

Themenbericht der Staatendokumentation



Afghanistan: Afghan legal system under the Taliban

from the COI-CMS

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1 About the author

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Since October 2019, Idris Nassery heads the Department of Islamic Jurisprudence, and since October 2021, he is Junior Professor of Islamic Jurisprudence at the Paderborn Institute for Islamic Theology (PIIT), University of Paderborn, where he is the head of the PIIT.

Idris Nassery studied Law and Economics at the University of Bielefeld and has completed his legal clerkship at the Higher Regional Court in Düsseldorf in 2019, qualifying as fully-fledged jurist.

Between 2013 and 2019, he was a fellow at the Mercator Foundation's Excellence Program of the Graduate School of Islamic Theology. During this time, he also worked as a research associate at the University of Paderborn, completing his Ph.D. in 2017 on the relationship between law and ethics in the thought of Abu Hamid Muhammad Al-Ghazali. Additionally, he studied Islamic Law and Comparative Law as a fellow at the School of Oriental and African Studies (SOAS, University of London), earning a Master's Degree in Islamic Law (LL.M.). Nassery also received training in 'Islamic Banking and Finance' at the London School of Economics.

As a fellow in the special program 'Master in classical Islam' (M.A.) at the University of Johannesburg (South Africa), he underwent training in the core disciplines of Islamic Jurisprudence and the Arabic language. This was followed by numerous research and language residencies at institutions such as the University of Oxford, Al-Azhar University in Cairo, Hamad bin Khalifa University in Doha, and Saint-Joseph University in Beirut.

In 2022, Idris Nassery became co-founder and chairman of the NGO Institute for Law and Society in Afghanistan e.V. (ILSAF).

2 Introduction

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After enduring 23 years of war (1978 - 2001), which saw the fall of the Taliban in 2001, Afghanistan was able to promulgate a new constitution that incorporated both Islamic and modern-progressive values in 2004.

While there were challenges in the new constitution, it was conceived as a democratic constitution, with a focus on ensuring basic rights and the equality of men and women.

In the light of the constitution, various laws and legal procedures that corresponded to national and international standards were established with the help of domestic and foreign scholars and jurists. The faculties of law and political science, as well as Sharia, were two institutions that contributed to the formation of the personnel of the judicial department by graduating hundreds of young men and women who later served as judges, prosecutors and lawyers.

Over the past two decades, the international community has undertaken and implemented numerous development programs aimed at rebuilding Afghanistan's legal system and enhancing

the capacity-building process for personnel within its judicial institutions. These programs have provided extensive education to many individuals working in the institutions.

Furthermore, the *[note: former]* Afghan government established a judicial management system that mandated all judicial institutions to record and document their cases and proceedings.

3 The Legal and Courts System of the former Government

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The judiciary of the Islamic Republic of Afghanistan was composed of the Supreme Court, the Court of Appeals, and the Court of First Instance, whose organizations and powers were regulated by law.

The Supreme Court is the highest judicial authority of the judiciary and the last judicial authority in legal cases, and was located in the capital of the country, Kabul.

Examining the compliance of laws, legislative decrees, interstate treaties and international covenants with the constitution and interpreting them based on the request of the government or the courts in accordance with the provisions of the law is considered the jurisdiction of the Supreme Court.

The Supreme Court was composed of nine members, who were appointed by the President and approved by the Wolesi Jirga (Parliament). Also, the president appointed one of these nine members as the Head of the Supreme Court.

According to Article 118 of the 2004 Constitution, special conditions were considered in appointing the members of the Supreme Court, including that the age of the members of the Supreme Court should not be less than 40 years and that none of them had been convicted by the authorized court of crimes against humanity, felony or deprivation of citizenship rights. Also, the members of the Supreme Court should not be members of any political party during their term of office. Furthermore, in addition to having sufficient experience in judicial affairs, judges of the Supreme Court must be citizens of Afghanistan and have higher education in the field of law or Islamic jurisprudence.

Judicial advisors were among other Supreme Court organizations' members, whose total number reached 36 people. These advisors were appointed from among judges who had full eligibility, competence and tact and had at least ten years of actual judicial experience in their records.

One of the duties of the judicial advisers was to analyze and evaluate the cases, prepare a summary report and present it to the judicial session for the purpose of making a decision.

According to Article 24 of the Law on Organizations and Jurisdictions of the Islamic Republic of Afghanistan, the jurisdictional powers of the Supreme Court included:

- Interpreting the Constitution based on the request of the government or courts.
- Examining the reasons and decisions regarding the return of criminals, whether foreign nationals or Afghans, to foreign governments and to make a final decision in this regard.

- Dealing with all cases of natural or legal persons.
- Reviewing the decisions of primary courts.
- Transferring cases across courts.

In addition to the above jurisdictions, the constitution also empowers the Supreme Court to exercise administrative jurisdiction.

The Supreme Court and other courts used to hold court sessions in public, in which the right to participate was free for individuals, but the courts could hold secret sessions, of course, if the law allowed this.

Each province of Afghanistan had an appeals court, which consisted of the General Head, Heads of each related Dewan (division) and judicial members.

The head of the appellate court was appointed from among the judges who had full qualifications, experience and tact.

One of the jurisdictions of the appellate court was to review the decisions and orders of the lower (primary) courts that were challenged in the circumstances and order specified by the law on the organization and jurisdiction of the courts in the appeal stage. This means that the appellate court could correct, violate, modify, approve or cancel the decisions and orders of the lower courts according to the law.

The General Head of the appeals court and the Heads of each related court, in addition to their competence were responsible for the quality, the deadline for handling cases, the correctness of the implementation of the law, the reasons for their decisions and orders.

There were primitive courts in the center of each province and in each district, which were called urban primitive courts.

Although the Islamic Republic of Afghanistan had created many facilities for people's access to justice and judicial authorities in twenty years, unfortunately, on the one hand, the insecurity of some areas and on the other hand, widespread corruption in the judicial system caused people to lack trust in these authorities.

4 The Legal and Courts System of the Taliban

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After the fall of the Taliban in 2001, with the support of some regional powers, they were able to gradually rebuild themselves in the villages. Despite the limited resources and with little facilities, they were able to establish courts in most rural areas and facilitate access to legal rulings at the local level for people. These actions of the Taliban made it possible for them to create a relatively predictable (not regularized) court even in war conditions, and this was exactly the turning point that greatly contributed to the victory of the Taliban in Afghanistan. This was while the governmental judicial institutions had largely lost their credibility with the people due to the

existence of widespread corruption. Therefore, the people preferred to go to Taliban courts rather than government courts.

In the past twenty years, the Taliban's judicial system was able to attract people's trust and attention with its practical actions. Taliban judges acted both as judges in the legal field and as scholars (ulama) in the religious field. Taliban judges completed their education by studying in Deobandi schools in Pakistan and Afghanistan, which were mainly based on Hanafi jurisprudence.

The granting of scholar positions (Alem) by schools that were formally independent of the armed movement was in fact a recognition of the authority of Taliban judges to decide on disputes and issue rulings. Therefore, on the one hand, as scholars (Alem), they had the authority to make decisions on cases, and on the other hand, as judges, they had the necessary tools to execute sentences.

After coming to power in 2021, the Taliban announced the cancellation of all the laws approved during the republican era and considered only the articles of the Zahir Shah era constitution that do not conflict with Islam to be applicable. So far, the Taliban have not clarified about the laws, especially criminal laws, national security and courts. However, the Deputy Minister of Justice of the Taliban said in this year's meeting of the government's accountability to the nation, that: 'During this period, twenty procedures and different legal documents have been processed'.

The Taliban courts make decisions and issue verdicts based on Hanafi jurisprudence. However, it has not been officially determined which Hanafi jurisprudential sources the judges of these courts will use as the basis for their rulings, so that the plurality of sources does not cause problems for the claimants and their lawyers.

In the last two years, the court system has either been closed or is working slowly in many branches.

The changes in Afghanistan's judicial system in the last two years have been mostly in formal and administrative areas, but no concrete changes have been made in the jurisdiction of the courts. In addition to canceling the laws of Republic jurisprudence, the changes in the judicial system and courts can be counted in the following areas:

- Removal of all judges and administrative employees of the courts
- Attempting to remove the Attorney General
- Non-observance of hierarchy in reviewing cases
- Cancellation of the independence of the Association of Defense Lawyers
- Women's lack of access to female lawyers
- Advancing the administrative affairs of the courts based on the principles of the Taliban and the orders of the leadership level
- Changing the basis of the judge's ruling from the law to the mufti's fatwa

In addition to cancelling the laws of the republican period, the Taliban dismissed all the judges and administrative employees of the courts and replaced them with people belonging to their own group, most of whom do not have sufficient judicial knowledge and experience of working in the courts.

During the republican period, many institutions were involved in the investigation of cases from the beginning to the end and were working together. So that, after the case was established by the investigative bodies, it was handed over to the Attorney General, and then the Attorney General would transfer it to the primary court through special procedures, and this process sometimes continued until the Court of Appeal and the Supreme Court.

Apparently, by observing some evidence, it seems that this process is not observed by the Taliban. Some statements indicate that the Taliban are planning to remove the Attorney General from the judicial system, while the Taliban deny this statement. However, documents have been obtained that clearly show that the competences of the Attorney General in investigating cases have been removed and the investigation of criminal and legal cases has been made part of the competences of the courts and the Supreme Court.

On the other hand, by canceling the independence of the Association of Defense Lawyers and merging it with the Ministry of Justice, the Taliban have caused the dissatisfaction of attorneys and lawyers.

As the Taliban have removed women from various fields (except for a few cases), they have removed female judges and female defense lawyers from their duties and stopped issuing licenses to female defense lawyers as well. This has made it difficult for women who are accused of crimes or involved in family cases.

With the non-compliance of the hierarchy in the handling of cases by the Taliban, the question is raised: how do the Taliban, in the absence of a clear judicial system, the absence of codified laws, the lack of independence for defense lawyers, and the lack of involvement of the Attorney General as one of the primary authorities in the investigation of cases, investigate the cases in courts?

The courts of the Islamic Emirate regulate their legal and administrative work based on the books, administrative and legal regulations that have been collected in a single book, which were implemented in the courts of the regions under their rule during recent years, even during the republican era.

The Taliban have arranged a 113-article administrative bill for the courts, which they act according to. In addition, in many cases, orders given by the leadership level are also enforced.

Among the other jurisdictions of the courts is the examination of legal cases. As the cases in the courts during the republican period were reviewed jointly by three judges (the president of the court, the examining judge and the associate judge). The court session was such that a single prosecutor read the lawsuit in the presence of the court and the defendant's defense lawyer

stated the defendant's defense. Then, after hearing the arguments of both sides, the judges of the court announced their decision according to the written laws.

But this procedure has changed in the Taliban courts. As mentioned before, currently the case is either decided within the security districts and does not reach the court, or is directly referred to the primary court by the security districts, instead of being referred to the Attorney General.

But what is noteworthy is that, according to reliable sources, in addition to the employees of the security sector, there are also four to five other people who act somehow as prosecutors, and one of them goes to the court together with the accused as a prosecutor and there he reads the lawsuit form.

The Taliban direct the accused to organize his defense at one of the law firms, but they do not allow the defense lawyer to go to the judicial assembly together with the accused and read his defense. The court asks the accused to read his defense if he is literate, and if he is not literate, his defense will be read by the court editor.

Previously, the examining judge and associate judge examined the case and extracted its ruling from the law, but now two muftis are in charge of that. The mentioned muftis examine the case and according to the books of Hanafi jurisprudence, they issue a Fatwa on the issue, and later the head of the court issues the ruling according to their Fatwa.

Therefore, the basis of the judge's ruling in the cases is the Fatwa of the muftis present in the court, and if the accused is satisfied or not satisfied with the court's ruling, the case is either terminated or the said accused is appealed.

If the accused appeals in the appellate court, where the judicial council also consists of a judge as the head of the court and two muftis, but the mentioned muftis are different from the muftis of the primary court. Therefore, if the accused is proven guilty again, this proof will be based on new reasons from new jurisprudential sources. It has happened many times that the muftis of the appellate court rejected the Fatwa of the muftis of the primary court regarding the appeal of the accused and considered it wrong and deduced a new ruling by referring to other books of Hanafi jurisprudence. Thus, the judge's decision is also issued differently than the one before.

By examining some cases, we found that the sources used by the judges and muftis of the Taliban courts are the following jurisprudential sources, while previously the judges issued rulings based on the codified laws that were approved in accordance with the Islamic Sharia:

1. Durr al-Hukkam / authored by: Ali Haider
2. Mujallat al-Ahkam al-Adliyya
3. Dur al-Mukhtar / authored by: Muhammad bin Ali Hanafi Haskafi
4. Al-Hedaya fi Sharh al-Badaya / authored by: Burhanuddin Marghinani
5. Al-radd al-Mukhtar with al-Durr al-Mukhtar / authored by: Ibn Abidin Muhammad Amin Dimaschi Hanafi.

6. Fatwa al-Hindiyyah (known as Fatwa Aalamgiri) authored by: Allama Maulana Sheikh Nizam and a group of famous scholars from India, has ten parts and has been translated into Urdu and other languages.
7. Al-Mabsoot / authored by: Muhammad bin Ahmad Sarkhsi
8. Al-Bahr al-Raiq description of Kanz al-Daqaq / written by: Ibn Nujaim al-Misri.
9. Bada'i al-Sana'i / authored by: Ala al-Din Abi Kasani Hanafi
10. Principles of administrative letter of the Islamic Emirate

What has been worthy of attention during the republican period was the establishment of the Women Judges Association in 2013 in the framework of the courts with female judges as heads and members from all over Afghanistan. By 2021, the number of female judges had reached 260, of whom 21 were serving in Herat province, 11 in Balkh, 2 in Takhar, 1 in Baghlan, and 225 in Kabul. In the same year, the number of female prosecutors reached 78, while the number of female defense lawyers reached 1,500.

But nowadays the association of female judges is inactive and all female judges, attorneys and prosecutors are not allowed to work in judicial system and organizations like in other sectors, which is another big challenge for women to achieve justice.

5 Conclusion

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Afghanistan's legal and judicial systems are rapidly collapsing. The Taliban have created a legal vacuum by suspending the laws. It can be concluded from the statements of the Taliban that they have ignored the laws and legal regulations in most fields, especially criminal law, family law, youth and women's rights. The law of the country is often formed by the orders of its leadership.

With the dissolution of independent institutions such as the Association of Defense Lawyers and the Independent Human Rights Commission, the Taliban have created other serious concerns for the provision of justice. Considering the current situation, it is expected that human rights violations will increase significantly.

The Taliban have claimed that they respect international laws and treaties if they have not violated the Sharia and principles of the Islamic Emirate, but in practice there is no sign of this claim.

In the current situation, the restoration of the legal system and the rule of law should be the priority of the international community for Afghanistan.