

# Organisation and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement

*Ramin Moshtaghi* \*

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## I. Introduction<sup>1</sup>

On 26 January 2004, the new Afghan Constitution was promulgated by Hamid Karzai,<sup>2</sup> the President of the Transitional Administration of Afghanistan. One year later it was followed by the enactment of the Law<sup>3</sup> of Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan (LOJC) and the Juvenile Law.<sup>4</sup> With the enactment of these regulations Afghanistan has given itself a new and complex structure of courts. Both laws were passed by resolution of the High Council of Ministers and enacted by presidential decree in accordance with

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<sup>1</sup> The article is based on the experiences gained while working in the Afghanistan Project of the Max Planck Institute for Comparative Public Law and International Law. The project aims to support the reconstruction efforts of the Afghan Judiciary and Administration (for further information see: <[http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/afghanistan\\_project.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project.cfm)>). In the course of the project in 2004, a manual in respect to the basic fair trial principles in Afghan law was compiled, which has successfully been used to train Afghan legal practitioners. Because of the success of the project, in the second half of 2005 a second edition for further workshops has been elaborated including newly enacted Afghan laws. Having in mind the difficulties to understand the complexity of the structure of Afghan courts and the fact that scientific material in English or other European languages is rare and Dari literature is mostly lost in the turmoil of regime changes and the civil war, I gladly took the opportunity to write this article to shed some light on the Afghan judiciary.

<sup>2</sup> Decree No. 103 published in the Official Gazette No. 818.

<sup>3</sup> To reduce the risk of confusion, I will maintain the official Dari terminology for these laws, speaking of laws (*qanun*) even though these are not laws in the formal sense of article 94 para.1 of the Afghan Constitution (AC) but governmental legislative decrees (*farman e taqini*). The authority to pass these regulations lies for the interim period with the government in accordance with article 159 Afghan Constitution.

<sup>4</sup> Law of Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan (*qanun e tashkilat va salabiat e mobakem e qoveje qasa'je e jomburije eslamiye afghanestan*, in the Afghan context often referred to as the Law of the Structure and Competencies of Courts) by Decree No. 14, dated from 21 May 2005, published in the Official Gazette No. 851, and the Juvenile Law (*qanun e residegi be takhalofat e atfal*, in the Afghan context often somewhat confusingly referred to as the "Law of Investigation of Children's Violation") by Decree No. 46, dated from 23 March 2005, published in the Official Gazette No. 846.

article 159 No. 2 of the Constitution.<sup>5</sup> They will stay in force until abrogated by Parliament, as provided by article 161 of the Constitution. Since the first parliament after the fall of the *Taliban* regime was inaugurated only on 19 December 2005 and is still debating its final procedural order,<sup>6</sup> it is not very likely that it will abrogate these laws in the near future, especially considering the complete lack of legislation in many other important areas.

In order to assess the new structure of courts it will be necessary to outline the basic lines of development in the history of the judiciary of modern Afghanistan (see under II.). In this regard, the article will mostly focus on the reforms and the development of the judiciary until the crucial year of Daoud Khan's *coup d'état* in 1973. The sometimes contradictory changes of various "revolutionary" governments during the following years accompanied by turmoil and civil unrest seem to be based on different ideological perceptions rather than on a promotion of civil rights and the rule of law. Accordingly, the Bonn Agreement<sup>7</sup> expressly re-established the Constitution of 1964 as a basis for the legal framework of Afghanistan.<sup>8</sup> In Part III. of the article, the present structure of courts and their organisation will be elaborated, thereby giving for the first time a comprehensive analysis of the new laws. Parts IV. and V. will assess the compliance of the outlined system with the Bonn Agreement and point out remaining deficits.<sup>9</sup>

As a preliminary remark, I would like to clarify that the focus of this article will be only the reforms and modernisation of the official judicial system. The immense problems involving the informal administration of justice by village or tribal councils (*jirgas, shuras*), which are unauthorised courts according to arts 116, 120 of the Afghan Constitution, will be left aside.

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<sup>5</sup> According to this provision the government is authorised to pass regulations concerning the structure and competencies of the courts during the interim period.

<sup>6</sup> The time of the elaboration of this article was May 2006.

<sup>7</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, also named Bonn Agreement after the location of its signature, Doc. S/2001/1154 of 5 December 2001.

<sup>8</sup> See article II. 1. of the Bonn Agreement.

<sup>9</sup> Furthermore, after this survey of the legal perimeters of the Afghan judiciary, the article of Mrs. Mandana Knust in this Volume, assesses the case of Abdul Rahman, an Afghan Apostate. His case sheds light on the implementation of the laws by the Afghan judiciary.

## II. Historical Overview: The Organisation and Jurisdiction of Courts in Afghanistan

### 1. The Beginnings of a Modern Nation State

For more than a century after Ahmad Shah Durani was proclaimed *Amir* in 1747, which is usually seen as the beginning of the Afghan Kingdom,<sup>10</sup> the judiciary remained in the firm grip of the *ulema*, the community of the religious scholars, or to be precise the *qadis* and *muf-tis*. The *ulema* strongly supported the central government, which in return bestowed large allowances and privileges upon them and thereby increased their power and influence. The *ulema* were basically free to administrate justice in accordance with their interpretation of Islamic principles.<sup>11</sup> In order to establish a monopoly of power in the hands of the state authorities the most prominent aim of modernisation and legal reform has been and still is to diminish the influence of religious leaders in the judiciary. This aim has only relatively recently been supplemented by the notion to reduce the power of the executive and to grant judicial independence.<sup>12</sup> Legal reforms aimed at judicial independence have been adopted only in the short period of the Afghan democratic experiment in the sixties and early seventies of the last century while already the central authorities at the end of the 19th century took the first steps to reduce the power of the *ulema* in the judiciary.

Amir Abdur Rahman (reign 1880-1901), was the first to undertake steps of modernisation in this regard. He strongly relied on Islam to legitimise and stabilise his centralised rule. Therefore, he introduced a new doctrine of sovereignty, in which the Islamic concept of divine sanction played a role similar to that of the European absolute notion of divine sovereignty. He claimed that in contrast to his predecessors, who had derived their power from decisions made in formal traditional gatherings by tribal chieftains, his rule was based on divine sanctions.<sup>13</sup> According to this doctrine, he was the leader of the Muslim society, the deputy of god for his subjects. Nevertheless, he perceived the uncontrolled power of religious leaders, which was characteristic of the rather

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<sup>10</sup> M. Ewans, *Afghanistan-A short History of its People and Politics*, 2002, 29 et seq.

<sup>11</sup> M.H. Kamali, *Law in Afghanistan*, 1985, 7 et seq.; B.R. Rubin, *The Fragmentation of Afghanistan*, 2002, 46 et seq.

<sup>12</sup> See also Kamali, see note 11, 14 et seq.

<sup>13</sup> Ewans, see note 10, 101.

informal system of adjudication by the *ulema* as a threat to his own power.<sup>14</sup> Determined to enforce the control of the state on the religious leaders, he transformed the *qadis*, who were responsible for the administration of Islamic justice, from purely religious authorities financed by fees and donations to state bureaucrats. In order to achieve this aim he took over the *waqf*, the religious trusts, thereby destroying the economic base of the *qadis*.<sup>15</sup> In order to achieve the title of *qadi* and to be appointed to one of the *shari'a* courts, candidates had to pass a state-controlled examination which tested their religious knowledge and thereby determined the amount of their salaries.<sup>16</sup> Once appointed, *qadis* were forbidden to engage in “worldly vocations or the teachings of sciences”.<sup>17</sup> In return, they were no longer dependent on fees and donations, but were paid a salary by the central authority. Furthermore, Abdur Rahman installed a system of *shari'a* courts which operated by procedures laid down by the state in a manual for judges, the *Asas ul Quzat*.<sup>18</sup> The duties and obligations that accompanied the transformation of a *qadi* into a state bureaucrat are portrayed in detail in this manual.<sup>19</sup> <sup>20</sup> The reforms of Abdur Rahman, although they formalised the administration of justice and thereby increased the power of the central authorities over the judiciary, did not touch the character of the judiciary as a stronghold of the religious establishment. Religious knowledge was still indispensable for becoming a judge in an Afghan court.

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<sup>14</sup> He accused them of behaving like kings ruling with “tyranny and unbearable cruelty”, cited according to Ewans, see note 10, 101.

<sup>15</sup> Ewans, see note 10, 101.

<sup>16</sup> Ewans, see note 10, 101.

<sup>17</sup> A. Ghani, “Disputes in a Court of Sharia, Kunar Valley, Afghanistan, 1885-1890”, *International Journal of Middle East Studies* 15 (1983), 353 et seq.

<sup>18</sup> Kamali, see note 11, 7; Rubin, see note 11, 50; Ghani, see note 17, 273; Ewans, see note 10, 14 et seq.

<sup>19</sup> Ghani, see note 17, 354.

<sup>20</sup> E.g. the *Asas ul Quzat* required every *qadi* to send a monthly report of all proceedings of his court to the *qadi* of the city in which the governor resided, and the latter was to collect the transactions of the whole province and send them, on a monthly basis, to the chief-*qadi* in the capital. The chief-*qadi* then had to go over all the accounts and to determine the correctness of the judgements. The standard was the *shari'a*, with priority given to the precedents of Abu Hanafi. If a *qadi* could not find a rule for a case, he was obliged to ask the chief-*qadi* in writing, who extracted it from the authoritative sources or acquired an order from the *Amir*, cf. Ghani, see note 17, 354.11.

Under his successor, Amir Habibullah (reign 1901-1919), this system remained unthreatened. In fact, Habibullah adopted a rather lenient attitude towards the religious leaders, who regained much of their influence and in return supported his reign willingly.<sup>21</sup>

## 2. The Reforms under Amanullah Khan

However, the coexistence of the central authorities and the religious establishment became seriously shaken under the rule of Amanullah Khan (reign 1919-1929). His rule was characterised by major changes, the most important of which was the formal independence of Afghanistan from the United Kingdom after the end of the rather short third Anglo-Afghan War (Treaty of Rawalpindi of 8 August 1919). Having formally established an independent state, Amanullah tried to transform the tribal society of Afghanistan into a real nation state as an example to the Islamic world. The reforms by Amanullah were certainly by far the most ambitious and radical reforms Afghanistan had seen so far. They included the introduction of female education,<sup>22</sup> the abolition of child marriage and restrictions on polygamy. Furthermore, he tried to radically change and modernise the economy of Afghanistan.<sup>23</sup> He also introduced ambitious reforms in the legal sector. Following the example of western countries, he tried to introduce a complete legal basis for the state in order to implement a rule of law, an idea formerly unknown in Afghanistan. In 1923, he gave Afghanistan its first Constitution changing it into a constitutional monarchy.<sup>24</sup> The judicial reforms of Amanullah, often called the *Nizamnama* reforms, were partly inspired by the Turkish *Tanzimat* reforms of the late 19th century.<sup>25</sup> Amanullah introduced a new system of state courts and a penal code. Article 21 of the Constitution stated that in courts of justice all cases had to be decided in accordance with *shari'a* law and the general crimi-

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<sup>21</sup> Kamali, see note 11, 7; Ewans, see note 10, 2002, 111.

<sup>22</sup> Female students were even encouraged to travel abroad.

<sup>23</sup> For details see e.g. Rubin, see note 11, 54 et seq.; L.B. Poullada, *Reform and Rebellion in Afghanistan 1919-1929*, 1973, 1 et seq.; also Ewans, see note 10, 128 et seq.

<sup>24</sup> Rubin, see note 11, 55.

<sup>25</sup> In fact, Turkish advisors played a major role in the formulation of the *Nizamnama* legislation, cf. Kamali, see note 11, 203.

nal and civil law.<sup>26</sup> This new penal code was not an adoption of western style legal texts, but mostly codified Islamic law. Nevertheless, since the *ulema* were no longer allowed to extract their own interpretation from the religious texts,<sup>27</sup> but had to follow the compulsory interpretation of the law, this codification significantly reduced their influence and undermined the position of the religious leadership at the tribal and village level.<sup>28</sup>

#### a. The System of Ordinary Courts

With regard to the organisation of the ordinary courts, arts 50-57 of the Constitution of 1923 in conjunction with arts 213-226 of the *Nizamnama* of Basic Organisation of 1923 introduced a new system of courts of general jurisdiction.<sup>29</sup> The former two-tiered system of the *shari'a* courts was transferred into a three-tiered system and the existing *shari'a* courts were renamed. The courts of general jurisdiction were referred to as Primary Courts (*Mahkama-e ebteda'iye*), Appeal Courts (*mahkama-e moraafi'a*) and the High Cassation Board in Kabul (*hay'at-e 'ali-e tamiz*).<sup>30</sup>

An innovation of the reforms of Amanullah was the introduction of Courts of Reconciliation (*mahkama-e eslahiya*). Civil cases had to be presented to these courts before they could be presented to a Primary Court. Only if the reconciliation failed it was possible to refer the case to the courts of first instance.<sup>31</sup> According to Kamali, law provided that the Courts of Reconciliation had to be established in all provinces, which was achieved by establishing them only in the provincial cen-

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<sup>26</sup> It has to be remarked that the reference to the *shari'a* was not meant like in Islamic constitutions of today as an exaltation of Islamic law but as a temporary solution for the corpus of statutory law was still embryonic.

<sup>27</sup> For details of Islamic criminal law, see A. El Baradie, *Gottes-Recht und Menschen-Recht*, 1983.

<sup>28</sup> Ewans, see note 10, 129; this explains why the codification of punishments by Amanullah was a highly controversial issue in the *Loya Jirga* of 1924, where the reforms of Amanullah were discussed and partially amended. Whereas under the Constitution of Amanullah no one could be punished except as provided in the general or military criminal code, the *Loya Jirga* reintroduced the possibility of punishment according to the rules of *shari'a* and other laws which were codified in accordance with the rules of *shari'a*.

<sup>29</sup> Kamali, see note 11, 212.

<sup>30</sup> N.M. Chishti, *Constitutional Development in Afghanistan*, 1998, 33.

<sup>31</sup> Kamali, see note 11, 212.



tres.<sup>32</sup> If this was the case, it was a rather impractical regulation, since parties had to travel over long distances into the provincial centres before they were able to refer their cases to the Primary Courts, which were much more conveniently situated.<sup>33</sup> The Courts of Reconciliation were supposed to attempt to reach an agreement by the parties; their decisions were to be based entirely on the agreement itself and hence not subject to appeal.<sup>34</sup> The Reconciliation Courts were competent in civil and commercial cases only, criminal cases fell in the jurisdiction of the ordinary courts.

The judges in these courts were to be appointed by the monarch on proposal of the Provincial Governors and recommendation by the Minister of Justice. A most interesting and important fact was that these judges would be selected among respectable persons known for their trustworthiness.<sup>35</sup> Remarkably, it was not a legal prerequisite for judges to have a religious education. Since the Reconciliation Courts were only supposed to reach agreements between the parties, they did not have to apply *shari'a* law. As a consequence for the first time it was not necessary to be part of the religious establishment in order to be appointed as a judge.

The Reconciliation Courts lasted only until the mid-1930s. Their jurisdiction in relation to commercial matters was then transferred to the newly established Commercial Courts, and the authority in civil cases was transferred back to the ordinary courts.<sup>36 37</sup>

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<sup>32</sup> Kamali, see note 11, 215.

<sup>33</sup> Unfortunately, it was impossible to obtain a copy of the text of the *Nizamnama* of Basic Organisation of 1923.

<sup>34</sup> Kamali, see note 11, 215.

<sup>35</sup> Article 211 *Nizamname* of Basic Organisation 1923, cited after Kamali, see note 11, 215.

<sup>36</sup> Kamali, see note 11, 215.

<sup>37</sup> However, a formal mediatory element as in the Reconciliation Courts is highly recommendable for the judicial system of Afghanistan bearing in mind the relatively high level of formality to be observed in the ordinary courts, as well as the high rate of illiteracy and the lack of qualified lawyers. Moreover, the century-old Afghan tradition of *Jirgas* or *Shuras*, i.e. gatherings of villagers or tribesmen designed to reach solutions for conflicts based on an agreement by both parties illustrates that the idea of mediation is deeply rooted in the Afghan society. For details see W. Steul, *Paschtunwali-Ein Ehrenkodex und seine rechtliche Relevanz*, 1981. These courts could serve as an inspiration for future judicial reforms.

Review by higher courts against decisions of the Primary Courts was only given if certain prerequisites were met.<sup>38</sup> In criminal cases, death sentences were to be automatically referred to all three instances and had to be approved by the monarch; sentences of the Primary Courts with regard to felonies were also referred to a higher court as a rule.<sup>39</sup> Furthermore, the defendant could appeal against sentences involving corporal punishment or damaging his reputation. According to Kamali, the Primary Courts consisted of different chambers for civil, criminal and commercial disputes.<sup>40</sup> However, since the Primary Courts were equipped with only one *qadi* and two *muftis*, it is not very likely that they all consisted of different chambers. It is much more probable that only the Urban Primary Courts in provincial centres had special chambers, as is provided today by arts 41 and 46 of the LOJC (2005) with regard to the Urban Primary Courts situated in provincial centres.

The Courts of Appeal were to be established in each provincial capital and were composed of one *qadi*, four *muftis* and two clerks. There were chambers for civil, criminal and commercial disputes.<sup>41</sup> In Kabul, the High Board of Cassation was established which served as court of final appeal for entire Afghanistan.<sup>42</sup> While the Appeal and Primary Courts were authorised to review the facts of the case, the Cassation Board was solely authorised to act on appeal of law and thus confined to examine the compliance of the lower courts with the *shari'a* and the statutory laws. The Cassation Board could either confirm or reverse the decisions of the lower courts, but it did not have the authority to decide the case itself. The judges of the Cassation Board as well as those of the lower courts were to be appointed by the monarch, whereas the assisting judges could be appointed by the Minister of Justice or, in the case of Primary Courts, by the Provincial Governors.<sup>43</sup> Beside the ordinary system of courts, several courts of specialised experience were competent for the adjudication of special cases.

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<sup>38</sup> In civil cases, the Primary Courts were competent to issue final decisions up to a certain pecuniary value, which was slightly higher for Urban Primary Courts in provincial centres. For details see Kamali, see note 11, 212.

<sup>39</sup> Kamali, see note 11, 212.

<sup>40</sup> Kamali, see note 11, 213.

<sup>41</sup> Kamali, see note 11, 213.

<sup>42</sup> Kamali, see note 11, 213; the Board of Cassation sat in a combined session with the Kabul Court of Appeal. If a decision of the latter one was appealed the acting judges were excluded from the session of the Board.

<sup>43</sup> Kamali, see note 11, 213.

## b. Courts of Specialised Experience

### aa. Commercial Courts

Since religious minorities, especially Hindus and Jews, played a major role in the commercial life of Afghanistan, the demand for jurisdiction outside the shari'a courts was very high. Therefore in the late 19th century a board of commerce named *Panchat* was established in Kabul. The president of this board was elected by the Kabul merchants and often Hindus were elected as its presidents.<sup>44</sup> The board adjudicated trade disputes on the basis of commercial customs, contracts and documentary evidence.

The religious establishment has been very critical of the *Panchat*. In the course of the *Loya Jirga* of 1924<sup>45</sup> the *ulema* succeeded in putting forward a notion which restored the commercial jurisdiction to the *shari'a* courts and consequently abolished the *Panchat*. In turn a special chamber was created within the courts of general competence for commercial cases.<sup>46</sup>

### bb. Other Courts of Specialised Experience

Other courts of specialised experience were the Civil Servants Courts, the High Court for the Trial of Ministers and the Military Courts.

The Civil Servants Courts consisted of the State Council and the Provincial Consultative Council, which were both composed half of elected and half of appointed members and whose primary function was advisory. The State Council had to advise the government in legis-

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<sup>44</sup> Kamali, see note 11, 220.

<sup>45</sup> In this *Loya Jirga* the reforms of Amanullah were discussed controversially. The gathering was convened by Amanullah after it became clear that the traditional tribal and religious elites were strongly antagonised by Amanullah's reforms. For details see Poullada, note 23.

<sup>46</sup> In 1931, a Commercial Disputes Tribunal (*faysala-e monaazi'at-e tidjarat*) was set up in Kabul, which was followed several years later by tribunals in Qandahar and Mazar-e Sharif. The authority for appeals lay with the Chamber of Commerce in Kabul; final appeals were to be considered by the Counsel of the Ministry of Commerce. Later on in 1949, a three-tiered court structure was established with a Court of Commercial Appeal (*mahkama-e moraafi'a-e tidjarati*) and a Cassation Court of Commerce (*mahkama-e tamiz-e tidjarati*), both situated in Kabul, Kamali, see note 11, 220.

lative matters and had to prepare draft legislation, while the Provincial Council's duty was to consider provincial administrative affairs under the supervision of the provincial governors.<sup>47</sup> Moreover, the Councils were competent to adjudicate all criminal charges brought against government officials in the capital or the provinces respectively. The State Council additionally served as a Court of Appeal and Cassation. It is remarkable that these courts were empowered to adjudicate charges brought against judges and judicial employees including *qadis* and *muf-tis*,<sup>48</sup> since they were regarded as regular civil servants.

The High Court for the Trial of Ministers (*diwan-e 'ali*) was an *ad hoc* tribunal, whose only duty was to investigate and adjudicate charges of misconduct brought against ministers.<sup>49</sup> The judges of these courts of specialised experience did not have to be elected from the religious establishment, since the relevant provisions were not part of the *shari'a*. Thus, the introduction of these courts undermined the influence of the *ulema* in the judiciary.<sup>50</sup> Moreover, Amanullah established a public administration academy in Kabul (*Dar al- hukkam*) in the 1920s to train administrative and judicial personnel. Although this academy could have served as a base for a developing secular legal elite, it was much too small and its training programme too brief to supply the required personnel for the reforms of Amanullah.

Even though the reforms of Amanullah were very ambitious, the promotion of judicial independence was not on their agenda. Although the Constitution of 1923 stated that "in Afghanistan all courts of justice are independent and immune from all forms of interference", it is doubtful whether this proclamation led to a greater freedom of the courts. The judiciary was still a part of the executive branch, which is illustrated by the fact that the Civil Servant Courts had the authority to sentence judges.<sup>51</sup> It was not until the Constitution of 1964 was introduced that the first steps in the direction of judicial independence were taken.<sup>52</sup>

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<sup>47</sup> Kamali, see note 11, 216 et seq.

<sup>48</sup> Kamali, see note 11, 216 et seq.

<sup>49</sup> For details Kamali, see note 11, 217 et seq.

<sup>50</sup> Kamali, see note 11, 212 et seq.

<sup>51</sup> The fact that the judiciary was still firmly in the hands of the overwhelmingly conservative religious establishment certainly did not serve as a strong motivation for any plans in this direction.

<sup>52</sup> Kamali, see note 11, 208; R. Grote, "Separation of Powers in the New Afghan Constitution", *ZaöRV* 64 (2004), 897 et seq.; Chishti, see note 30, 33.

With regard to the laws applicable by the courts, the Constitution of 1923 surely was the most liberal one Afghanistan ever had. For example, it did not confine judicial practice to a particular school of Islam. Article 21 provided that “In the courts of justice all disputes and cases will be decided in accordance with the principles of *shari’*a and of general civil and criminal laws.”<sup>53</sup> Accordingly, the judges were enabled to consult different schools of *shari’*a for the most appropriate and even for the most modern solution<sup>54</sup> whereas in other Afghan Constitutions<sup>55</sup> judges have been restricted to an application of the *Hanafi* school of law.

Since several of the reforms of Amanullah, especially those which undermined the power of the religious establishment, aroused much protest from the *ulema*, Amanullah lost most of his Islamic legitimacy in the eyes of the people. Furthermore, his economic reforms curbed the interests of the tribal chiefs and therefore antagonised them. Amanullah was overthrown by a rebellion led by Habibullah.<sup>56</sup>

### 3. Reaction and Slow Modernisation (1931-1964)

During his rebellion Habibullah relied mostly on the support of the religious leaders. After he was declared king (1929) he returned the responsibility for the administration of justice and education to them.<sup>57</sup> However, the short episode of Habibullah’s quite anarchic rule ended already in the same year when Nader Shah (reign 1929-1933), a former general of the Anglo-Afghan war and member of the royal family con-

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<sup>53</sup> Kamali, see note 11, 30.

<sup>54</sup> Kamali, see note 11, 30.

<sup>55</sup> E.g. in the present Constitution of 2004, article 130.

<sup>56</sup> In this atmosphere an attempt of his government to curb smuggling and toll collection in some border regions led to a rebellion of a northern Tajik tribe. An incident, which under normal circumstances would have been a routine confrontation, gained religious backing from many of the *ulema*. In the course of this rebellion the army failed to support Amanullah effectively. Kabul was taken and the leader of the northern rebellion Habibullah, was declared king. Amanullah had to flee in exile to Italy where he died in 1960, cf. Rubin, see note 11, 57; Ewans, see note 10, 129 et seq.; Poullada, see note 23, 1 et seq.

<sup>57</sup> Ewans, see note 10, 136.

quered Kabul, and took the throne.<sup>58</sup> As a reaction to the anarchy following the downfall of Amanullah in 1929, the 1931 Constitution enacted by Nader Shah emphasised the unity of Afghanistan and the supreme powers and competencies of the monarchy.<sup>59</sup> Nader Shah, who at least in theory, shared the goal of modernisation with Amanullah, was much more cautious and went to some length to appease the religious establishment. He abrogated most of the controversial *Nizam-nama* legislation and confirmed the enforcement of religious laws via religious courts as reintroduced by Habibullah.<sup>60</sup> Arts 87, 88 of the Constitution of 1931 stated that general lawsuits had to be filed under *shari'a* law and that these suits had to be dealt with in accordance with the principles of the *Hanafi* jurisprudence, while a recourse to statutory law was not mentioned.

As already elaborated, Amanullah's attempt to build up a legal elite beside the religious establishment failed. Therefore until the early 1940s, when the Faculties of Law and Political Science and the Faculty of *Shari'a* at the University of Kabul were established, a certificate of religious schools (*madradas*) remained the sole educational credential for entry to the judiciary.<sup>61</sup> Even after their establishment, the Law of Civil Procedure of 1957, for example, provided as a prerequisite for judicial appointment that a *qadi* had "to be fully knowledgeable in *fiqh*, (i.e. religious law), especially in Hanafi *fiqh* and to be able to apply the authoritative rules thereof in settling the disputes before him" (article 4). Additionally, the "*qadi* had to have full information of the state laws, especially those concerning judicial affairs". Notwithstanding the existence of two law faculties in Kabul, a legal certificate issued by them was not demanded as a requirement for appointment as a *qadi*. Article 2 of the same law<sup>62</sup> is also telling in this respect, describing the *qadi* as "the ruler of *shari'a* who is appointed by the sovereign or his regent, and who settles the disputes before him in accordance to the provisions of *shari'a*". This shows that for the decades following the downfall of Amanullah the influence of the religious establishment on the judiciary

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<sup>58</sup> Ewans, see note 10, 136 et seq.

<sup>59</sup> R. Magnus, "The Constitution of 1964", in: L. Dupree/ L. Albert (ed.), *Afghanistan in the 1970s*, 1974, 54 et seq.

<sup>60</sup> Ewans, see note 10, 139.

<sup>61</sup> Kamali, see note 11, 207; M.G. Weinbaum, "Legal Elites in Afghan Society", *International Journal of Middle East Studies* 12 (1980), 39 et seq.

<sup>62</sup> Quoted according to Kamali, see note 11, 229.

remained intact, with the sole exception of the courts of specialised experience.

After the assassination of Nader Shah in 1933, his son Mohammad Zahir Shah (reign 1933-1973) followed him to the throne. In the following decades the various uncles and cousins of Zahir Shah, who served as prime ministers, dominated the politics of Afghanistan. The most prominent of them was Daoud Khan, later the first president of the Republic of Afghanistan (Presidency 1973-1978).

Daoud served as prime minister from 1953 until 1963. While on the one hand, Daoud's term as prime minister was characterised by many successful modernisations, these modernisations were accompanied on the other hand by a curtailment of civil rights and freedoms and by an increased concentration of power in the hands of the central government.<sup>63</sup> While the intelligentsia was antagonised by the first, the latter upset the traditional tribal elites. After having also alienated the royal family by his tendency to reach basic decisions without their consent Daoud had to resign.<sup>64</sup> The resulting power vacuum provided a unique opportunity for these three forces ( i.e. intelligentsia, traditional tribal elite and royal family) to join and reach a broadly based compromise for the sharing of power.

#### **4. The Liberal Period of Afghanistan and the Constitution of 1964**

The result of this compromise was the Constitution of 1964. Contrary to the aims of the Constitution of 1931, its main objective was a separation and coordination of the different branches of power.<sup>65</sup>

This constitution is remarkable in many aspects. It was a product of ample negotiations and compromises between the various factions. Therefore the judicial modernisations were less ambitious but much more realistic than the reforms of the 1920s and also more systematic and consistent. The widespread acceptance of the 1964 constitution is underlined by the fact that the Bonn Agreement chose this constitution

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<sup>63</sup> Magnus, see note 59, 54 et seq.

<sup>64</sup> For details see Magnus, see note 59, 54; Ewans, see note 10, 165.

<sup>65</sup> Magnus, see note 59, 54.

as the legal framework of the transitional order.<sup>66</sup> Moreover the constitution of 2004 is in wide parts inspired by the constitution of 1964.

#### a. The Separation of Powers and First Attempts to an Independent Judiciary

Arts 97 and 98 of the constitution established the judiciary as an independent organ of the state. Article 98 was an important provision declaring the judiciary to be the sole organ competent to adjudicate in legal disputes, including those in which the state was a party. It was prohibited for any law to exclude a case from the jurisdiction of the judiciary. As an institutional guarantee of an independent judiciary, article 107 established the Supreme Court (*Stera Mahkama*) as the organ heading the judiciary of Afghanistan, which besides its judicial authority was also the highest administrative organ of the judiciary. The Supreme Court was responsible for the regulation of the organisation and functioning of the courts including the recommendation of candidates for judicial appointment to the king, as well as their promotion, transfer and recommendation for retirement. The Supreme Court furthermore was responsible to hear cases of judges suspected of having committed offences. Moreover, the Supreme Court was competent to appoint, promote, dismiss and retire the civil servants and administrative employees of the judiciary.<sup>67</sup> The Chief Justice (*qazi-ol'qozat*) was also responsible for the preparation of the budget of the judiciary, which was administered by the Supreme Court (article 107). Finally, the Supreme Court was competent to propose laws concerning judicial matters to the Parliament (article 70).

The nine judges of the Supreme Court including the Chief Justice were to be appointed by the king according to article 105. Under the same provision, the king was allowed to review the appointment of the judges after a period of ten years. Apart from that, removal of the judges was only allowed in case one third of the members of the Lower House demanded the impeachment of one or several members of the Supreme Court due to a charge of a crime stemming from the performance of their duties. To be successful, the impeachment had to be approved by a two-thirds majority of its members (article 106).

Supreme Court judges were prohibited from becoming ministers, government officials or members of the legislative after their term of of-

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<sup>66</sup> Article II 1. of the Bonn Agreement.

<sup>67</sup> Article 107 of the 1964 Constitution.



office (article 105). In return they enjoyed the financial benefits of their term of office until the end of life as long as they had not been removed from office in an impeachment procedure.

Additionally, article 90 of the Law of Organisation and Jurisdiction of Courts (1967)<sup>68</sup> provided that if a judge should join a political party or be nominated for membership in parliament or even the municipal council, he should resign from his office.

## **b. Criteria for Judicial Appointment**

### *aa. Supreme Court Judges*

Supreme Court judges had to be at least 35 years old (40 for the Chief Justice), they had to be eligible for election to the national assembly (*shura*)<sup>69</sup> and had to have “sufficient knowledge of jurisprudence, the national objectives and the laws and legal system of Afghanistan” (article 105). Therefore a formal decree of an institution of higher education was not necessary to qualify as Supreme Court judge. Thus this could imply that persons with an exclusively religious education could qualify as judges. However, according to Afghan legal experts article 105 has been interpreted as requiring familiarity with both Islamic and non-Islamic sources of law.<sup>70</sup> For example in the late 1960s, only two of the judges of the Supreme Court were religious dignitaries, both of them with long-standing judicial experience, the other ones were all graduates from Kabul university with postgraduate training in the West.<sup>71</sup>

### *bb. Regular Judges*

With regard to the regular judges, the criteria for appointment were stated in article 75 of the LOJC (1967). According to No.4 of that article, candidates must have a degree similar to a Bachelor of Arts of the Faculty of Law and Political Science or the Faculty of *Shari'a* or a licence from an official religious college (*madrasa*) run by the state. Until

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<sup>68</sup> Decree No. 588-2189 of 1967 published in the Official Gazette No. 89.

<sup>69</sup> This included according to article 46 being Afghan National for at least ten years, not being punished by a court with the deprivation of the political rights after the promulgation of the constitution and not being illiterate.

<sup>70</sup> International Crisis Group Asia Report No. 45, “Judicial Reform and Transitional Justice”, 2003, 10.

<sup>71</sup> Kamali, see note 11, 208.

the late 1960s judges were almost exclusively drawn either from the graduates of the Faculty of *Shari'a* in Kabul, from the nine state-run religious high schools or from private religious studies in mosques.<sup>72</sup> The latter appointments were obviously not in compliance with the legal prerequisites. This shows that an Islamic education was still the best guarantee for the entrance to the judiciary. However, article 102 of the Constitution of 1964, in contrast to its predecessor of 1931, explicitly reduced the application of *shari'a* law and required the courts to settle disputes by applying the Constitution and the laws of the state.<sup>73</sup> Thus, judges had to be familiar with Western legal practices besides having knowledge of Islamic law. Hence, the judiciary started to diversify its sources of recruitment and to attract more people who had undergone higher education. Additionally, a one-year judicial training programme was initiated in 1968. Senior judges, administrators and law professors were employed to strengthen the credentials of the candidates. Prospective judges with an Islamic education received a survey of Western legal principles and prevailing Afghan statutes while those with a secular education received Islamic *Shari'a* studies.<sup>74</sup> Admission quotas were established requiring a certain percentage of candidates to have a degree from the Faculty of Law.<sup>75</sup> The aims of this policy have widely been achieved, which is illustrated by the fact that while in 1968 about 80 per cent of the judges were religious dignitaries with no formal education, only four years later their contingent had dwindled to 53 per cent.<sup>76</sup>

### c. The Structure of Courts according to the Constitution of 1964 and the Law of the Structure and Organisation of Courts

The LOJC (1967) with the guidelines of the Constitution introduced a basically three-tiered system. The Primary Courts (arts 56-62) as courts of first instance had general jurisdiction in cases of criminal and civil law with the exception of cases falling under the special authorities of the Provincial Courts (arts 43-55). The Provincial Courts were partly courts of first instance in cases related to crimes of government officials stemming from the performance of their office, press offences, smuggling and other offences as promulgated by law. They were also compe-

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<sup>72</sup> Weinbaum, see note 61, 47.

<sup>73</sup> Article 102 of the Constitution of 1964.

<sup>74</sup> Weinbaum, see note 61, 44; Kamali, see note 11, 207.

<sup>75</sup> Weinbaum, see note 61, 47.

<sup>76</sup> Kamali, see note 11, 231.

tent in cases of tax claims and in cases of challenges of parliamentary elections and municipal or provincial council elections. Beside the Provincial Courts also had appellate jurisdiction concerning the judgments of the Primary Courts (article 36).

The President of the Provincial Court had the authority to establish a Chamber for Commercial Cases (article 47). If necessary, he had to appoint a judge for the adjudication of juvenile cases until a Juvenile Court was established (article 48).

The High Central Court of Appeal (arts 35-42) was situated in Kabul and was competent to review the factual and legal circumstances of first instance decisions of the Provincial Courts in cases of appeal, including cases of commercial and labour law. Later on this court was abrogated and its duties were transferred to a Central Public Security and Commercial Appeal Court.<sup>77</sup>

The Supreme Court (arts 5-17) was the highest organ of the judiciary empowered with administrative powers over the judiciary as well as with certain judicial authorities (article 13), most notably the decision whether laws were inconsistent with the constitution as well as the decision on the interpretation of the application of laws. Within the Supreme Court, a Court of Cassation was established (arts 18-34). The Court of Cassation was competent to review all verdicts of the Provincial Courts which were appealed on points of law (article 28). The Court of Cassation had to review the conformity of the decision with the law as well as with the principles of the *shari'a* (article 30). The lower courts were enabled to follow the precedents of the Court of Cassation (article 24).

Apart from the power of the King to appoint Supreme Court judges without the legislature playing a part in the nomination, the Constitution of 1964 provided the basic principles allowing for the development of an independent judiciary; surely, the legal prerequisites had never been better. However, in the brief period between 1964 and 1973, the courts were just beginning to form an independent entity and did not present real challenges to the executive or legislative authorities. In the only case that might have tested the power of the judiciary involving a

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<sup>77</sup> Decree No. 1380-415 of 1968 published in the Official Gazette No. 117.

dispute between the legislature and the executive about the budgetary authority, the King intervened and resolved the dispute.<sup>78</sup>

All in all, the Afghan legal system in the 1960s and 70s seems to have developed very slowly but steadily in the direction of a modern independent and self-confident judiciary with judges becoming more educated and better qualified to handle statutory laws. From this time on, a legal elite was beginning to emerge, substituting the religious establishment in administering law. This developing elite was decimated in the years of regime change and civil unrest.<sup>79</sup> The overwhelming majority of the members of this developing elite was either killed or imprisoned by the opposing factions or left the country. While the composition of the judiciary remained still largely intact during the presidency of President Daoud, it is unclear according to which prerequisites and criteria judges have been employed and appointed later on. It has been personally reported to the author by top ranking officials of the present Ministry of Justice that, for example, military service was regarded sufficient for at least judicial advancement if not even appointment to the judiciary during the communist rule. Likewise it seems that over the years of civil war and even after the fall of the *Taliban* in 2001, judges were appointed who lacked the legal prerequisites and had only very basic and solely religious education.<sup>80</sup>

## 5. The Period of Revolution and Civil Turmoil 1973-2001

### a. The Presidency of Daoud 1973-1978

With the proclamation of the Republic of Afghanistan by President Daoud following his *coup d'état* in 1973, the Supreme Court was abol-

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<sup>78</sup> J.A. Thier, "Re-establishing the Judicial System in Afghanistan," CDDRL Working Papers No. 19 (2004), Stanford Institute for International Studies, 1 et seq.

<sup>79</sup> Currently 7 per cent of the active judges have been appointed during the reign of Zahir Shah. Livingston Armytage, *Judicial Training Assessment and Strategy [Afghanistan]*, Centre for Judicial Studies, 2006.

<sup>80</sup> Around 20.5 per cent of the active judges have only primary, secondary or high school education. Armytage, see note 79; see also Thier, see note 78; United States Institute for Peace, *Establishing the Rule of Law in Afghanistan*, Special Report 117, 7 et seq., 2004, <<http://www.usip.org/pubs/specialreports/sr117.html>>.

ished and the authorities of the Supreme Court were transferred to the Committee of Public Justice of the Ministry of Justice, whose title was changed to High Council of the Judiciary.<sup>81</sup> The authority of the Chief Justice was transferred to the Minister of Justice. The structure of the other courts remained intact according to the 1967 Statute. The experience of the following years led to the re-introduction of a Supreme Court in the newly enacted Constitution from 27 February 1977.<sup>82</sup> The Supreme Court was once again attributed with its former competencies (arts 101, 112). Nevertheless, even in the text of this constitution the decline of the independence of the judiciary is visible. Article 76 introduces the judiciary as an organ of the state without even mentioning its independence. The President of the Republic appointed the judges of the Supreme Court as well as the Chief Justice (article 107), and interaction with other state organs was not provided. Furthermore, article 104 para. 4 gave the President of the Republic the possibility to review the appointment of the judges after a period of five years instead of the ten years established in the Constitution of 1964.<sup>83</sup>

#### b. The Communist Regime

Before the Supreme Court was re-established, the government of President Daoud was overthrown in yet another *coup d'état* by communist forces.<sup>84</sup> According to the proclamation of the Revolutionary Military Council of the Democratic Republic of Afghanistan<sup>85</sup>, the Constitution of 1977 was repealed and all affairs of the country had to be regulated by decrees and administrative regulations by the Revolutionary Council of the Democratic Republic of Afghanistan. The Revolutionary Council declared all previous laws and regulations with the exception of the Constitution of 1977 should remain in force as long as they were in compliance with the aims of the Democratic Republic of Afghanistan

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<sup>81</sup> M.O. Zhobal, *A short glance on the Activities of the Judiciary Organ[sic] of Afghanistan (1357-1368)*, in Persian, 1990, 19.

<sup>82</sup> Published in the Official Gazette No. 360.

<sup>83</sup> With regard to the lack of independence of the judiciary see also R. Bachardoust, *Afghanistan Droit constitutionnel, histoire, régime politiques et relations diplomatiques depuis 1747*, 2002, 146.

<sup>84</sup> For details Ewans, see note 10, 176 et seq.

<sup>85</sup> Decree of the Revolutionary Military Council of the Democratic Republic of Afghanistan of 6 May 1978, published in the Official Gazette No. 396.

and were not revoked by the Revolutionary Council.<sup>86</sup> Article 2 of the same decree transferred the authorities of the Supreme Court to a Supreme Judicial Council which was headed by the Minister of Justice and accountable to the Revolutionary Council, while the authorities of the Chief Justice were once again transferred to the Minister of Justice.<sup>87</sup> The duties of the Supreme Judicial Council were vaguely described as the defence of the laws of the Democratic Republic of Afghanistan and of the well being of the people, the verification of the desires of the revolution as well as the basic outline of policy and revolutionary duties as sanctioned by the Revolutionary Council. Furthermore, article 7 introduced a Revolutionary Court of the armed forces having indeterminate competency for crimes against the revolution or the profit of the people, public goods or the internal or external security of the Democratic Republic of Afghanistan. This system of revolutionary courts was changed and renamed several times in the years of the communist regime until their abolition in 1990.<sup>88</sup> Since these courts were a peculiarity of the communist era and had no influence on the present system of courts, they are not examined in detail at this stage.<sup>89</sup>

The communist constitution of 1980<sup>90</sup> once again reintroduced the Supreme Court as the highest organ of the judiciary.<sup>91</sup> It had the authority and duty to control the judiciary and to supervise its methods and its unity. Article 56 promulgated the independence of the judges. Curiously enough, however, article 55 provided that the Supreme Court had to report to the Revolutionary Council on a regular basis. All the judges of regular courts as well as the Supreme Court were to be appointed by the cabinet of the President of the Revolutionary Council; candidates were usually proposed by the Supreme Court.<sup>92</sup> Article 54 established special tribunals for cases which had to be defined by law.

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<sup>86</sup> Decree No. 3 of the Revolutionary Council of the Democratic Republic of Afghanistan of 28 May 1978 published in the Official Gazette No. 398, article 1.

<sup>87</sup> Article 6 of Decree No. 3.

<sup>88</sup> See M.H. Saboory, "The Progress of Constitutionalism in Afghanistan", in: N. Yassari (ed.), *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt-Implications for Private Law*, 2005, 12 et seq.; for a detailed report about this period see Zhobal, see note 81, 19 et seq.

<sup>89</sup> For details see Zhobal, see note 81.

<sup>90</sup> Constitution of 21 April 1980 published in the Official Gazette No. 450.

<sup>91</sup> Arts 54-58; quoted after Zhobal, see note 81, 32.

<sup>92</sup> Zhobal, see note 81, 32.

As a part of the attempts of the regime to raise popular support, a new constitution was enacted in 1987<sup>93</sup> which introduced only few changes in the structure of the courts. Article 107 declared the judiciary to be an independent organ of the state and article 109 confirmed the Supreme Court as the highest judicial organ responsible for supervising the activities of the courts and ensuring the uniform application of law. According to article 110, the Chief Justice as well as the members of the Supreme Court were appointed by the President for a period of six years.

### c. The Internal War of the *Mudjahedin*

With the revision of the Constitution in 1990 removing the last vestiges of communism, additional changes were introduced. Article 110 provided that the Chief Justice was accountable to the President and had to report to him. Furthermore in 1990, a new Law on the Organisation and Jurisdiction of Courts was introduced.<sup>94</sup> However, since the *Taliban* later abolished all laws and regulations promulgated by the communist regime and reintroduced the system of laws that had been in practice under the reign of Zahir Shah,<sup>95</sup> this rather short-lived law shall not be analysed in detail.

The following years were mainly years of civil war between the various factions of *mudjahedin* warriors. In 1992 a new constitution for the Islamic Republic of Afghanistan was drafted. However, it was never promulgated, which clearly indicates the inability to reach agreements between the different factions. Stability was not reached until the *Taliban* movement conquered Kabul at the end of September 1996 and established their radical Islamic system throughout most of the country.<sup>96</sup>

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<sup>93</sup> Constitution of 30 November 1987 published in the Official Gazette No. 660.

<sup>94</sup> Decree No. 63 of the Council of Ministers 1990 Published in the Official Gazette No. 739.

<sup>95</sup> Ewans, see note 10, 267.

<sup>96</sup> For details see Ewans, see note 10, 261 et seq.

## 6. The Way from the Bonn Agreement to the Constitution of 2004

After the terrorist attacks on the World Trade centre the United States led a multilateral military campaign against the *Taliban* regime causing its downfall.<sup>97</sup> <sup>98</sup> In order to achieve a provisional basis for restructuring the country the “Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions”, also called the Bonn Agreement was signed in 2001.<sup>99</sup> The agreement has proved relatively successful, although the *Taliban* as one of the warring parties have remained absent.<sup>100</sup> The Bonn Agreement envisaged three phases of transition, the third and final one ended on 19 December 2005 with the inauguration of the elected Parliament. The Bonn Agreement established the Constitution of 1964 along with the existing laws as a legal framework to the extent that they were not inconsistent with the agreement or the international obligations of Afghanistan and the Constitution.<sup>101</sup> In accordance with the provisions of this agreement, a Constitutional Commission was appointed by the Transitional Administration to assist a Constitutional *Loya Jirga*<sup>102</sup> in adopting a new constitution.<sup>103</sup> After public consultations in the summer of 2003, the Constitutional Commission submitted the draft Con-

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<sup>97</sup> For details see A.H. Guhr/ E. Afsah, “Afghanistan: Building a State to Keep the Peace”, *Max Planck UNYB* 9 (2005), 373 et seq. (406).

<sup>98</sup> On the question of its legality see e.g. R. Wolfrum, “The Attack of September 11, 2001, the Wars against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?”, *Max Planck UNYB* 7 (2003), 1 et seq.; R. Wolfrum / C. Philipp, “The Status of the Taliban: Their Obligations and Rights under International Law”, *Max Planck UNYB* 6 (2002), 559 et seq.

<sup>99</sup> See note 7.

<sup>100</sup> For the history and the details leading to the Agreement cf. Guhr/ Afsah, see note 97.

<sup>101</sup> Article II. 1. of the Agreement.

<sup>102</sup> The Pashtu term *Loya Jirga* (grand assembly/council) is defined in the Constitution of 2004 in article 110 as the highest manifestation of the will of the Afghan people, being composed out of the members of the National Assembly and the Chairmen of the Provincial and District Councils. Traditionally a *Loya Jirga* was an assembly of delegates of the different Afghan tribes convening on a national level, to reach important decisions for the country as a whole.

<sup>103</sup> Article I. 6. of the Bonn Agreement.



stitution to the transitional government in late September 2003.<sup>104</sup> Finally, the Constitutional *Loya Jirga* accepted the draft with minor amendments on 4 of January 2004 and the Constitution was proclaimed on 26 January 2004.<sup>105</sup>

The Bonn Agreement stipulated in respect of the judiciary, under III. 2): “The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan Legal Traditions”.

Before dealing with the questions of conformity it will be necessary to outline the present court structure established according to the agreement.

### III. The Present Structure of Courts

Article 116 of the Constitution and article 2 para. 1 of LOJC (2005) establish the judiciary as an independent organ of the state, being composed of the Supreme Court (*Stera Mahkama*), the Courts of Appeal (*Mohakem e Estinaf*) and the Primary Courts (*Mohakem e Ebtedaje*).

#### 1. Primary Courts

Article 40 para. 1 of the LOJC (2005) establishes the following courts of first instance in the circuit of the Courts of Appeal:

- Urban Primary Courts
- Juvenile Courts
- Commercial Courts
- District Primary Courts
- Primary Courts for Personal Status

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<sup>104</sup> On the consultation process see International Crisis Group (ed.), “Afghanistan Briefing 12.12.2003, Afghanistan: The Constitutional Loya Jirga”, 2003, 1 et seq.

<sup>105</sup> Decree No. 103 published in the Official Gazette No. 818.

Generally the District Primary Courts or the Urban Primary Courts respectively are competent to handle cases unless it is promulgated otherwise by law. Unfortunately, the formulation of the respective legal provision is somewhat unclear.

#### a. General Competencies

Article 48 LOJC (2005) promulgates the general competencies of the District Primary Courts for the adjudication of all cases of regular criminality as well as cases of private law. The wording of this article seems quite unambiguous both in Persian as well as in the English translation thereby excluding the Urban Primary Courts from the cases of regular criminality. However, according to the information received by Afghan lawyers,<sup>106</sup> general jurisdiction concerning these cases is also given to the Urban Primary Courts. The question whether the District Primary Courts or the Urban Primary Courts are competent is to be decided solely by referring to the principles of local competency elaborated in the respective procedural laws. Hence, it seems that the terms *jaza'-e adi* used in article 48 LOJC when referring to the competence of the District Primary Courts and *jaza'-e omumi* used in article 44 para. 1 LOJC in regard to the competence of the Chamber of Criminal Law of the Urban Primary Court are meant as synonym. Quite opposite to most of the existing English translations, which tend to translate the second term as public criminality. Additional support for this result is provided by the fact that in a certain district there is either an Urban Primary Court or a District Primary Court but never the two of them. While the District Primary Courts regularly are composed of three judges<sup>107</sup> without a distinction into subdivisions, the Urban Primary Courts are situated in provincial centres and are composed of five chambers:

- The Chamber of Criminal Law
- The Chamber of Private Law
- The Chamber of Public Rights
- The Chamber of Public Security
- The Chamber of Traffic Violations<sup>108</sup>

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<sup>106</sup> Perception of my friend and colleague Mr. Gholamhaidar Allama of the Afghan Independent Human Rights Commission on 27 March 2006.

<sup>107</sup> Article 47 LOJC (2005).

<sup>108</sup> Article 41 LOJC (2005).

The chambers are composed of a president and a maximum of four judicial members.

### b. Exclusive Competencies

Article 46 LOJC (2005) establishes exclusive competencies for commercial cases, criminal cases concerning crimes against public security and public rights cases. Commercial Courts have to be established in each provincial capital (article 45 LOJC (2005)). If, as yet, there is no commercial court in one of the capitals, the Chamber of Private Law has jurisdiction in the case.<sup>109</sup> As an Afghan peculiarity, the procedure of the commercial court is written in an extra law and differs from the ordinary private procedural law, a fact probably due to the *pancham* jurisdiction mentioned above,<sup>110</sup> which was different from the *shari'a* jurisdiction of the ordinary courts.

The exclusive competence to adjudicate crimes against public security cases lies with the Chamber of Public Security.<sup>111</sup> The Chamber of Public Rights on the other hand has the competence to review cases concerning public rights.<sup>112</sup> Furthermore, there are other exclusive competencies with regard to cases of juvenile criminality<sup>113</sup> and cases of public criminal law.<sup>114</sup> Juvenile Courts have to be established in all provincial capitals (article 26 of the Juvenile Code and article 44 LOJC (2005)). It is an important and interesting feature of the Juvenile Courts that according to article 26 para. 3 of the Juvenile Code, in addition to the usual qualifications, juvenile judges must have a special disposition for interaction with minors, a special theoretical training and experience in affairs related to the trial of juveniles.

In case of necessity, the Supreme Court has the authority to establish further chambers within the Urban Primary Courts as well as

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<sup>109</sup> Article 45 para. 2 LOJC (2005).

<sup>110</sup> See under II. 2. b. aa.

<sup>111</sup> Article 42 para. 4 LOJC (2005), see below.

<sup>112</sup> Article 42 para. 3 LOJC, the slightly unclear meaning of the term public rights (*hoquq e ami*) will be elaborated under IV. 2. b.

<sup>113</sup> Article 26 para. 1 of the Juvenile Code.

<sup>114</sup> The meaning of the term in Dari terminology is unclear, referring to Iranian legal terminology, public crimes means crimes against objects protected in the interest of the community, e.g. destruction of public goods, M.J. Jafari-Langrudi, *Terminologije e hoquq* (Legal Terminology), 2004, 191.

within the District Primary Courts after approval by the President of the Republic (article 50, paras 1, 2).

## 2. Courts of Appeal

Article 31 para. 1 LOJC (2005) asks for the establishment of Courts of Appeal in each of the provinces of the country. These courts are composed of the following chambers (article 32 para. 1):

- Chamber of Criminal Law
- Chamber of Public Security
- Chamber of Private Law and Personal Status
- Chamber of Public Rights
- Commercial Chamber
- Juvenile Chamber

The number of judicial members of each chamber may not exceed six persons (article 32 para. 2 LOJC 2005). The Chamber of Criminal Law (article 32 para. 3 LOJC 2005) also has to review traffic cases. In accordance with article 32 para. 3 LOJC (2005), the Supreme Court can, if necessary, establish further chambers in the framework of the Court of Appeal after endorsement by the President of the Republic.

According to article 35 LOJC (2005) in connection with article 6 of the same law, the decisions and verdicts of the Court of Appeal are binding with regard to the factual circumstances of a case.

The Court of Appeal itself has to review all factual and legal aspects of the lawsuit anew and has the competence to correct, overrule, amend, approve or nullify sentences of the lower courts.<sup>115</sup> The prerequisites under which an appeal can be filed are regulated in the respective procedural laws (for problematic restrictions see below).<sup>116</sup>

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<sup>115</sup> Article 33 LOJC (2005).

<sup>116</sup> See under IV. 3. a.

### 3. The Supreme Court

#### a. Structure

The Supreme Court is the highest judicial organ and heads the judiciary (article 116 para. 3 of the Constitution, article 16 LOJC 2005). This has to be understood literally: the Supreme Court is not only the highest Court of Afghanistan, but also has administrative competencies comprising the competence to administer and manage the affairs of the whole judiciary, a task that is fulfilled by the Ministries of Justice in most European countries. In this regard the Constitution of 1964 has obviously served as the model.

The Supreme Court is composed of nine judges as members of the court, one of whom is appointed Chief Justice (article 117 para. 1 of the Constitution). After a differentiated regulation for the first term of office,<sup>117</sup> the President of the Republic will appoint them for a term of ten years with the approval of the Lower House (*Wolesy Jirga*). Prerequisites for their appointment are stipulated by article 118 of the Constitution.<sup>118</sup> Of special interest are the prerequisites concerning the legal education. Here the constitution stipulates that candidates must have attained higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan. Hence, the appointment of judges having only religious legal education is explicitly allowed, whereas the Constitution of 1964 asked for “sufficient knowledge of jurisprudence, [...] and the laws [...] in

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<sup>117</sup> Article 117 para. 2 of the Constitution: Three members are appointed for a period of four years, three members for seven years and three members for ten years. Later appointments will be for a period of ten years.

<sup>118</sup> Article 118 of the Constitution:

“A member of the Supreme Court shall have the following qualifications:

-- The age of the Head of the Supreme Court and its members should not be lower than forty at the time of appointment.

-- Shall be a citizen of Afghanistan.

-- Shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan.

-- Shall have high ethical standards and a reputation of good deeds.

-- Shall not have been convicted of crimes against humanity, crimes, and sentenced of deprivation of his civil rights by a court.

-- Shall not be a member of any political party during the term of official duty.”

Afghanistan”,<sup>119</sup> which has been understood as requiring experience in both Islamic and secular law.<sup>120</sup> One may argue that the requisite of competence and experience in the Afghan legal system will serve as a regulator since the Afghan system, despite its numerous roots in Islamic law, also has strong components of secularly rooted laws. One can therefore argue that competence and experience in the legal system asks for more than an education purely based on religious law.

Article 117 para. 3 of the Constitution prohibits a second appointment of Supreme Court judges. Article 126 of the Constitution provides that former members of the Supreme Court enjoy financial benefits for the rest of their lives after finishing their term of office if they do not occupy administrative or political positions afterwards and have not been impeached.

Article 127 para. 1 of the Constitution regulates the procedure of impeachment of Supreme Court judges. To achieve an impeachment, at least one-third of the delegates of the Lower House (*Wolesi Jirga*) have to demand a trial of a member of the Supreme Court due to a misdemeanour committed during the performance of his duty or due to a felony. Furthermore, the Lower House has to approve this request by a majority of two-thirds of all of its members in order to dismiss the accused from his office and refer the case to a special court, to be established by a special law.<sup>121</sup>

Article 118 No. 6 of the Constitution prohibits Supreme Court judges from being members of political parties during their term of office.<sup>122</sup> This provision serves as an additional requisite to ensure the independence of the judges from undue political influences.<sup>123</sup> It is a precautionary measure that is not particular to Afghanistan but is also used in a couple of other countries, e.g. in Hungary,<sup>124</sup> to shield judges from political influence and to support the perception of the judiciary, in the eyes of the citizens, as an impartial organ of the state.

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<sup>119</sup> Article 105 No. 3 Constitution of 1964.

<sup>120</sup> See note 70.

<sup>121</sup> This law still remains to be elaborated by the new parliament.

<sup>122</sup> This prohibition is extended to regular judges by the provision of article 15 LOJC (2005).

<sup>123</sup> Article 118 No. 6 of the Constitution.

<sup>124</sup> Article 32 lit. a para. 5 Hungarian Constitution of 1949 prohibits judges of the Constitutional Court to be a member of political parties.

## b. Adjudicative Competencies

The duties and authorities of the Supreme Court are extensive. First there are judicial competencies directly related to the administration of justice. These are summarised in article 24 LOJC (2005) encompassing:

- The review of the conformity of laws, legislative decrees<sup>125</sup> and international treaties with the Constitution and their interpretation on request of the government or courts.<sup>126</sup>

Reading this provision together with article 3 of the Constitution, stating that no law can be contrary to the beliefs and provisions of the sacred religion of Islam, the court also has the power to strike down laws and provisions on the basis that they are contrary to the provisions of the Islam.<sup>127</sup>

- The proposal of legislation concerning the regulation of affairs of the judiciary to the National Assembly via the government;
- The reopening of final judgments based on newly emerged evidence upon request of the General Attorney or the parties according to the provisions of the respective law;
- The settlement of disputes between different courts with regard to competences on the request of the General Attorney or the parties;
- The competence to review the grounds of decisions in cases of extradition of criminals, both Afghan citizens and foreigners, to a foreign state and to promulgate the final decision;
- The Supreme Court is furthermore obliged to guarantee the uniformity of the judicial practice;
- Decisions on criminal and disciplinary violations of judges;
- To reply to legal questions of lower courts.

The Supreme Court generally takes care of these duties in plenary sessions. Ordinary sessions are convened every 15 days. Extraordinary sessions can be summoned upon the request of the Chief Justice, a pro-

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<sup>125</sup> This refers to decrees by the executive in accordance with article 159 of the Constitution for the interim period before the inauguration of the first parliament on 19 December 2005.

<sup>126</sup> This authority is also stated in the constitution see article 121.

<sup>127</sup> See also Thier, see note 78, 9; Grote, see note 52, 912; M. Lau, "The Independence of Judges under Islamic Law, International Law and the new Afghan Constitution", *ZaöRV* 64 (2004), 917 et seq. (925); R. Schmidt, "Wieviel Altes im Neuen?", *IP* 61 (2006), 104 et seq. (106).

posals by the General Attorney or a request of a third of the members of the Supreme Court.<sup>128</sup> Concerning its duty to guarantee the uniformity of judicial practice in its function as cassation court, decisions are not made in plenary sessions but by chambers of the Court.

Article 26 para. 1 LOJC (2005) states that if a chamber of the Supreme Court determines that the decision of a lower court contradicts the law, or is mistaken in its implementation or interpretation, the chamber of the Supreme Court will overrule the decision and will redeliver the case to a lower court in order to get a new decision. The Supreme Court is equipped with four chambers, which were introduced by article 18 para. 1 of the LOJC (2005):

- The Chamber of Criminal Law
- The Chamber of Public Security
- The Chamber of Civil Law and Public Rights and
- The Chamber of Commercial Law.

Each of the chambers is headed by one of the members of the Supreme Court.<sup>129</sup> The head of the chamber leads all activities of the chamber including its sessions. He is also responsible for the unification of the judicial practice of his chamber as well as for reporting to the Supreme Court Plenum. The exact shape of the chambers is not written down explicitly in the LOJC 2005.<sup>130</sup> However, article 6 LOJC (2005) stipulates that in case of an appeal on points of law to the Supreme Court, at least two members of the Supreme Court have to take part in the trial. Moreover, article 20 LOJC (2005) declares that the Supreme Court has judicial advisors<sup>131</sup> whose number shall not exceed 36.<sup>132</sup> It seems to be the practice<sup>133</sup> of the Supreme Court to have between eight

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<sup>128</sup> Article 25 LOJC (2005).

<sup>129</sup> Article 18 para. 2 LOJC (2005).

<sup>130</sup> In this regard the replaced LOJC dated 1967 (see note 68) should have been used as an example, with its detailed regulations about the different chambers in article 19.

<sup>131</sup> According to article 21 LOJC (2005) candidates are appointed from among the judges having competence, quality, knowledge and at least ten years of judicial experience.

<sup>132</sup> These judicial advisors have to analyse and review cases under consideration and prepare a report to the court so that a decision can be reached (article 22 LOJC (2005)).

<sup>133</sup> According to interviews with the Supreme Court conducted by my friend and colleague Mr. Pouya Esmailzadeh, whom I would like to thank warmly.



and ten advisors per chamber,<sup>134</sup> which results in a size of at least ten judges per chamber.

As a result of the importance of the appeal on points of law for the unification of the law, article 26 para. 1 LOJC (2005) also stipulates that the chambers of the Supreme Court can overrule decisions in case of violations of law even if this violation was not denounced in the plea. Article 28 LOJC (2005) declares decisions of higher courts on appealed cases binding for the lower courts.

With regard to the competencies of the Supreme Court, the question arises if the Supreme Court is a constitutional court. A constitutional court is characterised by its ability to control all three branches of state power with regard to their compliance with the constitution.<sup>135</sup> The Supreme Court has the power to review the conformity of laws with the constitution and with the principles and demands of Islam and thus controls the legislative power. Moreover, the Supreme Court controls the judiciary via its function as a court of cassation. However, a judicial control of the executive is still not existing, since an effective procedural administration law ensuring the control of the executive has yet to be implemented. Hence, as long as this prerequisite is not fulfilled, the Supreme Court of Afghanistan cannot be referred to as a constitutional court.

Another issue of concern is that the authority of the Supreme Court to control legislation as well as legislative decrees is designed in a very restrictive way. As the right to request a review of the conformity with the constitution is only conferred to the government and the lower courts,<sup>136</sup> all political forces which do not support the government are denied access to constitutional review of the legislation. Even the French Constitution, which in comparison with other constitutions aims at strengthening the position of the executive at the expense of the powers of parliament, grants the right to initiate proceedings before the Constitutional Council to the Presidents of both Houses of Parliament and to a quorum of members of parliament.<sup>137</sup> Therefore, it is questionable if the system of constitutional review will prove successful in Afghanistan.<sup>138</sup> There is also no possibility for ordinary citizens to file in-

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<sup>134</sup> The competence for the distribution of the judicial advisors to the different chambers lies with the Chief Justice (article 21 LOJC (2005)).

<sup>135</sup> K. Doehring, *Allgemeine Staatslehre*, 2004, 191.

<sup>136</sup> Article 121 of the Constitution, article 24 No. 1 LOJC (2005).

<sup>137</sup> Article 61 of the French Constitution of 1958.

<sup>138</sup> See also Grote, see note 52, 911.

dividual complaints alleging that their fundamental rights have been violated.

### **c. Administrative Competencies**

The administrative duties and authorities of the Supreme Court are elaborated in article 29 para. 1 LOJC (2005) encompassing:

- Devising the budget of the judiciary in consultation with the government;
- Heading and supervising the administrative activities of the other courts;
- Introduction of provisions and proposals to regulate the judicial and administrative affairs of courts;
- Reviewing results of scientific studies concerning the judicial affairs and the adoption of measures to solve problems of the courts and to unify their proceedings;
- Proposing candidates as judges and judicial advisors to the President of the Republic in accordance with the provisions of the LOJC;
- Proposing the appointment, transfer, promotion, extension of contracts and retirement of judges to the President in accordance with the provisions of this law;
- Proposing the establishment of courts and of administrative offices for the registration of documents, including their judicial and administrative competencies to the President of the Republic;
- Allocation of the budget of the judiciary;
- Ensuring the necessary facilities for the functioning of the courts;
- Conducting the inception course for the future judges and regulating the affairs related to the course;
- Adoption of the necessary measures to improve the level of education and experience of the judges;
- Supervision of the activities of administrative employees of the judiciary;
- Elaboration of annual statistics and reports of the activities of all courts of the judiciary;
- Other duties and authorities which have been assigned by this or other laws to the Supreme Court.

The Supreme Court performs these duties via the Public Administrative Department of the Judiciary.<sup>139</sup> This organ is introduced by article 23 para. 1 LOJC (2005) to improve the regulation of administrative as well as judicial affairs and is headed by an Administrative Director, who is appointed by the President of the Republic upon the proposal of the Chief Justice. Article 30 LOJC (2005) regulates the duties and authorities of the Chief Justice. They encompass *inter alia* the general leadership of the judicial and administrative activities of the Supreme Court. He is furthermore authorised to preside over the sessions of the Supreme Court as well as its tribunals, to supervise the enforcement of final judgements, to issue orders resulting from the review of cases of crimes or judicial or administrative transgression of judges. Finally, he may propose the amnesty or reduction of a punishment of a judge to the President of the Republic.

#### 4. Prerequisites for a Judicial Appointment

Article 58 LOJC (2005) establishes as criteria for the judicial appointment of the regular judges that candidates have to be Afghan nationals, that they are at least 25 years old and are free of a final conviction by a court due to the commitment of a felony or an intentional misdemeanour. Furthermore, they must hold at least Bachelor of Arts from the Faculty of Law and Political Science or the Faculty of *Shari'a*, a degree of an official state-run religious school (*madrassa*) or an equivalent to these and they must have successfully completed the inception course of the judiciary. Candidates fulfilling these prerequisites can be appointed judges by the President of the Republic on proposal of the Chief Justice. Candidates holding only a degree from one of the official state-run religious schools or its equivalent can be appointed for the first three years as a member of a primary court, a condition which seems to serve as a kind of apprenticeship. Finally, article 58 para. 3 LOJC (2005) gives the Supreme Court the authority to implement additional criteria if the number of applications exceeds the number of vacancies.

A point of critique in this regard certainly is the possibility to appoint candidates holding a degree of the Faculty of *Shari'a* and even those just holding a degree from official religious schools or their equivalent. Furthermore, it seems questionable which prerequisites will

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<sup>139</sup> Article 29 para. 2 LOJC (2005).

be accepted as being equivalent to a degree from official religious schools, especially with regard to the present shortage of judges, which may induce the authorities to be very lax on this point. Graduates from the religious schools tend to have a very poor knowledge of the actual law because they are mainly taught to memorise verses of the Koran and are normally not proficient with the use of legal text or even the principles of *shari'a*.<sup>140</sup>

For the future it would be highly advisable to realise existing plans to merge the Faculty of Law and Political Science and the Faculty of *Shari'a*.<sup>141</sup> Such a reform would streamline the universities in accordance with the structure of the modern Afghan system of law, which has merged the traditions of *shari'a* with the laws enacted by the state. A degree from this faculty should be the only acceptable educational degree for a judicial career.

Concerning the actual practice of nomination it has been widely criticised by researchers that judicial appointments are made on the basis of personal or political connections without regard to the legal prerequisites.<sup>142</sup>

#### IV. Conformity of the Organisation and Jurisdiction of Courts with the Bonn Agreement

As already elaborated, after the fall of the *Taliban* regime the Bonn Agreement mapped out the transition process leading to a new constitution and a permanent order. Concerning the judiciary, the Bonn Agreement stipulates in section III. 2): "The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan Legal Traditions".

<sup>140</sup> Weinbaum, see note 61, 44.

<sup>141</sup> For a sceptical view on the present education of jurists: Feinstein International Famine Center Tufts University, "Human Security and Livelihoods of Rural Afghans, 2002-2003", 2004, 207. <<http://nutrition.tufts.edu/pdf/research/famine/Mazurana.pdf>>.

<sup>142</sup> United States Institute for Peace, see note 80; Feinstein International Famine Center, see note 141, 208 et seq.

This part will examine the compliance of the justice system with the prerequisites of independence, rule of law, international standards and Afghan legal traditions. The question of compliance with Islamic principles will be left unanswered, since their exact content is heavily contested.

## 1. Independence

The idea of independence of the judiciary as required by the Bonn Agreement is a well-established legal doctrine. It has been embraced by numerous national constitutions and laws and has been recognized by various international treaties and legal instruments, starting with the Universal Declaration of Human Rights in 1948.<sup>143</sup> The principle is further promulgated by article 14 para. 1 ICCPR<sup>144</sup> and article 37<sup>145</sup> of the Convention on the Rights of the Child. Afghanistan is party to both of these international human rights instruments.<sup>146</sup> Moreover, the major regional human rights conventions also promote judicial independence.<sup>147</sup> Additionally it is enshrined in international humanitarian law<sup>148</sup> and in the statutes of international courts.<sup>149</sup>

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<sup>143</sup> Adopted and proclaimed by A/RES/217 A (III) of 10 December 1948. Stating in article 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

<sup>144</sup> Article 14 para. 1 “[...] In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

<sup>145</sup> Article 37 “States Parties shall ensure that:[...]  
d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

<sup>146</sup> Accession of Afghanistan to the ICCPR on 24 January 1983; Ratification of the Convention on the Rights of the Child by Afghanistan on 28 March 1994.

<sup>147</sup> See e.g. European Convention on Human Rights, article 6; American Convention on Human Rights, article 8; African Charter on Human and Peoples Rights’, article 7.

In order to concretise the meaning of judicial independence and allow for a monitoring of its implementation the United Nations General Assembly endorsed the Basic Principles on the Independence of the Judiciary.<sup>150</sup> Although as a General Assembly resolution these principles are not binding for the states,<sup>151</sup> they nevertheless provide good benchmarks for an assessment of the implementation of judicial independence. In addition to the UN Principles, several non-governmental organisations have created further comprehensive standards.<sup>152</sup>

The independence of the judiciary is derived from the most enduring components of justice, namely impartiality.<sup>153</sup> Independence refers to the autonomy of a judge or a bench in the application of the law to the facts when adjudicating cases. It can be more specifically described

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<sup>148</sup> See e.g. article 3 of the Geneva Conventions; Additional Protocol I article 75 para. 4; Additional Protocol II article 6 para. 2.

<sup>149</sup> Article 2 of the Statute of the International Court of Justice, UNCIO Vol. 15 (1945), 355 et seq.; article 40 of the Rome Statute 1998, UNTS Vol. 2187, No. 38544; article 12 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, S/RES/827 (1993) of 25 May 1993; article 11 of the Statute of the International Criminal Tribunal for Rwanda S/RES/955 (1994) of 8 November 1994; see also D. Shelton, "The Independence of International Tribunals", in: C. Trindade/ A. Augusto (eds), *The Modern World of Human Rights – Essays in Honour of T. Buergenthal*, 1996, 299 et seq.

<sup>150</sup> Basic Principles on the Independence of the Judiciary adopted by consensus on the seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in Milan, 6 September 1985 and endorsed by the General Assembly with A/RES/40/32 of 29 November 1985 para. 5. The General Assembly later specifically welcomed the principles and invited governments to respect them and to take them into account within the framework of their national legislation and practice, A/RES/40/146 of 13 December 1985, para. 2.

<sup>151</sup> K. Hailbronner/ E. Klein, "Article 10", in: B. Simma/ H. Mosler/ A. Randelzhofer/ C. Tomuschat/ R. Wolfrum (eds), *The Charter of the United Nations – A Commentary*, 2002, 268 et seq.; A. Cassese, *International Law*, 2005, 335.

<sup>152</sup> For a compilation, see Centre for the Independence of Judges and Lawyers, CIJL Bulletin No. 25-26 (1990), 1 et seq.; International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners' Guide Series No. 1, 2004.

<sup>153</sup> J.L. Morse, "A Declaration about Judicial Independence", *The Law Review Association of Quinnipiac University School of Law* 20 (2000), 731 et seq. (737).

as encompassing two different sub-aspects. First, institutional independence, which refers directly to the principle of the separation of powers,<sup>154</sup> thus prohibiting undue influence by other state organs on the judiciary as a whole and second, individual independence.<sup>155</sup> While institutional independence primarily prohibits intrusions by the executive but also to a lesser extent by the legislative branch of the state,<sup>156</sup> individual independence focuses on the individual judges and means the independence from external and internal forces by the respective person. Undue internal influence may be exercised by other members of the judiciary, especially superiors.<sup>157</sup> To ensure impartial decisions the individual judge has to be free from any interference and pressure when reaching his decisions and be subject only to law.

#### a. Institutional Independence

As already pointed out the institutional independence of the judiciary derives from the principle of separation of powers. As the UN Special Rapporteur on the Independence of Judges and Lawyers has pointed out in one of his reports: “[...] the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded.”<sup>158</sup> The separation of powers asks for the guaranteed autonomy of each of the public powers, their mutual independence and the guarantee of a confinement of each of the powers to its respective role.<sup>159</sup> Hence, the judiciary should have jurisdiction over all issues of a judicial nature and should have exclusive authority to decide whether an issue submitted for decision is within its competence as defined by law.<sup>160</sup>

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<sup>154</sup> W. Bondy, *Separation of Governmental Powers*, 1896, 12 et seq.; International Commission of Jurists, see note 152, 20; Doehring, see note 135, 161 et seq.

<sup>155</sup> M.P. Mills/ L. Waddle, “Judicial Independence in Mississippi”, *The Law Review Association of Quinnipiac University School of Law* 20 (2000), 709 et seq.

<sup>156</sup> M. Nowak, *CCPR Commentary*, 2005, 319.

<sup>157</sup> International Commission of Jurists, see note 152, 23.

<sup>158</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, Doc. E/CN.4/1995/39, para. 55.

<sup>159</sup> Bondy, see note 154, 12 et seq.; Doehring, see note 135, 161 et seq.

<sup>160</sup> Cf. principle 3 of the UN Basic Principles on the Independence of the Judiciary, see note 150.

Another critical point in regard to the separation of powers and the institutional independence is the formation of the judiciary, i.e. the appointment of judges. A comparison of the different legal systems, reveals several ways to appoint the judiciary. There is no agreement in international law as to the method of appointment. Different models are in place such as appointment by the government, appointment by the government with consent of the parliament or by a judicial service commission, co-option, or election by the people or by parliament. Moreover, different methods of appointment are used for different instances within the judiciary. Each system has its advantages as well as disadvantages.<sup>161</sup> What is important within any system is that the elected or appointed judge enjoys independence from the nominating body. To secure the independence and impartiality of the judiciary, the appointment procedure needs to adhere to transparent and strict selection criteria.<sup>162</sup>

*aa. Competences of the Judiciary*

Articles 120 and 122 of the Afghan Constitution meet the requirements for an institutional independence of the judiciary in providing that the competence to adjudicate lawsuits lies solely with the judiciary and that no law under any circumstances may exclude certain cases or a field of law from the competencies of the judiciary.

An additional positive aspect with regard to the institutional independence of the judiciary is the fact that the Supreme Court itself is responsible for the elaboration of the budget of the judiciary<sup>163</sup> as well as its distribution.<sup>164</sup>

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<sup>161</sup> E.g. an election by the people could motivate judges to reach popular decisions or to support popular opinions, while an appointment or election by one of the other state powers has the disadvantage of a personal dependence on the appointing/electing authority. In regard of these disadvantages an interaction between the other public powers in the appointment of the judiciary seems preferable. Moreover, it is also desirable to have a cooperation or at least consultation of the judiciary in the appointment or election of judges, most prominently to ensure the professional qualifications of the candidates. Cf. International Commission of Jurists, see note 152; Doe-hring, see note 135, 161.

<sup>162</sup> International Commission of Jurists, see note 152, 41.

<sup>163</sup> Article 29 para. 1 No. 1 LOJC (2005).

<sup>164</sup> Article 29 para. 1 No. 8 LOJC (2005).



*bb. Formation of the Judiciary*

Concerning the formation of the Afghan judiciary, one must distinguish between Supreme Court judges and regular judges, since they are appointed in different ways.

*aaa. The Appointment of Supreme Court Judges*

The Afghan Constitution stipulates a shared responsibility of the Parliament and the President of the Republic<sup>165</sup> for the appointment of the judges of the Supreme Court. The President appoints the Supreme Court judges with the approval of the Lower House of Parliament (*Wolesi Jirga*). Such an interaction generally seems to be a proper guarantee to ensure the independence of the Supreme Court and its judges. Questionable is the lack of a possibility for an opposition to veto nominations.<sup>166</sup> The provisional<sup>167</sup> Rules of Procedure<sup>168</sup> do not provide such a possibility. According to rules 72 and 73 the approval of the nominees by a simple majority of the delegates is necessary. A possibility for some kind of filibustering is not given.<sup>169</sup> Without a minority veto, the danger is that an executive supported by the majority in parliament might nominate only candidates from its own party, resulting in a politically one-sided or biased judiciary.<sup>170</sup> Even though for the time being such a possibility seems unrealistic due to the fractioned parlia-

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<sup>165</sup> Article 117 of the Constitution.

<sup>166</sup> For example, in the United States the possibility of the minority to veto appointments is secured by procedural regulations enabling the minority to effectively prevent the appointment of an unacceptable candidate. The so called filibustering, i.e. unlimited speech by a senator effectively prevents the voting on a candidate. This possibility is given since the standing rules of the senate place no general time limit on debate. See also D.S. Rutkus, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate, CRS Report for Congress*, 2005, 30 et seq.; for details about the U.S. System see H.J. Abraham, *The Judiciary*, 1996.

<sup>167</sup> The Afghan Parliament was inaugurated only in December 2005; it is still unclear how the final rules of procedure will be elaborated.

<sup>168</sup> National Assembly of Afghanistan, Rules of Procedure of the *Wolesi Jirga* (Lower House) adopted on 3 January 2006 for three months; unfortunately an official publication of the document is not known to the author.

<sup>169</sup> See rules 43-53 of the Provisional Rules of Procedure.

<sup>170</sup> Cf. Doehring, see note 135, 162.

ment, it is nevertheless recommendable to adopt appropriate safeguards in the final rules of procedure.

### bbb. The Appointment of Regular Judges

Regular judges are appointed on proposal of the Supreme Court and with approval of the President of the Republic.<sup>171</sup> The Public Administrative Department of the Supreme Court executes this authority for the Supreme Court.<sup>172</sup> This regulation grants the judiciary an extensive contribution in the appointment of judges and constitutes a rather unique regulation. For comparison, in Germany federal judges are chosen by a special election committee made up of members of the legislative and executive branches<sup>173</sup> and are appointed by the President of the Republic,<sup>174</sup> while the judiciary only has a right to be consulted.<sup>175</sup> Even the Italian system, which shares similarities with the Afghan system by giving the judiciary a very prominent part in the appointment of judges, is more restrictive in this regard.<sup>176</sup> There the Superior Council of the Judiciary is responsible for the appointment of judges.<sup>177</sup> However, a third of the members of the Italian Superior Council of the Judiciary including the vice-president are elected by parliament,<sup>178</sup> whereas in Afghanistan the Supreme Court alone, without any participation by

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<sup>171</sup> Article 132 of the Constitution; arts 60, 58, 29 para. 1 No. 5 LOJC (2005).

<sup>172</sup> Article 29 para. 2 LOJC (2005).

<sup>173</sup> Article 95 para. 2 Basic Law of the Federal Republic of Germany 1949 and §§ 2-5, 12 of the Judicial Elections Act (*Richterwahlgesetz*); for details on the German system see D.C. Umbach, "The Independence of the Judiciary and the Rule of Law", in: E. Cotran/ A.O. Sherif, *The Role of the Judiciary in the Protection of Human Rights*, 1997, 241 et seq. (245).

<sup>174</sup> Article 60 of the Basic Law of the Federal Republic of Germany.

<sup>175</sup> §§ 55 et seq. German Judiciary Act (*Deutsches Richtergesetz*).

<sup>176</sup> Arts 104, 105, 106 of the Italian Constitution of 1948 introducing a Superior Council of the judiciary, which has the exclusive competence to appoint, assign, move, promote and discipline members of the judiciary; for details see M. Cappelletti/ J.H. Merryman/ J.M. Perillo, *The Italian Legal System*, 1967, 102 et seq.; F. Mariuzzo, "Die Selbstverwaltung der ordentlichen Richter in Italien – der oberste Rat der Richterschaft", *Deutsche Richterzeitung*, 2001, 161 et seq. (163).

<sup>177</sup> Article 105 of the Italian Constitution of 1948.

<sup>178</sup> Article 104 paras 4, 5 of the Italian Constitution of 1948; see also Cappelletti/ Merryman/ Perillo, see note 176; Mariuzzo, see note 176, 163.

other public powers, is responsible for the choice and proposal of candidates to the President of the Republic.

By granting such extensive participation of the judiciary this regulation establishes a good prerequisite to ensure the institutional independence of the judiciary.<sup>179</sup> A point of concern is the missing participation of the parliament in the appointment procedure. Whereas the lack of democratic legitimation can be compensated by the participation of the directly elected President, the participation of the parliament nevertheless could improve the transparency of the process and thereby improve the population's perception of an independent judiciary.<sup>180</sup>

### b. Individual Independence of the Judges

As pointed out, independence of the judiciary not only requires institutional, but also individual independence of the judges. Both concepts are associated and interwoven. Individual independence requires that the judges be free not only from external but also from internal pressure and influence from within the judiciary itself.<sup>181</sup> The conditions of judicial service are of great importance in this regard, i.e. the security of tenure, including the question of removal from office. Judges should only be removed for serious misconduct or disciplinary or criminal offences that render them unable to perform their functions. Judges should not be removed from office for *bona fide* errors or for disagreeing with a particular interpretation of the law.<sup>182</sup> They need not necessarily be appointed for a lifetime or be unimpeachable, but they must be appointed or elected at least for several years.<sup>183</sup>

Another aspect is the question of discipline and sanctions. The freedom from instructions or pressure while administering a case is of rele-

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<sup>179</sup> Generally speaking, it is preferable for judges to be elected or appointed by a body independent from the executive and the legislature, cf. International Commission of Jurists, see note 152, 45.

<sup>180</sup> For concerns raised in regard to the present procedures see at the end of III. 4.

<sup>181</sup> Cf. A. Cox, "The Independence of the Judiciary: History and Purpose", *University of Dayton Law Review* 21 (1996), 566 et seq.

<sup>182</sup> Cf. International Commission of Jurists, see note 152, 57; cf. also e.g. Doc. CCPR/CO/75/VNM of 5 August 2002, para. 10.

<sup>183</sup> Nowak, see note 156, 320; Morse, see note 153, 733; International Commission of Jurists, see note 152, 51; cf. Principles 11,12 and 18 of the UN Basic Principles, see note 150.

vance in this respect. Judges must not be subject to directives or in some other manner dependent while adjudicating,<sup>184</sup> they should be free from binding orders in relation to their specific judicial activities and they should not be disciplined for a particular interpretation of the law in good faith.<sup>185</sup>

Concerning individual independence a further point of importance is the question of the personal security of the judges as well as that of adequate salaries.

*aa. Tenure*

The Afghan legal system provides different regulations for the tenure of the judges of the Supreme Court and the regular judges, as well as for their removal.

*aaa. Conditions of Tenure for Judges of the Supreme Court*

After an special regulation for the first appointment,<sup>186</sup> members of the Supreme Court including the Chief Justice are appointed for a term of office of ten years; the Constitution prohibiting a second appointment.<sup>187</sup> Generally speaking, a lifetime appointment as established for the federal judges in the United States<sup>188</sup> or an appointment until the age of retirement as practiced in Germany,<sup>189</sup> except for judges of the Federal Constitutional Court, is the most effective way to ensure judi-

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<sup>184</sup> Nowak, see note 156, 320.

<sup>185</sup> Cf. S.Lubet, "Judicial Discipline and Judicial Independence", *Law & Contemp. Probs* 61 (1998), 59 et seq.; id., "Judicial Independence and Independent Judges", *Hofstra Law Review* 25 (1997), 745 et seq.; K. Doehring, *Staatsrecht der Bundesrepublik Deutschland*, 1984, 239. The guarantee of the unification and correctness of administration of justice should not be achieved by disciplinary sanctions but by a review by higher courts.

<sup>186</sup> See note 117.

<sup>187</sup> Article 117 of the Constitution.

<sup>188</sup> Article I Sec. 2 Constitution of the United States of America.

<sup>189</sup> §§ 10, 21 German Judiciary Act.

cial independence.<sup>190</sup> However, a limited term of office does not necessarily imply a lesser degree of independence.<sup>191</sup>

It has to be taken into account that many powers and authorities are concentrated in the Afghan Supreme Court. As mentioned the Supreme Court is *inter alia* competent for the interpretation and the review of the conformity of laws, legislative decrees and international treaties with the Constitution,<sup>192</sup> responsible for the administration of the affairs of the judiciary<sup>193</sup> and for the proposal of legislation to the parliament concerning the regulation of judicial matters.<sup>194</sup> By the latter competence, the Supreme Court even takes part in the shaping of the legal system of the state, a task that belongs to the duties of the legislature, according to a strict interpretation of the doctrine of separation of powers. Considering this accumulation of competencies and powers, it seems in fact advisable to limit the term of office of the judges, in order to ensure the balance between the public powers. Beside that, the independence of the Supreme Court judges is increased by the regulation that former members of the Supreme Court receive financial benefits from their former office for the rest of their lives, under the precondition that they do not take another governmental or political post.<sup>195</sup>

Summing up, the regulations concerning the tenure of Supreme Court judges comply with the prerequisite of an independent judiciary as recommended by the Bonn Agreement. Nevertheless it should be mentioned that until the formation of the first Supreme Court after the transitional period by the approval of the newly elected parliament, it seems very likely that the President will deem himself competent to make changes to the provisional Supreme Court based on his provisional competencies in article 159 paras 2 and 4 of the Constitution, enabling him to remove and appoint members of the Supreme Court including the Chief Justice almost at whim. However, this transitional

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<sup>190</sup> Cf. Nowak, see note 156, 320; International Commission of Jurists, see note 152, 51.

<sup>191</sup> For example the Judges of the Federal Constitutional Court of Germany are appointed for a period of twelve years excluding a second term of office, and the history of this court shows a well-developed independence in relation to the other state powers. § 4 Federal Constitutional Court Act.

<sup>192</sup> Article 121 of the Constitution and article 25 para. 1 LOJC (2005).

<sup>193</sup> Article 30 LOJC (2005).

<sup>194</sup> Article 25 para. 2 LOJC (2005).

<sup>195</sup> Article 126 of the Constitution.

period will soon end with the approval of the Lower House of the candidates proposed by the President of the Republic.<sup>196</sup>

#### bbb. Conditions of Tenure of Regular Judges

Unfortunately, the period of office is not explicitly regulated by law. Neither the LOJC (2005) nor the Labour Law and the Law of Civil Servants, which can be used supplementary in case issues are not regulated by the LOJC<sup>197</sup> contain explicit provisions regulating the tenure of judges explicitly. According to information by both the Department of Research of the Supreme Court as well as its Department of Human Resources, the prevailing perception within the Supreme Court is that since the law does not mention any limit for the tenure except for Supreme Court Judges, the tenure of judges lasts until the retirement age. The conditions for retirement are regulated in article 62 para. 1 LOJC (2005), which states that retirement is mandatory at the end of 40 years of active service, upon reaching the age of 65 – a regulation which can be seen as an indication of a (working) lifetime appointment – as well as under other conditions defined by law. One of these conditions is regulated in article 133 of the Constitution. Under that provision, a judge may be dismissed by the President of the Republic on the suggestion of the Supreme Court in case the judge has been accused of a felony and the Supreme Court finds the accusation well-founded.

The tenure of the regular judges is regulated satisfyingly to support the independence of the judiciary.

#### *bb. Sanctions and Freedom from Undue Instructions*

Disciplinary sanctions are regulated in article 68 LOJC (2005). As stipulated in this norm, sanctions can be invoked in accordance with special regulations which have to be approved by the Supreme Court. These disciplinary regulations have not been passed yet, which leaves considerable insecurity with regard to their future content. To avoid uncertainties and to improve transparency it would have been preferable to adopt a clear system of sanctions in the LOJC itself. In this regard, the old law of 1967 was preferable since it contained respective provisions.

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<sup>196</sup> At the time of the elaboration of the article (June 2006), the Lower House was still debating about their approval of the nominees.

<sup>197</sup> Article 65 para. 1 LOJC (2005).

A point closely linked to the system of sanctions and directions is the freedom of decision of the judges, i.e. the freedom from binding orders in relation to the specific judicial activities of the judges. This point is regulated by article 14 of the LOJC (2005), stating that courts are independent while deciding on a case and are subordinated to the law while issuing a decision. However, critical in this regard will be the future practice of the judicial administration, since the difference between undue interference with the adjudication of justice and necessary disciplinary sanctions and measures can be very hard to discern.<sup>198</sup> Various participants of training courses for the judiciary have informed the author and his colleagues that they were frequently ordered by superiors via phone calls to decide cases in a certain way. This is a clear breach of Afghan law and international standards and an infringement of the independence of the judiciary. These cases raise great concern about the perception of judicial conduct within the judiciary itself. An incident exemplifying the attitude of many high-ranking judicial officials were the public statements of the head of the Department for the Supervision of the Judiciary, who openly stated his discontent during an ongoing trial and thereby tried to influence its outcome.<sup>199</sup>

### *cc. Security and Salary of Judges*

The duty to ensure security for judges and their offices lies with the Ministry of the Interior and other related authorities (article 73 para. 1 LOJC 2005). Practice will show whether the Ministry of the Interior will fulfil its responsibility in this respect. At least in Kabul, the police seem to be capable of handling the task. In the provinces, especially in the south-eastern part of Afghanistan in which elements of the former *Taliban* forces are still active, this is highly questionable.<sup>200</sup> It would also have been preferable to clarify that the judge or the president of a tribunal has the power to maintain the orderliness of courtroom proceedings, including the power to hold disruptive persons in contempt of

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<sup>198</sup> For some vivid examples see S. Lubet, "Judicial Discipline and Judicial Independence", *Law & Contemp. Probs* 61 (1998), 59 et seq.

<sup>199</sup> This took place during the trial against *Assadullah Sarwari* former head of the communist secret police on 25 March 2006.

<sup>200</sup> See C. Ahlund, "Major Obstacles to Building the Rule of Law in a Post-conflict Environment", *New England Law Review* 39 (2005), 39 et seq. (40); for a telling example although in the years 2002, 2003 see Thier, see note 78, 1 seq.; Feinstein International Famine Center, see note 141.

court and the explicit command over security personnel and the police in the courtroom.

Regarding the salary of the judges, article 155 of the Constitution and article 74 LOJC (2005) provide that Supreme Court judges as well as regular judges are entitled to an adequate salary. Although remuneration at present is not at all satisfactory, bearing in mind the prospect that Afghan justice institutions envisage an increase in salaries of 500 per cent in the next 12 years, as stated in the strategy paper “Justice for All” by the Afghan Ministry of Justice,<sup>201</sup> an adequate remuneration will hopefully be achieved in the future.

Summing up, the Constitution and the new LOJC set down an acceptable legal basis on which to build an independent judiciary. There are still some deficits in the laws which the new parliament will hopefully undertake to correct once it has adapted to its tasks. Nonetheless, the main problems for an independent judiciary seem to be related to practical aspects like lack of security, still insufficient salaries, and a lack of awareness in the minds of superiors of the implications of judicial independence and its importance. Another immense problem is the insufficient level of legal education of the judiciary. According to a recent study, more than thirty percent of the active judges are without higher education and have only visited primary or secondary schools or religious high schools.<sup>202</sup> The education of the judiciary will therefore be one of the most important tasks to ensure the correct and unbiased application of the law, a task which is unfeasible without a properly educated judiciary.

## 2. Rule of Law

The Bonn Agreement also asks for a judiciary in accordance with the rule of law.<sup>203</sup> The concept of the rule of law is hard to describe exhaus-

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<sup>201</sup> Afghan Ministry of Justice, Justice for All – A Comprehensive Needs Analysis, 2005, 14, <<http://www.ands.gov.af/admin/ands/goa/upload/UploadFolder/Justice%20for%20%20All%20%20A%20Comprehensive%20Needs%20Analysis%20Challenges%20and%20the%20way%20forward%20%20for%20the%20Justice%20sector%20in%20Afghanistan.pdf>>.

<sup>202</sup> “[...] 16.1% are educated in non-university settings including *Madrassas* (religious high schools), and 20.5% are primary, secondary or high school educated.”, Armytage, see note 79.

<sup>203</sup> Article II. 1. of the Agreement.



tively. There are numerous publications dealing with this topic, some authors even call the rule of law an opaque concept.<sup>204</sup> In literature there are basically two main perceptions, a legal positivistic one<sup>205</sup> sharing in varying degrees a formalistic understanding of the concept,<sup>206</sup> and a substantive approach including, also in varying degrees, aspects of morality and natural law.<sup>207</sup> Between these extreme views there are numerous particular conceptions seeing the rule of law as emphasising and advancing different goals.<sup>208</sup> It would go much beyond the scope of this article to give an in-depth analysis of the discussion, hence it will be concentrated on the core meaning of the concept of the rule of law and its implications for the structure and competencies of the judiciary. A famous statement which is regularly<sup>209</sup> cited as an example for the classical conception of the principle is part of the Constitution of Massachusetts, requiring "... a government of laws and not of men."<sup>210</sup> Read in context, this clause was a clear expression of the doctrine of separation of powers. While this doctrine is still seen as part of the rule of

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<sup>204</sup> G.P. Fletcher, *Basic Concepts of Legal Thought*, 1996, 11.; B.E. Hernandez-Truyol, "The Rule of Law and Human Rights", *Fla. J. Int'l L.* 16 (2004), 167 et seq. (168).

<sup>205</sup> Just exemplary J. Raz, "The Rule of Law and its Virtues", in: R. Bellamy (ed.), *The Rule of Law and the Separation of Power*, 2005, 77 et seq.; M.H. Kramer, "On the Moral Status of the Rule of Law", *CLJ* 63 (2004), 65 et seq.

<sup>206</sup> Demonstrated drastically in the phrase "A non-democratic legal system, based on the denial of human rights [...] may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies", Raz, see note 205, 78.

<sup>207</sup> Fletcher, see note 204, 11; M.J. Radin, *Reconsidering the Rule of Law*, 1989, 781 et seq.

<sup>208</sup> For an overview of the discussion: R.A. Cass, *The Rule of Law in America*, 2001, 1 et seq. and Bellamy, see note 205, 2005, 3 et seq.

<sup>209</sup> Cass, see note 208, 2; T.M. Reavley, "The Rule of Law for Judges", *Pepperdine Law Review* 79 (2002), 79 et seq. (80).

<sup>210</sup> Constitution of Massachusetts 1780 pt.I article XXX: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

law,<sup>211</sup> the modern understanding of the overall concept is much broader. The modern usage is widely traced back to A.V. Dicey<sup>212</sup> who defined the rule of law.<sup>213</sup> In a nutshell, each intrusion in the rights of the citizens has to be based on law. Moreover, there has to be equality before the law with everybody including the government being subject to the law.<sup>214</sup> This definition can be enriched with the definitions and guidelines that the International Commission of Jurists has worked out to concretise the implications of the rule of law:<sup>215</sup>

- The judiciary has to be an independent organ of the state,<sup>216</sup>
- A judicial review of the acts of the executive which directly and injuriously affect the rights of the individual has to be guaranteed<sup>217</sup> and
- In case of legislation delegated to the executive or other agencies a judicial review by an institution independent of the executive has to be

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<sup>211</sup> International Commission of Jurists, *The Rule of Law and Human Rights*, 1966, 30; M.N. Venkatachaliah, "Rule of Law: Contemporary Challenges", *Indian Journal of Public Administration* 45 (1999), 321 et seq. (323).

<sup>212</sup> Hernandez-Truyol, see note 204, 169; R.J. Liebl, "Rule of Law in Post War Iraq", *Hamline Law Review* 28 (2004), 92 et seq. (129).

<sup>213</sup> "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint" and "[...] we mean in the second place, when we speak about the rule of law [...] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals", cf. A.V. Dicey/ E.C.S. Wade, *Introduction to the Study of the Law of the Constitution*, 1948, 202.

<sup>214</sup> See also Venkatachaliah, see note 211, 323.

<sup>215</sup> International Commission of Jurists, see note 211, 1 et seq.

<sup>216</sup> International Commission of Jurists, see note 211, 30 et seq.; also R.S. Summers, "The Principles of the Rule of Law", *Notre Dame Law Review* 74 (1998/99), 1691 et seq. (1694); E. Deninnger, "Rechtsstaat" oder 'Rule of Law' - was ist das heute?", in C. Prittowitz/ M. Baurmann (ed.) *Festschrift für K. Lüderssen*, 2002, 41 et seq. (48); Venkatachaliah, see note 211, 322.

<sup>217</sup> International Commission of Jurists, see note 211, 12; Deninnger see note 216, 49.

guaranteed ensuring that the extent, purpose and procedure appropriate to delegate legislation has been observed.<sup>218</sup>

The independency of the judiciary has already been assessed above.

#### **a. Equality Before the Law and General Subjection to the Law**

Article 22 of the Constitution states that every citizen of Afghanistan, no matter if male or female, is entitled to the same rights and duties. Any discrimination or the bestowal of privileges is prohibited. Article 14 states that the proceedings and verdicts of courts will be based on the principle of equality before the law and the courts. Read together with the provisions about the impeachment of state officials,<sup>219</sup> these provisions implement equality before the law into the legal system of Afghanistan and also clarify that everybody is subject to law, including the President of the Republic. A question which could be raised in this respect is the question of justice and punishment for perpetrators of past human rights abuses and atrocities. This remains a task yet to be shouldered.<sup>220</sup> To end the culture of impunity will in the first instance be a political decision. It should be appreciated that there are at least no amnesty laws or similar legal obstacles for a prosecution of these crimes which could contradict the principle of equality before the law.

#### **b. Judicial Review of Intrusions of Individual Rights by the Executive**

To promote the rule of law, acts of the executive which directly and injuriously affect the rights of the individual should be subject to a review by courts.<sup>221</sup>

Article 120 of the Afghan Constitution and article 3 LOJC (2005) declare that the competence of the courts includes the review of all claims filed by natural or legal persons, including the state, no matter if

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<sup>218</sup> International Commission of Jurists, see note 211, 12 et seq.

<sup>219</sup> Article 69 of the Constitution in regard to the President of the Republic, article 78 in regard to the ministers, article 127 for the Chief Justice and the members of the Supreme Court.

<sup>220</sup> See also Guhr/ Afsah, see note 97, 385; Afghanistan Independent Human Rights Commission (ed.), *A Call for Justice, A National Consultation on Past Human Rights Violation in Afghanistan*, February 2005, available under <[www.aihrc.org.af/](http://www.aihrc.org.af/)>.

<sup>221</sup> Cf. International Commission of Jurists, see note 211, 12.

as a claimant or a defendant, in accordance with the provisions of law. Although these regulations promulgate the competency of the courts for the review of claims involving the state as a party, it is highly questionable which court and which chamber respectively is actually competent. It seems that the Chambers of Public Rights (*divan e hoquq e am'e*) of the Urban Primary Courts<sup>222</sup> at the first instance and the Chambers of Public Rights of the Appeal Courts,<sup>223</sup> the Chamber of Civil and Public Rights of the Supreme Court<sup>224</sup> at the appeal level are the competent bodies. Still the exact scope of the competencies of these chambers is somewhat opaque. Article 42 LOJC (2005) provides that the Chambers of Public Rights of the Urban Primary Courts are competent to review civil cases between natural and legal persons or between legal persons. The wording of this regulation raises doubts whether claims against the state are subject to the regulation or not, particularly since in contrast the wording of article 120 of the Constitution as well as article 3 of the LOJC (2005) expressly include the state as such into the notion of legal persons.<sup>225</sup> On the other hand, article 3 LOJC (2005), which regulates the scope of the competencies of the judiciary, explicitly encompasses claims against the state, therefore at least one of the bodies mentioned in the same law has to be competent to handle the respective cases. Most matching would be the Chambers of Public Rights, since first the term “public rights” has a connotation of claims involving the administration. Second, the replaced LOJC (1967) stipulated for the then Chambers of Public Rights (*divan e hoquq e am'e*)<sup>226</sup> of the different courts the competency to adjudicate claims against the state. Another argument for this perception is that article 42 para. 3 LOJC (2005) uses the word *qasie* for case, which is normally used in respect of criminal cases instead of the term *da'va*, which is used in article 42 para. 2 LOJC when referring to private disputes. Hence it seems likely that the function of the Chambers of Public Rights remained basically the same, namely to administer claims against

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<sup>222</sup> Article 41 para. 1 No. 3 LOJC (2005).

<sup>223</sup> Article 32 para. 1 No. 4 LOJC (2005).

<sup>224</sup> Article 18 para. 1 No. 2 LOJC (2005).

<sup>225</sup> “The competence of the courts includes the review of all claims filed by natural or legal persons, including the state, no matter if as a claimant or a defendant, in accordance with the provisions of law.”

<sup>226</sup> Article 19 para. 3 LJO (1967) for the Chambers of the Cassation Court, article 36 b) LJO (1967) for the High Central Court of Appeal and article 44 c) LJO (1967) for the Provincial Courts.

the state. This was also the perception of Afghan lawyers the author consulted.<sup>227</sup>

Another provision regulating the competence of the Supreme Court for judicial review of executive acts is article 24 para. 5, 6 LOJC (2005) concerning the extradition of accused or convicted foreigners and Afghan nationals to other states.

However, all mentioned provisions just regulate competences with regard to judicial review, none of them regulates the right to file claims, let alone the prerequisites under which such a right can be realised. A provision granting citizens the rights to bring an individual complaint alleging that their fundamental rights have been infringed by state action is not mentioned, neither in the Constitution nor in the LOJC (2005)<sup>228</sup> nor in other laws regulating activities of executive organs, for example in the new Police Law.<sup>229</sup> This may serve as an explanation why the courts are still not fulfilling their competence of reviewing administrative acts.<sup>230</sup> There is an urgent need to elaborate as soon as possible a law about the administrative court procedure including the right of complaint for every citizen.

It should be mentioned in this context though that article 58 of the Constitution establishes an Independent Human Rights Commission where everyone can file a complaint alleging that his or her human rights have been violated. The Commission can then refer the case to the courts, which are obliged to apply the constitution and may thus address human right breaches.<sup>231</sup> However, this can only serve as an additional instrument of human rights protection and cannot substitute a judicial review by the courts. First the Human Rights Commission has no means of interfering itself with the acts of the executive, e.g. to order temporary measures,<sup>232</sup> and second there is no obligation of the courts to review cases handed over by the Human Right Commission.

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<sup>227</sup> Perception of my friend and colleague Mr. Gholamhaidar Allama of the Afghan Independent Human Rights Commission on 27 March 2006.

<sup>228</sup> See as well Grote, see note 52, 911.

<sup>229</sup> Presidential Decree No. 75, Published in Official Gazette No. 862.

<sup>230</sup> Information received in an interview with Dr. Kwan of the Afghan Independent Civil Service Commission on the 27 February 2006.

<sup>231</sup> Grote, see note 52, 911.

<sup>232</sup> The Independent Human Rights Commission is solely competent to investigate cases, pass materials to the competent authorities and follow up the respective proceedings without having legal means to enforce them (article 23, 21 No. 9 of the Law on the Structure, Duties and Authorities of the Af-

Hence, the prerequisite of the Bonn Agreement for the judiciary to comply with the rule of law demands the introduction of a law regulating administrative court proceedings which above all grants citizens the right to challenge executive acts infringing their rights.

### c. Judicial Review of the Legislation Delegated to the Executive

To establish and strengthen the rule of law it is further advisable to introduce a judicial review to determine whether the executive has exceeded its delegated power of legislation.<sup>233</sup>

Compared to other legal systems, the Afghan Constitution equips the government with quite extensive law-making powers, which can be used without an interaction of Parliament. This extensive authorization is in itself rather problematic with regard to the separation of powers and the rule of law.<sup>234</sup> Article 76 of the Constitution grants the government the power to devise regulations to implement the basic lines of policy and to regulate its own duties, with the sole restriction that these regulations are not contrary to the text and the spirit of the law. Such an extensive authority should at least be softened by a strict judicial review.

According to article 121 of the Constitution and article 24 para. 1 LOJC (2005), the Supreme Court is competent to review the conformity of formal laws, legal decrees and international treaties with the constitution and its interpretation. However, these legal decrees (*faramin e taqnini*) are a peculiarity of the Interim Legal System. They have the function of formal laws<sup>235</sup> and are not equivalent to the decrees (*moqararat*) which the government may enact according to article 76 of the Constitution.<sup>236</sup> Therefore there is at least no direct possibility of judicial review of the legislative acts of the executive. Only an incidental review by the courts in the course of regular proceedings is possible as

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ghan Independent Human Rights Commission, Presidential Decree No. 16 published in the Official Gazette No. 855).

<sup>233</sup> C.f. International Commission of Jurists, see note 211, 15.

<sup>234</sup> For this question see Grote, see note 52, 909.

<sup>235</sup> See with regard to these legal decrees article 159 of the Constitution.

<sup>236</sup> This perception also correlates with the legal terminology used in the Iranian legal system since regulations passed by the government are called decrees (*moqararat*) too, while the term *taqnin* is reserved for acts of the legislator, see M.J. Jafari-Langrudi, *Terminologije e hoquq* (Legal Terminology), 2004, 679.

courts are only bound by law and not by decrees of the executive (article 130 Constitution). Hence, they can decide not to apply unlawful decrees. However, this indirect control is not sufficient with regard to the rule of law.

It should also briefly be mentioned that the proceedings of the Supreme Court when reviewing the conformity of formal laws in accordance with article 121 of the Constitution and article 24 para. 1 LOJC (2005) has as well not been regulated by a law yet.

### 3. International Standards

The third prerequisite of the Bonn Agreement for the Afghan judiciary is its compatibility with international standards. This requirement seems to be a subsidiary clause beside the requisite of an independent judiciary and the rule of law. In addition to these two, international standards concerning the judiciary include the principles of fair trial. Article 14 para. 1 ICCPR guarantees a right to a “fair hearing”. This principle is at the centre of civil and criminal procedural guarantees and, with respect to criminal cases, it is further developed by a number of concrete rights in arts 14 and 15.<sup>237</sup> However, the majority of the requirements necessary for a fair trial are less questions of the structure and jurisdiction of the courts than those of the respective procedural law.<sup>238</sup> The relevant aspects in the former regard the right to appeal in criminal cases and the special prerequisites of juvenile trials.

#### a. Right to Appeal

Article 14 para. 5 ICCPR reads “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher

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<sup>237</sup> Nowak, see note 156, 321.

<sup>238</sup> For an in depth assessment of the fair trial standards in the Afghan legal system refer to A. Guhr/ R. Moshtaghi/ M. Knust, “Max Planck Manual on Fair Trial Standards”, available under <[http://www.mpil.de/shared/data/pdf/maxplanckfairtrialmanual\\_2.ed\\_engl.pdf](http://www.mpil.de/shared/data/pdf/maxplanckfairtrialmanual_2.ed_engl.pdf)>, 2005; F. Defferrard, *L’Afghanistan et le procès pénal équitable*, Recueil Dalloz, 3 August 2006 no 29.

tribunal. A confirmation of the judgement by the original trial judge does not satisfy the requirement of review by a higher tribunal.<sup>239</sup> Reviews limited to questions of law would not satisfy the requirements; the case has to be reviewed with regard to legal and factual aspects of the conviction and sentence.<sup>240</sup>

Article 31 LOJC (2005) entails the obligation to establish Appeal Courts in each provincial capital throughout Afghanistan. Article 33 LOJC (2005) provides Appeal Courts to review judgements of lower courts by reconsidering all factual and procedural aspects of the case.

The details of the appeal process have been regulated in the Interim Criminal Procedure Code for Courts<sup>241</sup> and provide for an effective implementation of the right into the legal system.<sup>242</sup> The only problematic regulation in this respect is article 53 LOJC (2005) restricting the right to appeal. While the first restriction, which limits the right to appeal to the lapse of a certain time, is unproblematic,<sup>243</sup> the second limitation is questionable. Article 53 para. 5 LOJC (2005) excludes the appeal if the punishment is a fine not exceeding 50,000 Afghanis i.e. ca. 1000 USD.

It is questionable whether a limitation of the right to appeal other than the lapse of a time limit is in conformity with article 14 para. 5 ICCPR.<sup>244</sup> The right to appeal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness and severity of the offence.<sup>245</sup> The question whether petty offences may be exempted was seen as a question that may be regulated by internal law. However, for example the denial of judicial review for offences punishable by a prison term of up to one year was regarded as a violation of article 14 (5) ICCPR.<sup>246</sup> The limitation of the right to appeal in Afghan law is well below that line. However, in a country like Afghanistan,

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<sup>239</sup> Nowak, see note 156, 349.

<sup>240</sup> Nowak, see note 156, 348.

<sup>241</sup> Decree No. 115 published in the Official Gazette No. 820.

<sup>242</sup> For a detailed description, see Guhr/ Moshtaghi/ Knust, see note 238; Defferrard, see note 238.

<sup>243</sup> Guhr/ Moshtaghi/ Knust, see note 238.

<sup>244</sup> Nowak, see note 156, 350.

<sup>245</sup> The preparatory work leading to the codification of the right in the ICCPR contained in fact a restriction for petty offences. However, this exception was struck during the elaboration process and did not appear in the final text, Nowak, see note 156, 350 et seq.

<sup>246</sup> Nowak, see note 156, 351.



which is suffering from widespread poverty, it is highly questionable to impose a barrier of 50,000 Afghans as even the remuneration of well-paid jobs at western aid agencies usually does not exceed round about 300 USD per month. Therefore, the enactment of a different provision seems advisable to ensure compliance with article 14 para. 5 ICCPR.

### **b. Juvenile Trials**

Article 14 para. 4 ICCPR obliges state parties to conduct criminal trial against juveniles in such a manner as will take account of their age and the desirability of promoting their rehabilitation. This is repeated and developed further in article 40 of the Convention on the Rights of the Child, ratified by Afghanistan. States are not expressly required to establish juvenile courts.<sup>247</sup> Nevertheless, they must ensure that criminal trials against juveniles are conducted in a way different from those against adults and that due consideration is taken of the interest of promoting the rehabilitation of the juvenile.

Article 2 para. 1 of the Juvenile Code introduces rehabilitation and re-education of minors who are in conflict with the law as one of the objectives of the law. Article 26 of the law introduces special Juvenile Courts on the level of the Primary Courts. Furthermore article 26 para. 3 requires judges at Juvenile Courts to fulfil special criteria, i.e. to have special talents and professional training as well as experience in matters related to the trial of juveniles. Hence, the demands of a fair trial with regard to the structure of courts in juvenile trials are fulfilled.<sup>248</sup>

## **4. Afghan Legal Traditions**

It now remains to assess the compliance of the structure of courts with Afghan legal traditions. Disregarding the communist era as well as the other extremist regimes, whose rather peculiar structures of courts were attractive only to their respective clientele, the present system of courts presents itself as an organic development of the Afghan legal system of the 60s and 70s. The generally three-tiered structure of courts was known in Afghanistan since the times of Amanullah, and one could very well argue that the principle was already established in the time of

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<sup>247</sup> Nowak, see note 156, 347.

<sup>248</sup> Reaching the same conclusion in more detail Guhr/ Moschtaghi/ Knust, see note 238, 137.

Abdur Rahman in shape of the report obligation for the *qadi*. The system has been unified and simplified to reduce the overall number of different kind of appeal and cassation courts as a necessary modernisation. Also the Supreme Court, which due to its administrative functions rigorously separates the judiciary from the executive, was already established in the Constitution of 1964 as a guarantee of judicial independence. The speed and frequency with which revolutionary regimes have abolished the court shows the threat it has posed to an uncontrolled power of the executive. The possibilities of the Executive to influence the judiciary have been reduced compared to the Constitution of 1964, as the President of the Republic is no longer authorised like the former king to review the appointment of judges after a time of ten years, but is solely able to appoint new ones after the expiration of the term of office. Moreover, the tenure of office has been changed for the regular judges to a lifetime appointment, thus increasing judicial independence. Traditional proven means to reach unification of jurisprudence are still in use, as the formal questions of lower courts to the Supreme Court in regard of judicial matters (article 24 para. 9 LOJC (2005)) are a modern form of the presentation of questions to the chief-*qadi* already practised under the *Asas ul Quzat* of Amir Abdur Rahman.<sup>249</sup>

Modernisation of the system was and still is necessary – modernisation itself can be called a tradition of the Afghan system by now, especially when aiming at reducing the influence of the religious establishment and increasing the independence of the judiciary. In both aspects, there remains much to be done for the Afghan state in order to achieve the status of the 1960s and early 70s and even exceed it. Hence, the prerequisite of conformity with Afghan legal tradition is given, even though in some regards a little more courage in straining this prerequisite would have been preferable. However, another lesson drawn from the history of Afghanistan should be kept in mind as well, namely that drastic reforms always failed and that the great reform achievements were reached by compromises between traditionalist and progressive forces.

## V. Conclusion

Above all, to establish the rule of law in the Afghan legal system a judicial review of the executive acts must be implemented as soon as possi-

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<sup>249</sup> See above under II. 1.

ble. Apart from the non-existent provisions concerning a right to review of administrative acts, the structure and competency of the Afghan courts is basically in compliance with the international requirements established by the Bonn Agreement. However, there are still some deficits in the laws and some points remain unclear like, the exact number of the members of the different chambers of the Supreme Court and clear regulations about the distribution of general competencies between the Urban and District Primary Courts. Thus there is a need for some improvements, which the new parliament will hopefully undertake once it has adapted to its tasks. The problematic aspects of the norms mentioned seem to be rather due to a lack of competence and experience on the side of the legal drafters than to intent. Hence, it seems to be advisable for the community of donors to increase the support of the respective departments of the government commissioned with the task of legal drafting without being overcome by the temptation to design laws themselves, which just have to be translated in order to be implemented.<sup>250</sup> The laws of the 1960s and 70s reveal the skill of the drafters of legal texts before the era of civil turmoil and war and should be used when appropriate as suitable models for the present legal system.

Additional points of concern are the educational criteria for the appointment of the regular judges since necessary degrees vary greatly with regard to the level of legal education and the quality of teaching. Furthermore, they may be applied laxly due to the present lack of judges in Afghanistan. A uniform educational standard would be highly recommendable, leading to a uniform degree which should be the sole and only qualification for an entry into the judiciary. The level of education of judges has to be raised since this is an essential prerequisite for an independent judiciary. In addition, it would seem advisable to improve the transparency of the procedure for the appointment of the regular judges, preferably by the participation of parliament, by means of chosen delegates. Moreover, there are grave practical problems beside the still insufficient remuneration of most of the judges and lack of personal security in most parts of Afghanistan, most prominently the insufficient awareness in the minds of superiors of the meaning of judicial independence and its importance. The crucial task in the future will be to transfer the generally positive legal base provided for in the Constitution and the laws of Afghanistan into reality. Judicial independence

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<sup>250</sup> Very convincing in this regard: F. Ahmed, "Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code", *Hastings Int'l & Comp. L. Rev.* 29 (2006), 93 et seq.

remains a mere written promise, invisible for the people, if the importance of this principle is not embedded firmly in the minds of the members of the judiciary and if the government lacks an effective monopoly of force to be able to prevent war lords or other power holders from interfering with the affairs of the judiciary.