Materialien zum ausländischen und internationalen Privatrecht

45

Herausgegeben vom

Max-Planck-Institut für ausländisches
und internationales Privatrecht

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The Sharīᶜa in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law

edited by

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Mohr Siebeck

ISBN 3-16-148787-7
ISSN 0543-0194 (Materialien zum ausländischen und internationalen Privatrecht)

Die Deutsche Bibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data is available in the Internet at *http://dnb.ddb.de*.

Printed in Germany.

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Abbreviations

AI	Amnesty International
AIA	Afghan Interim Administration
AICA	Act on International Commercial Arbitration of 1997, Iran
AfgCC	Afghan civil code of 1977
Art.	article(s)
Bonn Agreement	Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions of 2001
CBI	Central Bank of Iran
CC	civil code
CCP	code of civil procedure
CEDAW	United Nations Convention for the Elimination of All Forms of Discrimination Against Women
cf.	confer
ch.	chapter(s)
ComC	commercial code
comp.	compare
CRB	Corporate Registration Bureau
d.	died
DCISA	Draft Constitution of the Islamic State of Afghanistan
DIS	Danish Immigration Service
Divorce Act	Act on the Amendment of the Divorce Provisions of December 10, 1992, Iran
ed(s).	editor(s)
eg	exempli gratia [for example]
EgypCC	Egyptian civil code of 1949
Enforcement Act	Civil Judgement Enforcement Act of 1977, Iran
etc.	et cetera
f. / ff.	following
FIDIC	International Federation of Consulting Engineers
FIPPA	Act on the Promotion and Protection of Foreign Investment, Iran
FS	Festschrift
HM	His Majesty
H.R. Principles	Human Rights Principles
ICG	International Crisis Group
ICJ	International Commission of Jurists
IDLO	International Development Law Organisation
ie	id est
IFL	International Legal Foundation
int.	international
IRI	Islamic Republic of Iran

IRI Constitution	Constitution of the Islamic Republic of Iran of 1979
ISAF	International Security Assistance Force
J.	Journal
Jh.	Jahrhundert [century]
JVC	Joint Venture Company
LAPFI	Act for the Attraction and Protection of Foreign Investments, Iran
lit.	literally
LJOC	Law on the Jurisdiction and Organisation of the Courts of 1967, Afghanistan
MPI	Max-Planck-Institute
MPs	Members of Parliament
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
NGO	Non-Governmental-Organisation
No.	number(s)
ODI	Overseas Development Institute
OIETA	Organisation for Investment, Economic and Technical Assistance of Iran
PCM	Communist Party of Morocco
PDPA	Peoples' Democratic Party of Afghanistan
pl.	plural
POW	prisoners of war
p./pp.	pages
SCC	Supreme Constitutional Court of Egypt
sect.	section
stud.	studies
Truth Commission	Special Court of Human Rights of Afghanistan
UDHR	Universal Declaration of Human Rights of 1948
UN	United Nations
UNAMA	United Nations Assistance Mission for Afghanistan
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
WCLRF	Women and Children and Legal Research Foundation
1933 Act	Act on the Observance of the Personal Status of non-Shīʿī Iranians in the Courts of August 1, 1933

The Position of Women in the Islamic and Afghan Judiciary

IRENE SCHNEIDER

After two decades of conflict and civil war, Afghanistan is facing the task of re-establishing the rule of law and rebuilding its political and judicial structures. After the devastating experience of the Taliban regime (1996-2001), which imposed a very regressive version of the *Sharīʿa* and was responsible for grave human rights violations, the rebuilding and reform of the judiciary and justice system is of special importance. Women were the main victims of this regime. This article analyses the position and role of women in classical Islamic and modern Afghan judiciary, focusing on the situation of female judges in the judiciary and the role of female witnesses in procedural law. As such, it connects questions on international human rights standards as laid down in the Universal Declaration of Human Rights of 1948 (UDHR) with classical and modern Islamic judiciary and procedural law.

A. Introduction

Afghanistan has a rich and complex legal culture. Besides those of the Hindu and Jewish minorities, the main legal system is the Islamic legal system of the *ḥanafī madhhab* or school of law, which has dominated Afghanistan ever since the region became Islamic. But there is also a strong *shīʿī* minority to be found in the country. Thus, the Sharīʿa, the Islamic law, has always played an important role in the development of the Afghan justice system. At the beginning of the 20. century, statutory law was introduced by Amanullah (r. 1919-1929) in the *niẓāmnāma* as an ambitious plan to create a modern Afghan state. Along with traditional customary law, the ḥanafī school provided the basis for the emerging Afghan justice system. This reform programme had far-reaching effects. On the legislative level, the codification of many of Afghanistan's laws

was achieved in the 1960s and 1970s. On the jurisdictional level, a modern three-tiered court system was created. The Afghan Constitution of 1964, and especially the Law on the Jurisdiction and Organisation of the Courts of 1967[1] (hereafter: LJOC), laid down rules for the creation of a modern judiciary. After the military coup in 1978, the Marxist government attempted to introduce a Soviet-style judicial system, but these changes were rejected before they took root. Of greater importance is the strong customary law, especially the *pashtunwali*[2] and other regional customs which constitute an important part of the Afghan legal culture. With regard to the jurisdictional system, the traditional *jirga/shūrā*, informal institutions mainly serving to settle disputes by ensuring that the involved parties reached an agreement, are of great practical importance. These institutions enjoy a great deal of acceptance amongst the population, especially in rural and tribal areas. Their competence and legitimacy stems from the renowned skill the tribal and rural – but also urban – populations display in settling disputes on the basis of consultation.

In January 2004 the new constitution (Constitution 2004) was ratified by the Constitutional *Loya Jirga*. This new constitution is the latest development in Afghan legal culture, which includes the adherence to such international conventions as UDHR and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) (Art. 7 Constitution 2004) as well as to the respect for the religion of Islam (Art. 3 Constitution 2004).

All these different kinds of rules, customs, and laws have contributed to the richness of the Afghan legal culture and judiciary system, and they can be used as a source for rebuilding a new and modern legislation and a modern judiciary based on the Islamic culture of the country.

A useful tool for analysing this complex situation is the concept of 'operative Islamic law' as explicated by the Pakistani lawyer and jurist Shaheen Sardar Ali in her book *Gender and Human Rights in Islam and International Law*[3]. Islamic law has always shown a certain flexibility and pluralism. While it is based on the *Qurʾān* and the rulings of the Prophet Mohammad, the jurists (*faqīh*) have to deduce the actual legal rulings from these textual sources using hermeneutical methods. The plurality of opinions resulting from this process was institutionalised in different schools of law which coexisted for centuries. But even inside each school it was considered acceptable for jurists to hold different opinions. The acceptance of such a pluralistic situation had its legal justification in the Prophet's saying: 'Blessing upon the plurality in my community.' Beginning in the 19. century, it was further expanded through the

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[1] Decree No. 588-2189 of September 24, 1967, qānūn-e ṣalāḥīyat va tashkīlāt-e qaḍāʾī-e dawlat-e shāhī-ye Afqānestān.

[2] See *Glatzer*, Zum Pashtunwali als ethnisches Selbstportrait, in: Subjekte und Systeme, FS Sigrist (2000) 93-102.

[3] *Ali*, Gender and Human Rights in Islam and International Law. Equal Before Allah, Unequal for Man? (2000).

influence of modern Western law. Secular legislation (*qānūn*) inspired by European models was introduced, especially in the field of commercial law. This, in turn, made the implementation of a modern judiciary necessary. Thus, the legal systems in the Islamic countries and in Afghanistan today are marked by legal pluralism[4]. 'Operative Islamic law' as defined by Sardar Ali is the law that has evolved over the centuries and, in particular, since the emergence of sovereign nation states and globalisation. It differs in formal and material aspects from classical Islamic law because it comprises not only this form of law, but has also integrated modern developments in Islamic law, Western concepts of law, and popular custom. 'Operative Islamic law' thrives in a plural legal system composed of constitutional/statute law, Islamic law, and customary norms. All three systems coexist and draw on each others' conceptual and normative sources. The socio-economic and political circumstances prevailing within the country also play a crucial role in determining the selective use of these three sets of regulatory norms[5].

However, Sardar Ali points to the fact that while 'operative Islamic law' has a potential advantage in that an interaction between different legal systems may advance justice, the opposite may also be the case[6]. Referring to the situation in Pakistan, she argues:

> Provisions of law advocating equality between the sexes (as required by the constitution of Pakistan) are disregarded and watered down by reading into these an element of inherent inferiority of women (under certain religious and customary norms). The emergent 'operative Islamic law' therefore evolves on the premise of male dominance and perpetuation of gender hierarchies[7].

As the Muslim countries are signatories to different international treaties, in particular the UDHR, 'operative Islamic law' also comprises the dimension of international law. Because the standard of *pacta sunt servanda*, for example, is already made obligatory in the Holy Qur'ān (sura 5, verse 1; sura 17, verse 34), it is clear from the ratification of these treaties that the Islamic countries have given up the classical concept of *jihad* as an offensive concept of war in favour of peaceful coexistence with the other countries of the world[8]. Concerning the national level and material law, the abolishment of slavery by all Islamic countries – an institution which existed through the Middle Ages in Islamic as well as Christian countries and existed in the US until the 19. century – can be taken as an example of the flexibility of Islamic law, its view toward the well-being/welfare of society (*maṣlaḥa*), and the principle of justice (*ʿadāla*). In Afghanistan, for example, the *hazara* slaves were set free in the niẓāmnāma

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[4] *Dupret/Berger/Al-Zwaini*, Introduction, in: Legal Pluralism in the Arab World, *Dupret et al.* (eds.) (1999); see *Yassari*, in this volume, 45 ff.

[5] *Ali* (note 3) 188-189.

[6] *Ali* (note 3) 188.

[7] *Ali* (note 3) 188.

[8] *Ali* (note 3) 218.

period in the 1920s[9]. The question which has to be dealt with here is: what specific feature does 'operative Islamic law' display in Afghanistan with regard to the judiciary and to procedural law?

With regard to classical Islamic judiciary, the sequence of courts to be found today in Afghanistan and other Islamic countries represents a development, an expression of 'operative Islamic law' or Islamic law in a modern form. In classical law as laid down in the *adab al-qāḍī*[10] literature, the institution of the judge (*qāḍī*) is the sole and central institution, with no use being made of institutions of review. According to the classical adab al-qāḍī, a review of a judgement was only permitted in rare cases, and then normally only by the judge himself or his successor in office[11]. The ruler never had the right to interfere with the judge's jurisdiction. On the other hand, the ruler always had the right to appoint and dismiss the judge and to either give him full jurisdiction or restrict his jurisdiction to certain areas or to certain cases[12]. Through the power afforded by the *siyāsa* (lit. 'politics, power to administrate the law'), the population was given the chance to turn directly to the ruler and hand in petitions of complaint, especially about the abuse of power by state officials. This institution was called *maẓālim* (lit. 'acts of injustice')[13]. Thus, the modern judiciary system – for example, the three-tiered court system of Afghanistan today – can be seen as an institutional adaptation and development of the classical system to modern times[14], fully in line with the principle of maṣlaḥa central to classical Islamic law.

The main aim of Islamic procedural law has always been the implementation of justice. This is clear from the strict rules regarding the interrogation of litigants and witnesses, and the strict prohibition of influencing their evidence or of the exertion of pressure to gain evidence[15]. Islamic procedural law guarantees the rights of witnesses and litigants and strictly forbids arbitrariness and force used by the qāḍī[16]. The main aim of classical and modern Islamic law is to ensure that a fair trial is conducted and to protect the rights of the litigants.

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[9] *Kamali*, Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary (1985) 204.

[10] The expression means literally 'the right behaviour of the judge'. It is the title of that part of Islamic legal literature which comprises rules for the behaviour of the judge and also Islamic procedural law.

[11] *Schneider*, Das Bild des Richters in der adab al-qāḍī-Literatur (1990) 224-226; *Schneider*, Die Merkmale der idealtypischen qāḍī-Justiz – Kritische Anmerkungen zu Max Webers Kategorisierung der islamischen Rechtsprechung: Der Islam 70 (1993) 154-159.

[12] *Schneider*, Das Bild des Richters in der adab al-qāḍī-Literatur (1990) 247-252.

[13] *Schneider*, (note 12) 237; see also *Schneider*, State, Society and Power Relations – A Study in the Late 14th/19th Century Petitioning System of Iran (forthcoming).

[14] *Coulson*, A History of Islamic Law (1964) 163-166, 172.

[15] *Schneider* (note 12) 66-68, 127-141.

[16] *Schneider* (note 12) 165.

Concerning the judiciary and procedural law of Afghanistan, mention needs to be made of the niẓāmnāma of Basic Organisations of 1923, which already provided for a three-tiered court system: the primary court (*maḥkama-ye ibtidā'īya*) in every administrative district, the court of appeal (*maḥkama-ye murāfa^{c}a*) in each provincial capital, and the Cassation Board (*hayat-e ^{c}ālī-ye tamyīz*) in the capital[17]. Art. 97 Constitution proclaimed the judiciary to be an 'independent organ of the state which discharges its duties side by side with the legislative and executive organs.' The aforementioned LJOC 1967 set the framework necessary for the establishment of a modern judiciary. A Supreme Court (*Stera Mahkama*) headed by the Chief Justice[18] and seated in Kabul had the exclusive power to interpret the law and to ascertain the conformity of the law with the principles of the constitution.

In the Afghan judicial system established immediately after the Taliban reign, women were greatly underrepresented. No reliable statistics exist, but in 2003 out of approximately two thousand judges, very few were women[19]. While women do hold some key positions – for example, as heads of the juvenile and family courts in Kabul and as members of the Supreme Court – their overall representation in both the judiciary and the university law faculties is low. In interviews with Amnesty International (AI), a number of senior judges expressed a lack of concern for, and even resistance to, the greater inclusion of women in the judiciary. This lack of concern with the under-representation of women is evident, according to AI, in the fact that neither the Supreme Court, the Ministry of Justice, nor the Attorney General's Office possesses any statistical data on the number of women judges and prosecutors[20]. Furthermore, in interviews with AI delegates, many senior judges expressed outright opposition to increasing the number of women judges. Other judges informed the organisation that if there were to be more women in the judiciary, then it would only be appropriate for them to serve in the family and juvenile courts[21]. This reluctance to accept female judges in penal law can also be seen in a statement made by the Deputy Minister of Justice in March 2003. He stated that, according to

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[17] *Kamali* (note 9) 212-213.

[18] *Kamali* (note 9) 223.

[19] *Johnson/Maley/Thier/Wardak*, Afghanistan's Political and Constitutional Development (2003) 26; *Amnesty International* (AI), Afghanistan: Re-establishing the rule of law (August 2003), AI Index: ASA 11/021/2003 (hereafter: AI-Report 8/2003). According to this report, out of a total of 2,006 sitting judges, only approximately 27 were female in 2003. However, the actual number of female judges and professors might be higher. I would like to thank my Afghan colleagues at the conference who supplied me with information about women in the Afghan judiciary, especially Ms Barakzai, a member of the former Constitutional Commission; Prof. Barmaki from the law faculty of the University of Kabul; Ms Kakar, a judge at the Supreme Court in Kabul; and Ms Rasouli, Head of the Children's Court in Kabul.

[20] I am thankful to Deputy Chief Justice Mahnavi for informing me in the discussion of my paper that the number of female judges in Afghanistan now amounts to about 200.

[21] AI-Report 8/2003 (note 19).

the Qur'ān, there are certain types of cases which should not be dealt with by women[22]. However, these types of penal cases were not tried in Afghanistan in the time before and after the Taliban, and Art. 29 Constitution 2004 explicitly forbids punishment contrary to human integrity. The question thus arises as to what the position of women in 'operative Islamic law' in Afghanistan actually is. As 'operative Islamic law' is strongly influenced by the Sharīᶜa, it is first necessary to analyse the position of women in classical Islamic law and the judiciary before trying to determine the position of women in the modern judiciary.

B. Women as Judges

I. Classical Islamic Law

Classical Islamic law is based, as is well known, on the text of the Holy Qur'ān and the *Sunna*, the rulings of the Prophet. In the Holy Qur'ān there is no text that explicitly forbids women to become judges or to participate in the judiciary system. As a result, there is no unanimously shared opinion in all schools of law that would deny women the right to be judges, but the topic is certainly controversial.

Mālik (d. 795), Shāfiᶜī (d. 820), and Aḥmad b. Ḥanbal (d. 855), the eponyms of the main *sunnī* madhhab, were all of the opinion that women lack the competency to hold the post of qāḍī[23]. Māwardī (d. 1058), the famous Shāfiᶜī jurist and author of *al-aḥkām al-sulṭāniyya*, a normative book on the constitutional system of medieval Islam, based his view on the argument that jurisdiction (*qāḍā'*) is a part of political leadership (*imāma*), for which a woman is not eligible[24]. He maintained that one of the requirements for a judge is that he has to be male. Basing his arguments on the traditional exegesis of the Qur'ān, sura 4, verse 38 'Men are in charge of women'[25] he actually interpreted the part of the verse that says 'what God has provided to them over what he has provided to women' as meaning reason (*ᶜaql*) and insight (*raᶜy*). Thus, he concluded: 'It is not allowed that they (ie women) stand above men'[26].

However, in the ḥanafī law school – which is dominant in Afghanistan – one finds a different opinion based on Abū Ḥanīfa (d. 767), eponym of the ḥanafī

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[22] See *Danish Immigration Service*, The political, security and human rights situation in Afghanistan, Report on fact-finding mission to Kabul, Afghanistan, 22 September to 5 October 2002 (7/2002), <www.udlst.dk> (hereafter: DIS-Report 2002) 36.

[23] *Ibn Rushd*, Bidāyat al-muǧtahid[6] II (1983) 460.

[24] *Al-Māwardī*, Adab al-qāḍī II (1971) 625-627; *Tanzil-Ur-Rahman*, Adab al-qāḍī: Islamic Studies 5 (1966) 199-207 (201), on this problem see also: *Moosa*, Women's Eligibility for the Qadiship: Awraq 19 (1998) 203-227.

[25] *Al-Māwardī* (note 24) 627.

[26] *Al-Māwardī* (note 24).

school. According to him, a woman could act as a qādī. But Abū Ḥanīfa restricted a woman's judgement to those matters wherein the evidence of a woman was held to be permissible in law. This meant an exclusion of women in the law of criminal procedure, especially in cases of *ḥudūd*[27] and *qiṣāṣ*[28]. The ḥanafī jurist Kāsānī (d. 1191) thus did not include – as Māwardī had – the male sex as one of the conditions for the appointment as a judge, because, according to him, a woman could preside as a judge over property cases for example, excluding ḥudūd and qiṣāṣ cases[29]. This seems to match the aforementioned situation in Afghanistan today, where although there are female judges, they are few and there is a strong reluctance to let them preside over penal cases.

Women are not unanimously denied access to penal jurisdiction. Mālik who denied women the right to even preside over civil matters, collected and inserted an interesting report in his main legal work, the *muwaṭṭā'*[30]. It is a tradition reported by ᶜAmra bt. ᶜAbdarraḥmān (d. around 721) from ᶜĀ'isha (d. 678), the Prophet's beloved wife. ᶜĀ'ishā played an important role in the transmission of legal and religious rulings from the Prophet and is accepted in the Islamic traditional literature as one of the main authorities on the opinions of the Prophet Muḥammad[31]. According to this tradition, ᶜĀ'isha, whom Muḥammad is said to have loved most among his wives, acted as a judge in a criminal case, that is, in a judgement of ḥudūd, in a case of theft. ᶜĀ'isha interrogated a slave suspected of theft and then gave the order for his hand to be cut off. She relied on a saying of the Prophet: 'A thief's hand is cut off for a quarter of a dinar and upwards.' ᶜAmra bt. ᶜAbdarraḥmān, the transmitter of this tradition and a well-known and accepted traditionalist[32], corrected the judgement of her nephew when he wanted to cut off the hand of a man who stole some worthless iron rings. She wrote to him: '"Amra tells you not to cut off the hand except for a quarter of a dinar or more.' By giving this verdict she obviously did not refer to ᶜĀ'isha's decision but considered herself competent to correct the decision of a male judge on the basis of a ruling of the Prophet she knew of[33]. ᶜĀ'isha and ᶜAmra both acted as independent judges basing their decisions on the ruling of the Prophet. Whereas the actions of the companions and the wives of the Prophet (and here especially ᶜĀ'isha) are usually con-

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[27] Ḥudūd, pl. of ḥadd (lit. 'borders') are the crimes for which punishments were fixed in the Qur'ān, eg, the cutting off of the hand for theft; see *Schacht*, An Introduction to Islamic law (1964) 175.

[28] Qiṣāṣ (lit. 'retaliation'), see *Schacht* (note 27) 181.

[29] *Al-Kāsānī*, Badā'iᶜ aṣ-ṣanā'iᶜ fī tartīb al-sharā'iᶜ² VII (1982) 3; *Ibn Rushd* (note 23) 460; *Al-Māwardī* (note 24) 625-628.

[30] *Mālik bin Anas*, Al-Muwaṭṭa' (1988) 634.

[31] *Roded*, Women in Islamic Biographical Collections (1994) 26-29.

[32] *Roded* (note 31) 48.

[33] *Mālik bin Anas* (note 30) 643: inna ᶜamra taqūlu laka: lā qatᶜa illā fī rubuᶜ dīnār fa-ṣāᶜidā.

sidered to be normative among the Islamic jurists, this report is never referred to in discussions of whether women should participate in Islamic judiciary.

Furthermore, the renowned historian and faqīh Abū Jarīr at-Ṭabarī (d. 923), author of the classical exegesis (*tafsīr*) of the Qur'ān, who held the opinion that the jurisdiction of women is possible in all legal matters, based his opinion on another reasoning[34]. He drew an analogy between jurisdiction and legal responses (*futyā*). Women were never denied the competence to give legal opinions (*fatāwā*) and thus act as *muftī* according to all schools of law. This is why, Ṭabarī argued, they were also capable of passing a judgement (*ḥukm*).

Thus, on the level of legal discourse, there is no clear argument prohibiting women from becoming judges in classical Islamic law. This reflects the fact that no text (*naṣṣ*) in the Qur'ān and Sunna unambiguously speaks out against the participation of women in the judiciary. In legal practice, however, women were obviously denied access to judgeship. When we consider the role women played in Islamic scholarship, however, it is clearly evident that they were actively involved in teaching and transmitting the rulings of the Prophet[35], but not in teaching Islamic law and jurisprudence (*fiqh*). In his analysis on 'Women and Islamic Education' in the Mamluk period (Egypt 13.–16. century), Bereky states that many women were associated with colleges (*madāris*) as benefactors, supplying the endowments necessary to establish and maintain the schools. But they played virtually no role, either as professor or students, in the systematic legal education offered in the madāris[36]. Roded, who analysed the biographical collections with regard to the role of women, stated that among the numerous learned women in the dictionaries, women's knowledge of Islamic law is only specified in about a dozen cases. She quotes the case of Fāṭima of Samarqand (12. century) who lived in Aleppo and studied ḥanafī law with her father. Legal decisions were issued under both of their names. She married her father's student, who was noted for his treatise on legal innovations. Nevertheless, Fāṭima's proficiency in law was such that when her husband prepared legal opinions, she would correct his errors, and he deferred to her judgement. His accomplishments notwithstanding, his name was added to legal decisions issued by Fāṭima and her father[37].

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[34] *Al-Māwardī* (note 24) 626 f.

[35] *Roded* (note 31) 80-84; *Schneider*, Gelehrte Frauen des 5./11. bis 7./13. Jhs. nach dem biographischen Werk des Ḏahabī (st. 748/1347): Proceedings of the XVIII. Congress of the Union Européenne des Arabisants et Islamisants, held at the Katholieke Universiteit Leuven September 3-9 (1996) 107 ff.

[36] *Berkey*, Women and Islamic Education in the Mamluk Period, in: Women in Middle Eastern History, *Keddie/Baron* (eds.) (1992) 144-145.

[37] *Roded* (note 31) 80-81.

II. Operative Islamic Law

Modern interpreters have tried to deal with the problem by pointing to the spirit of equality implicit in Islam, which, according to them, includes equality between the sexes. J. Moosa writes[38]:

> The controversial question among the different schools of Islamic (common) law (or Shari'a) is whether a woman is competent to be appointed as a qāḍī. The views of the jurists (founders of these schools) on the matter, although based on (their) interpretations of the primary sources of Islam [...] are nonetheless subjective and man-made. It can, for example, be argued that women *can/cannot* be judges or that Muslim countries can/cannot ratify human rights instruments because a basis and validation for conflicting views on particular human rights issues can be found in the same *corpus* of Islamic law which is ambiguous in many respects. The same pattern is evident with matters relating to the existence-expansion/non-existence-constriction of women's rights. This paper asserts that in order to deal with these conflicts guidance must ultimately be sought in the spirit of equality implicit in (canonical) Islam.

Putting aside the different possible interpretations, which only represent the pluralism inherent in Islamic law, it would seem more useful to analyse the situation of 'operative Islamic law' as actively practised in Afghanistan and – for reasons of comparison – in other Islamic countries.

In 1971 the judge of the Supreme Court of Afghanistan, Walid Huquqi, gave the following statement regarding the controversy about female judges[39]:

> The Holy Qur'ān does not forbid women from participation in public functions including the very important area of judicial service. Notwithstanding many good reasons in support of employing women in judicial posts, fanaticism practically foreclosed the possibility of women's participation in the judiciary.

On the basis of the 1964 Constitution, the Supreme Court employed women in judicial posts for the first time in 1969. The LJOC 1967 contains no rule barring women from participating in the judiciary. Art. 75 LJOC deals with the necessary requirements for the appointment of a judge. It states that judges must have possessed the Afghan nationality for at least 10 years, must not have been deprived by a court of their political rights, must be at least 26 years of age, etc. No mention is made of the male sex as a necessary condition. The preamble to the 2004 Constitution states Afghanistan's commitment to comply with the United Nations Charter and to observe the UDHR. Afghanistan has also signed the CEDAW. Furthermore Art. 22 Constitution 2004 states that the citizens of Afghanistan – whether men or women – have equal rights and duties before the law. So the question arises as to why only few women are practising as judges and why there is reluctance to admit women to the bench in penal processes. The argument brought forward by the Deputy Minister of Justice

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[38] *Moosa* (note 24) 204-205.

[39] Quoted in *Kamali* (note 9) 231.

refers to the Qur'ānic punishments, ie the aforementioned ḥudūd[40]. However, there is no text on prohibiting women from becoming judges in these cases.

As there is no clear naṣṣ that speaks out against women participating in the judiciary, the reasons for the low number of female judges must be sought elsewhere. In this context it seems necessary to compare the situation in Afghanistan to the actual situation in other Islamic countries.

In Iraq, where political structures broke down due to the intervention of US military forces, the US Marine Colonel supervising the reconstruction of Najaf indefinitely postponed the swearing in of its first-ever female judge on July 31, 2003, after her appointment had provoked a wave of resentment, including fatāwā, legal responses, from senior Islamic clerics and heated protest by the city's lawyers[41]. In Iran, women can only become assistant judges and may not be signatories to a judgement. However, in 2003 the first Muslim woman, Shirin Ebadi, won the Nobel Peace Prize. Ebadi had been Iran's first female judge in 1969, prior to the Islamic Revolution, and currently works as an attorney, providing legal representation for victims of political persecution and fighting for the rights of women and children in Iran[42]. In Algeria, women can become judges, and in 1998 out of 2,324 judges 547 were women working in all legal fields. In the Algerian Ministry of Justice there are 29 female judges out of a total of 95. But it is not clear from this report whether female judges are also permitted to pass judgement in penal cases[43]. In Tunisia, women have access to judicial office as well[44]. It has been reported that 25% of the judiciary was represented by women in 2002. In Nigeria the first female Chief Justice, Justice Rosaline Omotosho, succeeded a male judge; she held the office of Chief Justice from April 12, 1995, to February 27, 1996[45]. In Sudan, women have been integrated into the judiciary after receiving training in special courses for judges, equipping them to deal with all domains of the law, including penal law and entailing the setting of *ḥadd* punishments. There is evidence of women being nominated to the civil chamber within the court of the *Mudiriyya* in Khartoum and to a Court of Appeal. In November 1984 President Numayri decided to form an International Judicial Council (*Majlis al-qāḍā' al-ʿĀlamī*) and committed himself to appointing a woman to Sudan's Supreme Court[46]. In Egypt, which is normally considered one of the progressive Islamic

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[40] DIS-Report 2002 (note 22).

[41] middleeastinfo.org/article3118.html.

[42] Middle East Media Research Institute, Special Dispatch Series, No. 596, October 24, 2003; see also: <www.memri.org/bin/latestnews.cgi?ID=SD59603>; Interview with Amir Taheri of October 19, 2003.

[43] <www.un.org/womenwatch/daw/cedaw/cedaw20/algeria.htm>.

[44] <www.un.org/News/Press/docs/2002/wom1348.doc.htm>.

[45] <www.nigeria-law.org/LagosStateJudiciaryInBrief.htm>.

[46] *Layish/Warburg*, The Reinstatement of Islamic Law in Sudan under Numayri (2002) 255.

countries, the first female judge did not assume her post until 2003. Ms al-Jibali was appointed to the Supreme Constitutional Court[47]. Egyptian women have been striving to attain the bench for over 50 years, Egypt being the cradle of the Arab women's movement. However, the campaign for women judges has come up against entrenched attitudes. Negus reports that, if asked, a large percentage of the population would say that women are not fit to sit on the bench, claiming that they are too easily swayed by their emotions and would be too soft on criminals. However, both major state theologians, the Grand muftī and the Grand *shaykh* of *al-azhar*, have made statements favourable to the appointment of women judges; so has the Supreme Guide of the Muslim Brothers.

Analysing the situation in other Islamic countries, it becomes clear that female judges in the Islamic world are not a normal feature of the legal system. At the same time, though, exact statistics and information are difficult to obtain, and as of yet little research has been done on the topic. In comparison to these countries, Afghanistan may even be regarded as one of the more progressive Islamic countries. This is not only shown by the statement of Walid Huquqi quoted above as an expression of 'operative Islamic law' in Afghanistan, but is also evident in the aforementioned statutory law and the practice of appointing women that began in 1969. There are, as it seems, no general restrictions imposed on female Afghan judges. Unlike their female colleagues in Iran, Afghan female judges can sign their judgements and, it appears, may also be criminal law judges, at least according to the statute book. Thus, we can infer that there is obviously a strong tendency in Afghan 'operative Islamic law' to accept female participation in the judiciary, a tendency that is indeed older than those in other Islamic countries and predates such developments even in Egypt[48].

When considering the participation of women in the jurisdictional system in 'operative Islamic law', it is necessary not only to investigate the existing laws and the position of the Sharīᶜa, but also to take into consideration legal practice in particular. This is the point where the informal justice mechanisms of Afghanistan, known as jirga/shūrā, have to be considered. What is the role of women in these institutions? The emphasis on informal, non-judicial mechanisms for resolving disputes has been described partly as a reaction to the imposition of foreign models of justice (especially in the time of Soviet rule), which were perceived by Afghans as being incapable of properly serving the

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[47] *Negus*, Cairo Makes Belated Progress on Gender Equality (2003): <www.lebanonwire.com/0301/ 03012020DS.asp>.

[48] Discrimination does occur, however: in 2002 the Supreme Court dismissed a female judge for not wearing the *heğāb* during a meeting with US President George W. Bush. Marziya Basil was among a group of 14 female government officials who attended computer and management courses in Washington. She was sacked days after her return to Kabul. See: <www.lists.kabissa.org/lists/archives/public/womensrightswath-nigeria/msg00571.html> from 12.03.04.

interests of justice. The prevalent lack of confidence in formal justice mechanisms, combined with recent delays in rebuilding a formal judicial system, has perpetuated a strong reliance on informal justice systems in many areas. It is noteworthy that prior to the Taliban takeover, it seems not to have been unusual for villages in some districts to have had women's shūrā, or even sometimes for women to participate in a mixed shūrā[49]. And, what is more important: in the Constitutional Loya Jirga, one-fifth of the members were women. This important jirga on the national level could well serve as a top-down model for the jirgas and shūrās on the local levels[50]. It has to be stated here that in the 1970s the Ministry of Justice had already introduced an experimental scheme for establishing local reconciliation councils, the so-called *jirga-ye ṣolḥ*. Eight councils were set up in various localities across the province of Kabul in 1974. These were authorised to deal with minor civil, property, and family disputes; they were organised under the supervision of the local primary courts; and their main function was to settle disputes through the agreement of the parties. Surely, as Kamali argues in his book in 1985[51], this scheme would also flourish at the beginning of the 21. century among tribesmen known for their skill in employing consultation to settle disputes.

However, at the same time, these institutions on the local level pose several problems: First, women are not always allowed to participate. Second, as there are no court records, there is so far no transparency in terms of litigation and settlement. And, third, these jirga/shūrā often act as instances of criminal justice. In the past, customary practices which are sometimes absolutely contradictory to Islamic law have been sanctioned by local jirga/shūra, such as the custom of *badd*. This means, for example, that girls are brokered to meet debts or are offered as a settlement to resolve conflicts arising from feuds[52]. These practices contradict not only international human rights standards, but also contravene Islamic law and the statutory law of Afghanistan[53]. The Marriage Law of 1971 simply enacted that 'marriage may not be contracted in exchange of pore and badd' (Art. 21). The solution to this problem is to be found in the question of whether and to what extent it will be possible to preserve, on the one hand, a useful decision-making institution such as the jirga/shūrā, rooted particularly in rural and tribal society and backed by tradi-

[49] *Johnson/Maley/Thier/Wardak* (note 19) 30.

[50] *Ali* (note 3) 135 also argues for the usefulness of the top-down approach to women's participation in public life, citing for instance the example of Benazir Bhutto, elected Prime Minister of Pakistan in 1988.

[51] *Kamali* (note 9) 198-199.

[52] Another practice forbidden in Islam is shighār, the exchange of women to minimise the dowry.

[53] *Kamali* (note 9) 91; *Johnson/Maley/Thier/Wardak* (note 19) 7, argue that is necessary to harness the authority of these local councils. They write: 'While they are unable to do much about major warfare, elders and community groups have shown themselves capable of defusing the law-level insecurity that can make life a misery for ordinary citizens'.

tion, and to control, on the other hand, the scope of jurisdiction to be exercised by these institutions.

To sum up: in all parts of operational Islamic law in Afghanistan, even in traditional law as represented in the meetings of the jirga/shūrā, women can and do participate, but are outnumbered heavily by men. There is still an extremely strong reluctance, as evident in statements made by male jurists and judges, to accept women in these positions.

As in other Islamic countries, the social practice and the traditional structure of society, based on a patriarchal system, play an important role in Afghanistan. As Sardar Ali argues for Pakistan, women have a layered identity, each 'layer' outlining certain rights and obligations. Customary practices are not uniform and vary from region to region; this is true not only for Pakistan, where Pashtuns live as well, but also for the multi-ethnic society of Afghanistan. Yet the same trend seems to be asserting itself in both Pakistan and Afghanistan (and other Islamic countries): women being forced into subordinate positions in line with traditional perceptions of society and family life. Ali argues[54]:

> This notion is so deeply entrenched in the popular psyche, that even where religion and formal law gives a certain right to women, its denial by sheer force of custom invariably prevails.

This social perception of women's subordination is often justified by pseudo-scientific and pseudo-psychological arguments: a woman's mental state and sensitivity, her biological disposition as the bearer of children, etc. make her unable to take part in society on the same level as men. This 'biological' theory is, by the way, not altogether unknown in Western history: in late 19. century Europe, biology was used to argue that women were ruled by their – unruly – emotions, less likely to listen to the voice of reason, and were therefore a potential danger that had to be contained[55]. This pseudo-scientific perspective was turned in late 19. century England and other European countries into a powerful and convincing argument against the full public participation of women[56]. Schwarz argues convincingly that, given the dramatic social transformation stemming from the Industrial Revolution and confronted with the uncertainty of a life in which relations and gender concepts changed in line with its material conditions, men employed the language of science to (re-) define woman's 'proper' place of subordination[57].

However, 'operative Islamic law' in Afghanistan, which had already granted women the right to be judges in the 1970s, and the argument put forward by

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[54] *Ali* (note 3) 174.

[55] *Schwarz*, 'They cannot choose but to be women': Stereotypes of Femininity and Ideals of Womanliness in Late Victorian and Edwardian Britain, in: Political Reform in Britain, 1866-1996, *Jordan/Kaiser* (eds.) (1997) 133-150 (147).

[56] *Schwarz* (note 55) 133-150.

[57] *Schwarz* (note 55) 133-150 (133, 149).

Walid Huquqi, show that this kind of biological argumentation, rooted in the traditional structure of Afghan society, no longer seems to be appropriate in Afghanistan, where women have acted and still act as female judges. This impression is underlined by Art. 54 Constitution 2004, which explicitly calls for 'the elimination of traditions contrary to the principles of the sacred religion of Islam'. To overcome the difficulties women still confront in a highly traditional society, Kamali has argued in his analysis of the Afghan judiciary that, in a first step, the number of women in family courts should be increased. He argues that in both urban centres and rural areas the people could be persuaded by the logic of having a woman judge presiding over family disputes, as traditionally it is even more acceptable for women to communicate with other women. Any legislation and court regulation that concerns women should emphasise attendance in person and eliminate, as far as possible, women's representation through agents, guardians, and proxies[58]. Concerning the percentage of women at law and Sharīʿa faculties, Iran in particular is an example of an interesting development: the number of women with a traditional training in the classical sources of law such as the Qur'ān and the sayings of the Prophet are increasing, and many feminists – even if they believe in different social roles for men and women – are trying to accommodate to current needs by reinterpreting the scriptures[59]. They actively take part in the legal discourses in their countries and vote on the basis of the inherent dynamism of the Sharīʿa for an interpretation of the texts that gives more emphasis to the equality between the sexes.

C. Women as Witnesses

I. Classical Islamic Law

Regarding the question of the role of women as witnesses, there is a text in the Holy Qur'ān sura 2, verse 282:

> O ye who believe! When ye deal with each other, In transactions involving future obligations In a fixed period of time, Reduce them to writing ... And get two witnesses, Out of your own men. And if there are not two men, Then a man and two women, Such as ye choose, For witnesses, So that if one of them errs. The other can remind her.

The opinion prevails that in classical Islamic procedural law a woman's testimony has thus been normally considered worth half that of a man's. But the problem is more complicated than it seems at first sight. All schools of law agree that the number of witnesses in all cases with the exception of unlawful

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[58] *Kamali* (note 9) 198.

[59] *Kar*, Women's Strategies in Iran from the 1979 Revolution to 1999, in: Globalization, Gender and Religion, *Bayes/Tohidi* (eds.) (2001) 186.

intercourse (*zinā*) is to be two males, and that in property cases there have to be two male witnesses or one man and two women. There are, however, differences in the acceptance granted to the testimony of women in the ḥudūd, which is not accepted by the majority of jurists but by the *ẓāhirī* madhhab if there is a man among them and if there is more than one woman[60]. Abū Ḥanīfa accepted women as witnesses, not in ḥudūd but in cases concerning the body, such as divorce, returning to one's wife after divorce, marriage, and manumission; Mālik, however, refused to accept the testimony of women in cases concerning the body[61]. On the other hand, in issues of fact dealing exclusively with the female body, the testimony of two female witnesses, when corroborated by a male witness, is enough to win the claim[62]. In his article *Two Women, One Man*, Mohammad Fadel argues[63]:

> Instead of the cliché that in Islamic law, a woman's word is worth half of a man's, a more meaningful characterization of Islamic evidentiary discrimination against women would be that medieval Islamic law imagines legal disputes taking place across a public-private continuum. Because public space is regarded as man's space, the admissibility of women's testimony gradually decreases as the nature of the claim acquires more and more of a public quality. Thus, in a dispute regarding whether a baby was stillborn or died after birth, for example, the testimony of two women is sufficient, despite the fact that the dispute is both financial, in that the fact in question establishes rights of inheritance, and bodily, in that it establishes non-monetary legal obligations. The private nature of the event precludes a male (public) presence, and therefore the law admitted the testimony of women uncorroborated by the testimony of men.

Furthermore, the ḥanafī Khassāf (d. 874) interestingly wrote on the process of certifying the reliability of witnesses: 'Only those women from among the witnesses should be questioned who are intelligent (*barza*) and mingle and have contact with the people. Many things are reported from them and they can distinguish (*mumayyiza*).' Jaṣṣāṣ (d. 980) added in his commentary: 'Because a woman, if she is like this, she is like the men in the chapter of transmission (*istikhbār*)[64].' This argument seems to point to an equality of the testimony of men and women in cases where the women were considered intelligent and believed to have insight into affairs, faculties stemming from the fact that they did not live in seclusion but mingled with other people and thus knew the society and the public sphere as well as the private sphere. This argument was used by the two ḥanafī jurists, but only in the context of certifying the reliability of witnesses.

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[60] *Al-Awa*, Confession and Other Methods of Evidence in Islamic Procedural Jurisprudence, in: Criminal Justice in Islam: Judicial Procedure in the Sharia, *Haleem et al.* (eds.) (2003) 111-129 (120-121).

[61] *Ibn Rushd* (note 23) 464; *Al-Kāsānī* (note 29) 277.

[62] *Fadel*, Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought: Int. J. Middle East Stud. 29 (1997) 185-204 (194).

[63] *Fadel* (note 62) 185-204 (194).

[64] See also for another source: *Fadel* (note 62) 185-204 (195).

The alleged fact that women were more prone to error was explained by the commentators of the Holy Qur'ān as a result of their 'nature'. Fakhr al-Dīn al-Rāzī (d. 1210) explained that a woman's different biological nature made her more prone to forget than a man. However, Fadel shows that Ibn Qayyim al-Jauziyya (d. 1350) argued that if a woman was believed to be reliable in her testimony regarding financial dealings, she must be assumed, all things being equal, to also be reliable in other areas of life[65]. According to Fadel's research, both Ibn Taymiyya (d. 1328) and Ibn Qayyim al-Jauziyya rejected the rule that two women equal one man. They argued that this rule resulted from ignoring the difference between recording testimony for the purpose of protecting a right in the event of a future dispute, known as *taḥammul al-shahāda*, and testifying before a judge, known as *adā' al-shahāda*. They argued that the admissibility of testimony is not determined by gender, but rather by credibility[66]. This would point to the existence of different opinions, also with regard to the testimony of women, and that at least in the *ḥanbalī* school of law, to which Ibn Taymiyya and Ibn Qayyim belonged, the verse could be understood differently. Ibn Taymiyya and Ibn Qayyim al-Jauzīya are not only outstanding figures among the medieval jurists, but also have influenced modernist reform discourses on Islamic law and are held in high esteem in modern Saudi Arabia.

II. Operative Islamic Law

Modernists have tried to find more appropriate interpretations for this verse. In his interpretation of Holy Qur'ān sura 2, verse 282, the celebrated Egyptian modernist and reformer Muḥammad ᶜAbduh (d. 1905) denied that the requirement of two female witnesses was based on the different nature of men and women; instead, he argued that both men and women have the same capacity for remembering and forgetting, the sole difference being that the different economic roles of men and women in society made each vulnerable to forgetting those things which were not part of his or her daily experience[67]. Sayyid Quṭb (d. 1966), on the other hand, argued that it was the woman's psychology – specifically her motherly instincts – that prevented her from possessing the objectivity necessary for a witness[68].

Fazlur Rahman undertook a new interpretation of the verse. He criticised the classical understanding of Holy Qur'ān sura 2, verse 282, according to which it has to be seen as a general law to the effect that under all circumstances and for

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[65] *Ibn Qayyim al-Jauziyya*, Iᶜlām al-muwaqqiᶜīn ᶜan rabb al-ᶜālamīn III, 95; *Fadel* (note 62) 185-204 (197).

[66] *Fadel* (note 62) 185-204 (196-199).

[67] See *Muḥammad ᶜAbdūh* in *Riḍā*, Tafsir al-Qur'ān al-ḥakīm al-mashhūr bi-tafsīr al-Manār, Tafsīr XII (1999) 3, 105; see *Fadel (note 62)* 185-204 (187).

[68] *Fadel* (note 62) 185-204 (187).

all purposes a woman's evidence is inferior to a man's. Rahman argued that the verse does not show the slightest intention of proving any rational deficiency in women vis-à-vis men. He pointed to the fact that women have not been denied the ability to be witnesses. This, he argued, is clear from classical Islamic law which regards women with knowledge of gynaecology as the most competent witnesses in cases involving gynaecological issues[69]. Thus it could be argued that the verse has to be understood instead against the background of 7. century Arabian society, in which women did not participate in the public sphere of life at all. The verse could hence indeed be understood as a corrective of the complete non-recognition of women as legal persons in pre-Islamic times[70].

Muslim modernists argued that the apparent rule established by this verse was neither universally applicable across time nor generally applicable to all cases tried by a court. With regard to fiqh literature, Fadel has analysed the gender-based distinctions established in the medieval Islamic law of testimony and reached the conclusion that the arguments have to be considered political and not epistemological. As women were always given the right to equality in the transmission of knowledge as well as in the context of fatāwā, they surely were not generally considered unable to gain, preserve, and communicate knowledge to others. Fadel wants to show that the line drawn was between testimony (shahāda) and verdict (ḥukm) on the one hand and narration and fatāwā on the other. He coined these two discourses the political and the normative discourse[71].

Putting aside these intellectual discourses, it seems necessary to take a look at the legal practice as reflected in the legislation of the Islamic countries and their jurisdiction and 'operative Islamic law'. An analysis of the modern procedural law in legislation as well as criminal and civil jurisdiction is unfortunately beyond the scope of this article. Here only piecemeal information forming the basis of such an analysis can be collected and indicated. Regrettably, in his richly documented analysis of the application of Islamic law in Saudi Arabia, Frank Vogel does not refer to the role of female witnesses. This would have been of special interest, because the Saudi jurisdiction seems to rely heavily on Ibn Taymiyya and Ibn Qaiyyim al-Jauziyya, the two ḥanbalī jurists arguing in favour of more equality for female witnesses[72]. However, considering the conservative position of Saudi Arabia in family law and legal questions concerning the position of women – in Saudi Arabia women are even prohibited to drive – it is not very likely that a single woman's testimony is accepted in Saudi courts. In Tunisian law, female and male witnesses are

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[69] Quoted in *Ali* (note 3) 71.
[70] *Ali* (note 3) 71.
[71] *Fadel* (note 62) 185-204 (188-194).
[72] *Vogel*, Islamic Law and Legal System. Studies of Saudi Arabia (2000) 144-147.

equal[73]. Stephanie Waletzki, however, reports that in a case of marriage in Bardo in 1994, the judge rejected a female witness and summoned two female witnesses[74]. The law on evidence in Pakistan formerly made no reference to any such conditions, and the evidence of male and female witnesses was, according to Sardar Ali, always considered equal. The period of islamisation in the 1970s made this equality a thing of the past. However, according to Ali, the law of evidence has never yet been invoked in a court of law. Ali takes this as an argument for the strength of an 'operative Islamic law' that has evolved over the years. She warns, however, that although the law devaluing the evidence of a woman has never been invoked, this is no assurance that it will not be put to such use in the future, leaving women in a very uncertain and indeed vulnerable position with regard to their legal personhood[75].

In Iran, Art. 73 of the Penal Code of 1991 requires for the proof of zinā four male witnesses or three male and two female witnesses. The Iranian legislator thus followed a minority opinion of the shīʿī madhhab. Outside of penal law, the testimony of a woman is considered equal to that of a man[76]. In their analysis of Islamic law in Sudan under Numayri, Layish and Warburg state that sect. 3 of the Sudanese Evidence Act of 1983 clearly manifested the norm that a woman's testimony is tantamount to half that of a man's and this norm is also applied in practice. On issues of criminal procedure, according to sect. 316 (2) of the Penal Code of 1983, four male witnesses are required whilst women's testimony is not accepted at all. The code does not mention whether the witnesses must be male or female, apparently because this is not necessary given the known Sharīʿa norm and the Judgements Basic Rules Act of 1983, which provides that a judge shall presume that the legislators did not intend to contradict the Sharīʿa[77]. As women have been trained in Sudan to become judges in criminal cases as well[78], this would mean that women could be judges in cases where women were not admitted as witnesses.

Perhaps better than anything else, this situation prevailing in Numayri's Sudan demonstrates the inconsistency of 'operative Islamic law' and the discrepancy between different interpretations, caused on the one hand by the inherent flexibility of Islamic law and by the social, economic, and political conditions for applying a modern law on the other. Especially in cases where naṣṣ is given, it seems difficult to find solutions on a level of intellectual discourse for ensuring the consistency of Islamic law and the rules of gender equality as laid down in the UDHR – to which all Muslim countries are signato-

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[73] *Waletzki*, Ehe und Ehescheidung in Tunesien: Zur Stellung der Frau in Recht und Gesellschaft (2001) 156.

[74] *Waletzki* (note 73) 156.

[75] *Ali* (note 3) 102-103.

[76] *Tellenbach*, Strafgesetze in der Islamischen Republik Iran (1996) 14, 48.

[77] *Layish/Warburg* (note 46) 252.

[78] *Layish/Warburg* (note 46) 255.

ries. The example of Tunisia shows that even where the legislation adheres to this standard of equality, juridical practice may be different. However, as Ali states for Pakistan, an important dimension of 'operative Islamic law' at the domestic level is the use of international human rights standards[79]. This is especially applicable to Afghanistan, where in the coming years the legislation will have to revise the whole body of existing statutory laws in the light of the new constitution, which includes adherence to such international conventions as UDHR and CEDAW as well as to the religion of Islam. As has been shown above, the aim of classical Islamic procedural law is the implementation of justice. At the beginning of the 20. century, the abandonment of the classical system of judiciary consisting of the qāḍā' without any other institutions of appeal was not considered to be a problem in achieving this aim and imposing a modern system of jurisdiction. In almost every Islamic country, a sequence of courts can be found today. Furthermore, no substantial arguments can be brought forward against women as judges. This could pave the way for women to being accepted as full witnesses in procedural law. Justice, it seems, can only be archieved with the full participation of women. Fortunately, however, the implementation of the equal status of a female witness is guaranteed in Afghanistan, because the 2004 Constitution itself guarantees the equality between men and women before the law.

[79] *Ali* (note 3) 191.