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Esther Meininghaus

Legal Pluralism in Afghanistan

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Authors address

Esther Meininghaus
E-mail: e.meininghaus@gmx.de

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1 Introduction

Today, Afghanistan is a constantly discussed topic with regard to manifold issues: security, democracy, drugs trafficking and women's rights may count for the most urgent problems that are dealt with almost every single day in newspapers, news-casts, round tables and parliaments throughout the Western world. However, one topic often remains rather in the background: that of the Afghan legal systems, even though they represent an important factor for any further step to state construction and consolidation.

During the 20th century, many non-European countries experienced the implementation of nation states. Based on the Western concept of constitutionalism, these processes often came along with the introduction of formal legal systems. In their creation, already existing informal legal systems were mostly ignored. Conflicts arising from this kind of dualism of formal and informal legal systems, the latter being determined by their specific cultural environment, attract rising attention by researchers especially in the domains of sociology of law and anthropology.[1] While globalisation along with rising international interconnection and engagement in various fields necessitates a commonly accepted system of international law, it is remarkable that at the same time, a revitalization of particularly traditional legal forms such as customary or religious law can be observed.[2] In fact, the coexistence of two or more legal systems is rather the rule than an exception in many societies beyond those of Western national states.

The same is true for Afghanistan. In the Afghan context, analysing the legal system means to focus on three different pillars: Customary law, statutory law and *šarīʿa*, i.e. Islamic law. One therefore speaks of "legal pluralism". However, this topic is a very complex one and therefore not easy to grasp: All three types of Afghan legal systems were shattered by roughly 25 years of war, and hardly any research material on the development of legal systems of that time is available. Nevertheless, this paper tries to sketch the complexity of the topic and to present the most urgent problems regarding the country's present legislature and legal practice by means of several examples.

Definition of the Notion "Legal Pluralism"

In order to investigate the present situation concerning legal pluralism in Afghanistan, it is necessary to outline the term "legal pluralism" as it will be used in this essay. In secondary literature, various approaches on how to define this notion can be found. First, legal pluralism can be understood as the application of different legal sources to identical cases.[3] Another definition of legal pluralism however describes the parallel existence of ancient and modern legal sources, where the latter stem from the infiltration of foreign legal systems.[4] Moreover, legal pluralism can mean the application of different laws to different social groups.[5] Criteria for these laws can be ethnical or religious backgrounds, geographical locations, etc. Finally, the notion is also used whenever statutory and applied law do not coincide.

The common component of all these approaches consists of the vague relationship between state, society, and effective legal systems. Moreover, the relation between the different legal systems remains

[1] For an interesting analysis of the impact of informal legal forms on constutionalism see CONERMANN, S. and SCHAFFAR, W. (eds.): Die schwere Geburt von Staaten. Verfassungen und Rechtskulturen in modernen asiatischen Gesellschaften (= Bonner Asienstudien, 1). Schenefeld (EB-Verlag), 2007.

[2] CONERMANN, S.: "Verfassungen asiatischer Nationalstaaten als Ausgangspunkt für die Untersuchung rechtskultureller Spannungsfelder", in: CONERMANN, S. and SCHAFFAR, W. (eds.): Die schwere Geburt von Staaten. Verfassungen und Rechtskulturen in modernen asiatischen Gesellschaften (= Bonner Asienstudien, 1). Schenefeld (EB-Verlag), 2007. p. 9.

[3] VANDERLINDEN, J. : "Le Pluralisme Juridique, Essai de Synthèse", in: GILISSEN, J. (ed.): Le Pluralisme Juridique. Brüssel (Editions de l'Université de Bruxelles), 1972. pp. 19-56. p. 19.

[4] HOOKER, M. B.: Legal Pluralism - An Introduction to Colonial and Neo-colonial Laws. Oxford (Clarendon Press), 1975. p. 1.

[5] EHRLICH, E.: Grundlegung der Soziologie des Rechts. Berlin (Duncker & Humblot), [4]1989. p. 23.

unsettled: They may complement as well as contradict each other. Sometimes, it is not even possible to distinguish clearly which legal form is applied to a certain case because different legal forms are mixed up.[6] Whenever the topic of legal pluralism in Afghanistan is treated in this work, the notion is defined as the parallel existence and application of statutory law, Islamic law and customary law. In our given context, the different legal systems often do not show a complementing, but rather a contradicting nature, as I will try to show. Frequently, customary law, Islamic law and statutory law regulate the same domain, such as family law[7], with completely different regulations. It seems characteristic here that the Afghan 'legal system' does not show any established hierarchy of norms. Thus, it is not possible to extract the way these norms relate to each other from any commonly accepted system – neither for the researcher, nor for the Afghan people, as will be shown in the following.

The paper is organised as follows. From a Western point of view, a country's constitution is considered to serve as the basis for any kind of legal system active on its grounds. For this reason, I will first analyse the development of Afghan constitutionalism focusing on the most important constitutions dating from 1923, 1931, 1964 and finally that of 2004. In this context, I will have a look at the role these constitutions ascribe to each statutory law, Islamic law and customary law in Afghanistan. Furthermore, some light will be shed on the circumstances in which the different constitutions originated as well as on their implications for every day life. In the beginning of the third chapter, a short introduction to the origins of Islamic law is given. Afterwards, I will outline the role that is ascribed to Islamic law in Afghanistan today. The fourth chapter is dedicated to the origins and the functioning of customary law. Regional and ethnic differences shall find consideration here, too. Chapter five focuses on the conflicts that arise from the parallel application of the three different legal sources. Finally, I will give an outline of the problems every day legal practice in Afghanistan is confronted with. All in all, the advantages and disadvantages of the various legal forms shall also be illustrated, considering both the perspectives of the Afghan people as well as the international community.[8]

The transcription of Arabic and Pashtu notions follows the regulations of the German Oriental Society. For ease of notation, proper names of individuals or tribes are not transcribed.

2 Background: Constitutionalism in Afghanistan

The implementation of a constitution, KAMALI argues, is equivalent with the beginning modernisation of a country since a constitutional government itself is a product of modern times.[9] He continues: "Whereas modernisation in Afghanistan is largely identifiable with the ideals of Western democracy and liberalism, tradition is dominantly Islamic in content with a bias, perhaps, toward tribalism."[10] Indeed, the relationship between Afghan constitutionalism and the role it ascribes to tribal and religious forms of legal systems is a very interesting one. Therefore, I want to take a look at the development of constitutionalism in Afghanistan between the first constitution of 1923 and today. In doing so, the constitutions of 1923, 1933, 1964, and 2004 will be considered. The constitutions of the years between 1964 and 2004 do not seem to be of great importance for the case at hand.[11] In 1973, Daud Khan amended the 1964 constitution and ruled by governmental decrees until the promulgation of the 1977

[6] BENDA-BECKMANN, K. and F.: Die Revitalisierung von Tradition im Recht: Rückfall in die Vergangenheit oder zeitgemäße Entwicklung? Tätigkeitsbericht, 2003. p. 1.

[7] The Afghan family law is in fact mainly constituted of Islamic law. See SCHNEIDER, I.: „Recent Developments in Afghan Family Law: Research Aspects", in: Asien 104 (2007), pp. 106-118.

[8] I would like to thank Dr. C. Schetter and Prof. Dr. Conermann for their supervision and assistance during the process of writing this paper as well as M. Martens for his proof-reading.

[9] KAMALI, M. H.: Law in Afghanistan. A Study of the Constitutions, Matrimonial Law and the Judiciary. Leiden (E. J. Brill), 1985. p. 19.

[10] Ebd.

[11] For the developments described in the following see SABOORY, M. H.: "The Progress of Constitutionalism in Afghanistan", in: YASSARI, N. (ed.): The *Šarī'a* in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law. Tübingen (Mohr Siebeck), 2005. pp. 5-22. pp. 11 et seq.

constitution. The latter did not have time to have a measurable impact as Daud was overthrown only one year after its promulgation. In 1980, the communist regime promulgated a new, but only provisional constitution. In 1987, yet a new constitution was promulgated under the reign of Najibullah which, by contrast to its predecessors, underlined the role of Islam. This tendency was even enforced by the constitution of 1990. However, that constitution was replaced by the *muğāhidūn* after only two years. The following constitution of 1992 was never promulgated. The Taliban, reigning from 1996 to 2001, did not recognize the category of "modern state" and consequently did not introduce any constitution at all. All in all, Afghanistan witnessed three periods of unconstitutionalism between 1973-1977, 1980-1987 and 1992-2001. The constitutions in between are considered to have been of too short validity to have shown an effect. Therefore, they shall not be treated in this work.

2.1 The Significance of the First Constitution: Preliminary Notes

In contemporary Western societies, the constitution of a country is often perceived as the decisive basis for a well functioning state entity. The significance and symbolic meaning that are attributed to a constitution in our times may be well illustrated in the youngest discussions about the European Constitution. Especially with regard to national legislation, its implications are widely expected to be of outstanding relevance and therefore often seen very critically.

This was not too different in 1923 when Afghanistan obtained its very first constitution. This constitution, introduced by king Amanullah in 1923, was meant to be the starting point for a fundamental modernization of the country. The newly introduced constitutional monarchy was supposed to be followed by the creation of an Afghan national consciousness and pride in which the affiliation to the Afghan nation was defined by *ius soli*, excluding other sources of legitimacy like tribal or religious affiliation and ethnicity.[12] Article 8 (1923) intended judicial equalization for the first time. However, statutory law and *šarī'a* ruled different legal aspects each at that time, and therefore the apparent equalization should be observed carefully. When Islamic law was applied to Hindus for example, legal equalization was simply out of the question.

Besides the formation of an independent judiciary, the constitution's progressivism was reflected in the rights to freedom of religion and personal freedom (article 9) or freedom of education (article 14). Nonetheless, these innovations faced strong opposition. On the one hand, religious leaders protested against the lacking emphasis on the priority of the Hanafi[13] rite. In the sense of the intended right to freedom of religion, article 2 (1923) had been kept vague: "The religion of Afghanistan is the sacred religion of Islam. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided that they do not disturb the public peace."[14]

On the other hand, tribal lords opposed the educational reforms.[15] Amanullah thus faced fierce resistance of the two most important groups of the Afghan society. He was forced to give in. Finally, he charged the *loya ğirga* for a second time to discuss the controversial articles. The corrected version of article 2 (1923) read in the end:

> The religion of Afghanistan is the sacred religion of Islam and its official religious rite is the sublime Hanafi rite. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided that they do not disturb the public peace. Hindus and Jews must pay special tax and wear distinctive clothing.[16]

This example illustrates the great importance not only Islam, but also Islamic law played in the introduction of Afghan constitutionalism. The problematic is still relevant: Until recent times, discussions about these issues prevail in Afghanistan.

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[12] SCHETTER, C.: Ethnizität und ethnische Konflikte in Afghanistan. Berlin (Dietrich Reimer Verlag), 2003. p. 240.
[13] See pp. 7 et seq. on the different forms of Islamic law in Afghanistan.
[14] Translation quoted from SABOORY, Constitutionalism, p. 6, FN 5.
[15] Ibid.
[16] Ibid.

Amanullah was about to fail at his efforts of reform after only a few years. People faced the idea of nationality and nation with great mistrust. They felt closer to their tribe than to the abstract notion of "nation", and therefore rejected the forced affiliation with it.[17] After Amanullah's return from his trip to Europe in 1928, bringing along a variety of new reform proposals, the common mood tipped over. His proposals concerned the introduction of western-style fashion and the introduction of military service, the prohibition of polygamy, the abolition of the veil and the division of religion and state.[18] Many people saw these plans as a violation of their religious values and their code of honour. Amanullah was overthrown in 1929.

2.2 The Constitution of 1931

The second Afghan constitution was proclaimed on October 31, 1931. It reflected the previous resistance against Amanullah's reform politics. The new king, Nadir Shah, came to power supported by Pashtu tribes. He chose a conservative path in his reign in order to secure the loyalty of the tribes and the religious leaders, aiming at a consolidation of his power.[19] Therefore, he revised the secular innovations of his precedent and promoted an emphasized role of Islam instead, which were formulated in several articles.[20] This was also true for the field of law.[21] Despite these two different approaches, the contents of the constitutions of 1923 and 1931 have many aspects in common. It is for example worth mentioning that Nadir Shah went back to pre-Amanullah times by making tribal, ethnic and religious structures the ideal of his politics while at the same time maintaining Amanullah's *ius soli* as well as the equalization of every Afghan citizen before *šarī'a* and statutory law (article 31).[22] Nonetheless, one has to note that this principle of the 1931 constitution was not implemented in every-day politics: the admission to high official positions in times of Nadir Shah's rule for example was exclusively reserved to Sunnis.

The constitutions of 1923 and 1931 do in fact contradict each other in several points and therein reveal the great potential of conflicts resulting from the Afghan attempt to preserve traditions and to catch up with modernity at the same time. In contrast, the constitution of 1964 tried to strike a balance. It aimed at the inclusion of Islamic principles, at the same time trying to introduce social change and democratic reform.[23]

2.3 The Constitution of 1964

The constitution of 1964 already differed from its predecessors regarding its emergence: first, because it did not come into existence by force,[24] and second because the public was able to participate in its emergence, e.g. by means of press releases, instead of being confronted with accomplished facts.[25] One of Zahir Shahs objectives was the reform of the judicature. Moreover, the constitution did not only aim at centralizing the government, but also contained democratic aspects, e.g. the permission to found political parties (article 32). However, accordant laws were never passed.[26]

Especially regarding the legal system, the constitution of 1964 is of outstanding relevance. First of all, it declared the judiciary an independent organ of the state for the first time ever (article 97).[27] Moreover, it aimed at laying the basis for a unified legal system. At the beginning of the 20th century,

[17] SCHETTER, Ethnizität, p. 241.
[18] Ibid., p. 243.
[19] KAMALI, Afghanistan, p. 20.
[20] For a more detailed discussion see SCHETTER, Ethnizität, p. 255.
[21] SABOORY, Constitutionalism, p. 8.
[22] SCHETTER, Ethnizität, p. 252 and p. 256.
[23] KAMALI, Afghanistan, p. 21.
[24] KAMALI, Afghanistan, p. 10.
[25] KAMALI, Afghanistan, p. 22.
[26] SABOORY, Constitutionalism, p. 10.
[27] KAMALI, Afghanistan, p. 222.

administrative tribunals like civil and commercial courts had been added to the existing traditional *šarī'a* courts which mainly dealt with criminal, family and personal law. Although statutory law was created especially for their purposes,[28] there was no clear distinction between statutory and Islamic law. The courts' categorization was only derived from the prevailing practice. For example, often *šarī'a* courts adopted jurisdiction and legal procedures from statutory law, whereas administrative courts often referred to Islamic law if statutory law proved to be insufficient.[29] The decision to apply one or the other jurisdiction did not follow clear rules, such that the rather arbitrarily declared responsibility of a certain court caused uncertainty and confusion. The constitution of 1964 was meant to solve this problem by establishing standardized rules to regulate the Afghan jurisdiction in this regard (article 104).[30] Therefore, it determined the creation of standardized national courts. From now on, every legal decision, even e.g. in the field of family law, should be submitted to the constitutional courts (article 98).[31] Nevertheless, the dichotomy of both systems survived to the present day.

All the same, this constitution is of surpassing significance because it was the first one ever containing the effort to regulate the relation between *šarī'a* and statutory law.[32] It is remarkable here that statutory law was given priority over *šarī'a*.[33] Only if in a certain case no legal norm was available, it was allowed to refer to Islamic law (article 102).[34] Given an extensive absence of statutory law, in practice this provision was rather the rule than an exception, though.[35] Concerning the creation of new laws, parliamentary legislation had to agree with the principles of Islam (article 64). After the constitution of 1923, this constitution represented the second attempt to secularize the Afghan legal system. Nonetheless, it was not able to eliminate the coexistence of Islamic and statutory law.

2.4 The Constitution of 2004

Following the overthrow of Najibullah by the *muğāhidūn* and five years of Taliban-rule which "Islamized" every corner of Afghan life including the legal system, the Bonn Agreement (2001) served as a basis for the new constitution which came into force on January 26, 2004. Most of its prescriptions regarding the Afghan legal structure are based on the constitution 1964.[36] Afghanistan is considered a centralized state which is subdivided into 32 provinces.[37] These provinces do not possess any independent legislative and political authority.[38] The smallest administrative entities are made up by approximately 355 districts.[39] The Afghan judiciary follows a similarly centralized organisation: The country's highest court, the Supreme Court, is seated in Kabul. Headed by the Chief Justice, it is responsible for the organisation and administration of all lower courts and for the nomination of candidates which precedes the judicial appointment by the President.[40] Moreover, the Supreme Court includes the Court of Cassation, the Afghan administrative court of appeal. In Kabul, one also finds the High Court of Appeal that is responsible for all appeals against decisions made by one of the 32 Provincial courts which exist everywhere in Afghanistan.[41] However, the number of primary courts

[28] KAMALI, Afghanistan, p. 41.
[29] Ibid.
[30] SABOORY, Constitutionalism, p. 9.
[31] SABOORY, Constitutionalism, p. 10.
[32] KAMALI, Afghanistan, p. 11.
[33] KAMALI, Afghanistan, p. 21.
[34] THIER, J. A.: Reestablishing the Judicial System in Afghanistan (= CDDRL Working Papers, 19), 2004. p. 6.
[35] KAMALI, M. H.: "Islam and its *Šarī'a* in the Afghan Constitution 2004 with Special Reference to Personal Law", in: YASSARI, N. (ed.): The *Šarī'a* in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law. Tübingen (Mohr Siebeck), 2005. pp. 23-43. p. 35.
[36] THIER, Judicial System, p. 3.
[37] EVANS, A. and others: A Guide to Government in Afghanistan, 2004. pp. 7 et seq.
[38] THIER, Judicial System, p. 3.
[39] EVANS, Guide to Government, p. 8. Due to administrative reforms, the number of districts changed frequently during the last years.
[40] AMNESTY INTERNATIONAL: Afghanistan: Re-establishing the Rule of Law, 2003. AI-Index ASA 11/021/2003. In the following quoted as AI-Report 2003. p. 6.
[41] AI-Report 2003, p. 6 et seq.

throughout the country is less clearly defined as it is determined by the president. In fact, many provinces still lack a sufficient net of primary courts: In the regions of Bamiyan and Khost, for instance, even in 2003, neither a primary court nor a provincial court existed. And even if a primary court exists, it is often situated in the urban provincial capital only.[42]

In the constitution of 2004, the role of Islam remained important: the first article declares Afghanistan an Islamic Republic. Islam is the religion of the state (article 2), but at the same time, the freedom of religion is guaranteed for non-Islamic religious groupings as long as their religious practises agree with the law. Like in other Islamic states' constitutions, this point is critical: article 3 already provides that no single law is permitted to contradict Islam. Therefore, other rules of the constitution do not have to be taken into consideration.[43] The fact that the formulation reads "belief and previsions of the sacred religion of Islam" in contrast to the constitution of 1964, which read "basic principles of Islam", is quite explosive.[44] This blunt wording already led to bizarre situations: for instance, the Supreme Court decided in 2003 that cable TV was to be forbidden on behalf of the Islam because it allegedly promoted promiscuity.[45] This decision attracted much attention, but soon it was simply ignored. In 2004, the same court decided that a certain female singers' appearance on TV was to be forbidden because of its alleged contradiction to the Islam. At that point, president Karzai intervened, pointing out the primary cultural aspects of that case and referring it to the Ministry of Culture and Information which did not raise any objections.[46] Presumably, the compatibility with Islam will raise many more questions in the future.[47]

On the other hand, it is worth mentioning that no explicit reference to the Hanafi rite is given. This aspect appears in article 130 only and is exclusively intended to be applied if statutory law does not include rules for a certain case. Moreover, article 131 provides that if two parties following the Shia appeal to a court, the responsible court is obliged to apply *Shi'ite* law in cases of civil status. This article is widely seen as one of the most important achievements of the 2004 constitution. At the same time, conflicts are smouldering in articles 3 and 7, the latter providing for the adherence to human rights.[48] A novelty of this constitution is also its reference to different ethnic groups (article 4). According to this article, every citizen of the Afghan nation is considered Afghan, regardless of his ethnic roots.

Against the background of the circumstances that accompanied the preceding decades, it is understandable that this Afghan constitution was often celebrated as an important progress in Afghan history. Nevertheless, the constitution of 2004 rests on insecure grounds concerning the creation and implementation of a clearly structured, independent, and universal legal system providing for equal rights. The following chapters shall first illustrate the origins, developing and functioning of Islamic law and customary law as well as their role within the Afghan legal system. Problems of the contemporary legal practise in Afghanistan are described afterwards.

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[42] AI-Report 2003, p. 6.

[43] SABOORY, Constitutionalism, p. 20.

[44] See MAHMOUDI, P.: "The Sharia in the New Afghan Institution: Contradiction or Compliment?", in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), pp. 867-880. pp. 870 et seq.

[45] KAMALI, Afghan Constitution 2004, p. 37.

[46] KAMALI, Afghan Constitution 2004, p. 38.

[47] A prominent case in March 2006 was that of Abdur Rahman, an Afghan citizen who had converted to Christianity while living in exile. With reference to article 3, the Afghan judiciary accused him of having violated the provisions of Islam. Abdur Rahman was not sentenced to death because he was considered to be of unsound mind.

[48] The compatibility of human rights and Islam stipulated a fierce debate during the past years. See PISCATORY, J.: "Human rights in Islamic Perspective", in: THOMPSON, K. (ed.): The Moral Imperatives of Human Rights: A World Survey. Washington, 1980, or STEINBACH, U.: "Die Menschenrechte im Verständnis des Islam", in: Verfassung und Recht in Übersee 5 (1975). pp. 47-59.

3 Islamic Law

The given overview of different Afghan constitutions illustrates that Islamic law plays a significant, yet during the century varying role in the Afghan legal system. Apart from customary law, religious law represents another important pillar of Afghan legal practice. It is often impossible to separate both fields because they influenced each other extensively during the course of history. In the Afghan context, religious law is primarily Islamic law. According to estimations, 99% of the Afghan population are Muslim, among them Sunnites (80%-85%) as well as *Shi'ites*. The latter are by majority Twelver *Shi'ites*. The rarer Sevener *Shi'ites* often constituted a marginalized and discriminated minority in the course of history (1995: 0,1-0,2 mio.).[49] Traditionally, the Afghan Sunnites are followers of the Hanafi law, whereas *Shi'ites* tend to follow the Jafari school of law.

Islamic law roots in the times of prophet Muhammad. According to Muslim belief, he communicated the divine revelation in the form of the holy book, the Koran, to mankind. After his death, people were no longer able to ask him for advice. Instead, legal cases were decided on the basis of the Koran and the so-called *sunna*, a collection of deeds and sayings handed down from the prophet. As Koran and *sunna* as such do not provide for much legal material directly, two other sources of finding of justice were added later on: *qiyās*, an analogy by jurists, based on deductions from the Koran and *sunna*, and *ijmā'*, the jurists' consent.[50] The development of these methods dates back to the 9th century.[51] Different legal schools resulted from different interpretations. The Hanafi legal school which is predominant in Afghanistan was created in Kufa by Abu Hanifa (d. 767). It contains two additional methods of finding of justice: *ra'y*, the scholars' personal view, as well as ***istiḥsān***, an interpretation that seems to fit with the corresponding social situation and is therefore considered permissible.[52] The Hanafiyya is generally spread in Central Asia, Turkey and the Indian subcontinent.[53]

Apart from their methods of legal findings, the legal schools mainly differ in criteria concerning the contents which result from the different genesis of the individual beliefs. The Jafariyya for instance recognizes twelve Imams as legitimate successors of prophet Muhammad. In distinction to the Sunnis, the *Shi'ites* are of the belief that the prophet's son in law, Ali, was destined by Muhammad to succeed him in guiding the community.[54] Instead, Abu Bakr took over the Caliphate. The quarrels about the legitimacy of the Caliphate and Ali's claims finally led to the first schism of the believers, which later resulted in the differentiation between Sunnites and *Shi'ites*.[55] This division is also reflected in the different legal systems. The basis of the second legal source, the *sunna*, are the so-called ***adaḥādīth*** which are the collections of handed down deeds and sayings of the prophet. Decisive for the validity of a certain ***ḥādīth*** is the *isnād*, the chain of tradition which precedes the content of every tradition.[56] It contains the informants who handed down the tradition in the course of the centuries. It is characteristic for the Shia that it only recognizes traditions as legitimate which contain Ali in their *isnād*.[57] This criterion is not relevant for Sunnis. This is the reason why for instance Sunnis and Twelver *Shi'ites* fall back to different *ḥādīt* collections while applying Islamic law. If, in the Afghan context, one talks about Islamic law, it therefore has to be clear that this notion does not imply any homogeneity, but rather has to be understood as a collection of different forms of Islamic law.

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[49] GHAUSSY, G. A.: "Afghanistan", in: ENDE, W., STEINBACH, U. (eds.): Der Islam in der Gegenwart. München (C.H. Beck), 41996. pp. 264-278. p. 269.
[50] GHAUSSY, G. A.: "Afghanistan", p. 324.
[51] RADTKE, B.: "Der sunnitische Islam", in: ENDE, W., STEINBACH, U. (eds.): Der Islam in der Gegenwart. München (C. H. Beck), [4]1996. pp. 54-69. p. 63.
[52] RADTKE, Islam, p. 64.
[53] Ibid.
[54] ENDREß, G.: Islam. Eine Einführung in seine Geschichte. München (C.H. Beck), 31997. p. 48.
[55] Ibid.
[56] ENDREß, Geschichte, pp. 75 et seq.
[57] ENDREß, Geschichte, p. 84.

The de facto role of Islamic law in the contemporary Afghan legal system is not entirely clear. As already indicated, the constitution of 1964 attempted to unify the judiciary. Therefore, it not only gave statutory law priority over Islamic law, but also provided for a new national court structure. The term "*šarī'a* courts" no longer appeared in the constitution.[58] Instead, the Law of Judicial Authority and Organization (1967) divided the Afghan court system into "general" and "special" courts. Special courts were made responsible for deciding on disputes in the fields of taxation, expropriation, commerce, industry, conflicts arising from general or municipal elections or those between individuals and the administration, press and smuggling offences, offences of government employees, and juvenile, traffic and public offences.[59] *Šarī'a* courts, although no longer officially mentioned, remained active under the guise of the so called general courts which dealt with all other areas of conflict.[60] So even though the influence of Islamic law seemed to be inclining on the paper, reality was different. The same is true for the content of new law: In fact, it is assumed that several Afghan legal codes as The Guiding Rules on Criminal Affairs (1971, preceding the promulgation of the Penal Law) or the Civil Code (1977) represent codifications of Islamic law.[61] It is worth mentioning that although the influence of Hanafi law was prevailing here, Islamic law included aspects of legal schools other than the Hanafi rite, too: the reglementation of judicial divorce as in the Penal Code for instance follows the provisions of the more liberal Maliki rite, whereas those for polygamy as in the Civil Code are derived from the stricter provisions of *Shafi'i* law.[62] Given the fact that the Civil Code is valid until the present day, one therefore has to conclude that statutory law in Afghanistan cannot be considered as secular law.

The categories of primary and provincial courts we find in Afghanistan today already existed prior to the 1960s and had not been altered by the official reorganization of the court system.[63] KAMALI indicates that in those times, primary courts mainly applied *šarī'a* jurisdiction, while provincial courts (as well as cassation courts) made use of "mixed jurisdictions".[64] But what is meant by "*šarī'a* jurisdiction"? Was codified or uncodified Islamic law applied? Can we assume that the same structure is followed today? This assumption is supported by the fact that a dual system of education exists until the present day: while some jurists exclusively study Islamic law, whereas others only study statutory law. Consequently, court staff from judges to private lawyers are "products of this duality: one group trained in the *šarī'a* tradition, and the other graduated from a modernist higher education and neither fully appreciate nor comprehending the other."[65] Can we conclude that graduates from the Faculty of *šarī'a* tend to work in primary courts, whereas the other courts are staffed by graduates from the Faculty of Law? If so, do they "automatically" apply two different kinds of law? And are there aspects of Islamic law frequently referred to but not yet codified?

For the time between the Soviet occupation (1979-1989) and the end of the Taliban regime (2001), we do not possess any in-depth analysis of the Afghan legal system at all.[66] With regard to the judiciary, it is known that the provisional constitution of 1980 did not officially alter the provisions of the 1964 constitution in any significant manner, although in reality, the judiciary most probably became an integral part of the executive.[67] Furthermore, it is widely assumed that a re-islamization of all legal areas was practised under the Taliban regime.[68] A detailed knowledge of the Afghan judiciary's development in

[58] KAMALI, Afghanistan, p. 42.
[59] KAMALI, Afghanistan, p. 43.
[60] Ibid.
[61] KAMALI, Afghanistan, p. 42f. However, KAMALI refrained from analysing both examples in detail.
[62] KAMALI, Afghanistan, p. 233.
[63] KAMALI, Afghanistan, p. 227.
[64] Ibid.
[65] WEINBAUM, M. G.: "Legal Elites in Afghan Society", in: International Journal of Middle East Studies 12 (1980) 1, pp. 39-57. p. 39.
[66] A broad overview is given by SABOORY, Constitutionalism, pp. 11-18.
[67] KAMALI, Afghanistan, pp. 242 et seq.
[68] See for instance NOELLE-KARIMI, C.: "Die paschtunische Stammesversammlung im Spiegel der Geschichte", in: KEMPER, M., REINKOWSKI, M.: Rechtspluralismus in der Islamischen Welt. Gewohnheitsrecht zwischen Staat und Gesellschaft (= Studien zur Geschichte und Kultur des Islamischen Orients, 16). Berlin/New York (de Gruyter), 2005. p. 191. See also NOJUMI, N., MAZURANA, D., STITES, E.: Afghanistan's Systems of Justice: Formal, Traditional, and Customary. Study of the Feinstein International Famine Center, June 2004. p. 38.

these years, its concrete content and the influence of these innovations on the current Afghan legal practice, however, is lacking.

4 Customary Law

Having examined both Afghan constitutionalism and Islamic law, one might be surprised by the fact that until now, customary law did not yet come into play.[69] From a Western viewpoint, it seems natural to suppose that the aspect of constitutionalism is a very important one with regard to legal pluralism in Afghanistan. For instance, a German constitutional expert will assume that a country's constitution is the starting point for every other kind of law because every German law is measured with the norms of the Basic Constitutional Law. But one has to take into consideration that none of the various Afghan constitutions really influenced an individual's life – which, besides, is also true for the 2004 constitution. In fact, it is customary law which determines every day life for the majority of Afghan citizens.[70]

In the past, various Afghan rulers tried to extend the government's power even to the lowest level of a rural village.[71] In presumably all Afghan regions, there existed local assemblies like the socalled *ğirga* or *mağlis* as traditional tribunals for consensus-based conflict solutions. Especially Pashtu communities have been falling back to the principle of *ğirgas* for centuries.[72] In general, a *ğirga* is a group of men of varying number dealing with every aspect of life concerning individuals, groups of people, or even whole tribes.[73] However, *ğirga* is only the generic term for several sub-forms which are applied on certain occasions.[74] From the state's point of view, these assemblies were seen as competition to the rulers' authority. Therefore, the state tried to supersede these forms of local legal systems. However, such attempts only proved to be successful in certain urban areas. Due to the power vacuum which resulted from the past 23 years of war, the application of customary law survived in almost all rural areas.[75] Nevertheless, customary law does not constitute a homogeneous legal system. Rather, it often did and still does develop along tribal and ethnic lines. Due to this fact, an overview of existing research-literature may present single case studies supervising certain regions, while a comprehensive knowledge of the different forms of customary law is still not available.

In Afghanistan, the most prominent form of customary law is based on the Pashtu *paštunwālī*.[76] According to STEUL, *paštunwālī* is the sum of all values and all norms derived from those values that constitute a specifically Pashtu way of life. The principles governing this Pashtu code not only serve as a regulator for ordinary life in a given community, but also as principles for customary law.[77] The latter is decided upon in so-called *ğirgas* which were and still are usually held if the need for conflict resolution

[69] Despite not being mentioned in the context of constitutionalism, the Afghan Civil Code explicitly recognizes customary law along with Afghan law and the *šarī'a* as a legal source (articles 1 and 2). See NORWEGIAN REFUGEE COUNCIL: The Relationship between the Formal and Informal Justice Systems in Afghanistan. Postion paper, 2007. p. 8.

[70] INTERNATIONAL LEGAL FOUNDATION: The Customary Laws of Afghanistan. A Report by the International Legal Foundation, 2004. p. 4.

[71] WARDAK, A.: Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan, 2003. p. 4.

[72] YOUSUFZAI, H. M., GOHAR, A.: Towards Understanding Pukhtoon Jirga. An Indigenous Way of Peacebuilding and More, 2005. p. 12.

[73] YOUSUFZAI, Understanding, p. 18.

[74] Cf. YOUSUFZAI, Understanding, pp. 45 et seq. for more detail.

[75] WARDAK, Jirga, p. 4.

[76] In fact, customary law is applied in the whole of Afghanistan, yet *paštunwālī* is the only form studies in greater detail.

[77] STEUL, W.: Paschtunwali – Ein Ehrenkodex und seine rechtliche Relevanz. Wiesbaden (Franz Steiner Verlag), 1981. p. 135.

arises in a community.[78] Membership with *ğirgas* is open to every male of a community willing to participate.[79] The number of members in a *ğirga* usually depends on the gravity of the case.[80] Every participating party normally provides for half the members of the *ğirga*. These members are supposed to be neutral. They meet in a mosque, a private house or outside in order to discuss a current lawsuit and to judge on it afterwards. Like its composition, the duration of a trial depends on the gravity of the case at hand. At the beginning of the trial, each party has to deposit either money or property which will not be returned if the party does not recognize the judgement. Whereas such a refusal is not permitted in some regions, it is possible to call upon the *ğirga* twice more in order to retry the case in others.[81] Usually, the rejection of the third judgement is followed by punishments. These may vary from fines to burning down the house of the person found guilty or other kinds of measures which are enforced by so-called *arbakāy*.[82]

Despite regional or ethnic differences, all Pashtu *ğirgas* have one principle in common: legal proceedings are meant to re-establish public order in a very concrete sense.[83] This is why great store is set by securing a compensation (*badal*) for the harmed party that seems appropriate according to Pashtu evaluation. First, an apology from the offender's side (*nanāwāta*) is an important aspect.[84] Therefore, he pays a visit to the harmed party, accompanied by elders, scholars and old women. The compensation may be reached by fines, groceries, the delivery of land or the marriage of females out of the offender's family into the victim's family.[85] Depending on the case, the offender may also be banned from the community or even be executed.

It is important to note that sentences by *ğirgas* are based on preceding sentences which developed in the course of the centuries. However, it seems as if *ğirga*-applied customary law does not know a certain canon of sanctioning mechanisms.[86] Furthermore, it is worth mentioning that the *ğirga* tradition is purely oral: Sentences are pronounced orally only and handed down in the same way. The lack of any written tradition represents the main difficulty for outsiders willing to get an insight into the processes of decision-taking and their basis.

However, customary law is not only applied in Pashtu *ğirgas*, but also in non-Pashtu *šūrās* introduced during the reign of the Taliban. By contrast to *ğirgas*, *šūrās* at the time of their introduction showed a more fixed organizational structure.[87] At that time, a *šūrā* was headed by the local *mullā* of a village, paid by the Ministry of Pilgrimage and Endowment (and thus part of the executive). He was to appoint up to five further members to the *šūrā*. Members of *šūrās* were mostly *mullās* or other religiously trained personalities[88] as the introduction of *šūrās* aimed at abolishing elements of unislamic law, i.e. *paštunwālī*, from the Afghan legal system.[89] Such a religiously characterized membership seems to be typical of non-Pashtu *šūrās* until today.[90] As in the case with *ğirgas*, the exact number of members of a *šūrā*, the duration and the location of the tribunal depend on the given case. Furthermore, both have in

[78] NOELLE-KARIMI, C.: "The Loya Jirga – An Effective Political Instrument? A Historical Overview", in: NOELLE¬KARIMI, C., SCHETTER, C. and SCHLAGINTWEIT, R. (eds.): Afghanistan – A Country without a State? (=Series of the Mediothek for Afghanistan e.V., 2). Frankfurt a. M. (IKO), 2002. pp.37-51. p. 38.
[79] NOELLE-KARIMI, Loya Jirga, p. 38. However, this is not always the case – the exact determination of membership differs. Members in Nuristan e.g. are elected to a *ğirga* for two years. ILF, Customary Laws, p. 36.
[80] Cf. ILF, Customary Laws, pp. 7-10 for the following.
[81] Cf. ILF, Customary Laws, p. 22 for an exception to this rule.
[82] ILF, Customary Laws, p. 10.
[83] This is to be seen in contrast to western legal systems where the delinquent is punished for example by a jail sentence, while the victim does not experience "compensatory" justice in a material sense.
[84] ILF, Customary Laws, p. 10.
[85] Ibid.
[86] STEUL, Paschtunwali, pp. 155 et seq.
[87] NOELLE-KARIMI, Stammesversammlung, p. 191.
[88] NOJUMI, Systems of Justice, p. 38.
[89] Nevertheless, such efforts had only limited impact. Despite these tentatives, the application of penal law in those years for instance revealed influence of customary law. NOELLE-KARIMI, Stammesversammlung, p. 192. The execution of death penalties by family members of the harmed party for instance is typical of *paštunwālī*.
[90] Cf. ILF, Customary Laws, p. 52 for the Uzbek communities in the Northern Provinces.

common that the participation of women is allowed in neither *ğirgas* nor *šūrās*.[91] It is very problematic, however, that any further information about different proceedings in *ğirgas* and *šūrās* is rare.

5 Afghan Legal Practice Today: Intermingling of Statutory Law, Customary Law and Islamic Law

Article 120 of the Afghan constitution of 2004 provides: "The judiciary shall have competence to hear all lawsuits of individuals and legal entities including the State, regardless of their position as plaintiff or defendant, in accordance with the law."[92] YASSARI concludes that the state's jurisdiction explicitly rules every single legal dispute.[93] However, it is questionable whether this formula does not even cover procedures mentioned above like returning a case to *ğirgas* by official courts since the latter can hear every lawsuit. In order to close the obvious loophole for the application of customary law, it would have been necessary to choose a clearer formulation: "The judiciary shall have competence to decide all lawsuits [...]". If such a wording had changed the ruling practises is a different question, though. In any case, already the theoretical framework is doubtful here.

We have already seen that in some cases, statutory law most probably represents a codification of Islamic law. However, it remains completely silent in other cases which count for being a classical domain of Islamic law. For instance, this is true for so called *ḥadd*-punishments which are physical punishments rooted in the Koran, intended to rule crimes of sexual offence, slander, drinking of wine, assault, theft, and robbery."[94] The Penal Code (1965) simply does not contain any regulations regarding such lawsuits.[95] In yet other fields, statutory law leaves obvious loopholes for misuse: The Civil Code (1977) introduced several reforms in the fields of child marriage, polygamy and divorce. For instance, the law concerning child marriages states that the future partners have to be 16 and 18 years old at the time of the marriage. At the same time, though, it permits the marriage by representatives (articles 71 and 77 Afghan Civil Code).[96] Thus the possibility of misuse through marriage arranged by parents, brothers and uncles is still given. Polygamy became only restricted, but not forbidden (articles 86 and 89 Afghan Civil Code).[97] If in the following the necessity of enforcement of state law is addressed, this statement should be understood provided that legal reforms are undertaken in fields like the ones mentioned above.

While the relationship between statutory and Islamic law is already difficult to determine in detail, things get even more complicated if one adds customary law to the picture. An interesting example for the interference of statutory, Islamic and customary law can be found with the Hazara, mainly living in Central Afghanistan. Legally binding decisions by Hazara are made in tribal tribunals called *maraka*. Like the Pashtu *ğirgas*, their origins date back for several centuries, too. According to the ILF-report, members of a *maraka*, called *ma'ārkačī* are "elders, or Ulema, and the descendants of the prophet."[98] This remark seems to indicate that a mixture of Islamic law and customary law institutionalised here since the title *'ulumā'* is reserved for Islamic scholars who will, most likely, apply Islamic law.

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[91] The only exception is to be found in the province of Badakhshan where UN Habitat and UNOPS (United Nations for Project Services) initiated the organization of female-members-only *šūrās* in the 1990s. NOJUMI, Systems of Justice, p. 39.

[92] Italics added.

[93] YASSARI, N.: "Legal Pluralism and Family Law: An Assessment of the Current Situation in Afghanistan", in: YASSARI, N. (ed.): The *Šarī'a* in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law. Tübingen (Mohr Siebeck), 2005. pp. 46-60.

[94] See DILGER, K.: "Tendenzen der Rechtsentwicklung", in: ENDE, W. and STEINBACH, U. (eds.): Der Islam in der Gegenwart. München (C. H. Beck), [4]1996. pp. 186-212. Here pp. 203-208.

[95] KAMALI, Afghan Constitution 2004, p. 25.

[96] KAMALI, Afghan Constitution 2004, p. 39.

[97] Ibid.

[98] ILF, Customary Laws, p. 21.

Furthermore, the report states: "The decisions in this region are based on Jafary jurisprudence and customs."[99] It might even be permitted to compose a *maraka* from representatives following the Hanafi and Ismaili school of law if e.g. Pashtu and Hazara parties are involved in a dispute.[100] Against this background, it is probable that in fact, (folk-) Islamic law based on structures legitimated by customary law is applied here.[101] However, there are indications that the Hazara are not conscious of the application of religious law within customary law in the region. With regard to adultery, it is said, "[t]hey [the Hazara, E.M.] prefer to have the cases referred to the courts and the perpetrators punished under Sharia."[102]
In the case of murder, too, the Hazara seemingly tend to forward the dispute to the government[103] which may even send the case back to a *maraka* on the scene again.[104] Even if the case is dealt with in a *maraka*, the state remains involved because the offender is imprisoned until a judgement is pronounced. Only if his/her family is not able or willing to pay a fine, he/she is going to stay in prison.[105]

Such an involvment of statutory law's infrastructure is even more common in the region of Kunduz, being home to Tajiks, Usbeks, Arabs, Turkmens and Pashtuns. Here, legal disputes are settled in *šūrās*.[106] Their decisions are based on "Islamic Law as understood by the local Imam".[107] According to the ILF-report, it regularly happens that official courts in Kunduz ask for a *šūrās*' advice. At the same time, it is observed that the *šūrā* is more and more influenced by the intervention of warlords. Due to this fact, *šūrās* in Kunduz are loosing their trustworthiness in the population's eyes if the elders give up their objectivity in favour of a certain warlord.[108] Against this background, the statement of a judge quoted by the report who openly admits that a *šūrās*' activities are not only respected by official courts, but that they are even consciously incorporated into current proceedings, is quite explosive.[109] Such procedures are highly alarming because they undermine any kind of legal security, even in the field of statutory law.

In the Southern and Eastern Pashtu dominated regions, such an intermingling of official judicial institutions and tribal tribunals seems less established. However, we find a connection between customary law and Islamic law here, too. According to the ILF-report, it is customary for Pashtuns in these regions to let parties of dispute choose between the application of *paštunwālī* and Islamic law.[110] At least with regard to the Pashtuns, secondary literature often contains statements like the following: "Furthermore, for the Pashtun there is no contradiction between being a Pashtun and practising *Paštunwālī* and being Muslim and adhering to Islamic law."[111] However, the apparent harmony between customary law and the application of Islamic law should not mislead: Both systems do not complement each other without any contradictions. Thus, it would be interesting to find out why in some cases – and in which cases – the decision is made to refer to Islamic law – in only apparently clear distinction to customary law. Additionally, the practice to let people decide which system to choose indicates that Pashtuns obviously perceive Islamic law and customary law, i.e. *paštunwālī*, as two separated legal systems, too. By contrast, a more detailed analysis seems to show that even within the "pure" *paštunwālī*, elements of Islamic law are mixed up.

However, one example for the "collision" of customary law and Islamic law should be mentioned here exemplarily: the question of inheritance. According to Pashtu customary law, female family members do

[99] ILF, Customary Laws, p. 22. Italics added.
[100] ILF, Customary Laws, p. 32.
[101] Unfortunately, the report does not further deal with the term "Jafari costums" which seems to be quite essential here.
[102] ILF, Customary Laws, p. 25.
[103] Ibid.
[104] It is rather regrettable that the report does not offer any further explanation concerning the question whether this is the normal proceeding and what the reasons for this procedure are.
[105] ILF, Customary Laws, p. 24.
[106] However, the term *ğirga* is used here, too. Cf. ILF, Customary Laws, p. 51.
[107] ILF, Customary Laws, p. 52.
[108] ILF, Customary Laws, p. 58.
[109] Ibid.
[110] ILF, Customary Laws, p. 7.
[111] KAKAR, P.: Tribal Law of Pashtunwali and Women's Legislative Authority, 2004. See pp. 2 et seq.

not have a right to inheritance; Islam, on the other hand, is often regarded as progressive in this point because it worked against this deplorable state of affairs from the beginning of its spreading, with the holy Koran explicitly mentioning a share of the inheritance for the females.[112] Again, confronted with the mixing up of customary and Islamic law, it would be very interesting to get to know how concrete disputes are solved on the ground.

All in all, one has to recognize that as a matter of fact, the use of statutory law is superseded by that of customary law.[113] At the same time, a closer look at the application of customary law which, as already indicated, to varying degrees contains influences of Islamic law, reveals severe misuses. The holding of the tribunals as well as the penalties break with international human right standards.[114] The most obvious and perhaps most frequent case is the tradition of *badd*, the marriage of a girl from the offenders' in the victims' family, a tradition already mentioned. The idea which underlies this practise is described by ILF as follows: "[W]hen girls are wedded to the victim's family, kinship and blood sharing will transform the severe enmity into friendship."[115] This formulation is extremely euphemistic. The girls do not have a voice in that decision. Every fourth girl concerned by *badd* is younger than 18; they are often married to much elder men.[116] The consequences of *badd* are complex: often, women consider suicide to be the only way out of their situation. The men on the other hand are also often unhappy with a *badd*-marriage and "solve" the problem by marrying another time.[117] Moreover, children are likely to suffer from their parent's difficult relationship.[118] It is also worth mentioning that this practise is not restricted to rural areas, but can even be found in Kabul.[119] Besides, it contradicts Islamic law which provides women with a basic right to a say in the choice of their husband. But it also contradicts statutory law. First attempts to limit this tradition date back to 1926. They were unsuccessful, though. Forced marriage in Afghanistan has been prohibited since the introduction of the Afghan Penal Code (1976, Chapters 7, 8 to this issue) but according to academic studies, it is still often practised and only very rarely sanctioned. On the contrary, there even exist reports which testify the consummation of forced marriages on the part of national courts.

The direct and active involvement of government bodies like courts or the police in the enforcement of customary law, even though the latter violates statutory national and international law, is often connected with proceedings of the already mentioned warlords. This is regularly true for forced marriages between women and members of armed forces. An example which is typical of the region of Herat is the case of a woman named Rahima who was promised to a foot soldier of the former governor of Herat, Ismail Khan, when she was a child.[120] As she opposed these plans, Ismail Khan sent her to prison for six months; the "punishment" was executed without any trial. Official representatives forced her to return to her "fiancé", whom she had to marry thereafter. Despite the intervention of Amnesty International, it was not possible to achieve a divorce which she urgently demanded. Moreover, governmental institutions remained inactive and did not initiate any investigations. Similar reports can be found on local warlords who use to rape women of "their" villages without any investigations being initiated despite official complaints that are regularly filed.

The presumably high rates of forced marriages and child marriages are partly due to the economic situation of the country: Families sell their daughters for a dowry which shall be as high as possible in

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[112] See ARBERRY, A. J.: The Koran Interpreted. London/New York (George Allen & Macmillan), 1963. Sura 4, verses 7 et seq.

[113] AMIN, S. H.: Law, Reform and Revolution in Afghanistan. Glasgow (Royston), 31993. p. 66. Quoted from LAU, M.: International Commission of Jurists: Afghanistan's Legal System and its Compatibility with International Human Rights Standards. Final Report, 2003. p. 7, FN 4.

[114] YOUSUFZAI, Understanding, p. 95.

[115] ILF, Customary Laws, p. 11.

[116] One out of many examples can be found in the ILF, Customary Laws, p. 27.

[117] WOMEN AND CHILDRES LEGAL RESEARCH FOUNDATION (WCLRF): BAD, Painful Sedative. Final Report, 2004. pp. 26 et seq.

[118] WCLRF, BAD, pp. 29 et seq.

[119] WCLRF, BAD, p. 18.

[120] See AMNESTY INTERNATIONAL: Afghanistan: Women Still under Attack – a Systematic Failure to Protect, 2005. AI-Index ASA 11/007/2005. In the following quoted as AI-Report 2005. p. 14f.

order to settle their debts. Another problem lies in a deeply rooted public conscience which was decisively formed by the Taliban-Regime that practiced discrimination of women as an official policy. This may also explain why today, many Afghans consider rape and abuse only to be condemnable if the offender does not marry the victim.[121] This indicates that not only clear legal regulations are needed in order to create a security of law in today's Afghanistan, but also an improvement in the economic field as well as a fundamental change of conscience.

Given the strongly patriarchal social order of Afghanistan, a further characteristic of the current situation is the fact that many "private" conflicts are decided inside the family by its patriarch. As a consequence, many problems concerning domestic violence, marriage, divorce, inheritance etc. do not appear in public. Above all, this is a clear disadvantage for the female members of the family who do not have any opportunity to enforce their rights in front of an independent court.[122] Moreover, it is practically impossible to estimate the number of "home-solved" conflicts and their consequences because neither births nor marriages or deaths are registered.[123] However, even if a certain case comes before court, the Afghan judiciary neither knows a system of legal advocacy nor one of independent defence.[124] Given a poor educational standard, such a system is of urgent need, though. For this reason, some NGOs try to establish a system of educational training for defence attorneys, including a special training for female attorneys for the representation and defence of female defendants or inmates.[125]

6 Problems Regarding the Enforcement of Statutory Law in Contemporary Afghanistan

Problems regarding the enforcement of statutory law in contemporary Afghanistan are of various nature. First, statutory law and its institutions, the official courts, often prove to be inaccessible for large parts of the population. Some important courts are only situated in Kabul; for instance, courts dealing with property rights cannot be found elsewhere at all.[126] A similar problem concerns Family and Juvenile Courts. Only one of each exists in Kabul city (2004).[127] Besides such concrete infrastructural problems, it is important to note that especially in rural areas, the high illiteracy rate often discourages people from appealing to official courts since they are unable to find access to written documents.[128] But problems can also and mainly be found in the judiciary itself. Due to the countless changes of governments and the subsequent introduction of many different constitutions each of which causing the creation of new law led to the fact that today, not even the corpus of valid legal norms is clearly defined. The Petersberger Agreement states:

> [...], that until a new constitution shall be adopted the applicable legal norms will be 'those of the Afghan Constitution of 1964, unless they violate the agreement and with exclusion of those regulations regarding the monarchy and the executive and legislative authorities, and existing laws and regulations, as long as they are in accord with the Petersberg Agreement, with the international agreements found in Afghanistan, and with the applicable regulations of the constitution of 1964'.

In article 162, the constitution of 2004 states that only laws which agree with the constitution itself are considered to be valid. However, this issue has not yet been checked because, at least in 2002, neither

[121] AI-Report 2005. p. 12.
[122] WARDAK, Jirga, p. 6.
[123] AI-Report 2005, p. 16.
[124] NOJUMI, Systems of Justice, p. 23.
[125] Ibid.
[126] NOJUMI, Systems of Justice, p. 18.
[127] Ibid.
[128] WARDAK, A.: "Building a Post-War Justice System in Afghanistan", in: Crime, Law and Social Change (2004) 41. pp. 319-341. p. 327.

courts in Kabul or Mazar-i Sharif nor the Ministry of Justice nor the university had access to Afghan legal texts.[129] Moreover, court buildings in the urban areas have often been destroyed and thus prove unusable for proceedings.[130] Other insufficiencies concern the personnel: Active judges and lawyers often lack an academic background.[131] In addition, judges often do not see any necessity to improve their education: The already quoted final report of the International Commission of Judges states: "None of the judges interviewed expressed any significant interest in education or training or the provision of statutory materials to which none of them had access. Invariably, judges referred to copies of the Holy Quran and stated that it contained all the laws that were needed."[132] However, the judge's position is often not occupied according to qualification, but to personal relations.[133] Moreover, many judges are considered to be corrupt.[134] One should note, though, that the coin has another side, too: Not being aligned with local or regional commanders puts judges and government officials at a security risk.[135] A condition similar to that of the judicial personnel concerns the police who, being partly responsible for the enforcement of sentences, still remain in a desolate condition.[136] The least police officers underwent a sound training, but were rather "trained" before as members of paramilitary groups. Moreover, salaries are not paid regularly which is another factor leading to an increase of corruption.[137]

Overall, neither the judiciary nor its executing organs are fulfilling the demands of an independent, qualified instance. Therefore, one may easily understand that the common population still prefers the use of traditional forms of jurisdiction due to long delays until final verdicts, high costs, poor accessibility or simply mistrust in the official, yet opaque and insufficient legal system.[138]

7 Conclusion

"Legal Pluralism in Afghanistan" may appear as an opalescent notion from a Western viewpoint. In fact, though, we face a highly complex reality. A survey of constitutionalism in Afghanistan reveals two important points:

First of all, Islam always played an important role in Afghan constitutionalism, and so did, be it openly or covertly, Islamic law. Although the first constitution of 1923 aimed at secularising the Afghan state, it had to consider the voice of tribal lords and religious leaders which pressed for a more traditional mode than originally planned. The constitution of 1931 followed that vote more willingly. It was the constitution of 1964 which regulated the relationship between Islamic law and statutory law for the first time ever, giving statutory law priority over Islamic law. However, the impact of that regulation on reality is doubtful. In fact, we can assume that certain areas of Islamic law were codified in the following years. Therefore, it is reasonable to presume that these areas represent parts of statutory law today. Furthermore, we saw that the educational system for legal experts is dominated by the dichotomy of statutory and Islamic law to the present day. We do not know, however, which concrete impacts that dual system has on the Afghan legal practice.

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[129] ICJ, Legal System, p. 7.
[130] GUHR, A. H.: "Wiederaufbau des Justizsektors auf der Grundlage der neuen afghanischen Verfassung- Probleme und Perspektiven", in: GOMM-ERNSTING, C., GÜNTHER, A. (eds.): Unterwegs in die Zukunft. Afghanistan – drei Jahre nach dem Aufbruch vom Petersberg. Berlin (Berliner Wissenschafts-Verlag), 2004. pp. 212-243. pp. 216 et seq.
[131] GUHR, Wiederaufbau, p. 217.
[132] IC J, Legal System, p. 16.
[133] NOJUMI, Systems of Justice, p. 15.
[134] UNITED STATES INSTITUTE OF PEACE: Establishing the Rule of Law in Afghanistan (= Special Report, 117), 2004. pp. 7 et seq.
[135] NOJUMI, Systems of Justice, p. 24.
[136] US INSTITUTE OF PEACE, Rule of Law, pp. 10 et seq.
[137] NOJUMI, System of Justice, p. 26.
[138] WARDAK, A Post War Justice System, p. 327.

Secondly, we noted that none of the Afghan constitutions including the constitution of 2004 even mentioned customary law although it still represents the legal form probably most applied in contemporary Afghanistan. This is especially problematic as official courts seem to regularly refer cases to *šūrās* and *ǧirgas*. Such proceedings not only lack any legal basis, but also enforce the risk of abuse of human rights by the state being (in)directly involved in practices like *badd*. Furthermore, they only add to the intransparence of the Afghan legal system. This result is underlined by the fact that even categories such as customary law which are assumed to be homogeneous reflect divergences that strongly depend on the region at hand.

Last but not least, it became clear that a proper application of the constitution of 2004 is hindered by infrastructural problems. It is worth mentioning, however, that even if it were followed and applied strictly, it would reveal great loopholes. The reality of Afghan legal practice today still testifies misery and despair. Structures determined by military power and political influence are often reigning in the place of legal norms – a phenomenon which at least in certain northern regions is true with regard to tribal tribunals, too. Nevertheless, secondary literature often indicates that the integration of customary law and legal practice is a – or even the only – realistic option for the construction of a functioning legal state in Afghanistan.[139] Above all, the current government obviously follows such proposals as it

> considers that it must engage with the traditional system, to seek to eliminate its unacceptable elements and maximize its positive features. The aim should be to improve the quality of traditional justice, perhaps offering training to elders and others, incentives to follow the best approaches, and linkages to the state system where agreed procedures are followed.[140]

One cannot neglect that in the past century, customary law represented the only system which constantly guaranteed the establishment of a kind of "order" in Afghan social life. However, one should bear in mind that this order clearly discriminates and even excludes certain social groups like women and minorities from the legal system. Besides ignoring human right standards, its heterogeneity leads to a high degree of legal insecurity. A strong application of customary law provides for even more possibilities for the undermining of the state by local warlords, corruption and inequality. Besides, an emphasis on reference to customary law is critical with regard to non-tribal parts of the Afghan population. Residing in the cities, they simply do not have any opportunity to retain to customary law any more. Therefore, the idea to reestablish systems of customary law which are usually found in rural areas involves the risk to create a two-class system of legal practice in Afghanistan. In fact, such a system already exists: the district *šūrās* in Kabul for instance are forbidden to hear criminal cases, whereas those in Nangarhar may do so.[141] Due to these reasons, the integration of customary law into the country's official legal system is highly critical. On the other hand, we currently lack too much information about its concrete content in order to decide whether it might be possible to codify a canon of customary law in the future. Last but not least, extensive research on the different legal systems in Afghanistan might be an important contribution to the stabilisation of the country.

[139] See e.g. SENIER, A.: "Rebuilding the Judicial Sector in Afghanistan: The Role of Costumary Law", in: al-Nakhlah, Spring 2006. Furthermore WARDAK, Jirga, pp. 201 et seq. and WARDAK, Post-War Justice System, p. 18.
[140] GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (Ministry of Justice): Justice for All. A Comprehensive Needs Analysis for Justice in Afghanistan, 2005. p. 12.
[141] NOJUMI, Systems of Justice, p. 47.

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