See Arbitrary Detention in Afghanistan*, *supra* note 1, at iv.

285. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 258.

286. WASH. REV. CODE ANN. § 4.100.090 (West 2013).

287. *Arbitrary Detention in Afghanistan*, *supra* note 1, at 16.

compensation from the Provincial Commission of Compensation;

- The claimant must request compensation within three years after exoneration; and
- If the Provincial Commission rejects the request, the claimant can appeal to the National Commission of Compensation within 20 days after rejection by the Provincial Commission; and
- All decisions of the National Commission of Compensation are final.

D. Restrictions

Another important difference between the Iranian and Washington compensation laws are the restrictions on available compensation based on the circumstances. Iranian law does not restrict compensation to exonerates based on the kinds of crimes they are accused of committing.²⁸⁸ In contrast, Washington law limits compensation to individuals who are convicted and then exonerated for felony crimes.²⁸⁹ Afghanistan should use an approach similar to Iran because under the ICCPR, compensation should be available to all wrongfully imprisoned and detained persons, regardless of the severity of their crimes.²⁹⁰

Like Washington, if a person has been wrongfully convicted due to his own confession or guilty plea he should not be automatically excluded from the right to bring a claim for compensation,²⁹¹ because people plead guilty for a variety of reasons despite the fact that they are innocent.²⁹² Sometimes people confess to a crime because of torture or force by law enforcement or other authorities.²⁹³ These people should not be automatically excluded from compensation because they pled

288. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 255.

289. WASH. REV. CODE ANN. § 4.100.040 (West 2013).

290. ICCPR, *supra* note 3, art. 9(5).

291. WASH. REV. CODE ANN. § 4.100.040 (West 2013).

292. Faridi, *supra* note 212, at 15.

293. *See World Report 2016*, *supra* note 9. As discussed earlier in this article, in most cases torture is used in Afghanistan in order to obtain a false confession.

guilty or confessed under duress. This is especially so because of the shocking accounts of coerced confessions in Afghanistan.²⁹⁴

The Iranian and Washington compensation schemes exclude people who are concurrently imprisoned for another crime. However, people who are currently serving time in prison for a charge other than for which he is seeking compensation should not be excluded. Furthermore, unlike Washington, which only ensures compensation for wrongfully imprisoned individuals, compensation should be available to all who have been wrongfully imprisoned and detained.

E. Types of Awards

In Washington, a person who is eligible for compensation may recover monetary damages, reimbursement of accrued child support, court costs, attorney fees, and other forms of compensation.²⁹⁵ The law also stipulates the amount of compensation to be received.²⁹⁶ In Iran, a person can file for compensation for the number of days spent in detention.²⁹⁷ Although Article 14 of the Iranian CPC generally mentions that a claimant can demand mental, physical, and other possible damages,²⁹⁸ Articles 255-261, which cover compensation for wrongful detention, do not have such provisions.²⁹⁹ Thus, in Washington, a person may receive compensation for various kinds of damages but in Iran, a person can recover only monetary compensation.

Like Washington, Afghanistan should adopt a law that provides various kinds of remedies. The Washington scheme seems logical because a wrongfully detained and imprisoned person is not at fault. Thus, he must be compensated for the damages he or she sustained on behalf of error by the criminal justice system, law enforcement, or judicial authorities. Not only does the wrongfully imprisoned person suffer, but his children and family are also victimized by the injustices imposed on him. Therefore, all kinds of remedies should be available to them.

294. See Section II.B.

295. WASH. REV. CODE ANN. § 4.100.060 (West 2013).

296. *Id.*

297. IRAN CODE OF CRIMINAL PROCEDURE, *supra* note 177, art. 255.

298. *Id.* art. 14.

299. See *id.*, arts. 255–61.

Moreover, Afghanistan should create a fund for compensation. Iranian law stipulates that a fund for compensation must be established and that the fund's budget should be allocated each year in the national budget.³⁰⁰ Like Iran, the Afghan Ministry of Justice or an independent commission should establish a similar fund to prevent a shortage of funds to pay out compensation claims. This fund should be a part of the national budget each year and should be overseen by the Minister of Justice or an independent commission.

F. Calculating Awards

Similar to Washington, the proposed compensation law should clearly state the available remedies.³⁰¹ Also like Washington, the law should clearly indicate that a specific sum of money should be given for a specific amount of time.³⁰² However, Washington only provides compensation for felonies, thus the amount of money granted is calculated per year.³⁰³ The proposed Afghan law, addressing the problem of wrongful detention and wrongful imprisonment for all crimes, should stipulate the amount of monetary remedies per day, per month, and per year.

The current Afghan CPC does not adequately address the problem and seems unjust because it states that a wrongfully detained person should be compensated according to the daily income of the person.³⁰⁴ This has the effect of creating inequality before the law, which is inconsistent with the right of all citizens to be treated equally. To avoid uncertainty, the law should explicitly articulate set amounts of money for each victim to be compensated, such as 500 Afghanis per day; 15,000 Afghanis per month; and 180,000 Afghanis per year.

Given Afghanistan's current economic condition, compensation for these amounts of money seems like a great burden on the Afghan government. However, compensating the wrongfully imprisoned sufficiently will compel authorities to eliminate unlawful arrest, detention,

300. *Id.* art. 260.

301. WASH. REV. CODE ANN. § 4.100.060 (West 2013).

302. *Id.*

303. *See id.* The current amount of compensation is fifty thousand dollars per year in the case of actual imprisonment.

304. AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1, art. 323 § 2.

and imprisonment practices. Authorities will think twice before arresting a person when they have reasonable doubt that the person has committed the crime.

Additionally, the judiciary and prosecutors will proceed with cases more quickly to avoid wasting money that potentially will have to be paid out as compensation for wrongful imprisonment and detention. It will also likely have a psychological impact on the authorities. For example, if they wrongfully detain and imprison a person or do not proceed with a case in the time stipulated by law, the state will have to compensate the person for the recklessness and negligence of the governmental authorities. This would grab the attention of high-level authorities and incentivize them to process the case in the time stipulated by law.

Finally, the new law or CPC amendment must have an explicit name, and each compensation article should have an explicit title like the other articles in the CPC.³⁰⁵ The Afghan law should model Washington's compensation law, which is explicitly named and each article has a specific title such as, "intent," "claim for compensation," "procedure for filing a claim," "appeals," and "compensation awards."³⁰⁶

CONCLUSION

In the past fifteen years, thousands of Afghans have been wrongfully detained and imprisoned. A variety of factors contribute to this serious problem, such as the lack of defense attorneys; the use of force and torture during criminal investigations; the imbalance of defense attorneys and prosecutors; the lack of the training and experience by law enforcement officers, prosecutors, and judges; hostility towards defense attorneys, the accused, and their rights; and the abuse of power by government authorities. Despite the severity of this problem, no Afghan person has ever been compensated for wrongful imprisonment or detention, largely due to ambiguity and lack of compensation provisions in current Afghan law. Thus, the wrongfully imprisoned have gone uncompensated and face myriad problems upon their release.

305. Each article in the Afghan CPC has a title. See AFGHANISTAN CRIMINAL PROCEDURE CODE, *supra* note 1.

306. See generally *Compensation of Wrongfully Detained and Convicted Persons*, *supra* note 241; WASH. REV. CODE ANN. § 4.100.000 (West 2013).

Although Afghanistan has obligations under the ICCPR to legislate and ensure compensation for wrongful imprisonment and detention, it has not yet adopted a law for this purpose. This article has provided a detailed analysis of compensation schemes in Iran and Washington State in order to recommend a combination of both models to create a new compensation law for wrongful imprisonment and detention in Afghanistan. With this new law, Afghanistan can forge a new future for those who have spent months, even years, in prisons and detention centers for crimes they did not commit.

