Advisory Opinion

Referring to the English translation of the Current Draft of the Afghan Labour Law

by

Wolfgang Däubler
Professor at the University of Bremen

I. General Remarks

1. Subject Matters of the draft law

The draft law is entitled “labour law” without any restrictions. The authors seem to intend a codification of all kinds of relationships between labour and capital, between employees and employers. Indeed, the 159 articles of the draft law deal with all main questions of labour law.

In most of the countries, lawyers distinguish between individual and collective labour law. The first one comprises labour contracts and health protection whereas the second one deals with trade unions, their foundation and their legal status. Add
itionally, you will find specific rules about collective agreements and sometimes about strikes.

The draft law contains many well elaborated rules of individual labour law which is regulated in a comprehensive manner, obviously based on a lot of experience and knowledge of comparative law. Collective labour law is in a certain way underdeveloped. Article 5 guarantees the freedom of association in the sense that labour unions and employers´ associations can be established without prior (state) permission. Membership and lack of membership must not influence recruitment and conditions of employment. Employers (and their associations) and unions have the right to conclude collective agreements but their contents and their effect is not defined. Article 149 § 1 gives autonomy to the unions and the employers´ associations in carrying out their functions and planning their activities. Individual employees have the right to participate in the activities of the unions. The organisations of both sides may establish federations or confederations. As to possible activities of the unions and the employers´ associations, article 149 § 6 refers to future regulation by the labour ministry “according to the relevant legislative document.” Article 150 § 1 gives a kind of overview about possible subject matters of collective agreements comprising all aspects of work, leaves, incentives, “hygiene and insurance”, welfare conditions and social security, training opportunities and skills development, work related dispute settlement procedures and “implementation of productive plans according to legislative documents” and other issues concerning the

occupational circumstances. This is a rather broad list of subject matters, but one can find no rules

- by which way a collective agreement can shape the individual relationship,
- who is bound by a collective agreement; members of the unions only or all workers of the establishment,
- whether labour contracts can create a higher level of working conditions as the collective agreement,
- by which way a collective agreement can be reached – mediation, conciliation, strike?

Without such kind of rules, the collective labour law remains unfinished. Unions and employers´ organisations are allowed to exist but activities can always be treated to be illegal. This is not only a restriction of freedom. It will also be an obstacle to the legislator and the government to delegate power to the social partners: The state will always be responsible for the whole labour market, for wages as well as for working conditions.

It has to be discussed whether it will be possible to integrate into the draft at least some fundamental rules of collective labour law. One possibility is to refer to ILO-Conventions in a way that the evaluations given by the committee for the freedom of association and the committee of experts are binding for all Afghan authorities deciding labour law conflicts.

2. The informal sector

As far as we know, the informal sector comprises between 80 and 90 % of the workforce in Afghanistan. This means that labour law and most of other legal rules do not apply in that big part of the economy. As in other developing countries, labour law is normally restricted to the public sector; only exceptionally private firms are included (e. g. those which are influenced by the state or those owned by foreign investors having of rigid code of conduct). If this situation is accepted, labour law is protecting a rather small minority of the working class. The question arises whether one should develop rules for integrating at least a part of the informal workers into the formal legal system.

The drafted Afghan law which is evaluated here does not contain any element that would facilitate the integration of informal workers. Under the current situation, that cannot be reproached to anyone. On the other hand, a good labour law can be a kind of "offer" to individuals far from the official sphere to be integrated into the legal system giving them a lot of advantages. Without such an offer, these people will remain outcasts dominated by non-state powers. It has to be discussed in which moment one should try to change this situation.

Until now, there is no generally recognized model how to reduce the informal sector. In India you find an autonomous movement in rural areas fighting for rights leaving by this way the informal sector. A movement of this kind cannot be transplanted to another country like Afghanistan. In Uruguay, the Government followed another strategy some ten years ago. They established so-called wage councils (consejos salariales) which had a tripartite composition: one third of its members coming from the unions, one third coming form the employers´ associations and one third from the Government. The councils were established by sector of industry and services, one existing e. g. for the metal industry, another for the commerce, a third for the teachers, another one for the dustmen (garbage collectors), another one for the nurses etc. The council defines the minimum wage for each sector, but this minimum wage has a different level according to the qualification and the function of the persons; three levels are the rule. The decisions of the councils are extended automatically to the whole sector by decision of the labour minister. They are binding for everybody working in the sector, even for self-employed persons. The labour inspection is responsible for controlling whether all workers are correctly paid, even those who belonged to the informal sector in the past.

In the future, that can be a model whose usefulness has to be discussed with the labour ministry.

3. Structure of the text

The draft law contains fourteen chapters. It starts with "General Provisions" going to "Recruitment and Service Contract" (Chapter 2), "Hours of Work" (Chapter 3), "Right to Rest and Leave" (Chapter 4) and "Salary" (Chapter 5). A quite interesting topic is "Professional, Technical and Vocational Training and Skill Development of Employees"

(Chapter 6), followed by "Standards and Guiding Rules of Work" (Chapter 7), "Work Discipline" (Chapter 8), "Financial Responsibility of Employees" (Chapter 9) and "Ensuring Health and Occupational Safety Conditions" (Chapter 10). Special groups of employees are concerned in Chapter 11 ("Women and Youth Work"). Only three articles are dedicated to "Work Related Disputes" (Chapter 12); "Social Securities" are the object of chapter 13. Chapter 14 as the last one is entitled "Miscellaneous Provisions". You will find there a lot of quite important rules like collective negotiations (already mentioned above), prevention of worst forms of child labour, participation of employees in production and development affairs, prohibition of harassment, "House workers" (which means probably domestic work) and the establishment of private employment agencies. All these subject matters have nearly nothing to do with each other; some of them would merit an own chapter, some other ones could be integrated in the existing chapters. This will be discussed in detail afterwards.

If we find a solution to give the provisions in Chapter 14 an adequate place, the structure of the draft law is quite clear following the course of a labour relationship: Conclusion of a labour contract, rights and obligations arising from an existing contract, special rules for special groups of persons. The only critical point is that the "termination of the contract" including dismissal is dealt with in the chapter on recruitment (especially article 23); it would be much preferable to make a special chapter of it.

4. The language of the text

It is very difficult to give an evaluation of thekind of language used in the text. Will it be understandable for those people who need to live with it? Are there logical contradictions in the text? We never know whether possible deficiencies come from in inaccurate translation or are inherent to the original text. The definitions given in article 3 deserve closer attention because they can facilitate the understanding of the following text.

"Work" (No. 1) is defined as an activity "in return of salary". This is not completely correct because the legislator does regulate only "gainful work"; other forms of work like community activities, work in the household or the education of children is not paid and is not covered by labour law. Nevertheless, it is generally considered to be "work". The definition in article 3 deals with "gainful work".

The term “administration” (No. 2) is often used in the text comprising all kinds of employers except natural persons. In a certain way, it seems to be misleading to call a private enterprise an “administration”. It would be preferable to take the notion of “employer” comprising legal entities as well as natural persons. They are characterized by employing a “worker” or an “employee”. It would, therefore, be sufficient to define the notion of a worker or an employee. The given definition creates further problems by referring to the joint goal and to “efforts to perform the delegated tasks in effective and sound manner”. Would an entity lose the quality of administration if the performance is quite modest? Such a kind of appeal should not be part of a definition.

Working people as such are mentioned three times in different wordings which creates confusion. “Employee” is defined as a service worker “in relation to work with administration and employer”. Unlike in other countries, the relation as such is not defined. The “worker” is a person working under the control and supervision of the administration (employer). The “service worker” is recruited “based on a definite contract to perform supporting services to the work of the organization”. The notion of organization is nowhere defined (it may be a problem of translation). Employees and workers, however, will have contracts, too; it remains quite unclear what the specific character of a “service worker” may be.

To give a definition of an “employee” or a “worker” seems to be quite useful because it determines the field of application of labour law. It is up to the legislator to decide whether it will have a narrow definition or a broader one. The narrow one would mean that only persons who get instructions from another one during the performance of their work are considered to be “employees” or “workers”. Persons economically dependent on another one but organizing their activities by themselves are considered to be “self-employed” persons who have a civil law contract and who are not protected by labour law. If there are many of these self-employed persons in society who depend economically on big enterprises or on the state it would be preferable to integrate this group of persons into labour law. The definition would comprise all persons working under the control of another one or being dependent economically on him – with the aim of getting an income. The Republic of South Africa follows such a model; the definition

given by South-African Law could be used as an example. In such a case one should take the notion of "worker" which is the rule in British law since a lot of years.

The definition of a public employee is necessary only if the law gives specific rights to this group of persons. As far as I can see, there is nothing in the law that would make necessary such a definition.

The numbers 7 and 8 refer in an unusual terminology to domestic work (number 7 - gainful work in the household) and homework (number 8).

Number 9 concerns "employers" already dealt with. Number 10 defines "Workers´ Associations", but it remains unclear whether this is identical with the notion of "union" or "labour union" used e. g. in article 149. If one gives definitions they should be used in the whole law in a consistent manner. The workers´ association protects and defends the interests of the workers "in accordance to relevant legislative documents". These words seem to be superfluous because it is clear that the protection of workers interests will be realized only within the framework of the existing legal order. The formula used here could be interpreted in a sense that activities are only admissible if there is a special legal rule permitting it. This would be in contradiction to ILO-Convention 87 which gives autonomy to the unions of both sides in the sense that they decide what to do in order to protect and defend the interests of the workers. The same is valid for employers´ organisations.

Whether the "salary" needs a definition (given in umber 12) seems to be doubtful. There may also be cases in the private sector where people get commodities instead of money – shall money be the compulsory form of payment or would it be admissible to give e. g. products of the enterprise instead of a (small) part of the salary? That is a problem dealt with in many legal orders; it is up to the ministry to decide whether one should include in the law provisions about this topic. If the law applies more or less only to the public service there would be no necessity to establish such rules.

The meaning of the numbers 13 and 14 is not completely clear. "Allowances" seem to refer to the personal qualification of a worker whereas the supplementary salary refers to the type of work. One can do it in order to clarify what certain provisions mean.

The notion of "social security" (number 15) is normally used for the whole system e. g. of health insurance comprising contributions, their administration and the benefits paid to the workers. Why reducing it to the "amount of financial assistance"?

"Attendance record" (number 16) is a traditional way of supervising whether people are present. In modernized administrations and enterprises you will find a time account based on an electronic time registration. Perhaps it would be useful to add this to the given definition.

"Discrimination" (number 17) is not easy to define. One could have a look at the EU-Directives. A definition should comprise the notion of direct and indirect discrimination and describe the field in which it is prohibited. This is not only "recruitment" and "deployment", but also salary and dismissal. If the legislator wants to establish an antidiscrimination law, all these questions should be dealt with. To put them in a definition at the beginning of the text, seems not to be very convincing. One should at least refer to article 6.

Seen as a whole, article 3 should be concentrated on some few but meaningful definitions which should be followed in a consequent way during the whole text.

II. Evaluation of the individual chapters

1. "General Provisions" in Chapter 1

The provisions in this chapter deal with quite different matters, but it is acceptable to do this under the headline of "general provisions". Some of the articles deserve remarks.

- Article 1 should refer to article 35 of the Constitution, not to article 45.

- Article 2 describes the objectives of the law. Everybody knows that they will never be reached completely but they are important points of reference for future activities of the legislator and the social partners. After number 9, I would like to insert as number 10 another objective:

"Create good working conditions in order to give an incentive for productive work and innovation"

By this way, the interests of the employers are respected and an important link is established between working conditions and productivity: Good working conditions are not only an economic burden as some people may think.

- Article 3 (definitions) has been already dealt with.

- Article 4 does not really bring a clear definition of forced labour. What does "allure" mean in this context? Empty promises?
The exceptions are acceptable, but will number 3 really give the same rights to prisoners in jail as to normal workers?
Number 4 is not clear in so far as it refers only to unexpected situations or disasters. Will compulsory work be automatically legal in such situations or would one need an intervention of the administration telling the individual: "You have to fulfil the following task"? This should be clarified before the draft is enacted.

- Article 5 (freedom of association) was already dealt with.

- Article 6 deals in a quite reasonable way with discriminations. Two points need some discussion:
(1) The indirect discrimination is not defined. As it is a complicated matter one should do it in order to avoid that the rule will never be applied because nobody knows what "indirect discrimination" means. EU-Law can deliver an adequate formula.
(2) The exceptions to the prohibition of the discrimination are clear and convincing as to the "needs of the job". The following phrase "Employment and preferences based on competency and merit, expertise and all other works which needs special skills are not considered discrimination." are quite ambiguous. The phrase is unclear in so far as it refers to "works which need special skills" – this is already covered by the first phrase. The second problem is that obviously personal qualities like "merit" and experience and special skills can justify discriminations. This makes the prohibition as such nearly

worthless because in recruitment as well as in promotion and in dismissal one can always invoke these special qualities and thus make discrimination legal.

- Article 7 enumerates groups of workers to whom the law applies and whose employment relationships can be additionally regulated in a way that respects the present law. Normally rules of that kind are put at the end of a law but it is not especially embarrassing to find them here.

- Articles 8 and 9 contain rules of private international law. If work is performed in Afghanistan, Afghan law applies – this is a rule which can be found in many other legal orders, too.

- Article 10 contains the right to work (which is just a desire) and a right to equal wages. The point of reference for "equal" wages is not mentioned in the first paragraph. The second one speaks about quality and quantity of work, rank or grade – one cannot envisage concrete consequences derived from this provision. It remains a pure declaration.

- Article 11 mentions paid leaves which are regulated in detail in chapter four.

- Article 12 refers to different chapters of the present law.

- Article 13 deals with international conventions on labour matters which are considered to be binding if Afghanistan adheres to them. Especially in fields in which the present law contains loopholes (like in collective labour law), article 13 can be of high importance. It will be an important task for the labour ministry to take all necessary measures to popularise these conventions.

All in all, the first chapter needs some clarifications but can easily keep its structure and the big majority of its rules.

2. "Recruitment and Service Contract" in Chapter 2

Chapter 2 is quite long (articles 14 to 39) and deals with things which could be put better in different chapters: The recruitment of workers and the conclusion of the labour

contract, the dissolution of the labour contract including dismissal and fixed-term-contracts/part-time work as atypical labour relationships. The law would be much more accessible for the citizens if chapter 2 would be split into three parts.

a) Recruitment and labour contract

Considering firstly the recruitment of workers, some open questions should be discussed.

The labour contract (called service contract) has to be a written agreement (article 15 § 1). What happens if this form is not respected? The danger is high that the working person will be considered not to be a worker being deprived by this way of all labour law rights. In China, this was the situation until the labour contract law of 2007. One should give the worker at least a right to have a written contract within a month and give the task to the labour ministry and its offices to control whether this rule had been followed. The problem of working without a written contract will probably rarely arise in the public service but it can be quite common in the private sector. The same question arises if the labour contract does not contain the ten points mentioned in article 16: Will it be no labour contract or will it be a labour contract with loopholes? How can the loopholes be filled?

Another problem is the way the employer can get information about the applicant. Can he be asked about his private life in general or about his political convictions? Is the employer entitled to investigate which personal views an applicant has posted at facebook? In the US, employers sometimes ask the applicant to give them their password in order to get into facebook and other social media. In Europe, this is generally considered to be illegal because it hurts the personality of the applicant. Would it not be reasonable to tackle these problems?

There are some smaller questions, too.

- Not every worker is able to present a vocational training certificate according to article 14 § 1 number 3. The exception for “support staff” will not always be sufficient.

- Article 16 number 1 requires as a term of a labour contract “legitimacy of affairs of contract”. What does that mean? Does it mean that the activity of the employer has to be a legal one?

- Article 17 uses the word “employing agency” which in other provisions is not used. Does “agency” mean another thing as “administration” and “employer”?

- Not all workers know to read and write. In the context of the written contract one should add a rule for illiterate persons. The German Civil Code has tackled the problem and declares that a “hand signal” put on paper is sufficient.

- If the employer as an individual dies, the labour relationship shall continue with the successor. It is not adequate to refer to future legislation if such a case arrives (article 19).

- According to article 21 number 3, the worker has to take over tasks which are not in conformity with his labour contract “in the event of the temporary stoppage of work”. Temporary stoppage of work can also be a strike. Is the worker obliged to be a strike-breaker? In the case of a legal strike this would be in contradiction with the ILO´s view: According to the committee for the freedom of association, to oblige workers to take over the tasks of strikers violates article 3 of Convention 87 which guarantees the freedom of trade union activities. In order to prevent a contradiction with ILO standards it would be reasonable to add that “temporary stoppage of work” does not comprise a legal strike.

b) Termination of the Labour Contract

Article 24 § 1 contains a list with 12 points enumerating the possible reasons for termination. This is unusual in a certain way because it puts together very different things as final conviction to a punishment, reduction in the number of staff and mutual agreement. But one can follow this way without creating confusion.

The legal instrument by which the contract is terminated is not exactly mentioned. The contract “shall be terminated in the following circumstances” because of a dissolution of the organization or a reduction in the number of staff (number 7) and “due to economic, technological and structural reasons” (number 12). Article 24 § 7 only requires that the

organisation informs the employee "within one month". The "information" replaces the dismissal which is the rule in other countries. The period of notice of one month is a rule without any exceptions; even in cases of grave misconduct of the employee the employer has to observe the period of notice. Even a suspension according to article 22 is not possible. The Parliament will have to decide whether it will keep such a solution.

If the worker wants to end the labour relationship the rules established in article 25 are much clearer requiring "a one month written notice to the employer". This could be transferred to article 24 § 7.

The reasons for dismissal are described in a quite general manner. Does the "reduction of the number of staff" depend only on a decision of the employer? Has this decision to be justified? Which are sufficient economic and technological reasons in the sense of article 24 Number 12? Article 24 § 6 requires only that it is not feasible to transfer the concerned person to a similar job in the same organisation. But who is the "concerned" person? If workers have comparable jobs and five among ten should leave the administration who will be concerned? In Germany, there is a selection according to social criteria (age, years of service, maintenance obligations); would it not be preferable to apply such a principle in Afghanistan, too? The criteria may be different ones (like in China), but without criteria an arbitrary decision made by the employer can never be excluded. He will decide unilaterally who will leave and who leave and who will remain.

c) Atypical labour relationships

The fixed-term contract can last up to three years and can be renewed only once (article 15 § 2). According to article 15 § 4, it must not be concluded for works "which are basically continuous (more than six years)". By this way, the fixed-term contract will be an exception like in China since 2008.

The draft law does not mention the temporary agency work which has taken to a certain extent the function of the fixed-term contracts in China. Are there any experiences with temporary agency work in Afghanistan? Theoretically, it could be practiced even on the basis of a contract for an indefinite time with the agency – the assignment to a certain

enterprise or administration would be limited to a certain period; the same person would be sent afterwards to another enterprise..

Part-time work is even more limited than fixed-term contracts. Article 30 § 1 requires "an immediate need" for the recruitment of this category of workers. The contract is limited to six months and can be extended only once. Duties of a continuous nature cannot be an object of a part-time contract (article 30 § 3). These restrictions confirm that the full-time labour relationship for an indefinite time must still remain the rule. On the other hand the low number of part-time jobs reduces the chances of women to participate in the labour market. Being responsible for the household in the big majority of the cases they can only take part-time jobs which will not be available. Perhaps one could evoke article 22 § 2 of the Afghan Constitution which gives equal rights to men and women.

3. "Working time" in chapter 3

Chapter 3 contains an elaborated system of working time (called "hours of work") which deals with many questions in a way that needs no improvement and no comment. Nevertheless some problems should be tackled which are not yet mentioned.

In article 31 § 1 working time is defined by the worker using "his/her physical and mental power to serve for the organisation". That is quite a narrow definition because it puts away the situation that the worker is at the disposal of the employer waiting for instructions but remaining inactive. This is normally considered to be "work", too; otherwise the risk that there is nothing to do in the enterprise will be transferred to the worker. It has to be discussed whether the definition of "work" should be a broader one as it is the case in many countries including the EU.

In article 32, the weekly working hours are reduced for young people, for underground work, hard labour and unhealthy labour and finally for pregnant women. What is the effect on the salary? If a woman gets pregnant and works only 35 hours – will she keep her former salary? If a certain kind of work is evaluated to be hazardous and the working time is, therefore, reduced, will the worker be paid in the same way as before? Article 32 § 3 gives a positive answer but what about those people who suffer no "reduction" but

work at a reduced schedule from the very beginning? If some of these questions are answered in the following articles, one should at least refer to it.

Night work is well regulated in the articles 33 to 35. The additional payment mentioned in article 34 is different as to the quality of workers: Normal workers get 15 %, skilled workers get 25 %. Is this justified? Skilled workers earn more from the very beginning and get an additional privilege by the higher percentage. The disadvantages for health and private life coming from work at night are the same for both groups of workers.

The notion of overtime in article 39 is not quite clear, because the point of reference ("normal working hours") is not explained. Art. 31 § 2 says that the normal working period is not more than 40 hours per week "during the year". In the interest of flexibility, the law provides only for an average amount of hours. Is every hour above the average during one week "overtime"? Or does the provision mean that overtime should be calculated on the basis of the yearly working time? That should be clarified. Overtime depends on certain substantial conditions (which is a good solution) and "cannot be more than the average of normal working hours during the day" (article 39 § 2). If a worker works eight hours a day, is it really permitted to work sixteen hours if the conditions for overtime work are met? Some of the reasons enumerated in article 39 § 1 are not at all "unexpected". It is sufficient to mention number 5 ("perform works which have already been started if their stoppage may cause material and spiritual losses") or number 8 ("perform other required work identified by the relevant in charge") of the list. Would it not be better to admit overtime work only as an exception and oblige the employer to recruit additional personnel if the situation is reproduced several times or even regularly?

Is there an additional payment for overtime hours? Article 37 § 2 provides for additional payment (without mentioning its amount or percentage) if overtime is delivered in a special situation. Can that be generalized or is it an exception to the rule that there is no additional payment?

4. "Breaks and paid leaves" in chapter 4

Like chapter 3, chapter 4 is well elaborated, too. A great number of problems have been tackled; the proposed solutions deserve high interest. Article 59 makes, however, a

restriction in the sense that only government organisations have to follow these rules; in non-governmental and private organisations an agreement is necessary between worker and employer. This means that the legal rules can be replaced by very modest rights of the workers. It should be discussed whether it is necessary to have a framework of rules which should be followed even outside government. Will the legislator really admit that there is no sick leave in the private sector? Would it be admissible to renounce to Hajj rites even in the case of a person who passes his whole working life in the private sector? In my opinion, the legislator should at least define a minimum.

Some other questions have to be discussed.

Public holidays are enumerated in article 42. They comprise the weekend (Thursday and Friday), too. Public holidays are paid (as it is the case in German law and in many other legal systems). The amount is not mentioned but one can presume that it will be the sum people would have earned if it were a normal working day instead of a public holiday. But what about the weekend? If you have a monthly paid salary, there is no problem, but what will be the salary if the worker is paid day by day?

Article 45 deals with those workers who have to work during public holidays (e. g. policemen, doctors and nurses in hospitals). This rule should be attached directly to article 42 in order to improve the transparency of the law.

Article 56 provides paid leave for the Hajj pilgrimage for the worker “once during his entire service period”. What happens if the worker has different employers during his life? Will he be able to go to Mecca during each labour relationship? As it is a really important leave, this should be clarified.

The rules about sick leave and maternity leave are good and need no commentary. The “urgent leave” in article 52 does not depend formally on specific reasons. A notice or a request of the worker seems to be sufficient. Is this true? What happens in the case of article 52 § 3 (marriage, birth of a child, death of family members)? Is the whole “urgent leave” of ten days consumed in such a year or is § 3 a special rule which does not affect the general rule?

5. “Salary” in chapter 5

The chapter on salary regulates in article 61 the minimum wage. In § 3, the criteria for fixing the minimum wage are laid down. These are convincing criteria when the task is to define a minimum wage for the first time. If it already exists, one should pay attention to the inflation rate and the increase of productivity; both should be compulsory when a new decision is made.

As to the normal salary, the law mentions in article 60 several factors which determine the amount of the salary. This is quite difficult to realize. How can one evaluate the “quality of work”? What is the importance of a “grade” and of the “period of training”? The fact that these factors should be observed, can be supported, but it says nothing about their relative weight when a decision has to be made. Should it not be possible to mention (at least) collective agreements which could define the level of salaries? In article 75 § 3 the draft law uses the expression “collectively accorded”. Why not do it with the salary, too? If it is just one possibility there will be no pressure to follow that way.

According to article 45 § 2 (in the chapter on working time) people working on public holidays get an allowance of 50 % of their salary for normal work “in addition to the anticipated overtime in this law”. Article 69 (in the chapter on salary) says that in weekend and holidays the overtime payment will be 50 %. Does it mean that the worker gets 100 %? Is work on weekends and public holidays always overtime? All this would be in a certain contradiction to article 71 (“The work payment of work performed during public holidays is twofold, in case it is not compensated within two weeks as a day off by the agreement of the worker”). The “day off” appears here for the first time; systematically it would belong to the chapter dealing with working time. What happens if the worker does not agree? If he agrees will he have more than based on the general rules? The uncertainty about the salary to be paid in case of work on public holidays should be eliminated.

As to the way of payment, article 75 § 4 is not quite clear. The place of work is the normal place of payment, but the worker can (probably) decide otherwise. As the autonomy of the individual worker is quite small, it may happen that the employer chooses a place which is much more convenient for him. During more than a hundred years, German law

prohibited the payment in “inns”; in Thailand, it is still prohibited to pay in bath houses. Would it be reasonable to prohibit comparable things in Afghanistan? What about payment by check or by transfer from one bank account to another? Article 75 does not mention whether the worker receives banknotes or a check. There is a need for discussion.

6. “Professional, technical and vocational Training and Skill Development of Employees” in chapter 6

The articles 78 to 88 contain detailed rules about qualification measures. They are much better elaborated as in the big majority of other countries where the further education of workers is a secondary subject – at least in law. The main problem will be to get enough financial resources for realising the legal programme.

I would like to add one point which is often an object for controversies. Will the worker being in a qualification measure keep his salary? Or can the qualification measure be put into his spare time? The present draft law gives only a partial answer. If the training takes place during “work hours”, the worker will be paid as if he had worked (article 81 § 1). If the worker gets a higher education according to article 82 § 1, he will keep the salary and the allowances of his original post (article 82 § 2). But what will happen if a training measure takes place in the evening? What about visiting a vocational or technical training centre which is not qualified to give “higher education”?

Another problem linked to the payment is the obligation of the worker to pay the money back which the organisation has paid for the training measure if the worker leaves the administration or the enterprise too early. Which is the concrete amount the employer has paid in order to organise some courses? I would prefer to inform the worker about the concrete sum of money he has to pay back before he starts the qualification measure: That would create legal certainty and show the worker which will be his risk if he does not return to his workplace and stay there for the same time he had passed with the qualification measure.

7. “Standards and Guiding Rules of Work” in Chapter 7

The short chapter 7 (articles 91 – 93) is based on the assumption that the way of working can be regulated by legal rules. On this point, I am quite skeptical, but the issue has to be discussed.

One could add two points to this chapter whose real importance is not contested.

The first one is the prohibition of harassment which is now regulated in Art. 154 as part of the chapter entitled "Miscellaneous Provisions". The better place would be here, because this prohibition is part of the "work rules" people have to respect.

The second point is not mentioned until now in the draft law: The respect for fundamental rights at the workplace. To give an example: The Afghan Constitution guarantees in its article 34 the freedom of opinion. Why should it not be possible that workers express their opinions at their workplaces? The limits which have to be observed in general (no insult etc.) should be respected here, too. Human rights shall have their place in the enterprise which is not a territory where people are deprived of fundamental freedoms.

8. "Work Discipline" in Chapter 8

In other legal orders, the subject "work discipline" covers all kind of negligent behaviour of workers and the sanctions inflicted. In the draft law, it is different: Articles 92 to 96 deal with workers´ obligations and with incentives to improve the quality of work. It would be better to put these rules into the previous chapter.

The obligations of the worker, enumerated in article 94, are sometimes real obligations (cf. number 11 – confidentiality) sometimes pure appeals (cf. number 12 – "sound" attitudes to other employees and clients). Attention deserves article 96 encouraging the workers to do a good job.

The articles 97 to 104 contain real disciplinary procedures and sanctions including the right of the worker to go through different commissions and to present his case finally to a court. Article 102 contains very generous rules on sanctions for being absent; a dismissal is possible only after an absence of 20 consecutive days. In an industrialised country, where punctuality plays a very important role (how can an assembly line start if only half

of the staff is present?) this would be an unconceivable rule. The situation in Afghanistan is obviously different.

9. "Financial Responsibility of Employees" in Chapter 9

To be financially responsible for a damage caused by negligence is another sanction against the worker. It would, therefore, be preferable to put the four articles of this small part (articles 105 to 108) to the previous chapter.

As to the contents of the rules, there is just one point to be mentioned: The responsibility of the worker depends exclusively on his "fault". That can create an inacceptable situation; if a car driver does not pay enough attention just for a moment, he can be financially ruined for his whole life. In Western Europe, most of the countries reduce the responsibility of the worker; he is responsible only if his behaviour can be characterized as "gross negligence", as an action "without excuse". It would be advisable to include a comparable restriction in the draft law.

The other rules need no commentary.

10. "Ensuring Health and Occupational Safety Conditions" in Chapter 10

Chapter 10 (articles 109 – 121) is well conceived. Proposals to modify it can remain quite modest.

Article 110 concretises the principle laid down in article 109. Both could be put together. The preventive measures according to article 114 and the medical examination according to article 115 are o. k., but one is somehow wondering why work "under conditions harmful to health" are still possible despite of the good principles in article 109. But this is a problem arising in more or less every country. To keep the salary in the case of transfer to another workplace (article 118) is good. The medical centres according to article 117 will be very useful but they should be financed immediately. Is there any chance to put the financing into the law?

11. "Women and youth work" in Chapter 11

Not to admit young workers to works "that are physically arduous or harmful to health or carried out in underground sites" and to night work (articles 122 and 123) is quite convincing. To do the same with female workers would in Europe provoke criticism. One would say that the impact on the health is the same for men and women; why protect only women? The labour market effect would be that considerable parts of the industrial production would be monopolized by male workers – a fact which is once more in contradiction with the equality principle between men and women. Another point is the protection of pregnant women: It is well developed as to maternity leave which is longer than in Germany (18 weeks in comparison to 14 weeks in Germany) and as to the payment of the salary (article 125) if the pregnant woman can no more work at her former workplace. On the other hand, this protection will reduce the chances of women on the labour market: Employers will avoid the "burden" of pregnancy and prefer recruiting male workers. In Germany, there is a special insurance which refunds the salary the employer has to pay during and after the pregnancy. Moreover, the draft law does not contain a provision giving a special protection against dismissal for pregnant women: The employer can always decide to reduce the staff and end by this way the labour relationship of the female worker. The prohibition in article 127 to refuse employment of women does not comprise the dismissal; even if the provision would be extended, the employer could always find a reason for dissolving the contract without any relationship to pregnancy.

12. "Work Related Disputes" in Chapter 12

The articles 133 to 135 contain a very rudimentary solution of conflicts which may arise between employer and employee. Art. 133 prefers a solution by direct communication which is, of course, part of common sense and would be tried even without a legal rule. Article 134 concerns the case of a dismissal; if it is illegal the worker may return to the establishment and get the average salary including other benefits of the last six months prior to the dismissal. The condition is that "a competent authority" has declared the dismissal to be illegal. Whether there is a legal remedy against its decision seems to be without importance but it would be better to tell it in a clear way. But the main problem is another one: The Dispute Settlement Commissions have to be established first. What is

the legal situation in the time before their existence? Will the court decide? This has to be discussed.

13. "Social Security" in Chapter 13

What is characteristic for this chapter (articles 136 to 146) is the phrase "according to the relevant legislative document". The most important questions are transferred to the future legislation. If this is not the case, the draft law refers to the "budget" of the organisation (article 136 § 3) or to its "financial capacity" (article 136 § 4). This reduces the value of the pension scheme in articles 140 to 146. The retired person will be entitled to the salary of the last position (article 140 § 3) – a generosity because pensioneers normally spend less money than active workers. The compulsory retirement age is 65 years, but the worker can continue still five years if he agrees and if there is an urgent need of the organisation. According to article 142, the worker is entitled to request retirement before reaching the compulsory retirement age, but the conditions are not mentioned. One may assume that the total working period of forty years should be fulfilled (article 140 § 3), but there is no reference made to this provision. Even if this point is clarified – chapter 13 will have more or less a moral value which can be used as an argument in discussions about future legislation.

14. "Miscellaneous Provisions" in Chapter 14

For the citizen, it is difficult to understand a law where a lot of important rules (articles 147 to 159) can be found only under the headline of "miscellaneous provisions". As far as it is possible, the provisions should be put together with other rules which have found their place in the legal text.

Article 147 deals with the Labour High Council. It should be integrated in chapter 12 dealing with "work related disputes".

Article 148 (Monitoring and Guidance of Labour) would fit into chapter 7 dealing with "Standards and Guiding Rules of Work".

The articles 149 and 150 concern the freedom of association. They should be added to article 5 in chapter 1 on “General Provisions”, if the rights and obligations of unions and employers´ associations will not be the object of a new separate chapter. As to their contents one can refer to part I 1 above.

Article 151 concerns the prohibition of the worst forms of child labour. As part of the core labour standards of the ILO, it has a comparable value as the prohibition of compulsory work; it should be put into the first chapter, too. Article 151, however, does not define the phenomenon of “worst forms of child labour”; I would advocate for taking over the definition given by article 3 of the ILO-Convention 182. Another question may be raised why Afghanistan does not prohibit all forms of child labour.

Article 152 deals with the participation of employees in production and development. This should be transferred to article 5 or integrated in the (new) chapter on the freedom of association.

Article 153 deals with dismissals and should be put together with the rules on the termination of the employment relationship (above I 2 b).

The prohibition of harassment (article 154) should be a part of chapter 7 (see above II 7)

Article 155 (domestic workers) concerns a general question und should, therefore be integrated in chapter 1.

Art. 156 (Dispatching Employees abroad) is linked to the questions of private international law and should be put near article 9 in the chapter on general provisions.

The establishment of private employment agencies (article 157) does not concern labour law directly; if one will keep the provision in the law, it could easily remain under the title “miscellaneous provisions”. The same can be done with articles 158 and 159.

III. Summary

The draft law picks up the whole agenda of labour law. Most of its parts are well designed and can be compared with labour law rules of advanced countries. Collective labour law should be developed and labour law rules should reach more and more the informal sector. A lot of detailed problems have still to be discussed; one should find the time to do it. The project is of high value.