

## **F. Afghanistan**

### **1. Background**

Following the end of the Taliban regime in Afghanistan, the country faced the necessary challenge of establishing a new and functioning political system. In particular, the construction of an effective justice and administration system, consistent with the country's obligations under constitutional and international law, was and still is a vital prerequisite for the peaceful coexistence of the various groups that make up Afghanistan's population as well as for sustainable political stability.

The Afghanistan Team of the Max Planck Institute has been contributing to a series of projects for the establishment of institutions for the rule of law through consulting and training. In this manner, a valuable contribution is being made towards the creation of peace in the country.

In addition to this, the project's staff are gaining direct insights into the normative traditions, into the understanding of the law and into the real cases of conflict resolution that exist in this heterogeneous society. This is of particular importance for theoretical research.



*The Afghanistan Team in Kabul, summer 2010. Project coordinator Prof. Hamida Barmaki (far left) was killed in an attack on a supermarket in 2011 along with her husband and four children.*

## 2. Projects

The projects in Afghanistan can be divided into different areas which are closely related to each other. The first series of projects, in which numerous subject areas of law are taught, is targeted towards the further training of judges, public prosecutors and lawyers in the country's provinces. The second series of projects is aimed at training the growing number of new Afghan legal professionals through a training programme for candidate judges on the one hand and through the supporting of legal faculties on the other. The third series of projects deals with the establishment of administrative law in Afghanistan. Activities for supporting academic research make up the fourth series of projects. Smaller series of seminars

are also organised as required including, amongst others, seminars for Afghan diplomats.

Handbooks that are compiled by project staff serve as the basis for most project activities and are available in English as well as the languages of instruction, Dari and Pashto. In Afghan provinces and districts where there are no libraries, these handbooks are, for most lawyers, the only materials they can draw on to ascertain the law. The series, which is the best description of applicable Afghan law available, is being prepared in book form at the request of the Higher Education Minister and it is expected to be added to the library collections of law faculties, ministries, courts and many other institutions in the future.

The lecturers are predominantly Afghan university lecturers and judges with a precise knowledge of the problems of Afghan legal practice. Prior to their assignment, they were intensively prepared by Max Planck academics using the handbooks. Communicating through the national languages had significant advantages, primarily because the losses of linguistic exactness, directness and training time associated with interpretation were avoided.

The Afghanistan Team consists of a group of academics in Heidelberg as well as five lawyers and other support personnel in Kabul. The team has close connections to academics in the Max Planck Institutes for law in Freiburg, Hamburg and Halle.

**a. Further training programme for lawyers with particular focus on the provinces**

**Fair Trial Trainings**

Since 2004, the Afghanistan Team has been carrying out a project for the further training of Afghan judges and public prosecutors in criminal trial law. Focus is being placed on fair trial principles, i.e. the principles for the protection of suspects and defendants. These principles include the prohibition of torture, the right to a defence and the presumption of

innocence. The ultimate aim is to prevent violations of human rights through the judiciary. Police officers, prison officers, staff of the Ministry of Women's Affairs and representatives of non-governmental organisations also take part in the training in addition to judges and public prosecutors. In this context, the team works closely with the Supreme Court of Afghanistan, the central public prosecutor's office and the Ministry of Justice.

Further training courses usually last two weeks. Around 2,500 people have taken part in the courses in Kabul, Kunduz, Fayzabad, Bamyan, Jalalabad, Herat, Mazari-i-Sharif, Lashkar Gah, Kandahar and other locations. This means that more than half of all legal decision-makers in the field of criminal justice have been reached through these programmes. This is an important criterion given that the courses' goal is to effect a change in legal culture. Most of these decision-makers work in provinces and districts far away from the country's larger cities. The basis of instruction is always the *Max Planck Manual on Fair Trial Standards* which all course participants are given for their own personal use. This manual describes the underlying principles of a fair trial on the basis of relevant Afghan norms (in particular the constitution and the transitional code of criminal procedure) while clarifying them with reference to case studies. The fair trial training was primarily financed by the Federal Foreign Office of Germany and to a lesser extent by the EU as well as by the Dutch, British and Canadian governments.

### **Regional projects in north-east and south Afghanistan**

The Afghanistan Team has been carrying out a regional priority project in north-east Afghanistan since 2007 which has been financed by the Federal Foreign Office and has received additional funding from the Dutch government since 2011. As the public justice sector in this part of the country has not yet been able to sufficiently assert itself, training has been provided to judges, public prosecutors, staff of the consultancy office "Huquq" at the Ministry of Justice and to lawyers in the provinces of

Kunduz, Takhar and Badakhshan. The themes dealt with during training range from family law to criminal law and state law. A sound knowledge of these areas of law will help to prevent mistakes in legal proceedings and thus strengthen the population's trust in the work of the state court system.

A similar regional project with British and Canadian financing has been in operation in the Pashtun provinces of south Afghanistan (Urozgan, Nimruz, Zabul and in particular Helmand and Kandahar) since 2010.

The foundations of the courses on family law, which took place in different locations, were established at the Max Planck Institute for Comparative International and Private Law in Hamburg. It was here that the handbook on Afghan family law was developed and Afghan lecturers received training. The courses on criminal law are based on handbooks which were developed in cooperation with the Max Planck Institute for Foreign and International Criminal Law in Freiburg, where one of the preparatory courses also took place.



*Participants of a Max Planck Institute legal seminar in Fayzabad (Afghanistan)*

**b. Training of aspiring members of the judiciary**

**Candidate judges**

The Afghanistan Team has been assisting the Supreme Court of Afghanistan in the initial training of candidate judges since 2006. This extensive project is financed by the Federal Foreign Office.

It is intended that candidate judges gain in-depth knowledge of constitutional principles as quickly as possible through the intensive training which lasts several months. The project staff have compiled a large number of textbooks for the training of up-and-coming members of the judiciary in Kabul and update these textbooks regularly. On this basis, specially trained lecturers teach the subjects of constitutional law, fundamental and human rights, the organisation of the courts, judicial ethics, fair trial principals, criminal law (both general and particular sections), administrative law and property law. In later phases of the legal training, a French cooperation partner from the *Institut International Pour les Etudes Comparatives* (International Institute for Comparative Studies) teaches, among other things, civil procedure law. Other parts of the programme are financed by USAID.

986 candidate judges, 20% of whom are female, have taken part in the Max Planck team's courses since 2006. In November 2012, the Max Planck team will start training the next 120 future judges.

**Candidate lawyers, public prosecutors and Ministry of Justice staff**

The Max Planck Institute is making efforts to provide its training to all aspiring lawyers. Candidate lawyers, candidate public prosecutors and candidates for the Ministry of Justice are trained at the Independent National Legal Training Center (INLTC) in Kabul. This is done separately from the training of judges. Requests for the assistance of the Max Planck Institute are continuously being made in regard to this project as well. To date, such assistance has only been possible on a limited basis. At the end of 2008, the Max Planck Institute conducted a fair trial training course for

lawyers from the public prosecution service. Furthermore, in 2009 Max Planck lecturers also presented all the handbooks on Afghan law completed to date at one-day seminars at the INLTC and distributed them to future public prosecutors, lawyers and ministry staff. Since then, the INLTC library has been continuously supplied with the updated versions of the handbooks.

### **Training of multipliers**

The training of so-called “multipliers”, those who can pass on legal knowledge to different target groups, is a vital factor for the sustainability of projects. For this reason, the Afghanistan Team does not just instruct lecturers who live and work in the country, but also appoints them to teach their own courses as a matter of importance. In this way, lecturers from Afghan legal faculties, for example, can further communicate the knowledge they have acquired to their students all year round at their regular classes, thus supplementing the classes of the project. High-ranking judges, who apply their knowledge of the law practically and from whom other judiciary personnel can learn, are also a good example of important multipliers.

Since 2004, intensive training of lecturers and other multipliers has been taking place in Kabul, Heidelberg and various other locations.

Furthermore, the Afghan and Iranian lecturers from the Max Planck Institute have trained specially qualified Afghan lawyers in the subject areas of constitutional law, fundamental and human rights, organisation of the courts, legal ethics, fair trial principals and criminal law. The participants were lecturers from the INLTC, leading public prosecutors, ministry officials and Afghan staff of the United Nations and non-governmental organisations. The classes took place in the conference room of the project office in Kabul.

The first comprehensive training of multipliers in the area of administrative law was carried out in June 2012.

### **c. Foundations of administrative law in Afghanistan**

In recent years the issue of administrative law has been neglected by both Afghan authorities and by the international community despite the fact that it is a vital component for the realisation of constitutional principles. This is particularly true given the state of political turmoil in which Afghanistan still finds itself.

#### **Conference on Afghan administrative law**

The Afghanistan Team organised their first conference on administrative law in Afghanistan from 12 to 14 August 2010. The conference was led by Prof. Wolfrum and the then Deputy Minister of Justice of Afghanistan, Dr. Mohammad Qasim Hashimzai. The conference gave the Afghan experts the opportunity to describe the problems and challenges for Afghan administrative law and to develop approaches on how to overcome them together with international experts.

The structure and organisation of administration, the concept of administrative law, administrative procedure, forms of administrative action and the internal and judicial control of administration were all important discussion points. In addition to this, the issues of combating corruption, the initial and further training of administrative staff and the need for further legal regulations were also discussed. Along with the Afghan participants, experts such as Prof. Dr. Rainer Grote, (Max Planck Institute for Comparative Public Law and International Law), Prof. Dr. Karl-Peter Sommermann (German University for Administrative Sciences Speyer) and Prof. Dr. Pierrick Le Jeune (Université de Bretagne Occidentale) took part in the conference and made valuable contributions on matters of comparative law.

There are three important results of this conference, which can be noted. First of all, the participants concluded that there is no uniform or coherent understanding of "administrative law" in Afghanistan. While some participants considered the legal relationships between citizens and

administrative bodies to be the central issue, others were orientated towards the Iranian way of thinking, which takes the rights and duties of administrative staff as its starting point. Secondly, the conference demonstrated that Afghan administrative law is regulated only in a fragmented manner. During the conference, Dr. Mohammad Qasim Hashimzai pointed out the necessity for a consistent legal system of administrative procedure, which follows the German example and requested that the Max Planck Institute advise the Afghan Ministry of Justice on the drafting of such a law. Thirdly, the participants recognised the necessity of raising awareness on this issue in Afghanistan through training. The assistance of the Afghanistan Team was requested in relation to this matter.

### **Handbook on administrative law in Afghanistan**

Between 2009 and 2010 the project staff composed a handbook on administrative law in Afghanistan. This handbook has been used in the training of candidate lawyers since 2011. It has been used for the training of lawyers, other legal professionals and of administrative staff since 2012. The Afghan Civil Science Institute (ACSI), which is a type of administrative school in which the personnel of state institutions are trained, plays an important role in this process. Similar administrative schools are being established in Mazari-i-Sharif and other locations. The Afghanistan Team of the Max Planck Institute uses instructors from this institution to act as multipliers in its training programmes. The same is true in the case of university lecturers who are now lecturing on the new subject area of administrative law at law faculties and as stand-alone university courses on the subject.

### **Legislative advice**

The Afghanistan Team has also been advising the Independent Afghan Reform and Civil Service Commission (IARCS) and the Afghan Ministry of Justice on the drafting of bills on administrative law. One member of the

project's staff is working on a full-time basis with these institutions. Workshops take place at least once a year at which group advice is given on specific issues, progress is evaluated and further steps are agreed on.

At the first workshop in April 2011, the participants dealt primarily with the examination and classification of administrative legal issues. There was a consensus that two separate sets of law would be necessary: administrative laws to encompass the rules on internal administrative processes and relationships to citizens and, in addition to this, laws to make provisions for administrative disputes at courts or court chambers.

As is generally the case in all activities of the Global Knowledge Transfer Working Group, it was necessary to follow the principle of "local ownership" while carrying out this legislative work. According to this principle, it is the task of the Afghan participants to draft laws and bear the responsibility for them. The team staff and other non-Afghan experts only have an advisory function in the drafting process. With a view to this, all participants take part in the workshop discussions in the morning, while the conclusions of these discussions are incorporated into the drafting of administrative law by the Afghan participants in the afternoon.

Using a similar approach, the Afghan and international experts prepared a draft administrative law text in January 2012. The text was considerably improved at the workshop sessions. Since then, staff of the IARCSC in Kabul have continued to work on the draft with advice from Heidelberg. The draft law is due to be completed at the next workshop in autumn 2012.

#### **d. Support of legal faculties and PhD students**

Years of war have also led to a collapse of academia and education in Afghanistan and it is necessary to improve the quality of the legal studies courses currently offered at universities. Improvement is vital in light of the fact that the graduates are the future decision-makers of the judiciary and of governmental administration. These graduates will, therefore, play a vital role in the stabilisation of the state and in the establishment of the

rule of law. They will also face the task of gaining the trust of the population.

The cornerstone of this project was laid in 2004 with the holding of a “winter school” for deans and vice-deans of Afghan legal faculties and faculties of Sharia.

### **Consultation on the establishment of MA courses**

Between 2009 and 2010 institute staff, in cooperation with Kabul University and the Afghan Ministry of Education, developed a concept for a university course offering a degree entitled “Master for International and Comparative Legal Studies”. This process resulted not only in the development of the concept and curricula, but also the renovation of classrooms and library rooms at Kabul University, which were supplied with furniture, technical equipment and specialised literature. The Max Planck Institute assisted Herat University in a similar manner in 2011. In this case, the construction of an extensive library with literature on international law and comparative law in English and Persian is particularly noteworthy. Contrary to the original plans, it is now expected that the universities themselves will take responsibility for the realisation of MA courses.

### **Support of PhD students**

The support of PhD students, which began at the end of 2011, is of particular importance for the future of legal studies in Afghanistan. Due to the current state of legal education, which results from the circumstances in the country, very few Afghan lawyers and professors hold a doctoral degree. Legal faculties need, nonetheless, lecturers with doctoral degrees so that they can request the establishment of MA courses. With the assistance of the Federal Foreign Office of Germany, the Afghanistan Team is able to support three or four PhD students each year by facilitating stays abroad. The first candidates were selected in 2012.

**e. Other training programmes**

In order to improve Afghanistan's competencies in the area of international legal dealings and diplomacy, the Afghanistan Team has been training parliamentarians (in particular those from committees on international affairs) and staff from the Ministry of Foreign Affairs in international law. This training programme started in 2011 and is being carried out in cooperation with the Friedrich Ebert Foundation. Lecturers are also being continuously trained in this programme in order to improve their teaching skills. The course is being led by a staff member of the institute who holds a doctoral degree. The programme will be continued in 2012 with the support of the Federal Foreign Office, although only diplomats will be taught.

In addition to this, Max Plank academics are preparing training courses in labour law. This area has also been overlooked in the past, despite its practical relevance. Lawyers and trade unionists are the main target groups for these future courses. With this in mind, the team is working closely with Afghan trade unions and the Friedrich Ebert Foundation.

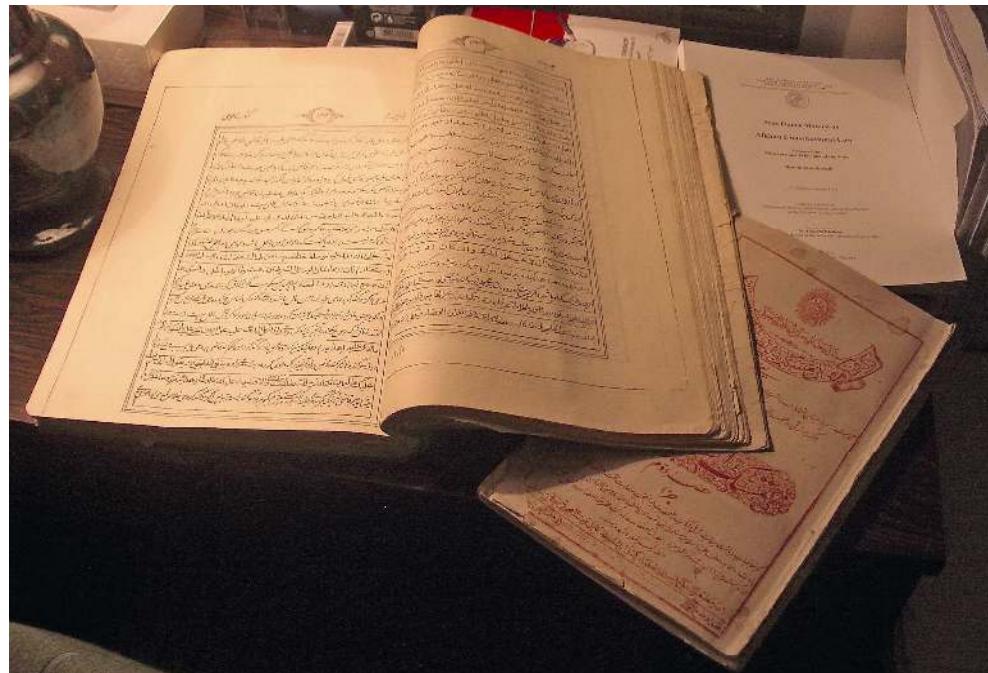
**3. Further planning**

Both in spite of and due to the uncertain political future of the country, it is planned to continue the Afghanistan project even after the withdrawal of international armed forces. The decisive reason in this regard is that the projects are yielding results and gaining recognition. Having received several months of training, individuals who completed the Max Planck courses for candidate judges are now working as judges and in some cases in other capacities in all of the country's provinces. It is such individuals that can bring about a substantive change in the country.

The administrative law project is also only beginning. After the first training sessions in 2012, it is planned to search for as many administrative staff members and lawyers as possible from 2013. This will be done so that

both the awareness and the application of principles of constitutional administrative processes will become more widespread.

In addition to this, the project team is developing numerous further approaches for the promotion of constitutional rule of law in Afghanistan. One interesting theme is, for example, the rights of politically and economically marginalised groups such as children or the disabled.



*The oldest and the newest legal literature in the Supreme Court: a copy of the Ottoman Mecelle next to a Max Planck Manual*

#### **4. Academic works and publications**

##### **a. Handbooks and teaching materials**

The main purpose of the Max Planck team's handbooks on Afghan law (published in English, Pashto and Dari) is to facilitate the further training of lawyers in Afghanistan. However, they also have the objective of making Afghan law accessible to a wider audience of interested parties. The handbooks are highly valued in Afghanistan and are used outside of the workshops. They are not only given to participants of the workshops but are also distributed to universities, government ministries, human rights organisations and the staff of international and foreign organisations. The English edition makes broader international academic discourse on Afghan law possible beyond the workshops themselves.

The handbooks have been thus far successfully edited by the Afghanistan Team. The following titles are available:

- *Max Planck Manual on Constitutional Law in Afghanistan Vol. 1: Structure and Principles of the State. Vol. 2: Human Rights and Fundamental Freedoms.* 2007, Dari and English.
- *Max Planck Manual on Afghan Criminal Law and Criminal Justice.* Revised second edition 2009 (in cooperation with the Max Planck Institute for Foreign and International Criminal Law), Dari and English.
- *Max Planck Manual on Fair Trial Standards.* Revised fourth edition 2009, Dari, Pashto and English.
- *Max Planck Materials on Fair Trial Standards in the Military Justice Sector.* 2010, Dari and Pashto.
- *Max Planck Manual on Family Law in Afghanistan.* Revised second edition 2011 (in cooperation with the Max Planck Institute for Comparative and International Private Law), Dari, Pashto and English.

- *Max Planck Manual on Judicial Ethics in Afghanistan.* Revised third edition 2011, Dari, Pashto and English.
- *Max Planck Manual on Public International Law in Afghanistan.* 2011, Dari and English.
- *Max Planck Manual on Constitutional Law in Afghanistan Vol. 1: Structure and Principles of the State.* Revised fourth edition 2011, Dari and English.
- *Max Planck Manual on the General Part of Afghan Criminal Law.* Revised fourth edition 2011 (in cooperation with the Max Planck Institute for Foreign and International Criminal Law), Dari and Pashto.
- *Max Planck Manual on the Organisation and Jurisdiction of Afghan Courts.* Revised fourth edition 2011, Dari and English.
- *Max Planck Manual on the Special Part of Afghan Criminal Law.* 2011 (in cooperation with the Max Planck Institute for Foreign and International Criminal Law), Dari and Pashto.
- *Max Planck Materials on Property and Ownership in Afghanistan.* 2011, Dari and Pashto.
- *Max Planck Manual on Administrative Law in Afghanistan* 2011, Dari and English.

### **b. Publications**

In addition to the handbooks published for the purpose of practical project work, the following publications can be named:

Dr. Tilmann Röder has published the following contributions on Afghanistan:

- *Kollisionen zwischen Shari'a, Gesetz und Stammestradiot in Afghanistan,* in M. Kötter and G. F. Schuppert (eds.), in *Normative Pluralität Ordnungen*, Baden-Baden 2009.
- Der schwierige Weg Afghanistans zu einem stabilen Staat, in *Max Planck Forschung* 1/2009.

- Civil-Military Cooperation in Building the Rule of Law, in A. Nollkaemper, R. Peerenboom, M. Zürn (eds.), *The Dynamics of the Rule of Law*, Cambridge UP, Cambridge 2011.
- *Human Rights Standards in Afghan Courtrooms: The Theory and Reality of the Right to a Fair Trial*, H. Elliesie (eds.), *Islam und Menschenrechte*, Frankfurt am Main 2010.

Julia Pfeiffer has published:

- Rechtsstaatlichkeit in Afghanistan: Zustand und Verbesserungsansätze gemäß der „Afghan National Development Strategy“, in *Zeitschrift für Afghanistan Kunde* 3, 2009.
- Ein langer Weg zur Rechtsstaatlichkeit, in *Sicherheit und Frieden* 3, 2010.
- The relationship between traditional dispute resolution mechanisms and the national justice sector in Afghanistan, in *Verfassung und Recht in Übersee* 1, 2011.

Ramin Moschtaghi has published:

- Die Islamische Republik als Verfassungsprinzip – Ein Vergleich anhand der Verfassungen von Afghanistan und Iran, in *Verfassung und Recht in Übersee* 2, 2008.
- Aktuelle Probleme beim Rechtsstaatsaufbau in Afghanistan - Das Gutachten des Obersten Gerichtshofes zum Misstrauensantrag des Unterhauses gegen den Außenminister, in *ZaöRV* 68 (2) 2008.

Mandana Knust Rassekh Afshar wrote the essay:

- The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution, in *Max Planck Yearbook of United Nations Law* 10, 2006.

### c. Works for academic qualifications

For the purposes of her thesis, Mandana Knust Rassekh Afshar is researching “constitutional guarantees on human rights in Islamic states

using the example of the right to a fair trial". This research project considers the constitutional guarantees on human rights in Afghanistan and other selected Islamic states and compares them with the minimal standards of international law.

Julia Pfeiffer is dealing with the responsibilities of international actors in state building missions under international law for her doctoral project. The author is working on the assumption that efforts of this kind are an infringement of state sovereignty and could therefore have consequences under international law. The reconstruction process in Afghanistan serves as one of her examples.

In his doctoral project, Tarek Azizy is researching the question of citizenship according to Article 25 of the Convention on the Settlement of Investment Disputes of 1965. The author is analysing, which requirements must be fulfilled for a natural person and in particular a legal person to claim the citizenship of a member state of the ICSID.

Martina Spernbauer has completed her PhD studies and dealt with the role of the EU in post-conflict peacebuilding using the example of reforms of the law enforcement and justice sectors in Kosovo and Afghanistan. Her work dealt with questions of lawfulness, legitimacy and accountability in the context of external aid and ESDP missions.