

Rule of Law in Afghanistan

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The rule of law in Afghanistan has been, generally speaking, fragile. The role of the state (dawlat) as a formal structure of authority, and in maintaining social order in Afghan society, has historically been limited. This applies in particular to rural Afghanistan, where about 80% of the Afghan population has been living.¹ In some southern and eastern parts of the country, state institutions have no – or merely a nominal – existence.² The weakness of the Afghan state in mind, the Bonn Agreement of 2001 began a process, focusing on political institutions and procedures, emphasizing the reform of Afghanistan's justice system by stating that "[...] with the assistance of the United Nations, a Judicial Commission [should be established] to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Af-

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- 1 Thomas Barfield, 'Culture and Custom in Nation-Building: Law in Afghanistan', *Maine Law Review*, volume 60, issue 2, University of Maine, College of Law, Portland, 2008, pp. 348 et seqq. (on p. 353)
- 2 Ali Wardak, 'Structures of Authority and Local Dispute Settlement in Afghanistan' in Hans-Jörg Albrecht / Jan-Michael Simon / Hassan Rezaei / Holger-C. Rohne / Ernesto Kiza (eds.), *Conflicts and Conflict Resolution in Middle Eastern Societies – Between Tradition and Modernity*, Duncker & Humboldt, Berlin, 2006, pp. 347 et seqq. (on p. 355); Fausto Zuccarelli, 'The Rule of Law and Justice in Afghanistan' in Angela Del Vecchio (ed.), *New International Tribunals and New International Proceedings*, Giuffrè, Milan, 2006, pp. 211 et seqq. (on p. 227); Devin T. Hagerty / Herbert G. Hagerty, 'The Reconstitution and Reconstruction of Afghanistan' in Devin T. Hagerty (ed.), *South Asia in World Politics*, Rowman & Littlefield Publishers, Lanham / Boulder / New York / et al., 2005, pp. 113 et seqq. (on p. 123).

ghan legal traditions.”³ Subsequently, the London Conference on Afghanistan, the Afghanistan Compact, signed in early 2006, followed up on that initiative by signalling an agreement between the Afghan government and the international community.⁴ Moreover, based on the United Nations Security Council Resolution 1746 (2007),⁵ adopted at its 5645th meeting on 23 March 2007, the Government of Afghanistan, the Government of Italy and UNAMA co-hosted the Conference on the Rule of Law in Afghanistan in Rome on 2 July and 3 July 2007, at the Ministero degli Affari Esteri (Ministry of Foreign Affairs),⁶ reaffirmed the crucial importance of judicial and legal reform and the implantation of the rule of law reform for the reconstruction of Afghanistan.⁷ Accordingly, the legal rule of law discourse and analyses have been centred primarily under the overall scope of Afghanistan’s justice system reform. Disquisitions on the rule of law in Afghanistan are therefore rather focusing on efforts dealing with practical issues such as the establishment of procedures and strengthening the judiciary as stipulated e.g. in the *qānūn-e tashkīlāt va salāhiyāt-e mohākem-e qove-ye qasā-ye jomhūrī-ye eslāmī-ye Afghānestān*⁸. At large, the evaluation of the situation seems to be disheartening.⁹ Some observers state that the rule of law in Afghanistan has not improved since the overthrow of the Taliban in December 2001. Many point out that security and freedom from

- 3 Cf. *Agreement on Provisional Agreements in Afghanistan pending the Re-establishment of permanent Government Institutions*, Bonn, 5 December 2001, Chapter “II) 2) legal framework and judicial system”.
- 4 Cf. London Conference on Afghanistan, *The Afghanistan Compact*, London, 31 January 2006 - 1 February 2006, available at <http://unama.unmissions.org/Portals/UNAMA/Documents/AfghanistanCompact-English.pdf> [accessed 20 December 2009], p. 1 and p. 4 et seq.
- 5 United Nations Security Council, *Resolution 1746 (2007) The Situation in Afghanistan*, 23 March 2007, S/RES/1746 (2007), available at: <http://www.unhcr.org/refworld/docid/460b8acb1c6.html> [accessed 20 December 2009], p. 4, para. 13.
- 6 For the so-called ‘Chairs Conclusion’ see <http://www.rolafghanistan.esteri.it/NR/rdonlyres/C555AE7E-E27F-4475-A050-75BD50F2B637/0/RomeConferenceChairsConclusions.pdf> [accessed 20 December 2009].
- 7 United Nations Development Programme Afghanistan, Project 00060050 (1 July 2008 – 30 September 2008), *Support to Provincial Justice Coordination Mechanism*, p. 3.
- 8 Law of Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan (often also referred to as the Law of the Structure and Competencies of Courts), published in the Official Gazette No. 851, 31 Sawar 1384 (21 May 2005), which repealed the Law on the Organization and Jurisdiction of the Courts published in the Official Gazette No. 739, dated 11 Hammal 1370 (31 March 1991).
- 9 Laura Barnett, *Afghanistan: The rule of law*, Library of Parliament / Bibliothèque du Parlement (Law and Government Division, PRB 07-17E), Ottawa, 2007, p. 1.

*corruption – key elements in fostering the rule of law – are nowhere near a reality in a country that has been ranked in the second or third lowest percentile for corruption by the World Bank Institute.*¹⁰

I. Rule of Law in Afghanistan's Context

In terms of Afghanistan's rule of law understanding the constitution of Afghanistan does not identify a clear definition: It is not mentioned explicitly in the normative part of the Constitution but only in the Preamble of the Constitution. Although the preamble itself does not share the legally binding character of the Constitution, since it is a compilation of motives rather than concrete rights or obligations, it nevertheless offers guidance for the interpretation of the text of the Constitution. The rule of law is therefore established as a constitutional principle.¹¹

A proposed definition, derived from a review of the existing body of literature, as well as extensive consultations and interviews conducted, states that "for Afghans, the rule of law refers to all those state and non-state institutions that promote justice and human development through the application of public rules that are deemed fair, applied independently, enforced equally, and consistent with human rights principles." It encompasses public institutions, institutional process, and rules dealing with four fundamental dimensions; namely (1) independence of the rule of law institutions, (2) public and fair trials, (3) equal enforcement, and (4) consistency with human rights principles. Further, the definition embraces and encourages the coexistence of the three major legal traditions in Afghanistan today: Islamic *shar'ia* (interpretations), Western (mainly French) positive law and legal thought, as well as customary

10 See, in this context, also Ali Wardak / Daud Saba / Halima Kaza / et al., *Afghanistan Human Development Report: Bridging Modernity and Tradition and the Search of Justice*, Center for Policy and Human Development / Army Press, Kabul / Islamabad 2007, pp. 37-50; Likewise, Tilmann J. Röder, 'Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan', *Max Planck Yearbook of United Nations Law*, Volume 11, Martinus Nijhoff Publishers, Leiden / et al., 2007, p. 307 et seq. (on p. 308).

11 Ramin Moschtaghi, *Max Planck Manual on Afghan Constitutional Law, Volume One: Structure and Principles of the State*, Amended 3rd Edition, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 2009, p. 22.

law.¹² Those four dimensions of the (proposed) Afghan definition of the rule of law are assessed against the limited body of qualitative and quantitative data available in today's Afghanistan. Special stress is placed on the key justice institutions, such as the judiciary, the police, the attorney general's office (*lu-ye tsārnoāli*) and prison system – key institutions for promoting the rule of law.¹³

Both the *Bonn Agreement* (2001) and the *Afghanistan Compact* (2006) strongly emphasize the duty of the executive and legislative authorities to bring Afghan laws in conformity to fundamental principles of human rights. This dimension, reflected also in the (proposed) definition largely represents the demands of the international community and donor countries. Noteworthy, according to the *Afghanistan Human Development Report*,¹⁴ few Afghans who were consulted saw this as an important dimension of the rule of law. Yet, despite the importance of understanding the issue of “cultural relativism” in the Afghan context (and potential tension between certain Islamic and human rights principles), the Afghan Constitution and new amended Afghan laws are, in general terms, formally consistent with the fundamental principles. Concerning the judicial sector, one has to state, however, that more than 80 per cent of disputes are still settled outside the state courts. The majority of legal

- 12 See generally Thomas Barfield, 'Culture and Custom in Nation-Building: Law in Afghanistan', *Maine Law Review*, volume 60, issue 2, University of Maine, College of Law, Portland, 2008, pp. 348 et seqq. (on p. 351); Mohammad Hamid Saboor, 'The Progress of Constitutionalism in Afghanistan' in Nadjma Yassari (ed.), *Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law*, Mohr Siebeck, Tübingen, 2005, p. 5; Ali Wardak, 'Building a post-justice system in Afghanistan', *Crime, Law and Social Change*, Volume 41, No. 4, Kluwer Academic Publisher, Dordrecht, 2004, pp. 319 et seqq.; Thomas Barfield, *Afghan Customary Law and Its Relationship to Formal Judicial Institutions*, United States Institute for Peace, Washington D.C. 2003, pp. 1 et seqq.
- 13 Their institutional attributes and the links among them as a system have been assessed in terms of such factors as the number of qualified police, judges, prosecutors, and prison officers who have received training; the level of the rehabilitation of courts and prisons; the level of functioning (and effectiveness) of these institutions; and their perception by ordinary Afghans have been used as indicators of the level of the (re-)establishment of the rule of law in Afghanistan. Cf. Ali Wardak / Daud Saba / Halima Kaza / et al., *Afghanistan Human Development Report: Bridging Modernity and Tradition and the Search of Justice*, Center for Policy and Human Development / Army Press: Kabul / Islamabad 2007, pp. 43 et seq., and, in particular, Table 2.1 on p. 45.
- 14 Ali Wardak / Daud Saba / Halima Kaza / et al., *Afghanistan Human Development Report: Bridging Modernity and Tradition and the Search of Justice*, op. cit. (note 8).

professionals has no or very limited access to up-to-date legal sources. Legal norms enacted by the legislative branch should therefore be described as a “patchwork”¹⁵ rather than a vivid system.¹⁶ Hence, the discrepancy between Islamic considered and so-called secular provisions remains unresolved and a legal policy issue. New codes like the Interim Criminal Procedure Code of 2004 even worsened this situation. Due to the fact that Italian legal reform consultants had streamlined the five-hundred articles of the 1965 *qānun-e ejra’āt-e jazā’i* (Criminal Procedure Code), Afghan judges, accustomed primarily to the civil law tradition, seem to find the new code to abstract – if they have ever seen it at all – and resort to its predecessor.¹⁷ In addition, many observers also express deep concern at the evident lack of apparent understanding and appreciation by judges by foundational notions of the judicial role and process:¹⁸ concepts of judicial independence, justice and the rule of law are not very much *au fait* within the judicial body.

Worth mentioning in the aforementioned context is Article 14 of the *qānūn-e tashkīlāt va salāhiyāt-e mohākem-e qove-ye qasā-ye jomhūrī-ye eslāmī-ye Afghānestān* that states, as to the guarantee against the interference of other state authorities on judicial decisions, that the judicial power shall

- 15 United States Institute for Peace, *Establishing the Rule of Law in Afghanistan* (Special Report 117), Washington D.C., 2004, p. 3; Amy Senier, *Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law*, al-Nakhla (The Fletcher School Online Journal for Issues related to Southwest Asia and Islamic Civilization), The Fletcher School, Tufts University, Medford, 2006, available at: http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf [accessed 20 December 2009], p. 1.
- 16 Tilmann J. Röder, ‘Kollisionen zwischen sharī’a, Gesetz und Stammestradi-tion in Afghanistan’ in Matthias Kötter / Gunnar Folke Schuppert (eds.), *Normative Pluralität ordnen: Rechtsbegriffe, Normenkollisionen und Rule of Law in Kontexten dies- und jenseits des Staates*, Nomos Verlagsgesellschaft, Baden-Baden, 2009, p. 257 et seq. (on p. 258).
- 17 Tilmann J. Röder, ‘Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan’, *Max Planck Yearbook of United Nations Law*, Volume 11, Martinus Nijhoff Publishers, Leiden / et al., 2007, pp. 307 et seqq. (on p. 309).
- 18 Livingston Armytage, ‘Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law), Volume 67, No. 1, Verlag W. Kohlhammer, Stuttgart 2007, pp. 185 et seqq. (on p. 198). See also Julia Pfeiffer, ‘Rechtsstaatlichkeit in Afghanistan: Zustand und Verbesserungsansätze gemäß der „Afghan National Development Strategy“’, *Zeitschrift für Afghanistankunde*, No. 3, SIIBA, Hamburg, 2009, pp. 24 et seqq. (on p. 27).

be independent and subject only to the law. Thus, the legislator stipulated clearly that the judiciary shall have exclusive authority to decide whether an issue submitted for decision is within its competency as defined by law.¹⁹ Having said this, one is able to ascertain that the separation of powers, in particular the separation between the judiciary and executive authority, is, at least formally also clearly regulated in the Constitution of Afghanistan:²⁰ Article 116 of the Constitution of Afghanistan and Article 2 para. 1 of the *qānūn-e tashkilāt va salāhiyāt-e mohākem-e qove-ye qasā-ye jomhūrī-ye eslāmī-ye Afghānestān* establish the judiciary as an independent organ of the state, being composed of the *Stera Mahkame* (Supreme Court), *mohākem-e estenāf* (courts of appeal) and the *mohākem-e ebteda-ye* (primary courts).²¹ Moreover, 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.²²

- 19 Cf. Principle 3 of the United Nations Principles on the Independence of the Judiciary, adopted by consensus on the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, 6 September 1985 and endorsed by the General Assembly Resolution A/RES/40/32, New York, 29 November 1985, para. 5. The United Nations 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, see: Resolution A/RES/40/146, New York, 13 December 1985, para. 2.
- 20 Ramin Moschtaghi, 'Aktuelle Probleme beim Rechtsstaatsaufbau in Afghanistan – Das Gutachten des Obersten Gerichtshofes zum Misstrauensantrag des Unterhauses gegen den Außenminister', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law), Volume 68, No. 2, Verlag W. Kohlhammer, Stuttgart 2008, pp. 509 et seqq. (on p. 512).
- 21 Ramin Moschtaghi, 'Organisation and Jurisdiction of the newly established Afghan Courts – Compliance of the formal System of Justice with the Bonn Agreement', *Max Planck Yearbook of United Nations Law*, Volume 10, Martinus Nijhoff Publishers, Leiden / et al., 2006, pp. 531 et seqq. (on p. 555).
- 22 Ramin Moschtaghi, *Max Planck Manual on Afghan Constitutional Law, Volume One: Structure and Principles of the State*, Amended 3rd Edition, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 2009, p. 77; Ramin Moschtaghi, 'Organisation and Jurisdiction of the newly established Afghan Courts – Compliance of the formal System of Justice with the Bonn Agreement', *Max Planck Yearbook of United Nations Law*, Volume 10, Martinus Nijhoff Publishers, Leiden / et al., 2006, pp. 531 et seqq. (on p. 570).

Compared to other legal systems, the Afghan Constitution equips the government, the executive authority, with quite extensive law making powers, which can be used without an interaction of the *Shura* (Parliament), the typical legislative authority despite the fact that the Constitution calls the *Shurā-ye Melli* (National Assembly) the “highest legislative organ”. Due to the fact that the Constitution places the legislative process Parliament firmly under Government control, one is able to state that the legislative powers have been severely curtailed. Should the Parliament, for example, despite the limitations on its legislative freedom of action, happen to adopt some legislation which the Government does not like, the President can still use his veto to prevent the bill from becoming law. Such a presidential veto cannot be overruled except by a two two-thirds majority in the Lower House, the *Wolsi Jirga* (House of the People), which in most cases will be difficult to achieve (Article 94 of the Constitution). Moreover, the Government enjoys substantial law-making powers of its own, which it can use independently of Parliament. Article 76 grants the Government the power to devise and approve regulations that are not contrary to the text and spirit of any law. The use of the regulatory powers of the Government is thus not dependent upon a prior parliamentary authorization. In the absence of any contrary constitutional or statutory provision, the Government can freely enact the rules which it deems necessary for the implementation of its policies. In addition, in case of recess of the House of the People, the Government can legislate in its place if this is necessary to confront an “emergency situation” (Article 79 of the Constitution). The “emergency situation” within the meaning of Article 79 of the Constitution has to be distinguished from a formally declared state of emergency, which entitle the President to transfer specific powers which normally belong to Parliament to the Government. By contrast, in an “emergency situation” under Article 79 of the Constitution, the transfer of legislative powers takes place automatically, without any formal presidential decision on the matter being necessary. Since the Constitution does not define the situation covered by Article 79 of the Constitution more precisely, the Government is free to adopt its own criteria in determining whether an “emergency” does in fact exist. The only way for Parliament to take back its powers would then consist in the rejection of the legisla-

tive decrees adopted by the Government during recess after it has reconvened.²³

This extensive authorizations are problematic with regard to the separation of powers and the rule of law and should at least mitigated by a strict judicial review. According to Article 121 of the Constitution and Article 24 para. 1 of the *qānūn-e tashkīlāt va salāhiyāt-e mohākem-e qove-ye qasā-ye jomhūrī-ye eslāmī-ye Afghānestān* 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 (*farāmin-e taqnīnī*) are a peculiarity of Afghanistan's Interim Legal System. They have the function of formal laws and are not equivalent to the decrees (*moqararāt*) which the government may enact according to Article 76 of the Constitution.²⁴ There is, therefore, 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 courts are merely bound by law and not decrees of the executive (Article 130 of the Constitution). Such an indirect control is, however, not sufficient with regard to the rule of law.²⁵

II. Conclusion

Afghan rule of law (institutions) still lack(s) efficiency, capacity and nationwide coverage. Outside of the major cities, village councils or tribal

23 Rainer Grote, 'Separation of Powers in the New Afghan Constitution', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law), Volume 64, No. 4, Verlag W. Kohlhammer, Stuttgart, 2004, pp. 897 et seqq. (on p. 909).

24 This perception correlates with the legal terminology used in the Iranian legal system since regulations since regulations passed by the government are called *moqararāt* as well, the term *taqnīn* is reserved for acts of the legislator, cf. Mohammad Ja'afar Ja'afari Langarūdi, *terminūlūzi-ye hoqūq*, Ganj-e Dānesh, Teheran, 1382 [2004], pp. 679-680.

25 Ramin Moschtaghi, *Max Planck Manual on Afghan Constitutional Law, Volume One: Structure and Principles of the State*, Amended 3rd Edition, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 2009, pp. 85-86; Ramin Moschtaghi, 'Organisation and Jurisdiction of the newly established Afghan Courts – Compliance of the formal System of Justice with the Bonn Agreement', *Max Planck Yearbook of United Nations Law*, Volume 10, Martinus Nijhoff Publishers, Leiden / et al., 2006, pp. 531 et seqq. (on p. 584 et seq.).

elders have for generations played the predominant role in resolving disputes and meting out justice. There are indications that this customary law system of law – which varies in form and substance throughout Afghanistan – has been subverted and manipulated by local wartime and current power-holders, but to what extent and effect has not been closely examined.²⁶ Unsurprisingly, Afghan rule of law institutions are often viewed as susceptible to corruption and have perceived limited legitimacy within much of the country.²⁷ Confidence in the formal justice system is particular low in the South East, West and South West, regions which report the highest level of insecurity.²⁸ While genuine rule of law reform within Afghanistan will require decades of investment, the current tension between expectations of rapid advancement and the delay on the ground has contributed to a sense of frustration among domestic stakeholders. Failing to improve rule of law reform could threaten the nation's reconstruction effort and the possibility of genuine peace and long-term stability.

26 United States Institute for Peace, *Establishing the Rule of Law in Afghanistan* (Special Report 117), Washington D.C., 2004, p. 10.

27 Alexandra Strand Holm, *Rule of Law in Afghanistan*, Dutch NGO Network for Afghanistan, Kabul, 5 July 2007, p. 1; M. Cherif Bassiouni / Daniel Rothenberg, *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need of a Comprehensive Plan*, Rome 3 July 2007, p. 10.

28 Ruth Rennie / Suchindra Sharma / Pawan Sen, *Afghanistan in 2009: A Survey of the Afghan People*, The Asia Foundation, Kabul, 2009, p. 20 and p. 88 (see also fig. 6.3).