

Working Translation

Presidential Decree No. 153

**Formation of the Judicial Reform
Commission and its duties**

Dated: 11.8. 1381
2 November 2002

Article 1:

Based on Bonn agreements and the resolution of emergency Loya Jirga for comprehensive reform of justice system of the country, the formation of Judicial Reform Commission is approved, and shall consist of the following persons.

- 1 Mr. Bahauddin Baha
- 2 Mr Habibullah Ghalib
- 3 Dr. Habiburrahman Zakria
- 4 Dr. Atta Mohammed Norzai
- 5 Mr. Abdul Ahad Ashrati
- 6 Dr. Quadir Amiryar
- 7 Mr. Mawlawi Mohammed Qasim
- 8 Ms. Mehroo Hamid
- 9 Mr. Haburrahman Ghani
- 10 Mr. Wasiq Faizul Rahman
- 11 Ms. Najjiba Hussaini

Article two:

The Commission will study reform of judicial affairs in the country and propose to the competent authorities of Afghanistan concerning reform and revival of justice system in the country.

Article three:

The Judicial Reform Commission provides comprehensive program for the reform of law with the close coordination and cooperation of supreme court, Ministry of Justice and other relevant institutions, shall Publish and distribute the laws of Justice and judicial system which is implement able, this commission has the power to propose any amendment for the improvement of laws and regulation to the competent authorities, so that suitable justice system could be establish in Afghanistan.

Article Four:

The Judicial Reform Commission shall consult with judicial organs for the selection and recruitment of professionals and provide opportunity for receiving the cooperation of UN, donor countries and other source of finance in support of financial, technical and logistical needs.

Article Five:

The duty of the Judicial Reform Commission is to take in consideration, programs for how to assess the selection of judicial professionals and prosecutors and to promote level of professional knowledge of judges, attorneys, bearing in mind, the experience of developed countries; and shall design and implement training programs for professionals, lawyers and law enforcement authorities in Afghanistan with the cooperation of international organizations.

Article Six:

The Judicial reform commission shall perform its duties in close cooperation with the Constitution Drafting Commission and submits its proposals to the Constitution Commission in order to be included in the draft of the new constitution.

Article Seven:

The Judicial Reform Commission shall perform its work with close cooperation and exchange of information with national Afghan Human Rights Commission.

Article Eight:

A secretariat consisting of legal experts, administrative technical personnel and financial expertise shall serve the Judicial Reform Commission. The secretary who shall be assigned by the commission is responsible for managing and administration of commission's daily routine work.

Article Nine:

The Judicial Reform Commission can create subcommittees and working groups, who's members are composed of commission members and other expert lawyers of governmental and non-governmental organizations, they perform their work in the commission as legal advisors.

Article Ten:

The Judicial Reform Commission shall approve rule of procedures and action plans for better management of its internal duties.

Article Eleven:

The Judicial Reform Commission reports on its financial and administrative activities to the presidency of Afghan Islamic Transitional Administration, UNAMA, and if requested to the international donors.

Article Twelve:

For the fulfillment of its mandate under the forgoing Articles, the Judicial Reform Commission might take in consideration the Guideline principles attached to this decree in their agenda.

Article Thirteen:

This decree shall come in to force from the date of its signature.

Signed/-

Hamid Karzai

President

The Transitional Islamic Administration of Afghanistan

Translated by:

Secretariat, Judicial Reform Commission
December 2002

SCHEDULE

GUIDING PRINCIPLES ON FUNCTIONS OF THE JUDICIAL COMMISSION

In implementation of this Decree the Judicial Commission may consider recommending the following principles:

The Judiciary

- Ensuring the establishment of an independent judicial authority in accordance with international instruments ratified by Afghanistan and the 1964 Constitution;
- The creation of a separate, or as a circuit or chamber within the Supreme Court, of a Constitutional Court having jurisdiction over interpretation of the Constitution, the constitutional validity of Afghan laws and regulations and deciding on alleged human right violations in contravention of the Constitution.
- Establishment of a High Judicial Council, constituted of senior members of the Judiciary and, if considered necessary, representatives of other senior members of the justice sector, to be the governing body of the Judiciary responsible for considering policies and laws affecting the Judiciary, approving the budget of the Judiciary and submitting it to the government for inclusion as a separate item within the general budget, appointment, promotion transfer, discipline and dismissal of judges except the Chief Justice and judges, of the Supreme Court, who shall be appointed and dismissed by the Head of State.
- Formation of a Judicial Inspection Committee selected by the High Judicial Council from senior judges to be responsible for inspection of the standards, performance, professional and personal conduct of all judges, except members of the Supreme Court, and to submit periodic reports thereon to the High Judicial Council. In the case of a complaint made against a judge, a report thereon shall be made to the High Judicial Council for appropriate action after a proper judicial hearing allowing the judge adequate opportunity for defence.
- Ensuring that the criteria for recruitment of Judges shall be based on such considerations as attaining a minimum age, possession of the necessary qualifications, experience, integrity, absence of previous conviction for dishonour or dishonesty, without discrimination on grounds of race, ethnic origin, colour, sect, gender, political or other opinion, property or social status.
- Ensuring that the Judiciary is the sole arbiter of legal matters. Military Courts for civilians, special and State security courts shall not be allowed.
- Prevention of intervention in, or influence of, judicial proceedings by executive or other authority for whatever reasons. Intentional non-enforcement, obstruction of and non-compliance with judgements and judicial decisions shall be punishable by law.
- Judges shall have immunity from criminal prosecution and civil suits for words said and acts done in the performance of their judicial functions.
- Further guidance on independence of the judiciary is found in Resolutions 40/32 and 40/146 of December, 1985, adopted by the General Assembly endorsing the recommendations of the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders on the Basic Principles on the Independence of the Judiciary.

The Ministry of Justice and office of the Attorney General

- The respective functions and the relationship between the Ministry of Justice and the Attorney General shall be more clearly defined in accordance with the provisions of the 1964 Constitution, applicable laws, legal traditions and the principles of international instruments. In particular, the issue to be resolved is whether the Attorney General is subordinate to, or independent of the Ministry of Justice.
- In any case, respect for the rule of law must be preserved. Prosecutors engaged in criminal investigation and criminal proceedings before the court shall by law be able to perform their duties freely and independently without intervention or influence from any executive or other authority.
- Guidance on the qualifications, selection, training, role and discretion of prosecutors may be found in the Basic Principles of the Role of Prosecutors adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders Havana, September 1990.

The Bar Association

- The adoption of a special law for the establishment of an independent Afghan Bar Association based on the following general principles:
 - All Afghan lawyers engaged in private practice shall be organized as members in a single independent association.
 - Lawyers not validly registered as members of the association shall not be permitted to practice law.
 - The association shall have a General Assembly comprised of all registered lawyers. The General Assembly shall elect a Council every () years composed of () members including a President and a Secretary.
 - The Council shall be the governing body of the association and shall be responsible for implementing the policies and resolutions adopted by the General Assembly and the provisions of the law relating, inter alia, to qualifications, training, licensing, rights and duties of members professional performance, conduct and discipline.
 - The association shall establish a social security fund for injured and sick members and a pension fund for retired members and dependent families of deceased lawyers.
 - Detailed Principles for the role and independence of the Bar Association are in the Basic Principles of the Role of Lawyers adopted at the 8th Session of the UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 1990.

Law Enforcement

Criminal Procedure

The Code of Criminal Procedure shall provide for compliance with universal standards of due process by law enforcement officials including:

- clear procedures for commencement of investigation, the authority responsible, area of jurisdiction, powers of arrest, summons, search, bail, discharge, release pending trial;

- treatment during detention;
- prevention of double jeopardy or second trial for the same offence;
- trials shall, as a rule, be open to the public;
- trials shall be in the presence of the accused;
- accused persons shall have the right of defence by a lawyer of their choice. In serious cases the State shall appoint a lawyer for representing the poor;
- persons charged shall be brought to trial without undue delay;
- convicted persons shall be informed of their right to appeal.

**International Principles Applicable to Law Enforcement Officials:
Several international instruments have been formulated as guidelines for States to take into
account in formulating their laws and regulations:**

1.The Standard Minimum Rules for the Treatment of Prisoners, adopted by the UN First Congress on the Prevention of Crime, 1955, Provide:

- Different categories of prisoners shall be kept in separate institutions considering their sex, age and criminal record;
- Proper environment for hygiene, cleanliness, clothing, health, food, exercise, contact with families and consular representatives for foreigners, religious practice, books, discipline and restraint;
- Careful selection of prison personnel to ensure proper education, qualification and suitability;
- Regular inspection of prisons by experts to ensure proper conditions and administration;

2.The Code of Conduct for Law Enforcement officials, adopted by the UN General Assembly on 17 December 1979:

- Obliges law enforcement officials to respect and maintain the human dignity of all persons in accordance with law and the international standards;
- Prevents law enforcement officials from resorting to torture or other inhuman or degrading treatment and from invoking superior orders or exceptional circumstance as justification for such treatment;
- Requires law enforcement officials to ensure protection of health of persons in custody;

3.Basic Principle on Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in August, 1990:

- Governmental and law enforcement agencies shall formulate and implement rules and regulations on the use of force and firearms by law enforcement officials;
- states of emergency and political instability shall not justify deviation from these rules;
- prohibition of use of firearms except in self- defence against imminent threat of danger or death of serious injuring, after adequate warning to prevent serious crime, to arrest or prevent the escape of dangerous persons. Officials shall identify themselves and declare their intention to use firearms;
- use of force shall be avoided in dispersal of unlawful non-violent assemblies. To disperse violent assemblies, firearms may only be used when less dangerous means are inadequate;

- force shall not be used against persons in custody unless extremely necessary to maintain security and order or when personal safety is threatened;
- careful selection of law enforcement officials to ensure that they possess the necessary moral, physical and psychological qualities necessary for their jobs. They shall be disciplined and punished for excessive use of force or unnecessary use of firearms;
- The foregoing guiding principles may be used as basis for formulation of laws and regulation for officials in charge of policing and running correction centers. They are also inevitable tools for the training of such officials, some of whom may have had no previous experience in law enforcement. Training on basic skills and on the international standards of human rights are of extreme importance. Recruitment may draw on the experience of those who had previous police services. Ethnical diversity would be a relevant element to prevent abuse and allay possible fears of minorities.

Alternative Disputes Resolution

- Laws and policies shall ensure that alternative dispute resolution mechanisms including out of court settlement, good offices, mediation and arbitration shall be encouraged and promoted. Arbitration law shall be developed as a modern effective way for settlement of disputes, especially commercial ones. Courts shall be enabled to enforce arbitration awards
- Tribal arbitration by Jirga or Shura (Solh) not contrary to law or public policy shall be promoted as customary law acceptable as fair and just within the community in question. Laws applicable in urban areas shall not be superimposed on communities used to traditional forms of justice.
- Ordinary courts shall not abandon their responsibility for administration of justice by forcing parties to seek out of-court settlements.

Access to Justice

- Governmental agencies, lawyers and non-government organizations concerned shall ensure that adequate policies, rules, regulations and programmes are adopted for facilitating access to law courts, alternative disputes resolution mechanisms and authorities and organizations concerned with administration of justice;
- Establishing of legal aid programmes for counseling and freely representing poor persons before law courts;
- raising awareness of persons through the media, in-community activities and other means of the laws, legal procedures, due process and rights to defence;
- regular publication of laws and amendments thereto in the Official Gazette and through the media;
- exemption from or reduction of court fees for persons who can not afford them;
- recognition and promotion of justice centers, paralegal services, defenders and community based NGOs to assist and advise citizens on settlement of disputes and claims;

Human Rights NGOs

Legislation relating to formation and functions of NGOs shall ensure that they.

- Shall, in accordance with the freedom of association, be allowed to organize freely and independently without restriction or intervention from official authorities;
- Engage in monitoring, investigation, publication and reporting on alleged violation of human beings;
- Address concerned official agencies to seek redress and remedies for such violations;
- Contest the legality or constitutionality of alleged violations, and of laws, regulations and administrative action;
- Participate in programmes and activities on human right education and awareness and in the training of judges, prosecutors lawyers and law enforcement officials;
- NGOs denied registration or whose activities are suspended or terminated shall have the right to seek redress before the courts;

Legal Education

- Review of curricula at law and Sharia faculty to ensure uniformity in subjects taught to prepare students for the law profession, taking in to consideration contemporary needs of society;
- Equipping law teaching institutes with books, laws, law reports and other equipment necessary for research, practical methodology and higher studies;
- Establishment of a Judicial Training Institute in which candidates for judicial or prosecutorial office shall spend a specific period prior to taking office, and to attend refresher training courses during their working career;
- Lawyers wishing to engage in private practice shall first pass a Bar Examination and thereafter spend a period of apprenticeship as trainees in an established law office or firm During the period of training they shall not have their own offices or act in their names as representatives of clients;

FINAL REMARKS

The above Guiding Principles have been formulated on the basis of intensive consultations with the various organs and persons engaged in the justice sector ascertaining their views on the requirements for reform. It has been considered necessary to include recent developments at the UN and international levels relating to the justice sector, as well as lessons learnt from experiences of other countries.

Needless to say, these principles remain as guidelines for the JC upon which it may base its work, policy recommendations and proposals for reform, taking into consideration Afghan existing laws, traditions, culture and aspirations. The UN shall be available to offer whatever assistance it can.