

The Independence of Judges Under Islamic Law, International Law and the New Afghan Constitution

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Introduction

The conviction that the rule of law depends existentially on a judiciary which can deliver impartial justice is so fundamental a principle that it has been enshrined not just in domestic constitutions but has also been endorsed by international law and organisations. All member states of the Commonwealth provide in their respective constitutions expressly for an independent judiciary¹. The Constitution of the Islamic Republic of Pakistan, for instance, provides for the establishment of a judiciary which is independent from the other two branches of government² and whose judges can only be removed or disciplined in accordance with the procedures contained in the Constitution itself³. Debates surrounding this universally acknowledged principle tend to examine the extent to which judicial independence has been implemented in actual constitutional and legal practice. All major international human rights' organisations include in their respective country reports a section on judicial independence and even a cursory engagement with the topic reveals that there is little doubt that in many countries the gap between constitutional theory and political reality is considerable. Judicial accountability and measures to combat instances of corruption have now made their way onto the agenda of a number of fora including the Commonwealth and prominent non-governmental organisations like Transparency International.

In Afghanistan, the fall of the Taliban at the end of 2001 as a result of the US-led operation Enduring Freedom has added new facets to the discussion of judicial independence. The removal of the Taliban set into motion a process of reconstruction not just of the country itself but also of its legal system. The blueprint for this process was contained in the so-called Bonn Agreement of December 2001⁴ which provided for a step by step re-establishment of the state and its institutions culminating in the passing of a new constitution and fresh elections to be held in accordance with the provisions of the new Constitution. The Bonn Agreement states

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¹ With the exception of the United Kingdom which does not have a written constitution.

² Article 175 of the Constitution of Pakistan, 1973.

³ Article 209 of the Constitution of Pakistan, 1973.

⁴ "The Agreement On Provisional Arrangements In Afghanistan Pending The Re-Establishment Of Permanent Government Institutions" provided for the official transfer of power to a transitional administration on 22 December 2001.

that the “judicial power of Afghanistan shall be independent and vested in a Supreme Court of Afghanistan and such other courts as may be established by the Interim Administration”. Despite occasional setbacks mainly due to rivalries between different political and tribal factions and a sustained campaign of terror attacks carried out by remnants of the Taliban and Al Qaeda, the process envisaged by the Bonn Agreement has, by and large, been adhered to. Following a Constitutional *Loya Jirga* a new Constitution of Afghanistan came into force in January 2004. It establishes, in accordance with Article 1 of the Constitution, Afghanistan as an Islamic Republic and an independent, unitary and indivisible state. The new Constitution contains many features and hallmarks which reflect its genesis as a compromise between different political concerns and objectives. Most prominent amongst them are the provisions concerning the status and role of Islamic law on the one hand and of international law on the other. Article 3 provides that “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam”. This Islamic provision has to be read with Article 7 which provides that “The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights”. The tensions within legal systems caused by the co-existence of international human rights norms and Islamic law is considerable. Many countries which pledge adherence to Islamic law as the primary source of law have entered reservations to those international human rights treaties which may clash with particular provisions of Islamic law.⁵

The Afghan judiciary will have an important role to play in reconciling the at times differing demands of Islam and international human rights law since, in accordance with Article 121, the Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law. Given that all laws in Afghanistan have to be in accordance with Islam the Supreme Court has considerable power in the shaping of the legal system. Conversely, the more powerful a court is the more tempting is it to manipulate its judges. Thus, the issue of judicial independence is inextricably linked to that of judicial accountability and supervision.

This article explores the issues of both judicial independence from the perspective of Islamic and international law before moving to the legal system of Afghanistan itself.

⁵ See A.E. Mayer, *Islam and Human Rights: Tradition and Politics*, 3rd ed., 1999 and Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford 2003.

Judicial Independence in Islamic Law⁶

Islamic law constitutes one of the major legal systems in the world today. In many Arab countries it still forms the basis of the legal system though in many instances it has been reformed and codified. Many countries with majority Muslim populations are officially Islamic states and their constitutions contain provisions to the effect that Islam is the state religion and that all laws should be in conformity with Islam. This applies for instance to Iran and Pakistan but also to Afghanistan.

It is important to understand the historical setting of the advent of Islam in order to understand the basic principles of Islamic law. Pre-Islamic Arabia was inhabited by tribal communities who followed animistic religions. The tribal community was the focal point for the individual. Survival outside the tribal community was difficult if not impossible. The tribes themselves developed their own sets of customary laws which were binding on all members. Besides the tribal communities there were trading communities in Mekka and Medina who enjoyed commercial relations to areas outside Arabia. The merchants and traders had developed their own set of mercantile laws.

The advent of Islam following the revelations of God's word to the Prophet Muhammad, the spokesman of God, led to the founding of an Islamic community in Medina in the year 622. The tribal communities by and large converted to Islam and gradually Islamic codes of conduct and Islamic law modified or replaced completely tribal customary law. Muhammad himself came from the tribe of the Quraysh, the tribe that held Mecca. Muhammad was 40 years old when the first messages from God were revealed to him. One of God's revelations commanded him to proclaim publicly what he had been told by God. The first conversions took place and a small community of believers emerged initially restricted to his family. Once the fact of the establishment of a community of believers had spread through Mecca the citizens took against the community fearing for their trading interest and their income. In the year 622 Muhammad established a Muslim community in the neighbouring Medina and it is this year which marks the beginning of the Islamic calendar. After the death of the Prophet Muhammad his friend and father-in-law Abu Bakr was elected Caliph, i.e. the leader of the community of believers, the *ummah*. Under his leadership the empire of Islam expanded considerably spreading as far as Egypt. Under Umar, the second Caliph, this expansion continued. His successor was Ali, the Prophet's son in law, who was to become the "founding father" of the Shia sect. The reign of Ali marks the end of the rule of the four righteous Caliphs. From then onwards the Islamic

⁶ One of the most succinct and accessible overviews of Islamic law continues to be Joseph Schacht, *An Introduction to Islamic Law*, Oxford 1964. See also by way of introduction to this topic Noel Coulson, *A History of Islamic Law*, Edinburgh 1964; Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford 1950 and Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases & Materials*, Albany: New York 1975.

world was divided into Shias and Sunnis. A succession of dynasties, beginning with Umayyads, who were followed by the Abbasids, ruled over the Muslim world. However, independent Muslim empires emerged in the middle of the 8th century and by the end of the century Persia, Spain, Morocco, Tunisia and Egypt were all governed by independent rulers.

The political fragmentation of the Islamic world had an effect on the development of Islamic law. In the early phase of the Islamic expansion and unified political control under the Medina Caliphs it had been possible to achieve a consensus about the contents of Islamic law. However, during the rule of the Umayyad dynasty divergence of opinion began to emerge: scholars would pronounce their own ideas of standard of conduct and the true nature of Islamic law. It was under the Abbasids dynasty that the early schools of Islamic law began to develop. The main distinction between these early schools was their dispute over the role of legal reasoning: the traditionalists maintained that there was no right for jurists to reason for themselves since the only exclusive authority on Islamic law were the Qur'an and the precedents set by the Prophet. In contrast, the modernists argued that jurists had the right to reason for themselves.

The historical circumstances of the emergence of Islamic law in the 7th century continue to determine the essential features of Islamic law today. The fact that Islamic law is a divine, i.e. religious, law, has had a profound impact on the development of the sources of Islamic law. The divine character of Islamic law is not only reflected in the hierarchy and essential characteristics of these sources but also explains the conceptual limitations on individual law-making. However, the Islamic polity has developed legal methods to deal with situations not directly provided for in the Qur'an and the Sunna of the Prophet. Indeed, many Arab countries have implemented modern codifications of Islamic law which, whilst being in harmony with Islamic law, nevertheless provide legal solutions for situations not contemplated in the main source of Islamic law.

The position of courts and of legal procedure in Islamic law is closely related to the historical development of Islam. Similar with the legal systems of ancient Rome and Greek and also Europe in the Middle Ages, Islamic law did not provide for a proper separation between judicial and executive powers. At the beginning of Islam it was the Caliph himself who administered justice. It was only under the rule of the Caliph Umar that judges were appointed. However, these judges, referred to as qadis in Islamic law, were regarded as the delegates of the Caliph or of the governor of a province. A qadi court was usually a single-judge court with general jurisdiction – there were no specialist courts dealing for instance with just criminal or just civil cases.

The Qadi court fulfilled a number of functions. The most important were as follows:

- a. The resolution of disputes between two parties either through a compromise between the litigants or through a coercive judgement;
- b. the enforcement of claims made by plaintiffs once they have been proven;

- c. the protection of the property rights of mentally ill people for instance by appointing a guardian charged with looking after their interests;
- d. the administration of pious foundations (*wakfs*) if no administrator had been appointed;
- e. the execution of testamentary provisions of the testator as long as they are lawful;
- f. the application of *hadd* punishments and the exercise of police powers within the area under his jurisdiction.

The exercise of the function of a qadi was regarded as a religious duty. He was obliged to follow certain basic principles of procedure. The most important was to consider all people equally and to act impartially. The qadi was supposed to listen carefully to the evidence given by the witnesses, to encourage compromise between parties as long as the agreement did not violate principles of Islam or was otherwise illegal, and to give judgement. Qadis were not bound by previous judgements and no rule of binding precedent emerged in Islamic law.

Whilst the Qur'an itself does not contain any express provision on the independence of the judiciary there are nevertheless a number of contemporary statements of Islamic law which stress the importance of the independence of the judiciary. The Supreme Court of Pakistan observed in the case of *Al-Jehad Trust v Federation of Pakistan*⁷ that

“Upon the advent of Islam, judicial functions were separated from the executive functions at its very initial stage. [...] The reason being that the foundation of Islam is justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what we may call ‘absolute justice’ or ‘absolute fairness’”.

Judicial Independence in International Law

The principle of judicial independence is firmly enshrined in international law. The starting point for the gradual endorsement of this principle is Article 10 of the Universal Declaration of Human Rights which provides that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal”. It was followed by Article 14 (1) of the International Covenant on Civil and Political Rights which establishes that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. In addition, the major regional human rights conventions also promote the principles asserted by the UDHR,⁸ as does modern international humanitarian law.⁹ The

⁷ PLD 1996 SC 324, at 424.

⁸ See European Convention on Human Rights (1950) Arts. 6 and 7; American Convention on Human Rights (1969) Arts. 8-10; African Charter on Human and Peoples' Rights (1981) Art. 7.

⁹ See e.g. Art 3 of the four Geneva Conventions (1949); fair trial guarantees for prisoners of war in the Third and Fourth Geneva Conventions; Additional Protocol I Art. 75 and Additional Protocol II Art. 6 (1977).

Cairo Declaration on Human Rights adopted by the Organization of Islamic Conference in Cairo in 1990 provides in Article 19 (a) that “All individuals are equal before the law, without distinction between ruler and ruled”.

The establishment of institutional mechanisms to monitor judicial independence and compliance with international law occurred comparatively late. It was only in 1985 that the United Nations General Assembly adopted the Basic Principles on the Independence of the Judiciary. These basic principles concretise what is meant by judicial independence *inter alia* providing that judges “must have tenure, and be free from direct or indirect pressure in the performance of their duties”. The Basic Principles also include a requirement that the independence of the judiciary be guaranteed by the state and enshrined in the Constitution or some other legislative instrument. However, it took close to another decade before the first Special Rapporteur on the Independence of Judges and Lawyers was appointed in 1994. Since then the Special Rapporteur has produced a number of reports concerned not just with judicial independence but also with complaints about corruption and attacks on the judiciary and lawyers. On a visit to Saudi Arabia in 2002 the Special Rapporteur stated that

“The administration of justice in Saudi Arabia is guided by the *sharia*, of which the *Qur’an* and the *sunnah* of the Holy Prophet are the constitution. The *sharia* contains many of the guarantees with respect to the independence of the judiciary, the right to a fair trial and due process contained in international human rights law. It is not disputed that the essence of the *sharia* is the pursuit of justice. What I have been most interested in under my mandate are the procedures presently applied to achieve this very objective, i.e. justice.”

In addition to the UN Principles on Judicial Independence, several major non-government organizations have created more comprehensive standards.¹⁰ Since the late 1990s especially the Commonwealth has been active in the area of judicial independence. In 1998, a joint colloquium consisting of the Commonwealth Lawyers Association, the Commonwealth Magistrates & Judges Association, the Commonwealth Parliamentary Association and the Commonwealth Legal Education Association produced a document entitled “The Latimer House Guidelines on Parliamentary Supremacy & Judicial Independence”. These Guidelines were later endorsed by a gathering of Commonwealth Chief Justices at Edinburgh on 9 September 2000. They have been adopted by the Chief Justices of a number of Commonwealth countries and have now been formalised as “Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of

¹⁰ These include Draft Principles on the Independence of the Judiciary (Siracusa Principles) 1981; Draft Principles on the Independence of the Legal Profession (Noto Principles) 1982; The Rule of Law and Human Rights (Declaration of Delhi, Law of Lagos, Resolution of Rio, Declaration of Bangkok); Union International des Avocats: The International Charter of Legal Defense Rights; International Bar Association: Minimum Standards of Judicial Independence 1982; International Convention for the Preservation of Defence Rights 1987 and Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region adopted by the Sixth Conference of Chief Justices of Asia and the Pacific on 19 August 1995.

Government". The objective of the Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values. Paragraph IV deals with Independence of the Judiciary. It states:

"An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country."¹¹

The Independence of the Judiciary Under the Constitution of Afghanistan

More than two decades of war have destroyed Afghanistan's legal system. Almost every single aspect of a functioning legal system has been affected. Even now, more than two years after the demise of the Taliban regime, most courts in Afghanistan do not have a complete set of the statutes and regulations in force in the country. In any event, in many areas of law there is uncertainty about the status of particular laws: significant amendments were made by many of the very short-lived or extremely undemocratic governments and there is thus doubt whether they should now be applied. This is for instance the case with the laws implementing large scale land distribution passed under Soviet occupation. The infrastructure of the legal system has suffered as well. Courts are dilapidated and ill-equipped, the prisons do not meet international standards, and there are hardly any trained lawyers. Law schools do exist but like the courts and the prisons their buildings are run down and their libraries have not seen any new acquisitions for many years.

However, despite a seemingly endless catalogue of woes there have been positive developments. By far the most significant is the passing of a new constitution.¹² With firm constitutional foundations in place there is at last a basic structure in place which can guide the re-building of the legal system according to the design and parameters laid down in its provisions. The new constitution provides for the creation of an independent judiciary. Articles 116 to 135 of Chapter VII of the

¹¹ See John H a t c h a r d, *The New Commonwealth Principles: from Latimer House to Abuja*, in: *Commonwealth Legal Education*, June 2004: 96, 5-6.

¹² The process leading up to the Constitution 2004 began formally on 5 October 2002 with the appointment of a committee to draft a new constitution to be adopted by a constitutional *Loya Jirga* (Grand Council). The Constitutional *Loya Jirga* convened on 14 December 2003 with 502 delegates being in attendance and adopted the new Constitution on 4 January 2004. The Constitution was signed and promulgated by President K a r z a i on 26 January 2004. The only official versions of the Constitution are in the two official languages of Afghanistan, namely Dari and Pashto, and there is no official English version. References to constitutional provisions in the English language are taken from the official website of the government of Afghanistan: <<http://www.afghanistangov.org/>> (09/10/2004).

Constitution are concerned with the judiciary. Article 116 (1) provides that "The judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan". The judiciary is headed, according to Article 116 (3), by the Supreme Court as the highest judicial organ. The Supreme Court is composed of nine members who are appointed by the President for a period of ten years with the approval of the House of Representatives. Article 117 also contains provisions for the initial phase of judicial appointments to the Supreme Court according to which in the beginning the appointment will be as follows: Three members are appointed for a period of four years, three members for seven years and three members for ten years. Later appointments will be for a period of ten years. The minimum qualifications of a judge of the Supreme Court include not just a minimum age, absence of a criminal record, and a reputation for good deeds but also the requirement that a judge "shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan". [Article 118] Supreme Court judges can only be dismissed by impeachment procedures contained in Article 127. This article provides that "When more than one-third of the members of the House of Representatives demand the trial of the Chief Justice, or a member of the Supreme Court due to a crime committed during the performance of duty, and the House of Representatives approves of this demand by a majority of two-thirds votes, the accused is dismissed from his post and the case is referred to a special court". The Supreme Court recommends the appointment of all other judges with "the approval of the President" [Article 132 (2)] and is also vested with the power to recommend the dismissal of a judge for "having committed a crime". The administration of the country's judiciary is equally controlled by the Supreme Court through its general Administration Office of the Judicial Power.

The jurisdiction of the Supreme Court is phrased in wide terms already outlined in the oath of office for the Supreme Court which provides that a judge must swear in the name of Allah to "[...] support justice and righteousness in accord with the provisions of the sacred religion of Islam and the provisions of this Constitution and other laws of Afghanistan, and to execute the duty of being a judge with utmost honesty, righteousness and nonpartisanship". [Article 119] Apart from the duty to decide cases and to attend to all law suits not just between private parties but also cases involving the state as a party to the proceedings [Article 120], the Supreme Court also has been accorded the power of judicial review. This important power is contained in Article 121 which provides that "The Supreme Court shall only by the request of the Government and/or the Courts review the compatibility of laws, decrees, inter-state treaties, and international covenants with the Constitution. The Supreme Court shall have the authority to interpret the Constitution, laws, and decrees." The laws to be applied by the Supreme Court in the exercise of its jurisdiction to decide cases and to review laws are in the first instance the provisions of the Constitution and other laws. However, Article 130 (2) also contemplates situations in which both Constitution and other laws do not cover the issues to be decided providing that "When there is no provision in the Consti-

tution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner". A special provision has been made with respect to the personal law of Shias where in the absence of applicable constitutional or statutory provisions the law of the Shia sect will apply [Article 131].

On the face of it the Constitution provides for an independent judiciary. The Supreme Court as the country's apex court has been endowed with decisive powers. In fact, its powers exceed that of supreme courts in many other Islamic countries: the judicial review jurisdiction when read in conjunction of Article 3, which provides that no law can be contrary to the beliefs and provisions of the sacred religion of Islam, enables the Supreme Court to review laws on the basis of Islam. The Constitution does not expressly provide for a power to strike down laws deemed to be repugnant to Islam using instead the phrase "to review compliance" and "to interpret them in accordance with the law". However, it could be argued that one such interpretation may be that the un-Islamic law would not be applied at all. In such a scenario the Constitution would oblige the Supreme Court to apply Hanafi law to the case unless both parties are Shias and it is a matter of personal law. Thus, the Supreme Court has considerable powers to review legislation on the basis of Islam albeit that *locus standi* for its original review jurisdiction is confined to the state and that there is no provision for the *suo moto* exercise of this jurisdiction. Nevertheless, issues of compliance with Islamic law could reach the Supreme Court from other courts in the exercise of its appellate jurisdiction.

The experiences of Afghanistan's neighbours Pakistan and Iran suggest that the power to review legislation on the basis of Islam increases the power of the courts to a considerable and necessarily unpredictable extent¹³. The unpredictability is caused by the very wide range of interpretations of what is and what is not considered to be Islamic on the hand and the personal religious convictions of a judge on the other. Thus even fundamental questions like, in the case of Pakistan, whether or not the punishment of stoning to death is in accordance with Islam, has been considered controversial by the Pakistani judiciary.¹⁴ In Pakistan the government regained control over the process of judge-led Islamisation of the legal system by reducing the independence of the judiciary so that judges who appeared to zealous could be transferred or removed altogether.

Afghanistan's experiences with an independent judiciary have been very limited. The 1964 Constitution provided for an independent judiciary but "in reality, in the short time it had, achieved neither independence nor coherence".¹⁵ Thus, a truly

¹³ See Martin Lau, Article 2A, the Objectives Resolution and the Islamisation of Pakistani Laws, in: Hans-Georg Ebert/Thoralf Hanstein (eds.), *Beitraege zum Islamischen Recht III*, 2003, 173-204.

¹⁴ Cf. *Hazoor Baksh v. The Federation of Pakistan*, PLD 1981 FSC 145 declaring the punishment to be un-Islamic and the reversal of that decision in *The Government v. Hazoor Baksh*, PLD 1983 FSC 255.

¹⁵ Chirs Johnson/William Maley/Alexander Their/Ali Wardak, *Afghanistan's Political and Constitutional Development*, London 2003, 24.

independent judiciary is a novel experience for Afghanistan. However, the past two years have thrown serious doubts over both the independence and the coherence of the judges of the Supreme Court. In respect of independence the current Chief Justice of the Supreme Court himself has been criticized in a report of the International Crisis Group¹⁶. The report points out that Chief Justice Fazl Hadi Shinwari is a close associate of Abd Sayyaf, the leader of the puritanical, Saudi funded Ittihad-i-Islami party, and that there has been speculation that his appointment was a concession to Sayyaf, who did not get a cabinet post in the interim government.¹⁷ There is no doubt that Chief Justice Shinwari's views of Islam are conservative and there is the very real possibility that he would exercise the Supreme Court's judicial review jurisdiction to weaken legal reforms aimed for instance at the improvement of the legal position of women.

The constitutionally well protected Supreme Court may thus have a destabilizing effect on the legal system; a result not contemplated by the Constitution or its drafters. In the context of Afghanistan, and also many other Muslim countries, the political struggle over the role of Islam in the state entails also a legal one capable of striking at the very roots of the legal system. The issue of Islam manifests itself most clearly in the legal system of a country: is the legal system in accordance with Islam? In Afghanistan Islam has been used for political mobilization for a very long time. In fact, the civil war against Russian occupation was fought in the name of Islam as was the Taliban's justification for the imposition of its rule over the country. In the current constitutional setting any potential conflict between Afghanistan's international obligations and Islamic law will ultimately have to be resolved by the Supreme Court whose powers are considerable.

Conclusion

A strong and independent judiciary can have a destabilizing effect on a legal system whose very foundations are unsettled and considered controversial. The case of Pakistan can serve as good illustration: the controversies over the role of Islam in the legal system was summarized by the Pakistani Supreme Court as having given "[...] rise to a controversy and a debate which has had no parallel, shaken the very constitutional foundations of the country, made the express mandatory words of the Constitutional instrument yield to nebulous, undefined, controversial juristic concepts of Islamic Fiqh. It has enthused individuals, groups and institutions to ignore, subordinate and even strike down at their will the various Articles of the Constitution by a test of what they consider the supreme Divine Law, whose supremacy has been recognized by the Constitution itself."¹⁸ A similar controversy

¹⁶ ICG, Afghanistan: Judicial Reform and Transitional Justice, ICG Asia Report No. 45, 28 January 2003, 10.

¹⁷ Ibid.

¹⁸ *Hakim Khan v. Government of Pakistan*, PLD 1991 SC 595, at 629.

could have a potential devastating impact on the stability of the legal system. In Pakistan, a combination of measures resolved the controversy. Judges of the Supreme Court imposed a ban on any court to declare laws to be invalid on the basis of Islam with the exception of the Federal Shariat Court itself, which had been given a limited jurisdiction to review laws on the basis of Islam by the Constitution itself. The jurisdiction of the Federal Shariat Court excluded important areas of law like the Constitution and personal laws. At the same time the selection and appointment of the judges to the Federal Shariat Court ensured that its judges were less likely to strike down legislation on the basis of Islam.

In the case of Afghanistan both the independence and the qualification of its judiciary are at issue. A Supreme Court dominated by judges close to conservative Islamic parties and trained exclusively in Islamic jurisprudence sits uneasily with a government which is supported by an international community not committed to the same Islamic values. Law reform could be severely hampered by a Supreme Court intent on striking down every law it deems to be repugnant to Islam. The wide judicial review powers could trigger a drawn out struggle between the government and the Supreme Court as was the case in India where the Supreme Court's enforcement of constitutionally guaranteed fundamental rights slowed down the attempts of the Nehru government to implement land reform legislation.¹⁹

Both the selection and the training of the judges of the Supreme Court of Afghanistan will therefore play an important role in the reconstruction of the country's legal system. The gradual extension of the government's control of areas other than just Kabul and its immediate surroundings will bring with it the expansion of the formal legal system and eventually the rule of law. A Supreme Court which shares the values expressed in the Constitution would be able to contribute constructively in the rebuilding of the country. Important legal issues fall to be decided including the status of the land reform laws of the 1970s and 1980s and the legal status of those accused of having committed crimes against humanity. Equally, a strong and impartial Supreme Court will ensure that future governments abide by the Constitution and that constitutionally guaranteed fundamental rights become a legal reality. A Supreme Court exclusively concerned with questions of religion would fail to realize the importance of its position to the reconstruction of Afghanistan.

¹⁹ See for instance P.K. Tripathi, "Kesavananda Bharati v. State of Kerala: Who wins?," in: 3 Supreme Court Cases (Journal) (1974).

ZaöRV 64 (2004)