

Matrimony and Women's Rights in the Afghan Civil Code 1976: A Critical Appraisal

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1. Salient Commitments and Documents

a) The Bonn Agreement and CEDAW

The Bonn Agreement 2001, which was ratified by Afghan representatives and diaspora groups with participation of the United Nations, drew up the political roadmap of Afghanistan and laid emphasis, inter alia, on women's participation for the "establishment of a broad-based, gender-sensitive, multiethnic and fully representative government with due regard to the importance of participation of women." The Bonn Agreement also spelled out the various preparatory steps that were to take place in the succeeding two years culminating in the promulgation of a new constitution.

In 2003, Afghanistan was the first Muslim country to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) without reservations.¹ CEDAW is the most rigorous international instrument on record on

1. The UN General Assembly adopted the CEDAW on 18 December 1979 and it came into effect as a treaty on 3rd December 1981, 30 days after the 20th member nation ratified it. Afghanistan had signed it in 1980 but not ratified. The CEDAW has been signed by over 180 countries, including Egypt, Indonesia, Iraq, Jordan,

gender justice standards. Various other Muslim countries that have signed the CEDAW have done so with reservations that mainly relate to articles 15 and 16. Article 15 gives women full equality in all civil matters, such as the rights to freedom of movement and choice of residence, and article 16 which accords to women the same rights as men in the choice of marriage and spouse and other rights and responsibilities within marriage. Article 16 also binds state parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

Egypt's reservations to articles 15 and 16 invoked the Islamic Shariah and its provisions on dower and maintenance for the wife as instituting an "equivalency of rights and duties that ensure complementarity" between the reciprocal rights and responsibilities of spouses. Morocco took similar reservations, also referring to the "framework of equilibrium and complementarity" of Islamic law. Jordan has noted, in turn, that the wife's domicile was legally that of her husband's, and Morocco and Tunisia both made article 15 subject to its compatibility with their Personal Status Codes pertaining to marital residence. All of these reservations stress that Islamic law visualises complementarity in marital relationships rather than the type of equality maintained in the Convention.²

The CEDAW Committee's reporting procedure has helped giving women equality issues a degree of public exposure.³ Certain practices that repeatedly feature in the Committee reviews mention the continued legality of polygamy in many Muslim states. Reformist movements in Muslim countries are careful, on the other hand, to situate themselves within the indigenous Islamic framework. In an era of heightened sensitivity in the Muslim world to the imposition of Western models, as Tuckers noted, and the renewed emphasis on allegiance to Islamic laws, the invocation of international

Kuwait, Libya, Morocco, Pakistan, Saudi Arabia, Tunisia and the Yemen. Yet all of these countries have taken reservations to certain articles of the Convention on account of incompatibility with religion or a "higher law." Implementation is monitored by the CEDAW Committee, a standing UN Committee in New York. State parties report to this Committee one year after ratification, and thereafter every four years. CEDAW consists of s 30 Article as follows: Article (1) defines discrimination; Articles 2-4 outline the nature of state obligations that need to be undertaken by the state party in through legislation, policy and other measures. Articles 5-16 specify areas of discrimination to be addressed, such as customary practices detrimental to women, prostitution, political and public life, citizenship, education and employment, health care and family planning, rural women, equality before the law, marriage and family relationships. Articles 17-30 detail the structure and function of the CEDAW Committee and other procedural matters.

2. See for details, Judith E. Tucker, *Women, Family and Gender in Islamic Law*, Cambridge: Cambridge University press, 2008, p. 80.

3. See the various progress reports submitted to the Committee available at the International Women's Rights Action Watch, www.iwraw-ap.org.

standards may not always have a positive effect.⁴

Afghanistan ratified the CEDAW at a time when it was preparing for a new constitution, and had committed itself to women's equality and fuller participation in government and other walks of life. Yet in actual effect, "Afghanistan's ultra-conservative tribal culture that prevails in most of the country's provinces makes the realisation of this commitment a most challenging task for the country even impractical in some ways."⁵ Afghanistan has difficulty implementing its own constitution, let alone the rigorous requirements of CEDAW.

Afghanistan is a signatory also to the Universal Declaration of Human Rights 1948; the International Covenant on Civil and Political Rights 1976; and the International Covenant on Economic, Social and Cultural Rights 1976. These instruments emphasise, *inter alia*, the principle of free consent to marriage, and that of equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. Afghanistan has reiterated its commitments on women's rights in two other international conventions it has signed after the 2004 constitution, namely the Afghanistan Compact, London 2006, and the Bonn Conference Communiqué of 2011.⁶

b) The 2004 Constitution

Most of the six constitutions Afghanistan has promulgated since 1923 contained clauses on citizens' equality and prohibition of discriminations without, however, leading to tangible results on women's equality, which is partly why the 2004 constitution took a more assertive stance in its pro-equality clauses.⁷ This was a tangible result, not only of the Bonn Agreement, but also of Afghanistan's unprecedented exposure to international opinion. The 25 years of civil war that began with the Russian invasion of 1979 also

4. Judith Tucker, *Women, Family and Gender*, 81.

5. Qassim Qamus, "*Zan dar qanun-e asasi jadid – woman under the new constitution*," p. 1: <http://www.bsharat.co.id/14zan/hogogi/07.html> (accessed 4 March 2014).

6. The London Conference on Afghanistan: The Afghanistan Compact 2006 affirmed, for instance, that by end 2010 the National Action Plan for Women in Afghanistan will be fully implemented, and female participation in all Afghan governance institutions, including elected and appointed bodies and the civil service, will be strengthened. The Bonn International Afghanistan Conference that issued the Bonn Conference Communiqué 2011 emphasised, in sections 6 and 7, women's equality under the constitution, and reaffirmed the rights of women as key for Afghanistan's future. Cf., Lena Ganesh et al, *Women's Economic Empowerment in Afghanistan*, 2013, pp. 82 & 84.

7. See for details on Islam and women's status in the 2004 constitution Mohammad Hashim Kamali, "Islam and Its Shareah in the Afghan Constitution 2004 with special reference to private law," in ed. Nadjma Yassari, *The Shareah in the Constitution of Afghanistan, Iran and Egypt: Implications for Private Law*, Tubingen: Mohr Siebeck, 2005, 23-45. See also Mohammad Hashim Kamali, "References of Islam and Women in the Afghan Constitution 2004," *Arab Law Quarterly* 22 (2008) 1-37 - www.brill.nl/alq

brought about a sizeable Afghan diaspora - Karzai and some of his colleagues included - who lent support to the pro-equality opinion that was gaining ground in the emerging civil society in the country. Added to this was women's wider participation in the preparation and approval of the 2004 constitution. Women participated in all the three preparatory stages: the Constitution Drafting Committee (three of eight members were women), the Constitutional Review Commission (eight of 34 members, of which the present writer was also a member), and then the Constitutional *Loya Jirga* (CLJ) that finally ratified the Constitution (102 of 511 members).

Article (22) of the 2004 constitution provided:

Discrimination and privilege of any kind is forbidden among the citizens of Afghanistan (*har naw tabeez wa imtiyeez bayn-e atbba-e Afghanistan mamno ash*). The citizens of Afghanistan, whether man or woman, have equal rights and obligations before the law.

This clause is more emphatic compared to the 1964 constitution (Art. 25), which simply declared that all citizens were equal before the law without any discrimination or privilege. The added phrase "whether man or woman" in the 2004 version was actually proposed by the women delegates of the CLJ themselves, who succeeded to insert the added phrase in the final text.

The 2004 constitution was also the first to impose a quota system in the composition of Parliament. With regard to the Lower House (Wolesi Jirga) it was provided: "at least two female delegates shall be elected from each province as a national average." (Art. 83). The October 2005 parliamentary elections consequently brought 69 women, of the total of 269 members, to the Wolesi Jirga.

On the composition of the Upper House (Meshrano Jirga), the constitution provided similar quotas in article (84) that brought 28 women, out of the total of 102 members to the Upper House in 2005. The quota system is not without its weaknesses, yet it is significant to see that twenty-seven per cent of Afghan parliamentarians are women as a result, a figure which is hardly matched by other countries of the Muslim world, or even Europe.⁸

Other provisions of the 2004 constitution that could be used in support of women's

8. Ganesh wrote, however, that women MPs even at such sizeable numbers lack "real political power," due to their linkages to political mentors or parties, rather than to their constituencies. The more outspoken female MPs "face particular intimidation or verbal attack" from the religious and conservative majority and even militant threats. See for details Lena Ganesh et al., *Women's Economic Empowerment in Afghanistan, 2002-2012*, Kabul, Afghanistan Research and evaluation Unit, 2013, 15.

equality include article (6), which requires the state to create “a prosperous and progressive society based on social justice, protection of human dignity, and realisation of democracy.” Article (7) requires the state to abide by the UN Charter, the Universal Declaration of Human Rights and other international treaties and conventions Afghanistan has duly ratified.⁹ Article (54) provides for the state to adopt “necessary measures to ensure physical and psychological well-being of the family, especially of child and mother” and to eliminate “traditions contrary to the principles of the sacred religion of Islam.” Article (44) similarly requires the state to “devise and implement effective programmes for balancing and promotion of women’s education.”

c) Twentieth Century Marriage Laws: An Overview

Several marriage laws were introduced during the course of 20th century, beginning with the *nezam nama* of Marriage 1921 under the then reformist King Amanullah and the influence also of parallel *tanzimat* reforms in Turkey. Other marriage laws were subsequently introduced in 1934, 1949, 1960 and 1971, and then the CC76. These were followed, during the communist interregnum, by the Revolutionary Decree No. 7 of 1978 under the then President Taraki that proscribed, under pain of punishment, expensive marriage ceremonies, child marriage and forced marriage. The more recent Law on Elimination of Violence Against Women (EVAW) 2009, as discussed below, also takes a punitive approach to these issues.

The CC76 is the only 20th century legislation that spells out the entire range of Shariah laws on marriage, divorce, inheritance, bequests etc. Yet it remains doubtful as to how much of it is being enforced. Poor enforcement is due partly to the prevalence of the *jirga* tradition in the country where local *jirgas* or councils, composed of tribal and religious notables sit and apply a mixture of local custom and Shariah and often resist recourse to statutory laws.¹⁰

Marriage laws that preceded the CC76 are on the whole preoccupied with addressing abusive customary practices relating to child marriage, forced marriage, exorbitant bride price and other expenditures, as well as procedural aspects of the marriage certificate (*nikah khat* or *nikah nama*). The substantive Shariah that governed matrimonial law was neither codified nor translated into the local languages. The CC76 was thus the first to

9. For a comparative analysis of the initial draft of the 2004 constitution and where it fell short of meeting the requirements of UDHR, see M H Kamali “*nukate chand dar bara-e qanon-e asasi wa ilamiya-e jahani huquq-e bashar*” *Asase Qanun*, no. 3, Kabul, 1382/2003, 9-13.

10. Cf. Martin Lau “Afghanistan’s Legal System and its Compatibility with International Human Rights Standards,” International Commission of Jurists Final Report, November 2002, 25.

replace the traditional *fiqh* manuals, such as the *hidayah* and other Arabic texts, as well as the Ottoman *Mejelle* that had hitherto dominated court practice in the country.¹¹

With the exception of the 1921 *nizam nama* of Marriage, and the communist decree (No. 7, 1978) which declared child marriage and certain other patriarchal practices prohibited under pain of punishment - all the other statutes stopped short of punitive measures and took a conciliatory stance on customary practices. This wavering legal attitude and language between rejection, complacency and approval added to the difficulty of combating prejudicial practices to women. The CC76 has on the whole continued the conciliatory stance on these issues.

2. The Civil Code 1976

a) Preliminaries of Marriage

Solicitation and betrothal are the two salient steps which customarily precede the contract of marriage (*nikah*). The *nikah* contract is often a mere continuation and follow-up. A great deal of the distortion associated with prejudicial custom also begins at this stage. It is important therefore to draw attention to what they actually involve. Since CC76 is completely silent on solicitation (*khastgari*), we begin with reviewing its relevant clauses on betrothal first, which will be followed, in turn, by a discussion of *khastgari* and its problematics. Reform proposals are advanced as and when the occasion arises.

The CC76 defines betrothal (*namzadi*) as a "promise to marriage which either of the parties may subsequently decide to revoke" (Art 64). No legal consequences are thus expected to follow a mere abandonment of an engagement. Legal consequences do, however, follow in the event of exchange of gifts or other financial commitments between the parties. According to article (65) the party who has given a gift to the other may demand its return or its monetary value at cost price - following a revocation by the other party and the existence of the gifted object. When the donor of gift revokes the engagement, or when the gift is perished or consumed, no one may demand its return. The law further stipulates that engagement is forbidden, whether explicit or implicit, with a woman who is undergoing her probation period ('*iddah*' - c. 3 months) following either a final or a revocable divorce. As for the woman undergoing '*iddah*' following the death of her husband, it is provided that "no one may make an explicit offer of

11. Except for the 1971 Marriage Law which was entitled *qanon-e izdiwaj* (law of marriage) and the Civil Code (*qanon-e madani*) all the previous statutes were known by alternative expressions, such as *nizam nama* (regulation codes). Other equivalent expressions such as *ta'limatnama* and *la'ihah* were also used for by-laws and government decrees. *qanon* signified a relatively higher juridical profile. None was expected to overrule the Shariah and were generally seen as supplementary and subordinate to it.

engagement to her” (Art 63). An implicit offer of engagement to such a woman may, in other words, be made.

Broadly, the probation period (*iddah*) of a divorced woman under Shariah is three menstrual cycles, and it is 130 days for a widow immediately following the death of her husband. Probation period of a divorced woman who is pregnant, however, ends with the delivery of the child in all cases.

The CC76 contains only three articles on engagement just reviewed. The problem here is one of conspicuous silence concerning the problematics of engagement that are very well known, namely the compulsory and binding character thereof, which means cancellation or abandonment of an engagement is rare due to social pressure and opprobrium. Engagement is to all intents and purposes seen as a binding agreement and revoking it is seen disgraceful on both sides, but which affects the girl much more. This is partly because engagement involves an agreement between the families more than it does between the prospective spouses.¹² When the parents arrange the engagement of their children, they are usually committed to the idea that it must lead to marriage. To ensure this, early engagement and marriage is preferred.

Gifts are usually given by the boy’s family at the time of engagement and, among the more affluent, also on festive occasion that follow. These are normally not returnable even when the engagement is revoked, but may be returned if land or durable goods are gifted. The boy’s family is expected frequently to give gifts, which can be burdensome in cases of childhood engagement where several years may pass before actual wedding.¹³ A bride price (*walwar* - lit. milk price – also known as *qalan* and *sheerbaha*),¹⁴ and dower (*mahr*) are usually determined prior to engagement. If the engagement is between relatives, the emphasis on the money side tends to be less and a dower may be specified at the *nikah* ceremony when offer and acceptance occur between the parties, or their guardians, in the presence often of the local Imam. Should this be between adult parties of mature age, the man is usually present but may choose to be represented by his father or uncle, whereas the woman is usually represented by her father or an older male relative.

12. There must be a very strong reason for the cancellation of any engagement, otherwise honour and custom will keep the couple together. If an engagement is cancelled the girl carries the stigma and will be considered a divorce. Her future will be uncertain and without the esteem she held prior to her first engagement. See Max Planck Institute Report entitled “Family Structures and Family Law in Afghanistan: A Report of the Fact-Finding Mission to Afghanistan,” January-March 2005 (henceforth referred to as the MPI Report), 15.

13. Cf. MPI Report, 12 & 14: in exceptional cases of adult engagement, wedding may follow soon, or may take months and sometimes years, especially in cases where the groom or his family faces difficulty in paying the bride price.

14. Sheerbaha, a Dari word, literally translates as *walwar*, which is a Pashto word.

The CC76 provisions pertaining to the return of gifts that may have changed hands would in all probability represent a rare situation. It is normally not seen dignified to claim back gifts of perishable and movable goods. The legal provisions do, however, relate to cases where landed property might have been gifted to the prospective fiancé e or her family. Giving of landed property upon engagement is rather rare, but may be given as dower (*mahr*).

The question we now raise is what motivates parents and families to play with the future of their offspring. Various factors tend to be involved. Child marriage is very frequent in Afghanistan, and sometimes oppressively twisted and disproportionate. Note, for instance, the case of a father "who married his eight year old girl to a man aged 50 years". In exchange the father got married to the fourteen years old daughter of his son-in-law."¹⁵

Engagement may be motivated by various factors and situations as may be outlined below:

- a) Friends and relatives sometimes pledge that their prospective newborn will be engaged to one another to strengthen their friendship.
- b) To reciprocate a favour received at a time of need, a man may give his daughter in marriage as a token of gratitude to another person or family.
- c) A girl with prospects of inheritance may be sought after by relatives and outsiders who may press for an early engagement.
- d) The parents may want to engage their daughter to a wealthy, influential, or a religious family.
- e) A powerful chief or warlord may force, trick or bribe the parents of a beautiful girl into engagement for himself or a member of his family.
- f) In order to ensure continuing good relations between families, a family patriarch may announce an engagement between two persons on his death bed.
- g) To penalise those who resist the patriarch, the latter may impose his will by suddenly announcing an engagement.
- h) When unable to choose among several candidates, a family may assume that the worthy candidate will prove himself by performing a good deed.¹⁶

15. Irene Schneider, "Registration, Court System and Procedure in Afghan Family Law," Conference paper presented an International Conference in Kabul Family law in Afghanistan" sponsored by the Max Planck Institute of Hamburg, Kabul, 10 June 2006, p.15.

16. See for details Mohammad Hashim Kamali, Law in Afghanistan: A Study of the Constitution, Matrimonial Law and the Judiciary, Leiden: E.J. Brill 1985, p.109f.

A United Nations Development Fund for Women–UNIFEM research data in 2006 records numerous cases of forced engagements and marriages in different parts of Afghanistan, which include the following three.

1. The uncle of a 13 year old girl forced her to marry an older man with two wives. She was beaten and abused by the husband, his wives and sons. After 6 years she fled to her parents' home and is seeking a divorce.¹⁷
2. At two years of age, a girl was promised in marriage by her family to an older man who died when she was six. His son then claimed that the girl was his widow and should therefore marry another member of the family. The case went to the village elders who decided in favour of the son. The girl has threatened to kill herself if she is forced to marry.¹⁸
3. A 5 year old girl was kidnapped by a neighbor and his wife. The kidnappers were found and arrested in another province; however, after allegedly bribing the police they were released. The girl's mother eventually found her daughter but was then forced to give her in marriage to the man, although he agreed to wait until she was of a "marriageable age."¹⁹

Forced marriages occur for many reasons including the settlement of feuds (*bada*), compensation for a crime by giving a young girl or girl child to the victim's family (*badd*) and by compelling widows to remarry someone from her deceased husband's family.²⁰ Boys and girls are often forced to marry at a young age, or engaged prior to, or shortly following their birth." These acts constitute criminal offences under the Afghan Penal Code (Art. 517), yet "believed to be widespread throughout the country."²¹

Engagement that must lead to marriage also lead to anomalies. It is anomalous, for instance, to register a divorce following an engagement, but this was precisely the case in *Mohammad Hussein v. Safra*,²² wherein Hussein stated in his petition to the head of Kabul document registration office that "owing to incompatibility, I wish to divorce my

17. Ibid., p.13.

18. Ibid., p.27.

19. United Nations Development Fund for Women–UNIFEM, Uncounted and Discounted: A Secondary Data Research Project on Violence against Women in Afghanistan, Kabul, 2006, p.10.

20. Ibid., p.11. Badd (lit.feud) is a mode of pacifying a feud between hostile tribal groups. One or more girls may be given in marriage as a token of peace without any brideprice (*walwar*). Pore means loan and indicates either financial loan or unfulfilled vengeance. A debt may thus be paid by means of giving a girl in marriage to the creditor.

21. Ibid.

22. *talaq khat* No. 11/24.IV.1350/1971, Document Registration Office, Shahr-e Kohna, Kabul. For a similar example where a *talaq khat* has been registered after an engagement see Id., Sultan Ahmad v. Niyaz Bibi, *talaq khat* No. 6/31.I.1349.

fiancé e (*namzad*), Safra with whom I had no sexual intercourse.” The divorce certificate also records Hussein’s statement that “I Mohammad Hussein hereby divorce Safra, my fiancé e with whom I had no sexual intercourse” by an irrevocable single *talaq*.

b) Solicitation (*khastgari*)

The CC76 makes no reference to *khastgari*, which precedes engagement and determines the terms of the initial agreement between the two families. Engagement then marks the successful outcome of *khastgari*. Usually the mother or other relatives of the boy visit the girl’s family to solicit engagement. If the initial response is affirmative, negotiation continues over the quantities of bride-price (*walwar*) and dower (*mahr*) as may be the case. *khastgari* provides the first opportunity where the families begin to take the matter in their own hands. One would normally expect that the families reflect the wishes of their sons and daughters, which may well be the case, but not always, as financial and other considerations weigh heavily on their attitudes. Since gender segregation and restrictive social environment provide little opportunity for easy encounter between boys and girls, parents and guardians take the matter in their own hands.²³

Wide differentials of age, personality and education are often ignored for want of larger sums in bride price. Sometimes a wide age gap provides an incentive for a bigger bargain. Poverty has always been a factor but reports also indicate increasing number of cases of disproportionate unions due to larger numbers of war widows and orphans. Warlords and drug dealers pay more money and also intimidate people to submit to their ominous wishes.²⁴

Afghanistan’s Law on Elimination of Violence Against Women (EVAW) 2009 prohibits forced and underage marriages as well as polygamy on pain of punishment. Thus it makes a person who “engages or marries a woman who has attained the legal age of marriage without her consent” liable to imprisonment of “not less than two years and the marriage or engagement shall be revoked.” (Art. 26). The same punishment is provided for a person who marries an underaged woman contrary to article (71) of CC76 provided that the victim of the offence makes a request to that effect (Art. 28). Anyone who obstructs a woman from “marriage or deprives her from choosing her spouse” is liable to a short term imprisonment (of up to three months – Art. 27). For a person who

23. Cf. MPI Report, 11.

24. According to a 2004 U.S. Institute of Peace Special Report “Establishing the Rule of Law in Afghanistan,” p.15: Warlords currently subvert both formal and informal justice processes through intimidation and interference in areas from the capital to rural districts. This is exacerbated by the fact that “senior warlords serve as provincial governors or hold other official positions.”

marries a woman or gives her in marriage in the name of *badd*, the punishment is “up to ten years and revocation of the marriage” (Art. 25-1). Those who facilitate the *badd*, such as witnesses, and representatives, are also liable to “a medium term of imprisonment” provided the victim makes a request.” (Art. 25-2). A person who marries with more than one woman without observing the conditions stipulated in CC76 (art. 86 & 89) is also liable to a “short term” imprisonment of up to three months. (art. 37)

EVAW was introduced as a Presidential Decree under the then President Karzai and has yet to be approved by Parliament. The likelihood of parliamentary approval is also not an assured prospect as EVAW has aroused much public controversy in Afghanistan with heated debates and currents of opinion developing both for and against it. At a Kabul seminar of November 2015 in which the present writer participated, commentators expressed reservations over suitability of the highly punitive approach the EVAW had taken toward child marriage and polygamy. They were inclined to recommend a blended approach that combined persuasive measures with punitive sanctions.

The blended approach so proposed is preferable due mainly to the fact that punishment is not always suitable for close relatives, especially the parents, which may also be difficult to implement. We may propose, therefore, that the existing CC76 clauses on betrothal should be fortified by an additional clause to declare that betrothal is invalid when it is accompanied by extortionist gifts, bride-price and dower. The law may, as such, convey a message and discourage, even proscribe, giving of very expensive gifts beyond some specified amounts.

One may also recommend adoption of a procedure to ensure the presence and personal confirmation of the adult boy and girl to their proposed engagement. But the larger issue of binding engagement requires careful attention to detail. Law alone is not enough. Education and public awareness play important roles. The law should take a firm stand when addressing instances of social mischief, but a totally punitive approach to these entrenched practices, like the one taken in EVAW is not likely to succeed.

The law should explicitly entitle adult boys and girls to revoke an engagement they do not wish to consummate and declare this to their respective families. Stipulating such a clause would endorse their basic freedom not to proceed with an engagement arranged without their participation and consent. When an adult male or female declare their wishes, this should be documented in the local district office in order to prevent a possible conflict.

To stipulate the suggested provisions would effectively extend the Hanafi law position on the option of puberty (*khiyar al-bulagh*). This option normally entitles the

prospective spouse to renounce, upon attaining the age of puberty, an actual marriage contract that a close relative, excluding the father, may have concluded on his or her behalf. A direct analogy to *khiyar al-bulagh* is not proposed here, but merely to say that the logic of our proposal has found a manner of expression in traditional Hanafi law. Our proposed clause actually extends the option of puberty also to engagement. This would be educational at least and would also be more relevant to addressing the social mischief of binding engagements so prevalent in Afghanistan.

c) Marriageable Age and Child Marriage

Child marriage is an entrenched yet problematic practice and the manner it is practiced in Afghanistan qualifies it as nothing less than a social mischief of wide proportions, and the CC76 has fallen short of taking effective measures to address it.

The CC76 stipulates the following concerning the marriageable age: "legal capacity to marry is obtained with the completion of 18 years for males and 16 years for females" (Art. 70). The succeeding section provides concerning the marriage of a girl below 16 that "her marriage contract can only be concluded by her legally competent father or the court" (Art. 71). The text then stipulates that "marriage of a minor girl below the age of 15 is not permissible under any circumstances" (Art. 71(2)).²⁵ The main problem here is that CC76 permits conclusion of a marriage contract by "the contracting parties, their guardian or representatives," (Art. 77) thus leaving the door to abusive practices wide open. For what it means is that "forced marriage and child marriage of girls by their fathers or grandfathers are considered legal."²⁶ The other problem is that the marriageable age is not really observed, especially in rural areas.²⁶

Implementing a fixed legal age for marriage is also problematic for Afghanistan since the country lacks a reliable system of registration of birth certificates. When the precise age of a boy or girl is disputed, or when a wide discrepancy exists between an alleged age and the physical appearance of a person, issues cannot be effectively resolved.

A person's age is usually determined by the Identity Card (*tadhkira*). There are, however, serious irregularities both in the accuracy as well as the distribution of the IC. Firstly, because of absence of a system for issuance of birth certificates, and secondly because the distribution of IC is highly irregular among women, and it is almost next

25. moballeg, "Family Law in Afghanistan," p. 6.

26. Referring to the age provision of CC76 the MPI Report (p.17) confirms that "In practice none of these limits are really observed by the families. In the rural areas of Bamiyan, Badakhshan, Kandahar, Kunduz and Ningarhar, the actual marriage age of minor girls can be as low as eight years. Minor boys can also be victims of these practices and be forced to marry at an unsuitable age."

to non-existent among the nomads (*kochis*) of Afghanistan. Children of the war years can be assumed to have remained outsiders to any method of registration and may have no IC at all. The IC was, in any case, mainly tied with the question of military service and could be issued to an individual any time up to the date of the call-up, or even after that. Since the IC was not necessarily issued at the time of birth, the age calculation of its bearer was liable to error and misrepresentation.²⁷

The courts have powers to determine a person's age in a case under their consideration. Such a judicial enactment is, however, of an *ad hoc* value and remains valid only for the case under adjudication. Moreover, prior to 1971, the courts' power in this respect was confined to minors only.

The age issue was reviewed at a 1971 judicial seminar of the then leading Supreme Court and Provincial Courts judges from all over Afghanistan. A proposal was made for expanded court powers in determining the age of individuals, both adult and minor. The seminar passed a resolution which granted the courts power to determine the age of adults. But it was pointed out that altering the age registered in the IC is a function of the Census Office (*daftar-e ihsaiyah*) and should not be dealt with by the judiciary. In the event where determining the age is connected with the issuance of a judicial decision, the court may, in case of a discrepancy between the age entered in the IC and the apparent age of a person, ask for expert opinion and establish the age at issue. But this age was not recordable in the IC.²⁸

As can be seen, the age problem cannot be adequately addressed through *ad hoc* solutions. Until a time when a reliable system of birth registration is established, neither the *tadhkira* IC nor the discretionary court powers can provide a comprehensive solution. This lack of conclusive information on age must also mean that no statutory age of marriage can be effectively enforced.

On an historical note, while debating the marriage bill (later law) 1971, Parliament considered various proposals on the age issue, but one which was eventually adopted was the one that the law should not specify any marriageable age unless it puts a ban on child marriage in the first place. Assuming that child marriage is permitted, as was the case in the proposed draft, then adopting a marriageable age of say fifteen would entitle the guardian to contract a girl of 14 in marriage as a minor person. Thus it was concluded

27. According to a 2005 UNESCO estimate "only 6 per cent of Afghan children possess the *tadhkira* certificate that guarantees citizenship." See Cherif Bassiouni, "Report of the Independent Expert of the Situation of Human Rights in Afghanistan," 13.

28. Qal'É, special issue on the judicial seminar 1350/1971, Supreme Court Publication, Kabul, 1971, p. 113 (in Dari and Pashto).

that no marriageable age should be specified. It was added that one may specify the age of majority which is fifteen according to most Shariah jurists, a view that was finally adopted in the 1971 Marriage Law.²⁹

d) The Marriage Contract

The marriage contract consists of a valid offer (*ijab*) and acceptance (*qabul*) and may be concluded, as per CC76 “either by the contracting parties themselves, or by their guardians (*awliye*) or representatives (*wukala*)” (Art. 77). Two other requirements of a valid marriage are presence of two competent witnesses, and absence of a legal impediment, whether permanent or temporary, between the prospective spouses, which CC76 has expounded in adequate detail (Art. 81–85). Close relatives through fosterage are also forbidden for one to marry (Art. 84).

Temporary impediments to a valid marriage, expounded in article (85) include, for example, re-marriage with a divorcee by triple (*talaq*) unless she goes through an intervening marriage and consummates it, and a woman who is not follower of a revealed scripture. These are classified as temporary prohibitions simply because the conditions envisaged in each case can legally be changed. There is basically little concern over the observance of these prohibitions among the Muslims of Afghanistan as they are generally being followed as an integral part of the religion.

Providing a dower (*mahr*) for the wife is also one of the requirements of a valid contract, but it is a condition (*shart*), as apposed to an essential requirement (*rukun*), and thus commands a lower order of priority compared to the element of consent. This is indicated in Article (99) of CC76 which provides “The wife is entitled to the stipulated dower (*mahr-e musamma*) if such has been specified at the time of contract. In the event when no dower is stipulated, or even when explicitly waived, the wife would still be entitled to a proper customary dower (*mahr-e muajal*).” The CC76 devotes no less than 17 articles (97–114) to dower – what may or may not be given in dower, whether prompt or deferred, whether or not it can be increased or decreased or waived after the contract, and whether inheritable, the role of local custom in respect of any ambiguity in the quantum of dower and so forth. Furthermore, “dower is the property of the wife and only she can make proprietary dispensations concerning it” (Art. 110). And then again that “the father may not waive or make a gift of his daughter’s dower either wholly or

29. Article (3) of the Marriage Law 1971 thus provided: “The *nikah* of a bride and groom who have not attained the age of majority is not a *nikah* of majority. The groom’s age is determined on the basis of his Identity Card (*tazkera*), but in the bride’s case, the court shall credit the information given by the bride or her guardian.”

partly to anyone” (Art. 113). Notwithstanding the elaborate textbook style treatment of dower, CC76 hardly goes out of its familiar track to address the widespread practice of forced marriages and exorbitant dowers in Afghanistan as a mark of social status, and works indirectly into an aspect of discrimination against the poor.

It would be reasonable and perfectly valid, from the Shariah viewpoint, to classify violation of consent of an adult boy or girl, as a bar to a valid marriage - or alternatively listed under temporary prohibitions when concluded by a guardian with questionable motives. Insertion of such a clause could be advantageously used to address the problem of forced marriages in a way that is also Shariah-compliant. It could be seen as an *ijtihad*-based addition to the familiar grounds of impediments to a valid marriage.

Furthermore, article (77) of CC76 which enables the guardians to represent their wards and conclude the marriage contract on their behalf goes against the spirit of a reformist legislation. Given the prevalence of abusive exercise of guardianship powers, one would have expected this law not to encourage the mediation of guardians and representatives in the conclusion of marriage. As noted earlier, CC76 has stipulated a legal age for marriage, which is the right step to take, and should have been reinforced at every opportunity that arose in the text. The law could have stated, for instance, that the power of guardianship ceases with the completion of those ages for boys and girls, who must then conclude their own marriage contract. Such a stipulation would not only be valid, in principle, but also in keeping with the purpose of reducing the role of the notoriously abusive guardians. To take yet a further step, the law could have stated, for instance, that adult boys and girls should in all cases be present at the session of contract and initiate the offer and acceptance in their own words or writing. The law could further regulate perhaps that the boy should make the offer (*ijab*) and the girl should express acceptance (*qabo*). Then even a step beyond that could be taken to provide that the registration formalities require the presence in person of the adult boy and girl to confirm and verify the substance of their agreement.

All of this would still fall short of saying that a marriage not so registered will not be legally recognised. For that would be difficult for Afghanistan where women are not encouraged to attend offices or leave home without permission of their parents/guardians, and there are in any case practical shortages of transportation, lack of easy access to government quarters, and lack of security. Yet our proposed additions would be educational and the attention they pay to details is likely to make an impact. Instances of violation may be subjected to disciplinary measures, such as community service, police attendance, fines etc., especially when the prospective couple live in cities and

within access of registration offices. The CC76 provides no supportive measures to reinforce its provision on the marriageable age. For these reasons and also the fact, as earlier explained, that the 2004 constitution, the CEDAW, and the Universal Declaration of Human Rights have all given women's equality a higher profile. The CC76 need to be carefully revised to ensure its harmony with the spirit of these commitments and ensure necessary adjustments to curb abuse of guardianship powers, exorbitant bride-price and dower, as well as child marriage and forced marriage in the country.

e) Polygamy

The CC76 has validated polygamy in principle but made it contingent on conditions such as just character of the husband, his financial ability "to provide all his wives with appropriate standards of food, clothing, residence and medicine." The law also stipulates that a lawful benefit should exist in the proposed polygamy such as "barrenness of the first wife or her affliction with a difficult-to-cure disease." (Art. 86). Article (116) provides that a man who is married to more than one woman may not compel his co-wives to live in a single dwelling without their agreement and consent. But these conditions are not likely to be effective simply because the intending polygamist is not required to obtain a court order in advance to certify that he will fulfill these requirements. The law merely entitles the existing wife to apply for judicial separation on the basis of injury (*zavar*) if the husband had indeed failed to fulfill these conditions (Art. 87, 183). It is further provided:

In the event where a person concludes a polygamous union with a woman while concealing the fact of his existing marriage from her and fails to obtain the consent of his new wife to that effect; if the latter denies her consent and also refuses to continue to be his wife, she may request the court for separation on the basis of injury (*zavar*) (Art. 89).

The CC76 has once again turned a blind eye to the social realities of Afghanistan. For the law places the burden of proof entirely on the wife. It is extremely difficult for an Afghan woman to prove that her husband is unjust and has inflicted marital injury on her. A partial remedy is provided, however, by recourse to arbitration in the event the wife is unable to prove her claim of *zavar* but still demands separation, in which case the court may appoint arbitrators to attempt reconciliation between the estranged couple, or recommend a separation (Art. 185).

Research findings suggests that the requirement, under CC76, for a man married to more than one woman to provide his co-wives with separate residences is routinely

being ignored. It is said to be rare, in fact “to find a man in Afghanistan with more than one wife that has provided them with separate residences.”³⁰

Poor families often give their young daughters in marriage to married men so as to ensure their daughters’ financial welfare. Young girls too tend to agree to marry older married men in order to alleviate the suffering of their immediate families. This was revealed in a number of interviews carried in different provinces of Afghanistan as in the following reports:

A married woman from Parwan province was interviewed and she said: “our father did not have money to cater for our financial needs. We could only have a meal once a day and would go hungry for the rest of the day. I therefore agreed to be married to a rich man, who promised to assist my father.”³¹

Another woman from Ghazni province said in an interview: “My father was old and I was the only young girl in my family. I was compelled to marry a rich married man, since I wanted to help my father.”³²

In another interview, a woman from Herat province said: “After the death of my father, I had three children, who were young and only one of them used to go to school. I could not send him to school anymore because I had no money. I did not want him to remain uneducated. I was worried about their future and no one was there to assist me. So I had to get married to a married man who pledged to pay for my children’s expenses.”³³

Research findings also indicate that married men often take a second wife without informing her about their existing marriage. This was found to be the case in no less than 35 percent of all the polygamous marriages. And the percentage is likely to rise further due to increased poverty, relentless civil war, growing refugee population and widespread dislocations they entail.³⁴

Most wives refuse to consent to their husbands’ taking another wife. In such cases the threat of divorce is widely being used by the husband in order to obtain consent of the existing wife. Since divorce is culturally frowned upon, it makes the existing wife anxious, often compelling her to accept polygamy as the last resort. Anxiety also surrounds the prospects of child/ren custody, which may further exacerbate the wife’s

30. Nasir Ahmad Yousefi, “The Wisdom of Polygamy in Islam: the Law and Customary Practice in Afghanistan,” unpublished article compliment of the author to the present writer, Kuala Lumpur, January 2016, p. 9.

31. Women and Children Legal Research Foundation, Kabul, “Research Report on Polygamy in Afghanistan,” 2006. <http://www.wclrf.org.af/wp-content/uploads/2013/09/Polygamy-In-Afghanistan.pdf> (assessed on 2 February 2016).

32. Ibid.

33. Ibid.

34. Ibid.

predicament. The existing wife is usually apprehensive that she may lose her child's custody in the event of divorce. The financial factor also plays a big role. Women rely on their husbands' financial support, and any threat of divorce places the existing wife at the risk of losing it.³⁵

And yet another factor is a strong gender discrimination in favour of male births. In the event the existing wife is childless, or who gives birth only to girls, the husband will, due to lack of medical knowledge, put this down to her fault and most likely marry another wife. An expert observer from Balkh province provided the scientific input into this unfair yet common scenario in Afghanistan as follows. Humans are made up of 23 pairs of chromosomes, one of which determines the gender of the newborn. This sexual chromosome is termed as XY for the male child and as XX for the female. If the mother contributes an X chromosome and the father also contributes an X chromosome, the child will be female, and if one of the parents contributes a Y chromosome, the child will be male. This simple explanation shows that it is not always the wife's fault if she cannot bear a male child.³⁶

In its section entitled "separation on grounds of *zarar* (harm)" the CC76 specifies the grounds of *zarar* and the possibilities also for reconciliation or divorce. One should note here perhaps that the *zarar* provisions in this law apply to both monogamous and polygamous marriages, and it is, as such, not confined to polygamy. The law provides the following on reconciliation and *zarar*:

1. Where the wife's claim of *zarar* is proven and no reconciliation can be attempted between the estranged couple, the court may order separation (Art. 184). The wife's claim of *zarar* must in that case specify the gravity of *zarar* as being such that would make continued marital life between other people like them in the same situation impossible (Art. 183). Separation (*tafaq*) that is granted as a result is equivalent to a single *talaq* which may be revoked during the probation period ('*iddah*) (Art. 184).
2. When the wife's claim of *zarar* is not proven but she still insists on separation, the court appoints two arbitrators of upright character, one from each side, to attempt reconciliation between them. The arbitrators investigate the causes of disagreement and the best manner in which to attempt reconciliation between them (Art. 188).

35. Hikmatullah Muradi, "Equal Protection Before the Law: A Study on the Matrimonial Rights of Women in Afghanistan." Unpublished M.A thesis, University Science Islam Malaysia, 2015, p. 77.

36. Interview with Jamila Saighani, expert gynecologist, Balkh province, Afghanistan, as quoted in Yousefi, "The Wisdom of Polygamy in Islam," p. 7.

3. When the arbitrators' effort to reconcile the couple fail regardless of whether or not they identify the causes of the conflict, the court may order separation if the parties insist on it (Art. 188.1).

4. In the event where the wife is the cause of disagreement, the arbitrators may recommend separation in lieu of her return of the whole or part of the dower to the husband and the court issues a decision accordingly (Art. 188.2).

It is further stipulated that the appointed arbitrators must take a solemn oath before the court to carry out their duties faithfully. Should the arbitrators disagree between themselves, the court orders them initially to reach an agreement, but if disagreement persists, the court may appoint new arbitrators. The arbitrators submit their recommendations to the court which then constitutes the basis of its decision (Art. 186.2 and 189).

In all of this, however, the law does not stipulate a time limit for this procedure, which could be very protracted, and could have been avoided for the most part if polygamy were made dependant on obtaining a court order in advance. It would also be preferable, indeed necessary, that the burden of proof is not placed on the wife's shoulders alone and a summary procedure of some kind is adopted to diffuse the problem of proof.

Moreover, polygamy should be treated under a separate section and not under the section devoted to monogamy. The CC76 treats monogamy under its chapter six (Art. 60-90) entitled "*izdiwaj* (marriage);" polygamy is addressed under (Arts. 86-89) thus conveying the impression of normality and approval of equal rank to both monogamy and polygamy, which is hardly justified. One gets the impression that CC76 encourages polygamy when one reads in Article (92 - under General Clauses, *ahkam-e umumi*) that "marriage of a woman from the *ahl-e kitab* (follower of scripture) is permissible over a Muslim woman and vice versa." Polygamy is thus not confined to Muslim or to Afghan women but its scope is extended to the followers of other faiths - and there is no reference at all to the applied law of the country of the non-Muslim woman.

The law should stipulate instead that a formal entry in the marriage contract be made of the relevant facts as to whether the foreign law involved allows or disallows polygamy. If the latter, this could be used as a factor of restraint also for Afghanistan. For this is not just an issue that affects the woman alone; it also affects her offspring who may not find a status under the applied law of the country of their mother.

f) Divorce

Before the CC76, divorce in Afghanistan was governed by Hanafi law. Any legislation

which addressed the subject then was of a piecemeal and supplementary nature leaving the substantive Hanafi law basically intact. Even the *nezama nama* legislation of the 1920s, which ruled on child marriage and polygamy did not extend to divorce. The brief section (consisting of six articles) of the Marriage Law 1971, was also devoted to formalities and expressly referred the substantive aspects of divorce to be regulated under Hanafi law. This may also suggest perhaps that divorce is not as much of a social mischief in Afghanistan as child marriage. Yet in the absence of reliable data this must remain an unproven assumption. Outside the urban areas, people hardly register marriage or divorce in any manner that would provide a reliable basis of making even an intelligent estimate of the real facts of the situation.

The CC76 articulates the substantive Shariah law of divorce, yet it provides, in its very first Article, that "in the absence of guidance in this law, the court shall issue its decision in accordance with the basic principles of *Hanafi fiqh* of the Islamic Shariah." That said, the divorce section of CC76 is actually based largely on the Maliki rather than *Hanafi fiqh*. But this is not peculiar to Afghanistan as many traditionally Hanafi countries have also adopted the *Maliki* law in their legislation on divorce, as *Maliki* law recognises judicial divorce on a wider scale than the other schools of Islamic law.

The CC76 provides for four main varieties of divorce: divorce by mutual agreement (*khul*), annulment (*faskh*), unilateral repudiation by the husband (*talaq*), and separation by means of a judicial order (*tafraq*). *faskh* and *talaq* under CC76 do not represent a change of precedent as these are recognised by the Hanafi law and the prevailing practice in Afghanistan. It is the last ground, namely *tafraq*, which is of interest as it introduces judicial divorce for the first time on the grounds known under traditional *Maliki* law.

All the leading schools of Islamic law recognise divorce by mutual agreement of the spouses known as *khul* and *mubarraah*. *khul* is effected with the consent and initiative of the wife who gives her husband a consideration, usually by returning the dower she may have received, for her release. The wife's failure to pay the consideration does not, however, invalidate the divorce, for *khul* is a contract which is concluded by an offer from the wife, and acceptance by the husband. As soon as the offer is accepted, *khul* operates as a single irrevocable divorce. *mubarraah*, like *khul*, is a dissolution of marriage by mutual consent. The difference between the two being that when discord is on the side of the husband and he desires a divorce by mutual agreement, it is called *mubarraah* (lit. mutual release). The offer of divorce may thus proceed from either side, but once accepted, divorce is complete and it operates as a single irrevocable *talaq* as in the case of *khul*.

khul and *mubarraah* are, however, hardly known and rarely registered in Afghanistan. Even

when the parties express their wish for divorce by mutual agreement, registration offices routinely record them as instances of unilateral *talaq* by the husband. This is a problem as *khul* has a *Qur'anic* foundation and merits recognition so as to establish a balancing influence vis-à-vis the ubiquitous unilateral *talaq* by the husband. According to moballegh, the women's petitions for *khul*, particularly in the provinces, is typically rejected. Even when it is considered, the wife's request for *khul* is subjected to the approval of the husband. When this is the case, "in a conservative society such as Afghanistan, almost no woman can practice this right."³⁷

khul under CC76 is a dissolution of marriage with consideration which is paid by the wife for her release. Consideration for *khul* may be any object of value including money, commodity, and service – such as an agreement on the part of the wife to nurse or support the child of the marriage for a period of time (Art. 156). The CC76, however, adopts the majority view of the Muslim jurists (in preference to Maliki opinion) on the point that the mutual agreement of the parties is essential in *khul*: *khul* is a contract which is completed with the offer and acceptance of the parties; either of the parties are entitled to revoke the offer before the acceptance of the other (Art. 161). It comes as a total surprise then to read in Article (160) the text that "*khul* incurs a final repudiation (*talaq-e bain*) which does not depend on a court order." This provision moves the law of divorce against the reformist trend in the Muslim world that seeks to bring divorce proceedings under the court jurisdiction and not away from it.

Consideration for *khul* may be a specified amount or it may be unspecified. In the former case, if a fixed sum is agreed and *khul* is completed, the wife is to pay it, and she may not demand any dower or maintenance from the husband. But if it be for a sum which has not been specified at the time when *khul* is agreed, both parties are released of their financial obligations and neither may demand any payment (Art. 162, 164). However, if the parties have explicitly agreed on a *khul* without consideration, a final divorce takes place, but their matrimonial rights remain intact (Art. 165). And finally, *khul* does not release the husband from maintaining the wife during the probation period of '*iddah*, unless the parties have explicitly agreed to the contrary (Art. 168).

The details on *khul* so provided in CC76 remain a dead letter without an affirmative procedure to encourage it in practice. For it is just a step short of distortion that the law allows for divorce by mutual agreement but registration offices only document a unilateral *talaq*. Thus it is necessary for the law to stipulate a simple procedure that makes *khul* an option offered to the couple at an early stage of their recourse to the registration office.

faskh under CC76 is annulment of a deficient marriage contract due to the absence of a basic requirement, such as marriage with a deficient dower, that is a dower which falls far short of the proper dower (*mahr al-mithl*). Annulment may also be caused by an irregularity occurring after the completion of a marriage contract. An example of this is when a *non-kitabiyah* wife (a woman who is not follower of a revealed scripture) of a

37. Abdulwahed Zia moballegh, "Family Law in Afghanistan: Past Experiences and Future Landscape," [http://afghanistananalyst.files.worldpress.com/.../moballegh 2008, p. 6](http://afghanistananalyst.files.worldpress.com/.../moballegh%2008%2C%20p.%206%20(accessed%2023%20August%202015).) (accessed 23 August 2015).

Muslim refuses to profess Islam after her husband has become a Muslim (Art. 132–34).

With regard to the grounds of divorce by *talaq*, CC76 has generally followed the Hanafi law with one or two exceptions that relate to the husband's intention: *talaq* pronounced in sleep or in a state of intoxication, for instance, is declared void (Art. 138). Similarly, *talaq* pronounced under duress, by a mad person, or a person who is mentally deranged owing to "senility or disease", or a person who has lost his power of discernment "because of anger or other factors while not realising what he is saying" is devoid of all legal effect (Art. 141). *talaq* pronounced in explicit terms "customarily indicating the meaning of *talaq*" is, however, valid even without proof of intention (Art. 139). Another point of reform introduced is the adoption of revocable divorce as the standard type of divorce in the sense that every divorce, regardless of the words or number used, effects a revocable divorce only. A revocable divorce (*talaqi raji*) does not terminate the marital tie until expiry of the probation period ('*iddah*') on which occasion, if the spouses have still not resumed normal marital relations, the revocable divorce becomes final (Art. 149).

Triple *talaq* that consists of three repudiations and which ruptures the marriage tie completely was previously the most common form practiced in Afghanistan. The CC76 has much to its credit abolished triple *talaq* altogether by enacting that "every *talaq*, regardless of the words or gesture used therein, shall effect a single revocable divorce only" (Art. 145). A revocable divorce leaves open the possibility of reconciliation and recourse to arbitration.

Judicial separation (*taftaq*) under CC76 may be based on any of the following four grounds: physical or mental disease, injury (*zarar*), failure to maintain, and desertion, which are summarised below:

- Physical or mental disease

Under CC76, "the wife may ask for a divorce when the husband is afflicted with an incurable disease, or a disease which requires a long time to cure but which makes life injurious for the wife." (Art. 176). The wife may not demand a judicial divorce if she had knowledge of her husband's disability either before or at the time of the marriage contract. Similarly, if she consented to continue the marriage relationship after the disability developed, she may not demand a judicial divorce (Art. 177). Whenever it is proven that a disease is incurable, the court is to order separation immediately, but if it is a disease which requires time to cure, the court is to postpone the separation order for a period not exceeding one year (Art. 179). In

establishing the nature of the disease, the court will refer to expert opinion. Divorce effected under these provisions is a final divorce which creates an immediate bar to inheritance between the parties but it does not create a bar to a subsequent marriage between them (Art. 180-82).

- **Injury (*zarar*)**

As earlier noted, if the wife alleges that cohabitation with her husband is injurious to her in such a way as to make it impossible for the people of their class to continue the marriage relationship, she may request the court for a divorce (Art. 183). The subsequent Articles entitle the wife to a divorce in injurious circumstances, both on the basis of proof she may furnish as well as mere insistence on her part. When the alleged injury is proved and reconciliation between the spouses seems impossible, the court is to order a divorce to take effect as a single irrevocable divorce (Art. 184). Whenever the wife's allegation of injurious treatment is not proven, but she still insists that this is the case, the court is to appoint arbitrators to attempt reconciliation - as already explained under polygamy above.

- **Failure to maintain**

The husband's failure to maintain his wife, either by willful refusal or simply because of his inability to do so constitutes a ground for divorce as follows: The wife may apply to the court for a divorce when the husband has no known property and his inability to support her cannot be proved either (Art. 191). But if the husband proves his inability, the court is to grant him a respite not exceeding three months; if he is still unable to maintain her, the court is to order a divorce (Art. 192). Divorce effected for failure to maintain is a revocable divorce; the husband can, therefore, resume marital relationships during the period of '*iddah* provided that he proves his ability to support her (Art. 193).

- **Desertion (*ghayeb*)**

If the husband disappears for a period of three years or more without a reasonable excuse, the wife may demand a judicial divorce if she has suffered injury (*zarar*) from his absence even if the husband owns property which can provide the wife with maintenance (Art. 194). When the court receives the wife's application, it shall communicate the matter to the husband and assign him a respite during which he is ordered to return to her or send for her to join him. If he fails to take action and does not return to her in spite of the court's warning and without reasonable excuse,

or if he cannot be contacted, the court shall decree a divorce. Divorce decreed on grounds of desertion effects a revocable divorce (Art. 195). Moreover, when the husband is imprisoned for ten years or more, the wife may apply for a judicial divorce after expiry of five years regardless of whether he is able to support her or not (Art. 196).

Notwithstanding the availability of delegated *talaq* (*talaq-e tafwez*) in both the *Shariah* and the Marriage Law 1971 (Art. 33), it is almost unknown in Afghanistan. The CC76 has provided, nevertheless, that the husband may delegate his power of *talaq* to a representative (*wake'l*) or to his wife (Art. 142). Once granted, however, he may not revoke the *talaq* he has delegated to his wife (Art. 143). My own research showed no case on record of a delegated *talaq* in the Kabul registration office. This is also confirmed by the MPI (Max Planck Institute) Report (2005, p. 20) which refers to the availability of delegated *talaq* under CC76 but adds that "this possibility is hardly known." Interviews conducted with women, including educated women, revealed apparently that not even a single incident of it had been known.

It is instructive to learn that the current marriage certificate in a booklet format, which is available on the Internet, makes a note of this. Compiled in 16 pages, the first 12 pages are devoted to an accurate recording of the facts of marriage, the parties involved (bride, groom, witnesses, representative/s, guardian) and certification by the registration office/court. The last four pages, bearing the title *tazakkur* (reminder), provides synoptic information (in about 45 short lines) on the purposes and requirements of marriage, rights and responsibilities of the spouses, and also reminders that the spouses are entitled to insert stipulations in their marriage contract. This may relate to education and work, or indeed an insertion to the effect that if the husband enters a second marriage, the wife should be entitled to divorce herself. This is an instance of delegated *talaq*, which is evidently available under the law, even if not utilised. This is to be welcomed as people are often unaware of the law and their own rights and reminders to that effect in the new booklet serves a very good purpose.

3. Issues Impacting Women's Equality

This section discusses four subjects: a) problematic of law enforcement; b) the Ulama Council Resolution on women's travel; c) Shia Personal Status Law; and d) an opinion survey on gender equality.

a) Problematics of Law Enforcement

While the formal recognition of equal rights of Afghan women has been restored in the 2004 constitution (Art. 22), after their drastic curtailment under the Taliban, deprivation and inequality affecting women remain a challenge largely unmet. This is due mainly to the “overall lack of security, different forms of violence, lack of a functioning law enforcement system and the dominance of social and cultural norms that discriminate against women.”³⁸ It is estimated that 60–80 per cent of all marriages in Afghanistan are forced marriages often involving underage girls. Forced marriages involve both adults and underage girls and boys, the former being the principal victims. Reports also indicate that “more than half of all Afghan girls are married before the age of 16,” and violations continue unabated.³⁹

Widows are routinely married off to a male relative of the deceased husband without her consent. Even the Taliban, famed for their anti-women policies, issued a decree against this practice, as well as against *badal*, based on Islam.⁴⁰ But this practice continues, as a means perhaps also of appropriating women’s legal inheritance. Forced marriage of widows is also prohibited in CC76.

Law enforcement deteriorated with the onset of civil war triggered by the Russian invasion of 1979. The absence of an effective government ever since brought prejudicial customs to women back into full play. Law enforcement during Karzai’s presidency (r. 2001–2014), showed minimal improvement due to rampant official corruption and worsening security situation. The NATO and international peace keeping forces also tend to emphasise formal structures rather than actual capacity building and the people’s economic livelihood. Warlords and drug dealers increased in number, often condoned by corrupt officials and even the foreign parties who might have expected them to catch and hand over the terrorists to them. No effective enforcement of CC76 could therefore be expected under such condition.

The CC76 has also been criticised for internal weaknesses. For instance, different marriageable ages are provided for males and females: 18 for males and 16 for females, which is not in conformity with the Convention on the Rights of the Child 1990.

38. Report of the UN Secretary General, “The situation of women and girls in Afghanistan,” E/CN/2005/5 as quoted in “Women of Afghanistan: Toward a Policy Framework,” by the Research and Statistics Unit of the Ministry of Women’s Affairs and UNIFEM, 30 November 2005, p. 16.

39. Afghanistan Research and Evaluation Unit, Women’s Rights, Gender Equality and Transition: Securing gains, moving forward, Kabul: AREU Publication, September 2013, p. 39.

40. Decree 104 #788 Official Gazette, p.76, 18/5/1419 AH signed by Mulla Omar explaining that “A widow in light of religion can marry anyone she wishes.”

Afghanistan is a signatory to this Convention, and it specifies 18 as the minimum age for both sexes.⁴¹ The CC76 provisions on obedience (*tamkeen*) and disobedience (*noshuz*) of the wife similarly envisage a regime of inequality between the spouses.⁴²

Afghan judges are noted for their strict, even dogmatic, application of Islamic law and scant attention to realities on the ground. Certain exceptions, even anomalies, have, however, been noted, especially when female judges presided the family courts: Forced marriage and child marriage are not allowed under the law. Yet Amnesty International found that instead of trial for forced or underage marriage, the judges sometimes ordered the girl to be married off. In cases where an unmarried girl was accused of running away from home, the court would reduce the sentence if the girl agreed to marry the man. When AI delegates pointed out that the legal age of marriage is sixteen, the Head of the Family Court replied: "We know that it is illegal, however, our solution is to marry them." For it was simply inappropriate to release girls accused of *zina* (illicit intercourse) crimes as their families would kill them.⁴³ Thus the judge, even though well aware of the ruling of CC76, could not apply it for fear of the life of the woman or girl.⁴⁴

Law making in Afghanistan also tends to be prescriptive: While CC76 meticulously articulates the Islamic law provisions, it often falls short of taking pragmatic measures to address society's problems. This is partially explained by the pressure of conformity to social norms. When legislating on sensitive issues of matrimonial law, Afghan governments are incline to appease the hardline advocates of custom and religion. Follow-up measures and pragmatic policy initiatives are often needed to translate the

41. Afghanistan signed this Convention on 27/9/1990 and ratified it on 28 March 1994 with reservations on account of compliance with Shariah. I may add that there is nothing in Shariah to go against the marriageable of 18 for boys and girls. See for a full list of international treaties and conventions Afghanistan has signed Lena Ganesh et al., *Women's Economic Empowerment in Afghanistan, 2002-2012*, Kabul: Afghanistan Research and Evaluation Unit, 2013, 86-90 at p. 89.

42. Cf., Abdulwahed Zia moballegh, "Family Law in Afghanistan: Past Experiences and Future Landscape," <http://afghanistananalyst.files.worldpress.com/.../moballegh> 2008, p.2. moballegh also wrote that the law provides for a regime of unequal rights to divorce and inheritance between men and women.

43. Irene Schneider, "Registration, Court System and Procedure in Afghan Family Law," Conference paper presented at International Conference in Kabul "Family law in Afghanistan" sponsored by the Max Planck Institute of Hamburg, Kabul, 10 June 2006, p.3.

44. The Afghan judiciary still falls short on inclusion of women. In 2010 only about 5 per cent of the 2, 203 judges were women. The family and juvenile courts are generally headed by women. There are no women in the nine-member Supreme Court Council. Cf., Lena Ganesh et al., *Women's Economic Empowerment in Afghanistan, 2002-2012*, Kabul: Afghanistan Research and Evaluation Unit, 2013, 16. Ganesh further reports that family courts have not been instituted in most provinces, and where they are instituted, not all are functional, in which case the informal justice mechanism with its patriarchal tribal jirga council is likely to fill the gap.

black letter of the law into practice.

b) The Ulama Council Resolution on Women

In March 2012 ex-president Karzai, somewhat unexpectedly announced his support for an Ulama Council of Afghanistan resolution that imposed restrictions on women's travel unaccompanied by male relatives.⁴⁵ The all-male Ulama Council had issued the resolution in January 2012 advising women to "avoid travel without the company of their male relative (*mahram*) under Shariah." Those women should keep away from mixing with strangers of the opposite sex in social circles, places of education, market place, offices and other walks of life. Women were told that "in human creation, man stands a rank above the woman." They were further reminded to respect polygamy which is "proven by the clear text of the Qur'an."⁴⁶ On 6 March 2012, just two days before Internal Women's Day, at a press statement, Karzai announced his support for the Ulama Council Resolution. Women activists, including Mrs Aryan Yun, an MP, and Salma Bayat, a civil society activist, declared the Ulama Council Resolution and Karzai's support for it to be violative of the constitution (Art.22, and 7 cited), just as they also turn a blind eye to women's struggle for equality.⁴⁷ Another MP, Ahmad Behzad, commented that the Ulama Council resolution contravened the constitution and added that "certain quarters are trying to establish a Taliban style Islamic rule in Afghanistan."⁴⁸

The Ulama Council resolution records a rather poorly informed understanding of the Qur'an. To say that polygamy is proven by a clear text and that women are superior in creation to women are both indefensible, but I shall not elaborate here as I have addressed the subject in fuller details elsewhere. Political expediency, the urge to pacify the Taliban, as well as Karzai's own sagging popularity might explain his press statement and support for the Ulama Council resolution - coming from a President who promulgated the 2004 constitution, ratified the Bonn Agreement, and then the CEDAW without reservations!

45. The Council of Ulama of Afghanistan is a pro-government NGO of no statutory standing, composed of 150 clerics in Kabul and some provinces, the Council meet occasionally and pass resolutions that carry no binding force. Cf. Lena Ganesh et al., *Women's Economic Empowerment*, 2013, 16.

46. For a critique of the Council of Ulama statements see Mohammad Hashim Kamali, *Afghanistan's Constitution Ten Years On: What Are the Issues?* Kabul: Afghanistan Research and Evaluation Unit Publication, August 2014, p. 27-30.

47. Cf., Masuda Kohistani, "faisala-e shura-e ulama ke-dar-bara-e zanan-e bidun-e mahram sadir karada ast – The ulama council resolution on women travelling without a mahram." In Dari <http://www.kabuljurnal.com/index/php/social/56-2012-03-29-10-19-14> (accessed 3 March 2014).

48. Ahmad Behzad http://www.bbc.co.uk/persian/afghansitan/2012/120308_109_facebook_youth_.shtml (accessed 4 March 2014).

c) Shia Personal Status Law 2009

Karzai's signing of the controversial Shia Personal Status Law (SPSL) 2009 became a rallying point of protest within and outside the country. For this law contravened the egalitarian tenor of the constitution and other international instruments Afghanistan had signed. According to critics, Karzai signed it just before presidential elections in order to appease the Shi'ah leaders and win their votes.⁴⁹ The SPSL was drafted by the Shia Mullahs Council, under the leadership of Mohammad Asif Mohseni. It weakened women's rights rather than promoted them, excluded women from the drafting process, and failed to fulfill required parliamentary procedures. The original draft required women to obey their husbands, and seek their husbands' permission when leaving the house for education or outside work. The minimum age of marriage for girls was initially enacted at nine, and automatic preference was given to husbands in child custody disputes.

According to a report by the Afghan Research and Evaluation Unit (AREU), when the SPSL's content became known to civil society, women activists and progressive Shia institutions protested and managed to delay the parliament's vote on the bill. This allowed time for the drafting of alternative and less discriminatory provisions.⁵⁰

While the bulk of civil society recommendations were rejected by Mohseni's allies in parliament, a group of MPs succeeded in bringing changes to SPSL's four disputed articles. The changes included raising the marriage age to 16 for girls and 18 for boys, raising the age for paternal custody of boys to seven years (from two years) and girls to nine (from seven), and making the clause on the husbands' permission contingent on several conditions. These changes curtailed some of the more discriminatory elements of the proposed law which was finally approved.

49. Karzai signed the SPSL in February 2009. SPSL applies to about five million Shias of Afghanistan. Article 132 required Shia women to sexually submit to their husband's demands, and were expected, barring illness, to have intercourse with them at least once every four days. The bill sat in parliament for some time until Karzai pushed it through the parliamentary process. "It's about votes. Karzai is in a hurry to appease the Shia because the elections are on the way," said Shinkai Karokhail, a woman MP, "There are moderate views among the Shia, but unfortunately our MPs, the people who draft the laws, rely on extremists." Due to the sensitivity of this law and the pressure by some Shia lawmakers, it was approved by the parliament as a package, not article by article, which is the normal procedure. https://en.wikipedia.org/wiki/Shia_Family_Law (accessed 30 August 2015). See also Lena Ganesh, *Women's Economic Empowerment*, Kabul, 2013, p.20.

50. See for details Canadian Women for Afghanistan, "Afghanistan Family Law," http://www.cw4wafghan.ca/sites/default/files/attachments/pages/cw4wafghan-familylaw-factsheet2_0.pdf (accessed 31 August 2015). See also Lauryn Oates, "A Closer Look: The Policy and Law-Making Process Behind the Shiite Personal Status Law" AREU (2009).

d) Women's Equality: an Opinion Survey

Notwithstanding its traditional society constraints that make the task of equality particularly challenging for Afghan women, currents of opinion in support of equality had also been gaining ground. Afghan intellectuals outside the Bonn framework and thereafter continued to support the egalitarian voice for women's rights. In an interview prior to the promulgation of the 2004 constitution, Hamzah Waezia, a traditional Shia intellectual underlined social justice and democratic participation. "The future constitution of Afghanistan should take clear and unequivocal positions on women's rights. Women should be able to enjoy full rights of citizenship independently of men." Waezia added: "women of Afghanistan were the victims of adverse customs and politics which denied them their civilian rights and reduced them to bed-partners rather than partners in life." Past governments had done little to improve their status. Women should also be able in principle to become "president, prime minister, party leader, politician and judge."⁵¹

Samy hamid called attention to the rule of law: The problem in Afghanistan is not due to lack of laws but due to lack of respect for the laws that already exist. One of the worrying problems in the immediate terms is the security issue which has made matters worse. Afghanistan is now ruled by warlords and gun-totters that only know the language of brute force.⁵²

In Rostar Taraki's view, bringing the rule of law to the Afghan environment requires advice and guidance but also the waging of an effective social education campaign at all levels of society: village, town, family, school and the society at large. This may also be said, Taraki added, of respect for democracy that requires a similar campaign if it were to constitute the basis of governance in Afghanistan.⁵³

Ms. Ghotay Khawray, another civil society activist, commented: "Men and women in Afghanistan should enjoy equal rights before the law and equal citizenship responsibilities. The Qur'an grants them both equal ranking in human dignity and essential justice and the new constitution of Afghanistan should grant them these rights without any discrimination."⁵⁴

51. "Interview with leading Afghan thinkers including Waezia and Samy Hamid on the proposed new constitution by a team of writers," (original in Dari), *Asmaa Journal*, Kabul, Special Issue 24-25 (1381/2003), 37.

52. Interview with *Samy hamid*, *ibid.* 27.

53. Interview with Rostar Taraki, *ibid.*, 45.

54. Ghotay Khawray "sheza aw asasi qanon- woman and the constitution," (in Pashto), *Jamia-e Madani*, Special Issue on the Constitution, no. 2, Kabul, 1382/April 2003, 34.

On an historical note, a similar current of pro-equality opinion, marked Afghanistan's so-called "brief experiment in democracy" in the 1960s. Commentators expressed an assertive vision of a future for women's rights. One of the Kabul weekly periodicals, *Wahdat* (unity), for example, registered the following as a part of its publication policy with the Ministry of Information:

The 1964 Constitution considers women equal to men in all civil and political rights... the Afghan woman is equal to man in all walks of life. *Wahdat* shall campaign for the amendment and replacement of all undemocratic laws and regulations which do not comply with the interest of the people.⁵⁵

Parwanah, another private weekly periodical of Kabul stated in its editorial policy:

Obtaining equal rights for the Afghan women constitute the main purpose of our publication... we shall campaign for the abolition of all laws which contradict democratic values of the 1964 constitution, social justice and human rights.

4. Conclusion

Afghanistan's isolation from the mid-20th century Islamic family law reform movement in the Middle East and even the neighbouring Pakistan and Iran, was followed by civil war and conflict. A discouraging episode that lay in the background was the failure of the *Nezam nama* reforms of the 1920s. During the nine years' reign of king Amanullah and his renowned mentor and Foreign Minister, Mahmood Tarze, Afghanistan acquired its first constitution and a total of 60 *nezam namas* that unfolded extensive reforms of law and government in the country. This was Afghanistan's own *tanzimat* that were also influenced by developments in Turkey. The *nezam nama* of Marriage 1921 was one of the earliest in the region and preceded parallel reforms in Egypt in the late 1920s.⁵⁶ Amanullah abdicated and a counter-reform movement under king Mohammad Nadir (1929–1933) culminated in the abolition *en masse* of all of the *nezama nama*. This drastic reaction to law reform thwarted the reformist zeal in Afghanistan for decades to come.

Another attempt at reform was the "brief experiment in democracy" under king Mohammad Zahir in the mid-1960's, which also began with a new constitution (1964). And curiously this too lasted nine years when king Zahir's cousin, Mohammad Daud, staged a military coup that toppled the monarchy in 1973. The truncated reform episode

55. Quoted in Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*, Leiden: E.J. Brill, 1985, 155-56.

56. To quote but one clause of that *nezam nama*, "the *nikah* of childhood prior to attaining majority is forbidden" (Art. 5). See for details Kamali, *Law in Afghanistan*, 110.

on this occasion was due to political discord in the royal household. The CC76 that Daud introduced also fell short of connecting with the reform movement that was already at its concluding stages in the Middle East and elsewhere.

If one were to single out three salient features of the mid-20th century Islamic family law reform, one was introduction of a legal marriageable age and its consequent abolition of child marriage. Next was the introduction of judicial divorce that largely overruled the husband's unilateral power of *talaq*. The third feature was to make polygamy dependent on obtaining an advance judicial order by the intending polygamist.

Except for some points of reform on divorce law and marriageable age, as reviewed above, the CC76 fell short of incorporating these reforms. I have also stressed the need for bridging the gap that now exists between CC76 and the egalitarian features of the 2004 constitution with special reference to women's equality.

Afghanistan's engagement in its third attempt at reform at the dawn of 21st century occurs under a set of markedly different circumstances. The Bonn Agreement, the unprecedented scale of international involvement in Afghanistan, the Afghan diaspora, the CEDAW, and the 2004 constitution set in place the blueprint of extensive changes in the structure of law and government in the country. It is unfortunate that on this occasion, security issues, Taliban insurgency, ineffective government and official corruption became major obstacles to progress.

The National Unity Government that Dr Ashraf Ghani and Dr Abdullah Abdullah announced with the mediation of John Kerry the U.S Secretary of State in September 2014 has, as of this writing (January 2016), remained less than effective. The two candidates became involved in protracted wrangling over the 2014 election results, internal disagreements over the choice of Cabinet ministers and other appointments. Security situation deteriorated in the meantime. Frequent Taliban attacks, suicide bombings and explosions became the country's incessant preoccupation. Added to this is now the IS/Daesh menace that deteriorates the tenuous security situation even further. The National Unity Government has not been united at the centre and there is clearly a need for greater since of unity and purpose at the leadership level as a matter of priority. Afghanistan is in need of effective governance to be able to move forward on a comprehensive reconstruction programme.

The people of Afghanistan are desirous of stability and peace. They are also a resilient people with a lively spirit of hope for a better future. This is shown perhaps by the fact that private enterprise has been active and the economy also improved during the Karzai years. The prospects of a political agreement with the Taliban and relations

with the neighbouring Pakistan remain uncertain with only occasional signs of progress. The quadrilateral peace negotiations, with the participation of the United States and China, Afghanistan and Pakistan, without, however, of Taliban participation are, as of this writing, soon to hold its third round of talks in Islamabad with the expectation of constructing a roadmap for a peace agreement with the Taliban. It is evidently necessary for the Taliban to be present at the negotiation table, and it seems likely they will participate.

Peace and security remain Afghanistan's top priorities. Law reform is unfortunately secondary and can hardly be expected to prosper in conflict-ridden situations. President Ghani seems to be otherwise engaged in taking necessary steps for transition to a more effective pattern of engagement in country's affairs, economic reconstruction and good governance. The two leaders may also be moving closer toward a unified agenda and work programme. A persistent campaign is being waged against official corruption. A project has also been started to restore the usurped landed properties to their original owners - a painful legacy of the war years that Karzai had remained quiet about all along. President Ghani enjoys international support with pledges of assistance from world leaders for his efforts toward a politically stable Afghanistan.

Appendices

Appendix I

A Background Note to the Civil Code 1976

Mohammad Hasan Sharq, who served as Deputy Prime Minister under President Mohammad Daud, wrote that committee work on CC76 had begun much earlier during Daud's tenure as Prime Minister (1953-1963). Mohammad Musa Shafiq (later Prime Minister), the then head of the legislative drafting department of the Justice Ministry, was assigned the task of working on the draft. "Shafiq translated the civil laws of the Republic of Egypt and Iraq and discussed them with the leading and pious *ulama* of the country." This work continued until the end of Daud's premiership. By 1341/1962 much of the draft of both the CC76 and that of the Penal Code 1976 were completed "in accordance with the provisions of the sacred religion of Islam."⁵⁷

President Daud resumed this project years later during his Presidency and "deliberated over it one day per week for a whole year under his own supervision. The then Minister of Justice, Wafiullah Samia, and two Kabul University Professors,

57. Mohammad Hasan Sharq, *tasis wa takhrib-e aawwalin jumhuriyat-e Afghanistan* (establishment and destruction of the first republic of Afghanistan), Pashawar: Markaz-e Nasharat-e Said, 1374/1995, 160-61.

Mohammad Ismail Qassimyar and Mohammad Akram Abqari, as well as a few other learned figures participated in the weekly Cabinet meetings for this purpose until they were both ratified in 1355/1976. Then in the same year, the implementation aspects of both the Civil and the Penal Codes became the principal agenda of a nation-wide judicial seminar, convened by the Legislative Department of the Supreme Court, with the participation of senior judges from all over Afghanistan. Sharq commented that the introduction of these codes was a major achievement for country's justice system and the Republic of Afghanistan both internally and from the viewpoint of the country's international standing.⁵⁸

That said, it is remarkable that President Daud promulgated both the two Codes both as decree laws with the advice only of his Cabinet. It is also ironical that both of these large statutes have yet to be ratified by Afghanistan's parliament even after several decades. President Daud, himself a coup leader, was surrounded by a group of military officers, some with communist sympathies, who helped him stage the coup following which many of them became members of his Cabinet.

Having toppled the monarchy, Daud effectively ended the 'brief democracy period' that had begun under the 1964 constitution. President Daud had made promises of legislative activism and reform, and of bringing "genuine democracy to Afghanistan." He may well have hastened to ratify CC76, which is admittedly well-grounded in the Shariah, but which leaves much to be desired to address actual problems in the legal system.⁵⁹

Piecemeal amendments to CC76 were made under President Daud himself in 1977, then also under the communist President Babrak Karmal in 1986, as well as under President Najibullah in 1987 – altogether to about ten Articles of CC76. Most of these amendments consist of relatively minor addition/ deletion of words and sentences on subjects such as dower (Art. 105),⁶⁰ reconciliation proceedings (Art. 188),⁶¹ entitlement

58. Ibid., p.161.

59. Ibid.

60. The amendment on dower consists of deletion of a few words of the original text of CC76 with the result that the divorced wife, in the event the marriage has not been consummated, is entitled to a half of the specified dower.

61. Amendment to article 188 consists of adding the phrase 'and the court considers continuation of martial life between the spouses unfeasible' to the original wording - thus expanding the court's discretion in the reconciliation proceedings.

to child custody (*hadanah*, Art. 239),⁶² custody proceedings (Art. 249, 250 & 251)⁶³ inheritance (Art. 2032),⁶⁴ and documentation proceedings for divorce (Art. 135).⁶⁵ It is remarkable though that none of these amendments appear in the text of CC76, not even in a later reprint of the original four volumes of the Code into one (dated 1384/2005) – which prompted the present writer, for the record, to provide brief information on them below.⁶⁶ All these amendments were proposed by Ministry of Justice and approved by the Cabinet and/or Revolutionary Council and the President at the time. None of them involved normal parliamentary procedures, nor in fact any substantive reform of the original provisions, as most seem to partake in clarifying ambiguities for purposes of court proceedings.

An additional point of information to mention here is that work is currently underway on a new draft family law under the proposed title *Qanun-e Khawadah* (in over 200 articles) as a self-contained statute independently from CC76. The proposed draft, compiled by Afghanistan's Ministry of Justice with the cooperation of WLUML (Women Living under Muslim Law), has been under review for a few years, it seems, and is still in its preparatory stages. A great deal of the draft text has actually been taken from CC76, albeit with insertion of changes and additions. The basic purpose of the proposed draft seems to be to reform aspects of CC76 that would help bringing them in line with the constitution 2004. Noteworthy are points of reform on guardianship, polygamy, and divorce so as to prevent abusive exercise of these provisions and ensure

62. The amendment to article 239 consists of addition of a word "paternal aunt- 'ammah' to a 16-item list of female relatives who are entitled to child custody in a descending order of priority.

63. Amendments to articles 249 and 250 consist of addition of three somewhat detailed clauses that extend the court discretion on selection of a suitable person or institution to undertake the upbringing of a child who might have completed the seven (for boys) or nine years (for girls) but who have no father and still needed protection. The court should ascertain the child's inclination but decide in their best interest, and may entrust custody to the mother or other close female relatives. In the case of orphans, the court may entrust custody to one of the agnatic relatives, and failing that to a child care institution. Amendment to article 251 consists of addition of the following phrase: "in the event the second person entitled to custody is also, in the opinion of the judge, not qualified to undertake healthy upbringing of the child, the court may grant custody to a person who agrees to undertake it, or to a child care institution."

64. Amendment to article 2032 consists of addition of 'maternal brothers and sisters' to the paternal siblings, all of whom are, as a result, excluded in the presence of the father and grandfather or of son's son from inheritance.

65. Amendment to article 135 consists of addition of two new clauses to the original article. These are: clause (3) "The divorce registration proceedings take place in the presence of the spouses or their representative;" and clause (4): "in the event the wife cannot be present due to valid reasons or refuses to attend, the divorce decree shall be sent to the district office of her residence, or to one of her close relatives."

66. This is probably not accidental as some of the amendments were carried under questionable circumstances when a communist regime (under Karmal), or one with communist sympathies (under Najibullah) were in power.

a measure of court supervision over them.

Appendix II

Moroccan Family Law Code, known as the Mudawana 2004

The Mudawana is generally seen as a balanced blend of both the traditional and modern influences in family law, and reflective also of the desire to strengthen the family unit. In about (400) articles, the Mudawana takes significant steps toward a detailed articulation of an egalitarian and participatory regime of family law.

Presented below is synoptic information on the general structure of this law to be followed by a selection of quotes of some of its salient provisions:

General Structure of the Mudawana

1. Both spouses share responsibility for the family; “women are men’s sisters before the law.”
2. Once a woman comes of age, she does not need a marital tutor (a male relative, usually the father who speaks on her behalf). Women cannot be married against their will, though if they wish to designate a male relative to act as their marital tutor, they may.
3. The minimum age of marriage for both men and women is 18 unless otherwise specified by a judge; in addition, boys and girls under custody may choose their custodian once they reach the age of 15.
4. A man may only take a second wife if a judge authorises it, and only when there is an objective justification for it, the first wife consents, and the man has sufficient resources to support the two families with all their maintenance rights. Moreover, a woman can stipulate in her marriage contract that her husband may not take a second wife. The first wife may also petition for divorce if the husband takes another wife without her consent.
5. The right to petition for divorce belongs to both men and women, though procedures for reconciliation and mediation are encouraged. A man may not repudiate his wife without the permission of a judge, and she and her children must be accorded their full rights under the law. Divorce proceedings take place in a court, rather than before a religious official.

6. If the husband does not fulfill his obligations according to the marriage contract, or causes his wife harm, she has the right to file for divorce. The law also permits divorce by mutual consent.
7. Children's rights are protected according to the international conventions Morocco has signed. Priority in terms of child custody goes first to the mother, then the father, then the maternal grandmother, or to whomever the judge deems the most qualified relative. Children in custody must be given "suitable accommodation," the terms of which must be settled within a month of any dispute. The parent who gains custody of the child keeps the house.
8. A married couple may negotiate an agreement separately from the marriage contract regarding the management of assets they acquire while married.

b) Selected Quotations

"Guardianship (*wilayah*) is the right of the woman: the woman of legal majority exercises it according to her choice and her interest." (Art. 24)

"Polygamy is prohibited if there is fear of lack of justice between the wives, and likewise prohibited if there is stipulation from the wife against her husband marrying another wife [while married to her]". (Art.40)

"The court shall not approve polygamy if the exceptional objective justification is not proven before it...." (Art. 40)

"All stipulations are binding except stipulations that contradict the terms and objectives of the marriage contract and legal rules; these stipulations are void while the contract remains valid." (Art. 47)

"Failure to respect any condition in the marriage contract constitutes an injury justifying a petition for divorce." (Art. 99)

"The wife bears with her husband the responsibility of managing and looking after the affairs of the house and the children".

"Consultation in the taking of decisions in regard to the management of the affairs of the family and the children and family planning [is one of the mutual rights and duties of the spouses]." (Art. 51)