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***“A Constitution for Afghanistan
Women’s Rights: Equality as
Constitutional Goal”***

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In the process of refounding the nation of Afghanistan, after 23 years of war and peace not yet fully restored in the country, it is important to consider which instruments a constitution may provide to safeguard a democratic future. In particular, Afghans will have to decide which form of government, which kind of separation of powers, which structure of legal protection the country needs and wants. But also a constitution will have to answer the quest for protection of fundamental rights. Which rights will be guaranteed in the future, and more particularly, which rights will men and women have in Afghanistan, to provide for safety, respect and equality of all citizens of a nation?

But constitutions are peculiar kinds of law.

- They have to be short – to allow, particularly in a state of transition, for developments in the future.
- They have to be clear – to state the fundamental things in detail, as stable safeguards against discrimination particularly of those vulnerable in society.
- They have to be adequate – and “fit” the nation’s needs and history and to meet all these requirements, is a difficult task.

In addition, constitutions are peculiar in yet another way: This is because there are good constitutions, and there are bad constitutions, throughout the world. Some think that bad constitutions are those which are poorly phrased. But this is not true. Bad constitutions are those which do not have a reality of constitutionalism to them. And some think a good constitution is a wonderful text with everything in it we are dreaming of. But this is not true either: Good constitutions are, primarily, those which work for all, men and women alike, without discrimination.

Therefore, in the discussion of women’s rights in the Afghan constitution, there is a need to address two points at the same time. First, the task is to frame short, clear and adequate rights. And second, the task is to make them work. More precisely, there is a need for a coherent set of rights needed by people, men and women alike, in Afghanistan. Luckily, there is an international consensus, in and beyond the Islamic world, on the importance of fundamental rights. Also, the 1964 constitution of Afghanistan provided for many of those, and is formally in place. And finally, one can work on the basis of ratification of all major human rights documents by Afghanistan.

In addition, there is a need to provide for a constitutional frame of legal structures, because we know that today the legal system is underfunded, regulations including the constitution are not accessible, there is even some uncertainty regarding the validity of the 1964 constitution, and state laws and state courts – different from religious laws and religious courts – are often absent. I will address fundamental rights first, and a working legal system at last.

I. FUNDAMENTAL RIGHTS

The fundamental question which needs an answer in the process of drafting a constitution for Afghanistan pertains to the status of the right to equality, as a right against discrimination, in this constitution. We may all agree that a phrase on equal rights should be part of the constitutional text. But the crucial question is:

- Will equality govern the constitution, or will it not?
- Will equality be a principle, a promise, or will it be a right, enforceable in court?,
- And will equality of women and men be one aspect next to others, or will equality be a principle and a right which informs the whole of constitutional law there is?

I will illustrate this point by briefly sketching some of the many rights which seem to be of importance; luckily, they are already part of the international law Afghanistan ratified so that we have solid starting points

A. Life, health, dignity

First, there is violence against women, and there has been and still is exclusion from public life

There is thus a need for security, for safety from violence –

And the constitutional answer to this need is

- a right to life;
- a right to health including non discriminatory access to health care, as an entitlement, not a privilege – which is already granted in Art. 14 (2) b CEDAW, to life and survival Art. 6 ICCPR, standards Art. 12 + 2(2) ICESCR;
- a right to individual and independent freedom of movement – which is already granted in Art. 13 + 2 UN, Art. 12 ICCPR sec 3: with the restriction on the basis of public order, morals not discriminatory based on gender;
- a right to justice, including non-discriminatory access to legal protection in secular courts, to individual legal representation, to a fair trial, including non discriminatory assessment of evidence,
- a prohibition of all cruel and degrading treatment, by public and private parties alike,

a right to dignity, and to individual self determination, in all spheres of public and private life.

Thus, in all these fields, the goal is freedom from discrimination.

Living standards, family

Second, there are over 40000 widows in Kabul
There is thus a need for minimum living conditions

And the constitutional answer to this need is

- a right to dignity, and a right to social justice and support for those in need – guaranteed in Art. 15 Egypt for war veterans and family members hurt by war;
- a right to justice in the family, safeguarded by regular family (not women) courts,
- a non discriminatory right to property and inheritance,
- a non discriminatory right to extend citizenship to those Afghan men or women marry.

And in all these fields, the goal is, again, freedom from discrimination

Here, it becomes particularly obvious that the status of the right to equality is particularly important, and that just a principle somewhere will not do. In family law, a detailed discussion of adherence to principles of Islamic law is needed, since it is, next to inheritance rights, the field in which Islamic law is more explicit than in others, and in which it is not entirely clear what a constitution devoted to the fundamental right to equality necessarily entails. The goal is, in an effort towards something which I would call islamic constitutionalism, to fully respect equality and to respect Islamic principles, and not to sacrifice one for the other.

Looking at constitutions around the world, there are different ways to refer to Islam in a constitution, crucial among which is that the constitution safeguards the positive and negative right to religious belief, fully compatible with the principles of the Q´ran. In addition, if the Afghan people consider a reference to Islam important, it seems advisable to refer to Islamic law in a principled way, stating that, for example, “The constitution is binding for all public authorities and shall be respected by all Afghan citizens in all spheres of life. It is based on deepest respect for Islamic law and jurisprudence. Thus, it shall be construed to adhere to fundamental rights and the principles of Islamic belief alike.”

B. Education, work

Third, there is an uneducated generation of girls.
There is thus a need for education and meaningful work

And the constitutional answer to this need is

- a right to education, non discriminatory in access and content – which has to be added to Art. 16 of the current constitution, and is already granted in

Art. 26 UN, 13, 14 ICESCR, 10, 14 (2) d CEDAW, 28 CRC, also in Art. 18, 21 Egypt, and is part of the demands of the Afghan Women Network;

- a right to access to professions, without distinctions based on gender, and to fair working conditions – which is already part of Art. 23 (1) UN, 13, 14 ICESCR, 10, 14 (2) b CEDAW, also: 13 Egypt.

Thus in all these fields, the goal is freedom from discrimination.

C. Equality

This leads back to a consideration of the right to equality. Equality is guaranteed in Art. 2 UN, 2 ICESCR, 26 ICCPR, CEDAW et al. If we look at the German and at the international experiences, we see that constitutions only work for women and men if all rights are granted in a non discriminatory fashion. History, including the history of the German Basic law which was needed and used to restructure the nation after 1945, tells us that non discrimination needs to be explicit and fundamental even to fundamental rights. Thus, it may be wise to consider a clause which states¹

- a general right to equality – to be found, for example, in Art. 3 I Germany, or, as equality of opportunity, in Art. 8 Egypt, and demanded by all major NGO's like in the Declaration of the Essential Rights of Afghan Women of 2000;
- specifically the prohibition of discrimination based on gender, family status, ethnicity, belief, and opinion, in all aspects of life;
- and more specifically the acceptability of positive measures to create equal opportunities for those who have been discriminated against, for example as a guarantee for equal representation of women and men in the political organs which rebuild the nation.²

The most important constitutional asset to this is to state that equality shall be applicable across the board, and an enforceable right for all.

¹ See also art 11 of Egypt: proper duties, considering her equal with man in all spheres of life; See also Art. 3 No 14 Iran: equality before the law, Art. 20 equal protection in conformity with Islamic criteria, Art. 21: state obligation to ensure “good motherhood”, rigid family roles. Examples are Art. 3 BL Germany, Art 20, 23 European Charter

² An allotment of a minimum of seats in decisive organs, like the Loya Jirga, is known to various legal systems, like in the loi de parité in France, or in the equality act of Finland, or in the committee nomination law for many public committees in Germany. It is also a demand by RAWA, WLUML and other NGO's.

II. A WORKING LEGAL SYSTEM

With this remark on the importance of the status of fundamental rights, I get to the structures which make a constitution work. When we reach a consensus on fundamental rights, we have to think about their enforcement.

“Enforceability” is the quality equality needs;

and Participation is the key to future justice under constitutional law.

Thus, resources for training seems to be key, and building acceptance seems to be crucial. In this area, coherence and institution building are generally important, but they are also of specific importance to women.

Women have been excluded from public life. There is an underrepresentation of women in all organs of society and political life. Yet it is crucial that women are part of the process of recreating Afghanistan the way the people of Afghanistan want it.

A working legal system thus means that participation of men and women in all public matters is ensured, by rights to access, to vote, to form parties and associations, to have a place for gender equality in the government and in parliament. This means:

- freedom of association, including the right to form, join, exit, and work in an association, without any distinctions based on belief, political opinion, ethnicity, or gender, already granted in Art 22,21 ICCPR, Art. 20 +2 UN;
- freedom of expression, already granted in Art. 19 ICCPR, under sec 3 with restrictions on the basis of public order, morals, but free from discrimination of women;
- non discriminatory elections, including the obligation of the state to enable men and women alike to take part in voting. If there is ever a constitutional referendum, will the constitution voted upon be known to all, women and men, in all regions of the nation? Again, it seems most important to create legal knowledge as local knowledge, to spread the constitution.
- non discriminatory access to public offices, including to positions as judge or prosecutor, – comparable to Art. 33 II Germany, or Art. 14 Egypt;
- the guarantee of courts, particularly and explicitly including family courts,

Thus in all these fields, the goal is, again, freedom from discrimination.

III. CONCLUSIONS

To include fundamental rights in constitutions is walking a fine line. On the one hand, a majority has to accept these rights, and found a national identity on this respect. Yet on the other hand, these rights have to guarantee freedom of those who are not the majority, and equality to those not always considered equal. This constitutional dilemma has to be solved, in processes of transformation and nation building around the world. It is not specific to Afghanistan, nor is it specific to any islamic country. But it is a challenge to every society dedicated to base the frame of the future, the constitution, on democracy, which means equality, liberty, and dignity of all.

If equality is fundamental to Afghanistan, the constitution needs to state that clearly. It will then guarantee equality as a truly fundamental right, informing all others, and valid in all spheres of life. It will then guarantee equality as a principle and as a right against discrimination.

If equality shall mean something, it will be defined, in accordance with international law, as freedom from discrimination based on gender.

If this shall not only be a promise, but work, and be meaningful, the constitution will guarantee rights to education and employment, political rights free from discrimination, rights of access to courts and legal protection

A “good” constitution is a constitution known to and used by the people.

Susanne Baer

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Abbreviations/Documents used:

CRC – Convention of the Rights of the Child – signed 1990, ratified 1994

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women - signed 1980

ICESCR – International Covenant of Economic, Social and Cultural Rights, ratified 1983

ICCPR – International Covenant on Civil and Political Rights, ratified 1983

Egypt – The Constitution of the Arab Republic of Egypt 1980, referendum

Germany – Basic Law of Germany

Iran – The Constitution of the Islamic Republic of Iran, adopted 1979, amended 1989

WLUML – Women Living Under Muslim Law