



Afghanistan Rule of Law Project پروژه امور عدلی و قضای

WORK OF THE JUDGE JUDICIAL TRAINING COURSE

COURSE SYLLABUS

The title of this course is “The Work of the Judge.” In a profound sense, the duty of each judge is to protect the independence of the judiciary and to instill public trust and confidence in the courts and the formal justice system. There is no magic formula for the discharge of this duty. The judge discharges this duty by diligently, ethically, and intelligently performing the day to day work of the courts, guided by the Constitution and laws of the Islamic Republic of Afghanistan, and the principles of Islam.

Therefore, this course will focus on the twin philosophical pillars of judicial independence and public trust and confidence, but in the process, address practical issues involving the interaction of judges with the public, procedural fairness, judicial demeanor, and decision writing. The course is designed to be delivered in modules of six – eleven hours, depending on the number of hours available in a particular judicial training.

The concept of judicial independence will be examined from the perspective of the interdependent principles of the judiciary as an independent organ of the state and the ethical duty of the judge to remain independent in the exercise of his or her daily responsibilities. Particular attention will be paid to the role of an independent judiciary in the vindication of the fundamental rights accorded the citizens of Afghanistan in the Constitution, and as a check and balance with respect to actions of the executive and legislative branches of government.

The trust and confidence of the public in the courts is essential to the realization of the constitutional guarantee of an independent judiciary. This course will discuss the role of the individual judge in instilling and maintaining that trust and confidence. The context for the discussion will be the emerging notion of the importance of procedural fairness in the work of the courts.

Lastly, the idea of procedural fairness will be examined within the context of decision-making, a task of singular importance to judges. Ideas will be presented to guide judges in the making of decisions, and exercises will be provided to assist judges in improving their skills in the actual preparation of written decisions and verdicts.

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JUDICIAL INDEPENDENCE

Independence of the Judiciary

Constitution and International Principles

Article 116 of the Constitution states as follows: “The judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan.” It is headed by the Supreme Court.

The Supreme Court is a branch of government, separate from and equal to the executive and legislative branches.

The Supreme Court is not a ministry, a department, or an office.

It should not be viewed as one of several justice institutions blended into something called “the justice sector.”

Such a view threatens the very essence of an independent judiciary.

The importance of an independent judiciary is recognized internationally:

United Nations Basic Principles on the Independence of the Judiciary (General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

Two of the basic principles are worthy of special mention:

No. 3. “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

No. 4. “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision”

These principles stand for the proposition that the judiciary must be an independent and unrestrained check on the actions of the legislative and executive branches of government.

Enforcement of Fundamental Human Rights

The principle of an independent judiciary is especially important in a young and developing republic, formed after several decades of turmoil.

In articles 22 – 59, the Constitution of Afghanistan delineates 37 fundamental rights and duties of citizens.

The majority of these rights and duties are universal and are found in the constitutions of many countries.

These fundamental rights include the following:

- Equal protection – equal rights and duties under the law, whether man or woman (article 22).
- Presumption of innocence when charged with a crime (article 25).
- Privilege against compelled confession (article 30).
- Right of a suspect or accused to an attorney, and for the destitute, an attorney paid for by the state (article 31).
- Prohibition against imprisonment for a debt (article 32).
- Freedom of speech and expression (article 34).
- Right to peacefully assemble and protest (article 36).
- Right to an education provided by the state up to the level of a B.A. (article 43), and particularly for women (article 44).
- Prohibition against slavery and forced child labor (article 49).
- Right to sue the government in court for compensation for harm suffered (article 51).
- Right to free preventive health care and medical treatment for all citizens in accordance with the law (article 52).

Any person whose fundamental rights have been violated can file a complaint with the Independent Human Rights Commission of Afghanistan (IHRC) (article 58).

The survival of Afghanistan as a republic will depend upon the ability of all three branches of government to vindicate these rights for all the citizens of Afghanistan.

The Parliament passes laws. The President, through the executive branch, executes and enforces the laws.

But what is the role of the judicial branch when it comes to these fundamental rights?

Said another way, where does the ultimate duty and responsibility to ensure the vindication of these rights lie?

Hypothetical scenarios for Discussion

Let's examine two hypothetical scenarios:

First scenario:

- Let's assume the Parliament passes and the President signs a law that states that it is unlawful and a crime for more than 50 persons to assemble at the same time in front of the Parliament or the Presidential Palace to protest an action taken by the government.
 - Any problems with such a law (article 36)?
 - Could an interested citizen challenge the law before participating in a protest?
 - If the Supreme Court finally reviewed the case and decided that the law was unconstitutional because it violated the right to peacefully assemble and protest, a fundamental right under article 36, what power would the Supreme Court have?
 - Could the Supreme Court declare the law void and unenforceable (checks and balances) or just resolve the case for the one citizen by granting compensation under article 51?
- Would the Parliament and the President have to honor the decision of the Supreme Court?
- What options would the Parliament and the President have?
- Would the situation be different if a protest organizer was arrested outside the Presidential Palace and charged with a crime for refusal to disperse, as ordered by the police, during an assembly of more than 50 persons?

Second scenario:

- Let's assume that because of a lack of public resources, poor persons accused of crimes are not given an attorney to represent them in court, and they are convicted and sent to prison.
 - What is the problem here (article 31)?
 - What can the convicted person do (complaint to IHRC; appeal)?
 - Let's assume that the case ultimately ends up in the Supreme Court, and the Court decides that the conviction must be reversed because the accused was denied his or her fundamental right to an attorney.
 - Will the decision of the Court apply to other persons in prison or only to the accused who appealed the case?
 - Is there a theory of precedent?
 - Could the Court order the MoJ to provide attorneys in the future?
 - Why? Why not?

The purpose of these scenarios is to suggest that the ultimate duty and responsibility to ensure the vindication of the fundamental rights set forth in the Constitution will fall to the judiciary.

How the Supreme Court will discharge this duty remains to be seen.

Without an independent judiciary, there can be little hope for the ultimate vindication of these fundamental rights..

Without independent judges there cannot be an independent judiciary.

Independence of the Judges

As we have seen, the independence of the judicial branch, and by necessary and logical extension, the judges employed by the judicial branch, is guaranteed by the Constitution.

At the same time, it is the ethical duty of every judge to maintain that independence. This ethical duty is clearly set forth in several articles of the *Regulation of Judicial Conduct for the Judges of the Islamic Republic of Afghanistan*, which was adopted by the Supreme Court on 19 June 2007.

Article 3 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.

The importance of this duty is explained in the official comments to article 3:

Under article 116 of The Constitution of Afghanistan, the judicial branch is an independent organ of the state of the Islamic Republic of Afghanistan. For the public to accept the independence of the judicial branch, and give deference to the rulings and judgments of the courts, the public must have confidence in the integrity and independence of the judges. To earn and retain this confidence, judges must comply with the law and act without fear or favor. They must not accept any interference or attempt at interference from authorities within the other organs of the state, from others within the judicial branch, or from any other persons, in any cases that are before them. They must be unmoved by partisan interests, public clamor, or fear of criticism.

These principles of judicial independence may be summarized as follows:

- For the judicial branch to function as an independent organ of the state, the judges who perform the work of the judicial branch must be independent and must be seen by the public as being independent.

- Acceptance by the public of judgments, decisions, and verdicts of the courts depends upon public trust and confidence in the integrity and independence of the judges.
- To be independent, judges must be completely free, in the performance of their judicial duties, from interference by any institution, authority, or person.
- To earn the trust and confidence of the public, judges must obey the law themselves, follow the provisions of the *Regulation of Judicial Conduct*, and be unmoved by partisan interests, public clamor, or fear of criticism.

These principles are reinforced in other articles of the *Regulation of Judicial Conduct*. Based upon articles 118 and 153 of the Constitution, article 9 of the *Regulation* provides, in pertinent part, that a judge “shall not be affiliated with any political party, work secretly or openly for the benefit of a political party, or provide, directly or indirectly, material or incorporeal assistance to a political party.”

Closely related to judicial independence is the notion of impartiality. Article 15 of the *Regulation* states, in part, that “[t]he impartiality of the judge is the best guarantee for the administration of justice, and a judge shall be required to exhibit neutrality and impartiality in all his or her work as a judge”

Impartiality begins with the absence of discrimination, bias, or prejudice. For this reason, article 15 of the *Regulation* further states that the “judge shall be required . . . to avoid any discrimination for reasons related to race, gender, ethnicity, sect, language, religion, or disposition while carrying out his or her judicial duties.”

Finally, the independence and impartiality of the judge and the appearance to the public of that independence and impartiality, is completely dependent upon the absence of any obligation, be it legal, personal, or moral, on the judge’s part to any person, business, or organization that may appear before the judge.

For this reason, article 21 of the *Regulation* states as follows:

A judge shall not accept any gifts or favors that put him or her under suspicion of graft or corruption, and shall not let any of his or her relatives or dependants receive such gifts or favors in regard to his or her position as a judge. A judge, or any of his or her court staff, or family members, shall not request or accept any gift, reward, loan, or favor in relation to anything done or to be done in connection with the performance of judicial duties. A judge shall not use his or her judicial position to enhance his or her personal interests, the interests of his or her family members, or any other person.

The idea of implied reciprocation is explained in the official comments to article 21:

The acceptance by a judge, his or her court staff, or a member of the judge’s family living with the judge, of any gift, reward, loan, or favor, whether solicited or unsolicited, carries a clear implication that the judge will be obligated or will

feel obligated to reciprocate. Such a perception calls into question the independence and impartiality of the judge. Therefore, no gift, reward, loan, or favor should be accepted from any person, attorney, business, organization, or other entity that is appearing, or may appear in the future before the judge, or that has, or may have, business with the judge connected to the performance of his judicial duties . . . Judges must distinguish between the proper and improper use of the prestige of the office in their personal, as well as their professional activities. The judge must avoid lending the prestige of his or her office for the advancement of his or her private interests or the private interests of others.

Simply stated, in all normal human relations, the doing of a favor or the giving of a gift carries with it the inference of an obligation to reciprocate at some time in the future.

It is the same for judges and public officials, except that the inference to be drawn by the public is that the judge or public official is corrupt and the reciprocation will take the form of some official act.

This perception of corruption, as much as the fact of corruption itself, destroys the public's trust and confidence in the formal justice system.

The prestige and power of judicial office places a judge in the position to request and receive favors and preferential treatment. A request for and acceptance of a favor strongly implies a duty to reciprocate in the future.

A judge cannot use his or her judicial position to enhance his or her personal or business interests, or those of his or her family or any person. Therefore, judges, and their families, must avoid the acceptance of all gifts and favors.

PUBLIC TRUST AND CONFIDENCE IN THE JUDICIARY

Importance of Public Trust and Confidence

As we have seen, under the Constitution of Afghanistan, the vindication of the fundamental rights guaranteed in the Constitution ultimately rests with the judicial branch of government.

No matter what the executive and legislative branches of the government may do, the public must believe that they can go to the courts to redress their grievances. Therefore, the public must have trust and confidence in the judiciary. Otherwise, the public will turn its back on the courts and embrace the informal justice sector.

While the system of informal justice is equipped to resolve some types of disputes through alternative methods of arbitration and/or mediation, that system is singularly ill-equipped to vindicate the fundamental rights guaranteed by the Constitution.

In all walks of life and human endeavors, trust and confidence must be earned, and once earned, must be sustained. It cannot be passed on or conferred by constitutional fiat. The same holds true for the courts.

Instilling Public Trust and Confidence

How, then, is public trust and confidence in the judiciary earned and sustained?

In part, it comes from the institution of the Supreme Court through the vision of the Chief Justice, as that vision is publicly articulated, and through regulations and procedures adopted by the Court, for example, the *Regulation of Judicial Conduct*.

But far more importantly, the confidence and trust of the public is earned and sustained, or conversely lost, as a result of the work of each judge each day.

In a very real way, the reputation of the judiciary rests squarely on the shoulders of each and every judge. So, the day to day work of the judges and the courts represents to the public the whole of the work of the judicial branch of the government.

Procedural Fairness

Introduction

How, then, can a judge understand and approach the daily work of the court in such a way as to enhance and sustain public trust and confidence?

One approach is to recognize the critical importance of procedural fairness, as distinguished from decisional fairness.

Judges, by training and temperament, are committed to the notion that the decision-making process be fair and impartial. And, indeed, this notion is very important.

But equally, if not more important to instilling public trust and confidence in the courts is the idea of procedural fairness.

The concept of procedural fairness, which has been recognized and verified by many recent empirical studies, is grounded on the fundamental principle of human nature that people who go to court for whatever reason are more influenced by the way they are treated by the court than they are by the result in their particular case.

Think of it this way: People value fair procedures because they believe that fair procedures produce fair outcomes.

Four Imperatives of Procedural Fairness

Of course, a person going to court hopes for a certain outcome, but on the path to that outcome, the person looks for and expects four basic things. We can call these the four imperatives of procedural fairness:

- The opportunity to appear before an independent and unbiased judge who applies the law rigorously and consistently;
- A meaningful opportunity to express their viewpoint and be listened to by the judge in an open and transparent way;
- Consistent dignified and respectful treatment by the judge and court officials; and
- Validation of their presence and viewpoint through a judgment, decision or verdict that explains and justifies the outcome, regardless whether or not the decision is in their favor.

First Imperative – Independent and Unbiased Judge

We have already talked about the first imperative – an independent and unbiased judge. Of course, as recognized in article 18 of the *Regulation of Judicial Conduct*, every judge has the duty to maintain a good working knowledge of the law as well. But let's look in more detail at the other three imperatives.

Second Imperative – Meaningful Opportunity to be Heard

People going to court have a great need to speak and express themselves in front of the judge, and be listened to by the judge.

People make a strong correlation between the ability to speak and a judge's respectful treatment of themselves as individuals.

After all, if the judge does not respect a person enough to hear their side or answer their questions, from that person's point of view, how can the judge arrive at a fair decision?

This basic notion of a person's right to present his or her case is clearly recognized in the *Regulation of Judicial Conduct*. Article 17 states as follows:

The parties shall have the right to freely present their evidence before the court; hence, the judge shall be required to take all necessary legal measures to ensure that sessions are held in a manner in which the parties may enjoy this right with a peaceful and confident spirit. To ensure this right, the judge shall maintain order in all court proceedings in which the judge is involved.

The corollary to the opportunity to express a viewpoint in court is the right to have that viewpoint heard and considered.

How the judge listens is crucially important. The person must be able to see that the judge is actually listening.

If the person believes that the judge is not listening, the person will feel that he or she is being treated with great disrespect and will have little confidence in the decision, or in the judiciary as a whole. The person will, in turn, convey this lack of trust and confidence to relatives, neighbors, and friends.

The judge must be an active listener. In this regard body language is very important. The old adage that actions speak louder than words remains true today.

We know from many studies that over 90 percent of the meaning of any given message comes from nonverbal communication. Everyone uses nonverbal behaviors. Some are positive; others are negative.

Perhaps the most important positive nonverbal behavior for a judge is making and maintaining direct eye contact with the person speaking. Direct eye contact conveys the impression that the judge is listening and is interested in what is being said.

By contrast, the following negative nonverbal behaviors should be avoided: vulgar gestures, rolling of the eyes, smirking, frowning, shaking the head, yawning, sighing audibly, focusing on someone or something else in the courtroom, putting feet up on the desk or leaning back in the chair, sleeping, or performing other work or tasks. These negative nonverbal behaviors convey disrespect and a profound lack of interest in what a person is saying.

Third Imperative – Dignified and Respectful Treatment

Going hand in hand with active listening is the imperative that the judge, and by extension court officials, treat every person who enters the court with dignity and respect. In this regard, article 19 of the *Regulation of Judicial Conduct* states, in part, as follows:

A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the litigants, legal officers, and the general public in the independence, impartiality, and integrity of the judiciary. He or she shall act soberly and be patient, courteous, and dignified in relation to litigants, lawyers, witnesses, and others with whom the judge deals in his or her official capacity, and shall avoid any gestures that are disgraceful to him or to her or to the status of the judiciary. The judge shall require similar conduct by court staff and others under his or her control.

To the parties, attorneys, and public at large, judges personify the courts and the judiciary. A judge should avoid impatience, anger and impolite behavior toward attorneys and parties.

Instead, a judge should be patient, dignified and courteous to all. This behavior sets an example for all in the courtroom and will be reciprocated.

Fourth Imperative – Decision or Verdict Explaining and Justifying Outcome

While active listening and respectful and courteous treatment are very important to the concept of procedural fairness, perhaps the best way to convince a person that they have been listened to and heard is to validate their viewpoint by addressing and discussing it directly in the ruling, judgment, decision, or verdict, and preferably, in the presence of the person.

Studies have shown that this validation is at least as important as the outcome itself. In short, people will more readily accept a negative outcome if they believe they have been treated fairly.

In this regard, it is very important that the decision, whether oral or written, be prepared in clear language that is understandable by the person, as well as his or her attorney.

Tips for Judges

Here are some tips for good courtroom communication and management:

- Set the tone for courtesy and respect
- Maintain appropriate demeanor
- Be on time and be prepared
- Practice active listening skills (restate arguments, probe arguments, and summarize)
- Explain courtroom procedures clearly
- Ask and answer questions effectively
- Communicate and explain decisions clearly
- Ensure control and manage the courtroom effectively and fairly

In doing the daily work of the court, here are eight words for a judge to live by:

- **Prepare** (for the hearing; for the trial)
- **Listen** (actively, patiently, and respectfully to the parties and attorneys)
- **Learn** (all the law applicable to the case or issue)
- **Deliberate** (with panel members and in your own mind)
- **Evaluate** (the facts and evidence objectively)
- **Decide** (finally and promptly)
- **Explain** (your reasons thoroughly and in understandable terms)
- **Move on** (to the next case or issue; don't agonize over prior decisions)

MAKING AND PREPARING A DECISION OR VERDICT

Introduction

Simply stated, the work of a judge is making decisions, usually in the context of a case involving two or more disputing parties. The decisions may take the form of rulings, judgments, written decisions, or verdicts. Two distinct steps are involved: 1) coming to a decision; and 2) preparing the decision.

Coming to a Decision

The decision-making process is complex. Decisions are made through a process of analysis, contemplation, deliberation, and questioning. They are seldom easy. The key is not to jump to conclusions, but to objectively review the evidence and apply the law to the facts of the case. This process should lead to a conclusion that will resolve the case. Once that conclusion is reached, the ruling, judgment, decision, or verdict can be prepared.

Preparing a Decision or Verdict – General Principles

The principles that guide the preparation of a ruling, judgment, decision, or verdict (referred to simply as a “decision” in this section) may be summarized as follows:

- Accuracy
- Legality
- Thoroughness
- Brevity
- Understandability
- Responsiveness
- Timeliness

We will address each of these principles in turn.

Accuracy

The decision must be accurate, that is, it must identify the parties and attorneys and the applicable dates of the court proceedings; recite the procedural history that gives rise to the decision; summarize the issues presented for decision; state the facts found by the court to have been proven; summarize the viewpoints presented by the parties; recite the law applicable to the resolution of the issues presented; and state the ultimate outcome with precision.

Legality

The decision must be legal in two senses. First, it must accurately identify the substantive law applicable to the resolution of the issues presented for decision. Second,

it must comply with any applicable procedural laws. For example, the Civil Procedure Code, Commercial Procedure Code, Criminal Procedure Code, and Interim Criminal Code for Courts contain articles prescribing the necessary elements of a decision or verdict. We will review these elements in the sections which follow.

Thoroughness

It is important that the decision be thorough and that it cover every relevant issue presented in the case and required to be considered by any applicable laws. Otherwise, there is a possibility that the decision will not be accepted by the appellate courts. Logically, the length of the decision will depend upon the complexity of the case. Nevertheless, the principles of brevity and understandability should not be sacrificed to the mistaken notion of excessive thoroughness.

Brevity

Brevity is one of the keys to understandability. Remember, the audience is broader than the attorneys and the appellate courts, and includes the parties themselves. Brevity will assist the parties in understanding the decision. And the understanding of the parties is an important key to instilling public trust and confidence in the judiciary.

Understandability

The decision must be understandable to all audiences, including the public. It is self apparent that a well-written decision that can be easily understood by the parties to the case, and by extension, the public at large, will be comprehensible as well to more sophisticated audiences, such as attorneys and appellate courts. But the converse is not true. Logically, then, a decision should be written in clear language easily understood by lay people. Unnecessary legal jargon should be avoided.

Responsiveness

As stated earlier, a decision should respond directly to the positions advocated by the parties, especially if those positions did not prevail. This recognition vindicates the appearance and participation of the parties in the case, and will go far toward convincing them that they were listened to and treated fairly.

Timeliness

Decisions should be rendered in the shortest possible time, consistent with the above principles.

Short of corruption or obvious bias, nothing destroys the trust and confidence of the public in the courts quicker and more thoroughly than the perception that the courts cannot complete their work in a timely manner.

Deadlines for the rendering of decisions prescribed in procedural laws must be honored, but should not be considered the best practice standard. From the moment a case is over, the parties begin to wait for and anticipate the decision or verdict. To the parties, this waiting period is neither welcome nor productive.

This passage of time should be reduced as much as possible, even to the extent, if possible, that the case is not taken under consideration at all and the decision is announced to the parties in the courtroom upon the conclusion of the case.

Elements of a Judgment or Ruling in a Civil Case

The Civil Procedure Code sets forth in detail the elements of a judgment or ruling in a civil case. In short, the Code provides a precise blueprint for preparing a judgment or ruling.

Chapter 13 governs judgments:

Article 246: the decision of the judicial panel on the merits or substance of the claim is issued in the form of a judgment.

Article 248: the decision must be based solely on the evidence gathered and investigated during the judicial proceedings.

Article 254: the decision consists of the introduction, description, reasoning, conclusion, and the text of the judgment.

Article 255: the introduction consists of –

1 – name of the court; president, judicial members, and secretary of the session, and prosecutor, if a participant.

2 – introduction of the plaintiff and defendant; their residence, occupation, duty, place of occupation, and work; the citizenship document's number and place of issue; the introduction of other individuals involved in the case; and the attorneys and legal representatives.

3 – identification of the type of subject matter of the claim.

4 – number, date, and place of issue of the decision, date of announcement, number of sheets of the decision, and its annexes.

Article 256: the description consists of –

1 – facts of the plaintiff's case, the defense of the defendant and other demands by the parties to the claim.

2 – confession or denial.

3 – testimony of witnesses and its acceptance or rejection.

4 – documents, actual evidence, and circumstantial evidence.

5 – oath or retraction.

6 – summary of the trial proceedings.

Article 257: the reasoning consists of –

1 – the investigative part of the case in the court.

2 – the means of proof or rejection and explanation of reasons.

3 – the reasoning that the court accepts or rejects based on the reasons presented.

Article 258: the conclusion consists of –

1 – non-existence of proof for the claim.

2 – of the defendant.

3 – size of restitution or damages related to the subject of the judgment.

4 – expenses of the court.

Article 259: the text of the judgment consists of –

1 – date of the judicial session and issuance of the judgment with a majority of opinion or a consensus.

2 – reliance on specific reasons with the mention of the article of the law.

3 – mention of the parties to the claim.

4 – determination of the subject of the judgment.

5 – dismissal of the claim.

6 – abandoning of the claim.

7 – non-existence of proof of the claim.

8 – obligation of the defendant.

Article 260: the text of the judgment must be clear and clear of any type of verbal or mental limitation.

Article 261:

1 – court's judgment shall be announced to the parties to the claim without delay after the conclusion of the trial.

2 – decision of the court shall be organized, prepared and issued within ten days.

Article 264: if there is vagueness in the judgment or decision, the court shall, pursuant to the request by the individuals involved in the case, get the judicial panel to explain the vagueness in the judicial session on the condition that the decision has not yet been implemented.

Chapter 14 governs rulings:

Article 267: a ruling of the court is a judicial decision that is not issued on the merits of the claim but rather in relation to the procedures.

Article 271: the ruling of the court consists of –

1 – date and place of the ruling's issuance.

2 – name of the court issuing the ruling, composition of the court, and secretary of the judicial session.

3 – individuals involved in the claim of an issue at dispute.

4 – issue about which a ruling is issued.

5 – reasons and grounds upon which the court has issued its ruling.

6 – legal reliance by the court.

7 – coming to a conclusion and taking a decision by the judicial panel.

8 – specifying the time period for complaints against a ruling that is not legally absolute.

9 – mention of the ruling being absolute in situations where the ruling has been considered final according to the provisions of the law.

Elements of a Decision in a Commercial Case

The Law on the Principles of the Commercial Courts sets forth the elements of a decision in a commercial case.

Article 238: Within 20 days after announcing the completion of the investigation the court shall issue its decision and deliver it to the parties.

Article 239: The court's order shall include the following information:

- a. Names and full details of the parties to the claim and their attorneys;
- b. Date of the order;
- c. Name of the court issuing the order;
- d. Names of the President of the Court and its members listed at the bottom of the order;
- e. The subject and type of claim and the parties' requests to the court;
- f. A summary of both parties' arguments and evidence, including documentary evidence;
- g. Legal arguments the court relied upon in issuing its order;
- h. Assignment of payment of the court's forms fee and other expenses.

Article 240: The court's order shall be clear and decisive.

Elements of a Verdict in a Criminal Case

Chapter 8 of the Criminal Procedure Code (1965, amended 1974) governs court findings (sentences).

Article 273: The court is at full liberty to pass a sentence if it is fully convinced of the sufficiency of the evidence that has been examined at the trial. However the court cannot base its findings on the evidence not examined thereat.

Article 275: A verdict of not guilty is brought in those cases in which the fact of the crime is not established or the deed is not punishable by the law. In this event, the accused is released immediately unless detained in some otherwise cases.

The court brings in a verdict of guilty when the guilt of the accused in the commission of the crime has been proved at the trial.

Article 280: The findings of the court must be legal and motivated. A verdict of guilty shall contain the offense punishable by law, its circumstances and the text of the applicable law thereon.

Article 281: The court is bound to consider motions made by the contesting parties and to give grounds for the issuing of due orders.

Article 282: The sentence and the grounds therefore shall be recorded within ten days from its issuance . . . If the motives for drawing the sentence have not been written by the Primary judge himself, the sentence must then be nullified for the lack of legal grounds.

Article 61 of the Interim Criminal Code for Courts (2004) states as follows:

1. The decision shall contain:
 - a. The identification of the accused;
 - b. The description of the facts and the circumstances included in the accusation;
 - c. A terse exposition of the reasons of the same decision with reference to facts and law provision;
 - d. The verdict.

Drafting Exercises

Introduction

For purposes of the following drafting exercises, assume that you are the president of a panel that has conducted the trial, that the panel has deliberated and is in agreement with the outcome, and that you are the judge who will draft the judgment, decision, or verdict. When listing the names of the panel members, choose whichever names you prefer. Please apply the principles you have studied in this course in preparing the drafts. Assume that all the law that you need to apply in preparing the judgment, decision, or verdict is stated in the exercise. You will have 60 minutes to complete each exercise.

Exercise 1 – Civil Law

Facts:

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 below:

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 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 the plaintiff according to legal deed number 214/156 dated

2/2/1386 issued by the primary court of Qara Bagh Disterict 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.

Law to apply:

Civil Procedure Code: paragraph 2 of article 258; paragraph 8 of article 259; paragraph 1 of article 279; articles 286 and 287; and paragraph 1 of article 350.

Civil Code: paragraph 1 of article 765; and article 773

Exercise 2 – Commercial Law

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 Mahammad, 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 Syed 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's 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's 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 Mr. Hamidullah, sons of deceased 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 Zabihulla 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. Based on the previous agreement the shopkeepers of the market have been paying the monthly rent to the legally authorized inheritors of Mr. Dost Mohammad, such as Said Mohammad, Habibullah, Hamidullah, and Zubihulla, 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.

4- 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.

5- 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.

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

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

8- 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. Baigum 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.

Law to apply:

Constitution: article 40

Civil Code: articles 1900 and 1904

Commercial Procedure Code: articles 231 and 237

Mujalah-Al-Ahkam: article 375

Exercise 3 – Criminal Law

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 autorance 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 scepded 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.

Law to apply:

Criminal Code: Articles 1 and 394