Recent Developments in Afghan Family Law: Research Aspects

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Summary

In 1985 the Afghan jurist Hāšim Kamālī wrote the following in his book *Law in Afghanistan*:

> In Afghanistan, a man may acquire a wife in any one of the following four ways: he may inherit a widow, gain a bride in exchange marriage, gain a bride as compensation for a crime of which he or his relatives were the victim, or pay a bride price.
> Inheriting a widow, exchange marriage and wives as compensation for a crime are all not acceptable according to sharī'a standards and of course do not conform to human rights standards.[1]

The aim of this article is to explore whether this situation still prevails more than twenty years after the country went through the experience of Soviet occupation (1979-1988), which had a clear tendency to secularise the legal system, the time of re-establishment of the Islamic system during the rule of the Mujāhidīn, the civil war (1988-1994) and the Taliban who tried to impose their strict interpretation of Islamic law on the country (1994-2001). Furthermore, the paper will examine which solution the Afghan intellectuals, jurists and politicians see for the prevailing problems of the Afghan legal system with regard to family law. On the basis of the concept of legal pluralism and with the scarcity of recent scientific research in mind, I will try to analyse the legal situation and contribute some considerations on the character of the public legal discourse in Afghanistan with regard to family law. After a short introduction on the state of affairs and an outline of the history and legal developments (1), I will describe the legal norms and practices in family law (2) and – with regard to the intense interest of the international community since the fall of the Taliban in dealing with the gender problem and improving the legal and social situation of women and children – I will analyse the situation and the strategy of problem solution proposed by Afghan jurists and intellectuals (3).

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[1] Kamali 1985, 84.
Editor's Note: few parts of the text are printed in 'Arial Unicode MS'. We apologize for any inconvenience while reading.

1 Introduction

Owing to the political and social instability Afghanistan has experienced over the past twenty years, research on the country has widely come to a standstill. Since Kamali wrote his book *Law in Afghanistan* in 1985, focusing on the constitution, matrimonial law and the judiciary, little research has been done. There are almost no scientific studies available in the area of legal anthropology and no field work has been undertaken in the different regions of Afghanistan since Steul (1981) on the Pashtunvali in Paktia/east Afghanistan and Tapper (1981, 1984, 2004).[2] Tapper did research on the family law of the Durrani Pashtuns.

The international community has concentrated on the reconstruction of the "rule of law" since 2002.[3] In the context of the project "Afghan Family Law"[4] a fact-finding mission was carried out between December 2004 and March 2005. During this mission some 200 interviews were conducted with employees of national, international and non-governmental organisations in Kabul, Kandahar, Herat, Balkh, Badakhshan, Bamiyan, Nangahar, Kundus, and Paktia. The interviewees were judges, prosecutors, and law lecturers from the faculties of law (qānūn) and sharīʿa.[5] The results of this fact-finding mission were discussed with Afghan Jurists and members of the government and judges at a conference in Kabul (June 2006). Some NGO members were also present.[6]

Afghanistan has a rich and complex legal culture. Besides those of the Hindu and Jewish minorities, the main legal system is the Islamic legal system of the Ḥanafī madhhab or school of law, which has dominated Afghanistan ever since the region became Islamic. There is also a strong Shīʿī minority in the country. Thus, the Sharīʿa, the Islamic law, has always played an important role in the development of the Afghan judicial system. At the beginning of the 20th century, statutory law was introduced by Amānullāh (r. 1919-1929) in the niẓāmnāma as an ambitious plan to create a modern Afghan state. Along with traditional customary law, the Ḥanafī school provided the basis for the emerging Afghan judicial system. This reform programme had far-reaching effects. On the legislative level, the codification of many of Afghanistan's laws was achieved in the 1960s and 1970s. The family law code dates from 1977. On the jurisdictional level, a modern court system with suc-

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2 Tapper's book *Bartered Brides* was published in 2004, but is actually rooted in her field work conducted in the 1970s.

3 AI Report 2003; Customary Laws 2004; Bahgam, Mukhatari 2004 are various reports from different organisations.

4 My paper is based on the results of the project called "Afghan Family Law" conducted by the Max Planck Institute for Comparative and International Private Law in Hamburg. The project is financed by the German Foreign Office. The members of the team are N. Yassari, H. Kamali (Malaysia), N. Kamali (Kuwait), M. Lau (London) and I. Schneider (Göttingen).

5 MPI Report 2005, 3.

6 See also Rastin-Tehrani 2006. In what follows, I will refer to my own notes from the discussion during the conference. The discussions have been recorded and N. Yassari intents to type them (February 2007).

cessive stages was created. The Afghan Constitution of 1964, and especially the Law of Judicial Authority and Organisation,[7] laid down rules for the creation of a modern judiciary. After the military coup in 1978, the Marxist government attempted to introduce a Soviet-style judicial system and to change the material law. This included Decree No. 7 from 1978, which prohibited *walwar* (see below) and other excessive marriage expenditures on pain of imprisonment for up to three years and prohibited child marriage for girls under sixteen and boys under eighteen, making the violator liable to imprisonment for a period of between six months and three years.[8] This decree, however, was widely ignored by the Afghan people.[9] What is of great importance is the strong customary law, especially the Pashtunvali,[10] as well as other regional customs which constitute an important part of the Afghan legal culture. With regard to the jurisdictional system, the traditional jirgas/shūrās, informal institutions mainly serving to settle disputes by ensuring that the involved parties reach agreement, are of great practical importance. These institutions enjoy a high degree of acceptance amongst the population, especially in rural and tribal areas. Their competence and legitimacy stems from the renowned skill that the tribal and rural (and also the urban) populations display in settling disputes on the basis of consultation.[11]

The new Constitution was ratified by the Great Loya Jirga in January 2004. This new Constitution is the latest development in Afghan legal culture, which includes the adherence to such international conventions as the Universal Declaration of Human Rights of 1948 and the Convention for the Elimination of All Forms of Discrimination Against Women (Art. 7) as well as to respect for the religion of Islam (Art. 3).

All these different kinds of rules, customs and laws have contributed to the richness of the Afghan legal culture and judiciary system, and they can be used as a source for rebuilding a new and modern legislation and a modern judiciary based on the Islamic culture of the country. An analysis of Afghan law and legal practice thus has to be based on the concept of legal pluralism. From a lawyer's point of view, legal pluralism denotes the recognition by the state (the legislator) of the existence of a multiplicity of legal sources which constitute its legislation: international treaties, customary law, religious law,[12] etc. The statutory law with regard to family law

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7 Kamali 1985, 203-44.

8 Kamali 1985, 104, 128.

9 For a detailed discussion of the reasons, see Tapper 1984.

10 Glatzer 2003.

11 For the participation of women in jirgas, especially the Loya Jirgas of 1964, 1976 (12.5%) and 2004 (114 women), see Ayyubi 2006, 374-75. The author states that more than 79% of the population living in rural areas have almost no access to the formal justice system (p. 376). Women are not involved in normal jirgas (p. 377); see also Wardak, 2006, 356-61.

12 Dupret, Berger, Al-Zwaini 1999, XI.

comprises the Civil Code (AfgCC) dating from 1977 and officially still in force. It is mainly based on Islamic law.

Islamic law in itself is pluralist. In classical Islam four (sunnī) schools and the Shīʿīs (ithnāʿ ʿasharī) coexisted with differences in legal theory and material law. Takhayyur (selection) and talfīq (combination) – methods for selecting and combining the legal solutions of the other schools of law – are well-known practices for modernising the law. Thus, Afghanistan is a country in which the Ḥanafī sunnī school of law prevails. The Afghan family law code of 1977 contains solutions from the Mālikī school of law, especially with regard to divorce.

Legal pluralism is, however, not confined to the perspective of state-enacted law. Sociological studies in legal pluralism focus on a plurality of social fields as producers of norms which are in partial interaction with each other. This perspective entails the deprivation of the state's capacity as the – sole – legal actor (as opposed to its multiple constituents) and consequently its consideration as the monopolist of legal production, be it directly or indirectly. Griffiths criticised any sort of theory which assimilates law to the state and which supports – explicitly or not – a centralised and hierarchical structure for the legal system. He reconstructed the legal system by taking into consideration the various legal sources. This involves a refutation of the prescriptive approach commonly used by legal theoreticians.[13] Furthermore, Sally F. Moore has developed the concept of "semi-autonomous social fields" (SASF). These are social fields which possess their own normative and regulatory capacities and are capable of enforcing these on their members. At the same time, however, these SASFs are integrated into a much larger social framework, which can affect them by an action originating from either inside or outside the SASF itself.[14]

In this paper I will focus on the concept of legal pluralism developed by Griffiths and Moore. I argue that the following aspects have to be taken into account when analysing the legal situation in Afghanistan: first, that the different legal systems coexist and interact; second, that state legislation and state law thus do not have the impact that they presume to have or ought to have according to the example of the Western nation states; third, that the focus has to be on the local actors and the use they make of the different legal systems; and fourth, that the influence of the social system – especially in rural and tribal areas – therefore has to be taken into account. As a consequence, the perspective is reversed, which leads to an investigation starting from the social field and not from the legislator.[15]

In discussing certain norms of family law, I will try to demonstrate the complex interaction between these different legal fields, their social significance and prestige and the different validities which result in displacements and suppressions.

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[13] Griffiths 1999, VII-IX.

[14] Moore 1978.

[15] Dupret, Berger, Al-Zwaini 1999, XII.

The following questions are to be discussed: What is the present situation like regarding legal practice in the area of family law, or more specifically with respect to the different parts of it, ranging from engagement to divorce? Which solutions are discussed in the country?

2 Legal norms and practices in family law

Based on the MPI Report of 2005, the different parts of family law will be dealt with in a chronological way, i.e. from engagement to divorce.

- **Engagement** (nāmzadī in Dari, kozda in Pashto) in Afghanistan is traditionally connected with two problems: the heavy expenditures and the fact that it is – in contradiction to classical Islamic law – regarded as being as binding as marriage.[16] According to Art. 64 of AfgCC it is a promise to marry, not marriage. The MPI Report states that annulments of engagements rarely occurred in 2005 because they were considered to taint a man's honour.[17] If an engagement is dissolved, the girl carries the stigma this has, not the boy. From a traditional social perspective, the girl will be considered a divorcee.
- According to classical Islamic law (see Qurʾān 4:5) and the AfgCC (Art. 99-101), the woman is entitled to receive **mahr** (a dowry) on marriage. This money is her property and it also gives her some financial security in the event of a divorce or her husband's death. However, mahr does not seem to play the same role in Afghan legal practice as other expenditures; **walwar** (Pashto; Dari: shīrbahā, toyāna Uzbaki: qalin) is paid instead. This is a sum of money (or a commodity) paid by the groom or his family to the head of the bride's household. Walwar is not mentioned in AfgCC, but it was forbidden and criminalised by Decree No. 7 from 1978. According to Kamali, walwar is frowned upon by the educated, but it is approved among the tribesmen and regarded as a sign of status and respectability.[18] Walwar is a very heavy payment and includes high sums in Kandahar and Paktia, in particular. This is confirmed by the MPI Report for 2005.[19]
- According to Kamali, the **compulsory marriage of a widow** to a member of her deceased husband's family is a problem which was still existent despite the legislative measures adopted in Afghanistan at the time of his research.[20] The Pashtuns, in particular, seem to observe this practice, which is prohibited in the Qurʾān (4:19). The custom is economically convenient in the sense that mar-

[16] Kamali 1985, 92.
[17] MPI Report 2005,15.
[18] Kamali 1985, 85.
[19] MPI Report 2005, 12-13.
[20] Kamali 1985, 145. In Art. 24 of the Marriage Law of 1971 it is stipulated that no one may contract a widow in nikāḥ without her consent. This includes the relatives of her previous husband.

riage with the widow of one's brother does not normally require the payment of a new walwar, and no mahr (dowry) has to be paid either. The law forbids this.

- **Exchange marriage**[21] is not acceptable according to Islamic law because the wife has to receive a dowry. Such marriages are forbidden in AfgCC (Art. 69). The MPI Report confirms this practice, however.[22] Customary law and especially Pashtunvali play an important role[23] together with the concept of honour (nāmūs). Nāmūs is applied to the female part of the family, but is also used for land.[24] A Pashtun man who is able to protect and defend the women of his family and the land of his clan can reclaim nāmūs for himself. The position of a man in society is expressed through nāmūs: a high degree of nāmūs means a high position in society. In contrast, households which are weak and cannot protect their women lose their nāmūs.[25] In her research on the Durrani Pashtuns, Tapper argues that marriage relations and the transfer of women between households must be seen as part of the wider system of exchange and control of all productive and reproductive resources.[26] According to the results of her field research, four ranked spheres of exchange exist. Men are ranked in the first and highest sphere. Direct exchanges between them include the most honourable and manly of all activities: vengeance and feud, political support and hospitality. Women belong to the second sphere. They and men see their importance confirmed in the highly valued form of exchange marriage, the most important kind of exchange and a prime expression of status equality. Exchange of productive resources (land, animals) forms a third sphere. Finally, market values are relevant in direct exchanges of products in the fourth sphere. Marriage arrangements communicate the real and potential strengths and weaknesses of a household through the choice of spouses, the character and amount of the relation, and the manipulation of ritual symbols. The direct exchange marriage (primarily sister exchange) is in harmony with Durrani egalitarian ideals and defines the ethnic group as a whole.[27]
- There is only one proper conversion between the first two spheres: two or more women can be given in compensation for the killing or injury of one man. The meaning of this conversion is ambiguous, but usually the honour goes to the killers who have "taken" a man and only "given" two women in return. It is in this context that the concepts of **pore** and **badd** have to be understood. 'Pore'

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21 Kamali 1985, 84.

22 MPI Report 2005, 17: In one example an 80-year-old father married his eight-year-old daughter to a man aged 50 and married the 14-year-old girl of that man in exchange.

23 Pashtunvali differs in the different regions and is not applied in other territories. There are, however, similar concepts and institutions. As no research has been done yet, I will refer to Steul and Tapper.

24 Steul 1981, 218.

25 Tapper 1981, 393

26 Tapper 1984, 297.

27 Tapper 1984, 299.

literally means a loan and indicates either a financial loan or unfulfilled vengeance. A man may thus pay his debt by giving a girl to his creditor in marriage. 'Badd' (literally 'feud') is similar to 'pore'. In order to pacify a feud between hostile tribal groups, one or more girls may be given in marriage as a token of peace without any walwar. 'Pore' and 'badd', Kamali states, are widely practised in Afghanistan, especially in the context of crimes of violence. The MPI Report for 2005 confirms this.[28]

- Against the legal rule (Art. 61 AfgCC), there is hardly any **registration** of marriages. This is also the case for births, divorces and deaths.[29]
- **Child marriages** are common[30] and often occur with a high difference in age between the spouses. According to pre-modern Islamic law, marriage is principally possible for children under age; according to classical law, puberty is attained at the age of nine years for girls and twelve years for boys. Forced marriages of children below this age are possible on the basis of ijbār (paternal constraint).[31] According to the AfgCC (Art. 70), the age of marriage is 16 for girls and 18 for boys. Child marriage was outlawed by Decree 7 of 1978.[32] There is a clear tendency in the Islamic world to avoid child marriages by defining the marriage age.[33]
- **Polygamy** is allowed in pre-modern Islamic law (Qurʾān 4:3 and 4:129) and also in AfgCC (Art. 86). It is, however, connected to certain conditions, e.g. that the man can treat his wives equally, is financially capable of providing his wives with adequate maintenance and has a lawful benefit from a second or third marriage because of the infertility of the first wife (AfgCC Art. 86).[34] According to the MPI Report, it is often the case that none of these conditions are met, and at the same time there seems to be a trend in certain urban social groups to favour polygamy as a form of social prestige.[35]
- **Divorce** also has to be seen in this context; according to pre-modern Islamic law, divorce (ṭalāq) is possible but a prerogative of the husband. Women can only obtain a dissolution of their marriage by the court (faskh) if certain conditions are met.[36] Here the AfgCC has some stipulations which intend to

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28 Kamali 1985, 91; MPI Report 2005, 18; see also Tapper 1984, 300-301.

29 MPI Report 2005, 19: most marriages have not been registered for the past 20 years. Being a requirement of a modern state, registration is not discussed in classical Islamic law, but today it is widely considered as being no problem in modern Islamic countries. Cf. Ebert 1996, 90; Schneider (in preparation).

30 Kamali 1985, 106-29; MPI Report 2005, 16-19.

31 Kamali 1985, 106-11.

32 Kamali 1985, 128-29.

33 Ebert 1996, 94-5.

34 Kamali 1985, 152.

35 MPI Report 2005, 20-2.

36 Kamali 1985, 158-73.

strengthen the position of women and give them the possibility of dissolution of marriage (Art. 176-191). However, in Afghan society, and especially in tribal areas, divorce is strongly disapproved of.[37] It seems that women under social pressure are more prepared to accept their husband having a second marriage than get a divorce.

The result of these interactions between customary law, a strong patriarchal system and Islamic law is a vicious circle: to protect the honour of the family, the family marries the girl off as soon as possible or at least gets her engaged. As engagement is considered as binding as marriage, dissolution is difficult, if not impossible exposing the women to social pressure and contempt. Thus women are forced to accept their husbands marrying a second or even a third time.

3 Which solutions are discussed in the country?

With regard to the special situation of legal pluralism, the interaction of the legal fields and the obvious weakness of the state to impose laws in Afghanistan, it seems important to analyse how these different legal systems are perceived in public discourse, how they are assessed and how they are referred to. This is connected to the question of which approaches to legal reform would have a chance of social acceptance in Afghan society. As could be clearly seen with regard to Decree No. 7 from 1978, legal reforms need social backing or they may be resisted or simply ignored.[38] In what follows, I will try to sketch the discourse among Afghan jurists about the legal situation and possible solutions. [39]

For the analysis of the discussion I will establish different levels of discourse, and in a next step I will try to find out how these levels were utilised in the contexts of arguments.

1. The *secular discourse* is based on the Universal Declaration of Human Rights and other international conventions as they are laid down in the Afghan Constitution of 2004 (Art. 7).
2. The *statutory discourse* refers to statutory law, in this case the AfgCC of 1977.
3. The *Islamic discourse* refers to Islamic symbols and arguments; I will call it a *modern Islamic discourse* when it is orientated to the human rights norms and towards a modern interpretation of the Qur)ān and sunna; in case traditional Islamic legal arguments are referred to, the discourse is characterised by the typi-

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37 Tapper 2004, 17, 104

38 Tapper 1984, 291 argued that if the Decree had been implemented, it would have been unlikely for either the levels of indebtedness or the status of women to change in any direct way; rather, it would have altered the whole system of economic goals and values throughout much of rural Afghanistan. In fact, the Decree was widely ignored.

39 I have based my analysis on the conference relating to the project which took place in June 2006 in Kabul. A thorough analysis of public legal discourse in the country based on discussions in parliamentary groups, the media, etc. is still an essential requirement of research.

cal plurality of legal opinions as represented by the sunnī (and the shīʿī) schools of law. It is then called *traditional Islamic discourse.* It has to be kept in mind that Islamic law of the Ḥanafī and Mālikī schools of law strongly influenced the AfgCC. As a consequence, Islamic law is at least partly compatible with statutory law.

4. The *customary discourse* also takes different forms, one of which is the Pashtunvali, which was already mentioned above.

The results can be summarised as follows:

1. Surprisingly, the level of *secular discourse* was completely ignored. There seems to be no perception of the superiority of international treaties and conventions with regard to national law.
2. Statutory law was only referred to rarely.
3. The dominating discourse was the *Islamic discourse.* The *modern Islamic discourse* was led by Hashim Kamali, who had already published his work on the topic in the 1980s (see the quotation at the beginning of the article). He can be seen as one of the main intellectual thinkers regarding modern Islamic law in Afghanistan. The *traditional Islamic discourse* comprised all possible interpretations of the classical (sunnī) schools of law mostly with a traditional interpretation.
4. "Pashtunvali" is not discussed as a term or concept. However, some customary concepts such as "nāmūs" (honour) were referred to and sometimes the Islamic Arabic term for "customary law", ʿurf, was made use of. In this case the concept was often dealt with positively. However, other customary rules and institutions were evaluated negatively and placed in a causal relation to poverty, illiteracy and underdevelopment. Thus it was suggested that these concepts, which actually seem to be deeply rooted in the traditional social and patriarchal system, would disappear along with economic and political development.

The following points were discussed:

- **Engagement**, especially the engagement of children or even unborn babies, was discussed vehemently and criticised. These practices were called un-Islamic and their roots were seen in cultural, social and economical underdevelopment.[40]
- **Walwar,** which was also considered as un-Islamic, was also discarded. However, no proposal was made as to how this expensive practice could be stopped in favour of the Islamic mahr, which would be paid to the bride and thus give her financial security after a divorce or her husband's death.

[40] See also Rastin-Tehrani 2006, 5.

- Whereas **registration**[41] is practised in most Islamic countries today and is seen as being in conformity with Islamic rulings, it is a problem with regard to legal practice in Afghanistan. In the discussion, the need for registration to guarantee legal security and rule of law was clearly recognised. However, it seemed difficult to find reasons why registration – which is legally prescribed in AfgCC, Art. 61 – is ignored in Afghanistan. One reason might be that registration is not required when seeking employment, e.g. in the administration. From the institutional point of view, a problem seems to be that registration offices, if they exist, are often situated inside court buildings and that people consider it inappropriate to start their conjugal life by going there to register as newly-weds. A reason for this sensitivity might be, however, that courts are not only associated with places of conflict resolution, but with the presence of the state generally. It is well known that courts in many areas of Afghanistan are avoided in favour of places of traditional conflict solutions such as local jirgas/shūrās.[42] A consensus was found in the discourse, according to which the registration should be referred to the local cleric, the mullā. As a result, reference was made to the *Islamic discourse* since an Islamic solution was considered most suitable to deal with an issue of great importance for a modern nation-state and the rule of law. Another objection was also raised pertaining to the *customary discourse*, and particularly to the concept of honour: registration was seen as unnecessary as a means of enhancing the reliability and trustworthiness of men's willingness to stick to the obligations of marriage, and some even felt it would threaten this bond. Thus with reference to the *customary discourse* – in this case with a clear positive evaluation – an institution of modern law with no negative implications in classical Islamic law (as Qurʾān verses opposing registration do not exist) was denied acceptance.
- Another issue that was passionately discussed was **child marriage.** Since child marriage is possible according to pre-modern Islamic law but is ruled out according to statutory law, this practice was strongly criticised. The great age difference between many spouses was criticised especially harshly. Child marriage and *ijbār* were clearly deemed as not Islamic.[43] This interpretation of child marriage goes against the Sharīʿa (but is in conformity with statutory law) and is clearly a reconstruction. It seems that an Islamic institution has been transferred to the discourse field of *customary law*, which is understood in a negative sense. Reasons for this practice were again seen in poverty. The close connection this problem has with the concept of "honour" and with the traditional social structure of society was thus ignored. The suggested solution to this social problem was given with reference to the *Islamic discourse* again,

41 Schneider (in preparation).
42 Ayyoubi 2006.
43 Rastin-Tehrani 2006, 6.

particularly to the concept of "al-amr bi-l-maʿrūf wa-n-nahy ʿan al-munkar" ("commanding the good and preventing the bad", in short: "virtue and vice"). It was argued that this Qurʾānic concept[44], which had been misused by the Taliban, should be used to convince the Muslims that the marriage of children who are under age is not Islamic.

- Whereas the discussion was lively and at some points also controversial with regard to the topics just dealt with, **polygamy** and **divorce** were mainly discussed on the normative level of the *Islamic traditional discourse*; not much attention was given to actual legal practice and problems connected with customary law.

4 Conclusions

A clear hierarchy exists with respect to the different types of discourses found in Afghanistan: the *secular discourse* has been widely ignored, just like the *discourse of statutory law*. The *customary discourse* is often referred to indirectly through the use of concepts such as "honour" and institutions such as the "jirga/shūrā". Customs are treated ambivalently; in a negative sense they are connected to poverty, illiteracy and the tense political situation, thereby ignoring the deep social roots these concepts and institutions have. There are positive associations with the concept of "nāmūs", honour, however. Its social relevance and influence on the behaviour of men was alluded to as an important factor, explaining the lack of registered marriages. *Islamic discourse* enjoys the highest prestige. This was even referred to in cases where clear legal rules existed in statutory law and in defiance of international law. It was held to be superior to customary law.

An important point is that certain topics which are considered to be central to Islamic values and are deeply rooted in custom (e.g. divorce) at the same time do not seem to be negotiable and were not even discussed. The most prominent and popular type of discourse conducted in the country is Islamic. The question is, what content is Islamic discourse connected to? Modern content with a tendency to implement human rights standards, traditional content or content connected to customary rules and institutions?

In this context the interesting tendency was the reconstruction of an Islamic institution – child marriage – as non-Islamic and custom-based. This topic led to a lively discussion and a new evaluation of child marriage as a problem which has to be tackled in Afghan society. This discussion would certainly not have been possible if child marriage had still been regarded as a central Islamic institution (as it is according to pre-modern Islamic law). It seems that this perception of child marriage and the transfer to the level of *customary discourse* has a broader basis in the current

[44] For the history and the present use of this concept with regard to the ḥisba jurisdiction, see Thielmann 2003.

legal discourse of the country. According to a study carried out by Bahgam and Mukhatari about the topic, there is little data available, but almost all the respondents interviewed – ranging from schoolgirls to legal experts – felt that child marriage is not Islamic and must be banned and subjected to prosecution through the will and efforts of relevant government agencies and institutions.[45] On the other hand, the best way of combatting this custom was not seen in the implementation of the AfgCC, but rather in making use of the genuine Islamic concept of "al-amr bi-l-maʿrūf wa-n-nahy ʿan al-munkar". The reference to this traditional Islamic institution has to be seen in the context of a wider legal discourse on this institution in Afghan society. In summer 2006 President Hamid Karzai's Cabinet approved the proposal to re-establish the "Department of Virtue and Vice" based on the Qurʾānic command of al-amr bi-l-maʿrūf wa-n-ahy ʿan al-munkar.[46] It seems that President Karzai had come under pressure from conservative political figures to re-establish the department in order to counter anti-Western propaganda by opposition groups. Under the Taliban, the department was a notorious symbol of arbitrary abuses, particularly against Afghan women and girls. It enforced restrictions on women and men through public beatings and imprisonment for women, e.g. if women wore socks that were not sufficiently opaque and consequently showed their wrists, etc. It also stopped women from educating girls in home-based schools, working, and begging. Because the ethical content of "al-marʿrūf" (virtue) is open to discussion, there is an ambiguity with regard to the responsibilities of this institution. The reinstatement of this controversial department has thus been criticised as an act to move the discussion away from the vital security and human rights problems engulfing the country. Whereas the Minister of Ḥajj and Religion, N. Shahrani, is said to have set the department its clear focus on alcohol, drugs, crime and corruption, more critical voices are afraid that this department could be used to silence criticism and further limit women's and girls' access to work, health care and education.[47]

A clear Islamic solution was also found for the problem of the lack of registration. According to the participants at the conference, the problem should be solved by transferring the registration of marriages to the local mullā. In both cases – registration with the mullās and reinstitution of the Department of Virtue and Vice – there is a tendency to fall back on Islamic institutions and concepts with a clear conservative character and history in the Afghan context.

As a consequence, the "Islamic value" of the AfgCC could be a matter of debate. As legal reform always has to be based on the social discourse in a state or society, a reform of the AfgCC in the present situation could possibly lead to a more tradi-

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45 Bahgam, Mukhatari 2004, 2, 12, 17: medica mondial questioned ministers and Afghan authorities. All of the respondents felt that a national campaign was needed to raise awareness. However, medica mondiale stated that despite the great concern and sense of urgency expressed by all the respondents, none of the ministries or institutions they represent has addressed the issue yet.

46 "Afghanistan: Vice and Virtue Department Could Return", in: Human Rights News, 18 July 2006.

47 "Afghanistan: Vice and Virtue Department Could Return", op. cit.

tional Islamic interpretation in some fields of family law. In other fields, such as child marriage, however, the transfer to the level of *customary discourse* opens up the possibility of putting this institution, which is unacceptable from a legal viewpoint (cf. AfgCC Art. 70), under a social taboo.

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