

Afghanistan

Rule of Law in Afghanistan

Original contribution by Hatem Elliesie, Doctoral Candidate and Academic Coordinator of the Horn of Africa Projects at Freie Universitaet Berlin, Germany, Vice-Chairman of the Board of the Arabic and Islamic Law Association and member of the Executive Committee of the African Law Association.

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 (Barfield 2008: 353). In some southern and eastern parts of the country, state institutions have no - or a merely nominal - existence (Wardak 2006: 355; Zuccarelli 2006: 227; Hagerty/Hagerty 2005: 123). Bearing the weakness of the Afghan state in mind, the *Bonn Agreement* of 2001 began a process, focusing on political institutions and procedures and 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 Afghan legal traditions." (Chapter II. 2. on "Legal framework and judicial system"). 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. Moreover, based on UN Security Council [Resolution 1746](#) (2007), 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* at the Ministero degli Affari Esteri (Ministry of Foreign Affairs) in Rome on 2 July and 3 July 2007, reaffirmed the crucial importance of judicial and legal reform and the implantation of the rule of law reform for the reconstruction of Afghanistan (United Nations Development Programme Afghanistan, Project 00060050, *Support to Provincial Justice Coordination Mechanism*: 3). 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 therefore focus on efforts dealing with practical issues such as the establishment of procedures and strengthening the judiciary as stipulated e.g. in the "*qnn-e tashklt va salhiyt-e mohkem-e qove-ye qas-ye jomhr-ye eslm-ye Afghnestn*" (*Law of Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan, Official Gazette o. 851, 31 Sawar 1384 (21 May 2005)*). At large, the evaluation of the situation seems to be disheartening (Barnett 2007: 1). 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 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 (Wardak et al. 2007: 37-50; Röder 2007: 307).

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, rather, 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 (Moshtaghi 2009: 22; for an overview on the judiciary and the justice system see [Wardak 2008](#)).

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 processes, 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. Furthermore, the definition embraces and encourages the coexistence of the three major legal traditions in Afghanistan today: Islamic *shar'a* (interpretations), Western (mainly French) positive law and legal thought, as well as customary law (Barfield 2008: 351; Soboori 2005). 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 tsmvli*) and prison system - key institutions for promoting the rule of law. (*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. Wardak/Saba et al. 2007: 43, and 45 table 2. 1).*

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, also reflected in the (proposed) definition largely represents the demands of the international community and donor countries. It is important to note that, according to the *Afghanistan Human Development Report* (Wardak/Saba et al. 2007) 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. With regard to 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 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" (United States Institute for Peace 2004: 3; Senier 2006: 1) rather than a vivid system (Röder 2009: 257/258). Hence, the discrepancy between provisions that are deemed Islamic or secular, conversely, remain unresolved and a legal policy issue. New codes like the Interim Criminal Procedure Code of 2004 exacerbated this situation. Due to the fact that Italian legal reform consultants had streamlined the five-hundred articles of the 1965 *qnn-e ejra't-e jaz'i* (Criminal Procedure Code), Afghan judges, accustomed primarily to the civil law tradition, seem to find the new code too abstract - if they have ever seen it at all - and resort to its predecessor (Röder 2007: 309). In addition, many observers also express deep concern for the evident lack of apparent understanding and appreciation by judges for foundational notions of the judicial role and process: concepts of judicial independence, justice and the rule of law are not very much *au fait* within the judicial body (Armytage 2007: 198; Pfeiffer 2009: 27).

Article 14 of the *qnn-e tashklt va salhiy-e mohkem-e qove-ye qas-ye jomhr-ye eslm-ye Afghnestn*, is noteworthy in that it states, as to guarantee against the interference of other state authorities on judicial decisions, that the judicial power shall be independent and subject only to the law. Thus, the legislation 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. (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). That said, one is able to ascertain that the separation of powers - in particular the separation between the judiciary and executive authority - is, formally and clearly regulated in the Constitution of Afghanistan (Moschtaghi 2008: 512): Article 116 of the Constitution of Afghanistan and Article 2 para. 1 of the *qnn-e tashklt va salhiy-e mohkem-e qove-ye qas-ye jomhr-ye eslm-ye Afghnestn* establish the judiciary as an independent organ of the state, being composed of the *Stera Mahkame* (Supreme Court), *mohkem-e estenf* (courts of appeal) and the *mohkem-e ebteda-ye* (primary courts) (Moschtaghi 2006: 555). 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 (Moschtaghi 2009: 77; and Moschtaghi 2006: 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 *Shur-ye Melli* (National Assembly) the "highest legislative organ". Due to the fact that the Constitution places the Parliament in the legislative process firmly under Government control, it is evident that the legislative powers have been severely curtailed. For example, should the Parliament, 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 *Wols Jirga* (House of the People), which in most cases will be difficult to achieve (Article 94 of the Constitution). Moreover, the Government enjoys substantial lawmaking 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 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 of the rejection of the legislative decrees adopted by the Government during recess after it has reconvened (Grote 2004: 909).

These extensive authorizations are problematic with regard to the separation of powers and the rule of law and should at least be mitigated by a strict judicial review. According to Article 121 of the Constitution and Article 24 para. 1 of the *qnn-e tashklt va salhiy-e mohkem-e qove-ye qas-ye jomhr-ye eslm-ye Afghnestn* 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 (*farmin-e taqnn*) are a peculiarity of Afghanistan's Interim Legal System. They have the function of formal laws and are not equivalent to the decrees (*moqarart*) which the government may enact according to Article 76 of the Constitution. (This perception correlates with the legal terminology used in the Iranian legal system since regulations passed by the government are called *moqarart* as well, the term *taqnn* is reserved for acts of the legislator; see Ja'afar Ja'afar Langard 2004: 679-680). There is at least no direct possibility of judicial review of legislative acts by 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, insufficient with regard to the rule of law (Moschtaghi 2009: 85-86; and Moschtaghi 2006: 584).

II. Conclusion

The state (*dawlat*) as a formal structure of authority still lacks efficiency, capacity and nationwide coverage in Afghanistan. Outside of the major cities, village councils or tribal elders have played the predominant role in resolving disputes and meting out justice for generations. There are indications that this customary 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 (United States Institute for Peace 2004: 10). Unsurprisingly, formal structure of authority and its institutions are often viewed as susceptible to corruption and have perceived limited legitimacy within much of the country (Strand Holm 2007: 1; Bassiouni/Rothenberg 2007: 10). Confidence in the formal justice system is particularly low in the South East, West and South West, regions which report the highest level of insecurity (Rennie/Sharma/Sen 2009: 20, 88, and fig. 6.3). While genuine rule of law reform within Afghanistan requires 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 reform rule of law could threaten the nation's reconstruction effort and the possibility of genuine peace and long-term stability.

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