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7 Sharia and national law in Afghanistan

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Abstract

Legal pluralism is the hallmark of Afghan legal reality. Afghan law is a combination of Islamic law, state legislation, and local customary law. This chapter traces the origins of that plurality and shows that the lack of clarity regarding the relationship between these different sources of law and the absence of guidelines as how to resolve conflicts between them is still causing many problems in Afghanistan today. Despite the existence of official law, i.e. the formal legal system established under the provisions of a constitution, the socio-legal reality is not reflected by it, and the law in the books does not represent the norms that actually govern the lives of the majority of the population. For ordinary people and villagers, who form the majority of the populace, tribal/customary and Islamic law are more significant and actually better known than any state legislation. As a result, in Afghanistan it is not the implications of sharia or sharia-based law that, at least for the moment, prevents the application and implementation of international legal and human rights standards, but the lack of a system by which the rule of law may be established so that the legal system is capable – practically, socially, politically – of guaranteeing and enforcing laws effectively. Although the Government of Afghanistan is committed to carrying out its duties imposed not only by Afghanistan's domestic laws but also by the country's international obligations, the greatest challenge to action is the lack of security and the fragile peace balance in the country.

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With an estimated population of more than 30 million inhabitants, Afghanistan is composed of more than ten ethnic and tribal groups, most of whom have lived together in the country for centuries. These include the majority Pashtuns, who constitute almost one half of the population, followed by a quarter of the population of Tajiks (27%), and sizeable communities of Uzbecs (9%) and Hazara (9%). Turkmen (3%), Aimaq (4%), Baluch (2%), and small communities of Brahui, Nuristani, Pashaie, Pamiri, Khirgiz, and Qizilbash are also represented. Each of these groups has had its own forms of languages, culture, and religious beliefs over the course of Afghanistan's history. However, the centuries-long interaction between all these groups, although distinguishable by accent and clothing for example, has resulted in a cultural blending of various Afghan ethnic and tribal traditions (Wardak 2005: 63). The country is almost exclusively Muslim with a majority Sunni population (80%) and an estimated 19 per cent Shi'i population. Afghan Persian or Dari is the official language, spoken by about one half of the population, with Pashtu, also an official language, spoken by some 35 per cent of people. Turkic languages are also spoken by some groups (11%), as well as another thirty minor languages that have been identified (e.g. Baluchi and Pashai). Many individuals speak more than one language.

(Source: Bartleby 2010)

7.1 The period until 1920

The struggle for an independent and unified nation

Afghanistan's geographic placement at the crossroads of civilisations determined its fate as early as the fourth century B.C. when Alexander the Great defeated the Persian invaders who had been the first to achieve domination. A series of conquests followed with particularly devastating invasions by the Mongol leaders Genghis Khan and Tamerlane. Two thousand years of ravage and invasions stalled the establishment of a unified state, which did not come about until the eighteenth century. The first Afghan kingdom, more a confederation of tribes then, was established by Ahmad Shah Durrani in 1747. He was approved as the first Afghan king in Kandahar in a mass gathering of the Afghan people referred to as the 'Great Assembly' (*Loya Jirga*), which was only later again taken up when it was reactivated as the National Assembly in the early twentieth century (see 7.3). Afghanistan ultimately emerged as a nation in the mid-nineteenth century, by which time the new rulers had to cope with the colonial ambitions of the British and the Russians (Reynolds & Flores 2005: 1-3).

The Second Anglo-Afghan War of 1878-1880 resulted in the creation of an independent Afghan kingdom within the British sphere of influence, serving as a buffer zone between Russia and India. Its present boundaries were fixed during the reign of King Amir Abdul Rahman (1880-1901), who aimed to bring the region's tribes and ethnic groups under centralised control, unify the country politically, and establish a central government with a certain degree of standardised administration. Amir Abdul Rahman held the position of King and Chief Justice, issuing verdicts in accordance with the principles of Islamic law and traditions.

In 1896 a compilation of criminal rules based on Hanafi law was proclaimed (Vafai 1988: 24). The king was vested with the authority to preside cases dealing with rebellion, embezzlement, forgery and bribery by government officials, treason, and crimes against the state and members of the royal family. In all other cases, law was dispensed by Religious Courts and religious judges. Statutory enactments of this area were basically designed to reiterate Islamic law. For example a guide called 'the judges principles' (*asās ol-qod,āt*) that drew from the classical Hanafi law was issued by Amir Abdul Rahman in the late 1880s and was designed to control the activities of the judges (Kamali 1985: 35; Vafai 1988: 24). Additionally, judges had to comply with an elementary court procedure outlined in a guideline for civil and criminal matters called 'book of governance' (*ketābče-ye h,okūmatī*). Amir Abdul Rahman divided the existing laws of his kingdom into three groups: sharia law, administrative laws (*qānūn*), and tribal laws. Likewise, he established three kinds of courts: the Religious Courts, which in fact already existed, that dealt with religious and civil matters; criminal courts administered by chiefs of police *(kotwals*) or by judges; and a board of commerce consisting of merchants, who settled business disputes (Vafai 1988: 11-12). Tribal groups had always had their own ways of dispute settlement. This was done in particular through the local assemblies (*jirgas*) following a specific procedure (see 7.10).

Amir Abdul Rahman reigned with an iron fist. The country was stable with little or no internal unrest. Afghanistan remained, however, a fragmented country with local governors acting with virtual autonomy. In addition, the country was held in a stranglehold by a corrupt and fanatic system of Islamic clerics (*mullahs*), absolutely opposed to any advancement that could potentially weaken their power. This held especially true in the tribal hinterlands of Afghanistan.

After Amir Abdul Rahman's death, his son Habibullah succeeded him. Habibullah (1901-1919) eased the system of compulsory conscription, dismantled his father's secret intelligence service, and put an end to some of the most brutal forms of corporal punishment. At the same time, religious organisations regained some of their former influence

(Ewans 2001: 80). The new king also founded a state council for tribal affairs and gave the tribal chiefs more autonomy in the administration of regional affairs. He ensured that the quality of education was improved by setting up schools of higher education based on the French model as well as military academies and teacher training institutes. The first hydroelectric power plant was also built during his reign. Under Habibullah a four-part compilation of Islamic law encompassing the civil and criminal principles of the sharia was made, the so-called 'Supreme Commandments' (*sirāj ol-aḥkām*), to be used as a framework of reference by judges (Kamali 1985: 35).

During World War I, Habibullah aligned himself with the British. This was a dangerous decision because the population was strongly opposed to the British and their domination of their country. Many Muslims were reticent about supporting an 'infidel empire' against the former seat of the Caliphate, the Ottoman Empire. Habibullah was accused by his people for having failed to achieve full independence from all foreign powers and was assassinated on 20 February 1919 in a hunting resort far from Kabul. When Amanullah, Habibullah's son, succeeded to the Afghan throne in 1919, the country was plagued with ethnic divisions, tribal conflict, and corrupt religious fanaticism.

7.2 The period from 1920 until 1965

The struggle between modernity and traditionalism

1919-1933: The first Afghan constitutions

Amanullah's first act as a king was to declare war on the British to end their domination in Afghanistan. On 3 May 1919, the third and last Anglo-Afghan war started and ended with the Treaty of Rawalpindi signed on 8 July 1919. Amanullah (1919-1929) was determined to reform Afghan society. From 1919 to 1923, a series of political, legal, and judicial initiatives were taken at his instigation with the aim of resolving the fractures of Afghan society (Kohlmann 1999). Slavery was formally abolished; campaigns of reconciliation against the violent divisions between Sunni and Shi'i were undertaken; and the status of the non-Muslim minorities was improved by abolishing their *jezye* tax (a poll tax levied from non-Muslims in Islamic societies).

Amanullah sought to bring Western secular law to his homeland. He was looking in particular at Kemal Atatürk in Turkey and Reza Shah in Iran. In April 1923, he enacted Afghanistan's first formal written constitution, the constitution of the government of Afghanistan, the *neẓām-nāme-ye asāsī-ye dūlat-e ʿālīe-ye afghānestān* (Vafai 2001: 93).[2] This first legal text, consisting of 73 articles, included a list of basic freedoms that

the Afghan people had never been awarded, such as freedom from torture, freedom from unlawful search and seizure, personal freedoms, and guarantees of justice from government officials. Islam was inscribed as the official religion of the state, but the constitution also granted protection to the followers of other religions. The equality of all Afghan citizens, access to political rights, personal freedom, freedom of the press, and the right to education were guaranteed. The Constitution of 1923 prohibited extra-judicial or extra-legal punishment; courts were to be the only legitimate institutions to deal with all disputes within society. The independence of the judiciary and the courts was recognised, and any kind of intervention in court procedure was prohibited. A special High Court was established temporarily to deal with crimes committed by members of government and ministers. Elementary education was declared compulsory for all Afghan citizens. Amanullah also introduced the right of women to education, permission for female students to travel abroad for higher education purposes, abolished child marriage, and put restrictions on polygamy. He furthermore issued a new administrative regulation, transferring jurisdiction of family matters from the Religious Courts to civil courts (Vafai 1988: 12).

Afghanistan's first constitution triggered the enactment of a plethora of other legislation (*neẓām-nāme*) related to administration, education, social institutions, trade, and industry. More than 51 *neẓām-nāme* were published between 1919 and 1927,[3] including the Law on Marriage, Wedding and Circumcision (*neẓām-nāme-ye nikāh,, ᶜarūsī, khatneh sūrī*) in 1921, as amended in 1926. This statute and all its successors (the Marriage Laws of 1934, 1949, 1960 and 1971) were a piecemeal legislation, enacted to address very specific questions on particular, mostly economic issues revolving around marriage, such as the expenses for weddings and other family ceremonies.[4]

In 1925, a penal code (*neẓām-nāme-ye ᶜomūmī-ye jazā*) was published (Vafai 1988: 25). It contained 308 articles and was primarily based on sharia principles, with some influence from the French penal code of the time. Article 1 of the Afghan Penal Code (1925) categorised crimes into three categories, as is done in the classical sharia: *ḥodūd* (class of punishments that are fixed for certain crimes, including theft, fornication, consumption of alcohol, and apostasy); *qes,ās,* (retaliation); and *taᶜzīr* (punishments that are administered at the discretion of the judge). The law concerning the court procedure (*neẓām-nāme-ye tashkīlāt-e asāsī*) required judges and the sharia courts to issue decisions in accordance with the provisions of the penal code. A group of religious scholars (*ulama*) also compiled a guide for judges (*tamassok alqod,āt-e amāniye*). It consisted of two parts, a civil and a criminal part (Kamali 1985: 37). The first enactment of a military penal code (*neẓām-nāme-ye jazā-ye ᶜaskarī*) was another major step towards more legal

certainty, especially considering that the Constitution of 1923 embraced the principle of the rule of law in criminal matters (Art. 21).

Amanullah's reforms were, however, responded to with hostility. The advent of civil, secular law was not accepted by Amanullah's assorted enemies among the *mullahs*, who saw their power fading in a more educated society. They accused the *neẓām-nāme* of being un-Islamic and in violation of God's laws. When Amanullah attempted to change the free day of the week from Friday to Thursday and ordered the unveiling of women and the compulsory wearing of European dress, the enraged *mullahs* joined forces with the tribesmen, who resented Amanullah's meddling in their affairs, and gradually began to destabilise his government. Amanullah had to make concessions. In the late 1920s, he agreed to end female education by the age of twelve, to rescind the prohibition on child marriages, to allow polygamy, and to strike down the freedom of religion as set forth in the *neẓām-nāme* (Kohlmann 1999). His efforts to provide Afghanistan with a modern legal framework were perceived as too radical by his fellow countrymen. His constitution and the changes he endeavoured to introduce underestimated the strength of traditionalism and conservative opinion.

Despite his many attempts to unify the country and help it overcome its ethnic and religious fractures, these grew only worse as the country became subject to fanatically competing leaders with extremist ideologies. In early 1929, Amanullah abdicated and went into temporary exile in India. His attempt to return to Afghanistan failed, as he could not secure the support from his people. From India, the ex-king travelled to Europe and settled in Switzerland, where he died in Zurich in 1960.

In contrast to Amanullah, his successor Nadir Shah (1930-1933), a military general in Amanullah's reign, adopted a more conservative path. His policies are reflected in the Constitution of 1931, which overruled many of the Amanullah reforms and numerous *neẓām-nāmes*. Against the backdrop of near anarchy in the country following Amanullah's abdication, a new constitution (*oṣūl-e asāsī-ye dūlat-e ᶜālīe-ye afghānestān*) was promulgated on 31 October 1931 (Ewans 2001: 101). It contained 110 articles and clearly endorsed the traditional supremacy of sharia in Afghanistan. This is manifested in the numerous references to the sharia, which essentially amounted to proclaiming sharia as the law of the country. Islamic law continued to dominate judicial practice, and the limited number of statutes that still existed was mainly concerned with procedural and administrative matters. The Constitution of 1931 was not only in clear contrast with its predecessor in its emphasis on adherence to Islam in legislation and government affairs but also clearly more conciliatory towards the tribal establishment.

The progressive views of Amanullah and the conservative approach of Nadir Shah created discontinuity in the legal and social order; the contradictory objectives of the constitutions of 1923 and 1931 gave further rise to disorientation and dissatisfaction. The need for corrective measures to bring about a balance between the expressions of the modernist and conservative ideological currents in the country was strongly felt.

1933-1964: Modernity and traditionalism revisited

In 1933 Nadir Shah was assassinated. His son Zahir Shah succeeded him at the age of 18. While officially Zahir Shah was proclaimed king, from 1933 onwards Afghanistan was effectively ruled by his uncle Hashim, who took the position of royal prime minister (1933-1946). Hashim was keen to implement the strict rule of the sharia (Ewans 2001: 104). Nonetheless, the proliferation of newspapers and journals, although under strict censorship, allowed for the exchange of ideas among the Afghan elite regarding the interactions between modernity and the rule of Islam in society and the life of the individual. Archaeological excavations conducted by the French fostered some ideas of a glorious pre-Islamic past, and encouraged secular ideas among Afghan intellectuals. The Afghan economy advanced with the introduction of Western banking institutions, the enhancement of exports of agricultural products, and transit trade through Russia. External relations expanded with other countries such as Japan, Germany, Italy, and the United States. In 1946, Hashim retired following the wish of the royal family and was replaced by Sardar Shah Mahmoud Khan, another uncle of Zahir Shah, as prime minister (Ewans 2001: 105).

Sardar Shah Mahmoud Khan (1946-1953) was a more tolerant and liberal ruler. He had political prisoners released and allowed a certain degree of freedom of the press. Relations with the United States improved, many projects were undertaken in construction, and the educational system started to develop once again. Despite all his efforts, however, the country was moving toward destabilisation once again. In 1953, Sardar Shah Mahmoud Khan was replaced by his cousin, Mohammad Daoud Khan, who took over the position of prime minister. Through cooperation with the Soviet Union and the United States, the economy was further developed. While the American influence was visible at the University of Kabul, the Russians pressed for another institute of higher education and established the Kabul Polytechnic. The Afghan army was reformed and modernised with Russian weapons after America twice refused the proposal made by Afghan authorities to supply the Afghan military with arms (Magnus & Naby 2002: 47).

The Constitution of 1931 remained in force, ensuring the prominent position of the sharia. From 1933 until the promulgation of a new constitution in 1964, a mixed pattern in legislation developed, leading to confusion over the relationship of state law to sharia, especially in cases of ambiguity and conflict between them. The courts generally applied the Arabic manuals of the Hanafi school of law and the Ottoman *Mejelle*, i.e. the codified version of the Hanafi school for civil transactions, excluding family law (Kamali 1985: 36). An early departure from this pattern came about with the promulgation of the Commercial Code of 1955 and the Commercial Procedure Code of 1963, both of which were not based on the sharia but on Western models (see 7.8).

This period can be seen as a time in which attempts were made to bring together the modern and conservative elements in Afghanistan. When members of the royal family appeared unveiled at the annual ceremony marking Afghanistan's independence, for instance, the religious establishment protested seriously. Daoud, who was well versed in matters of theology, though, insisted that veiling was not required in Islam. When the mullahs persisted with their campaign, they were thrown into jail without getting any public support. This was an altogether different outcome of events than had been the case with the fiasco of Amanullah's attempted reforms thirty years earlier.

7.3 The period from 1965 until 1985

Communism and the Republic of Afghanistan

1964-1973: Zahir Shah and tentative constitutionalism

Daoud was forced to resign in 1963. Shortly thereafter, Zahir Shah promulgated Afghanistan's third constitution, which was approved by the *Loya Jirga* (the National Assembly) on the 1st of October 1964.[5] This constitution was conceived over a period of eighteen months and reflects to a certain degree public consultations and debates from this period in its contents. The 1964 Constitution paid attention to issues of institution-building and democratic structures, namely the role and structure of a parliamentary democracy and the independence of the judiciary. Indeed, this constitution introduced for the first time, at least on paper, the separation of powers to the Afghan legal system.

The constitution excluded members of the royal family from political offices, but retained considerable powers for the king (Amin 1993: 17). As head of the state, he embodied national sovereignty and was the guarantor of the basic precepts of Islam and of the country's independence. The king was supposed to be a follower of the Hanafi doctrine

(Art.s 6-8). According to Article 15 of the Constitution of 1964, the king was accountable to no one and had to be respected by everyone.

Article 2 of the constitution declared 'the sacred religion of Islam' as the religion of Afghanistan. Equality of all human beings (Art. 25), secrecy of people's communication (Art. 30), and freedom of expression (Art. 31) were declared to be fundamental rights. A fundamental step towards more political participation was taken in Article 32 of the constitution; it allowed for the first time the formation of political parties. The aims and activities of a party, as well as its ideology, had to be in accordance with the values embodied in the constitution. Financial resources should be available to create a political party, and a party formed in accordance with the provisions of the law could not be dissolved without judicial proceedings and the decision of a competent court.

Article 103 of the constitution introduced a new institution, that of the Attorney General. Its duty was to investigate criminal activities as an independent body of the executive power of the government. The judicial branch was not to interfere in its activities. The office of the Attorney General was similar to the American institution of Attorney General, indicating that to a certain extent the Constitution of 1964 was influenced by the U.S. Constitution.

Although the Constitution of 1964 concentrated most state authorities in the person of the king, it was still the most liberal constitutional document ever in Afghanistan. Parliament was to consist of two houses; the House of the People (*Wolesi Jirga*), elected by the people of Afghanistan in free, general, secret, and direct elections in accordance with the provisions of the law for a period of four years; and the House of the Elders (*Meshrano Jirga*), one-third of its members to be appointed by the king and the remaining two-thirds to be elected in free, general, secret, and direct elections (Art. 43). The government was required to publish all legislation in the Afghan Official Gazette (*jarīde rasmī*) which was to be distributed to the courts and other legal institutions.[6]

The judiciary was to consist of a Supreme Court and other courts, with the task of adjudicating all litigation brought before them (Art. 98). The judges, who could be held accountable by the newly founded Supreme Court, were appointed by the king (Art. 99). The Supreme Court was established, with branches for civil, commercial, criminal, military, and national security cases. For the first time, a juvenile court was established in Kabul to adjudicate in cases where the defendant had not yet reached the age of fifteen (Lau 2003: 52).

The 1964 constitution was the first to provide a clear definition of 'law' and to establish a formal order of priority in favour of statutory law. Article 69 provided:

> Law is a resolution passed by both Houses, and signed by the king. In areas where no such law exists, the provisions of the Hanafi jurisprudence of the sharia of Islam shall be considered as law.

Although the rights and duties given to the Houses of Parliament by the 1964 Constitution were important and could have been the basis for people's participation in politics, in reality, the Houses remained largely ineffective, and no significant body of statutory law emerged. The Constitution of 1964 had established a powerful parliament and, thus, reversed the hitherto prevailing role of a more powerful executive. Consequently, the two engaged in a power struggle, both failing to adjust to their new roles under the constitution. Thus, like its predecessors, the third Afghan constitution was not implemented. No law for the formation and organisation of political parties was drafted, nor did any independent political party emerge, much less gain permission to be registered in Afghanistan (Rubin 2002: 73). The king's democratic experiment failed because he did not allow the constitutionally-mandated liberties to take root, as is evidenced by the fact that there was no law on political parties or on provincial councils and municipalities and by the fact that no attention was paid to the judicial reforms required by the 1964 Constitution. The conflict between the legislative and executive powers further exacerbated the instability and problems plaguing the Afghan political scene.

On 1 January 1965, Noor Mohammad Taraki formed the People's Democratic Party of Afghanistan (PDPA), which became known as the 'Khalq' party. Like all other parties in Afghanistan, the PDPA was an unofficial, clandestine party that was not registered with the government. The PDPA soon split into two parties because of disagreements between its leaders Taraki and Babrak Kamal. Whereas Taraki remained head of the 'Khalq' party, Karmal established the 'Parcham' party in 1967.[7] Most of the supporters of Khalq were Pashtuns from the rural areas in the country. The Parcham supporters came mostly from urban citizens and supported social-economic reforms in the country. The Khalqs accused the Parchams of being under the allegiance of Zahir Shah.[8] Meanwhile, the influence of communism began to become ever more visible, both groups being consistently pro-Soviet, and being strongly supported by the Russian embassy and Soviet advisors in Kabul.

A Criminal Procedure Code was enacted in 1965; it consisted of 500 articles addressing in particular the arrest, detention, interrogation, and trial of the accused. The code also covered the implementation of punishments, the temporary duration of imprisonment, and the differentiation between the role of the police and prosecutors and the supervision

of their duties and responsibilities. It is not entirely clear whether this new code was inspired by Soviet law. In any case, it signified the introduction of a secular piece of legislation, which brought the Afghan legal system closer to Western legal traditions.

1973-1978: The creation of the Republic of Afghanistan

On 17 July 1973, Mohammad Daoud Khan – the cousin of Zahir Shah and his prime minister until 1963 – carried out a military coup with the support of a small number of troops and a handful of military officers associated with the PDPA while Zahir Shah was in Europe. For the first time in its history, Afghanistan was proclaimed a republic. Meanwhile, the communist party was increasingly influencing various parts of Daoud's government by pushing its own allies and supporters into key administrative positions. This triggered opposition by the religious establishment and fostered the emergence of Islamic groups. Daoud clamped down on these Islamist groups. In 1974, the leader of the Muslim Brotherhood, Mohammad Niazai, was arrested along with some 200 followers (Ewans 2001: 131). Determined to get public support for his government, Daoud decided to crack down on the communist parties as well.

Had Afghanistan's ruler legalised the functioning of political parties and political parties been institutionalised through periodic elections, competition for power and influence could have taken place through the ballot box. In the absence of institutionalised and democratic mechanisms for political change, however, the competition between leftist and Islamic groups soon assumed the shape of armed conflict.

In 1976 a new penal code was enacted based primarily on Islamic principles, but drawing also on European criminal codes.[9] Article 1 of the Penal Code of 1976 defines the scope of application and sets forth as follows:

> This law regulates offences that call for discretionary (*ta^{c}zīr*) penalties. Any person who commits a crime calling for fixed punishment (*h,add*, pl. *h,odūd*) or retaliation (*qes,ās,*) or the payment of blood money (*diyat*), will be punished according to the principles of the Hanafi school of law.

That meant that the *h,odūd* crimes were not within the scope of application of the penal code. However, whenever a *h,add* crime could not be established by Hanafi evidence law, the punishment for that crime would fall within the scope of the 1976 Penal Code, if evidence was sufficient *vis-à-vis* the standards set by the code. The penal code, thus,

provided for an alternative procedure, making *h,odūd* crimes punishable under the principle of *ta'zīr*, with prison sentences of various durations.

The unstable legal situation led to the enactment of yet another constitution on 24 February 1977.[10] Daoud was elected president for a period of six years. The new constitution transferred all authorities of the king under the 1964 Constitution to the president of the state. Daoud also occupied the position of prime minister, foreign minister, and minister of defence. The power over the judiciary, which until then had been vested in the person of the king, was also transferred to the president, and the position of Chief Justice granted to the Minister of Justice.

The Constitution of 1977 differs considerably from the previous three constitutions. Alongside the emphasis on Islam, the 1977 Constitution introduced for the first time the notions of nationalism and socialism. Article 22 of the 1977 Constitution designated Islam as the religion of the state without reference to the prominence of the Hanafi school of law, as had the previous constitution (1964). Article 64 went further than the previous constitution, however, as it contains a repugnancy clause, subjecting all laws to a process of assessment on their compatibility with the basic principles of the sacred Islamic religion. Yet, in other respects the law was more liberal. For instance, Article 28 repeated the principle of equality of gender, stating that: '[T]he entire people of Afghanistan, both men and women without discrimination and privileges, have equal rights and obligations before the law.' The addition of the passage 'both men and women' was completely new and had never been in any Afghan legal document so far. Articles 39 and 40 of the 1977 Constitution granted freedom of assembly for all citizens of Afghanistan provided the assemblies are unarmed. A one-party system led by Daoud's party (the National Revolutionary Party) was created by Article 40 of the 1977 Constitution. A national assembly called the *melli jirga* replaced the former Parliament of the 1964 Constitution by substituting the two houses (House of People and House of Elders) with only one assembly (Art. 48 et seq.).

Also in 1977, the Afghan Civil Code (CC), modelled on the Egyptian Civil Code of 1949, was enacted as a further piece of legislation aimed at modernising the legal system.[11] The code encompasses 2,416 articles that regulate all aspects of civil law, including family and inheritance law. The code blends sharia-based law (mainly in the field of family and inheritance law) and modern secular law to solve the existing problems and thereby secure social stability in society. The code was in particular influenced by the French civil code, for example in matters regarding the age of capacity for transactions and the requirement for registration of documents concerning marriage, divorce, parentage, and kinship

(Art. 48 CC). To clarify the relationship between different sources of law, Article 1 of the code provides that in cases where there is an explicit regulation in the law, independent interpretation of the court (*ejtehād*) is not allowed. However, if no such explicit rule exists, the court may fill the gaps with the rules of the Hanafi school of law. Finally, the Civil Code of 1977 did not allocate any role to customary law, despite its prominent role in Afghanistan.

1978-1985: The Saur-Revolution, the mojāhedīn, and Soviet invasion

In April 1978, yet another coup, the so-called Saur-, or April-Revolution (*thavr*), was staged by parts of the PDPA. Daoud and his family were killed and power was handed over to a joint military-civilian Revolutionary Council, with Taraki serving as its head, president, and prime minister. The constitution was amended by a declaration the following day on 28 April 1978. All governmental affairs had to be executed through decrees and procedures of the Revolutionary Council. Decree No. 8/1978[12] implemented a stringent land reform, redistributing the land and severely limited the ownership of land. Any land considered as surplus was confiscated without compensation and redistributed to landless peasants and farmers. Modern Soviet type cooperatives were designed to replace the traditional rural economic relationships. In the field of civil law, on 17 September 1978 Decree No. 7 was promulgated. It abolished the bride price, or transfer of money from the groom to the bride's family, called *walwar* in Afghanistan (see 7.6); set the minimum age for marriage at 15 and 18 for girls and boys, respectively; and prohibited child and forced marriages.[13]

Meanwhile, Islamic resistance groups (the *mojāhedīn* movements) had started to form themselves outside Afghanistan. After the arrest of Niazai in 1974, some of his supporters, such as Hikmatyar and Rabbani, had fled to Pakistan. In 1974, they had split away from the main party, with Hikmatyar establishing the Islamic Party and Rabbani, the Islamic Society party. Besides these two groups, numerous other *mojāhedīn* movements were formed. These groups would later play a central role in the resistance against the communist rule and against the Russian military invasion (Magnus & Naby 2002: 151).

In 1979, internal conflicts within the PDPA escalated. Factional conflicts and the strong presence of the *mojāhedīn* movements in Pakistan and inside Afghanistan persuaded the Russians to act. Basing themselves on the Soviet-Afghan Treaty of Friendship of 5 December 1978, which allowed for military intervention by the Russians in the event of any threat to their interests in the area, Russian troops invaded Afghanistan on 27 December 1979. Karmal, the leader of the Parcham

party, mentioned above, was installed as head of the Democratic Republic of Afghanistan.

Some 850,000 Afghan refugees had fled the country by May 1980, with an estimated 750,000 Afghans applying for asylum in Pakistan and an additional 100,000 in Iran (Ewans 2001: 158). The Russian invasion was strongly condemned by the international community. Member states of the Organisation of the Islamic Conference gathered in Saudi Arabia and declared the invasion to be a threat to international peace and stability. The U.N. General Assembly passed seven resolutions condemning the invasion, all without practical effect. In the meantime, however, seven *mojāhedīn* opposition groups had come together in Peshawar in Pakistan and merged into the so-called Afghanistan's Islamic Union of Mujāhedīn on 16 September 1981 (Ekhwan 2002: 15).

Meanwhile, in Kabul, Karmal was concerned with gaining internal legitimacy among the Afghan people. He promised a government in which all factions and parties would be embraced and represented; a new constitution with provisions for elections and a multi-party system; land reform; amnesty for returning refugees and political prisoners; freedom of religion; and the establishment of Islamic institutions that could act as advisory bodies to the government. To appease public opinion, he restored the old black, red, and green national flag that was replaced after the Saur-Revolution by a flag without the green colour representing Islam.

On 21 April 1980, the fifth Afghan constitution was promulgated.[14] It contained 68 articles. In order to avoid a direct clash with public opinion, the Constitution of 1980 did not explicitly mention communism or Marxism in its provisions. Instead, it just pointed to the objectives, views, policies, organisation, and responsibilities of various administrative institutions in the government according to the PDPA program. Article 54 of the 1980 Constitution upheld the institution of the Supreme Court and reorganised the court system by providing for provincial and city courts, as well as special courts to try specific cases such as military cases. In March 1980, the Law on the Organization and Jurisdiction of the Courts was passed; it was amended less than two years later on 22 December 1981.[15] This law specified the court procedure and set out the hierarchy of the courts. Articles 12 and 13 of this law mandated the establishment of a bar association to 'provide legal assistance for the defence of accused persons'. Karmal also created a Department for Islamic Affairs, which was to act as an advisory body for the government on Islamic affairs.[16]

Despite these initiatives, the government continued to lose credibility. This was particularly so given its rampant disregard of national and international legal and human rights standards it purported to support

(e.g. ICCPR, CESCR, CERD, and CAT; see 7.9). During this period, there were frequent human rights violations at the highest levels of power, ongoing illegal detentions of political activists and religious leaders, and the well-publicised executions of members of opposition groups, in the absence of any trial or pretence of justice. In consequence, Afghanistan became an area of instability in the region, ravaged by internal conflict and foreign intervention. A March 1985 human rights report prepared for UNCHR details accounts of deliberate bombing of villages, massacres of civilians, and execution of prisoners of war belonging to resistance groups (Ermacora 1985: 12)

In the mid-eighties the war was particularly intense. The Afghan government, supported by Soviet troops, was involved in major combat all around the country, with the government focusing all its attention on its military campaigns rather than anything else. On 26 September 1982, the heads of the Islamic states conferring in Nigeria suspended the membership of Afghanistan from the Organisation of the Islamic Conference.

Foreign countries such as China, the U.S., Saudi Arabia, and Iran considerably helped the resistance groups within and outside Afghanistan. The alliance of the seven *mojāhedīn* groups, however, revolved only around their common struggle against the Russians and the Kabul regime. Besides this, the resistance groups had little in common and were involved in persistent factional disputes. From the very beginning, they were as much prepared to cooperate with each other as to fight each other. Neither their shared Muslim faith nor the concept of the need for a holy war (*jihād*) to oust the Russians was strong enough to outweigh their personal, tribal, and ethnic interests. All efforts to foster their commonness and bind them together into a unified movement failed. This lack of unity meant that the *mojāhedīn* were unable to coordinate their activities inside Afghanistan or carry out a unified strategy for their common objectives. In fact, this was one of the main reasons behind the unsuccessful attempts of the *mojāhedīn* to overthrow the communist regime in Kabul.

In April 1985, Karmal held a *Loya Jirga* in Kabul, inviting 1,800 representatives from around the country. With only 600 members attending, the assembly failed to garner much legitimacy as a genuinely representative body. The elections of August 1985 were yet another unsuccessful attempt by Karmal to legitimise his government (Ewans 2001: 165), as was the creation of a National Reconciliation Commission that was to design a new constitution. All his attempts to incorporate a broader participation of the non-communist groups into his government failed.

7.4 The period from 1985 until the present

From civil war to democracy

1985-1992: Afghan civil war

In autumn 1985, the Russians replaced Karmal with Najibullah, who was the head of the secret service department of the communist regime. His instalment to power was a political decision aimed at creating a stronger and more decisive government able to protect the continuity and power of the communist regime, even after the eventual military withdrawal of the Russians (Ewans 2001: 168). The international community's efforts to put an end to the Russian occupation moved very slowly, and no agreement had been reached so far. It was not until 28 July 1986 that the Soviet leader at the time, Gorbachev, facing heavy international pressure, announced that the Russian troops would be withdrawn, and that this withdrawal would be completed by October 1986.

In fact, Soviet troops only left Afghanistan on 15 February 1989. This represented a great challenge for the communist regime in Kabul. Najibullah had to stay in power without the support of the Soviet troops. Towards the end of 1987 the government of Najibullah, in an effort to reconcile the conflicting parties, drafted a new constitution, which was adopted on 29 November 1987 by the *Loya Jirga*.[17] The new constitution was similar to the Constitution of 1964 in its reference to the sacred religion of Islam (Art. 2). According to Article 94 of the 1987 Constitution, eight different governmental institutions were given the power to propose, introduce, amend, or repeal laws. The constitution also introduced the Constitutional Council of Afghanistan as a supreme institution for the interpretation of laws and international treaties in accordance with the constitution of the country. It was also to act as a consultative body for the president in legislative matters.

In 1990, Najibullah called upon the *Loya Jirga* to ratify a new constitution. In comparison to the two previous constitutions of 1980 and 1987, the 1990 Constitution did not make use of communist terminology. Islam and nationalism were back on the front page.[18] Article 1 proclaimed Afghanistan to be an 'independent, unitary and Islamic state'. Article 5 set forth provisions for a multi-party system. Article 25 gave due attention to the private sector for the establishment of private enterprises, and Article 20 encouraged foreign private investment.

The PDPA was reformed and renamed the Homeland Party. In November, Najibullah met with leaders of the *mojāhedīn* and representatives of the former king Zahir Shah to seek a political solution to the ongoing conflict. U.N. Secretary General Perez de Cuellar proposed plans for an international consensus on a peaceful settlement in

Afghanistan in May 1991. It aimed at Afghanistan's independence and self-determination, a cease-fire, halting the flow of weapons into the country, and a transitional mechanism leading to free and fair elections. The Kabul regime, Iran, and Pakistan accepted the resolution. The alliance of the seven *mojāhedīn* groups in Peshawar was, however, unable to consent on the composition of the future government in Afghanistan.

In this situation of negotiations, one of the strongest allies of the Kabul regime, Dostum, an Uzbek who had control of some of the northern provinces, seized the opportunity and joined forces with the resistance militias of Ahmad Shah Massoud, a Tajik to take Mazaar-e Sharif, the capital of one of the key provinces in the North of Afghanistan. This move was the death warrant for the peace plan of the United Nations and Najibullah's regime. Some parts of the Kabul regime joined ranks with the *mojāhedīn*. The advantage shifted decisively in their favour. They believed that victory was theirs and saw no need to stick to any U.N. peace plan that would include a role for Najibullah and his supporters (Ewans 2001: 177).

On 18 March 1992, Najibullah resigned and accepted the formation of a transitional government led by the *mojāhedīn* in close cooperation with the United Nations, despite the fact that the resistance groups were still struggling over power-sharing arrangements. Until then, the civil war that was waged in fact between the different *mojāhedīn* groups, rather than against communists, had been limited to some parts of the country. After the collapse of the Kabul communist regime the armed conflict spread into Kabul and the rest of the country. Government administration, legal institutions, universities, schools, and all other educational and social institutions did not function any longer and were simply closed down.

1992-2001: The Taliban and the rise of fundamentalism

The collapse of the Najibullah regime and the seizure of power by the *mojāhedīn* symbolised the end of a functional state structure in Afghanistan. A 51-member council called the Islamic Jihad Council (*shūrā-ye jihādī-ye eslāmī*), consisting of thirty field commanders, ten *mullahs*, and ten intellectuals, was established to rule the country for a period of two months. The Council was succeeded by an interim government that held power for four months. The problems were enormous: on the one hand, the new government had to deal with a state apparatus that lacked legitimacy; on the other hand, the resistance parties were not able to establish a functioning government. In the course of the civil war almost all the state institutions had been looted or destroyed (Ewans 2001: 181). The Ministry of Justice was used as a

military base, and all legal documents and laws stored at the ministry were destroyed during the five years of *mojāhedīn* domination.[19]

No new constitution was drafted, nor had the constitution of the previous regime been repealed; not a single decree was issued during the *mojāhedīn* rule to identify the sources of law for the judiciary and other legal organs; no central legislative activities took place during this period of time; and there was uncertainty as to the applicable laws in all fields (Lau 2003: 5). The difficulties were exacerbated by the ongoing civil war. This enhanced the rule of traditional law, i.e. classical Islamic and customary law (especially the *Pashtunwali*, an ethical customary code of the Pashtuns), since they represented the only continuity in the country. In more remote areas, where statutory laws had never arrived, the principles of Islamic and customary law had always been the primary sources for the resolution of legal and social conflicts (Lau 2003: 4).

Afghanistan was more fragmented than ever when the Taliban, a movement of indoctrinated students of Islam from the refugee camps in Pakistan, emerged in 1994. As head of the government, Rabbani controlled Kabul, its outskirts, and the North-East of Afghanistan. The West (the province of Herat) was controlled by Ismael Khan. The East (the Pashtun provinces) was under the leadership of an independent group of *mojāhedīn* commanders in Jalalabad, who occasionally fought against each other. A small region south and east of Kabul was controlled by Hekmatyar. The northern six provinces were under Dostum's command. And, finally, the Hazaras controlled the province of Bamian. Furthermore, dozens of warlords and leaders of militia groups exercised their control and harassed the population throughout the country (Rashid 2000: 21). Even international aid organisations feared entering Afghanistan, as the country was drowning in a savage civil war.

The successful expansion of the Taliban movement saw them control almost ninety per cent of the country by 1998. This, however, did not lead to the reestablishment of a strong state. The government activities of the Taliban were limited to the provision of security by incorporating local combatants into their own military structure and to the introduction of a bizarre and harsh version of Islamic law, with implications in all areas of law, such as public executions and a vigorous application of the *h,odūd* punishments (Schetter 2002: 113).

An announcement on Radio Kabul on 28 September 1996 stated that 'thieves will have their hands and feet amputated, adulterers will be stoned to death and those drinking alcohol will be lashed'. TV, video, satellite dishes, music, and games, including chess and football, were pronounced un-Islamic (Rashid 2000: 50). The Taliban also established a Department for the Promotion of Virtue and Prevention of Vice (*amr bi-l-ma^{c}rūf va nahī-ye an-al-monkar*) that was given unlimited authority for the enforcement of all the decrees issued by the Taliban

government.[20] A decree issued in 1997 by Mullah Omar, the founder of the Taliban movement, declared that all the laws against the principles of Hanafi Islamic jurisprudence were not applicable.[21] The Taliban announced via the radio that after the seizure of Kabul, they would abolish all the laws and regulations of the communist regime and reintroduce the system of law that was in place during Zahir Shah's reign (1964-1973), with the exception of the provisions related to the king and the monarchy.

They also claimed to support the principles of representative, non-discriminatory government based on the principles of the sharia (Ewans 2001: 205). That never happened; the Taliban regime violated all principles of the Constitution of 1964. Throughout their rule, the Taliban executed *ḥ,add* and *qeṣāṣ* punishments that had not been applied in the recent legal history of Afghanistan. The option of paying blood money to the victim's family in lieu of corporal punishment was not used very often. Amputation of hands and feet for theft and stoning of adulterer and adulteress were executed. The Taliban meant to deter people from committing crime and, therefore, ordered executions and amputations to be held in public in the sports stadium of Kabul.

One of the Taliban's first acts was the execution of former president Najibullah who had been living on U.N. premises since 1992. There was no trial, and the public display of Najibullah's dead body revolted many people outside and within the country.

Under the Taliban, discrimination against women peaked. They issued numerous edicts to control literally every aspect of women's behaviour, in both the public and private spheres. They were forbidden to take employment, to appear in public without a male relative, to participate in government or public debate, and to receive secondary or higher education. As a result, women were deprived of the means to support themselves and their children. Only female doctors and nurses were allowed – under strict observation of the religious police – to work in hospitals or private clinics. These edicts were issued by the abovementioned Department for the Promotion of Virtue and the Prevention of Vice and enforced through summary and arbitrary punishment of women by the religious police.

The Taliban claimed that they were prepared to provide for education and employment opportunities for women as soon as the social and financial circumstances were convenient. Unfortunately, such conditions for a sound Islamic program for women were never ascertained, with some subsequently claiming that such program had never existed in the first place.

The Taliban received support in the form of donations from foreign sponsors, located mostly in Saudi Arabia, Pakistan, and the United

States. New recruits from the religious schools (*madāres)* located in Pakistan were urged to join the Taliban movement to fight against the *mojāhedīn* groups in the North of the country. On 20 March 1996, more than 1,000 religious scholars and tribal leaders gathered in Kandahar to discuss the policies and platforms of the Taliban regime for the future. On the 4th of April, the assembly ended with the announcement of a *jihād* against the Kabul government still run by the *mojāhedīn* groups. Mullah Omar was named 'Commander of the Faithful', a title once abolished by the reformer-king Amanullah (Ewans 2001: 195).

In May 1996 Osama bin Laden, whose Saudi Arabian citizenship had been revoked in 1994, arrived in Jalalabad. He had been travelling to the Pashtun border areas between Pakistan and Afghanistan since the early eighties, where he had established training camps for the resistance forces against the communist regime. He cooperated with the Taliban who offered him their protection. Bin Laden provided the Taliban with extensive financial and human resources. After the bombing of the U.S. embassies in Kenya and Tanzania in 1998, Bin Laden became the world's most wanted terrorist. The Clinton Administration responded to the bombings of their embassies with cruise missiles directed against training camps that had been run by Bin Laden in Afghanistan since 1981. Ironically, these camps had at an earlier point in their history been supported by the U.S., Saudi Arabia, and Pakistan for training Afghan opposition soldiers to fight the Soviet occupiers.

With the assassination of Massoud on 9 September 2001 and the attacks of 9/11 in the U.S., the situation changed dramatically. The Bush Administration held Bin Laden responsible for the terrorist attacks of 9/11 and accused the Taliban of sheltering him. Consequently, starting on 7 October 2001, the United States began air strikes against the Taliban as part of a campaign aimed at putting an end to the rule of the Taliban regime, an objective that was soon achieved. This was done ostensibly in support of the so-called Northern Alliance of the *mojāhedīn* groups, since the Taliban regime had only been internationally recognised by Pakistan, Saudi Arabia, and the United Arab Emirates.

2001-present: Democracy and the future of Afghanistan

On 27 November 2001, a conference was held in Bonn, Germany, which brought together representatives of the resistance groups, consisting of the main civil war parties and warlords, pro-Zahir Shah technocrats and intellectuals, and two other small Afghan groups based in Pakistan and Iran (Wardak 2005: 65). Although the present anti-Taliban groups could not be considered to represent the Afghan people, the 'Agreement on Provisional Arrangements in Afghanistan pending the Re-Establishment of Permanent Government Institutions', also known

as the 'Bonn Agreement', provided a framework for the process of state formation to create a broad-based, multi-ethnic, and representative government in Afghanistan. Executive powers were vested in Hamid Karzai, a Pashtun, as head of the Interim Administration of Afghanistan on 22 December 2001. Karzai was reconfirmed as the head of the Interim Administration by the 1,550 members of an Emergency *Loya Jirga* held in Kabul on 10 June 2002.

On 14 December 2003, a nine-member commission presented a new draft constitution to the Constitutional Loya Jirga, the constitutional assembly, for the new Afghan Republic. The text of the constitution had been drafted following public consultations that took place over a period of several months. After almost three weeks of heated debates, the *Loya Jirga* approved the new constitution; it was signed on 26 January 2004 by Karzai. This cleared the way for the restoration and implementation of the rule of law, and hopes were expressed for an imminent end to the power of the warlords and the anarchy gripping the country (see 7.5).

The Bonn Agreement set June 2004 as the target date for the formation of a fully representative and elected Afghan government. However, that timeframe was repeatedly changed. When on 31 March 2004, the second international conference on Afghanistan's future took place in Berlin ('the Berlin Conference'), a work plan was issued for the Afghan government to hold free and fair elections in autumn 2004. Prior to the elections, the full exercise by citizens, candidates, and political parties of their political rights under the 2004 Constitution was to be ensured. These rights included, among others, freedom of organisation, freedom of expression, and the principle of non-discrimination, as well as paying particular attention to the participation of women as both voters and candidates. In the end, the decision was taken to hold presidential elections in October 2004, delaying parliamentary, provincial, and district voting until April 2005 (International Crisis Group 2005).

Thus, the first presidential elections in Afghanistan were held on 9 October 2004. According to U.N. officials, nearly 10 million voters were registered in the country. Since no census of Afghanistan has ever been taken, it is not possible to know how many eligible voters there actually were. Nearly 42 per cent of the registered voters were women, but it should be noted that that figure dropped to less than ten per cent in some provinces in the southeast. In addition, over one million Afghan refugees in Pakistan and Iran were registered to vote in the elections. Amongst seventeen challengers (including a female physician), the interim president Karzai was elected and sworn in as first elected Afghan president on 8 December 2004.

The first parliamentary elections in 36 years in Afghanistan, scheduled for April 2005, were finally held on 18 September 2005, with 2,800 candidates running for the 249 seats of the Lower House, among whom were 344 women. In contrast to the 80 per cent turn out rate for registered voters during the presidential elections, reports indicate that only about 50 per cent of the 12.4 million registered voters cast their vote during the parliamentary elections.[22]

A new Electoral Law with 57 articles, adopted on 27 May 2004, regulated the conduct of elections. Article 20 of the law provides for a single, non-transferable vote (SNTV) system under which candidates may run either individually or be nominated by a party. Under this system, party lists are not admitted.[23] Political parties may endorse or nominate candidates, but they are not allowed to use party symbols on the ballot, making it difficult for voters who wish to vote along party lines to identify their chosen candidates on Election Day. It must be noted that political parties have a serious credibility problem in Afghanistan. They are often associated, on the one hand, with the Communist Party and the Soviet invasion and, on the other hand, with the Islamist military groupings who formed to fight the Soviets and whose infighting produced much of the instability and bloodshed of the 1990s. Consequently, many Afghans do not trust political parties and see them as pursuing self-interested policies for their particular ethnic group, clan, or tribe. This is one of the primary reasons the SNTV system, which allows for a focus on individuals rather than parties *per se*, was chosen for use in the first elections in Afghanistan after so many decades of strife (Reynolds & Wilder 2005: 9).

The SNTV has, however, been criticised as being ill-suited for a country like Afghanistan. According to international observers, to be successful under this type of voting structure, a party must have sufficient control over its support base in each contested district to instruct it how to allocate votes among the party's candidates. Otherwise, the party risks having too many votes cast for one candidate, beyond the minimum needed for election, and too few for others. A system that encourages party development and participation in the political process would have been more desirable given Afghanistan's nascent democracy (International Crisis Group 2004).

As in the past, the 2004 Constitution provides for two houses in the *Loya Jirga*. The Lower House (the *Wolesi Jirga*) has 249 seats, with members directly elected by the people. Each of the 34 provinces is a single constituency in the *Wolesi Jirga*. Ten seats are reserved for the *Kuchi* (nomads) community (Electoral Law, §2, Art. 20), with the remaining 239 seats distributed among provinces in proportion to their population, with each province having at least two seats. Each member of the *Wolesi Jirga* enjoys a five-year term expiring on the 22nd of June

of the fifth year (2004 Constitution, Art. 83). Mohammad Yunos Qanuni, the former Minister of Interior and Education, was elected head of the Lower House.

The Upper House (the *Meshrano Jirga*) consists of a mixture of appointed and elected members (total 102 members). Sixty-eight members were selected by the 34 directly elected provincial councils, and another 34 were appointed by President Karzai (Art. 84, 2004 Constitution). President Karzai's appointments were vetted by an independent U.N.-sponsored election board and included seventeen women (50%), as required by the constitution. Sebghatulla Mojadeddi was appointed President of the *Meshrano Jirga* by President Karzai.

The new National Assembly has the potential to play a vital role in stabilising Afghanistan, institutionalising political competition and giving voice to the country's diverse population. By being accountable to the Afghan people, it can demand accountability of the presidential government. However, the success of this institution remains delicately poised, particularly because of the absence of a formal role for political parties, essential for mediating internal tensions.

Meanwhile, at the London Conference on 31 January–1 February 2006, donor nations pledged to help rebuild Afghanistan over the next five years with a sum of 10.5 billion dollars (equivalent at the time to 8.7 billion Euros). Some 80 per cent of this amount represents new money, with the remainder made up of outstanding portions of earlier pledges.[24] The key elements of the so-called Afghanistan Compact set out specific targets for improving security, governance, the rule of law and human rights and for enhancing economic and social development. A further vital and cross-cutting area of work is eliminating the narcotics industry, which remains a formidable threat to the people and state of Afghanistan, the region, and beyond.

At the Afghanistan Conference in Rome in July 2007 international donors pledged to support the training of judges, the building of new prisons, and the enactment of other measures to strengthen Afghanistan's judicial system with an additional 360 million dollars. President Karzai told the conference that urgent priorities included low salaries, poor infrastructure, and the training of personnel.

However, the security situation has deteriorated in the past several years. According to a report by the United States Institute of Peace, the year 2009 was the most violent on record for Afghans and international forces since 2001, and Afghan and international public confidence is diminishing.[25] Contrary to their pledge in 2007, the Afghan government and its international allies are mainly focused on two issues, namely combating corruption within the Afghan government and resolving the ongoing conflict with the Taliban. All other issues have become

secondary. The lack of security, economic development, effective rule of law, and coordination of efforts will, however, always stand in the way of sustainable progress in the country. As these problems are interrelated, none of them can be tackled without simultaneously addressing the others.

On 1 December 2009 the Obama administration announced that the U.S. would send another 30,000 troops to Afghanistan, but also start withdrawing troops as per July 2011. It is unclear whether such an increase in troop presence will boost security in Afghanistan, if no serious attention is given to the promotion of the rule of law, development, institution-building, and economic growth.

The presidential election of 20 August 2009 is another illustration of the growing instability in Afghanistan. With more than 40 presidential nominees, about 5 million people cast their votes.[26] The outcome of the election was marked with fraud and voting irregularities; no single candidate managed to obtain 51 per cent of the total votes. As the allegations of widespread fraud gained ground, a runoff election was scheduled to take place on 7 November 2009. On 1 November 2009, Karzai's main challenger Abdullah pulled out of the runoff election. Karzai, who won 49 per cent of the total votes in the first round of the election, was thus announced the elected president by the Independent Election Commission of Afghanistan. Although the election was over, the irregularities and fraud connected to the election process raised doubts about the legitimacy of the government. The reappointments of Dostum as Army Chief of Staff and Qahim as First Vice President, two prominent warlords accused of human rights violations and war crimes, further increased concerns about Karzai's government and his leadership.

On 28 January 2010 the latest Afghanistan Conference took place in London. The conference was meant to bring together the international community to 'fully align military and civilian resources behind an Afghan-led political strategy'.[27] A radical increase of civilian and military security forces is planned with the aim of reaching 171,000 members in the Afghan Army and 134,000 Afghan policemen by the end of 2011, bringing thus the total security force numbers to over 300,000. Furthermore, measures were announced to tackle corruption, including the establishment of an independent Office of High Oversight and an independent Monitoring and Evaluation Mission. According to agreements made at the conference, development assistance shall be better coordinated in the future, with the aim of increasingly channelling funds through the Government of Afghanistan. Interestingly, the strategy of the international community on Afghanistan embraces also the policy of the Afghan Government to integrate ex-warlords by offering

economic incentives to those who 'renounce violence, cut links to terrorism and agree to work within the democratic process'.

Meanwhile, the parliamentary elections planned for May have been postponed until September 2010. The election commission cited several reasons for its decision: security concerns, logistical challenges, and a budget shortfall, to name a few. The postponement of elections was hailed by Western donors, as it allows more time to put election reforms in place in order to avoid the repeat of the widespread fraud that marred the 2009 presidential elections. The postponement may also give the electoral institutions additional time to carry out the necessary preparations for the elections and to make improvements to the electoral process based on lessons learned during the 2009 elections.

7.5 Constitutional law

The Constitution of 2004[28] proclaims in its very first article that 'Afghanistan is an independent, unitary, and indivisible Islamic republican state'. Article 3 contains a repugnancy clause stating that 'In Afghanistan, no law may be contrary to the beliefs and provisions of the sacred religion of Islam. ('*mokhālef-e moᶜtaqedāt va aḥkām-e dīn-e moqaddas-e eslām*'). This is not new, since all Afghan constitutions, except for the 1980 Constitution, contained such a clause. This version of the constitution, however, fails to define what is to be understood as the 'beliefs and provisions of the sacred religion of Islam' or what the expression 'Islamic republican state' encompasses.

Article 130 of the constitution in fact stipulates the priority of statutory law over Islamic law, noting that 'The courts shall apply this Constitution and other laws when adjudicating cases'. The article further reads:

> When no provision exists in the constitution or the law for a case under consideration, the court shall, by following the principles of the Hanafi School of law and within the limitations set forth in this constitution, render a decision that secures justice in the best possible way.

It is, however, not clear whether these constitutional postulates imply that the ethical values of Islam govern the interpretation of the laws, or that the constitution and state-enacted law set the framework within which Islamic law must operate (Yassari 2005: 48).

Closely linked to these questions is the question as to who is to interpret the constitution. The proposal to establish a genuine 'Supreme Constitutional Court' was rejected in the drafting process of the 2004

Constitution. Consequently, the constitution, as it is currently formulated, foresees two distinct institutions with competence in interpretation matters. In the first place, Article 157 sets forth that an 'Independent Commission for the Supervision of the Implementation of the Constitution' should be created. Yet, according to Article 121, it is the Supreme Court that has the competence to 'review laws, legislative decrees, international treaties and conventions on their compliance with the Constitution and to interpret them, in accordance with the law [...]'. This constitutionally instituted dichotomy may cause serious problems in the future (Yassari 2005: 49). However, as an Independent Commission for the Supervision of the Implementation of the Constitution was never established, this problem is not acute and the task of interpreting and supervising the implementation of the constitution is conducted by the Supreme Court.

While articulating that 'Islam is the sacred religion of Afghanistan', Article 2 of the 2004 Constitution also asserts that followers of other religions are free to exercise their faith and perform their religious rites within the limits of the law. Furthermore, Article 130 sets forth that with reference to cases under court consideration, if no relevant statute is found the Hanafi school of law is to be utilised to the exclusion of all the other schools of Islamic jurisprudence. However, a new development in this constitution is the recognition, for the first time, of Shi'i law as a source of law to be used in cases where Afghan Shi'i are involved. Article 131 of the Constitution provides:

> In cases involving the Shi'i followers, the court shall, in disputes concerning personal status matters, apply the Shi'i school of law in accordance with (statutory) law. In other disputes, where no provision can be found in this Constitution and other laws, the courts shall adjudicate the case in accordance with the rulings of the Shi'i school of law.

It should be noted that in the first part of the article, the constitution makes explicit reference to matters of personal status, as opposed to other areas of the law, such as criminal and constitutional law. The latter portion of the same article, however, offers some freedom of interpretation, as it provides that whenever both parties to a legal dispute (other than in matters of personal status) are Shi'i followers and no ruling can be found on the basis of legal standards articulated in the constitution or other statutes and acts, the judge may apply the rules of the Shi'i school of law. Thus, whenever existing statutes, such as the civil code, do apply the scope of application, Shi'i law is excluded (Kamali 2005: 30).

In response to Article 131 of the 2004 Constitution a Code of Personal Status of Shi'i Afghans was promulgated in July 2009.[29] This law had been quietly making its way through Afghanistan's parliamentary system since 2007, when President Karzai finally signed the bill in March 2009, with the intention to gain the support of the Shi'i minority for the August 2009 election, without however paying attention to its content and potential backlash. Whereas there was generally a consensus among Afghans that the law as such was a positive development, giving rights and recognition to a historically excluded and persecuted minority, the content of some provisions of the bill that included several restrictions on the rights of Shi'i women caught the attention of national Afghan and international human right groups and the international media, causing the law to soon be dubbed the 'rape law' by Western journalists. Although the law had been circulated and shared with some local authorities and members of the civil society, it had received minimal public debate. According to a report of the Afghanistan Research and Evaluation Unit, the process of law making had lacked any public participation; this has revealed the weak links between policymakers and their constituents. It also showed a continued emphasis on ethnicity, sect, and faction as a basis for political alliances and organisation, rather than on partisan platforms that speak of issues of public interest (Oates 2009: viii). After strong public reactions, the bill was amended and some of the contested provisions, such as the rules on temporary marriage, were omitted; the amended Code of Personal Status with its 236 articles came into force on 27 July 2009 (see 7.6).

The 2004 Constitution requires the head of state to be a Muslim. He is the patron of the religion of Islam and, as such, must protect the 'basic principles of the sacred religion of Islam, and the constitution and other laws' of Afghanistan (Art. 63). The constitution has, however, omitted in this regard a reference to the Hanafi school of law, meaning then that there is no requirement that the president be a follower of the Hanafi doctrine. The article further prescribes that the president, unlike the construction of the king under Article 15 of the 1964 Constitution, is not beyond accountability. Article 69 expands upon this principle in its articulation of the impeachment procedure and removal from office of the president when he is charged with treason, crimes against humanity, or any other serious crime.

Article 116 foresees a three-tier court system with a Supreme Court, appeals courts, and district courts. The constitution does not, however, give detailed rules on the structure of the courts. According to Article 123, the rules related to the structure, authority, and performance of the courts and the duties of judges shall be regulated by statutes.

In January 2005, a temporary Supreme Court of Afghanistan was established. President Karzai appointed nine judges to the court, all of them Islamic scholars, including one Shi'i scholar. Fazl Hadi Shinwari, an Islamic scholar known particularly as being ultra-conservative was appointed as Chief Justice. The temporary Supreme Court operated until the parliamentary election in September 2005 and the formation of a new *Loya Jirga*. In summer 2006, President Karzai appointed several new, more moderate members to the Supreme Court. However, he also chose to re-nominate Shinwari as Chief Justice. Despite controversy surrounding the validity of Shinwari's legal credentials, his nomination was allowed to continue, but ultimately failed when voted on in Parliament. Karzai then chose his legal council, Abdul Salam Azimi, to succeed Shinwari. Azimi's nomination passed, and the new court was sworn in on 5 August 2006.

With regard to women's rights, the Constitution of 2004 contains an equality clause. According to Article 22,

> [a]ny kind of discrimination and privilege between the citizens of Afghanistan is prohibited. The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.

While the express wording of this article forbids discrimination between men and women, legal rules contained in the Civil Code 1977 and the Penal Code 1976 (see 7.6 and 7.7) as well as actual social practice, in particular in accordance with customary law, do. The equality clause must, thus, be seen as an article that had to be included in any modern constitution, but one that does not reflect the way women and their position in society are conceived in male-dominated and war-ravaged Afghanistan. It remains highly doubtful that women will be able to successfully rely on this article for the protection of their rights in the foreseeable future.

7.6 Family and inheritance law

The current Afghan Civil Code dates back to 1977; it contains provisions on family and inheritance law that are essentially a codification of the Hanafi school of law, with inclusion of some provisions of the Maliki school of law. Family law provisions cover matrimonial law, polygamy, child custody, and divorce. The enactment of the Civil Code constituted a step forward from its antecedent, the Marriage Law of 1971, which was silent on polygamy. Moreover, its provisions on child marriage and divorce did not match any of the family law reforms that had

taken place elsewhere in the Middle East, the Maghreb, and Pakistan in the 1950s and 1960s. In contrast, the Civil Code of 1977 introduced reforms on child marriage, polygamy, and divorce. These amendments (see discussion below) do not, however, sufficiently address the social need for more effective measures, and they do not further either the equality clause contained in Article 22 of the 2004 Constitution or the principles outlined in the CEDAW to which Afghanistan is a signatory.

An enormous gap exists between the professed support for the principle of equality and the reality of tribalism in Afghanistan's traditional society. The importance and prominence of customary law, and especially the customs and principles that are known collectively as the *Pashtunwali*, which enjoy quasi-legality and apply to virtually every aspect of daily life, should not be underestimated. These rules pertain mostly, but not exclusively, to the commission of crimes, especially those committed against persons and/or property (International Legal Foundation 2004: 7). Such conflicts are primarily resolved by an exchange of women from the family of the perpetrator of the crime to the family of the victim. Women involved in this exchange (*bad* or *badal*) do not have any say.

Custom-based and traditional attitudes towards women are difficult to change. Many women in Afghanistan cannot even hope to dream of enjoying something even resembling equal rights, despite the fact that the twentieth-century constitutions all boldly proclaim the opposite.

Marriage

The Civil Code of 1977 accords women the right to choose a husband without the prior consent of their guardian, in accordance with the Hanafi school of law. With reference to child marriage, Articles 70 and 71 of the Civil Code specify a marriageable age of eighteen for boys and sixteen for girls, but dilutes in the meantime the effect of its own provision by providing that a 'valid marriage contract may be concluded by the contracting parties themselves, or by their guardians and representatives' (Art. 77 CC). The law, thus, falls short of addressing abusive exercise of the power of guardianship whereby parents, brothers, and uncles often impose their will on minor, and even adult, boys and girls. More recently, the Supreme Court has approved of a new standardised marriage contract (*nekāḥ-nāme*), with the explicit aim of curbing forced and child marriages. It remains to be seen whether in absence of any sanction people will abide by it. This will also depend on the observance of the requirement of registration.

The 1977 Civil Code introduced a registration requirement for all marriages. According to Article 61 every marriage has to be registered. The competent body for the registration of marriages is currently the

district court of the area where the parties reside.[30] However, according to Afghan officials and current reports, in most parts of the country, marriages are neither certified nor registered. Only 5 per cent of the marriages have been registered (Ertürk 2006: 8). This means that the vast majority of Afghans are not officially registering their marriages. The registration of births, marriages, divorces and deaths are indispensable for determining the population number and ensuring legal security in a modern state. Due to the lack of reliable registration, it is not possible to collect statistics with regard to the marriage of minors for example. Likewise, in marital disputes, due to the lack of official documents, it is hard to prove the existence of a marriage.

The lack of registration is partly explained by the fact that non-registration does not affect the validity of the marriage: a marriage is considered religiously valid without registration. The participants of a workshop on family law, conducted by the Hamburg Max Planck Institute for Private Law (MPI) in 2006 in Kabul,[31] argued that a further reason why people do not register their marriages is their distrust in courts. Accordingly, it is against the Afghans' way of thinking, habits, and traditions to begin their marital life by going to a court, even if it is only in order to register the marriage. The other reason for not registering marriages is the fact that there is no need for it in daily life. Presenting certified documents is rarely necessary in Afghanistan. Thus, a simple but effective method for promoting registration would be a compulsory presentation of the marriage certificate to employers and landlords. For this purpose, trustworthy, extrajudicial registration authorities should be set up all over Afghanistan.

A further important issue in marriage law is the so-called bride price (*walwar*)[32], which has to be differentiated from the Islamic dower (*mahr*).[33] *Walwar* is a customary tradition whereby the groom or his family has to pay to the head of the bride's household a sum of money (or commodity) supposedly to reimburse the parents of the bride for the financial loss they suffered while raising their daughter. *Walwar* originates in the tribal tradition of Afghanistan, and viewed from the Pashtun perspective, it is a matter of honour: the higher the *walwar*, the higher the esteem of the husband's family for the bride. Some have argued that the concept of *walwar* is wrongly considered as 'selling girls', since this view ignores the socio-cultural background of the institution. The idea underlying *walwar* is to provide some financial relief to the girl's parents who purchase gold and silver ornaments, clothes, household utensils, etc. as dowry for their daughters. However, even if the dowry may be paid for out of the *walwar*, this is not a legal or customary obligation; *walwar* very often does not benefit the girl's family nor does

it flow into the expenses for the wedding ceremony, also paid for by the family of the groom (Kamali 1985: 85).

The amount of commodities or money acceptable as *walwar* differs from province to province, as do the social attitudes with regard to this practice. In the 1980s, Kamali recorded amounts varying between 20,000 and 200,000 Afghanis depending on the geographic areas; a uniform figure could not be given. Likewise, a report conducted by the abovementioned Hamburg MPI in 2005[34] revealed equally variable amounts of payment of *walwar*. Data revealed, for instance, that the *walwar* for a virgin girl ranged from 2,000 U.S. dollars (about 85,000 Afghani) to 40,000 U.S. dollars (1,700,000 Afghani) for the first marriage of a girl. This amount might be even higher if the man was already married; it would double for the third marriage and increase further for the fourth marriage. It is important to add that the amount of *walwar* can also vary according to chastity, beauty, education, and the social class or economic standard of the girl and her family.

The need to purge the Afghan way of life of this tradition detrimental to society at large has been strongly felt. Accordingly, *walwar* has been prohibited in all family law legislation prior to the Civil Code of 1977. The Marriage Law (1921) explicitly forbade the practice of *walwar*, as did its successor, the Marriage Law of 1926. Both statutes failed, however, to specify any means of enforcement or sanction in case of infringement. The Marriage Law of 1949 contains similar provisions. According to its Article 5, the bride is denied any further gift (including *walwar*) in addition to her dower. Article 6 provides the groom with some means of action and stipulates that the government is authorised to take action in a situation where, after the completion of a valid marriage, the guardian of the bride refuses to allow the bride to join her husband because of his refusal to pay extra money. This provision, however, had hardly a scope of application since normally the bride price is to be paid before the conclusion of the marriage (Kamali 1985: 87; Tapper 1991: 144).

Subsequent legislation repeated the prohibition of *walwar* (so Art. 15 of the Marriage Law 1971), but as its predecessors, the Marriage Act 1971 failed to specify the competent court to hear cases on the matter, the penalties involved, or the way the violator should be prosecuted. The absence of sanctions made Article 15 inapplicable in practice. The intention of the legislator to eliminate *walwar* did not include any effective measure for the enforcement of the prohibition or sanctions for violation. The civil code also does not address the issue, thus failing to tackle one of the most burning issues in Afghan legal reality. With no effective measure to sanction its breach, the practise is still widespread in Afghanistan today.

In a country suffering from widespread poverty and unemployment this institution must be reconsidered in view of the fact that many men cannot afford it and are forced to sell their land or travel abroad to earn money for it (Yassari 2005: 58-59). Ironically, economic reasons also play a significant role in the persistence of *walwar*. The girl child can become an asset exchangeable for money or goods. Families see committing a young daughter (or sister) to a family that is able to pay a high price for the bride as a viable solution to their poverty and indebtedness. The custom of *walwar* may motivate families that face indebtedness and economic crisis to 'cash in' the 'asset' as young as six or seven, with the understanding that the actual marriage is delayed until the child reaches puberty. However, there is no guarantee that this is really observed and some reports indicate the danger of little girls being sexually abused not only by the groom but also by older men in the family, particularly if the groom is also a child (Ertürk 2006: 8).

Polygamy

The civil code confirms the validity of polygamy, but makes it contingent on conditions such as just character of the husband, his financial ability to maintain more than one wife, existence of a lawful reason, and consent of the new wife (Art.s 86, 89 CC). Polygamy remains permissible under the requirements of Article 86 of the Civil Code, which reads as follows:

> Polygamy can take place when the following conditions are fulfilled: 1) when there is no fear of unequal treatment as between the wives; 2) when the husband has sufficient financial means to maintain his wives. This includes food, clothing, housing and adequate medical care; 3) lawful reason, such as the first wife remaining childless or her suffering from diseases that are difficult to cure.

Since judicial permission prior to a polygamous marriage is not required to certify that the husband has indeed fulfilled these requirements, these provisions are not likely to be very effective. Judicial intervention is only possible after the polygamous marriage has been concluded. Consequently, when an Afghan man enters a polygamous marriage, violating any of the legally prescribed conditions, the second marriage will be valid (Ertürk 2006: 11). It will only give the wife (be it the first or the second) a right to judicial divorce on the basis of harm (*darar*, see below) in cases where the husband failed to fulfil the stipulated conditions (Art.s 87, 183 CC).

These rules, once again, fail to address the social realities of Afghanistan, placing the burden of proof entirely on the wife. It is extremely difficult for an Afghan woman to prove that her husband is unjust and has inflicted injury on her. The current legislation cannot, therefore, be considered a real remedy for the difficulties Afghan women face. Since polygamy in the Afghan society is considered to be less of a social stigma than divorce, divorce is very rare and discouraged by social pressure. Moreover, it is questionable whether the entitlement to divorce is a real option to many Afghan women. In many cases, a woman may prefer putting up with the polygamous marriage of her husband, rather than to petition for a divorce that would likely leave her without financial means.

Divorce

Until the introduction of the Civil Code in 1977, divorce was exclusively governed by Hanafi law. Any legislation that addressed the subject prior to this time was of a piecemeal nature and essentially left the sharia law intact. The civil code, thus, represents the first attempt to comprehensively codify the sharia law of divorce. It provides for four types of marriage dissolution:

– First, there is the repudiation of the wife by the husband (*t,alāq)*. The provisions of *t,alāq* are codified in Articles 135-155 of the civil code and reflect the Hanafi rules. Under the code the husband's unilateral right to divorce, without giving any reasons and without recourse to the courts, has been retained. The husband's may pronounce the *t,alāq* verbally, in writing, or even by gesture (Art.s 139, 135 CC). Witnesses are not required and the repudiation does not need to be registered. The code is completely silent on that matter. The possibility of the husband to divorce his wife with no further formalities causes a permanent legal insecurity for the women as to their marital status.
– The second form of divorce is the judicial divorce initiated by the wife (*tafrīq*) (Art.s 176-197). This kind of divorce must be based on specific grounds that are borrowed from the Maliki school of law. The grounds for judicial divorce include: the husband suffering from an incurable disease; his failure or his inability to maintain his wife; absence/desertion for three years without a lawful excuse; the husband's imprisonment for ten years or more, in which event she can ask for a divorce after the first five years of imprisonment; and harm (*ḍarar*) which can denote both physical and psychological injury (Art.s 89, 176, 191, 194).
– Thirdly there is the divorce against payment (*khol*^{c}) (Art.s 156-176). This kind of divorce is initiated by the wife whereby she provides

> financial consideration in exchange for her divorce. *Khol*^{c} represents the only form of dissolution whereby the wife has the right to initiate divorce proceedings without pleading a special reason such as harm or injury as grounds for divorce. Under Hanafi law, however, it can only be effectuated with the husband's consent, severely limiting the scope of this right. The rules on *khol*^{c} in the Afghan code fail to take note of the family law reform measures that other Muslim countries have introduced. An Afghan woman's attempt to utilise *khol*^{c} under the Civil Code can, therefore, be frustrated simply by the husband's refusal to agree to her proposal.

Finally, there is the annulment of the marriage (*faskh*) (Art.s 132-134), the legal dissolution of the marriage contract on the basis of an absence of a key requirement for the legality of the contract. This can be the case when one of the two parties has not consented to entering into the marriage, when psychological illnesses (such as insanity) are detected, or when the dower is inadequate (Kamali 1985: 184).

It is clear that the Afghan Civil Code does not meet the standards envisaged in the Bonn Agreement or the equality clause of the 2004 constitution. Therefore, in order for the civil code to reflect these standards, it needs to be revised, not only with reference to polygamy and divorce, but also with regard to all of its provisions that do not comply with these standards.

Code of Personal Status of Shi'i Afghans

The Code of Personal Status of Shi'i Afghans (CPS) is composed of 236 articles. Article 1 states that the code was drafted in response to Articles 131 and 54 of the Constitution of 2004 to regulate the personal status of Shi'i Afghans. Accordingly, the Supreme Court must appoint eligible Shi'i judges to implement the code (Art. 2). Whenever issues arise that are not addressed by the provisions of the CPS, the court shall decide in accordance with the Shi'i Ja'fari school of law as espoused in the writings (*fatwas*) of its most renowned and recognised religious authority the so-called 'source of imitation' (*marja*^{c}*-e taqlīd*) (Art. 3).

According to Article 123 of the CPS, the husband is the head of the family. This kind of regulation is found in almost all family codes in Islamic countries. However, Article 123 further provides that the court may appoint the wife as head of the household, if it is established that the husband is intellectually unable to assume this position. The much contested Article 132(4) of the first draft of the code, which provided that the wife had to be sexual available whenever the man so wished, was omitted in the final version, as was the chapter on temporary marriage, which is recognised under Shi'i law, but prohibited under all

Sunni schools of law. Furthermore, Article 94 CPS stipulates that the marriageable age for women is 16 and for men 18, which is remarkable considering the Shi'i rules allowing for marriage from the age of puberty, i.e. 9 for girls and 15 for boys.

7.7 Criminal law

As mentioned earlier, according to the Bonn Agreement, all legislation that does not conflict with the regulations stipulated in the existing legal codes or with the international legal obligations to which Afghanistan has committed itself shall remain in place. Thus, to this extent, the Penal Code of 1976 is still applicable. Furthermore, the Law on Detection and Investigation of Crimes of 1978 (LDIC), the Counter Narcotics Code of 2005, the Juvenile Code of 2005, and the Police Law of 2005 are applicable. The Criminal Procedure Code of 1965 (CPC), as amended in 1974, has been replaced by a new Interim Criminal Procedure Code (ICPC) that was ratified by the Ministry of Justice on 25 February 2004. The Code has 98 articles and was prepared by the Italian Justice Project Office, an Italian organisation responsible for oversight and implementation of legal reform projects funded by the Italian government in Afghanistan. Regrettably, these sets of laws do not always operate well together. For example, Article 98(3) of the ICPC states:

> Upon promulgation of this law, any existing laws and decrees contrary to the provisions of this code are abrogated.

This article has been causing confusion and various problems for legal practitioners in the executive and the judiciary. For a police officer, a prosecutor, or a judge, it is extremely difficult to know which article(s) of the LDIC or CPC is contrary to the provisions of the ICPC and which is not (Gholami 2007: v).

Furthermore, according to some reports, substantive criminal law in Afghanistan continues to be governed in large part by Islamic law (Danish Immigration Service 2000: 35; Lau 2003: 21) and in certain areas by customary law (International Legal Foundation 2004: 14). Some of the punishments awarded for *h,add* offences, such as, for instance, the stoning to death of an adulterer if certain evidential requirements are met, do conflict with both the 2004 constitution, which prohibits the imposition of punishments 'incompatible with human dignity' (Art. 29), and Afghanistan's international legal obligations. This is also true for the *Pashtunwali* justice system, which is based on the principle of *bad*, or the exchange of women between families when a crime

is committed as compensation for the crime (Lau 2003: 22). However, it is not known whether the present administration intends to modify these aspects of Islamic and customary criminal law. It is in these areas that the most flagrant conflicts with international human rights standards still exist, and this is, together with family law, the two areas of law likely to be the most sensitive to reform.

7.8 Other legal areas, especially economic law

The first Afghan Commercial Code was enacted in 1955. It contained 945 articles encompassing regulations on the merchant, (Art.s 1-115), commercial companies (Art.s 116-470), commercial documents (Art.s 471-588), and commercial transactions including commercial agency and insurance (Art.s 589-945). Islamic law did not influence Afghan commercial legislation, as this legislation was based on the Turkish Commercial Code, which was, in turn, based on Western secular legislation, especially on German and Swiss law.

Traditional Afghan society with its tribal structures found it hard to adapt to the provisions of the code, as it did not match people's needs, nor could they fulfil the requirements of the code. Article 117 of the Commercial Code (1955) defined, for example, various kinds of companies that had to be registered at the High Court of Appeal in Kabul, with the Ministry of Justice publishing all relevant information (e.g. trade mark, name of the company, and other specifications) in the Official Gazette.

The areas of intellectual property, banking, money exchange, and industrial property had never been codified and also required urgent regulation in order to attract foreign investors and industries. Accordingly, several statutes were published to cover these areas of commercial activities. The following statutes still exist and are applicable according to the Bonn Agreement: the Commercial Code of 1955; the Commercial Procedure Code of 1963; the Law of the Chamber of Commerce of 1951; and the Law for the Registration of Trade Marks of 1960. Since twenty-five years of civil war have turned the economy into a war economy (Schetter 2002: 109), it is difficult to assess the effectiveness of statutory commercial law in Afghanistan today.[35]

In 2002, a new Investment Law was enacted. [36] It aims to attract and secure foreign investment in Afghanistan. It was amended in December 5, 2005. According to Article 2, the State is committed to maximising private, both domestic and foreign, investment and to creating a legal regime and administrative structure that will encourage and protect foreign and domestic private investment in the Afghan economy in order to promote economic development, expand the labour market,

increase production and export earnings, promote technology transfer, improve national prosperity, and advance the people's standard of living. The only requirement to invest in Afghanistan is to maintain a valid bank account and to pass a criminal background check. Investments in Afghanistan can be 100 per cent foreign-owned (Art. 10).

In September 2003, a new Banking Law was passed by Presidential Decree.[37] It contains 101 articles and is clearly investor-friendly as long as contracts are followed. There are, however, scant provisions for enforcement in case of any default. Afghanistan lacks special courts for banking matters, and there is no recognition of foreign judgments. Interestingly, the law makes no reference to the principles of Islamic Banking. Islamic banking and interest-free banking are still in their infancy in Afghanistan. The civil war has played its part in bringing about this situation. There are currently no Islamic banks in the country, and there is no legislation covering the institutional and procedural aspects of this kind of banking. The war and the period following it have brought even the regular banking system to the brink of collapse (Kamali 2005:26).

7.9 International treaty obligations and human rights

The Constitution of 2004 contains a long list of guaranteed basic human rights of the citizens of Afghanistan. Afghanistan has also ratified the following international treaties: CEDAW, CRC, CAT, CERD, CESCR, and the ICCPR.

During the past twenty-five years, though, Afghan society has been through an extraordinary amount of violence. Throughout this period, serious abuses of human rights and war crimes by all sides in the conflict have taken place, including massacres, looting of houses and property, rapes, revenge killings, illegal imprisonment, the torture and murder of prisoners, and assassinations of political opponents (Amnesty International 2002). The legacy of war, poverty, and religious fanaticism has particularly affected Afghan women, who have suffered from both cultural and structural inequalities and violence in Afghan society for centuries. The persistence of this situation over the past quarter of a century has produced what Wardak calls a 'culture of human rights abuses' that is justified, and even positively sanctioned, in the shadow of warlordism in Afghanistan (Wardak 2005: 73).

After the fall of the Taliban regime, the Afghan Independent Human Rights Commission (AIHRC) was established on 2 June 2002 in response to Article 58 of the 2004 Constitution.[38] The AIHRC is the product of a national consultative process between Afghan human rights activists, the Interim Administration at the time, and the United

Nations. Creation of the Commission was also encouraged and supported by Resolution 134/48 of the U.N. General Assembly in 1993, and the Paris principles. The Commission, with its eight branch offices throughout the country, aims to protect and promote human rights across Afghanistan. In accordance with the 2004 Constitution, the AIHRC functions as a permanent institution for the monitoring and, where necessary, investigation of the human rights situation in Afghanistan. AIHRC is funded by donor countries assisting Afghanistan, and, as such, forms an important part of national income for the country. The AIHRC is currently chaired by Sima Samar**,** a well-known women and human rights advocate and activist within national and international forums. Before chairing the Commission, she was elected as the Vice-Chair of the emergency *Loya Jirga*.

Since its establishment, the AIHRC has regularly reported on violation of human rights, related in particular to women, children, and civilian casualties and death as a result of ongoing clashes between the NATO and Taliban and perpetrators of war crimes in Afghanistan. Their latest report, the Report on the Situation of Economic and Social Rights in Afghanistan of November/December 2009 aims to assess the status of economic and social rights in Afghanistan in the year 1387 (2009) against the national and international obligations of the government with respect to these rights. The report highlights that one of the most significant challenges in Afghanistan is still the worrying security situation. Despite existing commitments, strategies, and policies developed to improve the socio-economic situation of Afghans, many men, women, and children continue to suffer from extreme poverty, high unemployment, systemic discrimination, and a lack of access to healthcare, schools, and adequate housing. Implementation and enforcement of legislation to protect social and economic rights also remains limited due to weak judicial institutions.[39]

The social reality of human rights protection in Afghanistan thus reveals a depressing picture of almost complete legal impunity. Not only do grave past violations of human rights remain unpunished, but abuses continue without any immediate prospect of bringing the perpetrators to justice. Any reform of the legal system to bring it in line with international human rights standards or with the provisions of the new constitution will require as an essential prerequisite the existence of a stable, functioning, and capable state, both able and willing to enforce laws (Lau 2003: 4). At present, this is sadly not the situation in Afghanistan.

7.10 Conclusion

The Afghan legal system and its evolution throughout the last hundred years have been coloured by three factors: its traditional and tribal government and local customary laws; Islamic law; and the development of statutory laws by the central state authorities.

The relationship between Islamic law and customary law is complex. Local customs and customary law continue to have a very prominent role. Despite official statements to the contrary, people usually resort to the chiefs and eldest of their communities, whom they frequently refer to as the 'white beards' (*rīsh-e sefīd*), for dispute resolution. Generally, when a dispute arises, the parties agree on whether the dispute is to be resolved 'sharia-wise' or in accordance with customary law, e.g. mainly the *Pashtunwali* (International Legal Foundation 2004: 7). There are very few reports and data on the application of customary law in Afghanistan. Decisions of the *jirga*s are conveyed orally, and there are no written reports. In many cases, customary law strictly contradicts Islamic law. This is especially so in cases where women, without their consent, are given into marriage to settle disputes between families. In these circumstances, and as is often the practical reality, the status of Afghan women under customary law is worse than the status afforded to them under the most conservative interpretation of Islamic law.

Historically, there has been simultaneous coexistence and competition between sharia and customary law. While Islamic law, namely the Hanafi school of law, substantially controls matters of personal relationship and most aspects of inheritance, local custom prevails in land tenure. In criminal matters, both sources of law can govern the case.

All Afghan constitutions, except the Constitution of 1980, endorsed the traditional supremacy of sharia in Afghanistan. This is manifested in the numerous references made to the sharia, proclaiming it as the law of the nation. This can be explained by the fact that Afghans have always had recourse to Islamic law. It has been the single constant to have steadily survived a century of law reform and legal insecurity. Note, for instance, a reminder of Afghan's political and legal history: the burst of modern legislation under Amanullah between 1919-1929 was abrogated by the succeeding regime; the Western-oriented reforms of the 1970s were eventually completely undone in the communist era; and the attempts to turn the legal system of the country from its religious tribal and customary basis to an imposed emphasis on a general Sovietisation of the legal system after 1978 failed.

Since the latter half of the nineteenth century, a number of efforts have been made to modernise and secularise the existing legal system, or at least specific areas of the law. Statutory legislation is a latecomer on the scene, meant to supplement the sharia especially in areas that

were not covered by the latter. Legislation in traditionally sharia-dominated fields such as family law, law of property, contracts, and evidence mainly sought to codify the substantive sharia rules for purposes of easy reference by judges and lawyers. In this respect, they are seen as merely a restatement of Islamic law (e.g., Art.s 497-750 CC, reflecting Hanafi contract law). Other pieces of legislation, such as the Commercial Code on the other hand, are genuinely secular codifications.

These legislative initiatives have frequently been accomplished only through the employment of drastic, even violent, measures (Reynolds & Flores 1993: 1). Ironically, the general effect has been to generate strengthened support for Islamic and customary law at the local level. Furthermore, Afghan legislation (secular and otherwise) has been limited both in its quantity and quality. The result is disjointed legislation, with many gaps and unregulated areas of law. Röder calls the legal landscape 'a patchwork' of various norms (Röder 2009: 257). While the nation may be a unified state in a strict sense, the law is in practice a fragmented *mélange* of secular, customary, and religious law variously applied according to local acceptance of central legislation and modified by shifting conditions of governmental authority. Legal pluralism is the hallmark of legal reality in Afghanistan.

Without exception, all surveys of the Afghan legal system have made note of the fact that Afghanistan's statutory laws and regulations exist solely on paper (Weinbaum 1980: 51). Most of the literature also points to the fact that for ordinary people and villagers, who form the vast majority of the population, tribal/customary and Islamic law are far more significant and actually better known than state legislation (Amin 1993: 66). The limited practical value of Afghanistan's statutory laws has to be attributed to the decline and demise of central political authority in Afghanistan as a result of the civil war, but also to the lack of training of legal professionals and the inability to adapt statutory law to Afghanistan's particular circumstances. This means for instance that judges either do not know the law well, or know it, but are reluctant to apply it. The *de facto* subdivision of the legal system into official statutory law and unofficial mainly unwritten law is characteristic of the Afghan legal history ever since attempts were made to introduce statutory laws. The difficulty of implementing statutory laws also has very practical considerations: many of the statutes have for a long time been unavailable, due to the destruction of archives and the complete breakdown of administrative order during the years of civil war.

Hence, in Afghanistan it is not the implications of sharia or sharia-based law which, at least for the moment, prevent the application and implementation of international legal and human rights standards, but the lack of a system by which the rule of law may be established so that the legal system is capable of – practically, socially, politically –

guaranteeing and enforcing laws effectively. Although the Government is committed to carrying out its duties imposed not only by Afghanistan's domestic laws but also by the country's international obligations, the greatest challenge to action is the lack of security and the fragile peace balance in the country.

A functional legal system in Afghanistan, which is applied by legal professionals and accepted by the population, requires incorporation of certain aspects of Islamic and customary law, within the limits imposed by human rights considerations. It is impossible to reject the existing body of tribal laws in its entirety, as this will damage the legal reform process; but at the same time, discriminatory practices, especially those against women, must be abolished. This, in turn, means bringing about a gradual change of popular attitudes on part of the population at large concerning the application of those rules that infringe upon basic human as well as basic Islamic rights. This is the *conditio sine qua non* for change. As long as practices such as *bad* and *walwar* are not seen as disgraceful and against human dignity, imposing a system from above will not be successful in Afghanistan. In changing these practices, history, traditional structures, and the failures of the past must be taken into consideration.

Notes

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2 *Neẓām-nāme* is the Dari expression for legal enactment. They are the first legal documents representing statutory law in Afghanistan, with the first being the 1923 Constitution. The expression was later changed to *os,ūl-nāme*.

3 According to the latest report of the Ministry of Justice in Afghanistan, the total number of *neẓām-nāmes* ('laws') enacted is 75. A list of these laws, acts, decrees, etc. is available in the Library of the International Development Law Organization (IDLO) in Rome and online at: http://www.idlo.int/afghanlaws/index.htm. See also Kamali 1985: 36.

4 There is unfortunately very little research and analysis on the actual effect of these statutes. It may be presumed that they did not really have much impact on behaviour and traditions, since one of the economically most devastating traditions of Afghan society, the *walwar* (as will be exemplified under 7.6) not only survived but is still practiced widely in Afghanistan today. See Kamali 1985: 83-105.

5 Afghan Official Gazette No. 12/1964, dated 1 October.

6 The Official Gazette was first published in 1963. Publication was irregular and stopped temporary due to civil wars and foreign invasion. It resumed its regular publication in 2001, after the fall of the Taliban regime.
7 *Khalq* literally means 'masses' or 'people'. *Parčam* literally means 'banner' or 'flag'. The names are derived from newspapers each party published. Khalq, edited by Taraki, was published only six times before the government banned it. After the split, Karmal and his supporters published the Parcham newspaper. Khalq's membership was primarily Pashtun and rural, while Parcham was predominately urban, middle-class Tajiks.
8 This was said because the Parcham newspaper '*Parcham*' was tolerated by the king himself and its publication permitted from March 1968–July 1969.
9 Afghan Official Gazette No. 347/1976, dated 7 October.
10 Afghan Official Gazette No. 360/1977, dated 24 February.
11 Afghan Official Gazette No. 353/1977, dated 5 January.
12 Decree No. 8/1978 was already brought into effect in September, Afghan Official Gazette No. 412/1978.
13 Afghan Official Gazette No. 409/1978, dated 17 September.
14 The constitution of the democratic government of Afghanistan (*oṣūl-e as,ās,ī-ye jomhūrī-ye demūkrātīke afghānestān*)[0], Afghan Official Gazette No. 450/1980, dated 21 April.
15 Afghan Official Gazette No. 479/1981, dated 22 December.
16 Afghan Official Gazette No. 471/1981, dated 5 January.
17 Afghan Official Gazette No. 660/1987, dated 29 November.
18 Afghan Official Gazette No. 728/1990, dated 29 May.
19 This is based on eye-witness accounts and interviews with members of the Ministry of Justice conducted by Hamid Saboory in Kabul during 2003.
20 Afghan Official Gazette No. 788/1999.
21 Afghan Official Gazette No. 783/1997, dated 12 May.
22 Some sources reported participation as high as 62 per cent, but this is unverified
23 According to the Afghanistan Research and Evaluation Unit (AREU), this kind of election system is nowadays only used in Jordan, Vanuatu, the Pitcairn Islands, and partially in Taiwan (Reynolds & Wilder 2004: 12).
24 The United States pledged an additional 1.1 billion dollars in financial aid for the coming U.S. fiscal year from October, slightly less than the 1.2 billion dollars from the World Bank. One billion dollars were also pledged by the Asian Development Bank; 855 million dollars by Britain; 480 million dollars by Germany; and 450 million dollars by Japan. Additionally, the European Union pledged 268 million dollars; Spain 182 million dollars; India 181 million dollars; the Netherlands 179 million dollars; Saudi Arabia 153 million dollars; Pakistan 150 million dollars; and Norway 144 million dollars. France trailed well behind with 55 million dollars.
25 See http://www.usip.org/node/5023.
26 See http://www.iec.org.af/results/index.html.
27 See http://afghanistan.hmg.gov.uk/en/conference/.
28 For an English translation of the Afghan Constitution of 2004, see 'Annex C, Constitution of Afghanistan 2004', in Yassari 2005: 271-329.
29 Afghan Official Gazette No. 988/2009, dated 27 July.
30 Global Rights, Afghan Family Law, Book 2: 16. Global Rights is a group of human rights activists formed in 2002 for the rule of law, access to justice, ensuring and publicising human rights.
31 See http://www.mpipriv.de/ww/de/pub/mitarbeiter/yassari_nadjma.cfm.
32 The equivalent Dari terms are *toyāna, pīsh-kash* and *shīr-bahā*; *qalīn* is the Uzbek equivalent and the Nuristani used the term *malpreg* (Kamali 1985: 84).

33 The expression 'dower' is used here to denote the Islamic institution of *mahr*. It should not be confused with the expression of 'dowry', which denotes the girl's trousseau, i.e. the (household) items that she brings into marriage.
34 See http://www.mpipriv.de/shared/data/pdf/mpi-report_on_family_structures_and_-family_law_in_afghanistan.pdf.
35 According to Asifa Kakar, a judge at the Supreme Court, commercial division, the Commercial Code is being applied in the court. There are, however, no publications of court decisions. There are also no private compilations accessible for reference.
36 Afghan Official Gazette No. 803/2002, dated 11 September.
37 Presidential Decree No. 63/2003, dated 18 September.
38 See 'Decree of the Chairman of the Interim Administration', http://www.aihrc.org.af, dated 6 June 2002.
39 See http://www.aihrc.org.af/English.

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