

The Hamida Barmaki Ph.D. Scholarship Program

About the Program

Afghanistan's demand for higher legal education strongly increased after the fall of the first Taliban regime in 2001. From 2005 on, the Afghanistan team of the Max Planck Institute for Comparative Public Law and International Law supported the country's public universities' efforts to modernise their curricula. In 2010-2011, the team developed the concept for an LL.M. program at Kabul University. A year later, the team suspended this work due to corrupt practices at the law faculty. Instead, it launched a Ph.D. Scholarship Program in order to promote early- and mid-career lecturers as future agents of change who would change the law faculties from inside in the future.

Under the supervision of Dr. Tilmann Röder, the team of the Max Planck Institute (later the Foundation) selected thirteen outstanding Afghan jurists who began writing their theses at universities abroad. As a necessary precondition, all candidates had already obtained a master's degrees in the USA, Australia, France, Italy or China. The scholarship program provided not only financial support but also a broad variety of academic courses and guidance by experienced Max Planck fellows. The topics they chose ranged from international economic law to constitutional law, administrative law, human rights, legal pluralism, family law and intellectual property law.

Most of the Ph.D. candidates were law lecturers from Kabul, Herat, Jalalabad, Mazar-e Sharif, and Takhar. Many of them continued teaching at their home faculties while doing their research. Others accepted important government positions and became presidential advisers, ambassadors, or human rights commissioners. For this reason, none of the theses could be completed after the funding of the German Foreign Office had expired at the end of 2017. Therefore, Dr. Röder and a group of committed university professors decided to continue their support on a private basis. Five years on, the program is considered not only an enormous success but also an important experience in regard of the possibilities and limitations of strengthening higher legal education in post-conflict environments.

In its final phase, the Hamida Barmaki Ph.D. Scholarship Program is coordinated by the Institute for Law and Society on Afghanistan. Besides supporting the remaining candidates with feedback and advice, the ILSAF team is available for requests from Afghans who aspire to write a doctorate or Ph.D. in the area of law or Islamic theology, and who fulfil the necessary conditions. These are primarily an internationally recognized master's degree and sufficient language skills. While ILSAF cannot offer any financial support, its team can advise on how to find supervisors and scholarships. Interested scholars may send their CV and research exposé to info@ilsaf.org.

The Hamida Barmaki Ph.D. Scholars and their Theses

Akbari, Suhailah

The WTO Transit Regime for Landlocked Countries and Its Impacts on Members' Regional Transit Agreements: The Case of Afghanistan's Transit Trade with Pakistan

Given the direct impact of free transit on exports and imports, Afghanistan has been involved in some transit trade legal arrangements at the regional and global levels since the post-Taliban regime. At the regional level, the ECO Transit Trade Agreement, the Afghanistan-Pakistan Transit Trade Agreement and the newly signed transit trade agreement between Afghanistan, India and Iran (Chabahar Transit Agreement) are among the transit agreements. At the global level – through joining the WTO as a permanent member in 2016 – Afghanistan now benefits from the rights that WTO transit rules grant the landlocked countries. Despite these treaties, transit legal challenges in Afghanistan – especially for access to and from the sea – remain.

This PhD thesis primarily examines how Afghanistan can benefit from the existing rules on freedom of transit at the regional and WTO levels and to use these two international legal instruments when a transit dispute arises. Among the transit agreements concluded between Afghanistan and its neighbors, the APTTA and Chabahar transit agreements are picked as examples in this study to analyze whether WTO membership has any impact on the implementation of these agreements.

Supervisor: Prof. Dr. Christoph Herrmann (University of Passau)

Admission to the program: 2015

Status: completed in 2020

Publication: <https://link.springer.com/book/10.1007/978-3-030-73464-0>

Amin, Najibullah

Imprisonment and Rehabilitation. A Case Study of Pol-e-Charkhi Prison

This thesis is about state-building, law, and order in Afghanistan. It focuses on the rebuilding process of the Afghan criminal justice system, as part of the overall state-building endeavour, in the period since the international intervention and reform began in 2001 until 2021. More specifically, the book examines the Afghan prison system and the rehabilitation aspect of the system's operation at Pol-e-charkhi, the largest prison in Afghanistan. The latter aspect aims to allow a practical and comprehensive understanding of the reform within a criminal justice institution with a specific legal mandate.

To this end, instead of one conventional story to tell, the thesis has three storylines. That is because as a lawyer, the author has always been interested in law-making. As a criminologist, he has been interested in criminal justice institutions such as prisons and the rehabilitation of prisoners. As an administrator, he remained interested in the overall state-building process, including the bureaucracy and administration of reform. All these interests are combined in this research project. To ensure a proper interface between the three storylines, looking beyond conventional perspectives, such as the dualistic notion of 'law in books and law in action' has been necessary. In this respect, the author has proposed to use the institution building model as the framework of analysis, as it appears to be an appropriate alternative that can enhance the scope of the study.

Supervisor, university: Prof. Dr. Jan Michiel Otto and Prof. Dr. Pauline Schuyt (University of Leiden)

Admission to the program: 2015

Status: completed in 2023

Amin, Salim

Judicial Independence in Afghanistan

In a globalised world of states' executive dominance, where different conflicting legal regimes constitute the backbone of a legal system, legal mechanisms of separation of power and judicial independence are insufficient for upholding the rule of law and protecting the fundamental rights of citizens, necessitating holistic measures for the proper application of such legal guarantees.

Abdul Salim Amin examines the extent of independence acquired by the courts and judges in Afghanistan in light of international standards, Islamic principles and Afghan legal tradition. In a global context, this allows for the consistent practical application of a general framework on a national level, reconciling Islamic with International law. The author concludes that in Afghanistan judicial independence is often impaired not only by both the general lack and unclarity of legal mechanisms but also by the missing implementation of existing mechanisms. As a result, constitutional rules are undermined, and international standards and obligations of judicial independence are violated.

Supervisor: Prof. em. Dr. Rüdiger Wolfrum (University of Hamburg)

Admission to the program: 2014

Status: completed in 2020

Publication: <https://www.bwv-verlag.de/detailview?no=5040>

Amiri, Wahidullah

Legal Pluralism in Afghanistan

Afghanistan is a legal pluralistic society. The legal order is based on at least three different systems of justice: Shari'a, state law, and customary law. Unlike many African countries, where legal pluralism is mainly a result of colonization, legal pluralism in Afghanistan primarily emerged as a consequence of the transplantation of legal systems from other countries. However, the top-down imposition of state law and other reforms have had little success in Afghanistan because it has almost always neglected local realities.

The post-Taliban government, led by President Hamid Karzai and mainly supported by the US, followed the preceding governments' path and centred its efforts exclusively on rebuilding state justice institutions. The different Afghan regimes prior to and during the 20th century tried to establish a monopoly of the state's formal justice system. However, despite constant state support and strong efforts, the formal justice system not only failed to provide effective dispute resolution apparatuses, but also had very little success in gaining the domination over the informal justice system. Given the inability of the state justice systems on the one hand, and the need for the rule of law and an effective justice system on the other, it is vital that the formal and informal justice systems be linked in a manner that will fill the vacuum and ensure citizens access to justice.

Supervisors: Dr. Ali Wardak and Prof. Mike Maguire (University of South Wales)

Admission to the program: 2014

Status: completed in 2018

Publication: unpublished (USW library)

Ayobi, Mirwais

Judicial Control of Public Administration in Afghanistan: A Contextual Analysis

Judicial control of public administration is essential for the realisation of the rule of law and democracy. To date, there is virtually no effective judicial protection in Afghanistan. However, a study of Afghan legal history suggests that the country has certain - currently underdeveloped - institutions that could be used as the basis for the creation of judicial control. Based on a historical study, the dissertation elaborates the pluralist legal culture of Afghanistan, rooted in tribal and Islamic legal conceptions alongside a State legal system.

Examining the state legal system reveals that the current legal framework is still fragmented and incomplete. Notwithstanding of the 2004 Constitutional outline with respect to the control of public administration, at the lower levels considerable flaws and insufficiencies are apparent. Apart from political, economic and cultural shortcomings, the laws and the regulations, which constitute the judicial control, are inadequate, fragmented and incoherent. Following the

mandate of the Constitution pertaining a unified judiciary, the system of judicial review does not resemble any well-known system. There is neither a separate administrative court system nor is there an administrative court within the unified judiciary.

As a result, the system is not able to meet the requirements of a functional judicial control system capable of ensuring effective judicial protection. However, by signifying commitments to the rule of law, international human rights and some of the general principles of administrative law, the Constitution provides the judicial control system with a legal basis as well as promising guiding principles. In this context, this work elaborates possible solutions for the development of judicial control of public administration in Afghanistan.

Supervisor: Prof. Dr. Dr. h.c. Karl-Peter Sommermann (German University of Administrative Sciences, Speyer, Germany)

Admission to the program: 2014

Status: completed in 2021

Publication: <https://www.lit-verlag.de/isbn/978-3-643-91393-7>

Haneef, Abdul Haneef

The role of Civil Society in the implementation of International human rights obligations of Afghanistan

This study explains the role of civil society actors in the implementation of Afghanistan's Human Rights obligations. The author argues that while Afghanistan's government largely harmonized the domestic legislation with international human rights standards, it faced serious problems and challenges to fulfil these commitments in practice. His shows that in Afghanistan, a broad inclusion of civil society actors in this area is important as civil society includes both traditional institutions such as councils of elders (jirgas) as well as modern institutions such as NGOs. But both go along with specific difficulties. While the traditional institutions are themselves partly incompatible with human rights standards, the modern institutions did not gain the trust of the people due to their inefficiency and their dependence on donors.

The author concludes that civil society actors have a good potential for working with the people and the government of Afghanistan to accomplish their International Human Rights obligations but they need to gain the confidence of the people, better coordinate among themselves, and legally and practically comply with rules set by the government. He highlights the specific strengths of civil society actors, such as raising public awareness about Human Rights, supervising government offices, advising public administrations, supporting victims of human rights violations, and coordinating with international organisations and other allies.

Supervisors: Prof. Dr. Seyed Mohammad Ghari, Seyed Fatemi and Dr. Mohammad Jalali (Shahid Beheshti University, Tehran); advisor: Dr. Seyed Hadi Mahmudi

Admission to the program: 2014

Status: completed in 2021

Publication: unpublished (SHU library)

Mutasem, Mohammad Haroon

Drug Trafficking in Afghanistan: Criminalization, Investigation and Prosecution

This dissertation is focused on the criminalization, investigation, and prosecution of drug trafficking in Afghanistan. To clearly understand the reasons for alteration of the drugs from a non-commercial product to more of a commercial one, a brief historical background of this phenomenon is provided at the beginning of this dissertation which is followed by a concise elaboration of the impact of the said phenomenon on various dimensions of life of people in Afghanistan.

In the part pertaining to the criminalization, the focus has been on the how of criminalization of drug related offenses in the laws of the country with an assessment of causes of change of leniency regarding the said offenses towards a gradual harshness. Parallel to the assessment of the laws of the country, a brief scrutiny of the international documents, to which Afghanistan is a party, is also provided for the purpose of understanding the obligations of Afghanistan arising from those international instruments. Following that, theoretical framework of policies in the field of criminalization of drug-related offenses is also provided for shedding light up on the extent and how of recourse to such policies in the codification process of Afghanistan. The part related to investigation and prosecution is aiming to indicate how the system is functioning and what are the flaws and shortcomings existing in the system. Assessment in this part is inclined towards elaborating that what has been the impact of investigation and prosecution of drug-trafficking cases in Afghanistan on increase of the drug related offences. The dissertation is concluded with a set of recommendation and proposals regarding both criminalization and also investigation and prosecution of drug trafficking cases for filling the gaps of the two aspects in the criminal justice system of Afghanistan.

Supervisor: Prof. Dr. Florian Jeßberger (University of Hamburg)

Admission to the program: 2014

Status: completed in 2020

Publication: <https://ediss.sub.uni-hamburg.de/handle/ediss/9023>

Naseh, Wali Mohammad

Trademark Protection in the Legal System of Afghanistan

Trademarks as part of intellectual property play an important role in the future development of a country. The research examines and analyses the degree, nature and function of trademark protection within the legal system of Afghanistan and compared them with the Paris, Madrid and TRIPs agreements.

Afghanistan, as a transitioning economy, has not developed a solid legal and practical foundation for providing comprehensive protection mechanisms for trademarks as have been articulated in developed countries and international agreements. Accordingly, the Afghan government has not entirely integrated these needs into its legal system and there are some inconsistencies of the ATML with these agreements. Another challenge is the lack of appropriate legal institutions for issuing, managing, administering and protecting of trademarks. The establishment of a well-functioning administrative institution will serve to fulfil the objectives of the laws. Therefore, the Centurial Business Registration CBR office holds the administrative responsibility for processing the registration of trademarks.

Therefore, legal protection of trademark in Afghanistan is linked not only to the existence of a well functioning of laws, regulations, clear procedures, mechanism and guidelines but also to an efficient and well-functioning administrative office.

Supervisor: Prof. Dr. Alexander Peukert (Goethe University, Frankfurt am Main)

Admission to the program: 2014

Status: completed in 2018

Publication: <http://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/docId/48779>

Rahimi, Humayoun

Afghanistan's WTO Accession and its Effects on Afghan Agriculture Laws

Afghanistan joined the WTO as an LDC in 2016. Agriculture is the backbone of its economy and the majority of people rely on agriculture for their livelihoods and their families' sustenance. Therefore, this study will explore the effects of accession on its agricultural laws and regulations. On this basis, the study is divided into five chapters. Chapter one explores the procedure of accession to the WTO in order to find out which steps have been taken for accession to the WTO and the relevant requirements. Chapter two examines agricultural laws and regulations in the country before its accession to the WTO. Chapter three scrutinizes the WTO regime on agriculture for LDCs and other international obligations on agriculture, which are binding for Afghanistan. Chapter four delves into Afghanistan's agricultural laws after the accession process to determine to what extent its agricultural laws and regulations comply with the WTO requirements. Finally, chapter five analyses the conformity of the domestic system with the WTO

regime. Thus, this study will try to express the gaps and conflicts between domestic agricultural laws and the regulations within the WTO.

Supervisor: Ass. Prof. Sergey G. Pen (Kazguu University, Kazakhstan)

Admission to the program: 2014

Status: halted

Saeed, Lutforahman

Islam, Custom and Human Rights. A Legal and Empirical Study of Criminal Cases in Afghanistan After the 2004 Constitution

The thesis focuses on the role of Shari'a in the criminal law system of Afghanistan. The author is the first scholar to explore the intertwinement of written law, Islamic law, and customary law in the highly complex Afghan society that is deeply influenced by traditional cultural and religious convictions. Given these facts, he explores how to bridge the exigencies of a human rights driven penal law and conflicting social norms and understandings by using the rich tradition of Islamic law and its possible openness for contemporary rule of law standards. This work is based on ample field research in connection with a thorough analysis of the normative contexts. It is a landmark, since it offers broadly acceptable and thus feasible solutions for the Afghan legal practice. The book is of equal interest for scientists and practitioners interested in legal, religious, social, and political developments concerning human rights and regional traditions in the MENA region, in Afghanistan in particular.

Supervisor: Prof. Dr. Mathias Rohe (University of Erlangen-Nuremberg)

Admission to the program: 2014

Status: completed in 2020

Publication: <https://link.springer.com/book/10.1007/978-3-030-83086-1>

Sediqi, Abdel-Ellah

Concepts of Medieval Persian. Mirrors for Princes in the Framework of Modern. Western Principles of Good Administration.

The thesis compares the precepts of good rulership in the Persian empire with the modern European principles of good administration. This approach is essentially multidisciplinary, combining law, history, political science, philosophy, sociology and public administration with their multiple and interwoven aspects. To address the delicate issue of identifying the representative sets from both sides of the comparison, i.e., ancient good rulership on the one hand, and modern European principles of good administration on the other, the author chose

two sets of sources. As for the Persian side, four books will form the basis for this comparative research. The first one, "Qabus Namah", is an 11th-century work of Qabus Ibn Washmgir, worth special focus for its pioneer position in this genre. The second book is the major piece of didactic prose on princely ethical conduct within a public office, written by Khwaja Nizam al-Mulk Tusi in the 11th century. The two last books - sharing the same title of "Nasihah ul Molouk" (literally advice to kings) - from Imam Ghazali (11th-century scholar) and Sheikh Saa'di (13th-century famous poet) will conclude this quartet. As for the modern European practice, the author will explore the normative frameworks applied by institutions such as the OECD, particularly the work of its Public Governance Committee, and the Council of Europe. This will be complemented by the major principles emanating from the French and German case law as confirmed by their supreme judges of the administrative order.

Supervisor: Prof. em. Dr. Rüdiger Wolfrum (University of Hamburg)

Admission to the program: 2014

Status: ongoing

Rahmani, Nasima

Divorced Women's Financial Rights In Afghanistan: Does Mahr Offer Financial Security To Afghan Divorced Women?

Divorced women in Afghanistan are not entitled to financial rights beyond three months' *iddat* maintenance. However, it might be argued that they have the right to *mahr*, as well as other possible rights under Islamic law including women's rights to stipulations in the marriage contract and the right to *muta'a*, which may offer some financial security to divorced women. The thesis focuses on *mahr*, seeking to find whether *mahr* has the capacity to compensate for the lack of post-divorce financial support in the life of Afghan women. It also poses the questions, if divorced women in Afghanistan do generally receive *mahr*; and if so, what payment they receive. To explore the answers, the thesis first analyses the available financial remedies offered to women under Islamic law and Afghan jurisdiction. The thesis then assesses the laws and practice for the existing support mechanisms for *mahr* within the state legal system and its application in marital disputes. It responds to the research question by presenting empirical findings from family court summary books, describing 1117 cases decided between 2003 and 2015, in-depth interviews with legal professionals, and the candidate's observations of cases heard in family courts in three provinces in Afghanistan. The thesis concludes that *mahr* does not provide adequate financial support for divorced women, and, as a consequence, a vast majority of them are left with no financial assistance.

Supervisors: Prof. Jenni Millbank, Prof. Ana Vrdoljak (University of Sydney)

Admission to the program: 2014

Status: completed in 2019

Publication: <https://opus.lib.uts.edu.au/handle/10453/140526>

Yousufzai, Mohammad Ayoub

Constitutional Review Mechanism for Afghanistan in Comparative Perspective

Elements of constitutional review appear in many of Afghanistan's twentieth-century constitutions. However, no constitution, except that of 1987, included a complete constitutional review mechanism, nor has it delegated the task to any specific institution. The 2004 Constitution in its articles 121 and 157 submits the task to the Supreme Court (SC) and the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC). Both articles are vague. Moreover, the adoption of this mixed institutional system caused serious challenges. The experiences of the 20 years of the Islamic Republic have shown that Afghanistan's constitutional system faces problems in protecting itself. This comprehensive comparative study aims to determine the challenges of constitutional review in Afghanistan, understand the advantages and disadvantages of different models, and analyse the reasons why constitutional review has never been effectively institutionalized in Afghanistan. It will finally suggest an appropriate model of constitutional review for the country.

Supervisor: Prof. Dr. Gaurav Kataria, LPU University (India)

Admission to the program: 2014

Status: ongoing

Zahir Hellali, Bahishta

The Afghan Legal Framework Regarding Child Labour

Not all forms of child work are illegal. According to international standards, only those forms that harm the physical and mental well-being of children and deprive them of education may be regarded as child labour. International conventions, such as those adopted within the framework of the International Labour Organization (ILO), aim at eradicating the latter.

However, despite numerous international conventions on the issue of child labour, including ILO Conventions No.182 and No. 138, and the UN Convention on the Rights of the Child (CRC), the dilemma of weak enforcement mechanisms on the domestic level undermines the combat against the worst forms of child labour and the protection of children from the hazardous work.

This thesis focuses on the national and international legal framework of child labour in Afghanistan. It also analyses the jurisdiction of the International Criminal Court, which has dealt with the matter in the past, and Afghanistan's obligations under the Rome Statute. The research

aims to identify the legal deficiencies and problems within the Afghan legal framework regarding child labour. It will end with recommendations for national and international mechanism.

Supervisor: Professor Dr. Dr. Rainer Hofmann (University of Frankfurt/Main)

Admission to the program: 2015

Status: final writing phase