

## Islamic Law and the Afghan Legal System

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The religious legitimization and 'pax Islamica' of the Taliban generally consists of a denouncement of the type of Islam and Islamic law implemented by the 'medieval' and 'fundamentalist' Taliban. In turn, any official denouncement of the Taliban's misinterpretation of Islam is based on an implied claim that other, more correct and appropriate, interpretations of Islam and, in turn, of Islamic law, will be implemented by the current government. There is little doubt that at least in the foreseeable future no Afghan government will be able to survive on a purely secular, non-Islamic, basis. Thus, Hamid Karzai's government has been careful to avoid any actions which might signal to the country that Afghanistan is slipping its Islamic moorings. At the same time he has been keen to reassure the international community that his government was committed to international law as applicable to Afghanistan, and that there was no prospect for the return to the religious fundamentalism executed by the Taliban. Political Islam is an intensely legalistic movement: Islam's claims to govern virtually all aspects of human life have historically manifested themselves in legal terms. It is the extent and degree of the implementation of Islamic law which is often cited as the litmus test for the Islamic credentials of an Islamic state. The role of Islamic law in Afghanistan's legal system is therefore a most delicate issue. So far the government has avoided any explicit engagement with this issue. The country's rather conservative Chief Justice HH Judge Shinwari has not been replaced nor has there been any attempt to deal with the legacy of 4700 judges [according to HH Judge Shinwari] which the current government inherited. However, it is noticeable that in turn the Chief Justice now accepts that Afghanistan's legal system is a mixed one consisting of Islamic law and of state enacted legislation. The relative calm over the thorny issue of the role of Islam in the legal system has been achieved by a concerted effort to avoid any direct dealings with it. This inertia is reflected in the barely visible efforts of the international community to rebuild the country's legal system. Italy, the appointed lead nation for Afghanistan's legal reconstruction, has delegated this task to the prestigious and well-known International Development Law Organisation [IDLO]. In turn, IDLO has established a branch office in Kabul and has embarked on the task of assembling a complete of Afghan laws past and present. Various commissions constituted under the provisions of the Bonn Agreement are dealing with legal issues but thus far only few visible manifestations of this work have emerged. The most decisive document to determine the future role of Islamic law, namely the Constitution, is being prepared in secret and is as yet, at least officially, marked 'strictly confidential'. In the meantime, it is not so much the substantive law but legal institutions which have been the focus of international assistance. For instance, a German government sponsored conference, originally meant to examine the role of Islam in the legal system, instead focused on the training and education of legal jurists. Attention is being paid to the country's police force, the infrastructure of courts, the payment of judges, the state of the country's law schools, etc.

However, there is virtually no domestic or international engagement in the area of substantive law. Thus, discussions on Afghanistan's compliance with its international obligations under various human rights treaties have been avoided at international conferences and meetings and domestic gatherings. The country's surprise ratification of the international Convention on the Elimination of All Discrimination against Women without any reservation has not resulted in any efforts by the government to examine whether or not the existing legal system complies with this international legal treaty. This paper will begin with a very tentative analysis of the position of Islamic law in Afghanistan's recent past. It will be argued that Afghanistan's legal system has been marked by several faultlines. The first is common to most legal systems of the developing world, namely the wide gap between official, state made and enforced law, and the legal reality, which bears no resemblance to the official legal system. The second faultline manifests itself in the role of Islamic law within this essentially plural legal system. Islamic law derives its authority not from the state but from religion. As a result at times it has clashed not only with positive laws but also with customary laws de facto co-existing with state laws. Prior to 1979 the state was able to legislate in areas of law traditionally occupied by Islamic law.

However, it is likely that in the present any attempt to dilute 'purist' interpretations of Islamic law will be considered controversial. It will be argued that it is decisive for the government to establish a legitimate mechanism which allows it to exercise control over the role of Islam in the future legal order. Any delegation of this authority to institutions outside the control of the government is liable to create alternative centres of power and political legitimisation. History has shown that governments perceived as un-islamic have little chance of long term survival. A Mixed Legal System Currently, Afghanistan does not have a uniform legal system.

Serious human rights abuses continue to occur on a regular basis and perpetrators remain outside the reach of Afghanistan's transitional government under President Karzai. The legal reality is marked by impunity: not only do past grave violations of human rights remain unpunished but such abuses are continuing without any prospect for a legal system capable of bringing the perpetrators to justice. Formally Hamid Karzai's government is responsible for the implementation of the Bonn Agreement and representing the state's central and ultimate authority his government must be enabled to carry out its duties imposed not only by Afghanistan's domestic laws but also the country's international legal obligations. There is no doubt that Hamid Karzai's government is sincere in its efforts to address human rights' abuses. However, Afghanistan must still be regarded as a failed state whose central government does not enjoy a monopoly on the legitimate use of power. In purely practical terms the government has found it difficult to address the issue of basic human rights. The authority of the central government does not extend far beyond Kabul. Thus, a prerequisite for the establishment of the rule of law and a legal system capable of guaranteeing basic fundamental rights is currently not present. Legal and judicial institutions, if they exist, face a host of problems. First and foremost, courts are understaffed and ill equipped. Secondly, neither judges, lawyers, nor educational institutions have access to applicable statutes and associated legal materials. Afghanistan's prolonged civil war has brought with it the destruction or disappearance of most statutes. Thus, in practice, courts apply Islamic law and not the provisions of the 1964 Constitution or the applicable statutory laws. However, even

during the period from 1964 until the outbreak of the civil war caused by the Soviet invasion of Afghanistan in 1979, Afghanistan's framework of constitutional and statutory laws seems to have played only a minor role in the administration of justice. In practice and legal reality, Afghanistan's courts have been applying Islamic and customary laws. Further, non-state fora for the settlement of disputes like jirgas, ie. councils of elders, have always played an important role in the legal system. Part II of the Bonn Agreement commits the Transitional Government of Afghanistan to a interim legal framework until the adoption of a new Constitution which consists of '(i) The Constitution of 1964, (a) to the extent that its provisions are not inconsistent with those contained in this agreement [ie. the Bonn Agreement], and (b) with the exception of those provisions relating to the monarchy and to the executive and legislative bodies provided in the Constitution; and, (ii) existing laws and regulations, to the extent that they are not inconsistent with the Bonn Agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations.' In respect of the judiciary the Bonn Agreement provides in Part II (2) that '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.' The contrast between the requirements to be met by Afghanistan's legal system under the provisions of the Bonn Agreement and the legal reality as it pertains in the country can only be described as dramatic: whereas the provisions of the 1964 Constitution and Afghanistan's international legal obligations can be ascertained without any difficulty, the same does not apply to the existing laws and regulations. The latter have to a large extent physically disappeared and many of them can only be located in foreign libraries and collections. Thus both the Interim Administration and the Transitional Government, which took control over the affairs of the state in June 2002, having been elected by an Emergency Loya Jirgah, are faced with the impossible task of enforcing a legal system that within Afghanistan does not even exist on paper. Like many other developing countries, Afghanistan's official law, i.e. the formal legal system established under the provisions of a constitution, does not represent the de facto norms that govern the lives of the majority of the population. The inability of successive governments to implement statutory laws in a uniform and countrywide manner is as much a reflection of underdevelopment as it is of political constraints. Without exception every single survey of Afghanistan's legal system observed, and frequently lamented, the fact that Afghanistan's statutory laws and regulations existed, for all practical purposes, on paper only. It is important to note that the limited practical value of Afghanistan's statutory law cannot be attributed solely to the decline and eventual demise of a central political authority in Afghanistan as a result both of more than two decades of civil war and the reign of the Taliban. In a carefully researched article on 'Legal Elites in Afghan Society', published in 1980, M.G. Weinbaum found that even 'where formal statutes exist, judges typically lack the training and research resources required to identify appropriate provisions of the law.' he also finds that 'many are also understandably overwhelmed by the necessity to adjust positive law, often foreign in origin, to the Afghan experience.' The

splitting of the legal system into an official law and unofficial law has been a hallmark of Afghan legal history ever since attempts were made to introduce statutory laws. In fact, it is possible to go even further and state with some confidence that past experience would suggest that any attempt to implement and enforce secular statutory laws which depart from customary and/or Islamic law is liable to be met with protests and civil unrest. The difficulties in implementing statutory laws experienced in the 1960s and 1970s are further compounded by purely practical considerations. First and foremost, many of the statutes framed and passed during that period are currently unavailable in Afghanistan. Most courts do not have access to or a collection of Afghanistan's main statutory laws. Even the Ministry of Justice and the University of Kabul do not hold complete sets of Afghanistan's statutory laws and regulations. The International Human Rights Law Group and the American Bar Association collected various Afghan statutes, principally concerned with penal, civil and commercial law, reprinted them in Pakistan and presented them to the Ministry of Justice in early June 2002. These laws must be regarded as important and their distribution within Afghanistan undoubtedly constitutes a significant step towards the establishment of a formal legal and judicial system. However, it must be noted that even during periods when these laws were presumably more easily available, they were in fact rarely applied and did not offer an accurate representation of Afghanistan's de facto legal system. As noted earlier, even during the 1960s and 1970s judges either had only limited knowledge of them or were reluctant to apply them. Lack of training, knowledge and purely ideological reasons make it highly unlikely that the redistribution of some of the statutes comprising a significant part of Afghanistan's corpus of codified laws will have any immediate impact on human rights and the rule of law in Afghanistan even in metropolitan areas like Kabul. Further, irrespective of the availability of printed versions of legal codes, there exists a fundamental difficulty in identifying the applicable law in Afghanistan mainly as a result of rapid political change and concurrent changes in the formal legal system. The Bonn Agreement provides that until the adoption of the new Constitution the following legal framework shall be applicable on an interim basis: 'The existing laws and regulations, to the extent that they are not inconsistent with this agreement or with the international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations.' This means that all existing laws are applicable unless they are in violation of the 1964 Constitution, international legal obligations or the Bonn Agreement. Important changes to the law were introduced as a result of political changes in the late 1970s. An example for this is the Law of Criminal Procedure. Whereas the Criminal Procedure Law of May 1965, as amended in 1974, provided that detention of a suspect on whatever grounds cannot exceed one week unless authorized by a court (see articles 26, 28, and 29), this situation changed profoundly in 1981. The Law on the Discovery and Investigation of Crimes and Supervision of the Attorney General on Its Legal Enforcement of March 1979, as amended in 1981, allowed the Attorney General much wider powers including the power to detain a suspect for up to six months without any court approval being required. It is not certain which of the two provisions govern at least in theory the detention periods of suspects in criminal investigations. The same degree of legal uncertainty pertains to other areas of law that underwent changes as a result of political transformations. Most prominent are the land

reform laws, which were introduced following the coup of April 1978: it has been impossible to establish the fate of these laws or the present status of any measures taken under them. A careful study of the statutory framework of Afghanistan's legal system is therefore fraught with both practical and theoretical difficulties. On a practical level, it is doubtful whether any wider dissemination of existing laws would result in an improvement of the rule of law or human rights.

Secondly, the corpus of statutory laws presents itself in layers, each layer representing particular periods of governance. It is primarily a political task to decide which of these layers should be applied, if at all. The redistribution of laws from a particular period cannot therefore be regarded as a politically neutral exercise since it imposes on the existing courts and institutions a particular choice of laws. Statutory laws were enacted under the Constitutions or Interim Constitutions of Afghanistan of 1964, 1977, 1980, 1987, 1990 and 1992. During all these periods of constitutional rule new statutes were enacted and existing ones amended or superseded.

Thus, it is likely to be regarded controversial which laws should now be recognized as valid and applicable. Islam and the 1964 Constitution According to the Bonn Agreement, the 1964 Constitution is applicable on an interim basis to the extent that its provisions are not inconsistent with the Agreement itself, with the exception of the provisions relating to the monarchy and to the executive and legislative bodies provided in the Constitution. Articles 25 to 40 of the 1964 Constitution contain provisions on 'The Basic Rights and Duties of the People'. If properly observed by all authorities and political and military factions these articles would go a very long way towards safeguarding human rights and the rule of law in Afghanistan. Article 25 provides for equality before the law: 'The people of Afghanistan, without any discrimination or preference, have equal rights and obligations before the law.' The article is remarkable in that it is simple, clear and unambiguous. However, as will be seen later, it must be regarded as a programmatic statement rather than a reflection of even the official law. This applies especially to the area of family law, which is governed by Islamic law, and which provides for differential treatment of men and women, especially in the areas of marriage, divorce and inheritance. As observed earlier, the legal reality itself departs significantly from the principles enunciated in Article 25. Article 26 contains a wide range of fundamental rights all concerned with the right to a fair trial, liberty and human dignity. Article 26 provides that: 'Liberty is the natural right of the human being. This right has no limitations except the liberty of others and public interest defined by the law. The liberty and dignity of the human being are inviolable and inalienable. The State has the duty to respect and protect the liberty and dignity of the individual. No deed is considered a crime except by virtue of law in force before its commission. No one may be punished except on the orders of a competent court rendered after an open trial held in the presence of the accused. No one may be pursued or arrested except in accordance with the provisions of the law. No one may be detained except on order of a competent court, in accordance with the provisions of the law. Innocence is the original state; the accused is considered to be innocent unless found guilty by a final judgement of a court of law. Crime is a personal deed. Pursuit, arrest or detention of the accused and the execution of sentence against him does not affect any other person. Torturing another human being is not permissible. No one can torture or issue orders

to torture a person even for the sake of discovering facts, even if the person involved is under pursuit, arrest or detention or is condemned to a sentence. Imposing punishment incompatible with human dignity is not permissible. A statement obtained from an accused or any other person by compulsion is not valid. Confession of a crime means the admission made by an accused willingly and in full possession of his senses before a competent court with regard to the commission of a crime legally attributed to him. Every person has the right to appoint a defence counsel for the removal of a charge legally attributed to him.

Indebtedness of one person to another cannot cause deprivation or curtailment of the liberty of the debtor. The ways and means of recovering a debt shall be specified in the law. Every Afghan is entitled to travel within the territory of his State and settle anywhere except in areas prohibited by the law. Similarly, every Afghan has a right to travel outside of Afghanistan and to return to Afghanistan according to the provisions of the law. No Afghan shall be sentenced to banishment from Afghanistan or within its territory.’ The provisions of Article 26 are strengthened by Article 100 which provides that ‘In the courts of Afghanistan trials are held openly and everyone may attend in accordance with the provisions of the law. The court may in exceptional cases specified in the law hold closed trials. However, the judgement shall always be openly proclaimed. The courts are bound to state in their judgements the reasons for their verdicts.’ The fair trial provisions contained in Articles 26 and 100, if properly implemented and reflected in the substantive and procedural laws of the country would go a long way in safeguarding basic human rights in Afghanistan. A closer examination of Afghanistan’s criminal laws, below, reveals that some of the constitutional provisions contained in Article 26 remain unimplemented. However, in the current situation this must be regarded as a comparatively small detail, considering that the reality of the criminal justice system as it currently operates in large parts Afghanistan, remains outside the legal system contemplated by the 1964 Constitution. Article 29 guarantees the right to property, Article 30 provides for freedom and secrecy of communications of persons, while Article 31 provides that freedom of thought and expression are inviolable. Article 27 provides that no Afghan can be extradited to a foreign state. A person’s residence is declared inviolable under Article 28. The right to assemble unarmed, without the prior permission of the state, for legitimate and peaceful purposes, in accordance with the provisions of the law, is guaranteed under Article 32, as is the right to form political parties. Apart from these civil and political rights, the 1964 Constitution also provides for limited social and economic rights. These comprise a right to free education (Article 34) and health, with the limits of its means (Article 36). What is absent from the 1964 Constitution is a properly defined and guaranteed constitutional mechanism for the enforcement of these rights. Article 33 provides that ‘Anyone who, without due cause, suffers damage from the Administration is entitled to compensation and may file a suit in a court for its recovery.’ However, this article falls short of providing an effective enforcement mechanism. Also missing are constitutional provisions that afford these rights any higher protection against constitutional amendment or removal than the other parts of the 1964 Constitution. Article 120 provides that only adherence to the basic principles of Islam, Constitutional Monarchy in accordance with the provisions of this Constitution, and the values embodied in Article 8 shall not be subject to amendment. The Judiciary The Bonn Agreement provides that: ‘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.’ Articles 97 to 107 of the 1964 Constitution contain detailed provisions on the establishment of courts and the status and independence of the judiciary. Article 97 establishes the judiciary as an independent organ of the State. The only court actually established under the Constitution is the Supreme Court (Article 98) while the number of the other courts is determined by law. The jurisdiction of the courts to hear cases brought before them is exclusive: ‘Under no circumstances shall a law exclude from the jurisdiction of the judiciary, as defined in this Title, a case or sphere, and assign it to other authorities’ (Article 98). However, Article 98 also provides that this provision does not prevent the establishment of military courts ‘but the jurisdiction of these courts is confined to offences related to the armed forces of Afghanistan.’ The Supreme Court is accorded a high degree of supervisory jurisdiction over the lower judiciary. Charges of misconduct against a judge are heard and decided by the Supreme Court, and all judges with the exception of the judges of the Supreme Court itself, are appointed ‘by the King on the recommendation of the Chief Justice.’ Article 105 provides for the appointment of nine persons to the Supreme Court by the King and lays down minimum qualifications consisting of age (having completed 35 years), of being formally eligible for election to the Parliament (see Article 46 of the Constitution for these qualifications) and of having ‘sufficient knowledge of jurisprudence, the national objectives and the laws and the legal system of Afghanistan.’ The terms of tenure of the nine Supreme Court judges provide for a reasonably high degree of judicial independence: once appointed the King can review the appointment of the judges of the Supreme Court only ten years after their respective dates of appointment and they can otherwise only be removed from office in accordance with Article 106. The latter article provides that after an initial demand of one third of the members of Parliament for the impeachment of a judge of the Supreme Court ‘on a charge of a crime stemming from the performance of their duty’, two thirds of the members of Parliament have to approve this demand. Should this happen the accused judge is suspended from office and a meeting of the Loya Jirgah is called to appoint a Commission of Enquiry. Should the report of the Commission indict the accused judge then a two-thirds majority of the Loya Jirgah can authorize the prosecution of the accused judge. A special tribunal appointed by one of the members of the Loya Jirgah then tries the accused in accordance with the criminal procedures of the Supreme Court. Except in cases of dismissal under Article 106, the judges of the Supreme Court shall, after their tenure in office, enjoy for the rest of their lives all the financial privileges pertaining to the term of their services. The Supreme Court as the country’s apex court is also constitutionally charged with the organization and functions of the Courts and the judicial affairs of the State in accordance with the provisions of the Constitution and the law. This duty extends to the organization of the administrative affairs of the other courts, including the administration of the budget of the judiciary. The latter is prepared by the Chief Justice in consultation with the Government and, after the approval of the Supreme Court, is presented by the government to the Parliament as part of the State budget. The budget of the judiciary is administered directly by the Supreme Court. The

service conditions of judges are identical to those of civil servants but ‘their appointment, promotion, dismissal, retirement and calling to account shall be within the competence of the Supreme Court, in accordance with the law’ (Article 107). Thus the Supreme Court occupies a strong position in the constitutional framework of Afghanistan. Once appointed its judges enjoy a high degree of independence and a high degree of control and supervisory jurisdiction over the lower judiciary and courts. The re-establishment of a formal judicial system has been difficult. In the metropolitan areas of Mazar-e-Sharif and Kabul civil and criminal courts appear to be functioning, as does the Supreme Court. However, it is far from clear who originally appointed the judges to these courts and to what extent they have ever enjoyed the exclusive jurisdiction over all trials as provided in Article 98 of the 1964 Constitution. The Law of the Jurisdiction and Organization of the Courts of Afghanistan of (Muslim Year) 1346 [1968] [the 1968 Law] contains detailed provisions on the hierarchy and organization of courts. It establishes the following courts: General Courts, which include the Supreme Court, the Court of Cassation, the High central Court of Appeal, Provincial Courts and Primary Courts; and Specialized Courts that include juvenile courts, labour courts, and other specialized courts established by the Supreme Court when needed. Field work revealed that in Kabul at least these courts are in operation though the number of cases heard by them and the exclusivity of their jurisdiction could not be ascertained. The Supreme Court itself consists of four departments: the department of the Administration of the Judiciary, the department of Judicial Inspection, the department of Research and Investigation, and the Public Prosecutor’s Office of the Judiciary. The 1968 Law contains detailed provisions on the judicial jurisdiction of the Supreme Court as well as its administrative powers and also establishes a Court of Cassation centred in the Supreme Court. The Court of Cassation functions as an administrative court of appeal and is divided into three ‘Collegiums’: the Collegium of Civil and Commercial cases, the Commercial Collegium and the Public Rights Collegium. The Court of Cassation can either annul the judgement of a lower court or confirm it. In case of the former a re-trial is ordered. The next level of the court structure consists of the High Central Court of Appeal. It consists of three Collegiums similar to those of the Court of Cassation and its main function is to hear appeals against judgements pronounced by provincial courts. Each province has one Provincial Court which enjoys appellate jurisdiction over decisions made by primary courts and a limited original jurisdiction primarily involving cases relating to charges against public officials, press offences and smuggling. The Chief Justice of Afghanistan determines the number of primary courts in each province. In 1980, there were about 220 primary courts and 28 provincial courts. Article 60 provides that the provincial courts are duty bound to provide the primary courts, located within their jurisdiction, with the necessary administrative services and assist in organizing their administrative affairs. All cases are in the first instance decided by a primary court but its decision is considered final only if in civil cases the value of the subject of the dispute does not exceed the amount of 500 Afghanis and in criminal cases, if the sentence does not exceed one month’s imprisonment. In the absence of an appeal by the contesting parties, a primary court’s decision becomes binding with the exception of cases involving minors, capital punishment, *quisas*, and life imprisonment. In addition to the 1968 Law, the Law of the Administration of the Courts of Justice of 1355 [1977] provides, in 279 Articles, much greater detail on the organization of lower courts and the High Court. It deals with the making of the



complaint, court proceedings and maintenance of discipline, the appearance of contesting parties and the manner of hearing a case and finally the pronouncement of judgements and the lodging of appeals. By far the most remarkable feature of this law is its insistence on open trials. Article 57 provides that 'In the Courts of Justice, all trials are held open'. A Law of Statutory Limitations for Primary, Appellate and Review Hearings of Civil and Criminal cases in Afghanistan of 1324 [1946], and a Law Concerning the Administration of Government Cases of 1343 [1965] provide further detailed provisions on court procedure and the administration of justice. A review of these laws, read together with the relevant constitutional provisions, suggests a developed and functioning system of courts modelled closely on civil law jurisdiction, but incorporating some elements of Islamic procedural laws, as for instance, the central position of the oath in criminal and civil trials. The Interim Authority appears to have continued the system of courts as they existed prior to the seizing of power of the Taliban in 1996. Under the Taliban, the pre-existing courts remained in place but it appears that in practice their powers and jurisdiction over both civil and criminal cases was limited: religious courts established by the Taliban on an ad hoc basis frequently heard and decided cases. The main structures of the judicial system as established under the 1964 Constitution and the laws mentioned above appear to have survived the political upheavals of the past 23 years, at least in Kabul and Mazar-e-Sharif. A number of courts exist and those visited appeared to be functioning, i.e. there were judges, administrators, and clerks as well as litigants. As a general rule, there appear to be no open trials. The legal profession is dealt with below but it should be mentioned at this stage that in none of the courts visited were any lawyers, nor indeed were there any facilities for lawyers. However, it is uncertain to what extent even the courts that appear to be functioning represent a true reflection of the legal landscape.

Who has access to these courts; what proportion of civil and or criminal cases are heard by them; to what extent were the judges appointed in accordance with the law, and equally important, under which law; how independent are they; which procedural laws do they follow and what substantive law do they apply are all questions which cannot be answered with any degree of certainty. Those judges interviewed had no access to Afghan statutes or any of the several constitutions, let alone the 1964 Constitution nor did they seem to know much about the procedural laws on the organization of courts. It was equally difficult to ascertain how judgements were enforced and by whom. The Office of the Public Prosecutor The constitutional position of the public prosecution service established by the 1964 Constitution is defined as follows: 'Investigation of crimes shall be conducted, in accordance with the provisions of law, by the Attorney General, who is part of the Executive organ of the State' (Article 103). This constitutional arrangement was continued in the 1977 Constitution (Article 106). This meant that in practice the public prosecutor's office was located in the Ministry of Justice. However, in the Interim Constitution of 1980 the Attorney General became an independent organ answerable to the Revolutionary Council. This pattern was also reflected in the 1987 Constitution (Article 119). Currently, the Attorney General's office continues to be independent of the Ministry of Justice. The Law of Saranwali, i.e. the public prosecutor of 1345 [1966], which at least in theory regulates the Office of the Public Prosecutor, places his office under the supervision of the Ministry of Justice. According to Article 10 of this law 'the public prosecutor and the police shall perform the duties of detection, investigation and

the prosecution of crimes through their own professional members.’ The law contemplates that the original investigation of a crime, once commenced by the police, has to be transferred to the public prosecutor within 24 hours. After completion of an investigation the public prosecutor either closes the file or refers the matter to a court. The Criminal Procedure Law of 1344 [1965] confers an exclusive power on the public prosecutor to file and prosecute a criminal action. The Office of the Public Prosecutor appears to have been abolished by the Taliban but has been resurrected by the current Government of President Karzai. However, there seems to be a certain degree of competition between the public prosecutor’s office and the Ministry of Justice. In Kabul, the Office of the Public Prosecutor appeared to be functioning well. According to the CRAFT report ‘Filling the Vacuum: Prerequisites to Security in Afghanistan’ [March 2002], Kabul Province has 184 staff and had by early March 310 cases pending, 42 of which had been submitted to the relevant courts. In 1980, nearly 100 districts had no public prosecutor at all. As in the case of the judiciary little is known about the functioning of the public prosecutor offices outside Kabul province. The Office of the Saranwali in Mazar-e-Sharif had only the most basic equipment, consisting of an old desk and a few chairs, no access to procedural or substantive criminal laws, and was staffed at the time of the visit by just one public prosecutor. He described his function as being very limited since military commanders in charge of various sectors of the city were also in full control of the investigation and prosecution of crimes, which were conducted by their own militias.

**Legal Professionals** The only law that could be located as being directly concerned with the legal profession is the Law for Organizing Affairs of Defence Attorneys of 1351 [1972]. As stated above, according to the 1964 Constitution, ‘Every person has the right to appoint defence counsel for the removal of a charge legally attributed to him.’ (Article 26). This is reflected in Articles 1 and 2 of the 1972 Law which provide that ‘A defence attorney has the right to defend deutor before all courts and before the Saranwali in accordance with the provisions of this law and other laws.’ and ‘Either of the parties to a suit has the right to assign a defence attorney for acting in his defence.’ The 1972 Law provides in Article 10 for the provision of defence attorneys to destitute persons to be paid from the state budget if so ordered by the relevant trial court. The 1972 Law regulates the admission to the bar of defence attorneys as well as their minimum qualifications. A Control Committee in the Ministry of Justice consisting of representatives of the Supreme Court, the law school, the Saranwali’s office and three senior defence lawyers has the duty to accept or reject the requests for engaging in the profession of defence attorney. The qualifications stipulated by the act are basic: a minimum age of 25 years, a law degree from a college of shariat, a college of law or an official sharia madrassa and no deprivation of political rights by a court’s verdict. There is no need or facility for vocational legal training or continuing professional development of members of the legal profession. The 1972 Law stipulates the basic rights and duties of lawyers and also contains some provisions on professional ethics and disciplinary provisions. The 1972 Law is contained in the collection of Afghan laws compiled by Robert Hager in 1975. No reference to this law could be located in Afghanistan itself and it appears to have been temporarily lost and thus not applied. Survived has, however, the remnants the Lawyers’ Association of Afghanistan, a voluntary body of Afghan lawyers formed in 1985. Its President, Mr. Shah Mahmmod Kerad, stated that in the late 1980s the association had about 5,000 members but that the Taliban closed it down in 1996. It reopened its offices only

in November 2001. A Women's Bar Association was formed in Peshawar several years ago. It has about 40 members and has, under the leadership of Mrs Paikan, opened an office in Kabul. However, the impression gained through visits to courts was that there was a glaring absence of criminal defence lawyers. Weinbaum confirms this impression in his article 'Legal Elites in Afghan Society'. He observes that 'By official count there are 162 defence attorneys, although not all are licensed for comprehensive practice or are fully active' (op. cit., p. 40). These figures confirm the impression that defence lawyers have never featured very prominently in recent Afghan legal experience. Law students and graduates spoken to were all reluctant to enter the legal profession since they did not feel sufficiently well trained - after all in practice courts apply Islamic law - and in any event thought that they would not be able to make a living as legal professionals. Substantive and Procedural Laws Article 102 of the 1964 Constitution provides that 'The courts in the cases under their consideration shall apply the provisions of this Constitution and the laws of the State. Whenever no provision exists in the Constitution or the laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi Jurisprudence of the Shariat of Islam and within the limits set forth in this Constitution, that in their opinion secures justice in the best possible way.' The Bonn Agreement provides for the wholesale resurrection of the existing laws subject to the proviso that these laws are not inconsistent with the Agreement, the 1964 Constitution or Afghanistan's international legal obligations. By a decree dated 5 January 2002 the Interim Authority officially repealed all 'decrees, laws, edicts, regulations and mandates, which are inconsistent with the 1964 Constitution and the Bonn Agreement'. It is interesting to note that the decree does not expressly repeal laws that are inconsistent with Afghanistan's international legal obligations. These are contained in a number of international treaties including the Convention of the Rights of the Child, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and, finally, the International Covenant on Economic, Social and Cultural Rights. The Ministry of Justice has been assigned the task of identifying the inconsistent laws in the course of a comprehensive legislative assessment. As already mentioned the assessment is hampered by the fact that many laws are not available. The relative obscurity of Afghanistan's statutory laws is not a new phenomenon. In the introduction to the most comprehensive collection of translated Afghan laws, Robert Hager remarked, in 1975, that 'in a country where Islamic law study is the basic training for judges and where the written laws remain uncompiled and are not widely distributed, the actual relationship between written law and the law of Islam is a matter for inquiry' [p. iii]. Thus there is little doubt that in current legal practice the written laws are of very limited importance. Criminal Law Substantive criminal law in Afghanistan continues to be governed in large part by Islamic law. The first comprehensive codification was enacted as the Penal Code of 1925. This was followed by the Criminal Law of September 1976. I have not been able to obtain a translation of this Code but a comprehensive description of it is contained in Gholam Vafai's "Afghanistan. A Country Law Study". It appears that the Criminal Law of 1976 introduces a quasi secular system for all tazir offences - i.e. offences which attract under Islamic criminal law only discretionary punishments administered by the state - but retains the system of Islamic hadd punishments,

retaliation and payment of fines for 'Islamic' crimes, which are to be punished according to the principles of the Hanafi school of Islam. Depending on the nature of the evidence available against an accused, hadd punishments will be imposed on those who have been found guilty of theft, highway robbery, adultery, rape and fornication. Some of the punishments awarded for hadd offences, such as, for instance, the stoning to death of an adulterer if certain evidential requirements are met, do conflict with both the 1964 Constitution, which prohibits the imposition of punishments 'incompatible with human dignity' (Article 31) and Afghanistan's international legal obligations.

However, it is not known whether the present administration intends to modify these aspects of Islamic criminal law. Apart from Islamic punishments, the remaining provisions of the Criminal Law of 1976 are modelled on European principles of criminal law and are thus unremarkable. It is in the area of Islamic punishments that the most flagrant conflicts with international human rights standards exist. This is also the area of law that is likely to be the most sensitive to reform. Procedural Laws The gap between procedural reality and theory is as wide as the one observed in respect of Afghanistan's substantive laws. Professor Nasrullah Stanekzai stated in an interview with the author that not only are there inconsistencies in the law caused by successive amendments but that courts are very slow, do not conduct their hearings in public, litigants do not know the law or do not have access to trained lawyers and that there was excessive bureaucracy. In his opinion, the legal system did not encourage people to ask for their own rights. In theory, criminal procedure laws are governed by at least two laws. Firstly, the Criminal Procedure Law of 1965, as amended in 1974. According to Vafai, it follows the pattern of the French Penal Code. As noted above, the 1965 law was substantially amended by the Law on the Discovery and Investigation of Crimes and Supervision of the Attorney on its Legal Enforcement of 1979. The latter underwent further amendments in 1981. The sweeping powers accorded to the Attorney General and the secret services under these laws are most disturbing. The latter enjoys exclusive jurisdiction to investigate crimes against external security, crimes against internal security and certain political crimes, as well as kidnapping and the taking of hostages. Generally, a person arrested by the police must be reported within 72 hours to the public prosecutor, who has a further 72 hours to decide whether to release the suspect or press charges. Further detention has to be authorized by a judge and should normally not exceed two months though the public prosecutor may extend the period of detention in special circumstances. On the conclusion of the investigation, the examining authority must issue an indictment that must be presented to the competent trial court. There is no jury system but the law provides for an open trial. The accused has the right to be represented by counsel or by a member of his family.

Perhaps somewhat more unusually, the victim of a crime has the right to petition the trial court for the recovery of damages suffered as a result of the crime. Apart from minor sentences, where the verdict is final, a convict can file an appeal against conviction and sentence within ten days after the pronouncement of the sentence. Since the first level of appeal courts is the provincial court, a convict has to be transferred to the provincial capital for his appeal to be heard. The appeal hearing includes a rehearing of the evidence and the provincial court is also permitted to call new evidence and to conduct its own investigation. Cases appealed to the Supreme Court arising out of the original jurisdiction of the provincial

court allow the Supreme Court to hear the evidence again. In all other appeals the Supreme Court reviews the legality of the conviction but does not in effect retry the case. The execution of a sentence cannot be carried out except by order of a competent court. It is unclear which of the procedural laws currently, at least de jure, apply in Afghanistan. The CRAFT report, compiled in March 2002, states that the public prosecutor can detain a suspect for up to seven days, after which the case must go to Court (p. 24). Neither the 1974 nor the 1981 law provides for a seven-day detention period and thus there is either in existence another procedural law passed after 1981, or the information given by the Public Prosecutor was inaccurate. In any event, the inability to even determine with any degree of certainty how long a suspect can be held before being produced in court is in itself disconcerting.

**Juvenile Justice** The 1976 Criminal Law makes provision for juvenile justice: a child under the age of seven years cannot be guilty of any criminal offence, and between the ages of seven and 13 a child, though presumed to be incapable of committing a crime, will be considered a juvenile delinquent and may be held in a correctional institution or put under the supervision and probation of parents or relatives. However, for persons between the ages of 13 and 18, a punishment of confinement in a correctional institution can be imposed. Mrs. Justice Anisa Rasoli, a female judge in Kabul's special juvenile court, stated that procedures in the juvenile court were always in camera, and that juveniles used to be taken to a 'punitive school' rather than prison. A punitive school for male children was opened in 1970 and a female section became functional in 1974. However, all juvenile delinquents are currently confined in ordinary prisons. The juvenile court exercises exclusive jurisdiction over children between the ages of seven and 15 years. There is no right of appeal against a verdict pronounced by a juvenile court.

**Legal Status of Women** Whilst the 1964 Constitution contains an equality-before-the-law provision that does not differentiate between men and women, the legal system nevertheless does. Many aspects of Islamic family law as applied in Afghanistan accord differential rights to men and women. A Civil Code promulgated in 1977 did, however, introduce some significant reforms. The new Civil Code repealed the law of marriage of 1960 and reformed several aspects of Hanafi family law.

According to Dariz, under the 1977 Civil Law women are now permitted to choose a husband without needing the prior consent of their guardian, a divorce pronounced by a husband while intoxicated is no longer recognized as valid, and it establishes a minimum age of 15 years for a female to enter into a valid marriage.

The legal capacity to marry is 18 years for boys and 16 years for girls. There is a registration requirement for all marriages and unlike the provisions of the 1960 Marriage Law non-registration does not affect the marriage's validity. The practice of polygamy has not been outlawed but has been regulated by the 1977 Civil Code. In order for a husband to enter into a second marriage he must prove that there is no fear of injustice to any wife, he must be able to provide the basic necessities for all the wives, such as food, clothing, housing and health care, and a lawful reason must exist for the second marriage, such as the first wife being barren or sick with an illness requiring difficult treatment. A court can refuse to register a marriage that contravenes any of these conditions and an aggrieved wife can file a suit for divorce. Further, the 1977 Civil Code allows a woman to stipulate a right to divorce should her husband take a second wife irrespective of any compliance with the three conditions outlined above. The

right of divorce of women continues to be restricted to a judicial divorce whilst a husband can divorce his wife through the extra-judicial pronouncement of a divorce either orally or in writing. The grounds for judicial separation include the husband suffering an incurable disease, his failure or inability to maintain his wife, his absence from his wife without reason for more than three years or his imprisonment for ten years or more, in which event the wife can ask for a divorce after the first five years imprisonment. It appears that the Islamic law in respect of inheritance and custody of children continues to be governed by Hanafi law. However, it is possible for a court to extend the age for the transfer of the custody of children from mother to father by an extra two years, if the extension serves the benefit of children. It appears that the 1977 Civil Law also established a family court but none was in operation at the time of writing. In actual legal practice the provisions of the 1977 Civil Law no longer appear to be applied. The demise of governmental institutions across Afghanistan means that marriages are generally no longer registered. This would render them void under the 1977 Law. In practice, however, unregistered marriages are regarded as valid.

The withering away of the 1977 Civil Law has reintroduced largely unreformed Hanafi family law and customary law into the sphere of family law. There appears to exist a large degree of confusion over the exact rights of women and their legal status. In June 2002, there were about 30 women confined in Kabul jail. Some of them were accused of criminal offences but the majority were, according to the Law Section of the Ministry of Women's Affairs, now headed by Professor Mahboba Haqiq Mal, who has succeeded Mrs. Sima Samar, detained for a variety of offences related to family law such as refusing to live with their husbands, refusing to marry a husband chosen by their parents, or for having run away from either the parental or the matrimonial home. It appears that these women have no access to lawyers, have no information on their rights, if any, and are generally left in jail until their respective relatives intervene. The most astonishing aspect of my findings was the profound uncertainty surrounding the legality of their detention. Even the female lawyers attached the Ministry of Women's Affairs were unsure about the rights of women. There is no doubt that the legal position of women has improved since the demise of the Taliban, at least in the metropolitan areas of Kandahar, Mazar-e-Sharif and Kabul: women are allowed to work, to move freely and to pursue education. Female students are now registered at the Law Faculty, are employed mainly in administrative functions in courts, in the Offices of Public Prosecutors and the Ministry of Justice. A dedicated Ministry for Women's Affairs has been created. However, even in the legal sphere the situation remains highly unsatisfactory. The legal status of women is uncertain, as are their rights under both the 1964 Constitution and Islamic family law. The outgoing Minister for Women's Affairs, Mrs. Sima Samar, has recently been charged with blasphemy though it is not known whether these charges are being pursued. Irrespective of the fate of this particular charge, her case must serve as a reminder that women who stand up for their rights take very real risks even in the post-Taliban legal order of the safe haven of Kabul. The legal problems faced by women are compounded by severe health problems caused by a shortage of health facilities and an inability to provide for women's physical and emotional needs, domestic violence, and sexual abuse. The long period of confinement of women under the Taliban means that many women cannot compete successfully for jobs with men and are consequently economically disadvantaged. Most women continue to wear the burqa even in Kabul, apparently often prompted by fear rather than choice. Conclusion Any reform of the

legal system to bring it in line with international human rights standards, or indeed with the provisions of the 1964 Constitution, requires as an essential prerequisite the existence of stable state structures able and willing to enforce laws. Only when this basic foundation has been established will it be possible to initiate any significant reforms. Currently, the rule of the state is for all practical purposes confined to Kabul and its immediate surroundings. Legal reform will therefore have to go hand in hand with the gradual expansion of state structures to rural areas and other cities. The main source for any legal reform has to be Afghanistan itself.

Experience has shown that the wholesale import of foreign laws hardly ever succeeds in improving human rights standards or the rule of law. The impetus for change and reform thus has to come from within. The Judicial Commission and the Human Rights Commission already provide institutional mechanisms for initiating legal reform. The implementation of these reforms depends as much on the existence of institutional capacity as it does on political will and power. The international community can assist Afghanistan in a number of ways. First and foremost is the continued support in establishing a secure environment where militias are disarmed and local commanders operate within the rule of law. Secondly, and in parallel, is the need for institutional support and capacity building in the legal sector. This task ought to prioritize the inclusion of women and other vulnerable groups in the reform of the legal system. Whereas the reform and implementation of criminal procedural laws is in itself not controversial the reform of substantive criminal law without any doubt is. Any departure from Islamic law is likely to be viewed with suspicion and distrust by the majority of the population. However, reform is possible within Islamic law through reinterpretation and a strengthening of procedural and evidential safeguards contained in the corpus of Islamic law itself.

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\*See Amin, S.H.: *Law, Reform and Revolution in Afghanistan*, 'for most ordinary villagers and tribesmen, who form the majority of the population, Islamic and tribal law remain more significant than State legislation', p. 66, n.d.

\*See Weinbaum, M.G.: 'Legal Elites in Afghan Society', *International Journal of Middle East Studies*, vol. 12 (1), 39-57, p. 51. \*The materials comprised the Bonn Agreement, the Penal Code (Books One and Two), the Criminal Procedure Law, the Civil Code, the Commercial Code and the Legal Procedures of Commercial Codes.

\*Amin observes that 'The texts of Afghan legislation are published in the *Rasmi Jarida* which is the Official Gazette. This source, first published in 1963, is a reliable means of finding enacted laws. Now a reasonably complete set of this publication can be found though with some difficulty.' *op. cit.*, p. 67.

\*See Vafai, Gholam H.: *Afghanistan. A Country Law Study*, Washington, Library of Congress, 1988, p. 36.

\**Quisas*, literally translated 'retaliation', denotes the right of the heir of a victim to demand the capital punishment.

\*See G.M. Dariz: 'Afghanistan', in: Sihombing, Judith and Finlay, H.A.: Lawasia Family Law Series (Volume One), Singapore, 1979, pp. 13 - 21. Outline001\_1 Outline001\_2 Outline001\_3 Outline001\_4 Outline001\_5 Outline001\_6 Outline001\_7 Outline001\_8 Level 9 Level 1 Level 2 footnote ref footnote tex nE»×Æ°ipypy□