Legal Pluralism and Family Law: An Assessment of the Current Situation in Afghanistan

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A. Introduction

The Afghan Interim Administration established by the Agreement on Provisional Arrangements in Afghanistan for the Re-Establishment of a Permanent Government, known as the Bonn Agreement of December 5, 2001, inherited a legal system devastated by a 23-year long conflict. According to the Bonn Agreement, the 1964 Constitution was applicable until the enactment of a new constitution: on January 26, 2004 the seventh Afghan constitution came into force. Furthermore, existing laws and regulations are applicable to the extent that they are not inconsistent with the Bonn Agreement or with international legal obligations to which Afghanistan is a party[1]. On this basis, all major codifications such as the Civil Code of 1977, the Commercial Code of 1955, the Law on the Jurisdiction and Organisation of the Courts of 1967[2] (hereafter LJOC) are *de jure* applicable until new laws are enacted. Pursuant to the Bonn Agreement, Afghanistan is thus theoretically equipped with statutory law with all necessary instruments for the implementation of its codes and the rule of law. However, as in many countries in transition, statutory law is not the only source of law. The question whether the civil code really governs in practice or whether other sources of law, such as uncodified Islamic and customary laws,

[1] Part II of the Bonn Agreement entitled *Legal Framework and Judicial System*, section 1, i and ii; see Annex B, 261 ff.

[2] Law on the Jurisdiction and Organisation of the Courts of 1346 (1967), Decree No. 588-2189 of September 24, 1967.

are more frequently applied must be considered in depth to understand the current legal system in Afghanistan.

Legal pluralism has many facets. It may describe the fact that in a given society different legal mechanisms apply to identical situations[3]; it has also been defined as being the result of the 'transfer of whole legal systems across cultural boundaries'[4], pointing to legal transplants and the reception of foreign law leading to the co-existence of existing and new laws. It may also relate to the existence of different rules applying to different groups (religious communities or geographic boundaries) within one state. Some refer to legal pluralism whenever state-enacted law and the living law, not necessarily associated with the state, do not correspond[5]. In its broad conception legal pluralism indicates a complex relation between law and society. There is however little research on the interaction and relationship between the different sources of law: they might not have an ordered relationship; they may conflict with each other; or be different but compatible[6].

Afghanistan may be said to show all of these facets. More recently, some international organisations have conducted field research studies on this issue[7].

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[3] *Vanderlinden*, Le pluralisme juridique, essai de synthèse, in: Le pluralisme juridique, *Gilissen* (ed.) (1972) 19: 'l'existence, au sein d'une société déterminée, de mécanismes juridiques différents s'appliquant à des situations identiques'.

[4] *Hooker*, Legal Pluralism – An Introduction to Colonial and Neo-colonial Laws (1975) 1.

[5] *Ehrlich*, Grundlegung der Soziologie des Rechts[4] (1989) 23.

[6] See *Woodman*, The idea of legal pluralism, in: Legal pluralism in the Arab World, *Dupret et al.* (eds.) (1999) 16-18.

[7] Recently some reports have been published by NGOs working in Afghanistan, see in particular: *The International Legal Foundation* (IFL), The Customary Laws of Afghanistan (September 2004), a compilation of tribal and customary laws based on field research in the Pashtun areas of Southern and Eastern Afghanistan, conducted by *Karim Khurram* and *Nathalie Rea*, <www.theifl.org/customarylaws.htm> (hereafter: IFL-Report 2004); *Danish Immigration Service*, The political conditions, the security and human rights situation in Afghanistan, Report on fact-finding mission to Kabul, Afghanistan, 20 March to 2 April 2004 (2004), <www.udlst.dk> (hereafter: DIS-Report 2004); *Women and Children and Legal Research Foundation* (WCLRF), BAD, Painful Sedative, Final Report (2004). For this report 468 women ranging from three to 50 years in 11 provinces were interviewed on the issue of *badd* ie the exchange of women, <www.boell.de/downloads/asien/studie_wclrf.pdf> (hereafter: WCLRF-Report 2004); *International Crisis Group* (ICG), Afghanistan: Women and Reconstruction (2003) [Asia Report 48], <www.crisisgrouporg/library/documents /report_archive/ A400919_14032003.pdf> (hereafter: ICG-Report 2003); *Lau*, Afghanistan's Legal System and its Compatibility with International Human Rights Standards, Report of the International Commission of Jurists (2003) (hereafter: ICJ-Report 2003) <www.icj.org/IMG/pdf/doc-51.pdf>; *Amnesty International* has published several reports on the legal situation in Afghanistan, most recently: Afghanistan – Women still under attack – a systematic failure to protect (May 2005), AI Index: ASA 11/007/2005 (hereafter: AI-Report 2005); Afghanistan – Re-establishing the rule of law (August 2003), AI Index: ASA 11/ 021/2003 (hereafter: AI-Report 2003). From January to March 2005, field research on family law was conducted by the Max Planck Institute for Foreign Private Law and Private International Law in nine provinces of

The following article attempts to draw a picture of pluralism in Afghanistan by looking at the legacies of a century of modern legal history and by evaluating information from these field research reports.

B. Legal Pluralism

When considering Afghanistan's legal system, one can distinguish three in many ways interconnected sources of law: Islamic law[8], state law and customary law. This is ascribed to a large extent to the legal reforms introduced by Abdul Rahman Khan (ruling 1881-1901), who is seen as the founder of the modern Afghan state[9]. Beside the three sources of law, he had also three kinds of courts established: religious (*Sharīʿa*) courts to deal with religious and civil matters, criminal courts which were administered by the chiefs of police or judges, and a board of commerce consisting of merchants, who settled business disputes[10]. Tribal groups had always had their own ways of dispute settlement: the local assemblies or *jirgas*.

Though state structures and a certain degree of administrative unity has been established over the last century in Afghanistan, a unified body of law never emerged; the Afghan legal system relies on the principles of Islam, local customs and the spirit of Afghan tribal codes, and to a much lesser extent on state-enacted statutes.

I. The historical dichotomy between Islamic law and statutory law

The dichotomy between the Sharīʿa and state law has a long history in Muslim countries. Before the adoption of constitutional forms of government (originating in the West) the legal system of Muslim countries was based on two

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Afghanistan: Kabul, Kandahar, Herat, Balkh, Nangarhar, Kunduz, Faizabad, Badakhshan, Paktia and Bamiyan. The aim was to find data and information on family laws and assess the sources of law and their interaction. The research was conducted by *Mohammad Hamid Saboory* and *Baryalai Hakimi*. The report entitled 'Family and Family Law in Afghanistan: a report on the fact-finding mission to Afghanistan (Kabul, Kandahar, Herat, Balkh, Badakhshan, Bamiyan, Ningarhar, Kunduz Paktia) January 10 – March 17, 2005' will be published in autumn 2005 (hereafter: MPI-Report 2005).

[8] By using the expression 'Islamic law', reference is made to the schools of law applicable in Afghanistan. For the purpose of this paper the emphasis on the differences within the schools has been omitted. For the inherent pluralism of 'Islamic law' see *Yassari*, Islamisches Recht oder Recht der Muslime – Gedanken zu Recht und Religion im Islam: Zeitschrift für vergleichende Rechtswissenschaften 103 (2004) 103-121.

[9] See on the reign of Abdul Rahman Khan *Rubin*, The Fragmentation of Afghanistan[2] (2002) 48-52.

[10] *Gregorian*, The Emergence of Modern Afghanistan – Politics of Reform and Modernization 1880-1946 (1969) 136 f.

sources: state law (*qānūn*) which served as the basis for public law and administrative regulations, and the Sharīᶜa (in its regional mould) governing matters of civil law and personal status[11]. The early constitutions of Muslim countries upheld the differentiation between Sharīᶜa and state law. In fact, Art. 16 of Afghanistan's first constitution, the *niẓāmnāma-e asāsī-ye dowlat-e āliye afqānestān* of 1923, required all Afghan citizens to obey both the rule of the Sharīᶜa and the laws of the state. No real contradiction was felt in this rule, as different fields of law were addressed. Islamic law and state law have coexisted in Afghanistan for a century, both regulating important sectors of society, whereby their respective jurisdiction also overlapped[12]. The education of the legal elites has been conducted along similar lines: legal education was offered in Islamic seminaries in the Sharīᶜa tradition, as well as in secular institutions of higher education teaching mostly state-enacted law. Even today, the universities are composed of faculties of law and faculties of Sharīᶜa, with different curricula.

The relationship between the Sharīᶜa and state law has become more critical with the emergence of the idea of 'Sharīᶜa-based Islamic government' that disrupted the logical structure of division of the previous era[13]. The idea that state law and Islamic law competed emerged, as did the question on the hierarchy of norms. This dichotomy that endured into modern times left some question open. Can this pluralism be incorporated into a modern legal system and the conditions of a modern world? Art. 1 of the new constitution of 2004, proclaims Afghanistan an 'Islamic Republic', and Art. 3 states that no law shall be contrary to the beliefs and provisions of the sacred religion of Islam. On the other hand, Art. 130 Constitution 2004[14] stipulates the priority of statutory law over Islamic law. Islamic law shall only be applicable when no explicit provision in state law exists. The constitution fails to define the 'beliefs and provisions of the sacred religion of Islam' or what the expression 'Islamic Republic' encompass. Do these constitutional postulates in the new constitution imply that the ethical values of Islam govern the interpretation of the laws, or does the constitution (and state-enacted law) set the frame within which Islamic law must operate?

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[11] See *Coulson*, A History of Islamic Law (1964) 124.

[12] *Weinbaum*, Legal Elites in Afghan Society: Int. J. Middle East Stud. 12 (1980) 39.

[13] See *Arjomand*, The Role of Religion and the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan, letter to the Constitutional Commission of Afghanistan of February 6, 2003 published on the internet: <www.cic.nyu.edu/pdf/E14RoleofReligionin ConstitutionArjomand.pdf>.

[14] Art. 130 Constitution 2004: The courts shall apply this Constitution and other laws when adjudicating cases. When no provision exists in the Constitution or the law for a case under consideration, the court shall, by following the principles of the Hanafi school of law and within the limitations set forth in this constitution, render a decision that secures justice in the best possible way.

The answers to these questions are difficult. Closely linked to this question is the question as to who is to interpret the constitution. Several models can be found in Islamic countries; be it the religious organ of the *shūrā-ye nagahbān* in Iran[15] or the Supreme Constitutional Court in Egypt. The proposal to establish a genuine 'Supreme Constitutional Court' was rejected in the drafting process. In the 2004 Constitution two institutions are foreseen: according to Art. 157 an 'Independent Commission for the Supervision of the Implementation of the Constitution' must be created. Furthermore the Supreme Court has the competence to 'review laws, legislative decrees, international treaties and conventions on their compliance with the Constitution and to interpret them, in accordance with the law [...]' (Art. 121). Here again we see a constitutionally instituted dichotomy, very likely to cause serious problems in the future.

II. The Sharīʿa and customary law

The traditions and behavioural norms embedded in customary law apply to almost all aspects of Afghan life. Despite this prominent role little research has been conducted on customary law in general[16] and the implications for family law in particular. The most important tribal code is the *pashtunwali*. Primarily, it is a tribal code of honour[17], 'the way of the Pashtu' as an integral part of the Pashtu identity[18]. It is thus applied to a wide range of legal fields, in particular to what is generally regarded as criminal law. The dividing lines are however not clear, since the pashtunwali dominates the social relations not only in criminal matters, but also in marriage and property disputes[19], hence fields that traditionally fell/fall under the jurisdiction of the Sharīʿa.

The relationship between customary law and Islamic law is thus a complex one. Palwasha Kakar argues that, in the Pashtun mind, the pashtunwali has a religious foundation in Islam, therefore, for a Pashtun there is no contradiction between being a Pashtun and practicing pashtunwali, and being Muslim and adhering to Islamic law[20]. Kakar goes on[21]:

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[15] See *Rasekh* in this volume, 113 ff.

[16] For a comprehensive account of the pashtunwali, see *Steul*, Pashtunwali – ein Ehrenkodex und seine rechtliche Relevanz (1981); *Glatzer*, Zum Pashtunwali als ethnisches Selbstportrait, in: Subjekte und Systeme, FS Sigrist (2000) 93-102; most recently IFL-Report 2004 (note 7) on the customary laws in Afghanistan.

[17] See *Steul* (note 16).

[18] *Kakar*, Tribal Law of Pashtunwali and Women's Legislative Authority, paper from the Afghan Legal History Project of Harvard Law School, published on the internet <www.law.harvard.edu/programs/ilsp/Kakar.pdf>; *Steul* (note 16) 135 with reference to *Spain*, The way of the Pathans (1962) 46.

[19] *Kamali*, Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary (1985) 4.

[20] *Kakar* (note 18) 2-3.

> 'Even though the Shari'a and pashtunwali overlap in the Pashtun consciousness, they are seen as functioning for a different purpose. The Shari'a represents God's will for humanity on earth and is practiced because it is a moral code whereas pashtunwali is seen as a matter of honor, which to a Pashtun is defined by a person's integrity in upholding and practicing the concepts that make up pashtunwali.'

According to the IFL-Report 2004, when a dispute arises, the parties agree with each other whether the dispute shall be solved 'sharīʿa-wise' or according to customary law[22]. This question can be of vital importance, since the rules of the pashtunwali more often than not contradict the Sharīʿa. This is particularly visible in cases where the Pashtun concept of women and their being part of the honour of the men comes into play[23]. Women are considered to be part of the *nāmūs*[24], a concept that Kakar defines as 'that which is defended for honor to be upheld, instead of acted upon to achieve honor (such as hospitality)'[25]. If someone offends the rules of the gendered order, there is reason to act in defence of one's nāmūs. This interpretation and the negative impact of the extreme seclusion of women known as *purdah* has led to a situation where women have been deprived of their basic rights, granted to them by Islamic law: their consent in matters of their own concern is not taken into consideration, and disobedience to the rules of customs are regarded as crimes and consequently punished by the community[26].

The norms of the pashtunwali rely more on the notion of restorative justice than on retributive justice[27]. Rather then being sent to prison for a committed wrong, the wrongdoer is asked to pay blood money to the victim and ask for forgiveness. The concept of blood money however varies, as in some crimes it requires the giving into marriage of women as compensation for the loss suffered by the victim's family and as a means to pacifying hostile tribal groups or families[28]. The IFL-Report 2004 states[29]:

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[21] *Kakar* (note 18) 2-3.

[22] IFL-Report 2004 (note 7) 7.

[23] Comp. *Steul* (note 16) 140-143 on nāmūs.

[24] Despite its applying to both genders, nāmūs is known to be the 'defence of the honour of women'; see *Dupree*, Afghanistan (1973) 126.

[25] *Kakar* (note 18) 4.

[26] IFL-Report 2004 (note 7) 7; WCLRF-Report 2004 (note 7) 15; DIS-Report 2004 (note 7) 50: 'A woman runs the risk of being murdered by her family, if she does not marry the person whom the family has chosen'.

[27] *Drumbl*, Rights, Culture, and Crime. The Role of Rule of Law for the Women of Afghanistan: Columbia Journal of Transnational Law, 42 (2003) 349; AI-Report 2005 (note 7) 36; see also *Wardak*, in this volume, 82, footnote 38.

[28] There are various rules for different crimes applied differently in different tribes; see for the full account IFL-Report 2004.

[29] IFL-Report 2004 (note 7) 11.

> 'Generally, girls are preferred to money, because when the girls are wedded to the victim's family, kinship and blood sharing will transform the severe enmity into friendship.'

Such practices fall under the concept of *badd*, which literally means exchange, equivalent or revenge[30]. The girls are given in marriage as a token of peace without brideprice (*walwar*)[31]. In this the girls and women have no say. The negative effects of these forced marriages are manifold: very often very young girls are wedded to considerably older men[32], suffering at best from frustration and at worst from abuse and maltreatment. If the 'severe enmity' does not change into 'friendship' and animosity between the families does not cease, the girl remains in a hostile environment without protection[33]. Men who are forced into marriage often resort to second marriages[34], making family life difficult[35].

Very often child marriages, forced marriage and polygamy are practised as instruments of tribal politics[36]. These practices contradict the Sharī^{c}a, basic human rights as well as the regulations of Afghan law[37]. In fact, family law legislation attempted to eliminate badd as early as 1926. Art. 9 of the *niẓāmnāma-e nikāh, ^{c}arūsī va khatnahsūrī* of 1926 [Law on Marriage, Weddings and Circumcision] (hereafter Marriage Law 1926) prohibited the practice of badd, as did the *qānūn-e ezdevāğ* [Marriage Law] of 1960 (Art. 20) and the *qānūn-e ezdevāğ* [Marriage Law] of 1971 (Art. 21). However, none of these statutes elaborated the prohibition any further or provided any meaningful

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[30] *Steul* (note 16) 153; literally the word 'bad' is the opposite of good.

[31] *Kamali* (note 19) 91; *Tapper*, Bartered Brides – Politics, Gender and Marriage in an Afghan Tribal Society (1991) 149. More on walwar see below.

[32] According to the WCLRF-Report 2004 (note 7) 27 more than 25% of the girls are under 18.

[33] On the effects of badd on women, men and society at large see WCLRF-Report 2004 (note 7) 25-32.

[34] WCLRF-Report 2004 (note 7) 26.

[35] See DIS-Report 2004 (note 7) 50 on forced marriages: '[i]t is customary practice that young women are married against their will to older men, which contributes to a high incidence of suicide among young women'.

[36] *Kamali* (note 19) 4.

[37] Afghanistan is signatory of following International Human Rights Conventions: The Convention on the Elimination of all Forms of Discrimination against Women ratified on March 5, 2003; the Optional Protocol of the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, ratified on October 19, 2002; the Convention on the Rights of the Child, ratified on April 27, 1994, the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, ratified on June 26, 1987 (reservation in respect of Art. 20 and 30); the International Convention on the Elimination of All Forms of Racial Discrimination, ratified on August 5, 1983 (reservations in respect of membership and jurisdiction of the International Court of Justice Art. 17, 18 and 22); the International Covenant on Economics, Social and Cultural Rights, ratified on April 24, 1983 and the International Covenant on Civil and Political Rights, ratified on April 24, 1983 (reservations in respect of membership provisions Art. 48(1) and (3)).

sanction against breach; badd is still widespread[38]; according to most reports *de facto* the situation has not changed to this day.

III. Customary law versus statutory law

One of the main fields of conflict here is the relationship between the formal administration of justice of the state and the informal dispute resolution systems as practised according to customary tradition[39].

According to Art. 120 Constitution 2004 and Art. 4 LJOC state courts shall have exclusive jurisdiction over all legal disputes. Art. 116 Constitution 2004 foresees a three-tiered court system with courts of first instance, appeal courts and the Supreme Court as last instance. The constitution does, however, not give detailed rules on the structure of the courts. According to Art. 123 Constitution 2004 the rules related to the structure, authority, and performance of the courts and the duties of judges shall be regulated by statutes. Art. 117 Constitution 2004 provides for a nine-member Supreme Court (*Stera Mahkama*), appointed for a 10-year term by the President with the approval of the House of Elders (*Wolesi Jirga*). In January 2005 the Temporary Supreme Court of Afghanistan was constituted. President Karzai appointed nine judges, all of them Islamic scholars, including one *shīʿī* scholar. According to the constitution, the Temporary Supreme Court will work until the National Assembly (*Loya Jirga*) is formed; elections for the Afghan Parliament are scheduled for autumn 2005.

Art. 44 (a) LJOC provides that specialised family law courts must be established in all provinces. Except for Kabul no such family court has been established yet[40]. In any case, according to the MPI-Report 2005[41], parties to a family law dispute hardly ever resort to state courts; if and when they do, the judges in some parts of the country refuse to adjudicate the case if no help was previously sought some informal dispute resolution institution[42]. In fact, in many regions of Afghanistan, especially where central state authority is weak or inexistent, people rather turn to community leaders, tribal councils and other forms of mediation and informal justice mechanisms known as *shūrā* or jirga[43], as opposed to official courts to solve legal disputes[44]. There is however a great

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[38] WCLRF-Report 2004 (note 7) 18.

[39] See *Wardak* in this volume, 61 ff.

[40] Comp. AI-Report-2003 (note 7) 7.

[41] See note 7.

[42] Confirmed by the AI-Report 2003 (note 7) 45.

[43] See on customary law and jirga *Wardak* in this volume, 61, 62 f.

[44] *Azabaijani-Moghaddam*, Including Marginalised Groups in the Legal System, Conference Paper for the Conference: State Reconstruction and International Engagement in Afghanistan, Center for Development Research, May 30 – June 1, 2003, Bonn, published on the internet: <www.bglatzer.de/arg/arp/azarbaijani.pdf>.

disparity in the emphasis placed upon informal justice systems by local populations living in different regions of Afghanistan. The strongest emphasis is placed in the Pashtun areas[45].

The jirga is generally comprised of prominent male members of the community with established social status and a reputation for piety and fairness who convene to resolve community problems, including those related to land, property, the family and crime[46]. Members of the jirga are interested in reaching a suitable decision according to the prevailing mood of the community as well as the best interest of the community as a whole[47]. Decisions are taken by consensus and are binding on the parties[48]. They are conveyed orally; there are no written reports[49]. In their decision-making the jirgas apply different sources of law, including Sharī'a law and Afghan custom[50]. There are, however, no reports on jirgas applying state-enacted law.

As mentioned above, in some areas courts would refuse to deal with cases that had not been initially referred to the local jirgas[51], whereas in others, no such thing has been reported. At the present time, one can only say with certainty that the actual relationship between the various kinds of dispute resolution is largely unregulated. The emphasis on informal, non-state dispute resolution mechanisms is partly explained as a reaction to the imposition of foreign models of justice perceived as being unable to address specific Afghan interests and serve justice[52]. Additionally, unlike state courts[53], informal settlements of disputes are without substantive delays and are less costly[54]. As Wardak points out, illiteracy also plays an important role in discouraging people from using the formal courts – the overwhelming majority of Afghans are unable to make applications, to read or understand the laws or complete the paper work. According to the ICG-Report 2003, there are also positive incentives to address the informal institutions, especially for women, as women 'know how to lobby influential men, such as village heads or mullahs'[55].

It remains doubtful however whether justice can be served in the best interest of all members of the community, if practices such as badd are still

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[45] AI-Report 2003 (note 7) 45.

[46] See *Steul* (note 16) 226 and the reported 58 cases on the mentioned issues.

[47] *Kakar* (note 18) 2.

[48] *Steul* (note 16) 123; *Kakar* (note 18) 6.

[49] IFL-Report 2004 (note 7) 9; WCLRF-Report 2004 (note 7) 15.

[50] AI-Report 2003 (note 7) 45; DIS-Report 2004 (note 7) 38.

[51] AI-Report 2003 (note 7) 45.

[52] AI-Report 2003 (note 7) 45.

[53] Comp. ICJ-Report 2003 (note 7) 22 '[c]ourts are very slow, do not conduct their hearings in public, litigants do not know the law or do not have access to trained lawyers and that there was excessive bureaucracy. In his opinion, the legal system did not encourage people to ask for their own rights'.

[54] See *Wardak* in this volume, 61, 70.

[55] ICG-Report 2003 (note 7) 21.

followed and decisions are made in absence of clearly recognised procedures, where conformity with Afghan law (be it Islamic state law or international human rights obligations) cannot be controlled[56]. Furthermore, the lack of documentation in the process of decision-making can lead to inaccuracies in evidence and thus undermine the value of the jirga as a tribunal for settling disputes[57]. However, as these informal dispute resolution mechanisms are widespread in Afghanistan, it would be hardly seen advisable to ban them all together. It is more reasonable to link them with the formal court system. The inclusion of informal justice mechanisms must however be approached with care; sentences by the jirgas or shūrā should be monitored in order to ensure that they are not contrary to basic human rights[58], especially in cases regarding criminal law and badd.

IV. Matters of personal status

1. Legislation

Historically, matters of personal status fell under the jurisdiction of the Sharīʿa and were governed mostly by *ḥanafī* law[59], as the majority of Afghans adheres to this school of law[60]. The first attempt to regulate family law matters by statutory law was undertaken by King Amanullah Khan in the early 1920s (ruling 1919-1929). Amanullah endeavoured to reform the system through statutory law. Indeed Afghanistan's first constitution, the niẓāmnāma-e asāsī-ye dolat-e āliye afqānestān of April 1923, triggered the enactment of a plethora of other niẓāmnāma. They were the first written legal documents in Afghanistan. More than 51 niẓāmnāmas were published between 1919 and 1927[61], among them the Marriage Law 1921 which was incorporated in the abovementioned Marriage Law 1926. An administrative code was issued to transfer the jurisdiction of family matters from religious to civil courts[62]. Amanullah introduced the right of women to education and the permission to travel abroad for female students for higher education purposes. He attempted to abolish the widespread practice of child marriages[63] and to restrict polygamy[64]. His reforms were however met

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[56] Comp. AI-Report 2003 (note 7) 46; AI-Report 2005 (note 7) 36.

[57] *Kamali* (note 19) 4.

[58] DIS-Report 2004 (note 7) 38.

[59] *Amin*, Law, Reform and Revolution in Afghanistan (1992) 90.

[60] *Vafai*, Afghanistan: A Country Law Study (1988) 10.

[61] A list of the niẓāmnāma is accessible on the website of the International Development Law Organization (IDLO), <www.idlo.int/ afghanlaws/index.htm>.

[62] *Vafai* (note 60) 12.

[63] For a history of child marriages in Afghanistan see *Kamali* (note 19) 110-129.

[64] *Gregorian* (note 10) 243.

with hostility[65]. The advent of secular state-enacted law was rejected by Amanullah's opponents, especially among the clerics, who saw their powers fading in a more educated society[66]. They accused the niẓāmnāma of being un-Islamic and in violation of God's laws. When Amanullah ordered the unveiling of women, the enraged mullahs joined forces with the tribesmen who resented Amanullah's centralisation efforts. The King had to make concessions: in the late 1920s he agreed to end female education by the age of 12 and to allow child marriages and polygamy[67].

Under his successors several statutes dealing with family law issues emerged: the Marriage Law 1934, 1949, 1960 and 1971. These statutes can be described as piecemeal legislation, enacted to address very specific questions on particular, mostly economic issues revolving around marriage, such as the expenses for weddings and other family ceremonies. The Marriage Law 1949 for example addressed the financial side of marriage ceremonies and limited the amount of money to be spent for them[68]. In its preamble the Marriage Law 1949 stated that it was enacted in order to:

> [...] put an end to the unlawful ceremonies, competition, hypocrisy and useless expenses in marriage, wedding and circumcision celebrations, and in order to carry out the provisions of these regulations, after having explained them to the people; the governors, mayors and heads of villages are responsible and charged with arranging meetings of religious scholars and dignitaries in which they shall personally participate and explain to the people the great damage caused by these ceremonies and the great expenses which are contrary to law and the economic interests and the morals of the people.

The preamble of the Law of Mourning Ceremonies of 1949 took a similar stance:

> [...] clearly explain to the people that mourning ceremonies shall be carried out in accordance with Divine law, so that all improper customs, useless expenses, and unlawful usages and habits which are detrimental to the morals and the economy of the people are completely stopped.

There is unfortunately very little research and analysis on the actual effect of these statutes[69]. It may be presumed that they did not really have much impact on behaviour and traditions, since one of the economically most devastating

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[65] *Amin* (note 59) 72.

[66] *Poullada*, Reform and Rebellion in Afghanistan 1919-1929 (1973) 120.

[67] *Stewart*, Fire in Afghanistan 1914-1929 (1973) 263, see Art. 3 of the Marriage Law 1926: 'Marriage of minors is permissible, [...] but child marriages cause disharmony, conflict and killing among you', as quoted in *Kamali* (note 19) 112.

[68] Art. 4 of the Marriage Law 1949 forbade for example to serve 'too many sweets', and Art. 3 stipulated that the groom should not be required to pay for the wedding gown of his bride beyond his means.

[69] For an account of the fate of these statutes and the practice of extravagant marriage ceremonies see *Kamali* (note 19) 83-105.

traditions of Afghan society, the walwar, as exemplified below, not only survived but is still practised widely in Afghanistan today.

In 1977 the Afghan civil code (AfgCC) was enacted, with 2416 articles encompassing all areas of civil law. It is generally based on the ḥanafī school of law and influenced to some extent by the French code civil as far as capacity for transactions, the requirement for registration of matters of personal status (marriage, divorce, proof of parentage and relationship (Art. 48 AfgCC), and domicile (Art. 51 AfgCC) are concerned[70]. Art. 56-336 AfgCC contain the provisions on family law and cover matrimonial law, polygamy, child custody, and divorce.

Soon after its enactment the political situation in Afghanistan became instable, and within a matter of years the reality of applied law revealed that the civil code was hardly used and that people resorted more often than not to the (uncodified) classical ḥanafī laws. This happened despite the fact that Art. 1 AfgCC stipulates the precedence of statutory law over Islamic law. Islamic law shall only be applicable when no explicit provision in state law exists[71]. Art. 130 Constitution 2004 reiterates the same hierarchy as Art. 1 AfgCC. In practice, however, the opposite is true. Statutory law is hardly applied. The preference of Islamic law over state-enacted law is partly explained by the instable history of changing regimes and rulers in Afghanistan, where Islamic law has been the single constant that has survived a century of law reform and legal insecurity. Surprisingly, even the acceptance by the population of codified Islamic family law has been hesitating. Without exception all surveys of the Afghan legal system observed the fact that Afghanistan's statutory laws and regulations existed on paper only[72].

2. *Marriage customs contrary to state law and Islamic law*

Nearly all aspects of Afghan society are connected to the structure and function of the family. The family determines social rank, religious adherence, marriage partners, and personal standards of behaviour of each of its members. The kinship system is based primarily on the extended family, comprising the husband, the wife, their married sons with their families, and unmarried daugh-

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[70] *Amin* (note 59) 51.

[71] Art. 1 AfgCC: 1. In cases where a provision of law exists, the application of religious jurisprudence (eğtehād) is not permitted. [...] 2. In cases where there is no provision in the law, the court shall apply the fundamental principles of ḥanafī jurisprudence of the Islamic Sharīʿa to secure justice in the best possible way.

[72] *Lau*, An Introduction to Afghanistan's Legal System: Yearbook of Islamic and Middle Eastern Law 8 (2001-2002) 27, 29.

ters[73]. Given the significance of the family in the scheme of social relationships, marriage is of utmost importance.

The preferred marriage partner is considered to be the father's brother's daughter, or failing this, someone in the same large kin group. Economic consideration underlies this aspect, since property transferred to the bride remains in the family[74]. This is why some writers have called marriage in Afghanistan 'essentially a business transaction'[75]. Extravagant wedding expenses involving payment of high brideprices and dower have added to the impression that 'marriage has become the privilege of the wealthy'[76]: the economic aspects of marriage have become great obstacles to marriages, as poor families will not be able to afford the marriage of their members, if they cannot raise the necessary amounts of money. The disastrous marriage expenses have weakened the financial status of the family and exacerbate poverty[77]. The economic interests of the families in the matrimonial affairs of their children are the driving force, and although many rituals and customs are well-intentioned and respond to basic considerations of continuity, many practices revolving around marriage are contrary to Islamic law, statutory law and basic human rights.

Besides the limitation of expenditures for the celebration of weddings and other ceremonies, as seen above, the most salient feature of early legislative acts in family law is the prohibition of the brideprice, walwar[78]. Walwar is a tradition whereby the groom has to reimburse the parents of the bride for the financial loss they suffered while raising their daughter[79]. It is thus a sum of money (or commodity) that the groom or his family has to pay to the head of the bride's household[80]. Walwar originates in the tribal tradition of Afghanistan, and viewed from the Pashtun perspective, it is a matter of honour: the higher the walwar, the higher the esteem of the husband's family for the bride. Some have argued that the concept of walwar is wrongly considered as 'selling out girls', since this view ignores the socio-cultural background of the institution[81]. The idea underlying walwar is to provide some financial relief to the girl's parents while purchasing gold and silver ornaments, clothes, household

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[73] *Smith*, Afghanistan: a country study[4] (1980) 97.

[74] *Smith* (note 73) 103.

[75] See *Smith* (note 73) 105.

[76] *Kamali* (note 19) 12.

[77] *Kamali* (note 19) 12.

[78] See for an account of walwar in Afghan Turkistan among the Maduzai, *Tapper* (note 31) 141-156.

[79] *Kamali* (note 19) 84. This practice is also known in other countries of the region, such as *shīr-bahā* in Iran.

[80] *Kamali* (note 19) 85.

[81] *Afridi*, Pakhtun Customs Relating to Birth, Marriage and Death: Monthly Diplomat, Pakistani Magazine, <www.diplomat.com.pk>.

utensils as dowry etc. for their daughters[82]. However, even if the dowry may be paid out of the walwar, it is not compulsory[83]; the walwar very often does not benefit the girls nor does it flow into the expenses for the wedding ceremony.

The amount of commodities or money acceptable as walwar differs from province to province, as do the social attitudes with regard to walwar[84]. In the 1980s Kamali recorded amounts of 20,000 to 200,000 Afghanis[85] according to geographic areas[86], a uniform figure could, however, not be given. The MPI-Report 2005[87] revealed the following data: walwar would be from 2,000 US$ (about 85,000 Afghani) to 40,000 US$ (1,700,000 Afghani) for a virgin girl. This amount might be even higher, if the man was already married; it would double for the third marriage and increase further for the fourth marriage[88]. It is important to add that the amount of walwar can vary according to chastity, beauty, education and family standard of the girl's family.

Special attention was given by the legislator to this issue; the need to purge the Afghan way of life of this tradition detrimental to society at large was strongly felt. The Marriage Law 1921 explicitly forbade the practice of walwar, as did its successor, the Marriage Law 1926. Both statutes failed, however, to specify any means of enforcement or sanction in case of infringement. The Marriage Law 1949 contains similar provisions. According to its Art. 5 the bride is denied any further gift (including walwar) in addition to her dower. Art. 6 provides the groom with some means of action and stipulates that the government is authorised to take action in a situation where, after the completion of a valid marriage, the guardian of the bride refuses to allow the bride to join her husband because of his refusal to pay extra money. This provision, however, had hardly a scope of application since normally the brideprice is to be paid before the conclusion of the marriage[89].

Subsequent legislation repeated the prohibition of walwar. The Marriage Law 1971 reiterated the formulation of the 1949 Law: Art. 15 Marriage Law 1971 provided that no one, including the relatives of the bride, may for the purpose of marriage ask or receive under any title any cash or commodity from the groom or his relatives. It goes on by stating that violators will be liable to prosecution and punishment according to law. However, the act failed to

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[82] *Kamali* (note 19) 85; *Tapper* (note 31) 143.

[83] *Kamali* (note 19) 85.

[84] See *Kamali* (note 19) 85, *Tapper* (note 31) 142: 'A brideprice is customarily seen as the equivalent of one hundred sheep'.

[85] In 1969 the average national income per capita was approximately 4,050 Afghani (US$ 90) *Smith* (note 73) xxxv; in 1977 it was 6,750 Afghani (150 US$) *Kamali* (note 19) 86.

[86] See *Kamali* (note 19) 85.

[87] See note 7.

[88] In a case reported from Paktia, a man paid 80,000 US$ (4,000,000 Afghani) as walwar for his third wife.

[89] *Kamali* (note 19) 87; *Tapper* (note 31) 144.

specify the competent court to hear cases on the matter, the penalties involved, or the way the violator should be prosecuted. The absence of sanctions in the Marriage Law 1971 made Art. 15 inapplicable in practice. The intention of the legislator to eliminate walwar did not include any effective measure for the enforcement of the prohibition or sanctions for violation.

The Civil Code of 1977 did not contain any provision on walwar. It is not clear why the civil code, which encompasses all matters of personal status, is completely silent on the matter, considering the importance attached to it in earlier legislation.

The legislative measures to discourage expensive weddings and walwar were well-intentioned but ill-planned. No effective measures to sanction their breach emerged, and the practice of walwar has survived a century of attempts to eliminate it. In a country suffering from widespread poverty and unemployment this institution must be reconsidered in view of the fact that many men cannot afford it and are forced to sell their land or travel abroad to earn money for it.

C. Conclusion

Legal pluralism is the hallmark of Afghan legal reality. Afghan law is a combination of Sharī^{c}a, state legislation and local customary law. Although historically grown, the lack of clarity regarding the relationship between these different sources of law and the absence of guidelines as how to resolve conflicts between them are felt strongly today. The socio-legal reality is not reflected by the formal legal system established under the provisions of the constitution, and the law in the books does not represent the norms that actually govern the lives of the majority of the population. Most writings on the Afghan legal system point to the fact that for ordinary people and villagers, who form the majority of the populace, tribal/customary and Islamic law are more significant and actually better known than any state legislation[90]. The difficulty in implementing statutory laws also has very practical reasons: many of the statutes are currently unavailable, due to the destruction of archives and the complete breakdown of administrative order during the years of civil war. Their limited practical value is also attributed to the demise of a central political authority as well as to the lack of training of legal professionals and the inability to adapt statutory law (often foreign in its origin) to the Afghan experience[91]. Very often, judges either do not know the law well, or know it but are reluctant to apply it[92].

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[90] *Amin* (note 59) 66.

[91] ICJ-Report (note 7) 29.

[92] The lack of knowledge applies not only to state law but also to Islamic law; comp. AI-Report 2003 (note 7) 35.

Customs such as badd and walwar have had a negative impact on family structures and society at large. Marriage has become – to a great extent – an economic issue. Legislative attempts to overcome these customs have failed. A change of attitude on part of the population at large concerning the application of rules that infringe upon basic human rights as well as basic Islamic rights is the condition sine qua non for change. As long as practices such as badd are not seen as disgraceful and against human dignity, imposing a system from above will not be successful in Afghanistan. It is impossible to reject the existing body of tribal laws in its entirety, as this will damage the legal reform process, but at the same time discriminatory practices, especially those against women, must be abolished. In changing these practices, history, traditional structures, and the failures of the past must be taken into consideration.