

MAX PLANCK INSTITUTE  
FOR COMPARATIVE PUBLIC LAW  
AND INTERNATIONAL LAW

Directors: Professor Dr. Armin von Bogdandy · Professor Dr. Dr. h.c. Rüdiger Wolfrum



In Cooperation With

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**Institut International  
de Paris La Défense**

**Max Planck Manual on Fair Trial Standards  
in the Afghan Constitution,  
the Afghan Interim Criminal Code for Courts,  
the Afghan Penal Code and other Afghan Laws as well as  
in the International Covenant on Civil and Political Rights**

3rd Edition  
(October 2006)

**Alexandra H. Guhr, Ramin Moshtaghi, Mandana Knust Rassekh Afshar**

With the support of  
Dr. Tilmann J. Röder, Dr. Silvia Tellenbach, MdC Dr. Fabrice Defferrard,  
Mihan Rouzbehani, Joseph Windsor

Funded By  
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## ABBREVIATIONS

AC	Afghan Constitution
APC	Afghan Penal Code
CNL	Counter Narcotics Law
CRC	Convention on the Rights of the Child
HRC	Human Rights Commission
ICCC	Interim Criminal Code for Courts
ICCPR	International Covenant on Civil and Political Rights
JC	Juvenile Code (also called: Law of Investigation on Children's Violations)
LPDC	Law on Prisons and Detention Centres
LP	Law of the Police
LSCC	Law on the Structure and Competencies of Courts (also called: Law on the Organisation and Jurisdiction of Courts)

## Introduction

One of the cornerstones of the rule of law is the notion of the right to a fair trial. The right to a fair trial is a fundamental principle in the field of human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the rights to life and liberty. The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him. The principle of a fair trial is the core of the civil and criminal procedures. This manual only deals with the fair trial principle in criminal procedural law. Here the principle of fair trial is put in concrete terms of certain rights such as the right to remain silent, the prohibition of double jeopardy etc. However, the principle is broader than the sum of these individual guarantees. It is designed to ensure that all individuals are protected by law throughout the criminal process, from the moment investigation or detention begins until the final disposition of their case. This means that the right to a fair trial also encompasses the notion that each individual must be able to make use of his procedural rights, regardless of his individual capabilities. For example, a mentally handicapped person must be given the necessary assistance to be heard by a judge and make use of his right to an adequate defence. If the individual situation is not taken into consideration, this may lead to a violation of procedural rights – even if the standard procedures are upheld. One of the most prominent and important criteria, underlying the right to a fair trial as a whole, is the guarantee of equality of arms between the prosecution and the defence. In essence, this means that the defendant must be granted such rights as to offset the structural disadvantages he has in comparison with the prosecutor. The prosecutor – or in Afghanistan the Primary Saranwal – as an organ of the State, has the full range of the State's authority and means at his disposal. The concept of the equality of arms inherent in the right to a fair trial therefore has the function of compensating for this structural disadvantage of the defendant. It is reflected in most of the specific principles discussed in this manual. For example, it affects the right to counsel, the right to an adequate defence and the right to an independent and impartial judge. Equality of arms is not maintained if the accused is excluded from an appellate hearing when the prosecutor is present. It is also not achieved when procedural rights, such as inspection of records or submission of evidence, are not granted in an equal manner to both parties. In both cases, the principle of the right to an adequate defence is violated.

This manual was compiled to identify those norms of the Afghan Constitution (AC) and Afghan criminal laws and criminal procedure that deal with fair trial standards. These are discussed with reference to those international standards by which Afghanistan is willing to abide under the Constitution, especially the International Covenant on Civil and Political Rights (ICCPR). Afghanistan acceded to the ICCPR on 24 April 1983:

**Art. 7 (1) of the Constitution:**

The state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

Afghanistan's international legal obligations under Arts. 9, 10 and 14 of the ICCPR entail a right of all persons to a fair trial. These rights have a basis in Afghan national law as well, as will be shown in the following chapters.

The manual is structured in the following manner. Before the various stages of judicial proceedings with the relevant fair trial standards are addressed, the general principles which are applicable at all stages of the proceedings are discussed in Chapter I. Chapter II concerning the pre-trial proceedings does not focus on issues in the same detail as the other chapters, as all the relevant principles that would have to be discussed are already covered in Chapter I concerning the General Principles. Chapter III covers the trial phase while Chapters IV and V deal with the post-trial phase and special cases, i.e. cases involving minors and mentally handicapped persons, respectively. Each chapter contains separate sections for each fair trial principle. Each of them is divided into several subsections. These begin with short cases focusing on the principle in question followed by the elaboration of the relevant Afghan laws and a commentary on the principle in Afghan and international law. The cases and the comments on them do not attempt to deal exhaustively with all the problems raised. They are rather designed as an introduction to the topic and act as focal points for discussion. Lastly, norms and, where appropriate, judgements from other Islamic or Muslim countries are cited in order to show parallels with or differences from the Afghan laws, but are not commented upon. This structure, with slight variations, is upheld throughout the manual. The exceptions are Chapter II (see above), Chapter III Section A (Access to courts), which is divided into two parts, and the Special Cases in Chapter V. After each section, proposals for a discussion touching on the significance of the rights and the main problems that may arise in practice are given.

In the second part of the manual eight cases are elaborated and analysed in detail. Each of these cases touches on several fair trial principles. These cases have been designed to facilitate in-depth discussion on the respective principle and its interaction with other principles. In addition, they can be used as models for moot courts during classes.

When speaking of legal regulations passed in the interim period according to Art. 159 AC the term “law” is used as in the Dari terminology. This terminology is maintained in the English translation to reduce the risk of confusion, although according to Art. 94 (1) AC these regulations are not laws in the formal sense, but governmental decrees.

For simplicity, the masculine pronoun is used throughout the manual document. The contents, however, apply equally to men and women.

# Part 1: Fair Trial Standards

## Chapter I: General Principles Applicable in All Stages

All the principles discussed in this chapter are relevant for every stage of the judicial proceedings. They have to be upheld in the pre-trial, the trial and the post-trial stages. A failure to do so has consequences for the further proceedings. For example, if confessions or witness statements are obtained through a violation of the prohibition of torture in the pre-trial stage, they become inadmissible and therefore lose their relevance as evidence during the following proceedings. This is the case according to respective international standards as well as the Afghan legal norms. It is, therefore, of utmost importance to keep in mind the applicability of all of the following principles during all stages of the proceedings, along with those specifically applicable in each particular stage.

At all times and during all stages of the proceedings, the suspect or the accused has the possibility of challenging procedural issues by recurring to Art. 16 Interim Criminal Code for Courts (ICCC), which allows for redress in the case of procedural violations:

### Art. 16 Interim Criminal Code for Courts

1. All the violations of procedural provisions different from those indicated in the previous article bring about the invalidity of the procedure only if they are denounced by the interested party.
2. When the denunciation is made during the investigations or the trials the responsible judicial authority shall make decisions to redress the procedure whenever possible.
3. In any case the denunciation can be made in the appeal or in the recourse to the Supreme Court.
4. The Appeal Court or the Supreme Court declares the invalidity of the procedure whenever it appears that the violations of procedural provisions have provoked relevant distortions in the decision of the case.

Art. 15 ICCC is an exceptional norm which safeguards the rights of the suspect/accused and the legality of the proceedings in the case of especially blatant violations of procedural rules. The suspect/accused is not obliged to challenge the legality of the proceedings, although he is free to do so:

### Art. 15 Interim Criminal Code for Courts

1. The criminal procedure is considered null and so declared, even ex officio, when:
  - a. The persons who have acted as judges or Saranwal did not possess the related legal status;
  - b. The procedure has not been instituted by the Saranwal and when he has not been present in cases in which his presence is mandatory.

Another safeguard provided for in the Constitution is Art. 58, which allows for an additional control mechanism that can be initiated through the Human Rights Commission (HRC), which is independent of the judiciary. This Commission was established by presidential decree on 6 June 2002. It is not specifically or exclusively responsible for fair trial rights – it can investigate violations of all fundamental rights of Afghan citizens. In addition to seeking redress before the courts on an individual initiative, a suspect/accused therefore has the option of seeking assistance from the HRC concerning his rights during judicial proceedings. The

HRC can then refer cases to the legal authorities, i.e. the courts, and assist in defending the rights of the complainant:

**Art. 58 Afghan Constitution**

- (1) The State, for the purpose of monitoring the observation of human rights in Afghanistan, to promote their advancement [behbud] and protection, shall establish the Independent Human Rights Commission of Afghanistan.
- (2) Any person, whose fundamental rights have been violated, can file complaint to the Commission.
- (3) The Commission can refer cases of violation of human rights to the legal authorities, and assist in defending the rights of the complainant.
- (4) The structure and functions of this Commission shall be regulated by law.

Absolutely essential for all principles, not only the general ones, but for all rights granted throughout the proceedings, is that the suspect/accused is informed of these rights. Without notification, the lay person in conflict with the judicial authorities will have no means to protect his rights. The relevant norms are listed under Chapter III Section E. A principle which could also have been dealt with in the Chapter I “General Principles” is the right to an interpreter/the right to translation. As this usually becomes relevant during the trial, it has been dealt with in Chapter III Section H.

## **A. Equality before the Law and Equal Treatment by the Law**

- a) Ahmad (A) a moneychanger has robbed his colleague Babor (B) of his possessions. The Saranwal, who is an old friend of A learns about the offence from the police but decides to drop the investigations due to the old friendship. Which violations of law and fair trial principles can you identify?
- b) Alem (A) an old hero of the war hits Osman (O) badly during a dispute over farming rights. O has to stay for a couple of days in the hospital. At trial the judge drops the charges due to the merits of A in the war. Is the decision of the judge in conformity with the principle of equality before the law?

### **a) Relevant Provisions**

#### **Art. 22 Afghan Constitution**

- (1) Any kind of discrimination and privilege between the citizens of Afghanistan is prohibited.
- (2) The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.

#### **Art. 1 Afghan Penal Code**

This Law regulates the “Ta’zeeri” crime and penalties. Those committing crimes of “Hudud”, “Qisas” and “Diyat” shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).

#### **Art. 22 Interim Criminal Code for Courts**

1. The Primary Saranwal has the obligation to introduce the penal action for prosecution of all crimes, known directly by him or reported to him, committed in the territory of the District, unless otherwise expressly provided by law.
2. The Saranwal shall not dismiss or suspend a case except as otherwise provided by the law.

#### **Art. 14 Law on the Structure and Competencies of Courts**

. . . Proceedings and issuance of decisions of the courts will be based on the principle of equality before the law and the court and must be in conformity with justice and neutrality.

#### **Art. 50 Counter Narcotics Law**

3. Informants may not participate in the commission of drug trafficking offences in connection with criminal investigations without prior authorization from the appropriate law enforcement authorities. An informant who strays from the instruction of the responsible authorities while conducting or participating in a criminal activity is subject to prosecution for any offence committed by himself.

#### **Art. 2 International Covenant on Civil and Political Rights**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Art. 14 International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals . . .

**Art. 26 International Covenant on Civil and Political Rights**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## **b) Comment on Equality before the Law and Equal Treatment by the Law**

The right to equality before the law and equal treatment by the law means that discrimination is prohibited throughout the judicial proceedings, including the pre-trial, trial, and post-trial stages. While judges and officials may not act in a discriminatory manner when enforcing the laws, and while they must ensure that the rights of all, both men and women, are equally protected by the courts, this does not necessarily entail identical treatment. Prohibited are only those distinctions that are not based on reasonable and objective criteria. Art. 22 of the Afghan Constitution (AC) clarifies that gender cannot be such a criterion to justify different treatment in the course of proceedings. This principle of equality also includes the right to equal access to the courts for all citizens of Afghanistan. Men and women must, therefore, be granted the same opportunities to effectively claim their rights. Hence, a curtailment of the right to access to court for women is unconstitutional, a fact which has to be stressed particularly due to the problems women are still facing in that regard.

In the case of criminal proceedings, the defence and the prosecution must have equal opportunities to prepare and present their cases during the course of proceedings (see also Chapter III Sections E, F, and H.). The rights of the suspect or the accused have to be equally ensured, regardless of the quality of the offence in question. A suspect/accused is entitled to be treated equally with other similarly situated suspected/accused people. Different treatment before, during, or after the trial must be justified by objective facts. Facts that cannot justify different treatment are, among others, gender, religious or political beliefs and ethnicity. This is relevant for the treatment of the suspect by the police, the Saranwal, and the judge before the trial, during the trial and after the trial.

Different treatment based on religious belief, i.e. a different treatment of Muslims and non-Muslims, is generally prohibited by the Afghan Constitution. Art. 22 AC prescribes equal treatment of all Afghans, regardless of religious belief. As there is no differentiation between Muslims and non-Muslims, the laws are equally applicable to both. An exception to the concept of equal treatment in the Constitution before the law can be found in Art. 131 AC:

“Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of the Shia Sect in accordance with the provisions of law.

In other cases if no clarification by this Constitution and other laws exists and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect.”

However, this article should not be understood as a violation of the principle of equality, but should rather be understood as the intention to ensure a special protection of minorities and their beliefs. It carries no weight in the criminal law context as criminal issues are never merely “personal matters”. This article is therefore only of relevance in the civil law context.

Another exception to the principle of equal treatment can be found in Art. 8 of the Afghan Penal Code (APC), whereby diplomatic representatives who commit crimes in Afghanistan are to be treated in accordance with the regulations of international law. According to Art. 41 of the Vienna Convention on Diplomatic Relations<sup>1</sup>, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. However, they are granted privileges and immunities in Arts. 29-36 of that same convention, among them immunity from the criminal jurisdiction of the receiving State and the privilege of not being obliged to give evidence as a witness.

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<sup>1</sup> Afghanistan became a party to the convention on 06 October 1965, and it entered into force in Afghanistan on 05 November 1965.

In accordance with Art. 11 APC, other people who are not Afghan citizens but are staying or residing in Afghanistan are considered as subjects of Afghanistan for the purposes of the Penal Law, unless otherwise specified by that law. They are, thus, subject to the same treatment.

Art. 22 ICCC ensures that there is no discrimination when criminal proceedings are initiated – selective prosecution is prohibited. All those suspected of committing crimes must be treated equally, regardless of their wealth, status, religious or political beliefs, ethnicity, gender or personal relationship to anyone working in the judicial services.

A questionable norm concerning equality before the law and Art. 22 ICCC is Art. 50 (3) Counter Narcotics Law (CNL). This regulation implicitly contains an impunity regulation for informants working together with the drug enforcement agencies. Under the condition of a prior authorisation from the law enforcement agencies informants may take part or conduct criminal activities in the field of drug trafficking without being liable to prosecution and punishment as long as they do not deviate from the instructions of the authorities in charge. However, the principle of equality before the law does not ask for equal treatment in every case. If there are reasonable grounds, it is acceptable to apply different regulations. Combating narcotic substances and the prosecution of drug trafficking crimes are of high importance in a state based on the rule of law. On the other hand, it has to be considered that the commission of crimes sanctioned by state authorities is not to be taken lightly, since a state based on law and legality has to beware of becoming itself involved in illegal acts. Due to these considerations, even in the field of drug trafficking criminality there is no international consensus regarding the permission of informants and undercover agents to take part in the commission of criminal acts themselves. For instance in Germany, no one is permitted to take part in criminal acts without being liable to prosecution, no matter if he is an agent of the law enforcement agencies or an informant, whereas in the United States such a possibility exists.<sup>2</sup> The provision in question does not constitute per se a transgression of the principle of equality before the law. Nevertheless, the possibility to give authorisation for criminal acts has to be used very cautiously. A derogation from the principle of strict criminal liability cannot be reasonably justified as long as there are other possibilities, which equally benefit the investigation and actions of the law enforcement agencies.

The concept of equality is anchored in many constitutions of Muslim States as well as in the Cairo Declaration on Human Rights in Islam. The pursuit of justice and equality is an ideal that governs the conduct of all State authorities including the judiciary.<sup>3</sup>

*One problem that arises in the Afghan law context is Art. 1 APC, which states that this law regulates the ta'zeeri crimes and penalties. "Those committing crimes of Hudud, Qisas and Diyat shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence)." Thus, the Shari'a in the form interpreted by the Hanafi school of law is to be applied. One problem that this article poses is that Art. 27 AC states that no act is considered a crime unless determined by a law adopted prior to the date the offence is committed. The Shari'a is not codified Afghan law so that Art. 27 AC could be*

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<sup>2</sup> In the U.S.A. in most of the individual states the prosecution has the discretion to waive criminal prosecutions in the case of informants. This power is regularly used when informants take part in criminal activities in order to facilitate information for the law enforcement agencies.

<sup>3</sup> Abd-el-Malek al Saleh, Osman, "The Right of the Individual to Personal Security in Islam", in: M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (New York: Oceana, 1982), p. 80.

*interpreted to exclude its applicability. However, even if one interprets Art. 27 AC to include the Islamic law norms concerning hudud, qisas and diyat, since both the elements of crimes and their consequences are clearly regulated in the Shari'a, and are thus foreseeable despite the fact that they are not codified in the Afghan laws, the problem of equal treatment arises. According to the Hanafi jurisprudence, non-Muslims are not to be punished in the same way for some of the hudud crimes. In practice, some legal experts in Afghanistan state that everyone should be treated in the same manner – regardless of whether they are foreigners, Afghans, Muslims or non-Muslims, even though this is not in conformity with the Shari'a. How non-Muslims are to be treated is, therefore, not totally clear. It appears to be the case that there is no uniform treatment of the problem and that not even the norms of the Shari'a are being adhered to in a consistent manner. In addition, even if the Shari'a laws were to be applied in a consistent manner, this would lead to the necessary enforcement of punishments, for example stoning to death, that are not in accordance with the Constitution.*

*Furthermore, differences arise concerning the standards and requirements of evidence. For example, evidence presented by non-Muslims against Muslims is not admitted at all in some cases. In the case of hudud and qisas crimes the weight of evidence given by women is half of the weight given to evidence brought forth by men.*

*This is not in accordance with Art. 22 AC, according to which any kind of discrimination between Afghan citizens is prohibited and men and women have equal rights and duties before the law.*

*How practitioners are to handle the problem is therefore not clear. It is to be expected that a discussion concerning Art. 3 AC, according to which “in Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam”, will also arise.*

*In more general terms, the principle of universal justice and equality is ordained in the Qur'an as well as the Tradition of the Prophet, leading Islamic jurists to conclude that the judge is obligated to treat all who come before him in a fair and impartial manner without discrimination.<sup>4</sup>*

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<sup>4</sup> Ibid., p. 80. Qu'ran: “Oh mankind! Lo, we have created you male and female and have made you nations and tribes that you may know one another. Lo, the noblest of you in the sight of Allah is the best in conduct.” Surat al-Hujurat XLIX:13.

Comment on the cases:

a) Art. 22 ICCC establishes the principle of mandatory prosecution. The Saranwal is obliged to start investigation in all cases where he is informed that a crime may have occurred. Exceptions have to be expressly stated by law.

The Saranwal was informed by the police about the offence of A, but dropped the case due to his old friendship. Since there is no exception like this provided by the law, this constitutes a breach of the principle of equality before the law and thus a violation of Art. 22 ICCC.

b) According to Art. 22 AC and Art. 14 of the Law on the Structure and Competencies of Courts (LSCC) the courts have to apply the principle of equality before the law in their proceedings and decisions. Discrimination or privilege between the citizens of Afghanistan is prohibited.

The court dropped the case of A and thereby effectively excluded him from prosecution and punishment because of his merits in the war. This privilege would only be justified if there was an objective reason for the different treatment. High prior merits of a person cannot justify the violation of rights of others or of the society.

Therefore the judge violated the provisions of law named above as well as the principle of equality before the law.

## **c) Comparative Law**

### **Art. 40 Constitution of Egypt**

All citizens are equal before the law. They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed.

### **Art. 20 Constitution of Iran**

All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria.

### **Art. 14 Constitution of Iran**

In accordance with the sacred verse: (“God does not forbid you to deal kindly and justly with those who have not fought against you because of your religion and who have not expelled you from your homes” [60:8]), the government of the Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.

### **Art. 19 Constitution of Iran**

All people of Iran, whatever the ethnic group or tribe to which they belong, enjoy equal rights; and colour, race, language, and the like, do not bestow any privilege.

### **Art. 7 Constitution of Lebanon**

All Lebanese are equal before the law. They equally enjoy civil and political rights and equally are bound by obligations and duties without any distinction.

### **Art. 5 Constitution of Morocco**

All Moroccan citizens shall be equal before the law.

### **Art. 25 Constitution of Pakistan**

(1) All citizens are equal before law and are entitled to equal protection of law.

### **Discussion proposal:**

- Taking a look at Art. 22 AC and Art. 1 APC, what experience have the participants gathered with proceedings concerning foreigners, women or members of different tribal groups?
- What do the participants think about equal access to courts for women? If they do have objections, what are their motives?
- Can the participants think of a situation in which a different treatment between followers of different religion is allowed?

## **B. Non-Retroactivity of Criminal Law / Legality of Crimes and Sanctions**

a) Farida (F) is a young Afghan woman. On 10 June 2005 she wears a simple scarf while she is going for a walk. On 12 June 2005 she is arrested because of the accusation of her jealous cousin. F does not understand what is happening to her. She is informed that since 11 June 2005 not wearing a burka is punished with an administrative fine of 1000 Afghanis.

Does F have to pay the fine?

b) Ahmad (A) kills his wife on 2 February 2005, because he finds out that she has cheated on him with his best friend. He is arrested by the police and is put on trial in Kabul. At the time the crime is committed the punishment for murder foreseen by the APC is the death penalty. On 30 September 2005 the death penalty is abolished.

Which punishment has to be applied, if the trial is taking place after the abolishment of the death penalty?

c) Tamim (T) is waiting at the post office in Kabul. Since he is bored with the slow proceedings there he winks at Fateme (F) who is standing in another queue. Ruhollah, a police officer, is witness to the act and wants to arrest T. Is he authorised to do so?

### **a) Relevant Provisions**

#### **Art. 27 Afghan Constitution**

- (1) No act is considered a crime unless determined by a law adopted prior to the date the offence is committed.
- (2) No person can be punished but in accordance with the decision of an authorised court and in conformity with the law adopted before the date of offence.

#### **Art. 2 Afghan Penal Code**

No act shall be considered a crime, but in accordance with the law.

#### **Art. 3 Afghan Penal Code**

No one can be punished but in accordance with the provisions of the law which has been enforced before commitment of the act under reference.

#### **Art. 21 Afghan Penal Code**

- (1) A person committing a crime is punished in accordance with a law that is in force at the time of commitment of the act, except when before pronouncement of the final verdict a new law which is in favour of the accused comes into force.
- (2) If a law comes into force after the pronouncement of the final verdict which does not consider the act for which the person committing it has been sentenced to a punishment, execution of the sentence shall be suspended and the penal effects based on it shall be removed.

#### **Art. 22 Afghan Penal Code**

If a person is sentenced to punishment for an act under a temporary law whose enforcement expires on a certain date, the expiration of the enforcement of the temporary law does not hinder proceeding of the trial and implementation of the punishment.

**Art. 130 Afghan Constitution**

- (1) While processing the cases, the courts apply the provisions of this Constitution or other laws.
- (2) When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accordance with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.

**Art. 15 International Covenant on Civil and Political Rights**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

## **b) Comment on the Non-Retroactivity of Criminal Law / Legality of Crimes and Sanctions**

The principle of non-retroactivity of criminal law is one aspect of the principle of “legality of crimes and sanctions” and is applicable in all stages of the judicial proceedings. According to this principle, only such actions are deemed criminal which have been defined as crimes by a law in force at the time of the action. The principle therefore contains two elements:

- 1) Actions that are not defined as a crime cannot be the basis for investigations, prosecution, sentencing or punishment.
- 2) In the case of legal reforms, no one can be prosecuted for an action that was not a crime at the time of action, even if it is later defined to be a crime.

This principle is internationally recognised by Art. 15 of the International Covenant on Civil and Political Rights (ICCPR) and ensures legal predictability and certainty. It is an absolute prerequisite for the rule of law, whereby individual liberties are protected against arbitrary and unwarranted intrusion of the State. This gives rise not only to the prohibition of retroactive criminal laws in the narrow sense but also to a general duty of state parties to define precisely by law all criminal offences in the interest of legal certainty and to preclude the extension by analogy of the scope of criminal laws. The definition of an offence under national law must result from a law in the strict sense of a general-abstract parliamentary law or an equivalent, unwritten norm of common law, which must be accessible to all persons subject to it.<sup>5</sup> The scope of the principle of legality of crimes and sanctions relates to all criminal offences, that is, to acts and omissions likewise. Art. 15 ICCPR prohibits not only the application of retroactive criminal law in criminal tribunals but also the imposition of a penalty that was not provided for under national or international law at the time the offence was committed. Moreover, a penalty heavier than the one that was applicable at the time the offence was committed may not be imposed.

However, this principle does have exceptions in favour of the accused. It is absolute only for the protection of accused persons. If the new law is more favourable for the accused than the old one under which the crime took place, this beneficial criminal law may be applied retroactively. This is called retroactivity of the most favourable law for the benefit of the accused.

The new Afghan Constitution has implemented the principle of non-retroactivity in Art. 27 AC. It is not clear if exceptions are allowed under the Constitution. However, Art. 21 of the Afghan Penal Code of 1976, which is presently in use, confirms the applicability of amended criminal laws benefiting the accused. Considering that this penal code was implemented despite the fact that the Afghan Constitutions of 1964 (Art. 26), 1976 (Art. 30), 1987 (Art. 41) and 1990 (Art. 41) all contained the principle of non-retroactivity, one may assume that such an exception benefiting the accused will continue to be allowed under the new Constitution.

*Islam already established this principle fourteen centuries ago: the Qur'an states that no one accused of a crime can be punished unless he has been forewarned of the criminal nature of his conduct.<sup>6</sup> As a consequence, most Muslim States have incorporated this principle in their*

<sup>5</sup> Nowak, CCPR Commentary, 2005, p. 360.

<sup>6</sup> Al Saleh, supra, p. 58, 59, 63. Qu'ran: “We never punish until we have sent a messenger” Surat Bani Isra'il XVII:15; “Messengers of good cheer and warning [were sent] in order that mankind might have no argument against Allah after the messengers. Allah is ever mighty and wise” Surat al-Nisaa IV:165; “And never did thy Lord destroy the towns until he had raised up in their mothertown a messenger reciting unto them” Surat al-Qasas XXVIII:59; “That I may warn you therewith, you and whomsoever it may reach” Surat al-An'am VI:19; “Every nation had its messenger raised up to warn them” Sura al-Fatir XXXV:25.

*constitutions (see below). Islamic law<sup>7</sup> also recognises that criminal law may be applied retroactively if the new law is more favourable for the accused than the old one under which the crime took place.*

Comment on the cases:

a) Art. 27 AC as well as Arts. 2 and 3 APC regulate the non-retroactivity of law. An act can only be considered a crime, if it is prohibited by a law adopted prior to the offence committed. The new law came into force on 11 June 2005. The act in question was committed on 10 June 2005. Thus on that date the wearing of a scarf did not constitute an offence and F cannot be punished for not wearing a burka. F does not have to pay the fine.

b) To answer the question whether A will be sentenced to death, it is necessary to find out which law was applicable at the time the court passed its sentence. The question of applicability of law is regulated in Art. 21 APC. According to that norm, the applicable law for the punishment of a criminal is the law that was in force at the time of the commitment of the act, except when before pronouncement of the final verdict a new law which is in favour of the accused comes into force. At the time A committed the murder the death penalty was in force. However at the time of his trial, the death penalty had been abolished. Thus, the new law in favour of A is applicable and he cannot be sentenced to capital punishment.

c) There is no criminal law prohibiting winking at a woman in the Afghan Penal Code or in any other source of criminal law. Hence, the police officer is not competent to arrest T. Even if one would deem the act of T morally condemnable this may not justify criminal prosecution. An essential prerequisite for criminal prosecution is a clear and unambiguous formal law.

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<sup>7</sup> Ibid. p. 63. In the Qu'ran, prohibitions of practices and crimes did not apply for actions taken in pre-Islamic times. For example: usury (Surat al-Baqarah II:275), marriage of one man to two sisters at the same time (Surat al-Nisaa IV:23), marriage of a man to his father's wives ("And marry not those women whom your fathers married, except what hath already happened in the past [of that nature]. Lo! It was ever lewdness and abomination, and an evil way." Surat al-Nisaa IV:22).

## c) Comparative Law

### **Art. 66 Constitution of Egypt**

Penalty shall be personal. There shall be no crime or penalty except by virtue of the law. No penalty shall be inflicted except by a judicial sentence. Penalty shall be inflicted only for acts committed subsequent to the promulgation of the law prescribing them.

### **Art. 169 Constitution of Iran**

No act or omission may be regarded as a crime with retrospective effect on the basis of a law framed subsequently.

### **Art. 8 Constitution of Lebanon**

**Line 3:** No offence may be established or penalty imposed except by law.

### **Art. 4 Constitution of Morocco**

**Line 3:** The law shall be the supreme expression of the will of the Nation. All shall abide by it.

The law shall have no retroactive effect.

### **Art. 12 Constitution of Pakistan**

(1) No law shall authorise the punishment of a person:

- (a) for an act or omission that was not punishable by law at the time or the act or omission; or
- (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Art. 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence.

See also Art. 32 Constitution of Kuwait, Art. 20 Constitution of Bahrain, Art. 27 Constitution of the United Arab Emirates.

### **Discussion proposal:**

- Do the participants have experience with proceedings based on tribal or religious law?
- Do they ever receive cases that have previously been dealt with by a religious or tribal leader?
- What do they think is more widely accepted by Afghan citizens: Jirgas or state courts?
- What are the benefits of precise statutory law?
- What is the problem if laws are formulated in a very vague way?
- Why is it problematic if analogies and unwritten codes of conduct are used as a base for criminal prosecution and punishment?
- What do the participants think about the importance of the principle?

## C. Presumption of Innocence

a) Ahmad (A) is suspected of having killed Babor (B). As the judge is convinced of A's guilt, he orders pre-trial detention. Has the judge breached the law by his decision?

b) Hasan (H) is accused of having robbed Fateme (F). Although evidence is scarce and the judge is not convinced whether H committed the deed or not he sentences him to a prison term. The judge assumes that since there is the possibility that H might commit further crimes, the danger that H constitutes for society is justification enough for his detention. Is this decision compatible with the law and fair trial principles?

Alternative: The judge is not convinced of H's guilt at all; he rather thinks that Osman (O), the brother of H, is the true offender. However, H makes a confession to having committed the crime. Due to this confession, the judge sentences H to a prison term. Which violation can you identify?

### a) Relevant Provisions

#### **Art. 25 Afghan Constitution**

- (1) Innocence is the original state.
- (2) An accused is considered innocent until convicted by a final decision of an authorised court.

#### **Art. 4 Interim Criminal Code for Courts**

From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

#### **Art. 6 Interim Criminal Code for Courts**

1. The terms for the duration of provisional detention following the arrest during the investigative phase are those established in article 36.
2. During the trial at the Primary level, the Court can extend the detention for two additional months; during the trial at the appeal level the Court can extend the detention for another two months term; during the trial before the Supreme Court the detention can be further extended by the same Court for additional five months.
3. When, during the above mentioned trials, the related terms expire, the arrested person shall be released.

#### **Art. 35 Interim Criminal Code for Courts**

1. In the course of the investigations activities the Primary Saranwal can order the arrest of the alleged author of a misdemeanour punishable by medium term imprisonment or felony and seizure of items and goods connected with the crime.
2. The person arrested shall be interrogated within forty-eight hours.

**Art. 36 Interim Criminal Code for Courts**

1. When the arrest performed by the Judicial Police is sanctioned or when the arrest has been ordered by the Saranwal and it remains in force, the arrested person shall be released if the Saranwal has not presented the indictment to the Court within fifteen days from the moment of the arrest except when the Court, at the timely request of the Saranwal, has authorised the extension of the term for not more than fifteen additional days.

**Art. 4 Afghan Penal Code**

- (1) Innocence (acquittal) is the original state. The accused shall be considered innocent as long as he is not convicted by a final verdict of the competent court.

**Art. 14 International Covenant on Civil and Political Rights**

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

**Art. 10 International Covenant on Civil and Political Rights**

2. a. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

## b) Comment on the Presumption of Innocence

The principle of the presumption of innocence is well-established in both international and Islamic law. The Constitution of Afghanistan establishes in Art. 25 that “Innocence is the original state. An accused is considered innocent until convicted by a final decision of an authorised court.” It is clear that the presumption of innocence is a principle that is valid during all phases of criminal proceedings under Afghan constitutional law. During the pre-trial phase the presumption of innocence requires that the measures taken against an accused are proportionate to the gravity of the charges brought against him. Also the objective of the measures are of importance. Every coercive measure taken against an individual in the pre-trial phase must be necessary and proportionate. Therefore, preventive or pre-trial detention must be exceptional and has to be justified by compelling reasons, such as the danger of obstruction of the investigation or of flight. Although Arts. 6, 35 and 36 ICCC are not as detailed as Art. 10 Constitution of Pakistan, they do show that the freedom of an individual who has not yet been found guilty of a crime cannot be arbitrarily restricted (see also Chapter I Section E).

During trial, the presumption of innocence first and foremost requires the impartiality of the judge. The right to the presumption of innocence requires that judges and other public officials refrain from prejudging any case. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial. The authorities therefore have a duty to prevent the media or other powerful social groups from influencing the outcome of a case by pronouncing the alleged guilt of the accused. If there is a risk of “pre-condemnation” by the public, the media coverage of a criminal trial should be regulated during the hearings. For example, it is possible to order the media not to show pictures of the hearing or not to cite the name of the accused. Furthermore, not only the procedural aspects of the premature statements concerning the innocence or guilt of a suspect/accused should be considered. Referring to a suspect/accused as a guilty person before the outcome of the trial may also lead to a stigmatising effect in the social surroundings of that person. This stigmatising effect may not be completely revoked even if the accused is later found to be innocent by the court.

Furthermore, due to the presumption of innocence, the prosecution bears the burden of proof. If there are reasonable doubts remaining after an assessment of the evidence, the accused has to be acquitted (principle of *in dubio pro reo*). Even a confession of the accused cannot be considered definite proof of the guilt of an accused. The court has to be convinced of the truth of the confession and hence of the guilt of the accused.

*In Islam, Man is regarded as originally innocent and pure, and thus every person is presumed to act righteously and honestly until the contrary is proved. This has an impact on questions of evidence: the existing conception of istishab is a presumption in the law of evidence that a state of affairs known to exist in the past continues to exist until the contrary is proved. Consequently, the burden of proof rests upon the prosecution and the accused is accorded the benefit of the doubt. The Holy Prophet Mohammad is said to have referred to the underlying idea of the presumption of innocence with the following words:*

*“Remove punishment as often as you can; and set the accused free if he has a chance, because it’s much better for the judge to be wrong in acquittal than to be wrong in punishment.”*

*“Avert hudud punishments by suspicions or doubts and if the accused has a way out, release him. It is better for the imam to pardon erroneously than to punish erroneously.”*

Comment on the cases:

a) According to Art. 25 AC and Art. 4 ICCC a suspected or accused person has to be considered innocent until a final conviction. Therefore pre-trial decisions cannot be based on the presumed guilt of the suspect. The only justification for limitations of his rights can be the need of collecting evidence and establishing the truth, in other words the protection of the proceedings of the judicial authorities, as stated in Art. 4 ICCC. Hence the judge is not allowed to base his decision on his belief in the guilt of A. He has violated the principle of the presumption of innocence.

b) A consequence of the presumption of innocence is that the burden of proof rests with the prosecution. Thus whenever the court, after finishing the taking of evidence, still has reasonable doubts in regard to the guilt of the accused, he has to be acquitted.

In the case at hand the judge considered it possible that H committed the crime. This is insufficient. The verdict is flawed and constitutes a breach of the presumption of innocence.

Alternative: The burden of proof of the prosecution means that the guilt of the accused has to be **proved** to the court. There is no provision stating that a confession has to be considered compulsive evidence of the guilt of the accused. If the court does not believe a confession to be true, this confession cannot prove the guilt of the accused. Hence the verdict constitutes a breach of the presumption of innocence.

## c) Comparative Law

### **Art. 67 Constitution of Egypt**

**para. 1:** Any defendant is innocent until he is proven guilty before a legal court, in which he is granted the right to defend himself.

### **Art. 37 Constitution of Iran**

Innocence is to be presumed, and no one is to be held guilty of a charge unless his or her guilt has been established by a competent court.

### **Art. 10 Constitution of Pakistan**

(IV-VII)

(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding [three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of [three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, [within fifteen days] from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:

Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy [or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity].

**Jurisprudence from Pakistan:**

P.L.D. 2000 SC 111 (p): Provisions of S. 7-A, Anti-Terrorism Act, 1997 are unconstitutional to such an extent that the same infringe the presumption of innocence and do not meet the condition of reasonableness due to vagueness. [p- 158] R

**Discussion proposal:**

- What information would the participants give to the press in high profile cases?
- How does public pressure influence the criminal proceedings?
- What is the role of the judge in relation to the accused, i.e. does he have a duty concerning the rights of the accused?
- Can the participants imagine motives of the suspect/accused for a false confession?

## **D. Prohibited Forms of Examination**

- a) Alem (A) is arrested for theft. In police custody he is beaten with a thick book until he confesses the offence. Is the behaviour of the police in accordance with the law?
- b) Osman (O) is arrested for numerous crimes. In order to obtain a confession the judicial police confront him with a huge, barking and aggressive-looking dog and threaten to unleash the dog on him. O, who is in fear of his life, confesses all the crimes in question. Have the judicial police violated the law?

### **a) Relevant Provisions**

#### **Art. 29 Afghan Constitution**

- (1) Torture of human beings is prohibited.
- (2) No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest, or imprisoned, or convicted to punishment.
- (3) Punishment contrary to human dignity is prohibited.

#### **Art. 30 Afghan Constitution**

- (1) Any statement, testimony, or confession obtained from an accused or of another person by means of compulsion, is invalid.
- (2) Confession to a crime is: a voluntary confession before an authorised court by an accused in a sound state of mind.

#### **Art. 5 Interim Criminal Code for Courts**

4. The suspect and the accused shall not undergo intimidation or any form of physical or psychological pressure.
5. Their statements shall be made in a condition of absolute moral freedom.

#### **Art. 7 Interim Criminal Code for Courts**

The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid, and the Court cannot base its judgement on it.

#### **Art. 4 Afghan Penal Code**

- (2) Any punishment which is discordant to human dignity is not permitted.

#### **Art. 3 Law on Prisons and Detention Centres**

- (1) The staff of detention centres as well as attorneys, judges and other people dealing with detainees and pre-trial detainees are obliged to respect human rights while performing their duties. Detainees have to be treated in an impartial way, without taking into consideration their ethnicity, nationality, piety, religion, race, colour, gender, language, social and political affiliation as well as other such qualities.

#### **Art. 7 International Covenant on Civil and Political Rights**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

**Art. 10 International Covenant on Civil and Political Rights**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (g) Not to be compelled to testify against himself or to confess guilt.

## b) Comment on Prohibited Forms of Examination

When dealing with the suspect/accused and questioning him the judicial authorities have to respect several prohibitions. One of the most important is the right to be protected from torture. It is applicable during all stages of criminal proceedings. It is an absolute and non-derogable right, it cannot be suspended, even in war time or in a state of emergency, nor is it admissible to invoke superior orders to justify the use or threat of torture. According to Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984<sup>8</sup> “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Acts of torture, as defined by international and national law, are thus the disproportionate use of force by law enforcement officials, such as:

- prolonged solitary confinement<sup>9</sup>,
- physical pressure during interrogation, such as hooding, prolonged playing of music, shaking, deprivation of sleep, threats of death etc. and
- medical experimentation.

The use of force by law enforcement officials should be exceptional; while law enforcement officials may be authorised to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, the use of force is only admissible to the minimum extent required. It is permissible to use the minimum means of force in cases of resistance or when personal safety is threatened. No force going beyond that may be used. National law ordinarily restricts the use of force by law enforcement officials in accordance with the principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of the relevant provision. In no case should provisions be interpreted to authorise the use of force which is disproportionate to the legitimate objective to be achieved.

In practice, acting in accordance with the prohibition of degrading treatment tends to be more difficult than the prohibition of torture. The prohibition on exerting “physical or psychological pressure on the accused”<sup>10</sup> is not as easy to adhere to because the actions which are prohibited may not be judged equally by all persons involved. The boundaries between degrading treatment and torture are not always clear. Similarly, the boundaries between legally appropriate actions the judicial authorities may take and exertion of pressure are not always clear.

Afghan constitutional and statutory law prohibit both torture and the exertion of physical or psychological pressure. Art. 5 (4) ICC, according to which the suspect and the accused shall not undergo intimidation or any form of physical or psychological pressure, reflects

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<sup>8</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Afghanistan ratified on 04 February 1985, entry into force 26 June 1987.

<sup>9</sup> Inter-American Commission of HR, 1982, OEA/Ser. L/V/II.57, doc 6, p. 124.

<sup>10</sup> *Kelly v. Jamaica*, Communication No. 253/1987, UN GAOR 46<sup>th</sup> Sess. Suppl. 40, p. 241.

Arts. 29 (1) and 2 AC, which prohibits torture in every stage of the proceedings. Art. 30 (1) AC strengthens this protection from torture and degrading treatment in the pre-trial and trial stages by disallowing evidence obtained by means of compulsion. By clearly defining the term “confession” as a voluntary confession before an authorised court by an accused in a sound state of mind, the motivation which usually causes the police or judicial authorities to resort to illegal use of force is eliminated as statements made outside of the given parameters cannot be used as evidence (see also Art. 7 ICCD). As confessions are one of the most important forms of evidence, the clear parameters of legality will hopefully reduce abuse of the suspect/accused by judicial authorities hoping to make their case. This protection from torture and degrading treatment is extended to the post-trial phase by Art. 4 (2) APC, which prohibits any punishment that violates human dignity, and by Art. 3 of the Law on Prisons and Detention Centres (LPDC), which clarifies that human rights have to be respected during prison stays of convicted detainees.

*The Qur’an explicitly prohibits the use of beatings, torture or inhumane treatment to extract a confession. Such treatment violates the accused’s dignity, which is not compatible with the central precept of Islam that views the individual as the “prize creation of Allah” who must be treated with justice and dignity. A violation of that dignity may lead to a loss of faith and confidence in Islamic justice, thereby increasing the likelihood of future criminal activity. Torture is a sin and the Prophet warned that “God shall torture on the Day of Recompense those who inflict torture on people in life”. Only very few Islamic jurists allow for physical or mental abuse, among them Ibn Abidin, who allowed an accused to be beaten in order to obtain a confession in the case that the accused was already known as an evil man.<sup>11</sup> A problem is that many of the punishments foreseen by the Shari’a, such as stoning, would be defined as torture by international standards. Although the codified Afghan laws do not foresee such punishments, Art. 1 APC allows for the application of the Shari’a in the case of hudud and qisas crimes. These are the crimes, for which the punishments usually do not comply with the prohibition of torture. Unfortunately, they are still applied in Afghanistan. This constitutes a violation of Art. 29 AC, among other norms (see also Chapter IV Section A 2).*

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<sup>11</sup> Tellenbach, Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law, pp. 8, 9.

Comment on the cases:

a) According to Arts. 29 (1) and 2 AC and Arts. 5 (4) and 5 ICCC torture is prohibited and no person, even with the intention of discovering the truth, can resort to torture.

Torture can be defined as an act of public officials, who intentionally inflict severe physical or mental pain or suffering in order to achieve a certain purpose, such as the extortion of a confession<sup>12</sup>.

A was beaten intentionally by the police with a thick book in order to force him to confess the offence. Severe physical pain is every pain that is not just insignificant. Since beating with a thick book can be very painful, the action of the police has to be regarded as torture. Thus the police breached the prohibition of torture.

Additionally it has to be clarified that evidence collected by torture is inadmissible at trial (see Art. 30 (1) AC and Art. 7 ICCC).

b) In order to constitute torture an act does not necessarily have to cause physical pain. The infliction of mental pain can be torture as well, as long as the pain is severe enough to be compared with physical pain of the type mentioned above. In the case at hand O fears for his life. Mortal fear is one of the most intense forms of mental pain; therefore it has to be considered as torture.

Hence the police violated the prohibition of torture, and the confession cannot be used as evidence against him (Art. 7 ICCC).

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<sup>12</sup> Nowak, Manfred: UN covenant on civil and political rights. - Kehl; Strasbourg; Arlington, Va.: Engel, 2005, p. 161.

### **c) Comparative Law**

#### **Art. 42 Constitution of Egypt:**

**para. 1:** Any person arrested, detained or his freedom restricted shall be treated in the manner concomitant with the preservation of his dignity.

**para. 2:** No physical or moral harm is to be inflicted upon him.

**para. 3:** He may not be detained or imprisoned except in places defined by laws organising prisons.

#### **Art. 38 Constitution of Iran**

All forms of torture for the purpose of extracting confession or acquiring information are forbidden. Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence. Violation of this article is liable to punishment in accordance with the law.

#### **Art. 39 Constitution of Iran**

All affronts to the dignity and repute of persons arrested, detained, imprisoned, or banished in accordance with the law, whatever form they may take, are forbidden and liable to punishment.

#### **Art. 4 Constitution of Pakistan**

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular:

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

#### **Art. 14 Constitution of Pakistan**

**para. 2:** No person shall be subjected to torture for the purpose of extracting evidence.

#### **Discussion proposal:**

- How would the participants define torture? In their understanding, does it include psychological pressure? (refer to Art. 30 AC and Art. 5 ICC) What behaviour is allowed?
- What is the truth content of confessions made under pressure?
- Can the participants think of a situation in which torture could be justified?

## **E. Freedom from Arbitrary Detention**

- a) Alem (A) and Babor (B) are both businessmen. In order to improve his chances for making a lucrative deal, B bribes a judge, who then orders the detention of A. Which breaches of law can you identify?
- b) Fazil (F) is under suspect of fraud. The Saranwal, who is very busy, orders his detention in order to handle the case at a time more appropriate to him. Is the behaviour of the Saranwal in conformity with the provisions of law?

### **a) Relevant Provisions**

#### **Art. 24 Afghan Constitution**

- (1) Liberty is the natural right of human beings. This right has no limits unless affecting the rights of others or public interests which are regulated by law.
- (2) Liberty and dignity of human beings are inviolable.
- (3) The State has the duty to respect and protect the liberty and dignity of human beings.

#### **Art. 27 Afghan Constitution**

- (1) No Person can be pursued, arrested, or detained but in accordance with provisions of law.
- (2) No person can be punished but in accordance with the decision of an authorised court and in conformity with the law adopted before the date of offence.

#### **Art. 31 Afghan Constitution**

- (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.

#### **Art. 4 Interim Criminal Code for Courts**

From the moment of the introduction of the penal action until the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

#### **Art. 6 Interim Criminal Code for Courts**

1. The terms for the duration of provisional detention following the arrest during the investigative phase are those established in article 36.
2. During the trial at the Primary level, the Court can extend the detention for two additional months; during the trial at the appeal level the Court can extend the detention for another two-month term; during the trial before the Supreme Court the detention can be further extended by the same Court for an additional five months.
3. When, during the above mentioned trials, the related terms expire, the arrested person shall be released.

**Art. 16 Interim Criminal Code for Courts**

1. All the violations of procedural provisions different from those indicated in the previous article bring about the invalidity of the procedure only if they are denounced by the interested party.
2. When the denunciation is made during the investigations or the trials the responsible judicial authority shall make decisions to redress the procedure whenever possible.
3. In any case the denunciation can be made in the appeal or in the recourse to the Supreme Court.
4. The Appeal Court or the Supreme Court declares the invalidity of the procedure whenever it appears that the violations of procedural provisions have provoked relevant distortions in the decision of the case.

**Art. 30 Interim Criminal Code for Courts**

1. The judicial police shall arrest on their own initiative:
  - a. The offender who is caught in state of *flagrante delicto* of misdemeanours, punished by medium term imprisonment, or felony;
  - b. The Person who is allegedly the author of a felony and there is a risk of his disappearance.
2. In all other circumstances, the judicial police perform arrests only in execution of orders of the judicial authorities.

**Art. 31 Interim Criminal Code for Courts**

1. The judicial police, after having identified the person arrested on their own initiative, inform him of the reasons of the arrest and interrogate the same about the crime and its circumstances within a maximum of twenty-four hours.
2. Immediately after a report shall be sent to the Primary Saranwal, and the person shall be put at his disposal.

**Art. 25 Law of the Police**

In order to thoroughly detect the crime and the criminal the police may hold the arrested suspect in custody<sup>13</sup> for a period of up to 72 hours.

**Art. 33 Interim Criminal Code for Courts**

1. The Primary Saranwal immediately after having been informed about the judicial police's activities indicated in Arts. 30, 31 and 32 either sanctions the deeds of the judicial police's activities or adopts decisions to revoke or modify them.
2. Before taking the actions mentioned in the previous paragraph the Saranwal can ask the police to provide explanations.

**Art. 34 Interim Criminal Code for Courts**

1. The Primary Saranwal shall interrogate the person arrested within forty-eight hours from the moment when the person has been put at his disposal.
2. The Primary Saranwal can release the arrested suspect whenever he deems the deprivation of liberty not any longer necessary.

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<sup>13</sup> The meaning of the Dari term "*tahte nazirat*" is not unambiguous: it may have the meaning of detention but also of surveillance.

**Art. 35 Interim Criminal Code for Courts**

1. In the course of the investigation activities the Primary Saranwal can order the arrest of the alleged author of a misdemeanour punishable by medium term imprisonment or felony and seizure of items and goods connected with the crime.
2. The person arrested shall be interrogated within forty-eight hours.

**Art. 36 Interim Criminal Code for Courts**

1. When the arrest performed by the Judicial Police is sanctioned or when the arrest has been ordered by the Saranwal and it remains in force, the arrested person shall be released if the Saranwal has not presented the indictment to the Court within fifteen days from the moment of the arrest except when the Court, at the timely request of the Saranwal, has authorised the extension of the term for not more than fifteen additional days.

**Art. 53 Interim Criminal Code for Courts**

3. The Court proceedings are conducted according to the following order:
  - b. When the accused is under detention the Court shall immediately assess the legality of the arrest and order the liberation of the accused when it realises that the arrest was unlawful or not necessary.

**Arts. 414 – 417 Afghan Penal Code**

**Art. 37 Counter Narcotics Law**

8. If the amount of drugs seized is less than those set under paragraph 4 of Art. 34 of this law, the law enforcement agencies named under paragraph 2 of this article have to complete the questioning and interrogation of the suspects within 72 hours and have to pass the case for investigation and judicial prosecution to the respective office of the Saranwal.
9. In cases where a seizure of quantities of narcotic drugs as set under paragraph 4 of Art. 34 of this law is detected and the offenders are arrested outside of the Province of Kabul, the law enforcement agencies referred to in paragraph 2 of this article are obliged to prepare a report of the case and turn over the suspected persons within 72 hours from the time of the arrest and the detection to the Primary Court Saranwal of the district the crime has taken place. The Counter Narcotics Police is obliged to transfer the suspects together with the preliminary findings of the investigation, the documents and testimonies within 15 days to the Headquarters of the Counter Narcotics Police in Kabul for further questioning and interrogation.

In this case the time limit for their interrogation starts with the arrival of the suspects in Kabul in the custody of the Counter Narcotics Police, however the time period for the transfer of the suspects to the Special Counter Narcotics Saranwal may not exceed 15 days from the date of arrest. The Special Counter Narcotics Saranwal has to notify the Primary Central Narcotics Tribunal in Kabul as soon as he is informed himself of the arrest of a suspect outside the Province of Kabul and apply for a warrant to detain the suspect for the additional days. The Special Counter Narcotics Saranwal has to conduct his investigation and the prosecution of the case in accordance with the provisions set forth in Art. 36 of the Interim Criminal Procedure Code.

**Art. 9 International Covenant on Civil and Political Rights**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

**Art. 10 International Covenant on Civil and Political Rights**

2. a. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

### a) Comment on the Freedom from Arbitrary Detention

The freedom from arbitrary detention as stated in Art. 9 ICCPR ensures that the deprivation of liberty permitted by law is not manifestly disproportional, unjust or unpredictable, and that the specific manner in which an arrest is made is not discriminatory, but is appropriate and proportional in view of the circumstances of the case.<sup>14</sup> The principle of legality contained in this right is to be understood both substantially and procedurally, i.e. there must be legal grounds for the arrest and the arrest must be executed in a lawful manner. An important safeguard for this right is the duty to bring the detainee promptly before a judge who has the power to release the detainee if the arrest is unlawful. This ensures an effective control by an independent authority and therefore reduces the risk of arbitrary detention.

Art. 24 AC, whereby liberty is said to be the natural right of human beings, shows how important the right to freedom from arbitrary detention is in the legal Afghan context.

Art. 27 AC, according to which no person can be pursued, arrested or detained but in accordance with the provisions of the law, clarifies that arbitrary detention is prohibited during the pre-trial, trial, and post-trial stages. This principle is closely linked to the presumption of innocence (see also Chapter I Section C). Art. 31 (2) AC, whereby the accused upon arrest has the right to be informed of the accusation and to be summoned to the court within the limits determined by law, ensures that the detainee has the opportunity to challenge the detention and have it reviewed by an independent authority.

The Afghan criminal laws and criminal procedure realise the principles contained in the Constitution by containing detailed regulations concerning the issue of detention. As Art. 4 ICCC states, decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth. The Saranwal can only order pre-trial detention in accordance with Art. 35 ICCC in the case of a suspected misdemeanour punishable with medium term imprisonment or in the case of a suspected felony<sup>15</sup>. The arrested person has to be interrogated within 48 hours, pursuant to Art. 35 (2) ICCC. In accordance with Art. 30 ICCC, the judicial police are generally only allowed to perform arrests in execution of orders of the judicial authorities. The exception is stated in Art. 30 (1) ICCC, whereby the judicial police can perform arrests on their own initiative if the offender is caught in the act of committing a felony or a misdemeanour punishable with a medium term prison sentence, or if the person is suspected of having committed a felony and there is the risk of disappearance. The arrested person is to be informed of the reasons of the arrest and interrogated within 24 hours (Art. 31 (1) ICCC). Immediately afterwards the suspect is to be put at the disposal of the Primary Saranwal, who then decides on the further detention and who himself is required to interrogate the detainee within 48 hours, according to Arts. 33 and 34 ICCC. Hence, according to Art. 31 ICCC the police is not allowed to detain a suspect for more than 24 hours. Problematic in this context is Art. 25 Law of the Police (LP). This norm specifies that a suspect can be held in police custody up to 72 hours. But the meaning of this norm is not unambiguous. A first possibility would be that Art. 25 LP as the later law derogates from Art. 31 ICCC thereby allowing for a more extended detention of a suspect compared to the prior law. On the other hand, the Dari term “*tahte nazariat*” used in Art. 25 LP normally implies observation and surveillance rather than detention. Hence, it may be possible that the legislature wanted to enhance the

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<sup>14</sup> Nowak, *supra*, p. 225.

<sup>15</sup> Art. 24 APC defines felonies as crimes punishable with death, continued imprisonment or long imprisonment, whereas misdemeanours are defined as crimes punishable with prison sentences of more than three months up to a period of five years, or with cash fines of more than three thousand Afghani in Art. 25 APC.

possibilities of the police to investigate crimes and criminals without extending the duration of the police custody and thus introduced a special regime of surveillance. This regime could for instance enable the police to discover whether a suspect tries to destroy evidence or threatens witnesses, which could justify pre-trial detention by the order of the prosecutor or judge. At any rate a suspect has to be released after a maximum of 72 hours if the Saranwal does not sanction the arrest. The suspect may be held under pre-trial detention for up to 15 days, starting from the moment of arrest, after an authorisation by the Saranwal. However, if the Saranwal does not present the indictment within these 15 days to the court, the suspect is to be released according to Art. 36 ICCC. The same norm permits an extension of the time-limit for a maximum of a further 15 days at the timely request of the Saranwal. Art. 34 (2) ICCC gives the Saranwal the competence to review the legality of the detention at all times before the trial. Art. 53 (3) (b) ICCC ensures that the legality of the detention is reassessed by the court at the commencement of the trial. Art. 6 (3) ICCC regulates the release of the arrested person during the trial stage as soon as the prerequisites for the detention are no longer fulfilled. Art. 27 (3) AC ensures that there is no arbitrary detention in the post-trial phase as it prohibits punishments unless in accordance with a decision of an authorised court and in conformity with the law adopted before the date of the offence. Should the accused be sentenced to a prison term, he can resort to the appeal and revision proceedings in order to have the prison sentence reviewed. The execution of this prison punishment must be in accordance with Arts. 85 and 89 ICCC. The APC furthermore contains regulations in Arts. 414-417, whereby punishments are foreseen for the illegal arrest and/or detention. This deterrent for those in a position to perform arrests or detentions presents a further safeguard against arbitrary detention.

There is a special provision in the Counter Narcotics Law stemming from the decision to establish a single Central Counter Narcotics Court in Kabul for the whole of Afghanistan (for details see Chapter III Section A 1). According to Art. 37 (9) CNL a suspect being arrested outside of the Province of Kabul and carrying a quantity of narcotic substances as prescribed in Art. 34 (4) CNL, i.e. a case that falls in the jurisdiction of the Central Counter Narcotics Court, has to be transferred within 72 hours to the Primary Saranwal of the district where the arrest took place. This regulation, which is in compliance with Art. 25 LP giving the police the authority to keep suspects in custody for 72 hours, is an argument for the view that Art. 25 LP derogates from the regulations of the ICCC. The Counter Narcotic Police is obliged to transport the suspect together with all the evidence and the file within 15 days of the arrest to their headquarters in Kabul. It is problematic that the time limit for the investigation by the Counter Narcotic Police as well as the Special Counter Narcotic Saranwal does not start prior to the arrival of the suspect in Kabul in the custody of the police. However it is explicitly stated in the same paragraph that the Special Counter Narcotic Saranwal is obliged to inform the Counter Narcotic Tribunal as soon as he has been informed himself about the arrest and to apply for additional days of detention if necessary. Moreover, there is an explicit reference to Art. 36 ICCC. Hence, if the request by the Saranwal has not been fulfilled within 15 days of the arrest the suspect has to be released.

If understood literally this regulation would allow for a detention of the suspect based solely on the estimation of the police for up to 15 days during his transfer to Kabul, since the necessity of an approval and sanctioning of the detention by the Primary Saranwal of the District are not mentioned. It could be argued that the respective norms of the ICCC, Arts. 33-36, are derogated from because Art. 56 (1) CNL declares the supremacy of the Counter Narcotics Law. However, several arguments can be raised against this interpretation. First, the transfer from the law enforcement agencies to the Primary Saranwal would make no sense if it were not for the review and sanctioning of the pre-trial detention. This explains also why the police must file a report even before they transfer the suspect to the Kabul headquarters.

Finally, the personal freedom and the presumption of innocence are both promulgated in the Afghan Constitution (Arts. 24, 25). To restrict them for a period of 15 days without at least a review by a Saranwal would constitute a disproportional restriction and an infringement of both. Hence, Art. 37 (9) CNL has to be interpreted in accordance with the constitution, if at all possible. Therefore, the Primary Saranwal has to review the grounds for the pre-trial detention in accordance with the prerequisites mentioned in Art. 4 ICCC because the protection of the lawful investigation is the only reason mentioned in the Afghan laws which can justify pre-trial detention despite the presumption of innocence.<sup>16</sup> If the detention is not sanctioned by the Saranwal the suspect is to be released at once. He may be summoned to Kabul, but he may not be thus detained and transported without an authorising decision.

As a side remark, the establishment of a single central court having the exclusive competence for drug trafficking offences for the whole country is rather problematic concerning the presumption of innocence. As a result of this principle pre-trial detention has to be limited to the shortest time possible. This period will be necessarily prolonged by the need to transfer suspects to Kabul. Instead of extending the period of pre-trial detention the authorities should work on solutions to shorten it, in order to realise the very basic right to personal freedom to the greatest possible extent.

This protection against arbitrary detention enjoys acceptance in many Islamic countries; as examples see the Iranian, Lebanese, Moroccan, and Egyptian Constitutions. Pakistan has especially detailed regulations, which are upheld by the jurisprudence.

*The Shari'a protects the individual's freedom of movement: "It is He who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the sustenance which he furnishes" (Qur'an 67:15). Most Islamic jurists agree that pre-trial detention should not violate this individual freedom, mainly because a mere accusation of guilt, without a sentence in an open court after a fair trial, is not sufficient to justify the Ta'zir punishment of incarceration. There is no common consensus concerning cases where such pre-trial detention could be acceptable. The differing views cover a wide range of possibilities<sup>17</sup>, from the view according to which Islamic law never authorises pre-trial detention, to exceptions in the case of especially serious allegations, where preliminary investigations lead to the conclusion that there is enough evidence to sustain a conviction, if the suspect is believed to attempt flight before the trial, or if there is the risk of the suspect altering the course of proceedings by influencing witnesses or tampering with evidence. Detention as a form of punishment is generally accepted, whereby the conditions of confinement and the rights of the prisoners are not uniformly agreed upon<sup>18</sup>.*

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<sup>16</sup> Another could be the danger of a repetition of an offence which may not be a petty one. However, this possibility is not foreseen in the laws of Afghanistan.

<sup>17</sup> Al Saleh, supra, p. 55 (75).

<sup>18</sup> Ibid.

Comment on the cases:

a) Under Art. 27 (2) AC no person can be arrested or detained but in accordance with the provisions of law. Since there is no legal provision giving permission to the detention of A, the judge violated the law. He will face criminal prosecution according to Arts. 414 – 417APC.

b) According to Art. 4 ICCD the reasons for pre-trial detention are limited to the need of collecting evidence and establishing the truth. Hence the workload of the Saranwal cannot be a base for pre-trial detention. On the contrary, due to the presumption of innocence and the severe intrusion into the right to liberty, a Saranwal has to shift his workload in order to finish the cases involving pre-trial detention first. F has been arbitrarily deprived of his right to liberty.

### **c) Comparative Law**

#### **Art. 41 Constitution of Egypt**

Individual freedom is a natural right not subject to violation except in cases of flagrante delicto. No person may be arrested, inspected, detained or have his freedom restricted in any way or be prevented from free movement except by an order necessitated by investigations and the preservation of public security. This order shall be given by the competent judge or the Public Prosecution in accordance with the provisions of the law.

The law shall determine the period of custody.

#### **Art. 32 Constitution of Iran**

**Line 1, 3:** No one may be arrested except by the order and in accordance with the procedure laid down by law. The violation of this article will be liable to punishment in accordance with the law.

#### **Art. 8 Constitution of Lebanon**

**Line 1, 2:** Individual liberty is guaranteed and protected by law. No one may be arrested, imprisoned, or kept in custody except according to the provisions of the law.

#### **Art. 10 Constitution of Morocco**

No one shall be arrested, put into custody or penalised except under the circumstances and procedures prescribed by law. The home shall be inviolable. Search warrant shall be issued and investigation ordered under the conditions and procedures prescribed by law.

**Art. 4 Constitution of Pakistan**

- (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.
- (2) In particular:
  - (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
  - (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
  - (c) no person shall be compelled to do that which the law does not require him to do.

**Art. 9 Constitution of Pakistan**

No person shall be deprived of life or liberty save in accordance with law. This order shall be given by the competent judge or the Public Prosecution in accordance with the provisions of the Law.

The law shall determine the period of custody.

**Art. 10 Constitution of Pakistan**

**(IV-VII)**

- (4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding [three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of [three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.
- (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, [within fifteen days] from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:  
Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.
- (6) The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

- (7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:  
Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy [or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity].

**Jurisprudence from Pakistan:**

P.L.D. SC<sup>19</sup> 1999 Part. II, p. 1026 (o): Every citizen and every other person for the time being in Pakistan is guaranteed as his inalienable right to enjoy the protection of the law and to be treated in accordance with the law wherever he may be and, in particular, no action detrimental to life, liberty, body, reputation or property of any person can be taken except in accordance with law. [p. 1056] T

P.L.D. SC 1998 Part I, p. 388 (ww): The Constitution guarantees Fundamental Rights, which are inviolable. Under Art. 9 every person in Pakistan is guaranteed a “right to life” and he cannot be deprived of life and liberty except in accordance with law. Thus, it is a sacred right, which cannot be violated, discriminated or abused by authority. [p. 606]M. Extra-judicial killings or custodial deaths cannot be justified as valid, legal or proper. [p. 600] H

**Discussion proposal:**

- Are the time limits contained in the ICCC realistic? Why or why not?
- What issues have to be considered when making a decision about pre-trial detention?

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<sup>19</sup> The All Pakistan Legal Decisions (P.L.D.), Supreme Court (S.C.).

## **F. The Right to Remain Silent**

- a) Ahmad (A) is accused of armed robbery. He remains silent during the trial. The judge sentences him to a long prison term reasoning that if he were not guilty he would have spoken in his own defence. Was the judge allowed to base his judgment on this circumstance?
- b) Alem (A) is under suspect of fraud. At a questioning he does not say anything, so the Saranwal tells him he is obliged to testify or else he will be punished even more severely. Was the behaviour of the Saranwal in conformity with the law?

### **a) Relevant Provisions**

#### **Art. 29 Afghan Constitution**

- (1) Torture of human beings is prohibited.
- (2) No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest, or imprisoned, or convicted to punishment.
- (3) Punishment contrary to human dignity is prohibited.

#### **Art. 30 Afghan Constitution**

- (1) Any statement, testimony, or confession obtained from an accused or of another person by means of compulsion, is invalid.
- (2) Confession to a crime is: a voluntary confession before an authorised court by an accused in a sound state of mind.

#### **Art. 5 Interim Criminal Code for Courts**

6. The suspect and the accused have the right to abstain from making any statement even when they are questioned by the relevant police or judicial authorities.
7. The police, the Saranwal and the Court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent, right to representation at all times by defence counsel, and right to be present during searches, line-ups, expert examinations and trial.

#### **Art. 7 Interim Criminal Code for Courts**

The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid, and the Court cannot base its judgement on it.

#### **Art. 53 Interim Criminal Code for Courts**

3. The Court proceedings are conducted according to the following order:
  - g. The accused can testify if he does not avail himself of the right to remain silent and the accused or his defence counsel can ask questions to the witnesses and the experts;
5. The accused can refuse to answer the questions of the Court consistent with his right to remain silent.

**Art. 50 Counter Narcotics Law**

1. Law enforcement authorities may use informants to prevent, detect, and investigate drug trafficking offences by gathering intelligence and evidence relevant to the commission of such offences.
2. An informant may establish or maintain a relationship with a person in order to acquire information or evidence of illegal activities and to provide that information and evidence to law enforcement authorities. Informants may use surveillance techniques described in this Article. if authorized by appropriate law enforcement authorities.
3. Informants may not participate in the commission of drug trafficking offences in connection with criminal investigations without prior authorization from the appropriate law enforcement authorities. An informant who conducts or participates in criminal activity outside the limit of the authorized conduct is subject to prosecution for any offence committed.
4. Authorizations for informants to acquire information or participate in crimes shall be recorded in writing and shall specify to the extent possible the types of actions the informant may engage in or conduct. All information provided by an informant shall be recorded by the officer receiving it.
5. If there are reasonable grounds to believe identifying the informant will put him in danger or will endanger lawful investigations, the identity of an informant may be declared secret by an order of the court and must not be revealed until the end of the investigations or a second decision of the court. Also the methods, devices and the technique of the investigations will be kept secret.
6. An informant may testify in court.
7. Testimonies and documents which have been obtained through the use of reliable informants shall be admissible in all detection, investigation, and trial proceedings.
8. Informants shall be recruited in accordance with special procedures established by the Ministry of Interior.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - g. Not to be compelled to testify against himself or to confess guilt.

## **b) Comment on the Right to Remain Silent**

The right to remain silent, also known as the prohibition of self-incrimination, is part of the very essence of a fair trial. It relates only to the accused. Witnesses, on the other hand, may not refuse to testify. This right is explicitly stated in Art. 14 (3) (g) ICCPR and is furthermore found in Art. 8 (2) (g) of the American Convention on Human Rights and viewed as being covered by Art. 6 of the European Convention on Human Rights.<sup>20</sup> In some legal systems, the right to remain silent is expressly recognised by the constitution, for instance in the United States, Canada and Mexico. In other countries, national legislation usually provides for a right to remain silent before the investigating authorities and the court (Germany is an example in this regard). The suspect/accused may at any time decline to answer further questions, and his decision to terminate questioning must be immediately and scrupulously honoured by the investigating authorities or the court, although they may, after the lapse of a period, ask further questions. The term “to be compelled” in Art. 14 (3) (g) ICCPR refers to various forms of physical or psychological pressure, ranging from torture and inhuman treatment prohibited by Arts. 7 and 10 ICCPR (see also Chapter I Section D) to various methods of extortion or duress and the imposition of judicial sanctions in order to compel the accused to testify.

Under the provisions of most legal systems, statements or confessions made by the accused during pre-trial interrogation can only be used against him if they were made voluntarily. In principle, any statement obtained in direct violation of the prohibition of coercion is inadmissible at trial. Confessions extracted by violent means are generally excluded. It is a matter of controversy, however, whether any further evidence which is discovered as a result of such a confession, e.g. the discovery of a corpse in a murder case, is admissible against the defendant. The American legal practice has developed the so-called “fruit of the poisonous tree” doctrine according to which such derivative fruits from unlawfully obtained confessions are in principle inadmissible. This doctrine is followed in other legal systems too as far as torture or other violent means of interrogation are concerned. In any case, it is far from being followed uniformly. However, the Human Rights Committee asserted in one of its unbinding General Comments on Art. 14 ICCPR that the law should require that evidence obtained by means of torture or cruel and inhuman treatment or any other form of compulsion be wholly inadmissible. For an in-depth analysis of the different possibilities of handling the admissibility of such evidence, please refer to Part II Case VIII.

Moreover, the right to be presumed innocent is affected if the judicial authorities draw adverse inferences from the silence of the suspect/accused. The burden of proof rests on the prosecution, so that a conviction based on the silence of the accused violates the presumption of innocence. Under no circumstances may the silence of the accused be considered as proof of guilt. Of course an accused staying silent can be convicted, but the reason for the conviction must be found in other facts. To state the point, a verdict mentioning the silence of the accused as a reason for conviction constitutes in most legal systems a breach of the right to remain silent.

To effectively make use of his right to remain silent, the suspect/accused must, of course, be informed of his rights.

The Afghan Constitution does not expressly guarantee the right to remain silent. However, the presumption of innocence in Art. 25 AC as well as Arts. 29 and 30 AC, which respectively prohibit torture and invalidate any statement, testimony, or confession obtained by means of

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<sup>20</sup> Nowak, CCPR Commentary, 2005, p. 344; R. Grote, Protection of Individuals in the Pre-trial Procedure in: D. Weissbrodt / R. Wolfrum (eds.) *The Right to a Fair Trial*, 1998, p. 712.

compulsion, implicitly contain this right. Since the burden of proof rests upon the prosecution, there cannot be an obligation for the suspect/accused to give evidence.

Furthermore Art. 5 (6) ICCC explicitly states the right to remain silent during the pre-trial stage. The possibility to make use of this right is strengthened by the duty to inform the suspect/accused of this right, which is contained in Art. 5 (7) ICCC. Art. 7 ICCC provides that evidence collected in violation of this right is invalid. Arts. 53 (3) and 5 ICCC refer to the accused's right to remain silent during the trial.

Art. 50 CNL is problematic in regard to the right to remain silent, since an informant generally does not inform a suspect or the person being investigated (see Art. 50 (2) CNL) about the fact that he is working for the law enforcement agencies and is gathering information. So naturally, he also does not inform them of their right to remain silent. On the other hand Art. 50 (6) and (7) CNL explicitly state that an informant may testify in court and that the evidence gained through the authorised use of informants is admissible in all phases of the judicial procedure. Therefore, generally speaking the use of informants is not unproblematic in regard to the right to remain silent. One may very well argue that the right to remain silent is not infringed and prior information about this right is not necessary in this case, since neither a police officer, a Saranwal nor a judge in an official capacity questions him and therefore it is not necessary to clarify that in spite of this there is no obligation for him to testify. This argumentation is endorsed by the wording of Art. 5 No. 7 ICCC which clearly refers only to police officers, Saranwals and judges as being obliged to inform a suspect about his right to remain silent. However, the right to remain silent has to be considered when the admissibility of relevant evidence is in question in a suit at law. Certain cases potentially threaten the right to remain silent because the circumstances of the situation are very similar to a formal interrogation, for instance, when an informant is put in a cell with a pre-trial detainee, who has refused to testify by invoking his right to remain silent, in order to "interrogate" him. This would be circumvention of the right to remain silent, since the suspect has invoked his right and is still in custody of the law enforcement authorities where he has no way to evade the questioning by the informant.

*In Islamic law, the accused has the right to refuse questioning and to remain silent during the investigation of hudud crimes, and his silence cannot be used as incriminating evidence against him, as hudud crimes can only be proven by means of an avowal or other positive evidence.<sup>21</sup> This is also true concerning other criminal acts under Shari'a. The accused has an absolute right to answer or refuse to answer questions by an investigator. If he answers he is not obliged to tell the truth. If he admits guilt, he has the right to change his mind. Should he do so, his admission becomes invalid and cannot be used as evidence at trial.<sup>22</sup> Under Islamic law, the accused can withdraw his confession at any time prior to the execution of the sentence, even if the sentence has already been passed<sup>23</sup>. In this case, there is no longer positive evidence that would justify a conviction. If the sentence has already been passed, its execution is stopped.*

*Islamic law requires that a confession be given freely and voluntarily. It is universally agreed among Islamic jurists that the accused cannot be forced to admit guilt.<sup>24</sup> Any confession given as the result of coercion, torture or unlawful detention cannot be used to sustain a conviction<sup>25</sup>. However, it seems that a few later Hanafi jurists would allow coerced*

<sup>21</sup> Al-Saleh, supra, p. 55 (71).

<sup>22</sup> Awad M Awad, *The Rights of the Accused under Islamic Criminal Procedure in: The Islamic criminal Justice System*, Cherif Bassioni (ed.), 1982, p. 107.

<sup>23</sup> Ibid, p. 55 (73).

<sup>24</sup> Awad, supra.

<sup>25</sup> Al-Saleh, supra, p. 55 (73).

*admissions. Those who hold this opinion qualify it by limiting it to the known evil and immoral men<sup>26</sup>. Some jurists adopt a middle position by prohibiting involuntary confession and its use while admitting evidence obtained as a result thereof, for instance the goods after a robbery (except in Hudud crimes).<sup>27</sup> These two deviant opinions are contested heavily by applying the Shari'a doctrine that right cannot arise out of wrong.<sup>28</sup> The admissibility of confessions obtained by deceit is highly contested.<sup>29</sup>*

Comment on the cases:

a) According to Art. 5 (6) ICCC the accused has the right to abstain from making any statement. In the case at hand A was not forced to make a statement, but the fact that he refrained from making any statements was used against him by the judge. Even though Art. 5 (6) ICCC does not contain the explicit prohibition of using the silence of a suspect/accused against him, this prohibition has to be derived from the right to remain silent. If the suspect/accused had to fear that his silence could be used against him, his right would de facto not be of any use to him. Thus the judge breached the right to remain silent by sentencing A on the base of his silence at trial.

b) Under Art. 5 (6) ICCC the suspect has the right to remain silent. Additionally the judicial authorities are obliged by virtue of paragraph 7 of the same article to inform the suspect of his right to remain silent before the start of the interrogation at the time of arrest.

The Saranwal has breached both provisions by telling A wrongfully that he was obliged to testify.

According to Art. 7 ICCC, the confession of A is therefore invalid.

### c) Comparative Law

#### Art. 13 Constitution of Pakistan

(a) No person shall, when accused of an offence, be compelled to be a witness against himself.

#### Discussion proposal:

- Does the silence of a defendant influence the decision of the court?
- What can be the reasons for the silence of the accused/suspect?
- What are the most important forms of evidence? (see also Art. 37 ICCC)

<sup>26</sup> Awad, supra.

<sup>27</sup> Awad, supra.

<sup>28</sup> Awad, supra, p. 107.

<sup>29</sup> For an overview about the discussion see Awad, supra.

## G. The Right to Counsel

- a) Ahmad (A) is suspected of having committed several crimes. During his questioning by the police he asks for his lawyer. However, the judicial police tell him he has to confess first. Which violation of legal provisions can you identify?
- b) Alem (A) is accused of having committed a murder. During the trial he asks for defence counsel. The judge refuses the request, based on the argument that he himself will ensure A's rights. Was the behaviour of the judge in accordance with the law?
- c) Osman (O) is suspected of drug trafficking. The judge rightfully orders pre-trial detention as requested by the Saranwal. In order to get evidence against the suspect the Saranwal requests the conversations of O and his defence counsel to be taped. Will the judge consent to the request of the Saranwal?

### a) Relevant Provisions

#### **Art. 31 Afghan Constitution**

- (1) Every person upon arrest can seek an advocate to defend his rights or to defend his case for which he is accused under the law.
- (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.
- (3) In criminal cases, the state shall appoint an advocate for a destitute.
- (4) The confidentiality of oral, written or telephonic communications between an advocate and his accused client are immune from invasion.
- (5) The duties and authorities of advocates shall be regulated by law.

#### **Art. 11 Law on the Structure and Competencies of Courts**

Every person upon arrest has the right to appoint a defence counsel to defend himself in regard of the accusation and evidence against him. In criminal cases a defence counsel shall be appointed for destitute persons according to the provisions on law.

#### **Art. 22 Juvenile Code**

- (1) In all stages of investigation and trial, the minor has the right to a defence counsel and interpreter. In case the parents or legal representatives cannot afford a defence counsel or interpreter, the juvenile court shall appoint a defence counsel and interpreter on government costs.

#### **Art. 5 Interim Criminal Code for Courts**

7. The police, the Saranwal and the Court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent, right to representation at all times by defence counsel, and right to be present during searches, line-ups, expert examinations and trial.

**Art. 18 Interim Criminal Code for Courts**

1. Legal assistance to the suspect and the accused requires the service of a qualified professional.
2. To this end an official register is established in the Ministry of Justice where only persons with a university degree in law or Shari'a can be included.
3. The suspect and the accused can be, in any case, assisted by a defence counsel of their choice.

**Art. 19 Interim Criminal Code for Courts**

1. The suspect or the accused who is financially unable to appoint a defence attorney is entitled to have a free defence attorney appointed for him or her in the following manner:
  - a. The investigating Saranwal or the Court adjudicating the case, on the petition of the person, appoints a defence attorney for the destitute person from amongst the lawyers officially permitted to work as defence attorney.
  - b. The person for whom an attorney has been appointed reserves the right not to accept the appointed defence attorney and to defend himself in person.
  - c. The fees of the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.

**Art. 38 Interim Criminal Code for Courts**

1. The defence counsel has the right to be present at all times during the interrogation of the suspect.
2. The suspect and the defence counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial.

**Art. 41 Interim Criminal Code for Courts**

1. When it has not been possible to identify any of the places indicated in article 17, the notifications shall be served on a defence counsel appointed by the police during their autonomous investigations, or by the Saranwal during his investigations.
2. The appointment of the defence counsel is made by the police and the Saranwal in a written form.
3. In this case the defence counsel represents the suspect.
4. The above indicated decision ceases to take effect at the end of the investigations.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

## b) Comment on the Right to Counsel

The right to counsel, which necessarily includes the right to communicate with counsel, is one of the most essential elements of a fair trial. Unfortunately, it is also one of the rights most often violated. A suspect/accused without counsel is often unaware of all of his rights and will therefore often be more compliant with the investigative authorities. It is crucial that the suspect/accused has early access to counsel in order to gain such information as how long he may be detained by the police, what the allegations brought against him actually mean, what the consequences of a refusal to make a statement might be, etc. An early access to counsel is also important in order to draw up a sound defence strategy.

Not only is the right to counsel anchored in Art. 31 AC, but it is also guaranteed for those not able to pay. This is repeated in Arts. 18 and 19 ICCC, which state that every person has the right to qualified professional legal counsel and that the suspect or accused unable to pay for his/her own defence is entitled to the appointment of a free defence attorney by the Saranwal. As the Saranwal becomes active upon the petition of the suspect/accused, it is an absolute necessity that the latter is informed of his right in order to be able to effectively make use of it. Unfortunately, the duty to inform the suspect/accused of his right to counsel is not expressly stated in the Constitution. However, it is contained in Art. 5 (7) ICCC. This duty is a logical and necessary consequence of the right to counsel, without which these protective norms would become meaningless in all cases where the suspect/accused is not aware of his rights. As a side remark, it has to be emphasised that this applies to all fair trial principles, not only the right to counsel.

For minors the right to counsel is additionally content of Art. 22 (1) of the Juvenile Code (JC). It states that defence counsel shall be appointed if the parents or legal representatives of a minor cannot afford one. The only difference between the named provision for minors and the provision for adults is that a petition of the minor is not necessary. The court has to act *ex officio* and is obliged to appoint a counsel on its own initiative.

It has to be mentioned that there is still a lack of defence counsel in Afghanistan, especially in the provinces. An interesting and promising makeshift solution for the present condition is the regulation in Art. 65 JC and Art. 96 ICCC. Art. 65 JC states that “since at present there are not enough defence counsels present in the country, suspected or accused minors can consult educated people having knowledge of legal issues”. Art. 96 ICCC also provides the possibility to appoint such an “interim defence counsel” for adult suspects/accused until a sufficient number of defence counsel are available in the country.

With this objective the president of each court is to prepare a list of people featuring the respective qualities out of the persons introduced through the Ministry of Justice in the capital and in the provinces by the administrative division of the governor’s office to the Appeal Court (Art. 65 JC) and for the normal criminal proceedings by the Government Cases Department (Art. 96 (2) ICCC). If defence counsel cannot be found, this will give the suspect/accused at least the possibility to be counselled by somebody with basic legal knowledge.

This makeshift solution still constitutes a breach of the right to counsel; however until there are enough lawyers throughout Afghanistan, this is preferable to having no legal counsel at all. Yet it has to be stressed that this can only be an *ultima ratio* if there is no defence counsel available, as established by Art. 18 ICCC.

The right to counsel is inextricably linked to the right to prepare a proper defence. It is essential that the suspect/accused can communicate freely with his defence counsel without having to fear any consequences. Without this essential prerequisite a defence is hardly possible at all and the right to counsel would remain without any substance. Art. 31 (4) AC

therefore protects all communication between the suspect/accused and his counsel and prohibits any type of invasion by the judicial authorities.

Even if the suspect/accused is absent, Art. 41 ICCC foresees the appointment of defence counsel to ensure that his rights are observed during the investigative phase (see also Chapter III Sections E and G).

*In Islamic law, there is consensus about the fact that the Shari'a does not deny the right to legal representation, even if the profession of a legal counsel did not exist in the time of the Prophet. The basis for this right is seen in the following Sunna:*

*“Since I am only human, like all of you, I might, when litigants come before me to decide between them, rule in favour of the more eloquent of them. If I should thereby transfer to him what is rightfully his brother’s I warn him to take not that which is not his, or I shall reserve for him a piece of hell.”*

*This Sunna points to the possibility of the judge being misled in his judgement by an eloquent party. This warning has led modern jurists to allow for assistance by legal counsel in order to achieve the equality of arms necessary for the suspect/accused to make effective use of his right to defend himself.*

Comment on the cases:

a) Under Art. 31 AC as well as Art. 11 LSCC and Art. 18 (3) ICCC, a suspect or accused has the right to be represented by defence counsel in all stages of the investigation and trial. Art. 38 (1) ICCC clarifies that defence counsel has the right to be present at all interrogations of the suspect. Therefore the police breached the named provisions by telling A he will get a lawyer only after he confesses.

A’s confession is therefore invalid (Art. 7 ICCC).

b) The provisions named above clearly state that everyone has the right to counsel during pre-trial as well as trial. Exceptions to this right are not provided. The right to counsel is even more important in cases where severe punishment is in question or if a case is especially difficult in legal or factual aspects. This clearly shows that the judge is not authorised to replace defence counsel by ensuring the rights of the accused himself. Of course, the judge is responsible for fair proceedings. However a judge, no matter how qualified, cannot replace defence counsel since they have different functions. Defence counsel’s obligation lies solely in counselling the suspect/accused. This obligation is also secured with the possibility to refuse testimony etc.

c) Art. 31 (4) AC states the inviolability of the confidentiality of communications between defence counsel and his client. Hence every invasion on this communication is forbidden; exceptions are not allowed under any circumstances.

The request of the Saranwal violates O’s right to counsel and is not in compliance with the law. Thus, the judge must refuse to give his consent.

## c) Comparative Law

### **Art. 67 Constitution of Egypt**

**para. 2:** Every person accused of a crime must be provided with counsel for his defence.

### **Art. 71 Constitution of Egypt**

Any person arrested or detained shall be informed forthwith of the reasons for his arrest or his detention. He shall have the right to communicate with whoever he sees fit and inform them of what has taken place and to ask for help in the way organised by law. He must be notified, as soon as possible, of the charges directed against him. Any person may lodge a complaint to the courts against any measure taken to restrict his personal freedom. The Law shall regulate the right of complaint in a manner ensuring a decision regarding it within a definite period or else release shall be imperative.

### **Art. 35 Constitution of Iran**

Both parties to a lawsuit have the right in all courts of law to select an attorney, and if they are unable to do so, arrangements must be made to provide them with legal counsel.

### **Art. 10 Constitution of Pakistan**

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

### **Jurisprudence from Pakistan:**

P.L.D. 1999 SC 1126 (c): The term “due process of law” can be summarised as follows:

- (1) A person shall have notice of proceedings which affect his rights.
- (2) He shall be given reasonable opportunity to defend [himself].
- (3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of its honesty and impartiality, and
- (4) That it is a court of competent jurisdiction.

Above are the basic requirements of the doctrine “due process of law” which is enshrined, inter alia, in Art. 4 of the Constitution. It is intrinsically linked with the right to have access to justice which is a fundamental right. This right, inter alia, includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be said to have been given fair and proper trial unless he is provided a reasonable opportunity to [contend] the allegation made against him. [p. 1136] C

### **Discussion proposal:**

- Every suspect/accused has the right to counsel, but when should defence counsel be appointed by the state? What issues should be taken into consideration?
- What is the function of defence counsel within the course of the proceedings and within the judicial system as a whole?
- Do the participants have experience with defence counsel?

## Chapter II: Pre-Trial Procedure / Investigative Phase

The general principles described in Chapter I are also applicable in the pre-trial phase. This phase starts from the moment the police or the prosecution receive information about a possibly criminal action and therefore initiate investigation. It lasts until the first hearing concerning the charges takes place before the court. In practice many problems arise concerning the implementation, or rather the non-implementation, of fair trial principles in the early stages of criminal proceedings. This can jeopardise the fair trial guarantee, especially since many convictions are either based on statements of the suspect and of witnesses or on other evidence, obtained by the police and the prosecution during the pre-trial investigation. It should be stressed that it is important for a fair trial that the judges themselves examine the evidence brought forth by the prosecution. This does not follow from distrust vis-à-vis the police and the Saranwal. Rather it is important that the judges have a direct impression of all the relevant evidence as it is they who decide the case. Furthermore, the examination by the judge is an additional safeguard against violations of the fair trial principle.

Four main areas can be identified which are of crucial importance to fair treatment of the accused in the pre-trial procedure:

- the protection from arbitrary detention,
- the right to remain silent,
- the right to counsel<sup>30</sup> and
- the right to be protected from prohibited forms of interrogation.

The protection from arbitrary detention (see Chapter I Section E) is especially important in the pre-trial phase as a principle closely linked with the presumption of innocence. Pre-trial detention should be the exception rather than the rule and should only be prescribed, in accordance with the relevant laws, when absolutely necessary. An important safeguard against arbitrary detention is the duty to promptly bring the detainee before the Primary Saranwal and the court (see the norms reviewed in Chapter I Section E), who have to be convinced of the necessity and the legality of the pre-trial detention.

The right to remain silent (see Chapter I Section F) is especially important in view of the weight a confession made during the investigative phase has for the decision-making process of the court during the trial. The right to remain silent under police questioning and the privilege against self-incrimination go hand in hand with the prohibition of torture. The judicial authorities are not allowed to exert excessive pressure – in whatever form – on the suspect, in order to coax him into making a statement or a confession. This right has the function of protecting the suspect/accused in an unfamiliar and possibly fear-inducing situation where he is incidentally under more pressure and may be inclined to say whatever he thinks the police or the Saranwal expect to hear. Here too, it is absolutely essential that the suspect/accused is aware of this right.

The right to counsel (see Chapter I Section G) carries weight in the pre-trial procedure, as the communication with counsel can prevent many other rights of the suspect/accused from being violated, or can at least reduce the risk of an infringement of the fair trial principles. Often, the suspect/accused is dependent on counsel to receive relevant and necessary information. In practice, this right is often violated, especially as the suspect/accused is usually not aware of his right despite the duty of the judicial authorities to inform the suspect/accused of this right

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<sup>30</sup> Rainer Grote, “Protection of Individuals in the Pre-Trial Procedure”, in: *The Right to a Fair Trial*, D. Weissbrodt / R. Wolfrum (eds.), 1998, p. 699 (700).

(see above). Having access to counsel during the early stages of proceedings can be crucial for ensuring an adequate defence during the actual trial proceedings. The suspect/accused may not be in a position to correctly judge the situation and may act in a manner that will reduce the efficiency of later defence strategies. In Afghanistan the right to counsel is recognised during all stages of the proceedings, and in the case that a suspect/accused cannot afford legal counsel, the judicial authorities are bound by the Constitution to pay for counsel.

The right to be protected against prohibited forms of interrogation is of special importance in the pre-trial procedure. Since pre-trial proceedings typically take place in closed sessions, they are very susceptible to breaches of these prohibitions. As already stated, the judicial authorities are not allowed to exert excessive pressure – in whatever form – on the suspect. Because the suspect in custody is at the mercy of the overwhelming power of the prosecution authorities, they may tend to resort to prohibited forms of examination in order to resolve the investigation quickly. The right to be protected from these forms of examinations is closely linked to the right to counsel. If defence counsel is appointed and is present at the examination, the possibility of breaches of the law is considerably reduced. Thereby defence counsel serves as an extra safeguard for the legality of the proceedings. Besides it is also very important to give the suspect early access to remedies in case of breaches of procedural law during the pre-trial phase, so that records obtained by prohibited forms of examination are excluded at an early stage of the proceedings. Such a special remedy is for example provided by Art. 23 JC. According to that norm a legal representative of a minor can file a complaint with the higher Saranwal.

**Questions to sum up the general and pre-trial principles:**

- Is every kind of different treatment before the law prohibited? Can you think of reasonable distinctions?
- Name the two elements constituting the principle of non-retroactivity of criminal law.
- Is there an exception to the prohibition of retroactivity of criminal law?
- What are the consequences of the presumption of innocence in relation to pre-trial detention?
- Are there consequences of the presumption of innocence for the judicial authorities vis-à-vis third persons, e.g. the media?
- What is the consequence of the presumption of innocence with regard to the burden of proof?
- Is it possible to renounce the right to be protected from torture?
- Can you name three actions falling under the prohibition of torture?
- Is it permitted to use force against suspects? In which cases can the use of force be justified, and which restrictions are there?
- Name the essential procedural safeguards in regard to the freedom from arbitrary detention.
- The right to freedom from arbitrary detention has to be understood in a substantive as well as in a procedural way. Explain those aspects.
- Name reasons that can justify pre-trial detention.
- Are the judicial authorities allowed to draw consequences from the silence of the suspect/accused in relation to his guilt?
- Are the judicial authorities obliged to inform the suspect/accused of his right to remain silent?
- Name advantages of the presence of defence counsel for the suspect/accused as well as for the court.
- In which cases is it of special importance for the suspect/accused to be represented by defence counsel?

## Chapter III: The Trial

### A. Access to Courts Established by Law

#### 1. Legality of Courts

a) In one of the provinces of Afghanistan the cases of drug trafficking have increased dramatically. The competent Primary Court of the Provincial Centre is already overloaded with many pending trials and decides to establish a Special Tribunal for Drug trafficking responsible for all cases occurring in its district. The establishment of this special tribunal aims at easing the work of the court, enabling a timely conviction and thus deterring potential perpetrators. Due to the shortage of judges, professors of law are instead assigned to this special tribunal. Is a trial before the Special Tribunal for Drug trafficking in conformity with the principle of legality of courts?

b) An Afghan soldier is accused of desertion before a military tribunal. He is provided with defence counsel and his rights as an accused are respected during the trial. The military judges sentence him in accordance with the laws applicable in this kind of military case. Has the soldier been sentenced by a competent court established by law?

c) In a small town, Ahmadulla (A) is suspected of having stolen his neighbour's moped and having sold it to an unknown person. The small town is equipped with neither a Saranwal nor a court. Thus the local Jirga decides on the criminal proceedings and the punishment of A. Is this course of action legally allowed?

#### a) Relevant Provisions

##### **Art. 116 Afghan Constitution**

(2) The judicial power consists of one Supreme Court, Appeal Courts and Primary Courts whose organisation and competence are regulated by law.

##### **Art. 123 Afghan Constitution**

With observance of the provisions of this Constitution, the rules related to the structure, authority, and performance of the courts, and the duties of judges are regulated by law.

##### **Art. 40 Law on the Structure and Competencies of Courts**

(1) Appeal Courts shall have the following primary courts within their judicial authority:

1. Primary Courts of Provincial Centre
4. District Primary Courts

##### **Art. 42 Law on the Structure and Competencies of Courts**

The Primary Courts of Provincial Centre have jurisdiction as court of first instance via their tribunals on the following decisions in accordance with the provisions of law:

1. Decisions on "public" criminal offences (Offences against public goods) via their Public Criminal Tribunal
4. Decisions on criminal offences connected with the public security or interest, narcotic trafficking and other crimes determined by law via their Public Security Tribunals.

5. Decisions on penal offences connected with traffic accidents via their Traffic Crime Tribunals.

**Art. 46 Law on the Structure and Competencies of Courts**

Decisions on cases of commercial law, public law and offences connected to public security within the local judicial competence of an Appeal Court will be taken care of by the commercial court and the respective tribunals of the Primary Courts of Provincial Centres.

**Art. 48 Law on the Structure and Competencies of Courts**

The district primary courts shall decide as court of first instance on all “normal” criminal offences [Note by the editor: i.e. offences which are not public criminal offences] . . . presented to them in accordance with the provisions of law.

**Art. 34 Counter Narcotics Law**

- (1) In accordance with the provisions of Arts. 32 and 50 of the Law Concerning the Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan, a Narcotics Tribunal within the Kabul Primary Court of Provincial Centre and a Narcotics Tribunal within the Kabul Appellate Court are established.
- (2) Each of the tribunals set forth in paragraph 1 of this article shall be composed of one President and six members.
- (3) The Presidents of the tribunals shall be responsible for leading and managing the affairs of their respective tribunals and shall preside over judicial proceedings in accordance with the provisions of Arts. 37 and 43 of the Law Concerning the Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan.
- (4) The tribunals set forth in paragraph 1 of this article shall exercise exclusive jurisdiction throughout Afghanistan over drug trafficking offences in the following cases:
  - (a) Two or more kg of heroin, morphine, or cocaine, or any mixture containing those substances;
  - (b) Ten or more kg of opium or any mixture containing opium; and
  - (c) Fifty or more kg of hashish or any mixture containing substances listed in Tables 1 through 4, with the exception of heroin, morphine, cocaine, and opium.
- (5) If the amount of narcotic drugs is less than those set forth in paragraph 4 of this article, the case comes under jurisdiction of the Public Security Tribunals of Provincial Courts.
- (6) Adjudication of drug-related offences shall be in conformity with the provisions of the Law Concerning the Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan and other relevant laws.

- (7) The appointment of the Judges of the Central Narcotics Tribunals and the regulation of other affairs related to their promotion and retirement shall be conducted in accordance with the provisions of the Law Concerning the Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan.
- (8) The amounts and types of narcotic drugs set forth in paragraph 4 over which the Narcotics Tribunals shall exercise exclusive jurisdiction throughout Afghanistan shall be subject to amendment in accordance with the procedures set forth in Art. 33.
- (9) The Central Narcotics Tribunal shall also have jurisdiction over criminal offences connected or related to drug trafficking offences set forth in sub-paragraphs 1, 2, and 3 of paragraph 4 of this article.

**Art. 51 Law on the Structure and Competencies of Courts**

- (1) The accused will be put on trial before the court having competence according to the provisions of this law and other related laws. In case a person commits several crimes, within in the jurisdiction of different courts, the competence for decision shall belong to the court having jurisdiction for the most severe punishment. If the committed crimes are equal in relation to the severity of the punishment, jurisdiction lies with the court having started the trial.
- (2) If a person commits several crimes within the jurisdiction of two different courts (a specialised and a general court), the case as a whole will be put to trial in front of the court having jurisdiction according to the main focus of the case as a whole. If it is not possible to discern such a focal point the jurisdiction will rest with the court having the authority to convey the severe punishment.
- (3) Partners and Assistants of the crime will be put to trial in front of the same court the prime perpetrator will be put to trial at.

**Art. 34 Law on the Structure and Competencies of Courts**

- (1) Whenever a dispute of competence arises between two courts in the jurisdiction of a Appeal Court, relating to criminal proceedings, a panel composed of the chiefs of the tribunals, under the supervision of the Chief of the Appeal Court shall settle the dispute and determine the competent court.

**Art. 120 Afghan Constitution**

The authority of the judicial organ is to attend to all lawsuits in which real individuals or incorporeal including the state stand before it as plaintiff or defendant and in its presence is expressed in accord with the provisions of the law.

**Art. 122 Afghan Constitution**

- (1) No law, under any circumstance, can transfer a case from the jurisdiction of the judicial branch as established in this chapter to another organ than has been determined in this Constitution.
- (2) This provision does not apply to establishing special Courts stated in Arts. 69 and 78 and 127 of this Constitution and military courts in matters relating to them.
- (3) The structure and authority of these courts are regulated by law.

**Art. 4 Law on the Structure and Competencies of Courts**

No law, under any circumstance, can transfer a case from the jurisdiction of the judicial branch to another organ.

**Art. 15 Interim Criminal Code for Courts**

1. The criminal procedure is considered null and so declared, even ex officio, when:
  - a. The persons who have acted as judges or Saranwal did not possess the related legal status;
  - b. The procedure has not been instituted by the Saranwal and when he has not been present in cases in which his presence is mandatory.

**Art. 14 International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

## b) Comment on the Legality of Courts

A basic prerequisite for a fair trial is that proceedings are conducted by a competent, independent and impartial tribunal established by law (Art. 14 ICCPR). Besides being independent (concerning the independence, please refer to the following chapter), tribunals or courts further must be competent and established by law. These requirements are necessary to ensure that the jurisdictional power of a tribunal is determined generally and independent of a given case and not arbitrarily by an administrative act. Also it is important that a tribunal or court is competent to hear the case. Political bodies or administrative agencies may be biased or arbitrary in their decisions due to political considerations. The term law is to be understood in the strict sense of a parliamentary statute or an equivalent unwritten norm of common law. It is crucial that this norm is accessible to all persons subject to it.<sup>31</sup>

As a basic principle, mostly due to the equality before the law and the equal treatment under the law, trials should not be conducted by special tribunals. Although specialised courts do not necessarily violate fair trial principles per se, they must be established to try certain groups of people based on permissible categories that do not violate the principles of equality and non-discrimination. A permissible example would be a military court. The particular character of cases under the jurisdiction of such courts requires judges with specific expert knowledge as well as special procedural regulations. It has to be stressed that the term *special court* cannot be understood as allowing for different fair trial standards for these courts.

Art. 122 AC and Art. 4 LSCC ensure that only courts and tribunals are competent to hear lawsuits; each states that “no law, under any circumstances, can transfer a case from the jurisdiction of the judicial branch to another organ”. Additionally, Arts. 120, 121 and 123 AC guarantee that everyone has the right to be tried by ordinary courts established by law, whose competence is regulated by law. Exceptions, i.e. special courts, have to be regulated by law as well (Art. 122 (2) AC).

Art. 15 ICCC contains a protection clause in case the judges or the Saranwal lacks the necessary legal status required by law. Then the proceedings are considered null and void. This regulation guarantees that a criminal charge may not be heard by any other institution than a tribunal.

To fulfil the prerequisite of the legality of courts it is not sufficient that different courts and tribunals are established by law and that these are the only competent institutions to handle suits at law. Moreover, the law must distribute the authorities of the different courts unambiguously and generally. Art. 25 ICCC gives the District Primary Courts the competence to adjudicate petty offences, misdemeanours and felonies,<sup>32</sup> without any distinctions. However, the LSCC distinguishes here between the Urban Primary Courts and its tribunals and the District Primary Courts. A distinction is introduced between regular criminal acts, public criminal acts, traffic criminal acts and criminal acts against the public security. Additional special laws<sup>33</sup> introduce specialised courts for criminal acts of minors and for cases concerning certain fixed quantities of narcotic substances. In legal methodology there is the well-established principle of *legis posterior derogate legis anterior*, i.e. the principle that if two conflicting laws exist the later one should prevail. According to this principle, the Law on the Structure and Competencies of Courts, the Juvenile Code and the Counter Narcotics Law, since all of them were introduced after the Interim Criminal Procedure Code, abrogate

<sup>31</sup> Nowak, CCPR Commentary, 2005, 319.

<sup>32</sup> For the classification of the criminal acts see Arts. 23-26 APC.

<sup>33</sup> Juvenile Code and Counter Narcotics Law.

the prior regulation. Concerning the Counter Narcotics Law this principle is even explicitly stated in Art. 56 CNL.

Art. 48 LSCC promulgates the general competencies of the District Primary Courts for the adjudication of all cases of regular criminality (*jaza'-e adi*) while the Public Criminal Tribunals of the Urban Primary Courts are according to Art. 44 (1) LSCC competent to adjudicate acts of public criminality (*jaza'-e omumi*). However, according to the information received by Afghan lawyers<sup>34</sup>, the Urban Primary Courts also have general jurisdiction concerning regular criminal acts, and the question whether the District Primary Courts or the Urban Primary Courts are competent is to be decided solely by referring to the principles of local competency elaborated in Art. 26 ICCC. Therefore it seems that both expressions, *jaza'-e adi* and *jaza'-e omumi*, refer to the same thing, i.e. regular or ordinary criminality in contrast to the cases of special criminality like drug trafficking, traffic crimes, crimes against security interests etc. Generally speaking, with regard to legal drafting it is of utmost importance to use exactly the same wording when the same thing is meant, so as to avoid confusion. To the same end, it would be highly recommendable to include the Urban Primary Courts into Art. 48 LSCC regulating the general competencies. Ambiguous regulations are problematic with regard to the principle of legality of courts.

To put it in a nutshell, generally speaking District Primary Courts and the Criminal Tribunals of the Urban Primary Courts have jurisdiction over criminal cases unless the competency of a specialised court is introduced by law.

Such cases are:

1. The Public Security Tribunals in accordance with Arts. 46 and 42 no. 4 LSCC for criminal cases concerning public security, drug trafficking and other matters explicitly allocated to the Public Security Tribunals. Crimes against public security are enumerated in Arts. 173-253 APC and in the Law Concerning Crimes against the Internal and External Security. The term “drug trafficking” is defined in Art. 15 CNL. However, Art. 34 (5) CNL states that these tribunals only have jurisdiction over cases of drug trafficking if the quantities of narcotic substances mentioned in Art. 34 (4) CNL are not met. Once again this is an effect of the principle of *legis posterior derogate legis anterior* explicitly stated in Art. 56 CNL.
2. If these quantities are met the Kabul Counter Narcotics Court is exclusively competent (Art. 34 (4) CNL) to handle cases of drug trafficking for the country as a whole.
3. According to Art. 42 no. 5 there is also a specialised Tribunal for Traffic Crimes within the Urban Primary Courts.
4. Finally, there are the Juvenile Courts in each of the provincial centres. In accordance with Art. 26 (1) JC they have exclusive jurisdiction in criminal cases involving minors.

These classifications, with the exception of the ambiguity mentioned, which should urgently be removed, provide an acceptable base for the jurisdiction of the different courts and fulfil the principle of legality of courts. However, Art. 34 (9) CNL is questionable in this regard. According to that norm, the Central Narcotics Tribunal also has jurisdiction over criminal offences connected to drug trafficking offences set forth in sub-paragraphs 1, 2, and 3 of paragraph 4 of Art. 34. The regulation is problematic because the necessary prerequisites for two offences to have a connection are not defined. The provision may be interpreted broadly, i.e. requiring only a slight connection between two criminal acts, like an identical perpetrator or even a participant, or it may be interpreted restrictively being applicable only if two incidents are so interwoven that two different proceedings would be impossible without their interfering

<sup>34</sup> This was the perception of our friend and colleague, Mr. Gholamhaidar Allama of the Afghan Independent Human Right Commission, in an interview on 27 March 2006.

with each other. The Afghan judiciary will have to implement this system of norms and to find comprehensible standards to solve this question. It is of utmost importance to find a comprehensible solution that is both based on the texts of the laws and applied uniformly so that every person subject to law has the possibility to inform him- or herself about the rule. A restrictive interpretation would be advisable considering the fact that there is a single central Counter Narcotics Court for the whole country in Kabul and the consequences this has on the duration of pre-trial detention, because in many cases a transportation from the provinces to Kabul will be necessary. It should be repeated that such a factual extension of the period of pre-trial detention is problematic concerning the presumption of innocence. It is very appreciable that Art. 34 (6) CNL declares that the Counter Narcotics Tribunals is to adjudicate in conformity with the provisions of the Law on the Structure and Competencies of Courts and other relevant laws. The tribunals are therefore embedded in the regular organisation of courts with the consequence that in case of dispute concerning the competencies of different courts it is up to the Appeal Court (Art. 34 LSCC) and the Supreme Court (Art. 24 (4) LSCC) to decide. This regulation is very helpful to establishing uniform regulation. Once the Supreme Court has reached a decision, every tribunal deviating from this line will face the danger of having its decision overturned.

As for the question of special courts according to Art. 116 2<sup>nd</sup> sentence AC and Art. 2 1<sup>st</sup> sentence LSCC, ordinary courts consist of the Supreme Court, the Appeal Courts and the Primary Courts. The sole permissible exceptions to the ordinary judicial system, i.e. special courts, are named in Arts. 69 AC (special court concerning specific crimes committed by the President), 78 AC (special court concerning specific crimes committed by Ministers), and 127 AC (special court concerning specific crimes committed by the Chief Justice or members of the Supreme Court). Neither the Juvenile Courts nor the Counter Narcotics Courts are special courts in the meaning of Art. 122. Rather both of them, like for instance Traffic Tribunals within the Urban Primary Courts, are specialised courts. Juvenile Courts fulfil the regulations stated in Art. 116 (2) AC about the judiciary – they are courts of first instance and subordinate to the Appeal Courts as well as the Supreme Court. Hence, they are not special courts, but part of the ordinary judiciary as defined in Chapter 7 of the Constitution. Thus, their establishment does not constitute a violation of the constitutional provisions. Identical considerations apply to the Counter Narcotic Tribunals. Art. 34 (1) CNL establishes Narcotic Tribunals as additional tribunals within the Kabul Court of Provincial Centre and the Kabul Court of Appeal. Art. 34 (6) CNL declares that the adjudication of drug-related offences must be in conformity with the provisions of the Law Concerning the Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan and other relevant laws. Hence, the general provisions concerning appeal and appeal on points of law are applicable as well. Consequently the Appeal Court, in the shape of the Counter Narcotic Tribunal, and the Supreme Court are competent to review appeals or appeals on point of law. Hence the system of Counter Narcotic Tribunals fits in the pattern established in Art. 116 AC.

Comment on the cases:

a) The tribunals of the Courts of Provincial Centre are regulated in Art. 41 LSCC. A special tribunal for drug trafficking is not foreseen in this regulation. The Special Tribunal for Drug trafficking was established by a decision of the court. Such a competence of the Courts of Provincial Centres is foreseen neither in the Constitution nor in the other relevant laws. Only the Supreme Court is authorised if necessary to establish other tribunals within the Appeal Court framework (see Art. 32 (4) LSCC) and only after endorsement by the President. Hence, the establishment of the special tribunal violated the law, and the accused must be put on trial before a competent tribunal, i.e. the Public Security Tribunal under Arts. 42 (4) and 46 LSCC. Furthermore, the special tribunal was not composed with judges but with professors of law. According to Art. 15 (1) (a) ICCC a criminal procedure is considered null and declared so ex officio if the persons who have acted as judges did not possess the appropriate legal status. The professors of law were not appointed with the recommendation of the Supreme Court and the approval of the President and consequently did not possess the status of judges (see Art. 132 AC, Art. 60 LSCC). Therefore, the procedure of the special tribunal has to be declared null and void.

The establishment of this special tribunal is not in conformity with the principle of legality of courts.

b) Although Art. 122 (1) AC sets forth that no law, under any circumstances, can transfer a case from the jurisdiction of the judicial branch to another organ, Art. 122 (2) provides an exception for military courts in military matters (repeated in Art. 4 LSCC). Consequently, the establishment of military courts is in accordance with the law. Nevertheless military courts must abide by fair trial standards just like ordinary courts. In the instant case military matters are concerned and fair trial principles are respected. Therefore the soldier was sentenced by a competent court established by law.

c) It is the sole right of the state to institute criminal proceedings. The rule of law requires that investigations and trials be exclusively conducted by the authorised judicial authorities in accordance with the relevant provisions (see Arts. 122 (1) and 130 (1) AC, Arts. 21-23 ICCC). According to Art. 15 (1) (a) and (b) ICCC the proceedings of the Jirga are considered null and void because the procedure was not instituted by the Saranwal and because the members of the Jirga did not possess the required professional status of judges.

A criminal proceeding conducted by a Jirga is therefore illegal and violates the rights of a suspect/accused to a fair trial, in particular the right to a trial before a court established by law.

### **c) Comparative Law**

#### **Art. 34 Constitution of Iran**

It is the indisputable right of every citizen to seek justice by recourse to competent courts. All citizens have right of access to such courts, and no one can be barred from courts to which he has a legal right of recourse.

#### **Art. 159 Constitution of Iran**

The courts of justice are the official bodies to which all grievances and complaints are to be referred. The formation of courts and their jurisdiction is to be determined by law.

#### **Art. 175 Constitution of Pakistan**

(1) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

#### **Jurisprudence from Pakistan**

P.L.D. SC 1999 Part II; p. 504 (oo): To justify the establishment of such Military Courts support must be found in the provisions of the Constitution. A Government established under the Constitution must not deviate from the Constitutional path and must find solution to all its problems within the framework of the Constitution. Therefore, to justify the establishment of Military Courts support must be found from the provisions contained in the Constitution. [p. 634] QQQ

#### **Discussion Proposal:**

- What experience do the participants have with Jirgas and other traditional decision-making institutions?
- Which mechanism for conflict resolution does the general population prefer to make use of? Why?
- Which problems concerning fair trial rights may arise if trials before Jirgas were allowed?

## 2. Access to the Courts

- a) The application for review of the lawfulness of the pre-trial detention of Mahmoud (M) was dismissed by the competent judge. The judge is very busy and therefore of the opinion that M should wait until the commencement of the trial when the lawfulness of the detention will be examined anyway. Is his decision correct?
- b) Farideh (F) is accused of having killed her husband. She was acting in self-defence, for her husband had attacked her with intent to kill. During trial the judge neither interrogates F nor does he interrogate her female defence counsel. Both try repeatedly to make a statement, but the judge refuses to hear them. He rather listens to the statement of F's father-in-law on the incident, because he considers women's testimony invalid. Is the principle of access to courts relevant in this case?

### a) Relevant Provisions

#### **Art. 22 Afghan Constitution**

- (1) Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited.
- (2) The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.

#### **Art. 31 Afghan Constitution**

- (1) Every person upon arrest can seek an advocate to defend his rights or to defend his case of which he is accused under the law.
- (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.

#### **Art. 58 Afghan Constitution**

- (2) Any person, whose fundamental rights have been violated, can file complaint to the [Independent Human Rights] Commission.
- (3) The Commission can refer cases of violation of human rights to the legal authorities, and assist in defending the rights of the complainant.

#### **Art. 14 Law on the Structure and Competencies of Courts**

. . . proceedings and issuance of decisions of the courts will be based on the principle of equality before the law as well as the court and with the observance of justice and neutrality.

#### **Art. 9 International Covenant on Civil and Political Rights**

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

#### **Art. 14 International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

## **b) Comment on Access to the Courts**

The right of access to the courts means that everyone must have the possibility of addressing a court in order to determine his rights in a suit at law, without being hindered by the law, administrative procedures or material resources. In essence, it is the right to be heard and to be given the opportunity to present one's case.

Art. 31 (2) AC contains the right to access to the courts as it secures the right to receive information about the accusations and to be summoned to the court within the legal limits. Therefore, Art. 31 (2) allows the defendant to have a court examine the decision concerning a limitation of personal liberty. This right to be summoned to the court generally allows for a review of the decision and can therefore be viewed to allow the same protection as Art. 9 (4) ICCPR, even if the choice of words is not the same. Art. 31 (1) AC, by which the arrested person can seek an advocate to defend his rights, strengthens this understanding of Art. 31 (2) AC, as it is based on the assumption that the accused has access to the courts.

Art. 58 AC is an extra safeguard that enables people to address the Independent Human Rights Commission (HRC) if their fundamental rights have been violated. The HRC can then refer cases to the legal authorities, i.e. the courts, and assist in defending the rights of the complainant.

The right of access to the courts is also linked to the principle of equality, as everyone, men and women, Afghans and foreigners, must have an equal right to access the courts. In practice, this still presents a problem in Afghanistan. However, Art. 22 AC, which prohibits discrimination and clarifies that men and women are equal before the law, covers this aspect of the right to equal access to the courts. Art. 14 LSCC has to be cited as well in this context. This equal opportunity to address a court in one's own case must be ensured by all those working in the judicial sector. Especially the judge can help ensure the rights of the female defendant by explicitly giving her the opportunity to answer the questions of the court herself – within the limits of her right to remain silent. He also has the authority to restrain the male relatives from exerting too much pressure on the female defendant. The right to equal access to justice for men and women is still a major problem in the reality of the system of justice in Afghanistan. In order to protect the rights of women in a society effectively the possibility to address breaches of their rights without discrimination is indispensable.

Comment on the cases:

a) Art. 31 (2) AC states the right of the accused to be summoned to the court within the time-limits determined by law (see also Art. 9 (4) ICCPR). This right secures to the accused the option of having a court examine the decision concerning the limitation of his personal liberty. Thus after the submission of the indictment (with this act M becomes an accused pursuant to Art. 5 (2) ICC), M has the right to have the decision of pre-trial detention reviewed by a competent judge. He is not bound to wait until the commencement of the trial. The decision of the judge is incorrect and violates M's right of addressing the court in order to determine his rights.

b) The right of access to courts also includes the right to be heard by the competent court and to be given the opportunity to present one's case. The judge refused to hear F or her female defence counsel although both tried to make a statement. F's right to present her case before a court of law was violated because of the fact that she is a woman. Thereby her right to an adequate defence was also ignored by the court. The right of access to courts is based on the prerequisite that everybody has an equal right of access regardless of gender, race, wealth, religion, ethnicity, nationality etc. (see Art. 22 AC, Arts. 2, 14 (1) and 26 ICCPR). Thus, the principle of access to courts has been breached by the judge.

### c) Comparative Law

#### **Art. 68 Constitution of Egypt**

The right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge. The State shall guarantee the accessibility of the judicature organs to litigants, and the rapidity of statuting on cases. Any provision in the law stipulating the immunity of any act or administrative decision from the control of the judicature shall be prohibited

#### **Art. 71 Constitution of Egypt**

**para. 4:** Any person may lodge a complaint to the courts against any measure taken to restrict his individual freedom.

**para. 5:** The law regulates the right of complaint in a manner ensuring a ruling regarding it within a definite period, or else release is imperative.

#### **Art. 34 Constitution of Iran**

It is the indisputable right of every citizen to seek justice by recourse to competent courts. All citizens have right of access to such courts, and no one can be barred from courts to which he has a legal right of recourse.

#### **Discussion proposal:**

- Would an effectively implemented right to access to the courts influence the general acceptance of the formal court system?
- What effect – if any – would it have on how civilians deal with conflict situations?
- What is the main obstacle to equal access to the courts at present?
- Are there reasonable problems imaginable preventing women from obtaining equal access to justice?

## **B. Independence and Impartiality of Judges**

- a) In the middle of the trial the judge recognises that the accused is an old school friend of his. The friend is accused of murder and the evidence against him is overwhelming. Nevertheless he does not want to be the one sentencing his old friend. What shall the judge do? What options are foreseen by the law?
- b) The defendant finds out that the competent judge has a little daughter who will start school soon. To win the judge's favour he brings a gift for the judge's daughter. The gift comprises a satchel, exercise-books and other useful things for school that the girl needs and the father cannot afford because of the expensive medicine he has to buy for his sick wife. Thus the judge accepts the present. After all he is not accepting a bribe – or so the judge thinks – furthermore he is convinced that the little gift will not influence his decision-making and that he will stay impartial. Is the principle of independence and impartiality of judges violated?
- c) In the middle of the trial the judge receives a phone call from a higher judicial authority ordering the acquittal of the accused for want of evidence. Although the evidence would warrant a conviction, the judge obeys the order because he fears a dismissal and does not want to jeopardise his career. What is the legal position?

### **a) Relevant Provisions**

#### **Art. 22 Afghan Constitution**

- (1) Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.

#### **Art. 116 Afghan Constitution**

- (1) The judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan.

#### **Art. 117 Afghan Constitution**

- (1) 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 Wolesi Jirga with observance of the provisions of the Art. 50 last paragraph and Art. 118 of this Constitution.
- (3) The appointment of the members for the second term is not permissible.
- (5) Members in no way can be dismissed from their service until the end of their term, except under the circumstances stated in Art. 127 of this Constitution.

#### **Art. 118 Afghan Constitution**

A member of the Supreme Court shall have the following qualifications:

4. Shall have high ethical standards and a reputation of good deeds.
6. Shall not be a member of any political party during the term of official duty.

**Art. 119 Afghan Constitution**

Members of the Supreme Court take the following oath in the Presence of the President before occupying the post:

In the name of Allah, the Merciful and the Compassionate

“I swear in the name of God Almighty to support justice and righteousness in accord with the provisions of the sacred religion of Islam and the provisions of the Constitution and other laws of Afghanistan, and to execute the duty of being a judge with utmost honesty, righteousness and non-partisanship.”

**Art. 126 Afghan Constitution**

Members of the Supreme Court enjoy official financial benefits for the rest of their lives provided they do not occupy state and political positions.

**Art. 127 Afghan Constitution**

- (1) When more than one-third of the members of the Wolesi Jirga 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 Wolesi Jirga 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.

**Art. 130 Afghan Constitution**

- (1) While processing the cases, the courts apply the provisions of this Constitution or other laws.
- (2) When there is no provision in the Constitution 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.

**Art. 132 Afghan Constitution**

- (1) Judges are appointed with the recommendation of the Supreme Court and approval of the President.
- (2) The appointment, transfer, promotion, punishment, and proposals to retire judges are within the authority of the Supreme Court in accordance with the law.

**Art. 133 Afghan Constitution**

- (1) When a judge is accused of having committed a crime [*other translation: felony*], the Supreme Court shall inquire about the case involving the judge in accordance with the law.
- (2) After listening to his defence, when the Supreme Court regards the accusation to be valid, it shall present a proposal about the judge's dismissal to the President.
- (3) After the Presidential approval, the accused judge is dismissed from duty, and punished in accordance with the provisions of the law.

**Art. 2 Law on the Structure and Competencies of Courts**

The judiciary is an independent Organ of the state, which is composed of the Supreme Court, the Courts of Appeal and the Primary Courts.

**Art. 14 Law on the Structure and Competencies of Courts**

The courts are independent in the examination and adjudication of their proceedings and only bound by law when issuing decisions.

Proceedings and issuance of decisions of the courts will be based on the principle of equality before the law as well as the court and with the observance of justice and neutrality.

**Art. 15 Law on the Structure and Competencies of Courts**

Judges cannot be members of political parties during their term of office.

**Art. 11 Interim Criminal Code for Courts**

1. A judge cannot handle the case if:
  - a. the crime was committed against him or his relatives;
  - b. he has performed the duties of the judicial police, of the Saranwal or has given witness or functioned as an expert in the same case;
  - c. he has been defence counsel of the accused.
2. When the cases indicated in paragraph 1 occur, the judge of a single member court shall request the President of the [Appeal] Court to authorise him to abstain.
3. When the cases indicated in paragraph 1 occur to a judge member of a collegial court, then he or she shall request the President of the Court to authorise him or her to abstain.
4. When the cases indicated in paragraph 1 occur to the President of a collegial court, he or she shall request the President of the next higher court to authorise him or her to abstain.
5. The President of the appropriate level Court either accepts or rejects the request. This decision cannot be protested.
6. When the President of the appropriate level Court authorises the abstention, he or she shall substitute the requesting judge or President for the handling of the case.
7. Pending the decision, the criminal procedures shall be stayed.

**Art. 12 Interim Criminal Code for Courts**

1. The accused or the Saranwal can request the disqualification of a judge or a President when he/she thinks that one of the cases indicated in paragraph 1 of Art. 11 occurs. The request shall be addressed according to the case to the appropriate President indicated in paragraphs 2, 3 and 4 of Art. 11. The president either accepts or rejects the request.
2. In case of acceptance, the President of the appropriate level Court shall substitute the disqualified judge or President. This decision cannot be protested.
3. Pending the decision, the criminal procedures shall be stayed.

**Art. 14 International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

**Art. 9 International Covenant on Civil and Political Rights**

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

**b) Comment on the Independence and Impartiality of Judges**

The independence of the judiciary power is one of the pillars of the rule of law. It is also one of the crucial fair trial standards. The independence of the judiciary is derived from the most enduring ingredient of justice, namely impartiality. Independence refers to the autonomy of a judge or a bench in the application of the law to the facts when adjudicating cases. It can be more specifically described as encompassing two different aspects: first, institutional independence, which refers directly to the principle of the separation of powers, thus prohibiting undue influence by other state organs on the judiciary as a whole and, second, individual independence. While institutional independence primarily prohibits intrusions by the executive but also to a lesser extent by the legislative branch of the State, individual independence focuses on the individual judges and describes an individual judge's independence from external and internal forces. Undue internal influence may be exercised by other members of the judiciary, especially superiors. To ensure impartial decisions the individual judge has to be free from any interference and pressure when reaching his decisions and to be subject only to law.

The decisions of courts may only be reviewed by higher courts, which are equally independent. In general, the impartiality and independence of the judiciary is guaranteed by different mechanisms: for example by the composition of courts, by nomination or election procedures, as well as by ensuring that a judge dealing with a specific case has no relationship with one of the parties that may affect the decision-making process. Judges should treat the parties in a fair and equal manner, and should make an objective decision based on the facts of the case. Factors that may influence the judge to favour one of the parties, such as engaging in commercial activities with one of the parties or accepting presents and gifts, private invitations as small and petty as they may be, or other bribes, are strictly forbidden. This is important not only to maintain the independence of the respective judge but also to safeguard and enhance the citizen's perception of the judiciary as an impartial and independent organ of the state. In this regard every hint of impartiality has to be avoided.

However the independence of courts does not imply that the courts are completely unrestricted and can reach whatever decision they like. The indispensable counterweight of the independence of the judiciary lies in the firm binding effect of the law, regardless of whether this law is statutory in nature or results from case law (Art. 14 LSCC).

As pointed out, independence of the judiciary requires not only institutional, but also individual independence of the judges. Both concepts are associated and interwoven. Individual independence requires that individual judges be free not only from external but also from internal pressure and influence from within the judiciary itself. The conditions of service of judges are of great importance in this regard, i.e. the security of tenure, including the question of removal from office. Judges should only be removed for serious misconduct or for disciplinary or criminal offences that render them unable to perform their functions. Judges should not be removed from office for bona fide errors or for disagreeing with a particular interpretation of the law. They need not necessarily be appointed for life or be unimpeachable, but they must be appointed or elected at least for several years. Another aspect is the question of discipline and sanctions. The freedom from instructions or pressure while administering a case is of relevance in this respect. Judges must not be subject to directives or in some other manner dependent while adjudicating, they should be free from binding orders in relation to their specific judicial activities and they should not be disciplined for a particular interpretation of the law in good faith.<sup>35</sup>

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<sup>35</sup> Moschtaghi, Organisation and Jurisdiction of the newly established Afghan Courts: The Compliance of the Formal System of Justice with the Bonn Agreement, Max Planck Yearbook of United Nations Law Vol. 10 (2006).

The provisions on the judiciary compose Chapter 7 of the Afghan Constitution. Art. 116 AC establishes the independence of the judiciary within the State structures. Art. 117 AC strengthens the independence of the judges of the Supreme Court by restricting the possibility of dismissal to the very limited case of Art. 127 AC, which requires the approval of a 2/3 majority of the Wolesi Jirga if a Supreme Court judge is to be dismissed and tried because of a felony or a crime committed during the performance of duty. All other judges can only be dismissed if accused of having committed a crime and both the Supreme Court and the President approve the dismissal (Art. 133 AC). The norms ensure that judges are not influenced by the fear of dismissal when making their decisions.

Art. 126 AC ensures the financial independence of Supreme Court judges even after the completion of their term, again reducing personal fears that may have a negative impact on the decision of a judge. Art. 132 states that judges are appointed with the recommendation of the Supreme Court and approval of the President. In addition, the appointment, transfer, promotion, punishment, and proposals for retirement of judges are within the authority of the Supreme Court in accordance with the law. Furthermore, regular judges have career appointments. This can be indirectly derived from Art. 62 (1) LSCC, which states that a retirement is mandatory at the end of 40 years of active service, for permanent and complete disability, for permanent sickness, upon reaching the age of 65 as well as due to other conditions defined by law. The expiration of a limited time of office (beside the 40 years) is not mentioned and not regulated anywhere else. As appointments are not made by the executive, they may be relatively unaffected by political matters.

However, it has to be emphasised that the judicial superiors of the individual judges are also forbidden to practice undue influence on subordinate judges. Disciplinary sanctions and orders are only allowed to ensure compliance with the law and not to influence the judicial decisions of judges. As a rule of thumb it can be said that orders are prohibited in cases where the decision in question may be appealed.

Concerning impartiality, Arts. 118 (4) and 119 AC are intended to ensure that the judges have high moral standards. Art. 118 (6) AC and Art. 15 LSCC forbid the judges from being members of political parties during their official terms of office, thereby reducing the risk of a decision based on political considerations.<sup>36</sup>

*In accordance with Islamic law, the accused has the right to a fair and impartial trial before a competent court. Despite the fact that modern forms of judicial process with the various court levels and formal procedures have only developed over time, the rules of Islamic law do not resist new developments in the judicial process which are compatible with Islamic doctrines<sup>37</sup>. The judge plays an important role in the Islamic justice system. It is argued that the knowledge and character of the judge have the same function that the strict rules of procedure have in a modern state, namely of granting the necessary protection to the accused in the course of proceedings. He is, therefore, expected to not only be well versed in legal matters, but also to have high moral standards and to be capable of treating all those who come before him in an impartial manner. The good reputation is of special importance.*

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<sup>36</sup> For the independence of the judiciary in Afghanistan in detail see *ibid*.

<sup>37</sup> Al-Saleh, *supra*, p. 55 (78-81).

Comment on the cases:

a) Art. 11 (1) ICCC states the cases in which a judge must abstain from handling the case. However, refusal of a judge due to an old friendship with the accused is not one of the mentioned instances. But the listing of lit. a-c should be considered as examples and not as an exhaustive listing of all cases in which a judge may be personally affected. In conclusion the judge shall request the President of the court to authorise his refusal (Art. 11 (2) ICCC for a single judge; Art. 11 (3) ICCC for a judge member of a collegial court). The judge has to follow the President's decision on his request for abstention (Art. 11 (5) ICCC). In the meantime the criminal procedures are to be stayed (Art. 11 (7) ICCC).

b) Accepting any kind of bribe, as little and unimportant as it may seem, is strictly forbidden for judges. Even if the judge concerned thinks that his decision will not be influenced by the presents and gifts of a party and even if he actually continues to treat the parties in a fair and equal manner, he still may not accept any bribes. This sort of behaviour seriously affects the public confidence in the independence and impartiality of judges. At least the bribing defendant would think he had won the judge's favour. Judges are not to act in a manner that could even be perceived as casting doubt on their impartiality. The principle of impartiality of judges has therefore been violated in the present case.

c) The principle of an independent judiciary not only requires that decisions of a judge be taken without intervention of other branches, such as the executive power, but also that the competent courts are free from any undue influences exercised by other courts and higher instances. Although lower courts may be bound by the decisions of the Supreme Court in case law, they are not subject to instruction and therefore not obliged to follow specific orders given by higher judicial authorities concerning the merits of a case. The independence of judges is strengthened by Art. 133 AC, which sets forth that judges can only be dismissed if they are accused of having committed a felony or a crime stemming from the performance of their duty and when the Supreme Court and the President approve the judge's dismissal (see Arts. 117 (5) and 127 AC for judges of the Supreme Court). According to Art. 130 (1) AC the judge has to apply the provision of the Constitution or other laws while processing the case and cannot acquit an accused arbitrarily. Art. 14 LSCC states clearly that courts must remain independent during the adjudication of cases and must adhere to the law when issuing a judgement. Justice and neutrality are to be observed during the proceedings and the issuance of judgements by the court. In conclusion, the order of acquittal given by the higher judicial authority breaches the principle of independence of judges.

## **c) Comparative Law**

### **Art. 65 Constitution of Egypt**

The State shall be subject to law.

The independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties.

### **Art. 68 Constitution of Egypt**

**para. 3:** Any provision in the law stipulating the immunity of any act or administrative decision from the control of the Judicature is prohibited.

### **Art. 156 Constitution of Iran**

The judiciary is an independent power, the protector of the rights of the individual and society, responsible for the implementation of justice, and entrusted with the following duties:

1. investigating and passing judgement on grievances, violations of rights, and complaints; the resolution of litigation; the settling of disputes; and the taking of all necessary decisions and measures in probate matters as the law may determine;
2. restoring public rights and promoting justice and legitimate freedoms;
3. supervising the proper enforcement of laws;
4. uncovering crimes; prosecuting, punishing, and chastising criminals; and enacting the penalties and provisions of the Islamic penal code; and
5. taking suitable measures to prevent the occurrence of crime and to reform criminals.

### **Art. 164 Constitution of Iran**

A judge cannot be removed, whether temporarily or permanently, from the post he occupies except by trial and proof of his guilt, or in consequence of a violation entailing his dismissal. A judge cannot be transferred or redesignated without his consent, except in cases when the interest of society necessitates it, that too, with the decision of the head of the judiciary branch after consultation with the chief of the Supreme Court and the Prosecutor General. The periodic transfer and rotation of judges will be in accordance with general regulations to be laid down by law.

### **Art. 20 Constitution of Lebanon**

Judicial power is to be exercised by the tribunals of various levels and jurisdictions. It functions within the limits of an order established by the law and offering the necessary guarantees to judges and litigants. The limits and conditions for the protection of the judges are determined by law. The judges are independent in the exercise of their duties. The decisions and judgements of all courts are rendered and executed in the name of the Lebanese People.

### **Art. 82 Constitution of Lebanon**

The Judiciary shall be independent of the legislative and executive branches.

### **Art. 85 Constitution of Lebanon**

Magistrates in the bench shall be irremovable.

**Jurisprudence from Pakistan:**

P.L.D. SC 1998 Part I, p. 161 (a): Right to access to impartial and independent Courts/Tribunals is a fundamental right of every citizen. The exercise of this right is dependent on the independence of Judiciary which can be secured only through appointment of persons of high integrity, repute and competence, strictly in accordance with the procedure prescribed under the Constitution . . . . [p. 189] A

**Discussion proposal:**

- What are the limits to professional objectivity? When would the participants choose not to deal with a case?
- What is the main obstacle for the independence and impartiality of the judiciary?
- Is education important for judicial independence too? If so, why is it important?

## C. Trial without Undue Delay

a) The suspect Alem (A) is arrested by the police and held in custody. He is interrogated and presented to the Saranwal 48 hours after his arrest. The Saranwal interrogates A immediately. He keeps him in custody because he sees a risk of escape. He is very busy during the following days and forgets to compose the indictment. Fifteen days later he remembers the case of A, but he is still overloaded with work and takes his time, for he is convinced that he is allowed to keep A in pre-trial detention for up to 30 days. Before the 30 days have elapsed the indictment is submitted to the competent court. The judge in charge is occupied with a lot of pending cases, which he deems more important than the case of A and attends to A's indictment only after two weeks. After having read the indictment he fixes the date of the hearing. A receives the notification of the deed concerning the commencement of the trial two months later. Were the time limits respected, or was the trial unduly delayed?

b) Mohammad (M) is suspected of having defrauded several car-buyers of their money in the year 1989. In 1992 the injured parties make a report. M does not receive notice of the actions taken against him until 1993. He is interrogated by the Saranwal for the first time in 1996. The indictment is not submitted until 2000. The trial commences in the year 2005. Despite the fact that the case is not complicated, a judgement cannot be expected before 2007. The court doubts whether the trial can proceed at all. What do you think?

### a) Relevant Provisions

#### Art. 27 Afghan Constitution

- (1) No person can be pursued, arrested or detained but in accordance with provisions of law.

#### Art. 31 Afghan Constitution

- (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.

#### Art. 36 Interim Criminal Code for Courts

When the arrest performed by the Judicial Police is sanctioned or when the arrest has been ordered by the Saranwal and it remains in force, the arrested person shall be released if the Saranwal has not presented the indictment to the Court within fifteen days from the moment of the arrest except when the Court, at the timely request of the Saranwal, has authorised the extension of the term for not more than fifteen additional days.

#### Art. 42 Interim Criminal Code for Courts

1. The Court immediately after having received the act of indictment orders the notification of the deed indicating the day and hour fixed for the commencement of the trial.

**Art. 9 International Covenant on Civil and Political Rights**

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
- c. To be tried without undue delay.

## b) Comment on a Trial without Undue Delay

“Justice delayed is justice denied.”

The requirement of a prompt trial in criminal cases obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal, are completed and judgements issued within a reasonable time. This must be reconciled with the right of the accused to adequate time and facilities to prepare the defence and the requirement of due diligence on the part of the judge. There are two sets of standards: the first one is applicable to detainees and the second one to everyone charged with a criminal offence.

Concerning the first set of standards, the accused upon arrest shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release (Art. 31 (2) AC, Art. 9 (3) ICCPR). This right is based upon the presumption of innocence, the right to personal liberty and the protection against arbitrary detention<sup>38</sup>. In criminal cases where the accused is held in pre-trial detention, the obligation of the State to expedite trials is even more pressing, and less delay is considered reasonable (and even less in cases of children in custody), especially because the aim is to limit the length of the detention<sup>39</sup>.

In the current practice of Afghan criminal procedure, this fundamental right is denied to persons deprived of their liberty, and it is common practice in Afghanistan that detainees are held up to more than three or even eight months before being brought before a judge in regular cases of minor criminality<sup>40</sup>.

On the other hand, in one instance, a delay of eighteen months from the arrest to the opening of the trial for murder was not considered to violate the principle of trial without undue delay, there being no indication that the pre-trial investigations could have been concluded earlier<sup>41</sup>. The reasons are that the legal or factual difficulties of a case may justify an extension of the pre-trial detention in comparison to less complex cases.

The second set requires that all criminal trials be held without undue delay (Art. 14 (3) (c) ICCPR.) This guarantee is tied to the presumption of innocence and the right to defend oneself. In order to guarantee an adequate defence, it aims to ensure that people awaiting trial on criminal charges do not suffer prolonged uncertainty unduly, and that evidence is not lost or undermined or the witnesses' memory distorted. Proceedings that have lasted six or about ten years<sup>42</sup> to complete, or a delay of 31 months between conviction and appeal<sup>43</sup> have been considered to constitute an undue delay. As a side remark, such an extended duration of a trial is also critical concerning the pacifying function which criminal proceedings should have on society. Such delay may enhance the temptation to resort to private retaliation, which endangers the state's monopoly of force and the rule of law.

<sup>38</sup> ECHR, *Tomasi v. France*, 27 August 1992, 241-A Ser. A, para. 84.

<sup>39</sup> *Haase v. Federal Republic of Germany*, (7412/76), 12 July 1977, 11 DR 78.

<sup>40</sup> *Afghanistan: Re-establishing the rule of law*, 14 August 2003, AI Index: AA 11/021/2003, p. 25.

<sup>41</sup> HRC, *P. Kelly. Jamaica*, 8 April 1991, Communication No. 253/1987, UN doc. GAOR, A/46/40, p. 248, para. 5.11.

<sup>42</sup> See HRC, *Cariboni v. Uruguay*, 27 October 1987, Communication No. 159/1983, UN doc. GAOR, A/43/40, p. 184 and pp. 189-190, para. 9.2 and 10.

<sup>43</sup> See HRC, *McLawrence v. Jamaica*, Communication No. 702/1996, UN GAOR 52<sup>nd</sup> Sess. Suppl. 40, Vol. II, p. 225 (p. 232, para. 5.11).

The period to be taken into consideration begins on the day a person is either charged or arrested or committed for trial and ends when the final appeal judgement is issued<sup>44</sup>.

The definition of the reasonable time limit is similar to the determination of the undue delay; both depend upon the circumstances of the individual case. Factors that have to be examined are the circumstances and the complexity of the case. Although the risk of flight is relevant in determining whether pre-trial detention is justified, it does not determine the issue of whether the length of pre-trial detention is justified. Factors that may influence the decision whether a delay is reasonable or not are the complexity, the nature and seriousness of the case, the number of charges faced by the accused, the nature of the investigation required, the number of people allegedly involved in the crime, and the number of potential witnesses. Accordingly, economic and drug crimes, multiple murder cases, and crimes involving terrorist organisations are qualified as complex and difficult, meaning the pre-trial period may be longer than in other cases. However, these are just rules of thumb. It is necessary to look into the merits of each individual case to be able to decide whether a time period is too extended or not.

The authorities fail to fulfil their duty of expediting the proceedings if, for example, they allow the investigation and proceedings to stagnate, or if they take an unreasonable time to complete specific measures. The proceedings are also carried out with undue delay if the system of criminal procedure itself inhibits a speedy conclusion of trials; the State has to organise the judiciary in such a way that the courts can meet the requirement of reasonableness<sup>45</sup>. For example, the difficult economic situation of the judicial authorities can under no circumstances be an excuse<sup>46</sup> for a prolonged delay.

The lack of co-operation of the accused does not justify delays: the accused is neither obliged to co-operate in criminal proceedings actively with the judicial authorities, nor to renounce any procedural rights<sup>47</sup>. The case might be different if the accused has displayed a determination to be obstructive (e.g. not to appear at the hearings or not to choose counsel) or if he attempts to abscond.

The Afghan Constitution, unfortunately, does not contain explicit wording in view of the right to a trial without undue delay. However, Arts. 27 (2) and 31 (2) AC, read in conjunction with Art. 36 ICC, guarantee that the arrested person generally cannot be detained for a period of more than fifteen days, or with the authorisation of the court a maximum of 30 days, without the indictment being presented to the court. Art. 42 (1) AC ensures that the court specify a date for the commencement of the trial immediately after having received the indictment, and requires that the accused be notified. It would have been advantageous to add explicitly that the date fixed for the trial must exclude undue delay. In this aspect the Constitutions of Egypt and Iran include regulations that do Arts. 9 and 14 ICCPR more justice than the norms contained in the Afghan Constitution and the Afghan criminal procedural laws.

*Islamic law also acknowledges the right to a trial without undue delay. In determining the period within which the trial is to commence, the right of the victim has to be brought into*

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<sup>44</sup> ECHR, *Yagci and Sargin v. Turkey*, 8 June 1995, 319-A Ser. A, p. 20, para. 58.

<sup>45</sup> ECHR, *Mansur v. Turkey*, 8 June 1995, 319-B Ser. A, p. 53, para. 68.

<sup>46</sup> HRC, *B. Lubuto v. Zambia*, 31 October 1995, Communication No. 390/1990, UN doc. GAOR, A/51/40 (vol. II), p. 14, para. 7.3.

<sup>47</sup> See footnote 44, p. 21, para. 66.

*equilibrium with the necessity of grasping the facts of the case and giving the disputing parties the opportunity to render proof and evidence.*<sup>48</sup>

Comment on the cases:

a) According to Art. 31 (1) ICCC the judicial police has to interrogate the person arrested on its own initiative within 24 hours after the arrest and present him immediately thereafter to the Saranwal (paragraph 2). A was interrogated and presented to the Saranwal 48 hours after his arrest, thus not within the stipulated period. The Saranwal is authorised to keep the arrested person in custody for a maximum of 15 days after the arrest. If he has not presented the indictment by that time, he is obliged to release the suspect unless the extension of the term (15 additional days) has been authorised by the court, at the timely request of the Saranwal (see Art. 36 (1) ICCC). Consequently the pre-trial detention of A for up to 30 days was unlawful. According to Art. 42 (1) ICCC the judge has to fix the day and hour for the commencement of the trial and order the notification immediately after having received the indictment. The judge attends to A's indictment within 2 weeks after its submission to the court. Even if the term *immediately* is not to be interpreted literally, the judge is bound to attend to the indictment without undue delay. In particular, when the accused is in custody the relevant provisions have to be interpreted restrictively by virtue of his right to liberty and the presumption of innocence. Two weeks delay cannot be justified as a reasonable period of time particularly in the case of an accused in pre-trial detention. Paragraph 2 of Art. 42 ICCC stipulates that the deed concerning the commencement of the trial shall be served on the accused and his defence counsel at least 5 days in advance. In conclusion a notification served on the accused 2 months after the judge has fixed the date of the hearing, but more than 5 days in advance of it, is in accordance with the named provision. Nevertheless it seems difficult to justify why an accused in the hands of the judicial authorities cannot be informed sooner.

When the suspect is held in custody, even short delays are considered unjustified, and the obligation of expediting trials is more pressing. The non-compliance with the designated time limits constitutes a violation of the suspect's rights to a trial without undue delay (as well as his right to liberty/freedom from arbitrary detention).

b) To answer the question whether the court can start the proceedings or not, one must examine whether a case of undue delay is given. The determination of an undue delay depends upon the circumstances of each individual case such as e.g. the complexity of the case or the nature and seriousness of the case. The judicial authorities first became aware of M's case in 1992, and a decision of the court is not expected before 2007. This is a period of 15 years. Even in complex cases concerning capital crimes such an extended period of the proceedings would hardly be justifiable. However, in the case at hand, due to the lack of complexity and the fact that the offences M is accused of are not very grave, a period of 15 years doubtlessly constitutes an undue delay. To answer the question whether this should lead to a closure of the case, due to the fact that M did not commit a capital crime, the extremely long period that has passed and the fact that M has unduly suffered prolonged uncertainty, it seems highly recommendable to close the case.

<sup>48</sup> Attia, Gamal, *The Right to a Fair trial in Islamic Countries*, in: Weissbrodt / Wolfrum, *The Right to a Fair Trial*, p. 343 (352), Springer Verlag Berlin 1998.

### c) Comparative Law

#### **Art. 71 Constitution of Egypt**

**para. 3:** He [an arrestee]<sup>49</sup> must be faced, as soon as possible, with the charges directed against him.

#### **Art. 68 Constitution of Egypt**

**para. 2:** The State shall guarantee the accessibility of the judicature organs to litigants, and the rapidity of statuting on Cases.

#### **Art. 32 Constitution of Iran**

**Line 2, 3:** In case of arrest, charges with the reasons for accusation must, without delay, be communicated and explained to the accused in writing, and a provisional dossier must be forwarded to the competent judicial authorities within a maximum of twenty-four hours so that the preliminaries to the trial can be completed as swiftly as possible. The violation of this article will be liable to punishment in accordance with the law.

#### **Art. 10 Constitution of Pakistan**

**para. 2:** Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

#### **Discussion proposal:**

- What problems arise if there is a long delay between the arrest and the commencement of the trial?
- What effect could a prolonged pre-trial procedure have on the accused and his family?
- What effect could long delays before the trial have on the administration of justice in general?
- What situations could justify a prolonged pre-trial detention? Give examples.

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<sup>49</sup> Addendum by the editor.

## **D. The Public Conduct of the Trial**

- a) Hassan (H) is 17 years old and accused of having committed bodily harm in several cases. His trial is held closed to the public. Is the principle of the public conduct of a trial violated?
- b) A leading member of the gang “dragons” is accused of shooting the leader of the rival gang “black panthers”. It is expected that members of both gangs will attend the hearing and that it will come to riots before and in the court room. To prevent the clash of these rival gangs during trial and to ensure the order of the proceedings the court decides that all persons attending the public hearing must show their IDs and be registered by the court. Is the court’s decision in conformity with the law?

Alternative:

The court divides the audience into one part favouring the dragons and another part favouring the black panthers. The court, aiming to prevent an aggravation of the situation due to inflammatory press reporting, excludes the press from the hearing.

### **a) Relevant Provisions**

#### **Art. 128 Afghan Constitution**

- (1) In the courts of Afghanistan, trials are open and everyone is entitled to attend trials within the bounds of law.
- (2) The court, in situations which are stated in the law or in situation in which the secrecy of the trial is deemed necessary, can conduct the trial behind closed doors, but the announcement of the court decision should be open in all instances.

#### **Art. 8 Law on the Structure and Competencies of Courts**

In the Courts of Afghanistan trials are open and everyone is entitled to attend trials with respect to the provisions of law. The courts can hold trials in secrecy in cases stated by the law or if the courts deem the secrecy of the trial essential. Even if the trials are held in secrecy, the verdicts have by all means to be pronounced in public.

#### **Art. 52 Interim Criminal Code for Courts**

2. The court keeps the order of the hearing. Hearings are open to the public except when the court decides that all or part of it shall be run without the presence of the public for reasons of morality, family confidentiality or public order.

#### **Art. 32 Juvenile Code**

1. The juvenile court shall hear the cases in relation to juvenile offenders behind closed doors. The pronouncement of the judgement will under any circumstances take place in public.

**Art. 14 International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

## b) Comment on the Public Conduct of the Trial

The principle of the public conduct of a trial comprises two components: the right to a public hearing and the right to a public judgement.

The right to a public hearing involves the possibility of the general public – including the press and observers – to attend the trial. The publicity of hearings is an important safeguard in the interest of the individual and of society at large<sup>50</sup>. This principle not only guarantees that the public is informed about how justice is administered and what decisions are reached by the judicial system, but it also constitutes a guarantee to the parties because the public can review the legality of the proceedings. Furthermore, the court can affirm its independence, impartiality and fairness, thereby increasing general trust in the judicial system among the civilian population. The principle of public attendance includes the right of the press to report on the hearings, as long as the requirements of the presumption of innocence, “non-prejudgement”, secrecy and morality are preserved.

A public hearing requires oral hearings held in public that must not be limited to a particular category of persons<sup>51</sup>. Information about the time and venue must be made available to the public by the courts. In addition, the courts must provide adequate facilities, within reasonable limits, for the attendance of interested members of the public, taking into account, e.g., the potential interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made<sup>52</sup>. Prohibited is also an indirect restriction of public attendance, for example by allowing police in civilian clothes to fill the courtroom before the beginning of the hearing so that there is no more space for media representatives and interested people<sup>53</sup>.

However, there are several permissible exceptions to a public hearing, by which the press and the public may be excluded from all or parts of the hearing. In some cases, the exclusion is even necessary to ensure the rights of the accused, for example in juvenile cases. Exceptions have to be construed narrowly and to be handled in a restrictive way. There is the “public order” exception (Art. 14 (1) ICCPR and Art. 52 (2) ICCD), referring primarily to the order within the courtroom, whereas a second restriction for “national security” interests (Art. 14 (1) ICCPR) relates primarily to the secrecy of important military facts vital to protect a country’s existence or its territorial integrity, or for the protection of the judges against terrorist attacks if this protection cannot be achieved by other means<sup>54</sup>. The third exception, “morality” (Art. 52 ICCD, Art. 14 (1) ICCPR), includes hearings involving sexual offences, especially when minors are concerned<sup>55</sup>. Another important exception is for juvenile cases, which are to be held *in camera* as a rule as stated in Art. 33 JC (see Chapter V Section B).

Another admissible exception covers cases in which the anonymity of witnesses has to be preserved, e.g. in trials concerning organised crime. Hence an exclusion of the public or a testimony behind a screen could be essential. Art. 128 (2) AC allows for a further exception if the “secrecy of the trial is deemed necessary”. Due to its relative vagueness, this regulation

<sup>50</sup> United Nations Compilation of General Comments, *Comment No. 13 on Art. 14 of the ICCPR*, pp. 123-124, para. 6.

<sup>51</sup> *Ibid.*, loc. cit.

<sup>52</sup> *G.A. van Meurs v. The Netherlands*, Communication No. 215/1986, OR of the Human Rights Committee 1989/90, Vol. II, p. 400 (p. 402, para. 6.1).

<sup>53</sup> This happened during a famous trial in 1992, where a trade unionist and political leader (N. Amaoui) was accused of defamation against the government of Morocco.

<sup>54</sup> Nowak, *supra*, p. 325.

<sup>55</sup> In 1993, during a famous trial in Morocco known as the “Commissaire Tabit Affair” – a high ranking officer abused his post to force more than a thousand women and girls to have sexual intercourse – the hearings were closed to the public.

may be subject to abuse. A detailed regulation such as the one that can be found in Art. 14 (2) ICCPR would have been more advantageous, as the criteria for determining the necessity of a secret trial are clearly stated. However, if Art. 128 (2) AC is implemented in a restrictive manner abuse can be avoided. Bearing in mind the exceptions in the Afghan legal system stated above, further exceptions that are in accordance with fair trial standards are hard to imagine.

Proceedings in appeal courts do not necessarily have to be conducted orally or in public, if the requirement that at least one court must deal with the merits in public is fulfilled at lower courts; however, every person has a right to an oral hearing if the appeal concerns an assessment of both facts and law including the question of guilt<sup>56</sup>.

Art. 14 (1) ICCPR requires that judgements in all criminal cases and suits at law are to be made public, but allows for exceptions in proceedings concerning juvenile persons, matrimonial disputes or the guardianship of children. Neither Art. 128 (2) AC nor Art. 8 LSCC nor Art. 33 JC allows for any exceptions to this principle.

Especially at the appeal stage, this duty does not necessarily imply the reading out loud of the judgement, but may in some cases be satisfied by making the relevant judgements available to the public at the court registry<sup>57</sup>.

*There do not seem to be any principles of Islamic law that would oppose the publicity of the hearing and the pronouncement of judgements.*

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<sup>56</sup> See *ECHR, Fredin v. Sweden* (no. 2), (20/1993/415/494), 23 February 1994, at 6-7.

<sup>57</sup> *ECHR, Pretto and others v. Italy*, Judgement of 8 December 1983, Series A, No. 71, p. 12, para. 25 - 26.

Comment on the cases:

a) Art. 33 (1) JC sets forth that the cases of juvenile offenders (for a definition, see Art. 4) are heard behind closed doors. As long as the judgement will be pronounced in the presence of the public, the principle of the public conduct of a trial is not violated in the case of H.

b) To safeguard public order the court can decide to exclude the public from the hearing in accordance with Art. 52 (2) ICC. The control of IDs and their registration constitute a measure to maintain the public order in the court room. Moreover, this measure is less far-reaching than an exclusion of the public: it can be regarded as proportional and in conformity with the law.

Alternative:

The right to a public trial refers not only to the public attending the hearing in person but also to the indirect publicity through the presence of the press in a public hearing. The presence of media representatives guarantees that larger parts of the population are informed about how justice is provided and what decisions are reached by the judicial system. This can help strengthen the trust in the judicial system. The presence of the press is important for the control of State powers and the legality of the proceedings. Excluding the press from the public hearing violates the right of the public to attend the hearing, unless the secrecy of the trial is deemed necessary (Art. 128 (2) AC) or reasons of morality (Art. 52 (2) ICC) require a trial closed to the press. Reasons of morality are given in cases of sexual offences, which are not relevant in this case. The question of when a trial in closed session is to be deemed necessary is not specified in the Constitution. Nevertheless, it should be implemented restrictively allowing only an exclusion of the public in cases of absolute necessity. In consequence the press cannot be excluded from all sensational hearings; otherwise Art. 128 (2) AC would leave room for abuse.

Since none of the exceptions of the publicity of hearings foreseen in the relevant provisions apply to this case, the exclusion of the press breaches the right to a public hearing.

### c) Comparative Law

#### Art. 165 Constitution of Iran

Trials are to be held openly and members of the public may attend without any restriction unless the court determines that an open trial would be detrimental to public morality or discipline, or if in case of private disputes, both the parties request not to hold open hearing.

#### Discussion proposal:

- What are the advantages of having a public trial?
- What are the disadvantages of having a public trial?
- What could be reasons for attending trial proceedings?
- In what circumstances could a closed trial be necessary?

## E. The Right to an Adequate Defence

- a) Djawed (D) is charged with murder. He is held in custody because of the existing danger of absconding. D is represented by defence counsel of his choice. The prison regulations limit the possibility of communication with defence counsel. Visits are only allowed only for four hours each day and in the presence of a prison officer. Furthermore all written communication is read by the prison officers. Does that affect the right to an adequate defence?
- b) During the trial, the prosecution finds new incriminating evidence that could verify aggravating circumstances and does not inform the accused and his defence counsel. They only find out about the new incriminating evidence and changed charges against the accused at the court's hearing. Defence counsel asks the court for an interruption of the trial and for adequate time to prepare the defence according to the changed situation. The judges are in doubt whether an interruption of the trial is necessary or if this would violate the right to trial without undue delay. What should the court decide? Did the Saranwal respect the legal provisions relevant for an adequate defence?

### a) Relevant Provisions

#### Art. 31 Afghan Constitution

- (1) Every person upon arrest can seek an advocate to defend his rights or to defend his case for which he is accused under the law.
- (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.
- (3) In criminal cases, the state shall appoint an advocate for a destitute.
- (4) The confidentiality of oral, written or telephonic communications between an advocate and his accused client are *immune*<sup>58</sup> from invasion.
- (5) The duties and authorities of advocates shall be regulated by law.

#### Art. 135 Afghan Constitution

If parties involved in a case do not know the language in which the trial is conducted, they have the right to have the material and documents related to the case translated through an translator and the right to speak in their mother language in the court.

#### Art. 11 Law on the Structure and Competencies of Courts

Every person upon arrest has the right to appoint a defence counsel to defend himself in regard of the accusation and evidence against him.

In criminal cases a defence counsel shall be appointed for destitute persons according to the provisions on law.

#### Art. 22 Juvenile Code

- (1) In all stages of investigation and trial, the minor has the right to a defence counsel and interpreter. In case the parents or legal representatives cannot afford a defence counsel or interpreter, the juvenile court shall appoint a defence counsel and interpreter on government costs.

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<sup>58</sup> Emphasis added by the editor.

**Art. 5 Interim Criminal Code for Courts**

8. The words or terms “suspect” and “accused” also include in their definition his/her defence counsel.

**Art. 19 Interim Criminal Code for Courts**

1. The suspect or the accused financially unable to appoint a defence attorney is entitled to have a free defence attorney appointed for him or her in the following manner:
  - a. The investigating Saranwal or the Court adjudicating the case, on the petition of the person, appoints a defence attorney for the destitute person from amongst the lawyers officially permitted to work as defence attorney.
  - b. The person for whom an attorney has been appointed reserves the right not to accept the appointed defence attorney and to defend himself in person.
  - c. The fees of the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.

**Art. 38 Interim Criminal Code for Courts**

1. The defence counsel has the right to be present at all times during the interrogation of the suspect.
2. The suspect and the defence counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial.
3. In the investigation phase the Saranwal and the judicial police shall notify the suspect and his defence counsel of searches, confrontations, line-up procedures and expert examinations in order to allow them to be present.  
This duty can be waived only when there is an urgent need to conduct the said operations, which is defined as when it is a flagrante delicto crime or there is a fear of the loss of evidential facts.

**Art. 42 Interim Criminal Code for Courts**

2. The deed [concerning the commencement of trial]<sup>59</sup> shall contain the name of the accused and the indication of the alleged crime with its factual circumstances in reference to the related law provisions and shall be served on the accused and his defence counsel, the victim and the Saranwal at least five days in advance.

**Art. 43 Interim Criminal Code for Courts**

1. The accused and his defence counsel are entitled to examine the documents contained in the file mentioned in the last paragraph of article 39 [act of indictment, file containing all the deeds formed during the investigations]<sup>60</sup> and the objects under seizure.

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<sup>59</sup> Addendum by the editor.

<sup>60</sup> Addendum by the editor.

**Art. 52 Interim Criminal Code for Courts**

1. The order of the hearing is explained to the persons present by the Head of the Court.
3. The Primary Saranwal, the accused and his defence counsel have the right to be always present.
4. The accused that with his behaviour disrupts the proceedings can be excluded by the Court for part or all the duration of the hearing.

**Art. 53 Interim Criminal Code for Courts**

2. The accused and his defence counsel have the right to be present.
3. The Court proceedings are conducted according to following order:
  - a. At the opening of the hearing the Court reads out the act of indictment;
  - g. The accused can testify if he does not avail himself to the right to remain silent and the accused or his defence counsel can ask questions to the witnesses and experts;
  - i. The Primary Saranwal and the defence lawyer can ask questions of the accused.

**Art. 56 Interim Criminal Code for Courts**

1. If from the deeds of the investigations or during the trial it results that there are alleged additional crimes and/or facts contributing as aggravating circumstances which have not been included in the act of indictment, the Court, at the request of the Primary Saranwal, makes the related accusation to the accused and/or to his defence counsel, when present, giving them adequate time to prepare the defence.

**Art. 57 Interim Criminal Code for Courts**

When the Court deems that the crime is to be given a different definition from that indicated in the act of indictment on the basis of the same facts and circumstances included in the accusation, it shall grant the accused and the defence counsel a time allowance for presenting a defence vis-à-vis the change in the definition.

## **Notification Rights**

### **Art. 5 Interim Criminal Code for Courts**

7. The police, the Saranwal and the court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent, right to representation at all times by defence counsel, and right to be present during searches, line-ups, expert examinations and trial.
8. The words or terms “suspect” and “accused” also include in their definition his/her defence counsel.

### **Art. 17 Interim Criminal Code for Courts**

1. The notifications are served by the judicial police that shall give the requesting judicial organs a report on the service rendered.
2. The notifications are served in the domicile of the concerned person in his hands or in the hands of an adult relative of cohabitant. Should this not be possible, a copy of the deed is left at his dwelling place.
3. When the person is under arrest the notification is served on him through the director of the prison.
4. When it has not been possible to locate the domicile of the concerned person, the judicial police shall conduct accurate investigations aimed at identifying the places where the person lives or works. In case the search for finding these places proves fruitless, the notification deed shall be delivered to the administrative organ of the place considered as the person’s last place of residence.

### **Art. 38 Interim Criminal Code for Courts**

3. In the investigation phase the Saranwal and the judicial police shall notify the suspect and his defence counsel of searches, confrontations, line-up procedures and expert examinations in order to allow them to be present. This duty can be waived only when there is an urgent need to conduct the said operations, which is defined as when it is a flagrante delicto crime or there is a fear of the loss of evidential facts.

### **Art. 40 Interim Criminal Code for Courts**

1. During investigations, the judicial police and the Saranwal shall give notice to the suspect, defence counsel and the victim of any activities at which they have the right to be present.
2. If there are no particular grounded reasons of urgency, the notification should be served at least three days before the performance of the activity.
3. Reasons of urgency imposing a shorter period or absence of notifications shall be clearly mentioned in the record of the activities.

### **Art. 41 Interim Criminal Code for Courts**

1. When it has not been possible to identify any of the places indicated in article 17, the notifications shall be served on a defence counsel appointed by the police during their autonomous investigations, or by the Saranwal during his investigations.
2. The appointment of the defence counsel is made by the police and the Saranwal in a written form.
3. In this case the defence counsel represents the suspect.
4. The above indicated decision ceases to take effect at the end of the investigations.

**Art. 42 Interim Criminal Code for Courts**

1. The Court immediately after having received the act of indictment, orders the notification of the deed indicating the day and hour fixed for the commencement of the trial.
2. The deed [concerning the commencement of trial] shall contain the name of the accused and the indication of the alleged crime with its factual circumstances in reference to the related law provisions and shall be served on the accused and his defence counsel, the victim and the Saranwal at least five days in advance.

**Art. 47 Interim Criminal Code for Courts**

1. When the notification indicated in article 42 has been delivered to the accused and he does not appear, the judge appoints a defence counsel for him.
2. Notifications continue to be served on the accused following the provisions of article 17.

**Art. 50 Counter Narcotics Law**

5. If there are reasonable grounds to believe revealing the identity of an informant will put him in danger or will endanger lawful investigations, his identity may be declared secret by an order of the court and must not be revealed until the end of the investigations or a second decision of the court. Also the methods, devices and the technique of the investigations will be kept secret.
6. An informant can testify in court.
7. Testimonies and documents which have been obtained through the use of reliable informants shall be admissible in all detection, investigation, and trial proceedings.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - b. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - c. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

**Art. 9 International Covenant on Civil and Political Rights**

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

## **b) Comment on the Right to an Adequate Defence**

The right to have all the necessary means for the defence at one's disposal is a well established principal under international law. This right not only includes the right to be assisted by a lawyer or to defend oneself, but also to have all the elements of evidence at one's disposal, as well as to put further questions to the witnesses. The right to an adequate defence is derived from the principle of the equality of arms. This means that the prosecution and the defence must have, to the greatest extent possible, an equal position throughout the proceedings. This principle implies in particular that generally no element of the examination of the case is settled while one party is present or represented, but the other is not.<sup>61</sup>

The right to an adequate defence becomes effective immediately at the moment of arrest and includes not only the right to have the assistance of a lawyer but also the guarantee of free and confidential communication with the advocate. An integral part of this right is the duty of the judicial authorities to inform the suspect/accused and his defence counsel of the charges against him, and of the relevant actions taken by the judicial authorities. Without this information, the preparation of the defence is hardly feasible, and the defence would be handicapped in relation to the prosecution. The principle of equality of arms entails that the parties have the same access to the records and other documents in the case, at least in so far as the latter play a part in the formation of the court's opinion. Moreover, each party must be given the opportunity to oppose the arguments advanced by the other party.<sup>62</sup>

The provision of the Afghan Constitution related to the right to defence is contained in Art. 31 AC, which even foresees the right to free legal assistance if the accused lacks the necessary financial means. The appointment of legal assistance without charge is essential for the enforcement of a fair trial and is contained in Art. 14 (3) (d) ICCPR. Art. 135 AC gives the suspect/accused the right to translation of the documents and material, as well as interpretation of the proceedings so that he is able to speak in his mother tongue before the court. This is essential for an adequate defence. An accused can only defend himself adequately if he has full understanding of all the evidence and the arguments presented to the court. Furthermore, the accused may be more articulate in his own language, increasing his possibilities to convince the court of his innocence. These constitutional rights are repeated in Art. 11 LSCC. Arts. 31 and 135 AC are complemented by many regulations contained in the Interim Criminal Code for Courts. For instance, notification duties are contained in Arts. 5, 17, 38 and 40 ICCC. These duties commence during the investigative phase and continue throughout the trial phase. Art. 41 ICCC contains a special regulation concerning the notification and the defence of an absent suspect/accused (see Chapter III Section G: trial in absentia). During the investigative phase, Arts. 38, 40 and 43 ICCC ensure that the suspect and his defence counsel can generally be present when certain evidence is collected, and that they have access to the investigative findings before the commencement of the trial. Art. 42 ICCC guarantees a minimum time period for trial preparation. According to that provision, the writ of summons to the trial has to contain inter alia the indication of the alleged crime, its factual circumstances and the related legal provisions, and it has to be delivered to the accused and his defence counsel at least five days in advance. Arts. 52, 53, 56, and 57 ICCC protect the right to an adequate defence during the trial phase. Art. 53 (3) (a) ICCC requires that the indictment is read at the beginning of the hearing. This ensures that the accused and the defence lawyer are fully aware of the charges brought against the accused. If during a trial it turns out that additional crimes or aggravating circumstances are in question or should it be revealed that another kind of crime than the one defined in the indictment has been

<sup>61</sup> Peter van Dijk, *The Right of the Accused to a Fair Trial under International Law*, 1983, p. 24.

<sup>62</sup> V. Dijk, *supra*.

committed, the judge has additional duties of information vis-à-vis the defence. Moreover, Arts. 56 and 57 ICCC demand that the defence is given extra time to prepare; therefore the hearing has to be postponed.

The accused and his defence counsel have the right to be present at all hearings, enabling them to question and challenge each piece of evidence. An exception is provided for in Art. 52 (4) ICCC, which allows the accused to be excluded from the duration of the hearing if he disrupts the proceedings. This is an admissible abbreviation of his right to be present, as the defendant himself can prevent an exclusion by proper behaviour before the court. Another exception is the trial in absentia, which is possible under Afghan law (see Chapter III Section G). It is the legislature's decision, whether a trial in absentia is permissible or not. In order to respect the principle of a fair trial certain conditions have to be met. Concerning the right to an adequate defence, a trial in absentia meets these conditions since it is only permissible if at least defence counsel is present for the accused.

There is another exception in Art. 33 LSCC. A minor can be excluded if the issues discussed during the trial may cause mental harm to the minor. The court can continue the trial in absence of the minor, provided that the proceedings taking place in his absence are later explained to the child. Even though this is a curtailment of the minor's right to attendance, there are conflicting rights which have to be protected and thereby could justify a restricted curtailment of this right. The conflicting right in this case is the mental health of the minor. Since this is a human right of utmost importance, exceptions to the right to an adequate defence are permissible if indispensable to the protection of the mental health of the minor. However, the judge in charge must be extremely careful to balance the rights in question correctly. If damage to the mental health of the minor is only a very slight possibility his right to an adequate defence must prevail.

A questionable norm in this context is Art. 50 (5) and (7) CNL. According to this provision, if there are reasonable grounds to believe revealing the identity of an informant will put him in danger or will endanger lawful investigations, his identity may be declared secret by an order of the court and may not be revealed until the end of the investigation or until a second decision of the court. Also the methods, devices and the technique of the investigations must be kept secret (Art. 50 (5) CNL). Moreover, Art. 50 (7) CNL states that evidence properly gained through the authorised use of informants shall be admissible in all detection, investigation, and trial proceedings. Art. 50 (6) CNL states that the informants can testify at court.

These regulations are not unproblematic in regard to the right to a proper defence. If the identity of an informant is withheld, it becomes much more difficult to challenge his credibility. This has to be seen in the context that informants will be regularly recruited out of the scene of drug criminals; therefore their credibility will not be unproblematic. Moreover, if interpreted broadly, Art. 50 (5) CNL could be invoked to justify an informant's non-appearance before the court, with the introduction of merely his recorded testimony under Art. 50 (7) CNL instead. According to Art. 50 (5) CNL of the same norm the identity of informants can be withheld until investigations are finished. Investigations are not expressly restricted to the investigation concerning the individual accused, and it is very likely in the field of drug trafficking offences that investigations against a syndicate will last several years, during which certain individuals are already charged. Certainly, criminal investigation is of high value and importance in a state which is to be based on the rule of law. Additionally, it is an imperative obligation of the state-run authorities to protect people from harm. On the other hand the right to an adequate defence is an essential right to ensure a fair trial. Therefore an optimal balance of the interests at stake has to be achieved in each individual case. Although the identity of an informant may be withheld in accordance with Art. 50 (5) CNL, this norm has to be applied restrictively. Moreover, the court has to undertake every effort possible to enable the defence to cross-examine the informant. For instance an informant could be

interrogated behind a curtain or via audio conference or at least by confronting him in court with a catalogue of written questions prepared by the defence. The principle of equality of arms furthermore demands a qualification of such evidence: the less possibility the defence has to challenge an informant's testimony, the less persuasive value it should be given. Otherwise, the prosecution would have an advantage compared to the defence, which would not be compatible with the idea of a fair trial.

*The Shari'a guarantees the right to defence, and prohibits its denial under any circumstances. The prophet is reported to have told Ali, whom he had just appointed as governor of Yemen<sup>63</sup>: "O 'Ali! People will come to you asking for judgements. When the two parties to a dispute come to you, do not decide in favour of either party until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth."*

*It is understood that if one is to prepare an effective defence, it is necessary to acquire a complete understanding of the alleged crime and the evidence so that the charges can be refuted<sup>64</sup>. Islamic law is mute concerning the times of notification; nonetheless, due to the accepted presumption of innocence and the right to defend oneself against every crime, there is at least no rule that would hinder the necessary information being passed on to the suspect/accused at the earliest possible moment. The presence of the accused during the trial is required under Islamic law at least in the case of hudud crimes.*

Comment on the cases:

a) The right to an adequate defence derives from the principle of equality of arms. The suspect/accused and his defence counsel must be granted an equal opportunity to prepare and present his case. Compared to the judicial authorities involved in criminal proceedings the suspect/accused is in a weaker position. The defence would be deprived of any opportunity of an adequate defence if the possibility of free and confidential communication between the suspect/accused and the defence counsel were not respected. The confidentiality of all communication between an advocate and his/her accused client is safeguarded by Art. 31 (4) AC. In principle, a restriction of visiting hours may be justified to a certain extent to establish order in a prison. However, the presence of a prison officer during the conversations with defence counsel as well as the reading of the written communication definitely constitutes a breach of D's right to an adequate defence as well as Art. 34 AC.

b) According to Art. 56 (1) ICCC, if during trial, additional evidence is found which can verify aggravating circumstances, the court must at the request of the Saranwal explain these to the accused and his defence counsel. The court must give the defence adequate time to prepare themselves for this change of circumstances. Consequently the court is obliged to accept the request of defence counsel and to grant the defence the time needed to respond to the changed circumstances.

Moreover, the Saranwal violated Arts. 3 and 38 (2) ICCC due to the lack of notification and the ensuing inability of the accused and his defence counsel to be present during the collection of further evidence.

<sup>63</sup> See al'- Alwani, Taha J, The Right of the Accused in Islam (Part two) Arab law quarterly 10 (1995) 3, p. 238.

<sup>64</sup> See *ibid*, p. 238 (241).

### **c) Comparative Law**

#### **Art. 71 Constitution of Egypt**

**para. 1:** Any person arrested or detained should be informed, forthwith with the reasons for his arrest or detention.

#### **Art. 67 Constitution of Egypt**

**para. 1:** Any defendant is innocent until he is proved guilty before a legal court, in which he is granted the right to defend himself.

#### **Art. 69 Constitution of Egypt**

The right of defence in person or by mandate is guaranteed.

The Law shall grant the financially incapable citizens the means to resort to justice and defend their rights.

#### **Art. 10 Constitution of Pakistan**

**(1)** No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

#### **Discussion proposal:**

- What is the consequence for the proceedings if the defendant and his lawyer are not allowed access to the investigative files?
- What are the advantages for the whole judicial system if the defendant is ensured the right to an adequate defence?
- What problems occur if a suspect/accused is not allowed to consult his counsel in private?
- Are there many defence lawyers in Afghanistan – if not, why not?

## **F. The Right to Call / Examine Adverse Witnesses**

- a) The Primary Saranwal and the accused represented by his defence counsel submit to the court their lists of the witnesses and experts they want to call, indicating the relevance of their testimony and examination. The judge accepts all of the 6 witnesses and the 3 experts introduced by the Saranwal, but he objects to 2 out of 6 witnesses presented by the accused. He argues that the two rejected witnesses are unreliable and their interrogation thus would be unnecessary and would hinder a trial without undue delay. Does the judge possess discretionary powers justifying this decision?
- b) A witness gives evidence against the suspect before a police officer during the police investigation in the pre-trial phase. The record is collected without the presence of the suspect or his defence counsel. The Saranwal wants the witness to be heard in the hearing, but the witness has disappeared without a trace. Therefore at the request of the Saranwal the judge orders the interrogation of the police officer before whom the witness has testified. Is the interrogation of the police officer admissible?

### **a) Relevant Provisions**

#### **Art. 51 Interim Criminal Code for Courts**

1. The Primary Saranwal submits to the Court the list of the witnesses and experts he wants to be heard together with the act of indictment, indicating the reasons of the relevance of their testimony and exams.
2. The accused and/or his defence counsel have the right to present their own lists of witnesses and experts indicating the reasons of the relevance of their testimony and exams.
3. The Court can exclude those witnesses or experts that in its view do not appear material for the adjudication of the case.

#### **Art. 53 Interim Criminal Code for Courts**

3. The Court proceedings are conducted according to the following order:
  - g. The accused can testify if he does not avail himself to the right to remain silent and the accused or his defence counsel can ask questions to the witnesses and experts;

#### **Art. 55 Interim Criminal Code for Courts**

1. The records of the testimonies of the witnesses as well as of the expert exam, collected during the investigative phase, can have the value of evidence as basis for the decision only if it results that the accused and/or his defence counsel were present during the operations and were in a position to raise questions and make objections.
2. Otherwise the related deeds have the sole value of clues.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

## **b) Comment on the Right to Call / Examine Adverse Witnesses**

The right to call and examine witnesses is an integral part of the right to an adequate defence (see above), and it is a fundamental element of the principle of equality of arms. The defence must be in a position to question witnesses who can submit exonerating or extenuating evidence, and must also have the opportunity to challenge the evidence put forth by the prosecution. One consequence of this right is that all of the evidence must normally be presented in the presence of the accused at a public hearing, so that the evidence itself and the reliability and credibility of the witness can be challenged. There can be some exceptions to the rule, for example to protect the witness, but these exceptions cannot infringe the rights of the defence. Hearsay is generally not allowed as the character of the actual witness cannot be directly evaluated by the participants of the trial proceedings. If witnesses remain completely anonymous, the defence would be deprived of most of the necessary information to challenge the witness's reliability. Hence, anonymity of witnesses has to be avoided whenever possible. If this is not possible the persuasive value of the statement has to be regarded as less than if both parties had been able to examine or cross-examine a witness thoroughly. An indication of this finding can be extracted out of Art. 55 (2) ICCC, which declares that statements obtained from interrogation of witnesses during the investigative phase should have only indicative value if the defence was not present.

While the court has some discretion concerning which witnesses will be summoned and need not call all proposed by the prosecution and the defence, the judges must not violate the principles of fairness and equality of arms and must explain the reasons for not calling witnesses requested by the defence. Arguments for not accepting a witness must be objective and not biased in favour of one side. They should be based on Art. 51 (3) ICCC. There may be limits to the right to examine witnesses due to practical factors, such as the unavailability of the witness or when the witness reasonably fears reprisal. However, the judicial authorities may not be negligent in their duty to find the persons concerned.

While the Afghan Constitution does not specifically name the right to call and examine witnesses, this right is contained in Arts. 51 and 53 ICCC. The duty to indicate the relevance of the testimony, in Art. 51 ICCC, enables both sides to prepare their questions and gives the defence the opportunity to see what evidence has to be presented in order to rebut the evidence of the prosecution. A consequence of this right is Art. 55 ICCC stating that testimonies of witnesses as well as expert examinations, collected during the investigation process, can only have the value of evidence if the suspect/accused and his defence counsel have been present and were in a position to raise questions and make objections. If that prerequisite has not been fulfilled the records can only be regarded as clues.

The Afghan law fully meets the requirements of the ICCPR.

*Under Islamic law, witnesses must be of stainless character ('âdil) if their testimony is to have any value for the proceedings. The defendant is given the right to challenge the reliability or righteousness of a witness. In 49:6 of the Qur'an it is stated:*

*“O ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwillingly and afterwards become full of repentance.”*

*In the rules referring to the qisas, the defendant can contradict the oath that has been taken by the adversary party. Both parties have the right to examine his opponent's witnesses and can discuss any evidence or proof rendered to the court. Written testimony is also not admissible if the witness did not come to the court to be examined. One exception to the rule that witnesses must participate in the court proceedings is the concept of the “testimony of testimony”. Hereby two other witnesses report the absentee's testimony, their statements are*

*examined together with the statement of the absent witness, and the two present witnesses can be examined by the participants of the proceedings.*<sup>65</sup>

Comment on the cases:

a) The court has the right to object to a witness. According to Art. 51 (3) ICCC the court has the power to exclude those witnesses or experts that in its view do not appear material to the adjudication of the case. In the present case the judge objects only to witnesses presented by the accused, confining himself to the succinct reason that they are unreliable and their testimony therefore unnecessary. Although it may be justified not to hear all listed witnesses, the reasoning of the judge is rather unsatisfactory. Expediting the trial is undoubtedly a legitimate aim, but since the judge treats the defence and the prosecution rather differently without a very convincing explanation, it seems more likely that the witnesses of the accused have been rejected arbitrarily and that the principle of equality of arms and in particular the right to call witnesses have been breached. Moreover, it is rather problematic that the court regards witnesses prior to their testimony as unreliable. It may well conclude so afterwards, but this perception has to be based on objective reasons, which should later be stated in detail in the decision.

b) It is the right of an accused to call witnesses and examine adverse witnesses (see Arts. 51 and 53 (3) (g) ICCC). Therefore it is important for the defence to be present during the questioning of witnesses. That is the reason why the Interim Criminal Code for Courts provides in Art. 55 (1) and (2) that, if the suspect and his defence counsel have not been present during an interrogation of a witness, the testimonies cannot be regarded as evidence but as mere clues. If the court wants to use the testimony as evidence, it is therefore forced to interrogate the witness again in order to give the defence the possibility to raise questions and make objections to the testimony. In the present case neither the suspect nor his defence counsel was present during the interrogation of the witness. Hence, Art. 55 (2) ICCC provides that the testimony of the witness can only be regarded as a clue. By interrogating the police officer, the accused cannot challenge the witness's credibility, nor can the participants in the proceedings directly evaluate the witness's character. Thus, the admission of the statement of the police officer would circumvent the aim of Art. 55 ICCC to guarantee that testimonies of witnesses can only be used in trial if the defence has had the possibility to question them. In conclusion the testimony of the police officer can also only be regarded as a clue.

### c) Comparative Law

The right to call and examine witnesses is almost never explicitly guaranteed by constitutional law. It is, however, a concept that is widely accepted and part of most nations' procedural law body. This right is usually regulated by specific procedural law and is sufficiently protected through the constitutional safeguards for the general right to a fair trial.

#### **Discussion proposal:**

- What is the judge's role in determining the facts of a case?
- What is the role of the prosecution in determining the facts of a case?
- Can the right of the defence to call witnesses have a positive effect on the verdict?
- What are factors that may influence a witness's testimony before the court?

<sup>65</sup> Attia, *supra*, note 48, p. 356.

- Are the testimonies of witnesses very reliable?
- What should be done if several witnesses contradict each other?
- Which factors may influence the perception of a witness at a crime scene?
- What are some signs of the unreliability of a witness?

## G. Trial in Absentia

- a) Hassan (H) is notified of the prosecution against him and has received the deed indicating the commencement of the trial and the charges against him. Nevertheless he does not appear before the court on the day of the hearing. The court appoints defence counsel and commences the trial a week later without the presence of H, but with the presence of his defence counsel. Is this proceeding lawful?
- b) Alem (A) is suspected of having committed a robbery. Investigations are started; however, the accused cannot be found. The Saranwal does not appoint defence counsel because he hopes that the suspect will be found and can then choose one himself. Only when it comes to trial, the judge appoints defence counsel. Were the principles applicable to a trial in absentia respected? If not, what are the consequences?

### a) Relevant Provisions

#### **Art. 17 Interim Criminal Code for Courts**

4. When it has not been possible to locate the domicile of the concerned person, the judicial police shall conduct accurate investigations aimed at identifying the places where the person lives or works. In case the search for finding these places proves fruitless, the notification deed shall be delivered to the administrative organ of the place considered as the person's last place of residence.

#### **Art. 41 Interim Criminal Code for Courts**

1. When it has not been possible to identify any of the places indicated in article 17, the notifications shall be served on a defence counsel appointed by the police during their autonomous investigations, or by the Saranwal during his investigations.
2. The appointment of the defence counsel is made by the police and the Saranwal in a written form.
3. In this case the defence counsel represents the suspect.
4. The above indicated decision ceases to take effect at the end of the investigations.

#### **Art. 46 Interim Criminal Code for Courts**

1. When it has not been possible to serve the notifications on the accused in any of the forms provided for in article 17, because none of the places there indicated are known, the Court shall issue a decree stating that the accused cannot be found, appointing a defence counsel for him.
2. Later on the notifications shall be served on the defence counsel.
3. Notifications made in this way are valid to all intents and purposes. The accused that cannot be found is represented by the defence counsel.
4. The decree indicated in the first paragraph ceases to take effect at the end of the decree, which has been issued and shall be re-issued in each of the following decrees.
5. Every decree must be preceded by a new search in the places indicated in article 17.

**Art. 47 Interim Criminal Code for Courts**

1. When the notification indicated in article 42 has been delivered to the accused and he does not appear, the judge appoints a defence counsel for him.
2. Notifications continue to be served on the accused following the provisions of article 17.

**Art. 53 Interim Criminal Code for Courts**

2. The accused and his defence counsel have the right to be present.

**Art. 59 Interim Criminal Code for Courts**

4. The accused tried in absentia, in the case of article 47, shall receive notification of the decision read out by the Court together with the reasons deposited later on in the office of the secretary of the Court within fifteen days from the moment of the decision.
5. The notification indicated in the previous paragraph is served on the defence counsel of the accused in the case of article 46.

**Art. 63 Interim Criminal Code for Courts**

1. The person who has been sentenced or the Primary Saranwal can contest the decision of the Court by filing an appeal.
2. The competent Appeal Court is the Provincial Court.
3. The act of appeal shall be deposited with the secretary of the Court, which has made the decision, or with the secretary of the competent Appeal Court within twenty days from the moments in which:
  - c. The accused tried in absentia has received the notification of the decision.

**Art. 64 Interim Criminal Code for Courts**

1. After the decision of the court in case of the not found accused the procedure stays until when the accused personally or the defence counsel delegated by him/her lays down an appeal.
2. In this case the beginning of the appeal term starts for the accused from the moment in which the same has been found and also a notification according to article 17 has been delivered to him/her.
3. The beginning of the appeal term starts for the Saranwal from the moment in which the Court notifies him about the notification delivered to the accused.
4. If the accused and the Saranwal do not lay down an appeal during the said term the decision becomes final.

**Art. 33 Juvenile Code**

3. If the issues discussed during the trial harm the minor mentally, the court can continue the trial in absence of the minor, provided that a summary of the course of the respective hearing is given to him later.

**Art. 14 International Covenant on Civil and Political Rights**

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

**b) Comment on the Trial in Absentia**

The right to be present at trial is not explicitly recognised by all human rights instruments. However, international jurisprudence has recognised the right to be tried in one's presence as implicit in the right to a proper defence. Trials in absentia can prejudice the fairness of the hearings in a very grave manner. The majority of national legal orders do not recognise the validity of trials in absentia, and some jurists even state that the presence of the accused during his trial is an absolute right. One famous exception is the French Code of Criminal Procedure. The European Court of Human Rights has therefore dealt in several cases with trials in absentia in France. The outcome of these cases was not uniform. The European Court of Human Rights considered that, in limited cases and under special circumstances, trials in absentia do not violate the rights of fair trial under Art. 6 of the European Convention on Human Rights. This is the case, if the accused, after his re-appearance, has the right to be judged in a new proceeding starting from the beginning of the trial, independently from what has been found in the previous trial. This right is generally recognised under French law. It is, however, not compatible with fair trial standards under the European Convention on Human Rights to preclude the accused from appeal on the basis of a trial in absentia.

Although Art. 53 (2) ICCC states that the accused has the right to be present during the trial, Afghan law allows for trials in absentia. However, the rights of the accused are protected by a number of regulations. Art. 41 in connection with Art. 17 ICCC provide for the appointment of defence counsel during the investigative stage for the suspect who cannot be found. Information about certain investigative actions, which the suspect has the right to receive before the commencement of the trial (see above), must be disclosed to this defence counsel. Arts. 46 and 47 ICCC, respectively, regulate the summons to a court hearing and the appointment of defence counsel in cases in which the accused cannot be found or does not appear before court. Art. 46 (2) and (3) ICCC state that if the accused cannot be found, his defence counsel is to be notified and is to represent the accused. In this regard Art. 17 (4) ICCC, to which references are made in several articles., provides for a safeguard: the judicial police have the duty to conduct accurate investigations aimed at identifying the places where the person lives or works. In consequence, a real effort must be made to find the suspect or accused before a trial in absentia is permitted. In accordance with Art. 59 ICCC, a renewed effort must be made to inform the accused tried in absentia of the decision and its reasons; if this is again not feasible, defence counsel has to be notified. Arts. 63 and 64 ICCC ensure that the time limit for an appeal does not start until the accused tried in absentia has been found and has received notification of the decision and its reasons. The accused tried in absentia, therefore, does not lose his right to appeal within the normal time limits prescribed by the law.

Another exception to the right to be present at the trial is the already mentioned Art. 33 (3) JC in case of juvenile trials. However, this cannot be regarded as a case of trial in absentia, since only a temporary absence of the accused minor can be justified by that provision.

*Under Islamic law, the presence of the parties in court is a general principle. However, if the accused refuses to attend the hearings, the proceeding may continue. In absentia trials may be justified in order to protect the rights of the plaintiffs or the victims in cases where the accused deliberately refuses to appear in order to impede all further proceedings. However, in no case is it allowed to impose hudud punishments in absentia.<sup>66</sup>*

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<sup>66</sup> Tellenbach, supra, p. 13.

Comment on the cases:

a) This is a case of a trial in absence of the summoned accused regulated by Art. 47 ICCC. Defence counsel was appointed for H by the judge as foreseen in Art. 47 (1) ICCC. As long as the notifications continue to be served on the accused following the provision of Art. 17 ICCC the proceedings are lawful.

b) The representation of the unfound accused during trial was respected according to Art. 46 (1) ICCC. However, Art. 41 (1) ICCC sets forth that the police and the Saranwal must also appoint defence counsel during their investigations. The police and the Saranwal did not follow the mentioned provision. Hence, the accused tried in absentia has the right to challenge the validity of the proceedings in accordance with Art. 16 ICCC and seek redress.

### **c) Comparative Law**

Here the same issue arises as concerning the right to call and examine witnesses. The modalities concerning the presence of the accused during the trial are usually regulated by procedural law in most countries.

#### **Discussion proposal:**

- Why is the accused's presence during the trial so important?  
(establishment of the factual circumstances, correct assessment of the accused's personality, the interest of the accused to influence the outcome of the proceedings)
- What circumstances may justify a trial in absentia?
- Can there be a trial in absentia when the accused is in the custody of the judicial authorities?

## H. Interpreters and Translation

- a) Naqui (N) is a citizen of Pakistan and suspected of drug trafficking. N does not have the necessary financial means to hire an interpreter. An interpreter is appointed by the Saranwal during his interrogation. The interpreter speaks Urdu with a very strong local dialect. N has difficulties in completely understanding him, but is happy to understand anything at all. Are his rights to a fair trial respected?
- b) Babor (B) is an Afghan citizen accused of theft. He is an Uzbek who does not speak Dari or Pashto. The judge refuses to appoint an interpreter for B because he is of the opinion that B should at least know one of the official languages of his country and as an Afghan has no right to an interpreter provided by the State. Is he right?

### a) Relevant Provisions

#### Art. 31 Afghan Constitution

- (2) The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law.

#### Art. 135 Afghan Constitution

If parties involved in a case do not know the language in which the trial is conducted, they have the right to understand the material and documents related to the case through an interpreter and the right to speak in their mother language in the court.

#### Art. 20 Interim Criminal Code for Courts

1. The suspect or the accused who does not know the language used during the investigations and the trials or who is deaf, dumb or deaf and dumb shall be given an interpreter for, at least, explaining to him the charge and the indictment and for assisting him during the interrogations and confrontations.

#### Art. 22 Law on the Structure and Competencies of Courts

- (1) In all stages of investigation and trial, the minor has the right to a defence counsel and interpreter. In case the parents or legal representatives cannot afford a defence counsel or interpreter, the juvenile court shall appoint a defence counsel and interpreter on government costs.

#### Art. 14 International Covenant on Civil and Political Rights

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
- a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

## b) Comment on Interpreters and Translation

The right to an interpreter is another principle that is applicable during all phases of criminal proceedings. This right was already recognised by the Geneva Conventions in 1949 and is contained in almost every human rights instrument, except the African Charter on Human Rights. The assistance of an interpreter is essential, given that all rights to a proper defence are useless if the accused does not have the lingual capabilities to understand the charges brought against him. It is indispensable for a fair trial that the accused be assisted by an interpreter at every stage of the criminal proceedings in order to guarantee his right to an adequate defence. Especially in criminal proceedings, where the consequences of a negative decision generally carry enormous weight for the future of the individual, it is essential that the accused can follow the proceedings in detail and is given the opportunity to articulate himself in a language that he fully commands. If the accused and his defence counsel do not have full command of the same language, details concerning the defence strategy cannot be communicated, and the defence counsel is in no position to represent the interests of the accused to the full extent. An exemplary situation, where the need to fully understand the proceedings is clear, is the examination of the witnesses. Being able to fully understand every part of the statement, and not only the general tendency, is the prerequisite for being able to adequately respond to the allegations. This right not only applies to aliens, but also to members of linguistic minorities.

Due to the importance of the assistance of an interpreter in criminal proceedings, the costs should be covered by the State in all those cases where the accused has no financial resources. This is recognised by Art. 14 (3) (f) ICCPR, which states that everyone is entitled to the free assistance of an interpreter if he cannot understand or speak the language used in court.

The right to an interpreter is specifically contained in Art. 135 AC. However, it could be argued that it is already implicitly foreseen by Art. 31 (2) AC, where it is stated that “every accused upon arrest has the right to be informed of the attributed accusation.” This right to be informed necessarily requires that the accused must understand what charges are brought against him. Art. 20 ICCC even allows for an interpreter in the case that the accused is deaf, dumb, or deaf and dumb. It provides a minimum of the guarantees stated in Art. 135 AC as it requires an interpreter for, “at least, explaining to him the charge and the indictment and for assisting him during the interrogations and confrontations.” In view of the more extensive wording of Art. 135 AC, by which the parties to a case “have the right to understand the material and documents related to the case through an interpreter and the right to speak in their mother language in court”, it is to be expected that Art. 20 ICCC will be interpreted more extensively as well. Although the Afghan Constitution is silent about the subject of the payment of the interpreter, the wording of Art. 135 AC, whereby the parties involved in a case “have the right to understand the material and documents . . . through an interpreter and the right to speak in their mother language in the court”, cannot be understood in such a manner as to lay the financial burden on the accused. It is the duty of the State to ensure the fair trial of the accused, which can only be guaranteed if the accused can both understand the proceedings and make himself understood. This right cannot be made subject to the financial status of the individual. Art. 20 (1) ICCC is also worded in a manner that implies that the interpreter will be paid for by the State: “The suspect or the accused . . . **shall be given an interpreter.**”

Regarding juvenile proceedings the obligation of the State to pay for an interpreter in case the parents or legal representatives cannot provide one, is explicitly stated in Art. 22 (1) JC.

*Islamic law in general also recognises the right to an interpreter. One aspect of the right to a defence is that the accused is capable of defending himself. This can only be done if he understands the charges and the evidence brought forth against him.*

Comment on the cases:

a) The right to an interpreter, which is secured by Art. 135 AC in connection with Art. 31 AC and Art. 20 (1) ICC, ensures that a suspect/accused is fully aware of the charges against him and of his rights as a suspect/accused. Therefore N should be able to fully understand every part of the statement, and not only the general tendency. Since he does not fully understand the translation of his interpreter, another interpreter must be appointed by the court.

b) The right to an interpreter not only applies to aliens, but also to members of linguistic minorities (see Art. 16 AC). The right to speak in one's mother tongue in court is explicitly ensured in Art. 135 AC. B's mother tongue is Uzbek. He must be granted the right to speak Uzbek in court, and the court is obliged to appoint an interpreter for B. Otherwise the right to an interpreter is violated.

### c) Comparative Law

#### **Art. 71 Constitution of Egypt**

**para. 1:** Any person arrested or detained should be informed, forthwith with the reasons for his arrest or detention.

#### **Art. 10 Constitution of Pakistan**

**para. 1:** No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

#### **Discussion proposal:**

- Have the participants often been confronted with the situation that an accused did not understand the language of the proceedings?
- Are there enough interpreters in Afghanistan to handle the problem of the linguistic minorities?

**Questions to sum up the principles applicable at trial:**

- To meet the requirement of the principle of legality of courts four prerequisites must be given. What are they?
- Under which conditions can trials be conducted by special tribunals?
- What rights are guaranteed through the principle of access to courts?
- The principle of access to courts is linked to other principles. What are they?
- Which factors may influence the judge to favour one or the other party?
- How can interventions of the executive in the decision-making of the judiciary be prevented?
- What personal qualifications are judges to have according to the law?
- Why are the time limits for all proceedings shorter when the suspect or accused is in custody?
- Can a delayed trial be justified if an accused is not willing to co-operate with the judicial authorities?
- What are the permissible exceptions to public hearing foreseen by law?
- Can the announcement of the court decision also be made in a closed session?
- When is the hearing of a case in closed session deemed necessary?
- What are the prerequisites for the possibility of an adequate defence? What rights are comprised?
- What is meant by the principle of “equality of arms”?
- When can records of the testimonies of witnesses as well as of experts’ examination collected during the investigative phase have the value of evidence?
- Why is the presence of the suspect/accused during the interrogation of the witnesses and experts of importance for his right to a fair trial?
- What are the general rules of notification of the accused?
- Two different categories of absent accused can be distinguished. What categories exist and what are the consequences for the trial in absentia?
- Who has the right to an interpreter and translation?
- Are the judicial authorities duty-bound to appoint an interpreter for the suspect/accused who does not have the financial means to hire an interpreter?
- Can defence counsel substitute an interpreter?

## Chapter IV: Post-Trial Principles / Follow-Up Procedure

### A. Decision, Sentencing, and Punishment

#### 1. Decision and Sentencing

a) Ahmad (A) is accused of fraud and is sentenced to a short imprisonment by a court. The decision is based on Art. 420 APC; however the verdict contains no reference to the facts at all. Moreover it is decided that the rationale of the verdict will not be given until one month after the decision, because of a capacity overload of the judges. What rights of the accused are infringed?

b) Hassan (H) is found guilty of murder in two cases by an Afghan court. The court bases its decision on H's confession, which was obtained by means of torture. Is the decision of the court consistent with the law?

#### a) Relevant Provisions

##### Art. 25 Afghan Constitution

- (1) Innocence is the original state.
- (2) An accused is considered innocent until convicted by a final decision of an authorised court.

##### Art. 27 Afghan Constitution

- (1) No act is considered a crime, unless determined by a law adopted prior to the date the offence is committed.
- (2) No person can be punished but in accordance with the decision of an authorised court and in conformity with the law adopted before the date of offence.

##### Art. 30 Afghan Constitution

- (1) Any statement, testimony, or confession obtained from an accused or of another person by means of compulsion, is invalid.
- (2) Confession to a crime is: a voluntary confession before an authorised court by an accused in a sound state of mind.

##### Art. 128 Afghan Constitution

- (1) In the courts of Afghanistan, trials are open and everyone is entitled to attend trials within the bounds of law.
- (2) The court, in situations which are stated in the law or in situations in which the secrecy of the trial is deemed necessary, can conduct the trial behind closed doors, but the announcement of the court decision should be open in all instances.

##### Art. 129 Afghan Constitution

- (1) The court is obliged to state the reasons for the decision it issues.
- (2) All specific decisions of the courts are enforceable, except for capital punishment, which is conditional upon approval of the President.

**Art. 130 Afghan Constitution**

- (1) While processing the cases, the courts apply the provisions of this Constitution and other laws.
- (2) When there is no provision in the Constitution 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.

**Art. 7 Law on the Structure and Competencies of Courts**

While processing the cases, the courts apply the provisions of this Constitution and other relevant laws. In cases not explicitly addresses by law, the considerations and issuance of a decision will be done in accordance with the provisions of Arts. 130 and 131 of the Constitution.

**Art. 4 Interim Criminal Code for Courts**

1. From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed to be innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

**Art. 7 Interim Criminal Code for Courts**

1. The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid, and the court cannot base its judgement on it.

**Art. 59 Interim Criminal Code for Courts**

2. Later on, the Court enters the trial room again and reads out the verdict together with its reasons. This reading has the value of notification. If the reasons of the verdict are not read out by the Court in the same context, they shall be deposited in the office of the secretary of the Court within fifteen days from the moment of the decision.

**Art. 9 Law on the Structure and Competencies of Courts**

The courts are obliged to state the reason and cause for the decisions they issue and to specify the articles of law their verdict bases upon.

**Art. 61 Interim Criminal Code for Courts**

1. The decision shall contain:
  - a. The identification of the accused;
  - b. The description of the facts and of the circumstances included in the accusation;
  - c. A terse exposition of the reasons of the same decision with reference to facts and law provisions;
  - d. The verdict.

**Art. 75 Interim Criminal Code for Courts**

3. The Court can read out the reasons of the decisions in the same context, or otherwise deposit them with the secretariat later on.

**Art. 13 Law on the Structure and Competencies of Courts**

The Court cannot abstain from issuing a judgment in a case the court has started to inquire. The case under inquisition will not be removed from the court before a decision has been reached.

**Art. 14 International Covenant on Civil and Political Rights**

1. . . . but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

## b) Comment on the Decision and Sentencing

When coming to a decision, the courts cannot act in an arbitrary manner, but must adhere to certain principles when judging the facts of a case and deciding on the consequences. Art. 130 AC as well as Art. 7 LSCC require that the courts apply the provisions of the Constitution and other laws while processing the cases. Paragraph 2 of Art. 130 AC then goes on to state that if an issue is not regulated by the Constitution or other laws, “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.” The court must, therefore, at all times keep the norms and the spirit of the Constitution in mind. Art. 25 AC and Art. 4 ICCC both contain the presumption of innocence, which has the most important impact on the decision-making process. The judges can only convict an accused of a crime if the prosecution can prove that the accused has actually committed the crime. The evidence by which the prosecution has proven its accusations must be stated in the decision in detail, in order to give the superior courts the possibility to review the decision. Prejudgement, discrimination, and arbitrariness are prohibited; the decision must be based on the evidence proving the charges of the indictment (see also Art. 9 LSCC). Art. 7 ICCC ensures that the evidence being considered by the court has been acquired by legal means. When considering evidence, the court must also take into consideration the prohibition of torture and of compulsion to gain a confession (Art. 30 AC; see also Chapter I Sections D and F). To ensure that the court reaches its decision on well-founded reasons and that these reasons can be reviewed, Art. 129 AC requires that the court must state the reasons for its decisions. Art. 128 AC requires that trials are generally open to the public, and that in all cases, the announcement of the decision must be open to the public. Art. 61 ICCC specifies what the decision must contain, which also includes a description of the facts, the circumstances and the reasons for the decision with reference to the relevant norms of law (see Art. 9 LSCC as well). Art. 59 (2) ICCC specifies that the verdict and the reasons must be read out by the court. If this is not done, they must be deposited in the office of the secretary of the court within fifteen days from the moment of the decision (see also Art. 75 ICCC). Art. 13 LSCC demands that once a court has started a trial there must be a decision; the court cannot refrain from issuing a decision. This decision can be the reference to another competent court in cases for which the first court lacks competence.

*Islamic law has very strict requirements concerning the qualities and duties of the judges, which naturally affect the decision-making process of the court (see Chapter III Section B in detail). Judges cannot act arbitrarily and are bound by detailed regulations of the Shari’a concerning evidentiary questions. These vary depending on which type of crime has allegedly been committed<sup>67</sup>: hudud, qisas or ta’zir. The procedural rules concerning hudud crimes, the violation of divine rules, are characterised by their rigidity and extremely stringent requirements of proof, which usually cannot be fulfilled. There is no room for discretion in the evaluation of evidence or in the punishment to be meted out. A freely given confession of the accused, which he has not withdrawn at any stage of the proceedings, suffices as evidence. However, depending on the crime and the school of legal thought, the confession must be voluntarily repeated up to four times. The number of incriminating witnesses otherwise necessary to prove the commitment of a hudud crime varies depending on the specific crime in question. The witnesses themselves have to meet very strict requirements before their statements can be used as proof against the accused. In the case of qisas crimes, the rules of evidence generally coincide with those concerning hudud crimes. The main difference is that a freely given confession cannot be withdrawn. The judge once again has no*

<sup>67</sup> See in detail Baradie, Adel El, Gottes-Recht und Menschen-Recht, pp. 96 – 165, Nomos, Baden Baden 1983.

*discretion concerning the evaluation of evidence or concerning the punishment. However, as the qisas punishment is viewed as the personal right of the injured person or the heirs of the victim, it can only be imposed if they all demand the qisas punishment. If the qualifications of a qisas crime are not fulfilled, or if the heirs waive the qisas punishment, indemnity is awarded to the victim or his family (diyat) and other punishments may be possible. The ta'zir crimes are not found in the Qur'an and were introduced relatively late into the Islamic law system as a means to reduce legal loopholes. The punishments foreseen for ta'zir crimes are not absolute. Depending on the crime, the judge has some discretion to decide if and how the perpetrator is to be punished. This is not the case if the crime is directed at somebody's personal right; the judge can only abstain from meting out punishment if the victim agrees. The procedural rules are strongly simplified in relation to the hudud and qisas crimes. As proof, a one-time confession (which cannot be withdrawn) or corresponding statements of two witnesses, one of which can be a woman, suffice as evidence. Means of evidence can also be a hearsay witness or the judge's personal knowledge. In proceedings concerning hudud or qisas crimes, these would never be admissible forms of evidence by the Hanafi school of law. The Shiites, on the other hand, accept the knowledge of the judge in cases of theft and forbidden sexual intercourse (see Iranian criminal law code 74-76, 105, 199), although it is not undisputed. If hudud or qisas crimes are in dispute, sometimes it is possible to substitute the testimony of one man with the testimony of two women.*

Comment on the cases:

a) Art. 129 AC and Art. 61 ICCC are breached, if the requirements of a valid decision are not met. According to Art. 129 AC the court is obliged to state the reasons for its decision. Beside a concise exposition of the reasons, a decision must contain references to the facts of the case as well as the provisions of law on which the decision is based (Art. 61 (1) ICCC). The references to the facts of the case are missing, so that the decision is not consistent with the applicable law.

Another violation is the delayed delivery of the reasons for the decision. Art. 59 ICCC only allows for a period of fifteen days. In the case of A the reasons were delivered after one month. This exceeds the time limit and thus constitutes a violation of the provision.

b) The decision of a court has to be based on valid grounds. Art. 30 (1) AC prohibits the use of force in order to obtain a confession. Paragraph 2 provides that the court can only base its decision on a voluntary confession. This requirement is not met. According to Art. 30 AC and Art. 7 ICCC, the confession is invalid and the court cannot base its decision on it.

### **c) Comparative Law**

#### **Art. 36 Constitution of Iran**

The passing and execution of a sentence must be only by a competent court and in accordance with law.

#### **Art. 166 Constitution of Iran**

The verdicts of courts must be well reasoned out and documented with reference to the articles and principles of the law in accordance with which they are delivered.

#### **Art. 167 Constitution of Iran**

The judge is bound to endeavour to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatwa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement.

#### **Jurisprudence from Pakistan**

P.L.D. SC 1996 Part I, 1 (d): General Principle is that the prosecution is to prove the case against the accused beyond doubt and such burden does not shift from prosecution even if the accused takes up any particular plea and fails in it. If there is any room for benefit of doubt in the case of prosecution the same will go to the accused and not to the prosecution. [p. 15] D

#### **Discussion proposal:**

- What forms of evidence do the participants find most convincing?
- When do the participants feel that the degree of conviction of the judge is sufficient to assume the guilt of the accused?
- What is essential for a higher court in order to review a decision?

## 2. Punishment

- a) Mohammad (M) is suspected of manslaughter. M hides himself in the mountains, so the police are unable to arrest him. Thus the police arrest his brother Alem (A) instead, although he is not suspected of having committed a crime. A is held in custody for six months. Which principle is violated?
- b) Osman (O) works on the staff of a prison in Kabul. He is an adamant supporter of his own ethnic group. Because of his prejudices against other ethnic groups, he treats detainees with a different ethnic background much more roughly and sometimes even beats them. Which provisions have been violated by O?

### a) Relevant Provisions

#### Art. 26 Afghan Constitution

- (1) Crime is a personal action.
- (2) The prosecution, arrest, and detention of an accused and the execution of penalty cannot affect another person.

#### Art. 27 Afghan Constitution

- (1) No act is considered a crime, unless determined by a law adopted prior to the date the offence is committed.
- (2) No person can be punished but in accordance with the decision of an authorised court and in conformity with the law adopted before the date of offence.

#### Art. 29 Afghan Constitution

- (1) Torture of human beings is prohibited.
- (2) No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest, or imprisoned, or convicted to punishment.
- (3) Punishment contrary to human dignity is prohibited.

#### Art. 1 Afghan Penal Code

This law regulates the “Ta’zeeri” crime and penalties.

Those committing crimes of “Hudud”, “Qisas” and “Diyat” shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).

#### Art. 2 Afghan Penal Code

No act shall be considered crime, but in accordance with the law.

#### Art. 3 Afghan Penal Code

No one can be punished but in accordance with the provisions of the law which has been enforced before commitment of the act under reference.

#### Art. 4 Afghan Penal Code

- (2) Any punishment which is discordant to human dignity is not permitted.

**Arts. 97 – 172 Afghan Penal Code**

[These articles describe the various punishments and related issues such as aggravating or mitigating circumstances, plurality of crime and punishment, complementary punishments and security measures, suspension of enforcement and dismissal of punishments, and amnesties.]

**Art. 3 Law on Prisons and Detention Centres**

- (1) The staff of detention centres as well as attorney, judges and other people dealing with detainees and pre-trial detainees are obliged to respect human rights while performing their duties. Detainees have to be treated in an impartial way, without taking into consideration their ethnicity, nationality, piety, religion, race, colour, gender, language, social and political affiliation as well as other discriminating qualities

**Art. 15 International Covenant on Civil and Political Rights**

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

## b) Comment on the Punishment

Art. 26 AC specifies that “the prosecution, arrest, and detention of an accused and the execution of penalty cannot affect another person.” This is a concept accepted in Islamic law<sup>68</sup>, but which has often been neglected in Afghanistan. If suspects cannot be found, family members are sometimes brought before the courts instead. Sometimes not only the accused is punished, but several members of the family as well. This practice is not compatible with the codified Afghan law, international standards or Islamic law.

Punishments are not allowed to violate human dignity, and especially torture is prohibited (see Art. 29 AC and Art. 4 (2) APC.)

While the wording of Art. 27 (3) AC containing the *nulla poena sine lege* principle is quite clear, Art. 130 (2) AC states that “When there is no provision in the Constitution 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 similar provision in the Iranian Constitution led to the discussion concerning the possibility of a judge punishing a person because of behaviour that is forbidden according to Islamic law but not according to Iranian statutory law. This could possibly also lead to a discussion in Afghanistan. However, as Art. 130 (2) specifically provides for the limitations contained in the Constitution, a solution applying Art. 27 AC and consequently Arts. 2 and 3 APC seems likely. This would theoretically exclude all punishments for behaviour not specified in the codified laws of Afghanistan, but which is forbidden according to Islamic law. Problematic is, once again, Art. 1 APC. It would not be in accordance with the Constitution if Shari’a law were directly applicable for all hudud and qisas crimes, unless the Shari’a were to be understood as an “adopted law” in the sense of Art. 27 AC. This interpretation does not stand on firm ground. Furthermore, it is completely unclear, for what and how non-Muslims would be punished in the case of crimes not contained in the Penal Code which only deals with ta’zir crimes. In addition, some of the hudud and qisas punishments could result in a violation of Art. 7 AC, by which Afghanistan is bound to the international conventions and treaties it has signed, among them the ICCPR which includes the prohibition of torture (see above). Some punishments, such as whipping<sup>69</sup> and amputation<sup>70</sup>, violate the prohibition of torture and cruel, inhuman, or degrading punishment contained in Art. 7 ICCPR, and in consequence also violate Art. 7 AC. Furthermore such a punishment would violate Art. 3 (1) LPDC, which states that the staff of detention centres as well as attorney, judges and other people dealing with detainees and pre-trial detainees are obliged to respect human rights while performing their duties.

The concept of *nulla poena sine lege* contained in both codified Afghan law and in Islamic law, as well as international law, does not permit punishments not specified by law.

In contradiction to this, the practice is still found whereby the family of the alleged perpetrator is ordered to provide the family of the alleged victim with a young girl or girls of the family in order to compensate for the alleged crime. This violates Arts. 26, 27 and 29 AC and Art. 3 APC. This practice also violates Art. 4 (2) APC, whereby any punishment which is discordant to human dignity is not permitted. Such practices must be brought to the attention

<sup>68</sup> Qu’ran 17:15: “No bearer of burdens can bear the burden of another”.

<sup>69</sup> HRC, *Higginsen vs. Jamaica* (Views adopted on 28 March 2002) Com. No. 792/1998.

<sup>70</sup> HRC, *Angel Estrella vs. Uruguay* (Views adopted on 23.03.1983) Com. No. 74/1980. See also Nowak, *supra*, p. 162.

of the judicial authorities and must be prosecuted in accordance with the law in all cases. The Afghan Penal Code actually foresees a punishment for such actions:

**Art. 517 Afghan Penal Code**

- (1) A person who gives in marriage a widow, or a girl who is eighteen years or older, contrary to her will or consent, shall be sentenced in view of the circumstances to short imprisonment.
- (2) If commitment of the crime specified under the above paragraph is for the purpose of “Bud dadan” [as a compensation for wrongdoing], the offender shall be sentenced to medium imprisonment not exceeding two years.”

*Islamic law foresees punishments that are not in accordance with human dignity, and could be classified as torture or cruel, inhuman and degrading treatment. This is specifically the case concerning some of the punishments foreseen for the crimes of hudud. Problematic is that the punishments of hudud are fixed by divine law and cannot be ignored or changed. Art. 1 APC refers directly to the Shari’a in cases of hudud and qisas crimes, which would be in direct conflict with Art. 29 AC. Some Islamic scholars argue that the rules are time-specific and have to be taken as metaphors for taking more modern measures against crime, while others plead for the application of strict procedural rules and the imposition of strict evidential requirements which would ultimately avoid the implementation of hudud punishments without negating their general applicability. There is as well the practice of subjecting the application of the norm to such strict conditions that hardly any case can be found which can be regarded as the hadd crime in question. A good example of this practice is the crucifixion, which was introduced as a punishment after the Islamic revolution in Iran but has never been executed since then. There is no common consensus concerning this problem, and some countries like Sudan, Iran, and Pakistan still execute some of the hudud punishments. Punishments provided for hudud crimes include stoning, crucifixion, and amputation of extremities<sup>71</sup>. The judge has no discretion concerning the type of punishment. The punishment for qisas crimes is a death sentence – usually by decapitation with a sword. The heirs of the victim, or the victim, can waive this punishment and demand diyat (blood money) instead. In case the qualifications for a qisas crime are not fulfilled or if the victim or his family does not demand the death penalty, a ta’zir punishment can be imposed. Ta’zir punishments include capital punishment, whipping, prison sentences, and fines. In former times the judge was allowed to devise any suitable punishment, for example to nail the fraudulent shopkeeper by the ear to the door of his shop; however, it is likely that modern criminal codes limit the types of punishment to the mentioned ones. The judge has a wide degree of discretion concerning the punishment. A hadd punishment can only be meted out in the case of a hadd crime. (See also Chapter III Section A no. 1.)*

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<sup>71</sup> For details concerning the punishments see Baradie, supra, pp. 96-165.

Comment on the cases:

a) There is a clear breach of Art. 26 AC. Every person can be held liable only for his own personal conduct. Therefore it is unlawful to prosecute, arrest or detain a person other than the accused. A is not suspected of being connected to his brother's crime. M's liability cannot affect him, so his detention is unlawful.

b) O breached the prohibition of degrading treatment. The physical violation of the detainees is contrary to Art. 29 (3) – in severe cases also (1) – AC and Art. 4 APC. Also Art. 3 LPDC is breached with regard to two aspects. First O violated the prohibition of torture and inhuman and degrading treatment and thus breached human rights. Second he did not treat the detainees in an impartial way. His conduct was based on ethnic grounds and is therefore discriminatory.

### c) Comparative Law

Rules of procedure and evidence concerning the actual trial proceedings are rarely contained in the Constitution of a country. They can be found in the criminal procedure codes and have to adhere to the right to a fair trial protected by the Constitution.

### Discussion proposal:

- What is the intended goal of or the reason for punishment in general?

### **3. Capital Punishment**

#### **a) Relevant Provisions**

##### **Art. 129 Afghan Constitution**

- (2) All specific decisions of the courts are enforceable, except for capital punishment, which is conditional upon approval of the President.

##### **Art. 76 Afghan Penal Code**

- (1) If the minor commits a felony, whose punishment is death or continued imprisonment, the Court can order his quarantine in the Correction House or charity organisations or corrective schools, provided its duration is not more than five years.

##### **Art. 84 Afghan Penal Code**

- (1) If the teenager commits a felony, whose punishment is death or continued imprisonment, the Court can order his quarantine in the Correction House for a period not less than two years and not more than fifteen years.

##### **Art. 97 Afghan Penal Code**

Principal punishments are:  
1. Execution

##### **Art. 98 Afghan Penal Code**

Execution is the hanging of convicted person on gallows until death.

##### **Art. 145 Afghan Penal Code**

Reduction due to extenuating circumstances: capital punishment is changed to a prison term.

##### **Art. 149 Afghan Penal Code**

Aggravating conditions: a prison term is changed to capital punishment.

##### **Book Two Afghan Penal Code**

[The second book of provisions lays out the sentences for felonies, misdemeanours, and obscenity.]

##### **Art. 6 International Covenant on Civil and Political Rights**

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

## **b) Comment on Capital Punishment**

There is no universal consensus concerning the death penalty. Under international human rights standards, however, people charged with crimes punishable by death are entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards. This is especially important due to the irreversibility of the death penalty. It may only be imposed for the most serious crimes. The imposition and execution of the death penalty is also restricted concerning certain categories of people, such as juveniles, pregnant women and mentally impaired persons (see Art. 6 ICCPR).

In Afghanistan, the death penalty is foreseen by the Afghan Penal Code for certain crimes concerning the external and internal security of the State. The execution is carried out by hanging the convicted person until death (see Art. 98 APC). Furthermore, as previously mentioned, Art. 1 APC refers directly to Islamic law in the case of hudud and qisas crimes, for which the penalty can also be death. The death penalty can be carried out in a number of ways that are not in accordance with international law standards, such as death by stoning. Several articles in the Afghan Penal Code also make references to “hudud” charges, such as Arts. 426, 436, 447 and 454 APC, leading to the assumption that the punishments foreseen by Islamic law for hudud crimes are accepted within the Afghan legal system. This would now be a violation of Art. 7 AC, by which Afghanistan is bound to the international conventions and treaties it has signed, among them the ICCPR which includes the prohibition of torture (see above). Certain forms of the death penalty, such as stoning to death, violate the prohibition of torture, and therefore a death sentence in accordance with Islamic law based on the reference in Art. 1 APC could also violate Art. 7 AC. What is of relevance in practice is that according to Art. 129 (2) AC the death penalty can only be executed with the approval of the President. The President is, therefore, in a position to withhold his approval in all those cases where the means of execution violates the prohibition of torture.

### **Discussion proposal:**

- What aspects would speak against the implementation of the death penalty?
- Do the participants view the death penalty as a necessary element of the criminal system?
- Are there conditions under which the death penalty has to be imposed?

## **B. The Guarantee of *Ne Bis in Idem* / Prohibition of Double Jeopardy**

Osman (O) is sentenced to imprisonment by a court in Kabul for smuggling drugs, after he was already convicted and detained in Herat for the same crime. Is O treated unlawfully by the court?

### **a) Relevant Provisions**

#### **Art. 78 Interim Criminal Code for Courts**

1. The Supreme Court quashes the protested decision when:
  - d. It results that for the same person and the same facts a previous decision was already adopted.

#### **Art. 19 Afghan Penal Code**

With the exception of cases included in Arts. 6 and 7 of this law, punitive claims cannot be launched against a person who proves that a foreign court has acquitted him in respect of the crime under reference or that he has been convicted and the final pronouncement has been implemented upon him, or that the punitive claim has been dropped in accordance with the law before the pronouncement of the final judgement or punishment of the convict.

#### **Art. 20 Afghan Penal Code**

The period of arrest and imprisonment that the accused or convict has spent outside Afghanistan as a result of application of punitive verdicts shall be deducted from the duration of the punishment to which the person will be sentenced for commitment of the same crime in Afghanistan or from the punishment that is being implemented upon him.

#### **Art. 14 International Covenant on Civil and Political Rights**

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

## b) Comment on the Guarantee of *Ne Bis in Idem* / Prohibition of Double Jeopardy

The principle of *ne bis in idem* or the prohibition of double jeopardy, whereby nobody can be tried or punished twice for the same offence in accordance with national legislation, is laid down in Art. 14 (7) ICCPR. The double jeopardy clause protects against three distinct abuses:

- a second prosecution for the same offence after final acquittal,
- a second prosecution for the same offence after final conviction and
- multiple punishments for the same offence.

However, the implementation of the principle is far from uniform.

Although the new Afghan Constitution does not explicitly provide for the principle of *ne bis in idem*, neither the Constitution nor Islamic law contains any provision prohibiting the application of the *ne bis in idem* principle.

Despite the fact that the principle is not named in the Constitution, the concept as such is contained in the Afghan legal system. Art. 78 (1) (d) ICCC is based upon the presumption that the principle of *ne bis in idem* is applicable. According to this article, the Supreme Court must quash a decision if a final decision – whether a conviction or an acquittal – was already reached regarding the same person and the same factual circumstances. The Afghan Penal Code also contains norms concerning penalties that are based on the presumption that no one should be punished twice for the same offence. Art. 19 APC states that in general, “punitive claims cannot be launched against a person who proves that foreign courts have acquitted him in respect of the crime under reference or that he has been convicted and the final pronouncement has been implemented upon him, or that the punitive claim has been dropped in accordance with the law before the pronouncement of the final judgement or punishment of the convict.” Art. 20 APC goes on to state that “the period of arrest and imprisonment that the accused or convict has spent outside Afghanistan as a result of application of punitive verdicts shall be deducted from the duration of the punishment to which the person will be sentenced for commitment of the same crime in Afghanistan or from the punishment that is being implemented upon him.” These norms, therefore, do not allow for punishment in the case of a previous acquittal or the double punishment of the same offence once the punitive verdict has already been implemented. However it has to be mentioned that Arts. 19 and 20 APC are not cases of *ne bis in idem*, since that principle only regulates decisions by national courts. Since Arts. 19 and 20 APC concern cases of decisions by foreign courts, they go beyond the imperatives of the *ne bis in idem* principle. Such provisions are quite common and reasonable bearing in mind that the only cause for a punishment can be the guilt of the convict, which is somewhat compensated for by a prior punishment, no matter whether imposed by a foreign or a national court.

Comment on the case:

The ruling of the court breaches the prohibition of double jeopardy. This principle is contained in Art. 78 (1) (d) ICCC. Once a person is convicted or acquitted he cannot be liable for the same act under the same facts again. Thus the court in Kabul cannot open a trial against O because he was already convicted by the court in Herat for the same crime.

### c) Comparative Law

#### Art. 13 Constitution of Pakistan

No person:

- (a) shall be prosecuted or punished for the same offence more than once; or
- (b) shall, when accused of an offence, be compelled to be a witness against himself.

P.L.D. SC 1993 Part I, p. 247 (b): Retrial of an offence in which a person who having once been tried as accused stands finally acquitted is not permitted [p. 250] B.

#### Discussion proposal:

- What role does this principle of *ne bis in idem* have for society?
- What significance does this principle have for the individual that has been convicted or acquitted of a certain offence?
- Is this principle applicable if serious procedural errors (forged documents, bribed witnesses) occurred during the proceedings?

## C. Appeal or Other Review in Higher Courts

- a) Yasir (Y) is convicted by the Primary Court. The judgement is overruled by the Appeal Court, which acquits him. However, Y is arrested by the police and put into prison on the basis of the ruling of the Primary Court, because the judge is still convinced of the guilt of Y. Does this constitute a breach of law?
- b) Mahmoud (M) files an appeal contesting the wrong evaluation of facts and circumstances by the Primary Court. After its review the Appeal Court comes to the conclusion that the evaluation of facts was not defective; however the application of the law and definition of the crime were wrong. By applying the proper law the Appeal Court increases the punishment of the Primary Court. Is the decision of the Appeal Court consistent with the law?

### a) Relevant Provisions

#### Art. 116 Afghan Constitution

- (2) The judicial branch consists of the Supreme Court, Appeal Courts, and Primary Courts, whose organisation and competence shall be regulated by law
- (3) The Supreme Court as the highest judicial organ, heads the judiciary organ of the Islamic Republic of Afghanistan.

#### Art. 28 Law on the Structure and Competencies of Courts

The judgements and orders of upper courts on appealed cases are binding for lower courts.

#### Art. 31 Law on the Structure and Competencies of Courts

- (1) An Appeal Court shall be established in each province of the country according to this law.

#### Art. 33 Law on the Structure and Competencies of Courts

- (1) The Appeal Court shall consider judgments and orders of lower courts, which have been appealed, according to the provisions of this law and other respective laws.
- (2) The Appeal Court shall reconsider all facts and circumstances of the case during the proceedings mentioned in paragraph 1. The court can amend, overrule, change, approve or nullify the decisions and orders of the lower court according to law.

#### Art. 63 Interim Criminal Code for Courts

1. The person who has been sentenced or the Primary Saranwal can contest the decision of the Court by filing an appeal.
2. The competent Appeal Court is the Provincial Court. [The paragraph had not been correctly translated; the Dari text translates: "The President of the appeal court is the competent authority for the appeal."]

3. The act of appeal shall be deposited with the secretary of the Court [court office], which has made the decision, or with the secretary [court office] of the competent Appeal Court within twenty days from the moments in which:
  - a. The Court has read out in the Court room, in the same context, the verdict and its reasons at the conclusion of a trial in which the accused and/or his defence counsel were present;
  - b. The reasons of the verdict, which were not read out together with the verdict, have been notified to the accused and to the defence counsel; in this case the second notification is considered the beginning of the term;
  - c. The accused tried in absentia has received the notification of the decision.

#### **Art. 66 Interim Criminal Code for Courts**

1. The act of appeal shall contain the indication of the contested decision and expose the reasons according to which the decision is considered wrong.
2. The denunciation of the errors of the decision shall make reference to:
  - a. Wrong application of the law and definition of crime;
  - b. Wrong evaluation of facts and circumstances;
  - c. Wrong application of the penalty and/or of its amount.

#### **Art. 68 Interim Criminal Code for Courts**

1. The Appeal Court shall confine its review to the points of the decision to which the act of appeal makes reference.
2. When the Appeal is filed by the primary Saranwal the Court can:
  - a. impose punishment in the case the accused was found not guilty in the Primary Court;
  - b. increase the punishment in the case the decision was founded on an error in the interpretation or application of the law.
3. When the appeal is filed only by the accused the Court can in no case increase the punishment inflicted by the Primary Court.

#### **Art. 70 Interim Criminal Code for Courts**

1. The appeal is rejected if it has not been filed within the established term.
2. The decision of the Appeal Court can confirm or modify in all or in part the previous decision.
3. In the verdict the Court can order the arrest of the accused or release the accused under arrest.

#### **Art. 71 Interim Criminal Code for Courts**

1. The Person sentenced by the Appeal Court, the Victim or the Saranwal can lodge a recourse to the Supreme Court only if the complaint refers to:
  - a. Violations in the application of the law or wrong interpretation of the law; and
  - b. A decision based on the provisions of the article 7.

#### **Art. 26 Law on the Structure and Competencies of Courts**

- (1) If one of the tribunals of the Supreme Court, in course of an appeal realises that the case has been decided contrary to the law, or with a mistake in relation of the application or interpretation of the law by the lower court or by a breach of article 130 or article 131 of the Constitution, the tribunal overrules the lower court decision and refers it back to the lower court to issue a new verdict.

**Art. 78 Interim Criminal Code for Courts**

1. The Supreme Court quashes the protested decision when:
  - a. The accusation does not constitute a crime, statute limitations has occurred or the prosecution was not permitted;
  - b. The decision concerns matters which are beyond the jurisdiction powers;
  - c. The sentence was adopted against a wrong person;
  - d. It results that for the same person and the same facts a previous decision was already adopted;
  - e. The same Supreme Court deems superfluous to refer the decision or can amend it on the basis of the already existing documentation.

**Art. 81 Interim Criminal Code for Courts**

1. It is permitted, at all times, the revision, in favour of the person sentenced for misdemeanours or felonies, of the final decision in the following cases:
  - a. When the facts on which the sentence is based cannot be reconciled with the facts established in another final decision;
  - b. When a judgement drawn up by a civil Court upon which the sentence is grounded has been quashed;
  - c. When facts, circumstances or documents, demonstrating the innocence of the sentenced person, which were not known before the sentence, are newly disclosed or emerged;
  - d. When it turns out by means of judicial assessment that the sentence was based on false testimonies, forged documents or any other fact of criminal nature which have been assessed by a final judicial decision;
  - e. When after a sentence for murder new evidentiary elements supervene or emerge according to which results that the death of the person did not occur;
  - f. When the sentence was adopted at the end of a process conducted without informing the accused by regular notifications or not giving him the possibility to appear so to deprive him of the right of defence or when a real impediment for appearing was not known or disregarded by the Court.

**Art. 82 Interim Criminal Code for Courts**

1. The revision can be requested by the Saranwal, the sentenced person, or his or her defence counsel, or a close relative or heir.
2. In any instance, the request for revision must have the consent of the sentenced person unless the sentenced person is determined by the court to be incompetent, in which case the revision may be requested by the defence counsel or a close relative or heir without consent of the sentenced person.

**Art. 53 Law on the Structure and Competencies of Courts**

Issued verdicts of the primary court can be final in the following cases:

4. A Fine of fifty thousand Afghanis or below.

**Art. 14 International Covenant on Civil and Political Rights**

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

## b) Comment on the Appeal or Other Review in Higher Courts

A penal sentence is one of the strongest manifestations of the repressive power of a state; it has a damaging impact on the person concerned, not only through the punishment inflicted on him, but also through its stigmatising effect. The defendant must have an opportunity to have the decision imposing such a burden reviewed. The aim of procedural remedies is to avoid or at least to reduce the risk of erroneous sentencing by the court. The right to appeal has to balance the necessity of having a reliable sentence that protects rights on the one hand, and the right to correct mistakes that the judge may commit as a human being on the other hand.

The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal (Art. 14 (5) ICCPR). A confirmation of the judgement by the original trial judge does not satisfy the requirement of review by a higher tribunal<sup>72</sup>. If domestic law provides for more than one instance of appeal, the convicted person must be given effective access to each of these instances of appeal<sup>73</sup>.

Reviews limited only to questions of law would not satisfy the requirements; the case has to be reviewed with regard to legal and factual aspects of the conviction and sentence. The examination includes whether or not due process has been observed and the grounds for appeal<sup>74</sup>. The right to have a conviction and sentence reviewed by a higher tribunal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness and severity of the offence; the guarantee is not only confined to the most serious offences<sup>75</sup>.

The review must be genuine; it is not sufficient simply to pass laws, but it is essential to ensure that the right can be effectively exercised. This includes inter alia the prevention of excessive formality, unreasonably short time frames for lodging an appeal and long delays in rendering a judgement (as a counterpart to the right to be tried without undue delay)<sup>76</sup>.

The guarantees of a fair trial must be observed in all appellate proceedings. Particularly the right to adequate time and facilities to prepare the appeal, the right to legal aid, the right to a hearing before a competent, independent and impartial judge and the right to a duly reasoned written judgement are of high importance. Also the indication of grounds on which the judges base their decision has to be included with sufficient clarity<sup>77</sup> (see also Art. 129 AC).

The state party must preserve sufficient evidential material until the completion of the appeal procedure in order to guarantee an effective review of the case; a failure of this requirement constitutes a violation of the right to appeal only when the right to a review is prejudiced, i.e. when the evidence in question is indispensable to perform the review<sup>78</sup>. Moreover, a judicial

<sup>72</sup> *Salgar de Montejó v. Colombia*, Communication No. R.15/64, UN GAOR 37<sup>th</sup> Sess. Suppl. 40, p. 168. at 129-130.

<sup>73</sup> The HRC refers to the wording of Art. 14 para. 5 ICCPR “according to law”, in: *Henry v. Jamaica*, Communication No. 230/1987, UN GAOR 47<sup>th</sup> Sess. Suppl. 40, p. 210 (218 para. 8.4.).

<sup>74</sup> *Inter-American Commission*, Case 9850, Annual Report of the Inter-American Commission, 1990-1991, OEA/Ser.L/V/II.79, doc. 12, rev. 41, 1991, at 74-76.

<sup>75</sup> HRC, General Comment 13, para. 17.

<sup>76</sup> *Inter-American Commission*, Report on the Situation of Human Rights in Panama, OEA/Ser.L/V/II.44, doc. 38, rev. 1, 1978.

<sup>77</sup> See as an example: ECJ, *Melin v. France*, (16/1992/361/435), 22 June 1993; ECJ, *Hadjianastassiou v. Greece*, (69/1991/321/393), 16 December 1992.

<sup>78</sup> HRC, *M. Robinson v. Jamaica*, 29 March 2000, Communication No. 731/1996, at 130 para. 10.7.

decision must state the reasons on which it is based. If the reasons are not given, procedural remedies threaten to become illusory.

There are three different forms of judicial review in the Afghan legal system:

- the appeal to the Appeal Court,
- the appeal on points of law to the Supreme Court and
- the reopening of a case as an extraordinary form of review.

As competent courts Appeal Courts have to be established in each of the provinces of the country (Art. 31 (1) LSCC). The Appeal Courts review legal matters, wrong evaluation of facts and circumstances as well as wrong application of the penalty and/or its amount (see Art. 66 (2) ICCC). In relation to the facts and circumstances of the case the verdicts of the Appeal Courts are final (Art. 35 LSCC). However the scope of review of the Appeal Courts is restricted. The parts of the decision which have not been contested by the act of appeal cannot be reconsidered and modified. Furthermore, the accused has the right to complain without exposing himself to the risk of an impairment of his position (Art. 68 (3) ICCC); otherwise, the free exercise of the right to appeal would be hampered by the fear of aggravation. This principle does not apply when the appeal has been lodged by the Primary Saranwal (for these provisions see Art. 68 ICCC).

Art. 63 (3) ICCC establishes a term of twenty days as the deadline beyond which, if no act of appeal has been deposited, the decision becomes final (Art. 64 (4) ICCC).

The period of twenty days either starts:

- a) in cases where the accused and/or his defence counsel were present, on the day the decision including the reasons was read out in the courtroom,
- b) in cases where the reasons were not read out with the verdict but the accused and defence counsel were notified about them, on the date of the later of the two notifications, or
- c) in cases of trial in absentia, on the day the notification of the verdict has reached the accused.

According to Art. 63 (3) ICCC the appeal has to be submitted to the office of the court that has passed the decision or to the office of the competent appeal court. To assure the principle of equality before the law and guarantee equal access to justice, illiterate or physically unable persons can fingerprint the written appeal instead of signing it, and illiterate persons can lodge an act of appeal if they are not in a position to present a written text by letting the secretary of the court write down their oral statement (Art. 65 (4) ICCC).

Unfortunately the new Law on the Structure and Competencies of Courts contains a limitation on the right to appeal. According to Art. 53 (4) of this law, when the punishment is a fine not exceeding 50,000 Afghanis, the verdict of the Primary Court is final and not subject to appeal. It is questionable whether a limitation of the right to appeal is in conformity with Art. 14 (5) ICCPR. The preparatory work leading to the codification of the right in the ICCPR contained in fact a restriction for petty offences. However this exception was struck during the elaboration process and did not appear in the final text. The question whether petty offences may be exempted was seen as a question that may be regulated by internal law<sup>79</sup>. In any case the denial of judicial review for offences punishable by a prison term of up to one year was regarded as a violation of Art. 14 (5) ICCPR<sup>80</sup>. The limitation of the right to appeal in Afghan law is well below that line. However in a country suffering from widespread

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<sup>79</sup> Nowak, *supra*, pp. 350-351.

<sup>80</sup> *Ibid*, p. 351.

poverty like Afghanistan, it is highly questionable to impose a barrier of 50,000 Afghanis. Therefore a different provision seems desirable in the future.

After an appeal has been lodged, the Appeal Court can reach the following conclusions:

a) The Appeal Court is to reject the appeal if it has not been filed within the established term of twenty days (Art. 70 (1) ICCC) and in cases where a fine of no more than 50,000 Afghanis has been imposed, since in both cases the decision of the court of first instance is final and an appeal cannot be granted.

b) Otherwise, if the appeal has been lodged according to the provisions of law, the Appeal Court can either confirm the previous decision or modify it completely or in parts (Art. 70 (2) ICCC).

Additionally the Appeal Court has the power to arrest the accused or to release the accused under arrest (Art. 70 (3) ICCC).

Finally it has to be stressed that, since Art. 129 (1) AC and Art. 9 LSCC are not limited to the decisions of the courts of first instance, the decisions of the Appeal Courts must also fulfil the formalities listed in these provisions. The same is true in respect of the other provisions regarding fair trial principles. As long as there is no explicit exception they also apply to appeal trials.

If the Appeal Court has not rejected the appeal, the decision of the Appeal Court itself is subject to an appeal called the appeal on points of law to the Supreme Court (Art. 71 ICCC). Such an appeal can be lodged by the victim, the convict or the Saranwal. Since the appeal is solely an appeal on points of law the complaints are limited to:

a) Violations in regard to the application of the law or wrong interpretation of the law (Art. 71 (1) (a) ICCC) or

b) The cases where a decision is based on evidence which has been collected without respect of the legal requirements (Arts. 7 and 71 (1) (b) ICCC).

There is a deadline of thirty days to lodge an appeal to the Supreme Court according to Art. 72 ICCC. Art. 73 ICCC states that, with regard to the appellate modalities, Art. 65 ICCC is applicable.

The Supreme Court can reject the appeal (for conditions see Art. 76 ICCC), amend the contested decision (Art. 77 ICCC) or quash the decision and reach a new verdict either by itself (Art. 78 ICCC) or by referral to the Appeal Court (Art. 79 ICCC).

By deciding on appeal on points of law, the Supreme Court performs an essential duty in two aspects. First, the possibility of an additional appeal gives the convicted person a second chance to get his verdict reviewed by a higher court; hence an additional protection for his rights is established. Second, the appeal on points of law has an essential relevance for the legal system as a whole as well as the rule of law. Art. 26 (1) LSCC gives evidence of that function, as it gives the Supreme Court the power to overrule the decision of a lower court in case of breaches of the law, even if these breaches have not been invoked in the plea of appeal; this power is quite different from that of the Appeal Court (see above). By exercising control over the decisions of lower courts, the Supreme Court gives guidelines to the judiciary, the prosecutors, the police and the defence lawyers for the proper interpretation of the law and thereby promotes the unification and the uniformity of the application of the law throughout Afghanistan. As a consequence, this function of the Supreme Court also has an important impact on ensuring the principle of equality before the law throughout Afghanistan. Also the possibility to anticipate legal sanctions is enhanced, which is an essential prerequisite to achieving the rule of law.

Appeal and appeal on points of law are ordinary procedural remedies because the contested decision is not yet final when challenged. The facts and the sentence established by a final decision are in general accepted as irreversible. The irreversibility of decisions is an important factor for legal security, since legal cases have to be solved definitely after a certain period of time. Therefore irreversibility of final decisions must be the general rule.

However in the interests of justice there can be exceptions in very special circumstances. The remedy applicable in these cases is the reopening of the trial. Since the reopening challenges a final verdict it is called an exceptional procedural remedy. Due to the special elements of this remedy the cases in which a reopening is permissible have to be clearly indicated by law (see the exhaustive list in Art. 81 ICCC). Analogies or other extensive application of the norm is inadmissible.

The petition for reopening focuses on two objectives: the discontinuance of the execution of the sentence<sup>81</sup> and the restoration of the dignity of the person previously stigmatised by the sentence. The procedural rules are fixed in Art. 83 ICCC. Filing a petition for reopening does not however stay the execution of the protested sentence except in the case of capital punishment (Art. 83 (2) ICCC). The preliminary examination is made by a Judicial Committee that is set up ad hoc for each individual case. This Committee has the power to reject the petition (paragraph 5) and this decision cannot be protested (paragraph 6). When the Committee finds that there are reasons to believe that the petition is supported by credible evidence, the petition is delivered to the Supreme Court.

The Supreme Court can make three kinds of decisions:

- (1) The approval of the petition, the quashing of the sentence and the acquittal of the sentenced person, if it can be established beyond reasonable doubt from the evidence and the opinions expressed that the convicted person was innocent (no. 9).
- (2) The rejection of the petition if not duly grounded (no. 10).
- (3) Dispatching the case to the court that adopted the protested decision when the Court finds that the case needs to be reassessed (no. 11). In this case, the final decision in question and its execution are upheld, pending the new decision of the Court. An appeal or the recourse to the Supreme Court is possible against this new decision. When the new final decision is favourable to the petitioner, the previous decision is quashed and the execution discontinued.

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<sup>81</sup> Art. 81 Interim Criminal Code for Courts states that the petition is permitted “at all times”, meaning that the petition can still be filed long after the execution of the punitive measures.

Comment on the cases:

a) According to Art. 28 LSCC the lower courts are bound by the decisions of the higher courts. According to Art. 70 (2) ICCC, the competence of the Appeal Court includes the modification of previous decisions. After the judgement of the Primary Court has been overruled and Y was acquitted, there is no legal basis for an imprisonment of Y.

b) Under Art. 68 (1) ICCC the court must confine its review to the points of the decision to which the appellant makes reference. Although M just refers to a wrong evaluation of facts and circumstances, the Appeal Court bases its judgement on a wrong application of the law. Moreover Art. 68 (3) ICCC states that if an appeal is filed only by the accused the court can under no circumstances increase the punishment inflicted by the lower court. Hence the Appeal Court violated Art. 68 (1) as well as (3) ICCC.

## c) Comparative Law

### Art. 185 Constitution of Pakistan

- (1) Subject to this article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgements, decrees, final orders or sentences.
- (2) An appeal shall lie to the Supreme Court from any judgement, decree, final order or sentence
  - (a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or
  - (b) if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or
  - (c) if the High Court has imposed any punishment on any person for contempt of the High Court; or
  - (d) if the amount or value of the subject matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of [Majlis-e-Shoora (Parliament)] and the judgement, decree or final order appealed from has varied or set aside the judgement, decree or final order of the court immediately below; or
  - (e) if the judgement, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgement, decree or final order appealed from has varied or set aside the judgement, decree or final order of the court immediately below; or
  - (f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.
- (3) An appeal to the Supreme Court from a judgement, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal.

### Art. 203 DD Constitution of Pakistan

- (1) The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudud for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.
- (2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:  
Provided that nothing in this article shall be deemed to authorise the Court to convert a finding of acquittal into one of conviction and no order under this Art. shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defence.

### Discussion proposal:

- What importance does the possibility of appeal and recourse to the Supreme Court have for the uniformity of the application of the law?
- Does the effective implementation of the right to appeal have an impact on society?

**Questions to sum up the post-trial principles:**

- When is the court hindered from basing its judgement on certain evidence?
- Why is the court required by law to state the reasons for its decision?
- What are the requirements of a valid decision?
- What role is assigned to the President in the case of the death penalty?
- Which abuses does the prohibition of double jeopardy prevent?
- Name the legal remedies available to the sentenced person or the Saranwal, if a decision of a court appears unlawful.
- What has to be taken into account to ensure the exercise of the right to review of higher courts?
- How does the court have to deal with illiterate persons?
- Who has the right to file an appeal or an appeal on points of law?
- Under which circumstances can a final court decision be challenged?

## **Chapter V: Special Cases**

### **A. Trial against Persons with Mental Disabilities**

Ruhollah (R) is accused of manslaughter. R suffers from a congenital insanity. He confesses the crime before the judge during the court's hearing. What value does his confession have? Alternative: The court finds R guilty and sentences him to death. Are the court's decision and sentence in accordance with the fair trial principles?

#### **a) Relevant Provisions**

##### **Art. 30 Afghan Constitution**

- (2) Confession to a crime is: a voluntary confession before an authorised court by an accused in a sound state of mind.

##### **Art. 44 Interim Criminal Code for Courts**

1. If during the trial it appears that the accused suffers of a mental illness which prevents him from the possibility of defence, the Court either ex officio or at the request of the Primary Saranwal stays the proceeding submitting the accused to mental examination.
2. Should examination confirm the above indicated mental state, the resumption of the proceedings is postponed until the suspect recovers.
3. In case the accused is later on sentenced to imprisonment, the time spent in a closed institution for the mental examination is detracted from the prison term.

##### **Art. 89 Interim Criminal Code for Courts**

3. When a prison sentence is to be executed on a person who is found to be mentally ill the execution is stayed until his recovery. The Saranwal orders his transfer to a medical centre for the treatment of the mental illness. The time spent in intramural treatment shall be deducted from the prison term.

##### **Art. 65 Afghan Penal Code**

Penal responsibility comes into existence when a person commits a criminal act by free will and in state of healthy mind and senses.

##### **Art. 66 Afghan Penal Code**

Obstacle to penal responsibility comes into existence from the realisation of any sensual indisposition or one of the instances of lack of will.

##### **Art. 67 Afghan Penal Code**

- (1) A person who while committing a crime lacks his senses and intelligence due to insanity or other mental diseases has no penal responsibility and shall not be punished.
- (2) If a person while committing a felony or misdemeanour suffers from a defect in his senses and intelligence, the court shall consider him excused and observe in his case the provisions of this law with respect to extenuating conditions.
- (3) Obscenity committed by persons mentioned in paragraph 2 of this article shall not be considered crime.

### **Comment on the Trial against Persons with Mental Disabilities**

Mentally disabled persons require special attention. As each case must be considered on its own merits, the actions taken by the judicial authorities may have a different psychological impact on persons in a sound state of mind and those with mental problems.<sup>82</sup> Actions which usually are still in compliance with fair trial principles may, therefore, constitute a violation when a mentally incapacitated person is affected.

Art. 30 AC defines a confession as “a voluntary confession before an authorised court by an accused in a sound state of mind”. A statement that would usually amount to a confession, but which is given by a mentally incapacitated person, can therefore not be used as evidence in court proceedings. Arts. 65-67 APC clarify that penal responsibility exists only in the case of a sound state of mind. Should the suspect/accused be suffering from insanity or a mental disease, he cannot be punished for his actions. Arts. 44 and 89 ICCD also deal with the case that the mental incapacity only becomes apparent during the proceedings, or only sets in during the proceedings. The proceedings are stayed until the suspect/accused has recovered. The proceedings can only be continued when the suspect/accused is again capable of defending himself. Any time spent in a mental institution during the break in the proceedings is subtracted from the prison sentence, if the accused is actually sentenced at a later date. Should the accused be found guilty and sentenced, the execution of the punishment is stayed until he/she is in a sound state of mind. This means that mentally insane persons can neither be imprisoned, nor can they be executed.

*According to Islamic law, mentally incapacitated persons cannot be treated in the same manner as an offender of sound mind. If the mental incapacity sets in at the time of the crime, the criminal character of the crime remains, but the perpetrator is not sanctioned.<sup>83</sup> As criminal responsibility is a prerequisite for punishment, judicial proceedings are stopped if the mental incapacity sets in after the crime. Should the mental incapacity commence after the sentence has been passed, the Hanafi School of law pleads for a stay of the execution of the sentence.<sup>84</sup>*

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<sup>82</sup> HRC, *Williams vs. Jamaica* (Views adopted on 04.11.1997) Com No. 609/1995, in: UN GAOR 51<sup>st</sup> session Suppl. 40 (A/51/40), p. 63.

<sup>83</sup> Gamal, *supra*, p. 355.

<sup>84</sup> *Ibid*, p. 355.

Comment on the cases:

According to Art. 30 (2) AC a statement of an accused is only considered a confession to a crime if it constitutes a voluntary confession before an authorised court made in a sound state of mind. Since R is insane his statement does not have the value of a confession as defined by the law. Consequently R's confession is invalid.

Alternative: The punishment of a person having committed a crime requires his penal responsibility (Art. 67 (1) APC). Penal responsibility only exists when the criminal act is committed by free will and in a sound state of mind (Arts. 65 and 66 APC). According to Art. 67 (1) APC a person who lacks his senses and intelligence due to insanity or other mental diseases while committing a crime has no penal responsibility and may consequently not be punished. Since A is insane, he has no penal responsibility and must therefore not be punished. The court is neither authorised to sentence A to death nor to a prison term. In conclusion the court's decision is not in conformity with fair trial principles.

**Discussion proposal:**

- What is problematic about statements made by mentally ill persons?
- Do the participants have experience with trials against mentally ill persons?
- What is the essence of the guilt when somebody does commit a crime? Does it exist when the perpetrator is mentally ill?
- What can justify the imprisonment of a mentally ill person?

## B. The Treatment of Juveniles

a) Fateme (F), who is 14 years old, is under suspicion of having committed several offences. She is arrested by the police in accordance with the provisions of law. On the same day the Juvenile Saranwal interrogates her without informing her parents. Which provision of law could be breached?

b) Alem (A) is a 13-year-old citizen of Herat. He is suspected of having committed an offence. The Juvenile Saranwal takes him into pre-trial detention in accordance with the relevant provisions. Since the detainment centres in Herat are overcrowded, he is put in a cell together with several adult detainees. In a neighbouring town there are places for juvenile detainees available. However, the Saranwal deems the transfer of A too much of an effort. Did the Saranwal act in conformity with the law?

### a) Relevant Provisions

#### Art. 73 Afghan Penal Code

Determination of age takes place on the basis of citizenship document (Tazkera). The court can, in case of non-conformity of the appearance of minor with the age shown on the citizenship document, obtain the opinion of a medical mission.

#### Art. 74 Afghan Penal Code

If the minor commits obscenity, the court can instead of the punishments contained in this Law reprimand him in the judiciary session or order his surrender to one of his parents or someone who has a right of guardianship over him or an honest person who undertakes his sound education and civility in the future, or order his quarantine in the Correction House or charity organisations and/or corrective schools which shall be established for this purpose by the state.

#### Art. 75 Afghan Penal Code

If the minor commits misdemeanour, the court can take one of the following measures in his case:

1. His surrender to one of the persons included in article 74 of this Law, provided its duration is not more than three years, and less than six months and that the person to whom he is surrendered should undertake, in writing, his future sound education and civility.
2. His quarantine in the Correction House or one of the corrective schools for a period of six months to three years.

#### Art. 76 Afghan Penal Code

- (1) If the minor commits a felony, whose punishment is death or continued imprisonment, the court can order his quarantine in the Correction House or charity organisations or corrective schools, provided its duration is not more than five years.
- (2) If the anticipated punishment for the felony is long imprisonment, the period of quarantine cannot be less than one year and more than four years.

**Art. 77 Afghan Penal Code**

If the minor after his surrender to an undertaker and during the period of undertaking commits misdemeanour or felony, the court can penalise the undertaker with cash penalty as follows:

1. In case of commitment of misdemeanour, from one to two thousand Afghanis.
2. In case of commitment of felony, from two to five thousand Afghanis.

**Art. 78 Afghan Penal Code**

If the minor is surrendered to someone who is not relative, his return by the court to a relative shall be effected at his own request or that of one of his relatives, provided at least one year has passed from the time of enforcement of the order. Renewal of request for return is not permitted until six months from the time of his refusal. If the court orders the return of minor to his relatives, this order is considered the same as the order of surrender of minor.

**Art. 79 Afghan Penal Code**

The minor who is quarantined in the Correction House or charity organisations or corrective schools can leave the institution of the proposal of concerned institution, agreement of the public attorney and the approval of the Attorney General. The said minor cannot under any circumstances remain in the above institutions for more than five years or after the age of eighteen.

**Art. 82 Afghan Penal Code**

If the teenager commits obscenity, the court can sentence him to the punishment anticipated in this Law, or order his surrender to one of the parents or someone who has a right of guardianship over him or an honest person who undertakes his proper behaviour in the future.

**Art. 83 Afghan Penal Code**

If the teenager commits misdemeanour, the court can in his case, instead of the anticipated punishments for the said crime, take one of the measures contained in article 76 of this Law.

**Art. 84 Afghan Penal Code**

- (1) If the teenager commits a felony, whose punishment is death or continued imprisonment, the court can order his quarantine in the Correction House for a period not less than two years and not more than fifteen years.
- (2) If the anticipated punishment for the felony is long imprisonment, the minimum period of his quarantine in the Correction House cannot be less than one year and its maximum not more than half of the maximum of long imprisonment.
- (3) If the maximum punishment for the felony should be less than ten years the court can order his quarantine in the Correction House for a period of less than one year and more than half of the maximum of the anticipated punishment for that same felony.

**Art. 85 Afghan Penal Code**

- (1) The age of minor and teenager at the time of commitment of the crime is considered the basis for determination of the responsibility.
- (2) If the minor commits a crime and by the time of issuance of verdict reaches the age of teenager, he shall be treated as minor.

**Art. 86 Afghan Penal Code**

- (1) If the teenager commits a crime and by the time of issuance of verdict completes the age of eighteen, he shall be treated as teenage.
- (2) If the crime which the said teenager has committed is felony or misdemeanour for which the anticipated punishment in the Law is long or medium imprisonment, the court can instead of quarantine in the Correction House sentence him to medium imprisonment for misdemeanour.<sup>85</sup>
- (3) The period of imprisonment in the instances mentioned in the above paragraph can in no case exceed the period of quarantine in the Correction House anticipated in this Law for the felony or misdemeanour which has been committed.
- (4) Punishments other than long and medium imprisonment anticipated in this Law can be substituted by cash fine which should not exceed five thousand Afghanis.
- (5) If the teenager during the period of this quarantine in the Correction House completes the age of eighteen, he shall be transferred to the relevant prison for the remainder of his period of quarantine.

**Art. 87 Afghan Penal Code**

If the minor or teenager commits more than one crime, his trial is permitted on the basis of a single claim for all the crimes, provided the court passes its verdict on the basis of that crime for which the heavier punishment is anticipated in the Law.

**Art. 88 Afghan Penal Code**

Repetition of crime by minor and teenager does not obstruct repetition of punishment and adaptation of measures anticipated in this Law.

**Art. 89 Afghan Penal Code**

If the minor or teenager is sentenced to repeated quarantines, the total period of his quarantine does not exceed five years in the corrective school and fifteen years in the Correction House.

**Art. 90 Afghan Penal Code**

- (1) If a teenager who has not completed the age of eighteen spends two third of his sentence in the Correction House, the court can at the request of the teenager or one of his parents or someone who has the right of guardianship over him order his release on the condition that the Correction House should certify in a report his good behaviour and the public attorney confirm it. In this case, the teenager shall be surrendered to one of the person included in article 74 of this Law.
- (2) If the teenager, having spent two third of his sentence in the Correction House, completes the age of eighteen, his release shall take place when he undertakes in writing to keep his behaviour in the future good and acceptable.

**Art. 91 Afghan Penal Code**

Provisions relating to repetition in crime and consequential complementary punishments and security measures are not applicable to minor and teenagers. Confiscation, closure of place and prohibition from going to places which cause deviation of morals are excepted from this provision.

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<sup>85</sup> Correct translation: If the crime which the said teenager has committed is a felony or misdemeanour for which the anticipated punishment in the law is long or medium imprisonment, the court can instead of ordering quarantine in the Correction House sentence him to medium imprisonment for a felony and short imprisonment for a misdemeanour.

**Art. 92 Afghan Penal Code**

Substitution of cash fine with imprisonment is not permitted in the case of minor and teenager.

**Art. 93 Afghan Penal Code**

A person who at the time of committing a crime has completed the age of eighteen but has not completed the age of twenty cannot be sentenced to death. In this case, continued imprisonment shall be substituted for execution.

**Art. 40 Law on the Structure and Competencies of Courts**

- (1) Appeal Courts shall have primary courts of the following composition in their jurisdiction:
  2. Juvenile Courts

**Art. 44 Law on the Structure and Competencies of Courts**

- (1) In the Capital of each Province one Juvenile Court shall be established.
- (3) The method of procedure on juvenile offences shall be regulated by a special law.

**Art. 2 Juvenile Code**

Objectives of this law are:

- 1) To correct and re-educate minors in conflict with the law.
- 4) Taking into account the Convention on the Rights of the Children during investigation and trial.
- 5) Give hearing to the statements and views of minors and their legal representatives during investigation and trial.

**Art. 3 Juvenile Code**

A child, who is accused, has infringed the law or . . . etc. will be treated in accordance with the provisions of this law.

**Art. 4 Juvenile Code**

The following terminologies have to be interpreted in the following way in course of this law:

- 1) A minor: A person having not yet completed the age of eighteen.
- 2) A minor lacking decision-making ability: A person having not yet completed the age of seven.
- 3) A minor possessing decision-making ability: A person having completed the age of seven but not yet the age of twelve.
- 4) A juvenile: A person having completed the age of twelve but not yet the age of eighteen.
- 7) Legal representatives are parents, guardians, relatives, lawyers or legal guardians of a child.

**Art. 5 Juvenile Code**

1. A person who has not yet completed the age of twelve is criminally not responsible.

**Art. 6 Juvenile Code**

1. During investigation and trial the age of a minor will be determined on the basis of citizenship document (Tazkera).
2. In case a minor does not have a citizenship document or the appearance of the child indicates an age different from the indicated one, the opinion of a forensic doctor will be sought.
4. The Determination of the minor's age will take place in relation to the date the criminal action was accomplished.

**Art. 7 Juvenile Code**

Humiliating and harsh punishment of a minor, even for correction and re-education purposes is not allowed.

**Art. 9 Juvenile Code**

1. Whereas the detection of offences of minors lies within the responsibility of the police, special Juvenile Prosecutors are responsible for the assessment, the investigation and the prosecution of offences of minors. To this end special juvenile prosecutor offices will be established in the Capital and in the Provinces.
3. Professional members of the Juvenile Prosecutor's office in addition to meeting the criteria outlined in the relevant code shall also have the specific aptitude, professional training and special experience in juvenile matters
4. Juvenile Prosecutor cannot initiate legal action directly against children who have committed crimes, unless a person or a source submits written complaint to the prosecutor.

**Art. 10 Juvenile Code**

4. Minors in detention shall be separated from adult detainees.

**Art. 12 Juvenile Code**

The minor under suspect and arrested shall be detained in a special temporary location . . .

**Art. 17 Juvenile Code**

1. The Special Juvenile Prosecutor is obliged to take the following points into his consideration while investigating a crime connected to minors in order to reach a grounded conclusion:
  - 1) Age as well as day, month and year of birth
  - 2) Degree of psychological development
  - 3) Personality and abilities
  - 4) Reasons and motives for committing the offence
  - 5) Level of education at the time of the offence
  - 6) Circumstances and living condition at the time of the offence
  - 7) Defamation and gravity of the offence
  - 8) Previous criminal record
  - 9) Behaviour during and after the offence
  - 10) Nature of the offence, witnesses, devices, intentions, time and location of the offence
  - 11) Degree of danger posed by the offence to the injured party
  - 12) Existence of accomplices, assistants or instigator of the crime
  - 13) Other circumstances that can reasonably have an effect on the determination of the punishment.

2. The Prosecutor is obliged while investigating offences of minors to acquire information about them from the police, parents, custodians, teachers, experts and any other person having information about them.
3. The Prosecutor is obliged to keep the criminal records and the details of the investigation confidential. Only the competent court and the defence counsel are allowed to have access to the criminal record.

**Art. 26 Juvenile Code**

3. The judges of juvenile court, in addition to meeting the criteria and qualifications stipulated in the Law on the Jurisdiction and Organisation of Courts, shall also have specific aptitude, professional training and special experience in children's trial.

**Art. 32 Juvenile Code**

1. The Juvenile Court shall hear the cases in relation to juvenile offenders behind closed doors. The pronouncement of the judgement will under any circumstances take place in public.
2. The publication of documents related to the proceedings of the juvenile court, including testimonies of witnesses and statements of experts in mass media is not allowed.
3. Revelation of details about the personality of the minor or of information that can lead to an identification of the minor are under no circumstances allowed.

**Art. 33 Juvenile Code**

1. The judges of the Juvenile Court issue their decision in the presence of the minor, after having listened to the statements and arguments of the minor, the testimonies of witnesses, the legal representatives, the prosecutor, the defence counsel, the staff of special social service institution and the statements of experts.
3. If the issues discussed during the trial harm the minor mentally, the court can continue the trial in absence of the minor, provided that a summary of the course of the respective hearing is given to him later.

**Art. 34 Juvenile Code**

1. The minor, his legal representative, his defence counsel, legal aids, witnesses, the judicial members of the court, the victims and the prosecutor can attend the trial. If the presence of the legal representative is not in the interest of the minor, or his presence disturbs the proceeding of the trial, the court can order his expulsion from the trial.

**Art. 36 Juvenile Code**

Judges are duty bound to consider the provision of article 17 of this code while issuing orders.

**Art. 39 Juvenile Code**

1. The following points have to be taken into account when the punishment of an accused minor is considered:
  - a) The punishment for minors having completed 12 years of age and having not yet completed 16 years of age cannot exceed one third of the maximum sentence stipulated in the Penal Code for persons above 18 years of age for the same crime.
  - b) The punishments for minors having completed 16 years of age but not having completed 18 years of age cannot exceed half of the maximum sentence in the Penal Code for those above 18 years of age for the same crime.
  - c) Minors cannot be sentenced to lifetime imprisonment or to the death sentence.

**Art. 65 Juvenile Code**

Since at present there are not enough defence counsels present in the country, suspected or accused minors can consult educated people having knowledge of legal issues.

With this objective the president of each court shall prepare a list of people featuring the respective qualities. These people will be introduced through the ministry of justice in the capital. In the provinces they will be introduced by the judicial administration to the appeal courts.

**Art. 37 Convention on the Rights of the Child**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

**Art. 40 Convention on the Rights of the Child**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

**Art. 6 International Covenant on Civil and Political Rights**

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.

**Art. 10 International Covenant on Civil and Political Rights**

2. b. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

**Art. 14 International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

**Art. 24 International Covenant on Civil and Political Rights**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

## b) Comment on the Treatment of Juveniles

Dealing with juvenile offenders in criminal trials requires special protection on account of their age. Both international law and Islamic law base the criminal responsibility of children on their stage of development.

Under international law a child is a person aged less than 18, unless majority is attained earlier under national law (Art. 1 Convention on the Rights of the Child<sup>86</sup>, CRC). From the start of investigation to the implementation of punishment, at least the same guarantees and protections as accorded to adults are assigned to the juveniles. The wider protection of children ranging from the pre-trial to the post-trial stage derives from the awareness of their vulnerable position, their narrowed responsibility, and the interest of the State and society in protecting and promoting juveniles.

A special feature of juvenile trial is that the interests of the child should be a primary consideration at all stages. Arrest and detention should only be used as a measure of last resort and for the shortest appropriate time. The proceedings are to take into account the age and the desirability of promoting the child's rehabilitation. Art. 40 CRC calls for treatment that is consistent with the promotion of the child's dignity and the desirability of the child's reintegration in society. Therefore, separate juvenile justice systems to handle cases of accused children are desirable. To enable the reintegration in the social environment, records of child offenders must be strictly confidential and only accessible to authorised officials. To protect the privacy and to avoid the stigmatisation of the children, trials of juveniles should exclude the public and the press. Juveniles should be separated from adults if they are subjected to imprisonment<sup>87</sup>.

Capital punishment as well as lifetime imprisonment without the possibility of release are forbidden for children according to Art. 37 (a) CRC.

Special provisions protecting the interests of juveniles can also be found in the Afghan Penal Code and the newly established Juvenile Code. Wherever there is a discrepancy between the two laws, preference has to be given to the new Law of Investigation on Children's Violation. The supremacy of the *lex posterior* is a prominent principle of legal theory.

The new Juvenile Code contains essential definitions in Art. 4 in regard to minors, which have been cited above. These provisions replace the old differentiations of the Penal Code (Arts. 70 – 72 APC).

According to Art. 4 (1) JC a minor is a person who has not completed the age of eighteen. Minors who have not yet completed the age of twelve lack criminal responsibility (Art. 5 (1) JC). Both Art. 85 APC and Art. 6 (4) JC provide that the age of the child at the time of the commitment of the crime is the basis for the determination of the penal responsibility. It has to be stressed that the age of the child at the time of the verdict is irrelevant (see Arts. 85 (2) and 86 (1) APC).

The judicial procedure for minors shows several peculiarities. The most prominent one is the setting up of Special Juvenile Courts as determined in Art. 44 (1) LSCC. Moreover, as stated in Art. 9 JC there have to be Special Juvenile Prosecutors. Arts. 9 and 26 JC introduce special criteria for legal professionals serving as Juvenile Prosecutors or judges.

<sup>86</sup> Afghanistan ratified the Convention on the Rights of the Child on 27.09.1990, which entered into force in Afghanistan on 27.04.1994.

<sup>87</sup> *HRC, Thomas vs. Jamaica* (Views adopted on 26.05.1999) Com. No. 800/1998.

Furthermore, according to Art. 9 (4) JC the Special Juvenile Prosecutor is not authorised to initiate legal action directly against children who have committed crimes, unless a written complaint by a person or an institution is submitted to the prosecutor.

Art. 32 (1) JC specifies that juvenile trials must be held in closed session. Furthermore, the publication of documents and the coverage of juvenile trials in the media are restricted by the norm.

Art. 10 JC names requirements for the pre-trial detention of minors. Above all it also affirms that children in detention have to be kept apart from adults. The Juvenile Code repeats several fair trial principles to emphasise their validity and importance especially for minors, e.g. the right to defence counsel and interpreter in Art. 22. The law names the most important points that are to be considered by the prosecutor and the judge in Arts. 17 and 36 JC respectively.

The possible punishment for children is regulated in Art. 39 JC depending on the age and on the offence committed.

Art. 7 forbids humiliating and harsh punishment of a minor, even for correction and re-education purposes; Art. 39 JC provides that a minor cannot be sentenced to capital punishment or life imprisonment.

The intention of the Juvenile Code is clearly to avoid detention of minors. It is regarded as the last possible resort to re-educate and correct juvenile offenders (as stated in Art. 8 JC). That intention has already been visible in the regulations of the Penal Code referring to the punishment of juveniles. Hence, as long as the provisions of the Penal Code in regard to minors are not contrary to the new Juvenile Code and there are no special provisions in this new law, the provisions of the Penal Code are still applicable.

After the introduction of the new Juvenile Code and the setting up of Juvenile Courts by the Law on the Structure and Competencies of Courts the Afghan legal system provides a good legal basis for conducting fair trials specially adjusted to the needs of minors

*Islamic law also addresses the question of responsibility in criminal proceedings against juveniles. A child is regarded as fully responsible when he obtains physical maturity. The so-called bulugh may differ between boys and girls and cannot be equated with mental maturity.<sup>88</sup> For a hadd crime punishment is only allowed if the person has reached bulugh. Concerning qisas crimes, Islamic law never regards an immature child as having committed a crime by intent, but only by pure negligence. As a consequence, no retaliation against the juvenile is permitted. Fixed regulations for ta'zir crimes are not existent. However, a guiding principle can be derived from the rules on hudud and qisas crimes, which can also be applied to ta'zir crimes: the age and the state of the development have to be taken into account when dealing with criminal acts committed by young people.*

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<sup>88</sup> Tellenbach, supra, p. 13.

Comment on the cases:

a) According to Art. 22 (2) JC the legal representatives have the right to be notified and to participate in all stages of the proceedings against the minor, no matter if carried out by the court or by the prosecution. As defined in Art. 4 (7) JC parents are legal representatives of a minor. Therefore the Juvenile Saranwal violated the law by not informing F's parents about her questioning. The consequences of this breach of law are questionable. Art. 22 (3) JC states that the absence of the minor's legal representative during investigation cannot stop the process of investigation. However this provision most probably aims at the protection of the investigation process; legal representatives do not have the possibility to block the investigation by not attending the proceedings. Therefore this provision cannot permit the prosecution to refrain from notifying the legal representatives and thereby to violate the provisions of law. Hence the questioning has to be deemed invalid in accordance with Art. 7 ICCC.

A special remedy in juvenile proceedings is provided by Art. 23 JC. The norm allows for the legal representatives to file a complaint to the higher Saranwal.

b) According to Art. 10 (4) JC, minors in detention have to be kept separate from adults. Art. 12 JC provides that they have to be detained in special temporary locations. There are no exceptions to this rule. Hence, the Juvenile Saranwal violated the provisions of law by detaining A together with several adults.

**Discussion Proposal:**

- What are the goals when prosecuting and punishing juvenile delinquents?
- What are the disadvantages of imprisoning minors?
- Do the participants have experience with the transgression of minors? If so, are there peculiarities?

## Part 2: Case Studies

### Case I

Osman (O), an Afghan student aged 27 years living in Kabul, was arrested on 11 November 2003 on charges of attempted murder in three cases. O was interrogated at the police station for 36 hours by several police officers, without being given any food and without being allowed to sleep. His glasses had been taken away from him so that he could not see much because of his long-sightedness. One police officer threatened him with “more stringent treatment” and told him that they were “informed about the residence of his sister”. Finally, the police officer held a pistol to O’s head and pulled the trigger – O did not know that the pistol was not loaded. After these events O confessed to the three charges and signed a written confession. During the whole interrogation O was denied access to a lawyer. The case of O was discussed by TV stations and in newspapers for weeks. On 13 November 2003 the head of the police announced that he was sure that O was the murderer during an interview broadcast on TV. Furthermore, one day later in several public meetings before the court hearing, the investigator stated that O was guilty.<sup>89</sup>

- Which principles could have been breached during O’s interrogation?
- How should police officers behave during the investigation period?
- Were the press statements of the law officials correct?
- How should persons involved in the investigations act in the public?

#### I. Interrogation / Behaviour of the Police Officers

a) The treatment of O during the interrogation could constitute a violation of the principle of protection from torture and degrading treatment contained in Art. 29 (1) and (2) AC, Art. 5 (4) ICC (see Chapter I Section D).

Torture can be understood as

- acts of public officials
- that intentionally inflict
- severe physical or mental pain or suffering
- in order to fulfil a certain purpose, such as the extortion of information or confessions or the punishment, intimidation or discrimination of a person.<sup>90</sup>

If one or several of the elements constituting the term torture are lacking, then the action is not considered torture, but rather cruel, inhuman or degrading treatment. While inhuman and/or cruel treatment includes all forms of imposition of severe suffering that are unable to

<sup>89</sup> Based on *Gridin v. Russian Federation*, Human Rights Committee, CCPR/C/69/D/770/1997.

<sup>90</sup> Nowak, *supra*, p. 161.

be qualified as torture for the lack of one of its essential elements<sup>91</sup>, degrading treatment is the weakest level of violation of this principle where the humiliation rather than the severity of the suffering is of more importance<sup>92</sup>. Most difficult is the delineation of torture from cruel and inhuman treatment according to the degree of the severity of suffering inflicted, which also depends on the subjective feelings of the victim.<sup>93</sup>

The actions in question are

- food and sleep deprivation for 36 hours,
- taking away the glasses,
- the threat of “more stringent treatment” and the knowledge of the sister’s residence
- and the simulated execution.

The simulated execution is an act of a public official (police officer) that intentionally inflicts severe mental pain or suffering. O is suffering mortal fear and thus an immense mental pain. This act is committed in order to extort information or a confession from O and therefore constitutes torture.<sup>94</sup>

Concerning the other actions, whereas the other elements are all present, it is doubtful in terms of severity whether they constitute torture.

However, food and sleep deprivation for 36 hours does constitute cruel and inhumane treatment. Depriving O of food and sleep causes physical suffering. Additionally the deprivation also causes a reduction of mental capacities. The ability to follow the interrogation and to answer adequately is diminished, raising the insecurity of the victim and making him more vulnerable to such threats that followed.

Taking away O’s glasses also reduces his well-being but may only constitute degrading treatment, since the mental pain is of a lower intensity. However no longer being able to clearly perceive the surroundings will increase the fear and insecurity. O may be disoriented and may not react in the same manner during the interrogation as he would if he could clearly see the faces and gestures of his interrogators.

The menace of “more stringent treatment” during an interrogation has to be understood as an indirect threat of degrading treatment with the intention to intimidate the questioned person. The statement that the police officers are aware of the sister’s residence constitutes a specific threat of harming and dishonouring his sister and as a consequence O himself and his whole family, even if this is not explicitly stated. This further intimidates the victim and exerts psychological pressure on him. However the treatment lacks the intensity to be considered as torture.

All actions are therefore in violation of Art. 5 (4) ICCC, according to which the suspect or the accused is not to undergo intimidation or any form of physical or psychological pressure. Furthermore, these actions constitute a breach of Art. 7 ICCPR in the form of torture and cruel, inhuman and degrading treatment, and a breach of Art. 10 (1) ICCPR as a violation of the right to be treated with humanity and with respect for the inherent dignity of the human person. The latter two breaches also constitute a violation of Afghan constitutional law, as Art. 7 (1) AC demands that the State abide by the UN Charter, international treaties and

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<sup>91</sup> Nowak, *supra*, p. 163.

<sup>92</sup> *Ibid.* p. 165.

<sup>93</sup> *Ibid.* p. 162.

<sup>94</sup> Cf. *ibid.* p. 162.

international conventions that Afghanistan has signed. Afghanistan acceded to the ICCPR which entered into force in Afghanistan on 24 April 1983.<sup>95</sup> Should the police officers actually harm the sister, this would also constitute a violation of Art. 26 AC that states that “Crime is a personal action. The prosecution, arrest, and detention of an accused and the execution of penalty cannot affect another person.”

It has to be stressed that, regardless of whether an action is considered as torture or as cruel, inhuman and degrading treatment, both are forbidden under Afghan as well as international law.

b) The behaviour of the police could also constitute a violation of the right to remain silent, which is at the same time a prohibition of pressure to make self-incriminating statements. See Arts. 29 (2) and 30 AC and Arts. 5 (4), 5, 6, and 7 ICCC (see Chapter I Section F).

The right to remain silent is closely related to the prohibition of torture and degrading treatment and prevents the suspect/accused from being compelled to make self-incriminating statements. Various forms of direct or indirect physical or psychological pressure, ranging from torture and inhuman treatment to various methods of extortion or duress are prohibited.

Art. 29 (2) AC prohibits torture of a person under prosecution, arrest, imprisonment, or who is convicted to punishment, even with the intention of discovering the truth.

As stated above, the mock execution constitutes torture and therefore constitutes a breach of Art. 29 (2) AC.

Art. 30 AC states that any statement, testimony, or confession obtained from an accused or another person by means of compulsion is invalid. Art. 5 ICCC goes further and prohibits the intimidation or any form of physical or psychological pressure. Art. 5 ICCC also clarifies and affirms that statements must be made in a condition of absolute moral freedom and emphasises the right to remain silent. The regulation furthermore requires that the accused/suspect be informed of this right.

In the present case, pressure was exerted on O by the deprivation of food and sleep as well as the threats. These actions were taken by the police with the aim of having O confess to the charges of murder. On the third day this aim was fulfilled when O confessed and signed a written confession. In view of the actions taken by the police, he was in no way able to make this decision in a condition of absolute moral freedom. Moreover it is not clear, whether O was even in a position to know the contents of the confession he signed as his glasses had been taken away from him. The behaviour of the police thus constituted a breach of Art. 5 ICCC and violated the right to remain silent, and would have done so even if he had not confessed in the end.

The pressure exerted on O also constitutes a breach of Art. 14 (3) (g) ICCPR which contains the right to remain silent, thereby also violating Art. 7 AC in connection with Art. 14 (3) (g) ICCPR for the same reasons as stated above.

c) The denial of any contact to his attorney could violate the principle of the “right to counsel” based upon Art. 31 (1) AC and Arts. 5 (7), 18 (1) and (3), and 38 (1) ICCC (see Chapter I Section G).

The right to an adequate defence is not only guaranteed during the trial but also in the pre-trial phase (see the wording of Art. 31 (1) AC). This right could be seen as a counterweight to the

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<sup>95</sup> See <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>.

intimidating atmosphere that often dominates the proceedings at a police station and which is sometimes specifically designed to obtain a confession.<sup>96</sup> The suspect/accused must also be informed of this right in accordance with Art. 5 (7) ICCC in order to make proper use of it. Art. 18 ICCC specifies that the suspect/accused has the right to the service of a qualified professional of his own choosing. Art. 38 ICCC further increases this protection by stating the right of defence counsel to be present at all times during the interrogation of the suspect.

In the present case O was denied access to a lawyer throughout the interrogation. It is unclear, whether he was not informed of this right and thus did not ask for counsel, or if his demand for counsel was rejected by the interrogating police. Either way, at least Art. 31 (1) AC was violated as O was not provided with counsel. Had counsel been assigned to O, the lawyer would have had the right to be present in accordance with Art. 38 ICCC.

Art. 14 (3) (b) ICCPR also contains the right of a suspect/accused to communicate with counsel of his own choice, whereas Art. 14 (3) (d) requires that the suspect be informed of his right to counsel and that counsel be assigned if it is in the interest of justice. Not specifically stated is whether this right is also applicable in the pre-trial stage. However, the Human Rights Committee has found a violation of the Covenant in several cases where the accused was denied access to counsel and was forced to confess in pre-trial detention.<sup>97</sup> These decisions show a tendency whereby the right to counsel is granted during all stages of the proceedings, i.e. also in the pre-trial stage.

Again, it is unclear whether O was informed of his right to counsel. However, he was definitely prevented from communicating with counsel of his choice. Furthermore, in view of the fact that O was charged with murder and in view of the harsh punishment that may follow a conviction, in this case it would have been in the interest of justice to assign counsel. Art. 14 (3) (b) and (d) ICCPR are therefore breached, and also constitute a violation of Art. 7 AC (see above).

#### CONSEQUENCE:

The confession O signed after a simulated execution, after 36 hours of interrogation and sleep and food deprivation, can no longer be used as valid evidence in a trial against O. Art. 30 AC states that any statement, testimony, or confession obtained from an accused or another person by means of compulsion is invalid. Additionally Art. 7 ICCC generally states that testimonies of witnesses and documents of evidence that have been collected without respect of the legal requirements are invalid.

d) Police officers are also bound by some of the principles of fair trial/due process during the investigative phase (see Chapter I). They are obliged to treat all suspects in a non-discriminatory manner, i.e. they have to treat objectively similar fact patterns similarly and objectively dissimilar fact patterns dissimilarly.<sup>98</sup> Exceptions to this rule have to be justified by objective reasons. Different treatment on the basis of factors such as ethnicity, religion, gender, status, wealth, political affiliation are especially problematic (see also Art. 3 LPDC). Different treatment based on such factors is presumptively discriminatory due to historical experiences and the fact that it is hard to think of objective reasons to justify different treatment based on these factors. The police are also bound by the presumption of

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<sup>96</sup> See *ECHR, Magee v UK*, Application No.28135/95, Judgement of 6 June 2000.

<sup>97</sup> *Conteris v. Uruguay*, in UN GAOR 40<sup>th</sup> session SUPPL 40 (A/40/40), p. 196; *Manera Lluberas v. Uruguay*, UN GAOR 39<sup>th</sup> session SUPPL (A/39/40).

<sup>98</sup> Cf. Nowak, CCPR Commentary, 2005, p. 606.

innocence and cannot treat the suspect in a manner that would imply his guilt. This also means that pre-trial detention must be restricted to very few cases where the letter of the law is strictly adhered to. The police officers must respect the suspect's right to remain silent, and must inform the suspect of this right. All legal authorities have to treat the suspect in accordance with human dignity. Lastly, they must allow the suspect to have access to counsel of his choice and must inform the suspect of this right.

## **II. Interviews / Pre-trial Behaviour in Public**

a) The statement of the head of the police as well as the one of the investigators could violate the presumption of innocence under Art. 25 AC, Art. 4 ICC, Art. 4 APC. (Chapter I Section C).

The principle that an accused is innocent until convicted by a final decision of an authorised court cannot be restricted by the confession of the accused. A confession can be false for various reasons or invalid as in the present case, due to the compulsion during the interrogation and can therefore not restrict the presumption of innocence. The presumption of innocence constitutes an obligation for all public authorities, that is, the police, the Saranwal, the judge responsible in the pre-trial phase, etc., to refrain from prejudging the outcome of a trial<sup>99</sup>.

In stating that he was "sure that O was the murderer", the head of the police influenced the pre-trial as well as the trial phase in an inappropriate manner and anticipated the court's decision; the investigator who pronounced the suspect guilty acted in an equally irresponsible manner. The authorities failed to exercise the restraints that the presumption of innocence requires of them and thus violated the principle contained in Art. 25 AC, Art. 4 ICC, Art. 4 APC.

b) Due to the presumption of innocence, authorities involved in the investigations should act carefully when making statements in public. Public statements made by high-ranking law enforcement officers are precarious in that they have to comply with the right of the public to be informed about the relevant issues on one hand, while ensuring that the rights of the suspect/accused are not violated on the other hand. Accordingly, announcements made by officials should be restricted and discreet, particularly if the investigations concern cases that may cause strong emotional reactions by the public and if there is a risk of "pre-condemnation". The presumption of innocence not only has the function of allowing for a fair trial before an unbiased court, but is also meant to protect the suspect from stigmata that go hand-in-hand with being convicted or even accused of committing a crime. If the suspect is pronounced guilty by officials in public before the guilt has been established in regular court proceedings, there is the risk that the suspect is burdened with negative social consequences, such as isolation and belittlement by peers, which may well have a strong impact on the suspect's family, work life and social life, even if he is declared not guilty at the completion of the trial.

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<sup>99</sup> Nowak, *supra*, p. 330.

## Case II

Khalid (K) was arrested on 8 September 2003 as the police suspected that he was involved in the disappearances of two 11-year-old girls and there was a real risk of K leaving the country. K was not told the reasons for his arrest until 5 days later during his first interrogation by the police.

During his first interrogation, K answered all the questions and confessed because he thought that he was obligated to answer when he was questioned by the police officers. He was not informed of his right to counsel. Immediately after the interrogation, the police sent a report to the Primary Saranwal, who sanctioned the arrest and detention, and interrogated K within 24 hours. He did not present an indictment to the court until 4 weeks after K's arrest.<sup>100</sup>

- Which principle could have been violated by the five-day detention before the interrogation?
- What information should the police have given K at the outset of the interrogation?
- Which regulation did the Primary Saranwal not adhere to when presenting the indictment? What is the consequence of this error?

### I. Detention of K before the Interrogation

The fact that K was detained for five days before being told the reasons for his arrest could violate his right to protection from arbitrary detention contained in Arts. 27 (2) and 31 (2) AC, Art. 31 (1) ICCC, Art. 6 (1) in connection with Art. 36 ICCC and Arts. 9 (2) and 14 (3) (a) ICCPR (Chapter I Section E).

a) First of all, it must be established that the police had the competence to make the arrest. Art. 30 (1) (b) ICCC allows the judicial police to arrest a person who is allegedly the author of a felony (see Arts. 23 – 26 APC) if inter alia there is a risk of his disappearance. Here the potential felony was the kidnapping of two girls (Art. 420 (2) APC), and there was a risk of K leaving the country. Assuming that the police had grounds for believing that K was the perpetrator of such a felony, the arrest itself was in accordance with Art. 30 (1) (b) ICCC.

b) However, the principle of protection from arbitrary detention during the pre-trial procedure requires that the arrested person be interrogated as soon as possible and the legal requirements of the arrest and detention be promptly reviewed in order to prevent unnecessary detention periods. Generally, Art. 27 (2) AC requires that in the case of an arrest, the provisions of the law have to be adhered to. To determine whether Art. 27 AC has been violated, it is necessary to examine the other provisions pertaining to an arrest.

c) Firstly, Art. 31 (2) AC specifically contains the right of the accused to be informed of the accusation upon his arrest. Art. 31 (1) ICCC reflects the right contained in Art. 31 (2) AC by specifying that the judicial police making the arrest must inform the person of the reasons for

<sup>100</sup> Based on *Gridin v Russian Federation*, Human Rights Committee, CCPR/C/69/D/770/1997; *McLawrence v Jamaica*, Human Rights Committee, CCPR/C/60/D/702/1996.

the arrest and interrogate the same about the crime and its circumstances, after having identified the person arrested on their own initiative.

It is an accepted principle that the arrested person has the right to be informed of the reasons for his arrest and the charges against him. The information should be in “simple, non-technical language” so that the arrested can understand the essential legal and factual grounds for his arrest. The reason for arrest need not be in writing. Merely informing a person that has been detained pursuant to the provisions of emergency legislation is insufficient; rather, the purpose of this provision is to enable anyone arrested to have the lawfulness of his detention reviewed by a court.

It is unclear exactly what point of time the term “upon arrest” in Art. 31 (2) AC implies. However the wording of the Dari text indicates that it refers to the instant of arrest.

Art. 31 (1) ICCC requires that the arrested person must be informed of those reasons, which have to be explained to him once his identity has been determined by the police. In every individual case the facts of the case will have to be taken into consideration. However, in this case, K was not informed of the reasons for his arrest for five days despite the fact that his identity was quite clear from the moment of arrest. Other reasons for not informing K of the accusations are not given.

The police violated Art. 31 (1) ICCC, Art. 31 (2) AC and therefore also Art. 27 (2) AC, by not informing K of the reasons for his arrest for five full days.

d) Furthermore, Art. 31 (1) AC states that every person upon arrest can seek an advocate to defend his rights or to defend his case for which he is accused under the law. Art. 5 (7) ICCC specifies, among other things, that the police is duty bound to clearly inform the suspect at the time of arrest about his right to representation at all times by defence counsel.

In this case, K was not informed of his right to counsel and spent five days in detention without having access to legal representation. This constitutes a violation of Art. 31 (1) AC and Art. 5 (7) ICCC.

e) Lastly, Art. 31 (1) ICCC states that the police must not only inform the arrested person of the reasons for the arrest, but must also interrogate the same about the circumstances of the crime within a maximum of twenty-four hours. The underlying idea of strictly fixed interrogation periods is the presumption of innocence, which can be found in Art. 25 AC. An innocent person should not be held in custody any longer than absolutely necessary.

In the present case, K was not interrogated for a period of five days. As there are no reasons for this delay, this is a blatant breach of Art. 31 (1) ICCC, and therefore also of Art. 27 (2) AC.

(According to Art. 31 (2) ICCC, a report must be sent to the Primary Saranwal immediately after the interrogation. In this regard, the police acted in accordance with Art. 31 (2) ICCC.)

## II. Interrogation

K was interrogated without legal representation present. He answered the questions and confessed because he thought he was obliged to do so.

As was covered in Chapter I Section G, every person has the right to counsel during all stages of the proceedings, including the pre-trial stage. In addition, every person has the right to remain silent (Chapter I Section F). Art. 31 (1) AC states that every person can seek an advocate to defend his rights or to defend his case for which he is accused under the law. Art. 5 (7) ICCC specifies among other things, that the police are clearly duty bound to inform the suspect or the accused about his right to remain silent and right to representation at all times by defence counsel. This information is to be given to the suspect/accused at the time of arrest **and** before the interrogation. Furthermore, Art. 5 (6) ICCC states that the suspect/accused has the right to abstain from making any statement even when he is questioned by the relevant police or judicial authorities.

At the outset of the interrogation, the police failed to inform K of his right to legal representation and also failed to inform him of his right to remain silent. This negligence constitutes a breach of Art. 31 (1) AC, and Art. 5 (6) and (7) ICCC and violates the two fair trial principles.

The consequence is the applicability of Art. 7 ICCC, according to which any evidence collected without respect of the legal requirements indicated in the law is considered invalid and the court cannot base its judgement on it. K's confession is therefore useless for the judicial authorities.

### **Alternative:**

Immediately after his interrogation by the police, a report was sent to the Primary Saranwal. The Primary Saranwal sanctioned the arrest and the detention and interrogated K within 24 hours. However, he did not present an indictment to the court until four weeks after the arrest had passed. This may have violated K's right to protection from arbitrary detention as addressed in Chapter I Section E. As mentioned above, Art. 27 (2) AC states that no person can be pursued, arrested or detained but in accordance with provisions of the law. Art. 6 in connection with Art. 36 ICCC contain regulations concerning the pre-trial detention.

Art. 6 ICCC refers to Art. 36 ICCC to determine the terms for the duration of provisional detention following the arrest during the investigative phase. Art. 36 ICCC determines that the indictment has to be presented to the court within fifteen days from the moment of arrest except when the court, at the timely request of the Saranwal, has authorised the extension of the term for not more than fifteen additional days. If this is not done, the arrested person is to be released.

In the present case, the Primary Saranwal took four weeks to present the indictment to the court. He did not request the court to extend the term of pre-trial detention. The term of K's pre-trial detention during the investigative phase was therefore much longer than allowed for in Art. 6 in connection with Art. 36 (1) ICCC. As a result, K has to be released in accordance with Art. 36 (1) ICCC.

### Case III

The family of Lema (L), a young woman from Herat, had chosen a husband for her. However, L did not want to marry this man and ran away from home. When she was apprehended by the police, she was taken into detention. The Saranwal informed her that she was accused of the crime of immodesty. For the trial, L was not brought before the court to explain her situation. Instead, the court heard her brother on her behalf. She was sentenced to 10 years in prison.

Alternative:

L was not brought before a State court because the judge was ill. Instead, she was sentenced to imprisonment by a Jirga after a traditional proceeding.

- What principles could have been violated by sentencing L to a prison term because of immodesty?
- Does it suffice that the brother was heard on behalf of L?
- What difference does it make that in the variation L was brought before a Jirga instead of the State court?

#### I. Legal Basis for the Prosecution and the Decision

The fact that L was sentenced to a prison term for the supposed crime of immodesty could have violated the principle of legality of crimes and sanctions and general principles of sentencing (see Chapter I Section B, Chapter IV Section A).

Specifically, Art. 27 (1) AC states that “no act is considered a crime unless determined by a law adopted prior to the date the offence is committed.” This principle is repeated in Art. 2 APC, which states that “no act shall be considered crime, but in accordance with the law.” Art. 3 APC goes on to say: “No one can be punished but in accordance with the provisions of the law which has been enforced before commitment of the act under reference.” It must be clear which actions are criminal and which are not in order that citizens can foresee which actions are prohibited and entail punishment, so that they need not fear unexpected repressive behaviour from the judicial authorities. By defining criminal behaviour in laws and by the restriction of investigation, prosecution, and punishment on behaviour that has been previously defined as being criminal, citizens are protected from arbitrary actions taken by State officials. Art. 130 AC confirms in paragraph 1 that the courts must apply the provisions of the Constitution and other laws when processing cases. The court does not have the discretion to choose whether or not to apply the relevant laws – it is bound by the law and cannot make decisions that are not in conformity with the laws.

In the present case, L was accused of the crime of immodesty. However, this is not a crime contained in the Afghan Penal Code. There is, therefore, no legal basis for the detention or prosecution of L. Both in the pre-trial stage and in the trial stage, L’s fair trial rights have been violated.

## **II. Access to the Courts**

The fact that the court heard L's brother instead of letting L present her case is a violation of the principle of access to the courts (see Chapter III Section A 2).

Art. 31 (1) and (2) AC do not expressly contain the individual's right to be heard, but this right is based on the assumption that the accused has access to the courts. The right to be heard is therefore implied by the wording of Art. 31 AC, especially paragraph 2 that states that "the accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law." Art. 52 (3) ICCC and Art. 53 (2) ICCC both contain the right of the accused to be present during the trial. Furthermore, Art. 58 ICCC, which describes the conclusion of a trial, allows the accused or the defence counsel to respond to the accusations of the Primary Saranwal in paragraph 2 ICCC.

In the present case, L was not allowed to state her case before the court. Instead, her brother was heard on her behalf. The fact that L was not present violated her rights mentioned in Arts. 52, 53 and 58 ICCC as she was not given the opportunity to explain her behaviour or defend her case. The rules of trial in absentia cannot be applicable as these only apply if the accused cannot be found or wilfully does not appear for the proceedings. In this case L was in the custody of the State and was not given the option of appearing for the trial. The fact that her brother spoke on her behalf cannot be an equivalent substitution for the right to be personally heard. It is also not comparable with the situation that an accused chooses to allow his defence counsel to speak for him, as the defence counsel provides legal representation and is duty bound to act in the interest of the accused. The brother of L was not bound to act in the interest of the accused. It is possible that his interests or the interest of the family were contrary to the interest of L. Furthermore he may not have known all the relevant facts of the case. The court was not able to make its own assessment of the accused, and would possibly have come to a different decision if it had had a personal impression of L and if she had been allowed to present all the information she would have thought relevant for the court.

This is also closely linked to the right to an adequate defence, which is also made impossible by not being able to respond to the accusation at all.

Therefore, her right to access to the courts was violated, and as a consequence, also her right to an adequate defence.

## **III. Access to Courts Established by Law**

If L had been brought before a Jirga instead of the State court, this would have violated her right to access to courts established by law (see Chapter III Section A 1).

Both Art. 120 AC and Art. 3 LSCC state the competence of the judicial organs, which is – among other things – to attend to all lawsuits in which real individuals stand before it as a defendant. Art. 122 AC and Art. 4 LSCC prohibit the transfer of a case from the jurisdiction of the judicial branch to another organ.

Art. 15 ICCC emphasises that the criminal procedure is considered null if the person who has acted as a judge does not possess the relevant legal status.

In the present case, the Jirga was not given the authority by law to preside over a proceeding concerning behaviour deemed to be criminal. The proceedings must, therefore, be deemed illegal. L's right to have the proceedings against her conducted by a competent, independent and impartial tribunal established by law was violated.

## Case IV

Ashir (A), a citizen of Turkmenistan, was arrested as he was suspected of dealing with opium. During the trial, the charges were read out and witnesses were heard. However, although A understood a little Dari, he did not understand enough to be able to follow the proceedings. The judicial authorities had proposed that he hire an interpreter, but A could not afford the high fees. Defence counsel was assigned to his case by the Saranwal. The defence counsel appeared before the court together with A. However, as A and his defence counsel could only communicate in general terms, A was not fully aware of the charges and could not understand the examination or cross-examination of the witnesses, none of whom he had ever seen before.

- As A understood at least some Dari, were his rights sufficiently protected by assigning defence counsel for the trial?
- Did A give up his right to examine the witnesses by declining to hire an interpreter although he knew that he would not be able to follow the proceedings?

A's fair trial rights contained in Art. 31 (2) AC, Art. 135 AC and Art. 20 (1) ICCD could be violated by not ensuring the presence of an interpreter (see Chapter III Section H).

### I. Right of Access to Documents and Information

Art. 31 (2) AC contains the right of the accused to be informed of the accusation upon arrest. Art. 20 (1) ICCD furthermore specifies that the suspect or the accused who does not know the language used during the investigations and the trials must be given an interpreter, at least, to explain to him the charge and the indictment and to assist him during the interrogations and confrontations.

The right to be informed of the charges implicitly contains the right to understand these charges. It is inadequate to present the accusations to the suspect or the accused without ensuring that these are properly understood. Even if the suspect or accused can communicate in some manner in the relevant language, in some cases this may not be sufficient to understand the charges and their consequences. The suspect or accused must be sufficiently proficient in the language in which the accusations are conveyed to him.

In the present case A understood a little Dari. However, he did not speak the language fluently and did not understand the charges in full. Therefore, his right to information was violated.

## **II. Right to Have an Interpreter**

Art. 135 AC specifies that parties who do not know the language in which the trial is conducted “have the right to understand the material and documents related to the case through an interpreter and the right to speak in their mother language in the court.” Art. 20 (1) ICCD is once again relevant, whereby the suspect or the accused must be given an interpreter to explain the charges and the indictment, and to assist during the interrogations and confrontations. As explained above, the right to a fair trial is not ensured if the suspect or accused understands some of the language used, but is not sufficiently proficient to understand the proceedings in full and to articulate his responses in an adequate manner. He must be in a position to understand the witness properly in order to question his statement. While it is helpful to appoint defence counsel for the accused, this alone does not guarantee the right to a fair trial if the accused cannot adequately communicate with the defence counsel. The accused has the right to understand the material and the documents related to the case and to follow the proceedings, regardless if he has defence counsel or not. In addition, defence counsel can only represent the accused to the best of his ability if he is fully aware of the circumstances of the case as perceived by the accused. The accused must be given the opportunity to communicate with his defence counsel. The right to an interpreter is therefore closely linked to the right to examine witnesses (see Chapter III Section F), right to counsel (see Chapter I Section G) and the right to an adequate defence (see Chapter III Section E). The defence counsel is not an adequate substitute for an interpreter, just as an interpreter is not an adequate substitute for the defence counsel, if the circumstances of the case require the appointment of counsel.

## **III. Waiver of the Right to Examine Witnesses**

As examined in Chapter III Section F, the accused has the right to call and examine witnesses. This is not mentioned in the Constitution, but specifically stated in Art. 53 (3) (g) ICCD: “. . . and the accused or his defence counsel can ask questions to the witnesses and experts”.

Not being able to pay for an interpreter cannot be viewed as a waiver of this right, even if the accused was aware of the fact that he would not be able to follow the proceedings. His refusal to hire an interpreter was based solely on the fact that he did not have the necessary financial means to do so. A waiver of his right to examine witnesses must be expressly stated and can only be deemed valid if the accused was informed of his right and made the decision of his own free will – without being put under pressure by the judicial authorities.

## Case V

Yasir (Y) was sentenced to imprisonment for grievous bodily harm. He was sentenced in absentia, as the judicial authorities were unable to obtain information about his whereabouts although sufficient attempts had been made to do so. An arrest warrant had been issued. The authorities had tried to find him at all of his known former residences. For lack of options, the arrest warrant was delivered to the “municipal councils” of all of his former residences. In his absence, defence counsel was assigned to represent him before the court. The defence counsel had sufficient opportunity to learn the facts of the case, to bring forth evidence for mitigating circumstances, and to cross-examine the witnesses brought forth by the Saranwal. On his return from Pakistan, Y is arrested and is informed of the proceedings that took place in his absence. Two days later he wants to appeal before the higher court. However, the court refuses to admit the motion, claiming the time limit to submit an appeal has passed.

- Are the conditions for a trial in absentia fulfilled?
- Must Y accept the sentence without review from a higher court?

### I. Conditions for a Trial in Absentia

The trial against Y in absentia could constitute a violation of Arts. 17 (1), 41, 46, 47 (1) and (2), 53 (2), 59 (4), (5), 63 (1), (2), (3) (c) and 64 ICCC.

The judicial authorities were unable to obtain information about Y’s whereabouts although sufficient attempts had been made. Therefore the investigations themselves did not violate Art. 17 (1) ICCC, which describes the way the investigations should be administered.

Since it was not possible to serve the notification on the accused in any of the forms provided for in Art. 17 ICCC, because neither the domicile of the accused nor the places where he worked could be identified, the court was permitted to appoint defence counsel for him in accordance with Art. 46 (1) ICCC. After the defence counsel had been appointed, the counsel had sufficient time to learn the facts of the case and to take part in the trial. Therefore, Art. 53 (2) ICCC, the right to an adequate defence (see Chapter III Section E) and the right to call/examine adverse witnesses (see Chapter III Section F) are not violated, since the defence counsel was not prevented from defending the accused to the best of his abilities.

The conditions of a trial in absentia are therefore fulfilled.

## **II. Possibility to Appeal**

However, the refusal of the higher court to accept the motion of appeal violates Art. 63 (3) (c) ICC. According to this article, the act of appeal should be deposited within twenty days from the moment in which the accused tried in absentia **has received** the notification of the decision.

In our case the higher court therefore incorrectly argues that the time-limit has passed, since the time-limit only commences to run once the accused has received the notification. This happened once he was arrested and informed of the proceedings, after which he filed the motion of appeal within two days. The time limit was therefore not surpassed. Y still has the right to appeal.

The right to appeal is of utmost importance in cases of trials in absentia, since this right is essential to compensate for the curtailment of the right to be heard by the court. Therefore a fair trial in cases of trial in absentia is not possible without having the right to challenge the decision after being notified of it.

## Case VI

Arman (A) is a 15 year old Afghan citizen living in Kandahar with his parents. He was suspected of having committed a theft. Due to the risk of repetition he was arrested and taken to a police station. Shortly afterwards he was questioned by the ordinary Saranwal. His parents were not informed about the questioning and were not present. A was not informed about his right to counsel.

At the trial before the Juvenile Court, which was open to the public, A was sentenced to an adult punishment because he lacked an ID card (tazkere) and therefore could not prove his age. He had not had access to counsel during the proceedings based on the argument that defence counsel was not available. After he served the sentence in the adult prison, he was retried before the Juvenile Court, where he received another sentence of quarantine in the correction house.

- How would you evaluate the behaviour of the police officers?
- What do you think of the behaviour of the Saranwal?
- What do you think about the proceedings of the trial which were open to the public?
- Should A have had representation before the court?
- Was the first sentence in accordance with Afghan and international law?
- What do you think about the proceedings following the first prison term?

### I. Behaviour of the Police

The police arrested A on grounds of the risk of repetition. Since A is 15 years of age and thus a minor as defined in Art. 4 (1) JC, the provisions of the Juvenile Code have to be applied (Art. 3 JC).

Art. 9 (1) JC declares that the police have the competence for the detection of juvenile offences, and Art. 10 (1) JC states the grounds on which a juvenile may be arrested by the police, enumerating risk of escape (a), risk of elimination of documents and other evidence (b) and risk of repetition (c). Therefore the police were allowed to arrest A.

### II. Behaviour of the Saranwal

Concerning the proceedings of the Saranwal several points are questionable.

a) At first it is doubtful whether the ordinary Saranwal was competent to question A. Art. 9 (1) JC establishes the special competence of the Juvenile Saranwal, who is responsible for the assessment, investigation and prosecution of juvenile crimes. Therefore in the case at hand, the acting Saranwal lacked the competence to question A.

b) Secondly A did not have access to counsel during the interrogation by the Saranwal, which could constitute a violation of his right to counsel. This right is stated in Art. 31 AC and Arts. 5 (7), 18 (1), (2), (3), 19, 38 and 41 ICC. However, since A is a minor, primarily

Art. 22 (1) JC has to be applied as *lex specialis*. According to this norm a minor has the right to be represented by defence counsel during all stages of investigation and trial. A has not been informed about his right to counsel.

No matter whether one derives the obligation of the judicial authorities to inform a suspect/accused about his right to counsel from Art. 5 (7) ICCC or whether one considers it an immanent part of the right to counsel itself, there is a breach of the right to counsel. Even though there is no written obligation corresponding to Art. 5 (7) ICCC in the JC, it can rightly be argued that this obligation is valid for minors as well. First, the JC is *lex specialis*; therefore the ICCC is applicable if there are no provisions in the JC and the norm is not contrary to the aims of the JC. Second, if the judicial authorities are obliged to inform an adult suspect/accused about his rights, they are a fortiori obliged to inform minors about their rights since they are even more in need of support and information than adults.

c) Furthermore the parents of A have not been informed about the questioning of A by the Saranwal.

According to Art. 22 (2) JC the legal representatives of a minor have the right to be notified and to participate in all stages of legal proceedings carried out by the prosecutor or the court. Parents are legal representatives as defined in Art. 4 (7) JC. Therefore by his failure to inform the parents of A the Saranwal has violated Art. 22 (2) JC.

As a result of the breaches of law provoked by the Saranwal, the documents and pieces of evidence obtained during the questioning, e.g. the protocol of the questioning, are invalid (Art. 7 ICCC).

In regard to breaches of procedural law there is a special form of complaint for the legal representatives during the pre-trial phase of a juvenile case. According to Art. 23 JC, a legal representative has the right to file a complaint to the higher Saranwal after the representative has been informed about the procedure of the investigation. The higher Saranwal is obliged to assess the complaint without delay and to reach the necessary decision.

### **III. Accordance of the First Trial with Afghan and International Law**

The first trial is problematic since

- a) the trial was held in public and
- b) A was sentenced to an adult punishment.

a) As a basic principle stated in Art. 128 AC and Art. 52 (2) ICCC, trials have to be held in public. Nevertheless, a specific exception for trials before the Juvenile Court is provided by Art. 32 JC. According to this norm the Juvenile Court hears cases in closed session and only the decisions are read out to the public. The aim of this provision is to protect the privacy of the minor, to avoid stigmatisation and to promote the possibility of later reintegration. Hence by holding the trial in public the court violated Art. 32 JC.

As stated above (Chapter V Section B), by establishing this norm Afghanistan has satisfied the demands of Art. 40 CRC, which is binding for Afghanistan due to Art. 7 AC.

b) A was sentenced to an adult punishment because he could not prove his age.

Art. 73 APC as well as Art. 6 (1) of the new JC state that the determination of age during investigation and trial of a minor is based on the citizenship document (*tazkere*). If a minor holds no document or his physical appearance indicates an age different from the document, the opinion of a forensic doctor has to be sought (Art. 6 (2) JC). If the opinion of the doctor is questionable, the opinion of a team of doctors has to be sought (Art. 6 (3) JC). These provisions demonstrate the obligation **of the court** to determine the age of a minor.

Hence the court is under no circumstances allowed to shift the burden of proof to the minor or to assume a certain age of a minor based on its own impression. The impression of the court can only raise doubts with regard to the validity of the ID document (Art. 6 (1) JC) or the examination of a single forensic doctor (Art. 6 (3) JC) but cannot prove the age of a minor. Therefore the assumption that A was an adult without consulting at least one forensic doctor constitutes a breach of Art. 6 (2) JC.

This breach of procedural law will have to be addressed in the course of an appeal according to Art. 16 ICCC. The prerequisite of Art. 16 (4) ICCC is fulfilled, since it would not have been possible to sentence A to an adult punishment had his age been determined according to law. Therefore, the breach of procedural law was significant to the decision.

#### **IV. The Second Trial of A**

In our case A was retried after serving his sentence in an adult prison and received another sentence of quarantine in the correction house.

This could constitute a breach of the *ne bis in idem* principle, also referred to as the prohibition of double jeopardy.

Although the new Afghan Constitution does not explicitly provide for this principle, Art. 78 (1) (d) ICCC states that the Supreme Court quashes the contested decision without referral when it comes to the conclusion that for the same person and the same facts a previous decision was already adopted. This shows that the Afghan criminal law system is familiar with the principle of *ne bis in idem* and regards the violation of it as a serious breach of procedural law. Also, Art. 83 APC states that, if a minor commits a misdemeanour, the court can take one of the measures of correction contained in Art. 76 APC **instead** of ordering the anticipated punishment for the said crime. One of these punitive measures is quarantine in a correction house. The word “**instead**” clearly shows that only one of the measures is allowed. Hence, double jeopardy in this form is not allowed. Since A was already sentenced to an adult prison term the juvenile sentence against him constitutes a breach of Art. 83 APC, as well as a breach of the *ne bis in idem* principle.

Thus, a complaint to a higher court in accordance with Art. 16 ICCC can be filed which will lead to the quashing of the second sentence. The prerequisite of Art. 16 (4) ICCC is fulfilled, since if the principle of *ne bis in idem* had not been breached a second conviction of A would not have been possible at all.

## Case VII

Yasir (Y), a 30 year old mentally handicapped man, and Hamid (H), a 24 year old man, were both suspected of the crime of manslaughter. The police used different techniques when interrogating the two suspects. Y was treated more roughly even though his physical state was recognisably weak. The different treatment was based on the fact that H belongs to the same ethnic group as most of the police officers, whereas Y belongs to a minority group. Furthermore, Y was more vulnerable because of his physical and mental state of health. Y was put on trial. In the course of the proceedings a mental examination was made which proved that Y had been mentally incapacitated since birth. After the resumption of the proceedings the judge – a relative of the victim – sentenced Y to 12 years of imprisonment under Arts. 97 and 100 APC.

- What principles could the police have violated in the course of their interrogation of Y?
- What were legal problems in the proceedings of the court in the case of Y?
- What could be the legal consequences of the breach of a procedural law contained in the ICCC?

### I. Breaches of Fair Trial Principles during the Police Interrogation

The question whether Y was tortured cannot be answered as the reference “treated more roughly” does not give enough information to evaluate the situation.

In any case, the rough treatment and the lack of medical aid could constitute a breach of Art. 22 AC, which states in paragraph 1 that any kind of discrimination and privilege between the citizens of Afghanistan is prohibited. While judges and officials may not act in a discriminatory manner when enforcing the laws, and while they must ensure that the rights of all, both men and women, are equally protected by the courts, this does not necessarily entail identical treatment. Prohibited are only those distinctions that are not based on reasonable and objective criteria.

Therefore, different treatment of suspects is not forbidden under all circumstances, and it can be useful to cope with the different circumstances of the suspects. For example, a mentally ill or juvenile suspect will need more attention and support than an average adult in order for him to understand and make use of his rights in the investigative (and following) stages. However, under no circumstances can the ethnicity of a person be a reasonable and objective criterion for different treatment. The fact that this criterion is not an objective one is shown by the consideration that it will be seen differently depending on the ethnic background of the official himself. The official may be tempted to treat a suspect belonging to the same ethnic group more favourably, or may be tempted to be harsher towards a suspect belonging to a different ethnic group. Despite the fact that Art. 22 (1) AC does not explicitly refer to ethnicity, this article has to be interpreted in the context of the whole Constitution. Therefore, Art. 4 AC must also be considered. This article explicitly states that the nation of Afghanistan is formed by all of its ethnic groups, and that all members of all of these ethnic groups are

citizens of Afghanistan. Therefore, they are all protected equally by Art. 22 AC and cannot be treated differently due to their affiliation with one of these ethnic groups.

Thus, the treatment of Y by the police constituted a breach of Art. 22 AC and of the fair trial principle of equality before the law.

Not only were the police officers not allowed to treat Y more roughly in respect of his ethnic background, quite to the contrary they were even obliged to treat him more carefully than the average suspect due to his recognisably weak mental and physical state of health.

They should also have thought about contacting a psychologist or psychiatrist to analyse Y's mental constitution.

## **II. Legal Problems during the Proceedings of the Court**

Two points are problematic in relation to the proceedings of the court.

First the acting judge was a relative of the victim (a), and second the mental examination proving that Y had been mentally incapacitated since birth had no impact at all on the further proceedings of the court (b).

a) Art. 11 (1) (a) ICCC states that a judge cannot handle a case if the crime was committed against him or his relatives. As the judge was a relative of the victim the verdict is flawed.

b) Art. 44 (2) ICCC states that if an examination confirms the existence of a mental illness, which prevents the accused from the possibility of defence, the court has to postpone the resumption of the proceedings until the suspect recovers.

In our case Y was mentally incapacitated since birth; therefore he was not and will never be able to defend himself. In accordance with Art. 44 (2) ICCC, a provision based on the principle that proceedings should not take place against a person who is unable to defend himself due to his mental illness, the court was obliged to permanently postpone the proceedings, which effectively means to close the proceedings. In such a case, where it is established that the accused is mentally not capable of understanding and participating in the proceedings, the judge and the prosecutor have the duty to take the necessary actions.

<p>It should be added that if such a person is dangerous for others or himself, his incapability to defend himself does not mean that he has to be released. However, he cannot be subjected to regular proceedings of the court. This leads us to the consideration that there should be special regulations in the future Afghan law to regulate such proceedings. If an accused is incapable to follow the proceedings but is nevertheless dangerous, and if a special procedure proves that he in fact presents a danger to society or himself, he should be treated and safeguarded in a hospital.</p>
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### III. Possible Legal Consequences of the Breach of a Procedural Law

The ICCC provides two possible consequences for breaches of procedural law, i.e. the nullity of a decision according to Art. 15 ICCC and the invalidity of a decision regulated in Art. 16 ICCC. The most important difference between them is that in cases of invalidity the decision in question has to be challenged by the interested party in order to revoke it, whereas the nullity of a decision is declared *ex officio*.

a) The first violation of procedural law in question is the breach of Art. 11 (1) (a) ICCC as the judge deciding the case was a relative of the victim.

In regard to possible consequences, the possibility of the nullity of the verdict should first be considered since the consequences are more extensive and therefore more favourable for the convict.

Art. 15 ICCC states two cases of nullity of a decision. In the case at hand Art. 15 (1) (a) ICCC could be of relevance. According to this provision, the criminal procedure is considered null if the persons who have acted as judges or as Saranwal did not possess the required legal status.

Although the judge was a relative of the victim and therefore was not allowed to handle the case according to Art. 11 (1) (a), it cannot be argued that he lacked the legal status of a judge. Therefore a case of nullity does not obtain.

Hence, the subsidiary clause of Art. 16 ICCC may be applicable. According to that norm, “All violations of procedural provisions different from those indicated in the previous article [Art. 15 ICCC] bring about the invalidity of the procedure . . .”. In accordance with Art. 16 (1) ICCC, a challenge has to be made to bring about the invalidity of the procedure. Art. 16 (3) ICCC allows for the denouncement to be made during the appeal to the Appeal Court or to the Supreme Court. Hence Y as well as a potential defence counsel can still file a denouncement.

A further condition for a declaration of invalidity of the procedure by the higher courts is that the violation of procedural provisions **appears** to have significantly influenced the decision of the case (Art. 16 (4) ICCC). In our case the impartiality of the judge is in question as the judge was a relative of the victim of the crime. Even though it cannot be proved that the judgement was affected by that relationship, there is a high probability that his decision was influenced by personal considerations. That probability is sufficient for an appearance of distortion of the verdict.

That conclusion is supported by the special importance of the impartiality of judges for the judicial system as a whole as well as for the trust of the people in the judiciary. Therefore every reasonable appearance of judicial bias should be prevented and verdicts bearing this flaw should be overruled.

As a result, the higher court will have to declare the invalidity of the procedure after a relevant denunciation.

b) The judge is also in breach of procedural law as he failed to take into account the effect on the court’s further proceedings of the mental examination performed on Y, which proved that he had been mentally incapacitated since birth.

A situation like this is not regulated by Art. 15 ICCC. Therefore it falls within the scope of Art. 16 ICCC. It is unquestionable that the breach of procedural law has significantly distorted the decision, since a verdict against a person being mentally unable to act in court would not have been allowed at all (pursuant to Art. 44 (2) ICCC).

However, since both breaches fall under Art. 16 ICCC, the invalidation of the decision may depend on the formal filing of an appeal, which is necessary before the higher court can take

action (Art. 16 (3) ICC). Due to his mental illness, Y is not capable of filing an appeal by himself. This has the consequence that he is also not capable of denouncing the procedural error. The denouncement, however, is mandatory in order to enable the higher court to review the proceedings (Art. 16 (1) ICC). Thus, we face a situation in which the proceedings should be reviewed and pronounced invalid by a higher court, but there is no real possibility of triggering this review as the defendant is in no state to do so himself and the court cannot act *ex officio* since the case at hand does not fall into the scope of Art. 15 ICC.

This once again shows the importance of legal counsel especially for suspects/accused persons possessing a particular weakness in relation to legal proceedings like juveniles or mentally disabled persons. Cases like the one at hand demonstrate that the appointment of defence counsel not only serves the interest of the suspect or accused, but may as well promote justice and the rule of law. Had defence counsel been present at court, the procedural violations would have been less likely, since he could have intervened.

## Case VIII

Ahmad (A) is suspected of being a leading member of a criminal gang kidnapping and exploiting children. The police know that the children are kept under very dire conditions without food and water and there is imminent danger for the lives of the children if they cannot be found quickly. A is properly arrested and questioned by the police. During the questioning he refuses to give answers about the children's whereabouts. Fearing for the lives of the children a police officer burns A with cigarettes until he informs the police about the hide-out of the gang where the children are subsequently found. Several of them have already died due to the lack of water. Several pieces of evidence are found beside the children at the hide-out.

Some days later A is questioned again by the Saranwal. Prior to the questioning, the Saranwal informs A correctly about his right to remain silent as well as about his right to appoint defence counsel.

- Was the behaviour of the police in accordance with the law?
- What do you think of the usability of the evidence collected by the judicial authorities? Can it be used against the accused in trial?

### I. The Behaviour of the Police

Under Art. 29 (1), (2) AC and Art. 5 (4) ICC, torture is prohibited. There are no exceptions to this rule.

Torture can be understood as acts of public officials that intentionally inflict severe physical or mental pain or suffering in order to fulfil a certain purpose, such as the extortion of information or confessions or the punishment, intimidation or discrimination of a person.<sup>101</sup>

In the case at hand, A was burned by the police with cigarette butts to obtain information on the whereabouts of the children. By this action all elements composing torture are fulfilled. One may raise the question whether, in such cases, there could be an exception to the prohibition of torture because the action in question was used to save the lives of the children. This question must be answered in the negative. Even though several jurists are unsatisfied with this solution, the arguments prohibiting exclusions are overwhelming. First, there is a great danger of abuse. Second, there is always the possibility that the suspect may be innocent. Third, it can be argued that once an act of torture is permissible, Pandora's Box is opened for other exceptions which would otherwise be impermissible. Moreover, according to Art. 24 AC, the human dignity of every person is inviolable. Even though it is hard to define the exact content of the concept of human dignity, it is undisputed that actions by which a person is treated like a mere object are contrary to human dignity. By torturing a human being the person is treated as a mere object, since he is only used as a source of information regardless of the cost to his physical integrity. Hence torture constitutes a violation of human dignity.

Finally the Constitution is absolutely clear in its wording as Art. 29 (1) AC states "Torture of human beings is prohibited" and Art. 29 (2) AC clarifies that not even the intention of finding out the truth can justify torture. An exception to an essential and prominent constitutional

<sup>101</sup> Nowak, *supra*, p. 161.

prohibition like the one at hand would at least have to be explicitly stated as well. Thus, an exception does not exist. The police breached the law and the fair trial principle of prohibition of torture by burning A with cigarettes.

## **II. The Usability of the Evidence obtained by the Judicial Authorities**

a) The first evidence in question is A's confession obtained by the police through torture. As already stated this confession is invalid for trial according to Art. 7 ICCC.

While it may seem unsatisfactory for some jurists that in very extreme cases like the one at hand the police officer having tortured the criminal should be severely punished, it is absolutely unquestionable that the evidence, especially the confession obtained directly by acts of torture is inadmissible. A trial relying on such evidence could not be called a fair trial at all, since the suspect/accused would be a mere tool in the hands of the prosecution without any possibility of defence against fundamental breaches of procedural law.

b) Furthermore, the validity of the pieces of evidence which the prosecution authorities obtained after the torture of A is in question. The evidence consists of the pieces found at the hide-out as well as the second confession that A made when he was questioned by the Saranwal a few days after the problematic first questioning.

While the invalidity of evidence obtained directly by way of a prohibited action is clear under Art. 7 ICCC, the impact on evidence obtained only indirectly from such an action is questionable. Art. 7 ICCC states that "the evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid . . .". Unfortunately the wording of the norm is not very helpful to the case in question. On the one hand, the wording allows the argument that all evidence is invalid because all pieces of evidence obtained after the breach of law are at least indirectly based on the forbidden action. One benefit of this solution is the effective prevention of bypassing Art. 7 ICCC because, once a violation of procedural rules has been committed, there is no way to use any piece of evidence that has the slightest connection with the violation in trial. Another benefit is the disciplining of the prosecution authorities, since they are forced to respect the procedural provisions in the strictest sense or else they run the risk of rendering all the evidence obtained by them unusable. On the other hand, applying this theory, the wording as well allows for the argument that Art. 7 ICCC only affects the evidence obtained directly by way of the prohibited action. It is not expressly stated in Art. 7 ICCC that it prohibits the use of both evidence obtained directly and evidence obtained indirectly through the violation. Therefore, in regard to evidence merely indirectly obtained by the violation of the law – e.g. the forced confession that leads the police to the dead body of a victim on which the weapon used for the crime is found – all the circumstances of the case in question have to be regarded in detail to reach a decision on the admissibility of every single piece of evidence. Here several aspects can be taken into account. First it can be asked whether the evidence would have been possibly obtained even if the violation of law had not taken place at all. For instance, it is highly possible that a corpse would have been found by other means even if the suspect had not been forced to confess. Second the aim of the breached norm can be taken into account. For example, one aim of the prohibition of torture is to effectively ensure that a suspect/accused is never forced to incriminate himself. Under this aspect, a piece of evidence which is found by information contained in the confession but which could also have been obtained quite possibly without the confession does not necessarily have to be excluded.

Moreover a weighing of the severity of the offence in question against the severity of the violation of procedural law by the prosecution authorities can be helpful. For example, in

cases of breach of procedural law, it is much more convincing to close all proceedings in cases of simple theft than in a case of capital felony.

The benefit of promoting this theory is that a termination of the legal proceedings as a whole in each case of a breach of procedural law can be prevented. This is of particular importance since it is not only the protection of the suspect/accused that must be taken into account, but also the high importance of criminal justice, especially in cases of capital crimes.

Applying these theories to the case at hand, the solution under the first theory is simple. All of the evidence is invalid because it was obtained indirectly from a breach of law.

The second theory must differentiate between a) the confession of A, during the questioning by the Saranwal and b) the evidence obtained at the hide-out.

a) First the question has to be posed if the confession would have been obtained if A had not already been forced to confess.

This question cannot be answered in the affirmative. It is uncertain whether A would have confessed in the same way. There is the strong possibility that A only made his second confession because he was convinced of the admissibility of his first confession. He may simply not have seen another sensible way of action, because nobody informed him about the inadmissibility of his prior confession. He might have refrained from confessing the crime if he had known about the inadmissibility of his first confession. As the violation of law still has an effect on A's behaviour, the second confession of A is also inadmissible. Additionally the aim of the prohibition of forcing a suspect to confess confirms this result. The aim of this prohibition is to prevent the suspect/accused from being forced to incriminate himself. It cannot be excluded that A believed his first confession was still valid and therefore felt obliged to repeat his confession in front of the Saranwal.

b) Regarding the evidence found at the hide-out the following circumstances have to be taken into account: the hide-out was found only after A had been tortured. On the other hand the hide-out would probably also have been found if A had not been tortured, if only a bit later.

Thus considering all the circumstances at hand, following the second theory the evidence found at the hide-out has to be considered admissible.

Both of these theories have their merits and disadvantages. In regard to the principles of a fair trial it is not crucial which of them is implemented in Afghanistan. The Afghan legal system will have to make that choice on its own. What is important is that in cases in which evidence is obtained directly by a breach of procedural law and in cases in which it is obtained indirectly but where the violation still has an effect on the suspect/accused's behaviour, the evidence must be effectively excluded from being used in trial. Whether that is achieved by an all-inclusive solution banning all evidence directly or indirectly based on the violation of law or by a separate consideration of each individual piece of evidence is not important for a fair trial. Particularly during a transitional period, the all-inclusive solution may better discipline prosecution authorities to abide by the law. On the other hand, if such wide-ranging inadmissibility is put into practice, this may evoke the impression of an ineffective system of criminal prosecution, which may be problematic in the transitional period Afghanistan is going through at the moment. Furthermore, it may not be necessary to ban all evidence directly or indirectly based on the violation of procedural law in order to discipline the prosecution authorities. The best way to prevent and reduce grave breaches of procedural law like torture might rather be the creation of transparent penal proceedings and the prosecution of perpetrators of acts of torture.