



Afghanistan Rule of Law Project پروژه امور عدلی و قضای

LEGAL RESEARCH JUDICIAL TRAINING COURSE

COURSE SYLLABUS

The purpose of this Legal Research course is to provide judges with the tools that they need to identify legal issues and to locate and effectively use the sources of law available to correctly decide those issues. The course is designed to be taught over eight one-hour class periods as follows:

Class Period 1: Importance of Legal Research

Class Periods 2 – 4: Identification and Formulation of Issue(s) to be Researched

Class Period 5: Sources of Law

Class Period 6: Finding the Sources of Law

Class Period 7: Exploring the Sources of Law

Class Period 8: Unsuccessful Legal Research and Class Evaluation

The course will focus on book legal research and computer-assisted legal research, and the materials include a DVD of a power point presentation on methodology for Class Periods 6 and 7. However, the materials can be easily and effectively presented without the use of the power point presentation. Likewise, the materials may be used as a reference resource by judges. For this purpose, **the DVD also includes** the Official **Gazettes**.

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Importance of Legal Research (Class Period 1)

Questions for class discussion:

How are cases decided?

What is the duty of the judge in deciding a case?

What does the Constitution say?

What does the Regulation of Judicial Conduct say?

Why is legal research important?

Lecture Materials:

Introduction: Judges hear cases, either in preliminary proceedings or trials (or on appeal). Relevant evidence is introduced by the two parties, and following the proceeding or trial, the judge (or panel of judges) renders a decision. The purpose of the decision is to correctly resolve all the legal issues presented in the case. To resolve the legal issues, the judge must first decide which facts have been proven, and then apply the relevant law to those facts. Without identifying and applying the relevant law, the legal issues cannot be properly decided and the correct decision rendered. Legal research is needed to identify, locate, and analyze the applicable law.

Constitution: Article 129 of the Constitution states in pertinent part that “[t]he court is obliged to state the reasons for the decision it issues.” This is an important requirement because if reasons are not stated, the parties and attorneys, and by extension the public, can not know the basis for a decision and will not have trust and confidence in the decision, and by extension the courts and the judiciary. Part of the reasoning explained in the decision must include the application of the relevant law to the facts proven in the case.

Regulation of Judicial Conduct: Judges are expected to know and follow the law. This expectation, which is logical and self-apparent to the parties, attorneys, and the public, has been codified as an ethical principle in the Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan, adopted by the Supreme Court on 19 June 2007.

Article 3 of the Regulation states as follows:

The independence and neutrality of a judge are the sole guarantees to ensure the administration of rights and the dispensing of justice. Hence, the judge shall be required to strictly prevent any interference, or attempt at interference, in the affairs that fall within his or her jurisdiction by other authorities or persons, including relatives. He or she shall respect and comply with the law, and shall

bear in mind that in exercising his or her judicial functions, he or she shall not be subject to any authority other than the authority of the law.

Article 18 of the Regulation states as follows:

To be able to adjudicate fairly and equitably, a judge shall be knowledgeable of all international laws, treaties, and conventions to which Afghanistan is a signatory, and stay committed to their implementation. A judge shall take reasonable steps to maintain and enhance his or her knowledge and skills necessary for the proper performance of judicial duties, taking advantage for this purpose of training which will be made available by the judiciary.

The official comments to article 18 state as follows:

Judges must make their decisions in accordance with the Constitution and laws of Afghanistan, and all applicable international laws, treaties, and conventions. Existing laws are amended or repealed, and new laws are enacted. The education of a judge, therefore, continues throughout the judge's term in office. The Supreme Court will provide continuing judicial education for the judges in Afghanistan, and the judges will be required to complete a certain number of hours of continuing education and training during a specified period. Likewise, judges with knowledge and expertise in certain subject areas will have a duty to act as trainers in the continuing judicial education program.

Public Trust and Confidence:

Ultimately, correct decisions play an important part in the process of building public trust and confidence in the courts. People who bring a case to court expect, and have a right to expect that the judge will know the law and apply it correctly. Therefore, it is extremely important that judges have access to the law, and that they have the ability to identify the legal issues involved in a case and identify the law applicable to the resolution of those issues.

Questions?

Conclusion: In the next hour we will talk about the importance of precisely identifying the issues presented in a case for decision before beginning the legal research.

Identification of Issue(s) to be Researched (Class Periods 2 – 4)

Hypothetical Scenario One (Class Period 2)

A person with the identifications mentioned for the plaintiff came to legal primary court of Qara Bagh District of Kabul Province. At the time, he was enjoying his legal capacity

and he had brought the mentioned defendant with the identifications provided above with him. The defendant was also enjoying of his legal capacity. The petition letter of the plaintiff was addressed to the primary court of Qara Bagh District of Kabul Province as provided bellow:

Hereby, I, the plaintiff with the identifications provided above, while enjoying my legal capacity, have a complaint against the defendant who is here with me and enjoys of his legal capacity and his identifications is provided above.

My complaint is regarding a piece of agricultural irrigated land that is 2000 square meters located in Estarghach Village of Qara Bagh District of Kabul Province which is attached from east side to a land belonging to Amin son of Nadir grandson of Qadir, from west side to public road, from north side to the wall of the local grand mosque and from south side to a public stream. This specific piece of land is my property according to legal deed number 0214/156 dated 2/2/1384 (Hijri Shamsi). I have this deed which is original and has its registration number by the judicial division. I used this land as its owner cultivating crops in it from 2/2/1384 to 5/2/1385. I went abroad to pursue higher education in France afterwards and the defendant misused the situation and taking advantage from my absence, he usurped my land while he was a mature man and enjoyed his legal capacity. He occupied this land which is my property without any legal or religious ground. I request the respected court to order the release of my property from the defendant and make him to hand it over to me according to paragraph (1) of Article (765) of the Civil Law, and Article (286) of the Civil Procedure Code.

After writing of the summary of the case, in accordance with Article (215) of the Civil Procedures Code, the plaintiff was asked to bring two witnesses on adverse possession in the judicial session.

Both parties were informed of the upcoming judicial session on 10/01/1386 and they came to the court at the mentioned time. According to the Article (48) of the Civil Procedures Code the session was officially started and the complaint of the plaintiff was read before the defendant and the defendant understood its content. The mentioned plaintiff was asked to present his two witnesses on adverse position, as it was asked from him before hand, namely, Ahmad Mobeen son of Sediq grandson of Nasim, and Jafar son of Akhtar grandson of Momin , whose names were already provided to the court. The plaintiff answered yes, these two persons are the witnesses I promised to bring to the court, and I request the respected court to let them come to the judicial session room in order to testify before the court. The permission was made and the first witness, Mr. Mobeen, while the second witness was outside the session room, came to the session and started his testimony as provided bellow:

I testify that a piece of agricultural irrigated land which is an area of 2000 square meters located in Estarghaj Village of Qara Bagh District of Kabul Province and is attached from east side to a land belonging to Amin son of Nadir grandson of Qadir and from west side to public road and from north side to the local grand mosque and from south side to a

public stream belongs to this plaintiff according to his legal ownership document. Currently, I see that the property is in the hand of this defendant who has usurped it.

After this, the second witness was permitted to come to the session and he stated that:

I testify that a piece of agricultural irrigated land which is an area of 2000 square meters located in Estarghaj Village of Qara Bagh District of Kabul Province and is attached from east side to a land belonging to Khalid son of Hamid and from west side to public road and from north side to the local grand mosque and from south side to a public stream belongs to the plaintiff according to legal deed number 214/156 dated 2/2/1386 issued by the primary court of Qara Bagh District of Kabul Province. But now, the defendant has usurped it.

Signatures, fingerprints and testimonies of the witnesses were all according to the claim of the plaintiff and the provisions of law, so, they were accepted by the court and the defendant was asked to answer to questions. The defendant said that the claim is not true. I need a written copy of the allegations against me and some time to prepare my written defense. According to Article (26) of the Civil Procedure Code a copy of the claim of the plaintiff was given to the defendant and a deadline was given to him to prepare his defense and be ready in the court in the next session.

The next session was held on 20/01/1386 with the presence of the both parties in continuance of the pervious session. The defendant was asked whether he prepared his written defense or not. He said yes and asked for permission to read it before the court. The permission was made and he started his defense as follows:

I, the defendant with the mentioned identifications, while enjoying of my legal capacity start my defense against the false claim of the plaintiff.

Object of the claim mentioned in the petition of the plaintiff which is regarding a piece of agricultural irrigated land which is an area of 2000 square meters located in Estarghaj Village of Qara Bagh District of Kabul Province and is attached from east side to a land belonging to Amin son of Nadir grandson of Qadir and from west side to public road and from north side to the local grand mosque and from south side to a public stream belonged to Mr. Shafiq who has brought this case before the court, but later on, he sold this property to me without any force or reluctance on 05/02/1385 for a price of two hundred thousand Afghanis. From that time, I have been the owner of this land and I have adverse possession of the property. So, his claim against me is not true and I can prove it with the available documents and I request the court to reject this claim against me.

After the end of the defense of the defendant, the summary of the case was officially registered and date of the next session was announced for the both parties.

Next session was held on 21/01/1386 in continuance of the pervious sessions and with participation of the both parties of the conflict. According to Article 213 of the Civil

Procedures Code the claim of the plaintiff and the defense of the defendant were read for the two parties and they had become aware of their contents. According to Paragraph 2 of Article of the Civil Procedure Code, first, the plaintiff was asked to present his documents in support of his claim. The plaintiff presented his original legal deed along with a letter from Archive Section of the Kabul Appeal Court that confirmed his claim. Through letter number 13/8 dated 18/01/1386 the court has asked the properties department of Qara Bagh District to provide information regarding this case, and the plaintiff presented a letter issued by the properties department of Qara Bagh District with number 71/20 dated 20/01/1386 in which it was stated that according to the existing evidences, the mentioned irrigated agricultural land that is 2000 square meters and is located in Estarghaj Village of Qara Bagh District belongs to Mr. Shafiq son of Mohammad Rafiq according to legal deed number 214/156 dated 2/2/1386.

After that, the defendant was given opportunity to present any defense, document or reason supporting his claim. The defendant said I have nothing more than what I already said in my defense; I have bought the piece of land in exchange of two hundred thousand Afghanis. The defendant was asked to present any document proving that he has bought the land but he has no document in this regards and he can not prepare any no matter how much time be given to him. He stated that his adverse possession of the land proves that he is owner of the property.

Questions for class discussion:

What type of a case is this?

What is the general area of law involved?

What are the precise legal issues presented for decision?

Where would you go to find the law applicable to these issues?

Lecture Materials:

Effective legal research depends upon a clear understanding of the issues presented for decision before beginning the research. Otherwise, much time will be wasted. Therefore, time should be spent in thinking about and identifying the issues presented for decision. Once all the issues are identified, they should be analyzed, refined, and narrowed to the point of precision, and then written down.

Then, one by one, the issues can be researched, all the applicable law identified, and the issues decided.

Hypothetical Scenario Two (Class Period 3)

Facts:

Indictment of Ms. Fakhria the defense attorney: To the esteemed commercial division of the High Court, Kabul: My identity is mentioned above, I am plaintiff by proxy and hold

all of my legal possessions against the defendant whose identity is mentioned above as well and having his complete possessions, as a proxy I file the case as below: Description of the Lawsuit: The market of Dost Mohammad located in the Jada-e-Mondavi Jadid within the authority of District 1 of Kabul city, which is the most well-known business center in Kabul, was the property of our deceased father Dost Mohammad son of Mir Mohammad grandson of Jan Mohammad permanent inhabitant of the provincial capital of Ghazni province, till his death he had complete possession over the mentioned market and had neither sold nor leased a single shop to anybody. After the death my deceased father, his property (per stirpes) has legally been inherited among us and the shop which is currently as object dispute came as a portion and share of my client Sayed Mohammad son of Dost Mohammad Due to the internal conflicts Syed Nasrullah (my client) compelled to exile, thus the object of dispute has been illegally taken over by the existing defendant and using it for his own benefit. In fact the defendant was not my client's lessee and there exists no legal contract between my client and the defendant, the defendant has arbitrarily controlled over the shop and is not ready to evict or pay its rent as appropriate. Based on the letter of per stirpes (No. 11) (905) dated 18/03/1355 the mentioned shop belongs to my client, thus the portion of each of heirs had been identified, the defendant has got no affirmative documents, he (defendant) is depends on implausible reasons and making excuses to continue his illegal ownership and as a proxy while I asked the defendant for eviction of the shop and refunding the remaining rents, he denied at the spot, and making excuses that he (defendant) has rented the shop from another person, but presenting no legal documents from the owner whom I am attorney for. My client has not allowed anybody the lease of the shop and nobody has the competence of giving on lease in his (plaintiff) absence. Such unjustifiable and illegal possessions are usurpations, the legal decision on usurped goods, is eviction only, so according to the following legal reasons, the refusal of the defendant to evict the shop is an obvious usurpation and is fully illegal: 1- article 40 of the constitution states as: Property is immune from invasion. 2- Articles 1900 and 1904 of the civil law: Only the owner can have the possession of his/her property and can use and benefit it. 3- Article 375 of Mujalah-Al-Ahkam: Sale is lawful only if allowed by the owner, his/her proxy, guardian or heir, otherwise the transaction is terminated. 4- Article 95 of Mujalah-Al-Ahkam: possession over others' property is nullified. 5- Article 97 of Mujalah-Al-Ahkam: Nobody is allowed to possess anyone's property except justifiable reasons. 6- Article 881 of Mujalah-Al-Ahkam: Usurpation is to take over somebody's property without his/her prior permission. 7- Article 901 of Mujalah-Al-Ahkam: Any act that equals to usurpation in terminating ownership shall be subject to provision provided to usurpation. 8- Article 596 of Mujalah-Al-Ahkam: usurped goods shall be returned in kind. Therefore the defendant is obliged to evict the object of dispute (shop), so that I hand it over to my client, and should pay its rent as well, but the rents depend on the routine changes in the monthly rents according to the business flow, which is due to be estimated after being determined, however for the moment I just demand eviction of the shop, the rent remaining would be decided by the time the shop's eviction provision is issued. Thus as a proxy I kindly request the chief judge and the esteemed judicial division to issue a fair decision against the defendant and evict the shop for my client, the defendant disobeys and refuses the facts, finally I wish you would decide according to the

Islamic law (Sharia law). The First defense statement of the defendant: First: Firstly the plaintiff by proxy has not mentioned in his invalid claim that in which part of the province the shop is located, but to mention the location of the object of dispute (when it is immovable property) is deemed one of the important requirements for verity of any claim. By the time the object of dispute is immovable property, thus it is necessary to mention its location and adjacent areas in case of conflicts or witnesses, besides, its four directions (Hudud Arbaha) and the names of three owners along with their ancestors' names if possible (article 1623 of Mujala-Al-Ahkam). Therefore the claim of the plaintiff by proxy is completely unjustifiable, nullified and inconsiderable. Second: As observed the plaintiff has not mentioned my grand father's name, which is considered legal requirements of an action (in identification of the litigants the name of the grand father is required, this is the documented phrase and is vindicated upon) therefore the claim of the plaintiff is not considerable (Alam Gaery Volume 6 page 225). Third: The mentioned plaintiff by proxy has not mentioned the date of Dost Mohammad death who is the testator of the client and except to mention the inheritable property, the number of the inheritors is also not known, as the action is filed vague, and vagueness nullifies an action, therefore the action is inconsiderable. I was asked on the case of inheritance whether it is required for its validity to determine the assets or not? Yes it is the precondition for verity of the action "Fatawi Kamilia"). Fourth: In the invalid action of the plaintiff by proxy vaguely mentioned the satisfaction of the inheritors during the apportioning, thus the action filed is invalid, vague and inconsiderable. Fifth: The plaintiff by proxy has expressed as if I have never been the lessee of the shop and have taken on the shop arbitrarily without the prior permission of the owner and without paying the rent. God's curse upon the liar, the due object of dispute (shop) was and is now under my occupancy on the basis of key-money and I am one of the shopkeepers owning the privilege of key-money and the right to be prioritized in its lease, I have bought the right of usufruct of this shop based on irrevocable sale I have been lessee of this shop for long time, because I have rent payment receipts of the mentioned shop along with other essential documents based on the market rules, the original of the mentioned documents are preserved at my home and photocopies are presented to you in the attachment, Therefore I kindly request that you issue a fair and just decision on the false and unjustifiable claim of the plaintiff by proxy. My documents to defend the due claim are in accordance with article 166 of commercial procedure law of the country, which are sufficient and valid documents to nullify this false claim. 1. Article 40 of the constitution is not applicable on me because I am neither usurper nor remonstrant, but based on the customary law as well as commercial transaction, I have the legal right of key-money and lease prior to anybody else. 2. As the owner has taken the rent on a regular base means that I have had the right to benefit and use the object of dispute (shop). 3. According to the law the use of property means that the owner must abide by the rights and privileges of the side dealing with. 4. Owning the contract of key-money can not be useless sale. 5. My possession over the object of dispute (shop) is legitimate and based on key-money and lease. 6. It is the legal reason of my business transaction. 7. Owning the privilege of key-money and the right of lease is not deemed usurpation. 8. The mentioned case is not and would not be usurpation as well. 9. As I am not usurper and the plaintiff by proxy does not have the privilege of my key-money and lease priority "In some cases of

eviction in the Cairo city, if a shop owner gives his/her shop on lease or key-money to someone, in this case the lessee is privileged to benefit the shop, based on the contract the owner can not order its eviction even if the shop is endowment (Rad-ul-Mukhtar Vol. 4 Page 21, thus the plaintiff by proxy does not have the right of evicting the object of dispute (shop), thus based on the privilege of the key-money, you are kindly requested to issue a fair decision. The first defense statement of the plaintiff by proxy: 1- The defendant has criticized that the location (area in the province) of the object of dispute is not indicated in the case, in reply I mentioned that the exact location of the object of dispute is already marked in the case as area of the 1st district, Mandavi area, basement of the Dost Mohammad market, which is the only well-known market, the article 1623 of the Mujal-ul-Ahkam has clearly stated but is not appropriate in this occasion, no vagueness is seen in my case, the defense statement of the defendant is completely wrong and inconsiderable. 2- The defendant criticized that the plaintiff has not indicated his grand father's name, Firstly in reply to his criticism it is to point out that in commercial disputes the mentioned shortcoming can not cause to refuse hearing a case, secondly; it is due to the defendant's violent character that he did not introduced me his grandfather's name, thirdly; even if it was a shortcoming but as the defendant has mentioned in his defense statement, this is a tiny shortcoming which has been solved. 3- in a false defense statement the defendant added that Dost Mohammad date of death is not mentioned in the case, as verity is the requirement in a claim, the defendant's claim is inconsiderable thus, as a reply I write that my lawsuit is not based on the right of inheritance which might require such a condition, because we have distributed our inheritance in conformity with letter of division (No. 11/905) dated 18/03/1355 the shares of all inheritors have been determined, the mentioned document is legally acceptable and reliable. This is in accordance with article 281 of civil procedure law and articles 156, 161 and 179 of the commercial procedure law, since reliable document is on hand, there is no need to indicate the name of the deceased or date of his death or the document limited to sharing the inheritance, in the case, therefore the reasoning of the defendant is quite wrong and inconsiderable. 4- The defendant has mentioned in fifth reasoning of his defense statement that the plaintiff by proxy has expressed as if I have never been the lessee of the shop and have take on the shop arbitrarily without the prior permission of the owner and without paying the rent, God's curse upon the liar. In reply I would like to state that thousand times God's curse upon the liar, the defendant has not taken the object of dispute on the basis of lease or rent, if falsely claim, should present his key-money document, I mean the document if he has really taken from me or my proxy, in case he present the document singed by me, my proxy or my client, otherwise it is obvious that the defendant is liar and God has cursed the liars in the Holy Quran, useless argument will result nothing, reasoning should be supported by documents, if no document of key-money exists, it clearly shows that it is a false claim and the defendant is liar and will remain under the God's curse. 5- The defendant has criticized our existing document of inheritance, as our letter per stirpes is registered and is devoid of fakeness, the respected court can ask the archive department for a copy of our per stirpes document, this will clarify the issue and no question will remain, I have a copy of my per stirpes document on hand if you have time to read, I would present it. 6- In his defense statement the defendant has mentioned that he has a witness while paid the rent, he seems hesitated

because at first he talked about document and later on he mentioned the witness, it is obvious that he has no proving document to present, if he (defendant) certainly has the document he has to present because all commercial disputes are settled based on documents, there is no need to witness, and it is obvious that the court will refuse false-witnesses, it would be better that a Muslim avoid occupying other Muslims' property should keep in mind the doomsday, its judgment, and should avoid bothering Muslims, has to lead peaceful life with complete faith and honesty, in the society. With his defective thought the defendant depended 9 legal and Islamic articles that I am replying them as follow: 1- The defendant has written that article 40 of the constitution is not applicable on me, because I am neither usurper nor remonstrant. As a reply I present that the defendant prohibit me from my own property and not evicting my shop, he (defendant) is therefore called usurper and remonstrant and article 40 of the constitution is applied in such circumstances. 2- The defendant has mentioned that as the plaintiff receives the monthly rent it definitely shows that he usufructs. In response I would like to say that the current rent of the shop which equals one or two percent of a shop without key-money is not deemed usufruct, but the complete usufruct from the shop is to receive the same amount of rent like the owners of my neighboring shops with no key-money. I am claiming the eviction of my property in order to benefit in the same way as others and article 1900 of the civil law means complete usufruct not incomplete one. 3- The defendant has indicated that according to the law usufruct from the possession means that the owner should take in account the rights and privileges of the side dealing with. I am replying that it is in case if the defendant has got a right by the time the defendant has no rights like key-money, thus eviction of the shop is my right. 4- The defendant states that the privilege of key-money is not deemed invalid sale, in reply I refuse this and asking to present the document of key-money which is given by me, my legal attorney or my client, no document is certainly available if any documents existed you would have presented, if you have any document that you have received without our permission, then the sale is absolutely invalid, while the owner disagrees the invalid sale is to be nullified and the shop has to be evicted. 5- The defendant has repeated that his possession over the shop is legitimate based on the lease and key-money, but in response I reject that no key-money transaction exists, there is no document, he (defendant) agrees to pay one percent of the rent only and it is obvious that our legitimate right is forcibly and tyrannically misused, we don't have any consent in this regard, as a result your possession is completely tyrannical and should be ended immediately, and the usurped property should be handed over to its owner. 6- The defendant has mentioned that the legal cause is the legitimate act, in response I indicate that the defendant's activity would have legitimacy only if a contract existed among us, as there is no legitimate contract and protocol between us, the possession is completely tyrannical which comes under article 97 of the Mujalah-ul-Ahkam, which should be ended. 7- The defendant has written that having the privilege of key-money and the right of priority in lease is not considered usurpation, as a response I mention that the defendant has got no key-money document, in case he possessed one, would have offered it in details during this defense statement. 8- Defendant has pointed out that the current situation is not deemed usurpation; in reply I indicate that based on the article 901 of Mujalah-ul-Ahkam, the mentioned act of the defendant is usurpation, it is because the removal of property is the possession of the

owner, as due to the tyrannical act of the defendant, therefore a fair legal decision has to be taken to remove the property from the usurper's possession and to evict the object of dispute (shop). 8- The defendant has mentioned that as I am not usurper, therefore the plaintiff does not have the right on me to evict the shop for him, the response is the one that I indicated before, the legal point that the defendant has mentioned is not applicable in this case, because no contract of key-money essentially exists, thus as the baseless and undocumented reasoning of the defendant have been refused through my reasoning, the defendant's defense statement is legally inconsiderable, therefore the esteemed commercial division of the High Court of Kabul and the members of the judicial session are kindly requested to issue a decision based on the letter of legal per stirpes (11) dated 18/03/1355 that we (defense attorney & client) have on hand, and our document and the afore mentioned articles of the law should be given effect and make decision on the eviction of the shop, this will save me from further useless quandary. Second defense of the defendant: In her invalid defense the mentioned plaintiff has refused both the right of priority of lease and the privilege of key-money in the object of dispute (shop); however I am ready to prove both the priority of lease and the privilege of key-money. There was no conflict and contradiction among the inheritors of Dost Mohammad in terms of making shops' key-money contracts and rents payment, based on the family relations every one of them was authorized and representing all the inheritors, receiving monthly rents and making key-money contracts of every shop with no limitation of the floor and the shares of inheritance. However in some other circumstances the brothers of the plaintiff with complete authority and representation of the inheritors have received the monthly rents and the key-money, some documents are signed by agreement of Mr. Habibullah and Hamidullah sons of Dost Mohammad representing all the inheritors, besides, in some other documents Zabihullah son of Dost Mohammad, the brother and representative of the plaintiff and the client has agreed and signed documents related to rent and key-money. In some other occasions a person by named Sharif Khan Maket caretaker who is very trustworthy for all the inheritors, has signed and certified all the documents of key-money, whose documents are available with all shopkeepers deserving the right of key-money and lease priority. The performances of the competent representative of the inheritors as well as the performances related to key-money contract of the shops is in essentially in conformity with article 85 of the commercial law of Afghanistan and are considered legal, because the due article instructs as: (a person who is assigned to carry on, commercial transaction of a trader in a certain area, is considered as a representative of the trader). Even now I believe if the plaintiff invites her competent representatives to the court, they will all agree and would certify the signatures mentioned in the documents. Nevertheless some other acceptable documents do exist, that the current plaintiff and brothers as well as competent representatives of the inheritors of Habibullah, Hamidullah and Zabihullah have received rents of the market in various times and then have divided among the inheritors, which seems to be another legal reason to refuse the false claim of the mentioned plaintiff. If the esteemed court agrees to observe our documents signed by plaintiff, with her legal capacity and competence, the mentioned plaintiff has acquired the rent of shops in the same way as from other shopkeeper with key-money; this will prove and point out the real liar. The plaintiff has received the rents of the shops by her own approval; if the documents are

observed, this may make her (plaintiff) feel ashamed. Thus legal evidences exist for both the privilege of key-money and the right of priority of lease; the mentioned two rights are bona fide rights for me as well as other shopkeepers of the mentioned market. If the plaintiff plans to take the shops which are under our key-money and lease and give them to other affluent people by too much dollar, she (plaintiff) should never imagine this, because such unfair acts are neither acceptable to the holy Sharia nor the judicial justice, we the shopkeepers of the due market have been here at an unstable situation when tens of rockets have been being fired to Kabul especially the area where our business center is located, it was only to preserve the right of lease priority and key-money, most of the shopkeepers lost their family members and goods, some traders have been plundered by unknown armed people. We the lessees were waiting for a peaceful time and expected to earn the legitimate alimony of our family through the privilege of key-money of this shop, if God willing. Although during the chaos and lootings some shopkeepers lost their goods as well, who are ready to legally prove this by presenting acceptable witnesses in front of the court, based on the instruction of chapter 6 of the commercial procedure law. It is because the plaintiff by proxy demanded that what is said should be proved, witnesses come second after documents to prove a right, and this is the bona fide right of the people whose documents have blazed to defend their right of key-money and lease priority by presenting witnesses. Some shopkeepers who own documents are defending their rights through the documents on hand, others whose documents have lost during the plundering are legally entitled to defend and prove their rights of key-money and the priority of lease by presenting witnesses. As the plaintiff has refused us to present our witness, the mentioned refusal of the plaintiff does not have any legal reason, this cannot prevent us to defend our rights. Now you judges can distinguish that who is creating conflicts and who is the one teasing and irritating poor people. I have paid the monthly rent of the shop in the same way as other shopkeepers have done, from the time we have made the contract of key-money with the owner, even in some times the plaintiff by proxy has received and signed the receipt by her herself which certainly proves the right of my key-money and priority in lease, besides a person named Masoud have been representing the mentioned plaintiff by proxy, has received the rent, this can be an affirmative reason proving my key-money and the right of lease priority.

1- Having the contract of key-money is inherently proving a kind of limitation over the ownership of the owner; if the owner respects the rights of the lessee, the lessee will also pay mutual respect to the owner.

2- All the shopkeepers having the privilege of key-money have paid and are paying their monthly rents in a regular basis; paying rent certainly gives the meaning of usufruct.

3- As the lessee having their key-money documents on hand are proving their rights through the documents and those whose documents have blazed can defend their rights of key-money by presenting witnesses, in such situations the owner has substantially no rights of eviction.

4- Based on the previous agreement the shopkeepers of the market have been paying the monthly rent to the legally authorized inheritors of Mr. Mir Alam khan, such as Said Mohammad, Habibullah, Hamidullah and Zabihullah the sons of the deceased inheritors of Mr. Dost Mohammad, the inheritors have signed most of the commercial documents, however in some cases Mr. Sharif Khan the reliable caretaker of the market to whom the inheritors have given complete authority of the market, has received the rent with his signature and stamp on the receipt, some shopkeeper have signed the receipts as witnesses, thus all the defendant shopkeepers have attached their usual commercial documents to their defense statements, they are valid in front of the commercial court based on the article (85) of the commercial law, the mentioned documents are also valid based on the article (166) of commercial procedure law, false claims are inconsiderable in such cases.

5- Since I have the privilege of key-money and the priority of lease and the monthly rent is taken from us in the same way as other shopkeepers, now if our key-money contract is ignored and the plaintiff is imagining larger amount of dollar, this would be a kind of oppression over oppressed people.

6- As we have the privilege of key-money, paid the rent on due times and the owner has accepted the rents, this situation clearly states the legitimate use.

7- If no key-money contract existed than how the monthly rent has been taken so far.

8- According to the law and Sharia, having key-money contract and the right of priority is never deemed as usurpation.

9- We have the right of key-money and the owner has received monthly rent based on the due right, so our defense statement is legitimate and legal, which can pave the way for issuing fair judicial decision. The plaintiff by proxy has written the following defense statement for the second defense statement of the defendant: I Ms. Fakhria kindly request that: I read the counter-defense statement of the defendant, except the repetitive words and baseless claims, there is no new reasoning to prove his claim, he (defendant) just want to make quandary for me as well as waste of time for the respected judicial panel. Therefore the court is requested to start its judicial session as soon as possible and if the court has obtained any documents of the property owner or our authorized representative it must show them during the court session and then the court shall decide a fair decision in the regard and it does not need the reply.

Questions for class discussion:

What type of a case is this?

What is the general area of law involved?

What are the precise legal issues presented for decision?

Where would you go to find the law applicable to these issues?

Hypothetical Scenario Three (Class Period 4)

Facts:

To the honorable president and members of the criminal chamber of the primary court of first district of Kabul city!

I, Ahmad s/o Mahmood s/o Khalid permanent resident of Bangi village of Farkhar, district of Takhar province, currently living in Deh Afghanan in the second district of Kabul city, while being free, wise and mature, and having the legal capacity, file an accurate and religious petition against Shakir s/o Nasir s/o Abdullah permanent resident of Bangi village of Farkhar, district of Takhar province, currently living in Deh Afghanan in the second district of Kabul city, while enjoying his legal capacity, as follows:

Description of the petition:

In the date 4/6/1386, my brother, Sharif s/o Mahmood s/o Khalid, with two other persons namely Nasir s/o Shakir s/o Abdullah and Fakhri s/o Nisar s/o Zubair who both are permanent residents of our village were driving a Toyota Corolla car with the number plate of 2781 from the direction of Muradkhani. On the way the defendant in this case stopped their car and due to a verbal contention that had occurred a month before then between them, he fired 4 bullets on my brother with his Russian Klashinkov and two of the bullets hit my brother on the left chest and killed him. Since my brother was innocent and had committed nothing to be killed, the crime of defendant, based on the following reasons, is obvious and proven and is entitled to be punished:

1. The two above mentioned witnesses who are righteous were present in the crime scene and have eye witnessed the crime. In the case of need they will testify about the incident.
2. The Klashinkov by which the murderer has fired on my brother was found in the crime scene and the police has it at hand.
3. The authorance of 4 other persons who were present in the scene and acknowledge that the victim was murdered by the defendant. The authorances of these 4 people is written in the page number 7,8,9,10,11, and 12 of the investigations that has been conducted by the responsible authorities.
4. The vest of defendant which is contaminated with blood is found in the crime scene.

Based on the above mentioned reasons, the murder is conducted by this defendant and I request the honorable court to issue their verdict in the favor of the victim and sentence the defendant to retaliation in accordance to articles 1 and 349 of the Criminal Code in order to retribute the defendant and byword the others. The defendant is malignant and does not accept his fault.

I request the order of religion in this regard.

The defense of the defendant:

I, Shakir s/o Nasir s/o Abdullah permanent resident of Bangi village of Farkhar, district of Takhar province, currently living in Deh Afghanan in the second district of Kabul city, while being free, wise and mature, and having the legal capacity present my defense against the baseless and illicit claim of the plaintiff as the following:

As the plaintiff has mentioned in his petition that there was a verbal contention between the defendant and the victim, I would like to state before the court that one month ago Sharif s/o Mahmood who is brother of the plaintiff attacked on me with a stiletto in his hand and with out any reason he wanted to kill me. I scepced the scene and didn't let him do so. He had also expressed in many places that if he find me some where, he would kill me. Therefore, according to articles 57 and 58 of the criminal code that articulate the self-defense, I killed him in order to prevent him from killing me in the future.

Hence, I request the court to issue their verdict for my innocence based on article 25 of the Constitution, articles 4 and 57 of the Criminal Code and article 4 of the Interim Criminal Procedure Code.

I request the order of religion in this regard.

Questions for class discussion:

What type of a case is this?

What is the general area of law involved?

What are the precise legal issues presented for decision?

Where would you go to find the law applicable to these issues?

Questions?

Conclusion: In the next hour, we will explore the sources of law available to you, and the order of priority in applying conflicting sources of law.

Sources of Law (Class Period 5)

Questions for class discussion:

What are the sources of law in Afghanistan?

Are all those sources of equal weight and importance?

What is the highest law in Afghanistan?

If the sources of law provide conflicting information for deciding an issue, how do you know which source to give preference to?

Where would you look for guidance to answer this last question?

Who decides if a law is contrary to the Constitution?

Who decides if a law is contrary to the religion of Islam?

Would it ever be necessary for you to decide these questions?

Is it fair to assume that laws duly adopted by the Parliament are not contrary to the Constitution or the religion of Islam?

Do government regulations and executive legislative decrees have the force and effect of law?

Where would you look to find the sources of law?

Lecture Materials:

There are several sources of law in Afghanistan, including the following:

- Constitution of 2004
- International treaties and conventions ratified by the Parliament
- Duly-adopted laws
- Duly-adopted government regulations
- Executive legislative decrees
- Commentaries
- Sharia law

The Constitution clearly sets forth the order of priority in the application of these various sources of law:

Article 130 states as follows:

While processing the cases, the courts apply the provisions of this Constitution and other laws.

When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.

Other articles of the Constitution are of interest as well:

Article 3 states that “[i]n Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.”

Article 121 states as follows:

The Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law.

So, where does legal research begin? Under article 130, it must begin with the Constitution, which includes ratified treaties and conventions, and the duly-adopted laws.

These sources should be sufficient to decide almost all legal issues that will be presented to you.

Hypothetical Scenario

Let’s assume that you are the president of a panel on the appeals court reviewing a case from the primary court where a person was convicted of a serious crime and sentenced to prison. The person is very poor, and at the beginning and during his trial, he asked to have a lawyer appointed by the court to represent him without cost. Because of a lack of public resources and the unavailability of defense attorneys, the lower court denied the request, and the person was forced to go through the trial without a defense attorney. In the appeal, the person asks that the verdict be reversed, that the case be sent back to the primary court for a new trial, and that he be given a defense attorney at no cost to him.

What are the precise legal issues presented?

Where would you go first to look for the applicable law?

What would you find (article 31 of the constitution states, in pertinent part, that “[i]n criminal cases, the state shall appoint an advocate for a destitute.”)?

Would you need to look any further?

Where would you look (new advocates law)?

What would your decision be in this case?

Questions?

Conclusion: In the next hour, we will examine the methods for finding the various sources of law, both through written materials and the computer.

Finding the Sources of Law (Class Period 6)

Questions for class discussion:

You are in your court and have identified several legal issues to research.

Where do you go to find the law?

Do you have the Constitution in your court?

Do you have the laws in your court?

Do you have the Official Gazette in your court?

What books and periodicals do you have in your court?

Do you have a computer in your court?

Does it have internet access?

Lecture Materials:

The answers to these questions point out the difficulties that you have in finding the law that you need to resolve legal issues.

There are basically two places to look for the law: printed publications and the internet. Printed publications are found in courts, government offices, libraries, and bookstores. The internet requires a computer with internet access.

Let's look first at printed publications. What printed publications are available to you?

- The Constitution
- The Judicial Reference Set, 2nd Ed. (a 17 – volume set containing the important statutes and regulations that is being distributed to all judges)
- The Official Gazette
- The Koran and texts on Sharia Law
- Legal dictionaries
- Textbooks and materials from your classes at the university
- University law journal articles
- Qaza Magazine (Supreme Court)
- Mizan Newspaper (Supreme Court)
- Adalat Magazine (Ministry of Justice)
- Sarwanwal Magazine (Office of Attorney General)
- Huquuq Law Journal (Law Faculty, Kabul University)

- Judicial training materials prepared by Max Planck, GTZ, ARoLP, IDLO, ISISC, and other organizations supporting judicial training programs

The world wide web, or the internet, provides an immense resource for legal research, both within and outside of Afghanistan. Within Afghanistan, the following websites exist that provide access to the Constitution and laws:

- www.afghanistantranslation.com (links to the Constitution, laws, regulations, decrees, international covenants, conventions, and treaties, and training materials)
- www.supremecourt.gov.af
- www.nationalassembly.gov.af
- www.moj.gov.af

Once you are able to find the applicable law, how can you tell if the version of the law you have found is the most recent version? This is very difficult to do. There is no efficient access system or updating or supplementing scheme. There is no specialized private legal publishing industry that keeps track of changes. However, you can assume that the Judicial Reference Set has the most current laws as of the date it was published.

The best place to look is in the Official Gazette. For those of you with access to a computer, a DVD of issues 1 – 920 is included with your materials. The DVD can be searched using the table of contents or the “find” feature. Searching the printed Official Gazettes requires looking at the table of contents of each issue. However, if you have internet access, there is an Official Gazette searchable database through a link on the MoJ website.

Questions?

Conclusion: In the next hour, we will discuss the methods of exploring the sources of law in order to find the specific provisions of law applicable to the legal issues to be decided.

Exploring the Sources of Law (Class Period 7)

Questions for class discussion:

Let’s assume that you have the Judicial Reference Set. How do you find the specific law that you are looking for?

How do you determine if other laws are relevant?

Lecture Materials:

There are no printed digests, organized by legal issues, to lead you to specific laws or articles.

Therefore, it is necessary to examine the whole of a law to find the relevant articles.

There is, however, an index to the Judicial Reference Set that can lead you to the broad subject areas of relevant laws, and a table of contents for each volume of the Set.

Once you have found what seems to be the right law or laws, how do you find the specific article or articles that provide the answer to the legal issue that you have identified?

The obvious starting point is the index or table of contents at the beginning of the law. But you must be careful to examine every article that may be relevant to the issue you are researching. Sometimes this level of care will mean that the whole law must be read.

In Class Exercise (30 minutes):

Let's go back to Hypothetical Scenario 1 from a few days ago.

What were the legal issues that we identified arising out of that case scenario?

Let's take the following legal issue [choose one issue]:

Now, using your Judicial Reference Set, find the article or articles that answer this legal issue.

Conclusion: In the next and last hour of this course, we will consider the difficulty created by unsuccessful legal research, and we will discuss and evaluate this course.

Unsuccessful Legal Research and Course Evaluation (Class Period 8)

Questions for class discussion:

What do you do if your legal research has not uncovered any law applicable to the issue(s) to be decided?

Who, if anyone, can you consult for advice and assistance in deciding the issue(s)?

Could you consult a person outside the court, for example, a university professor?

What are the ethical considerations in consulting others?

If you have decided to apply Sharia law in the absence of guidance from the Constitution and the laws, how do you find the applicable Sharia law?

Lecture Materials:

Nothing is more frustrating than conducting thorough legal research and not finding a satisfactory answer to the legal issue(s). What can you do?

First, you can go back and re-analyze the issue in an effort to provide different and better guidance for a second attempt at legal research.

You can seek guidance from your colleagues, other judges.

But, there are some ethical constraints that you should be aware of.

Article 4 of the Regulation of Judicial Conduct states as follows:

The judgment of a judge shall be based upon facts and evidence that have been admitted through the court proceeding; hence, the judge shall not rely upon his or her personal information while considering a case, or, except when allowed by law, consider any evidence that has not been properly admitted in the case and discussed openly by the parties.

The official comments to article 4 state as follows:

In his or her capacity as a decision maker, a judge is not an investigator, and must rely, in making his or her decision, on the information and evidence submitted by the parties during the proceeding. Except when allowed by law, a judge cannot take into consideration, in making a ruling, personal knowledge or information, or evidence that has not been properly submitted in the case. This principle is reaffirmed, for example, in article 248 of the Civil Procedure Code of the Islamic Republic of Afghanistan.

Article 5 of the Regulation of Judicial Conduct states as follows:

A judge shall have the right to freely express his or her opinions. In collective adjudications, a judge shall not impose his or her opinion on the rest of the judges, or follow the opinion of the other judges contrary to his or her own will. A judge shall be independent of other judges with regard to decisions that the judge is to make. A judge shall not meddle in any case that is being considered by another judge. A judge shall not make any comment in public or otherwise that might reasonably be expected to affect the outcome of a proceeding or the right to a fair trial of any person or issue.

The official comments to article 5 state, in pertinent part, as follows:

Judges in the same court are colleagues, and are free to discuss pending cases among themselves. However, a judge must be independent of other judges in the same court and in other courts with regard to decisions that the judge is to make. A judge must not attempt to influence another judge in the making of such decisions, and the judge making the decision must not accept any influence.

Article 7 of the Regulation of Judicial Conduct states as follows:

A judge shall obey the orders and instructions of his or her superior judicial officials to an extent that it does not contradict his or her independence and neutrality, and does not influence his or her fair and impartial adjudication.

The official comments to article 7 state as follows:

Under article 116 of the Constitution of Afghanistan, the Supreme Court is the highest judicial organ, and heads the judicial branch, which consists, under law, of primary and appeal courts, as well as the Supreme Court. The Supreme Court is responsible for the administration of the judicial branch. Judges, at all levels, must follow administrative regulations, directives, and instructions that have been adopted to permit the efficient functioning of the courts. At the same time, as stated in article 4 of this regulation, a judge must be independent of other judges, be they colleagues, the chief judge, or judges sitting in a higher level court, with regard to a decision that the judge is to make in a particular case. For example, the chief judge of a court cannot direct or order a judge of that court to decide a case in a particular way. Such an order would be a direct violation of article 5.

These articles of the Regulation of Judicial Conduct stand for the fundamental proposition that to maintain the independence of the judiciary, each judge must be independent in his or her daily work, and not subject to influence by anyone, including other judges, in making decisions.

So, while it is perfectly acceptable to seek advice from colleagues on pending cases, that advice can not be viewed as prescriptive.

Seeking advice from a person outside the court, such as a law professor, is much more problematic, and unless the parties are put on notice that the advice is being sought and are given an opportunity to respond to the advice, the contact would be considered *ex parte*, possibly in violation of article 4 of the Regulation of Judicial Conduct.

Questions?

Discussion and Evaluation