# Matrimonial Problems of Islamic Law in Contemporary Afghanistan

by

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# Abstract

This paper concentrates on problems of excessive expenditures in marriage ceremonies, child marriage, polygamy and divorce. To date, these areas are governed by the traditional Ḥanafi law which, on the whole, has remained in its medieval form in Afghanistan. The existent statutory legislation which has been added to the Ḥanafi Law, has introduced no substantial change to the Ḥanafi traditional doctrines. Modern reforms of the Sharī'a as introduced in the Middle East have challenged the validity of the traditional interpretations of the Sharī'a principles. The traditional laws of child marriage, polygamy and divorce have been subject to radical change in recent times. Afghanistan also underwent a brief experience of similar reforms under the Nizāmnāma legislation of the 1920's. These were, however, short-lived, and a rebellion by the traditionalists in 1929 led to a reversal of these reforms. The Nizāmnāmas constitute the first modernist reforms and are therefore a good starting point in the study of matrimonial problems.

The existent evidence in many Muslim countries including Afghanistan points to the continuation of a modernized Sharī'a in the area of family law. Modernization of the Sharī'a necessitates a process whereby proposals for its reform must seek juristic justifications from within the Sharī'a. Needless to say that law reform especially in the area of family law must reflect the social needs. An inquiry into the juristic and social bases of the matrimonial problems is therefore the main concern of this paper. The fact that child marriage, polygamy and divorce are easily attainable without involving legal deterrents to guard against their abuse, constitutes a major problem in these areas. This paper underlines these problems and aims at providing solutions in terms of future reforms.

Experience has proved that as a result of the intransigence of the traditionalist religious attitudes, and of the prevalence of patriarchal tribal practices, statutory legislation on matrimonial problems often failed to take effect in practical terms. It is therefore important to be pragmatic in one's approach to finding solutions to these problems.

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## List of Statutes Referred to

As a general rule, statutes are published both in pushto and Dari. With the exception of the Constitutions which are available in English, translation of other statutes and regulations are supplied by the present writer; the original titles of the statutes are quoted beside their English translation.

1. Nizāmnāma of Nikāḥ, Wedding and Circumcision 1921 A.D. (Nizāmnāma-e Nikāḥ, Urusi, wa Khatna Suri 1300 A.H)
2. Constitution 1923 A.D. (Nizāmnāma-e Asasi 1302 A.H)
3. Nizāmnāma of Basic Organizations 1923 A.D. (Nizamnama-e Taskilāt-e Asāsi 1302 A.H)
4. Nizāmnāma of Nikāḥ, Wedding and Circumcision 1924 A.D. (Nizāmnāma-e Urusi wa Khatna Suri 1303 A.H)
5. General Penal Code 1924 A.D. (Nizāmnāma-e Umumi Jazā 1303)
6. Constitution 1931 (Usulnāma-e Asasi 1310 A.H)
7. The Law of Marriage, Wedding and Circumcision 1934 (Usulnāma-e Nikāḥ, Urusi wa Khatna Suri 1313)
8. The Law of Marriage, Wedding and Circumcision 1949 A.D.(Usulnāma-e Nikāḥ, Urusi wa Khatna Suri 1328 A.H)
9. The Law of Employment, Promotion and Retirement of Civil Servants 1954 (Usulnāma-e Istekhdam, Tarfi' wa Taqā'od-e Māmurin-e Mulki 1333 AH)
10. The Law of Court Administration 1956 (Usulnāma-e Idāri Maḥakim-e 'Adliya 1335 A.H)
11. The Law of Civil Procedure 1957 (Usulnāma-e Ijra'at-e Moḥakimāt-e Ḥoquqi Adli 1336 A.H)
12. The Law of Marriage and Registration of Nikāḥ Khat 1960 (Usulnāma-e Izdewāj wa Tartib-e Nikāḥ Khat 1339 A.H)

13. The Law of Commercial Courts 1955 (Usulnāma-e Moḥakimāt-e Tijarati)
14. The Law of Commerce 1962 (Usulnama-e Tijarat)
15. Law of Crimes by Civil Servants and Offences against Public Security 1962 (Usulnāma-e Jaza-e Jarā'em-e Mamurin wa Jarā'em aleih-e Amniyat wa Manfiāt-e 'Amma 1341 A.H)
16. The Law of Juristic Consultation and Legislation 1963 (Qanun-e Fetwā wa Taqnin)
17. Constitution 1964 (Qanun-e Asasi 1343)
18. Law of Criminal Proceedings 1964 (Qanun-e Ijra'at-e Jaza'i 1343 A.H)
19. Law of Public Prosecution 1963 (Qanun-e Sāranwalay 1344 A.H)
20. Law Relating to Advocates 1965 (Qanun-e Tanzim-e Umur-e Modāfi'in 1344 A.H)
21. The Law of Judicial Authority and Organizations 1967 (Qanun-e Salaḥiyat wa Tashkilāt-e Qaḍa'i 1346 A.H)
22. The Law of State Servants 1970 (Qanun-e Māmurin-e Dawlat 1349 A.H)
23. Marriage Law 1971 (Qanun-e Izdewāj 1350 A.H)
24. Republican Ordinance No.1, 1973 (Farmān-e Jomhuri Shomara-e Anwal, 1352 A.H)
25. Republican Ordinance No.2 1973 (Farmān-e Jomhuri Shomara-e Dowum 1352 A.H)
26. Republican Ordinance No.3 1973 (Farmān-e Jomhuri Shomara-e Sewam 1352 A.H)

## List of Regulations

Prior to 1964, regulations of general applicability were usually called Ta'limatnama (lit. educative regulations) which were usually authorized by the monarch. After 1964, the more usual terms replacing Ta'limatnama appear to be Muqarar̄at (lit. enactments) or Rahnom̄a (lit. guide). Regulations of the Supreme Court under these names often received authorization of the Head of State; sometimes, however, the Supreme Court, using its powers under the Law of Judicial Authority and Organizations 1967, issued regulations which were authorized by the Supreme Judicial Council:

- Regulations for Registration of Formal Documents 1957 (Ta'limatn̄ama-e Taḥrir-e Wasā'eq 1336 A.H)
- Regulations for Advocates 1957 (Ta'limatn̄ama-e Wik̄alat-e Da'w̄a 1336 A.H)
- Regulations Relating to Proceedings and Disciplinary Trial of Juveniles 1969 (Muqarar̄at-e Marbut ba Ijra'̄at wa Moḥakim̄a-e Tadibi Khord Sal̄an 1348 A.H)
- Regulations Relating to the Study and Observation of Judges and Officials of the Judiciary 1970 (Muqarar̄at-e Marbut ba Taḥsilat wa Moshāhed̄at-e Quḍat wa Karkun̄an-e Qaḍaiya 1349 A.H)
- Regulations for the Judicial Training Course 1970 (Moqarar̄at-e Marbut ba Markaz-e Setazh wa Muṭ̄ali'at-e Qaḍ̄a'i 1349)
- Regulations for the Training of Clerks 1971 (Moqarar̄at-e Marbut ba Setazh-e Moḥaririn, 1350 A.H)
- Regulations for the Employment of Judges and Members of Primary Courts 1972 (Moqarar̄at-e Marbut ba Imteḥ̄an bar̄a-e Istekhd̄am-e Quḍ̄at wa A'd̄a-e Mahakim-e Ibtid̄aia wa A'ḍ̄a-e Riȳasat ha-e Maḥakim 1351)

- Regulations Relating to the Registration of Formal Documents 1973 (Ṙahnoma-e Marbut ba Tanzim-e Omur-e Wasā'iq 1352 A.H)

## Supreme Court Circulars

## List of Cases

Owing to the absence of law reporting in Afghanistan, cases referred to below have been mostly translated from the court records which are usually written in Dari:

## Note on Abbreviations

AUFS Reports: American Universities' Field Staff Reports.

BSOAS: Bulletin of the School of Oriental and African Studies.

MEJ: The Middle East Journal.

WJJ: De Wolesi Jirgay Jarida (House of People Journal)

## Note on Transliteration:

The transliteration of Arabic words is in accord with the usual rules as followed in The Encyclopedia of Islam (Second edition). The alphabet in Dari is substantially similar to that of the Arabic, and legal terminology of Islamic law in Dari closely follow their Arabic source. For the purpose of this paper, the present writer considered the Arabic rules of transliteration conveniently applicable to the transliteration of Dari words.

# Introduction

The subject of matrimonial problems is of especial interest as this field has received so little attention by writers in the past. Information on this subject is scarce in the national languages of Afghanistan and almost non-existent in English. A typical feature of the existent literature in the national languages (Pushto and Dari) is that it is largely a re-iteration or merely translates the classical Hanafi law and, on the whole, ignores the problems arising from the traditional interpretations of the Hanafi law of marriage and divorce. The uncritical approach adopted in previous studies of matrimonial subjects reinforced the conservative outlook of the religious enthusiasts, and in turn contributed, to some extent, to the continued existence of the problems concerned.

Family law is an important area of Sharī'a law, as this is the main area where Sharī'a has been extensively reformed by many Muslim countries. Sharī'a is often considered to be immutable. Modern reforms of the Sharī'a family law have challenged the validity of the concept of immutability of the Sharī'a. How the Sharī'a has been opened to the influence of social change, and how the two concepts of continuity and change have been merged together within the boundaries of the Sharī'a, has attracted a great deal of attention from contemporary scholars. The weakening of the tenacious concept of immutability may be regarded as the beginning of a new era, after some thousand years of stagnation in the history of Shari'a law. Within this development may lie the seeds of reform of other areas of the Sharī'a.

Legislative reforms, in modern times, attempted to amalgamate the two philosophical streams of modernist legislation and the classical doctrine of jurisprudence in Sharī'a. It is this process of amalgamation that distinguishes legislative reforms of the Sharī'a from purely securlarist legislation. This process of amalgamation often imposes fundamental limitations on the freedom of the legislature. For according to the classical doctrine of jurisprudence in Sharī'a, law is the command of God, it is imposed from above and postulates the eternally valid standards to which the structure of state and society must conform. In the modernist approach, law is shaped by the needs of society; it must respond to social problems. Yet "the needs and aspiration of society can

not be, in Islam, the exclusive determinantsof the law; they can legitimately operate only within the bounds of the norms and principles irrevocably established by the divine command. And it is precisely the determination of these limits which is the unfinished task of legal modernism" (1)

When law is the command of God, it is necessarily at the core of religion; law and religion are inherently intertwined. This inevitably makes the task of the reformist an essentially perilous one, for he is aware of the necessity to avoid offending religious sentiments of the society at large. Religious conservatism and social traditionalism in this way present formidable barriers to the task of the modern reformer. An example of the conflicting forces of modernism and traditionalism, can be found in the Afghan experience of modern reform during the 1920's when opposition of the tribal and religious traditionalists went so far as to force King Amánullah, a prominent reformist of his time, to abdicate from the throne. As part of the wider programme of modernization initiated by Amanullah (1919-1929), certain radical reforms of the marriage law were promulgated under the Nizāmnāma legislation. These reforms included the abolition of child marriage, the imposition of strict limitation on polygamy, the abolition of patriarchal practices of enforced marriage without the consent of adult parties etc. The Nizāmnāma reforms were parallel in time and similar in content to the Tanzimat reforms in Turkey which had also begun to stimulate modernist activities in Egypt. Most of the early reforms of family law in Egypt, for example, took place during the 1920's. (2)
The Afghan experience in reform was unfortunately short-lived; as a result of the traditionalist rebellion in 1929, Afghanistan faced a serious political crisis which ended in a total discontinuation of many of the reforms including those embodied in the Nizāmnāmas.

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1. See N.J.Coulson, Islamic Surveys, Edinburgh University Press, 1964:6.
2. There are, of course, differences in the actual measures taken: while Egypt, for example adopted the Maliki law of judicial divorce, the Nizāmnāmas contained no reform in the area of divorce. The Egyptian legislation (1920, 1929) on the other hand contained no parallel reform on polygamy as were introduced under the Afghan Nizāmnāmas.

Thus, while reformist activities continued to take shape elsewhere in the Middle East, Afghanistan reverted to the traditional Hanafi law. The fear, real or imaginary, of provoking similar reaction among the tribal and religious traditionalists, thwarted reformist zeal for some time to come. Afghanistan's experience of reform during the 1920's provides an interesting case history of the hazards involved in introducing extensive reforms which were inadequately carried out by the administration. For the propriety of most of the reform measures can hardly be disputed; the main weakness emanated from the fact that Amanullah was ahead of his time, and that his sense of realism hardly matched his zeal for reform. This period of reform has stimulated a great deal of scholarly interest among writers of various disciplines. To date, much of this interest has been shown by foreign writers of modern history on Afghanistan; legal research and materials concerning this period are extremely scarce. Part of the explanation for this gap in the writing of historic and legal work by Afghans, is that subsequent regimes suppressed any interest shown in the reformist activities which took place under Amanullah.

The reformist experience of the 1920's, or rather the failure of this experience, has functioned as a shaping force regarding the pace and pattern of reformist activities in the following years. The triumph of the traditionalists held Afghanistan back and curbed the introduction of socio-legal reforms. Tribal and religious traditionalism are therefore regarded as factors which are closely related to the prospects for reform in Afghanistan. An illustration of developments in these two areas i.e. tribalism, and religious traditionalism, can be found in the concluding chapter, but the existence of these forces is kept in mind throughout this thesis.

Subsequent legislation on family law has, partly as a result of these pressures, avoided introducing any substantial reform in the traditional Hanafi law of marriage and divorce. Legislation in these areas has largely concerned itself with matters of formalities undergone in marriage and divorce, such as registration formalities and certain popular practices incurring excessive expenditure in marriage ceremonies, leaving the substantive Hanafi law basically unchanged. Thus the subjects of child marriage, polygamy, and divorce, which represented the

main problematic areas of family law have either received no legislative reform or whatever legislation that has been enacted in these areas has left the traditional Ḥanafi law basically unchanged. A characteristic feature of legislation on family law is that it is supplemental to the classical Ḥanafi law. Parliamentary legislation to date has made no attempt to either reform, consolidate or codify the family law. Some of the parliamentary Acts that will be discussed in due course are very limited in scope. It will therefore be noted that legislation on family law has not only refrained from law reform, but it has also paid little attention to the purely administrative function of legislation in modern times, that is to say the enactment of uniform statutory texts to provide an authoritative source for practice in the courts. Even in those areas which were covered by legislation, the latter has not, so far, been successful in tackling the problems involved. The problems of registration of marriage and divorce and the adverse popular practices of excessive expenditure in marriage ceremonies, have for example continued to remain unresolved. This low rate of legislative success can be attritbued to various socio-economic factors, but also to the absence of comprehensive and innovative legislation. Even the recent Marriage Law of 1971, when promulgated, after four years of delay in Parliament, was almost immediately criticised as being not quite so forthcoming as to offer solutions to the long-standing problems. Details of the individual problems will be discussed in the following chapters, not only in legal terms, but taking into account also certain related socio-economic factors which foster these problems.

It is important to bear in mind that the rebellion in 1929 of the traditionalists against the regime was not an unprovoked one. It would also be a mistake to exclude the role played by other factors in the causation of the said rebellion. The existing information on this subject has amply shown that in an attempt to identify the causes of the rebellion, allowance has to be made forother factors such as serious differences of opinion, and divided loyalty in the higher echelons of the Government, military weakness, short-temperedness of King Amanullah, the introduction of some provocative changes (1) and so forth, a full

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1. Such as the official changing of holiday from Friday to Thursday, and the imposed wearing of Western dress in The streets of Kabul.

discussion of which falls beyond the scope of this study. It is an open question whether, if the radical reforms of the 1920's had been administered with greater caution and through techniques of persuasion rather than open confrontation with the traditionalists, the latters' rebellion might have been prevented. The prolonged suspense of reform was not the only lesson to be learned from King Amanullah. The answer surely did not lie in the cancellation and discontinuation of law reform. It was rather to be sought in re-orientation of techniques, and in drawing positive conclusions from the experience of the 1920's.

In 1964, Afghanistan promulgated a new Constitution (the third in this century) which despite its inadequacies was on the whole, inspired by the ideals of progress, democracy and equality. An important feature of this Constitution was its reorganization of the judiciary and its emphasis on the independence of judges. Unification of the laws and judicial practice was proclaimed to be among the cardinal aims of the constitutional reform. As a result a unified system of national courts replaced the earlier divisions between administrative and Sharī'a courts. A major departure from the position held under the previous Constitution of 1931* was made in the definition of the law as a resolution of both Houses which is authorized by the sovereign. The Constitution of 1964 also gave priority to statutory law over the Ḥanafi fiqh; and the legislature was obligated to legislate for the vital affairs of the country. Throughout the extensive publicity that preceded and followed the promulgation of this Constitution, one message was greatly emphasised, namely tahawul (change). The changes that have been achived during the nine years of the life-span of this Constitution, were broadly speaking very little in comparison to the pronounced aims and official pronouncements that accompanied this Constitution. No uniformity of the laws has been achieved, in fact, if it may be said, except for a few statutes, little legislation has been effected. The Marriage Law of 1971 for example has shown no attempt in the pursuit of the pronounced ideals of equality and social progress. Dissatisfaction with the experience under this Constitution finally led to a coup détat and the overthrow of the regime in 1973. The new regime which established a Republic, replacing the monarchy, gave its main reasons

*The Constitution of 1931, on the whole, maintained the supremacy of the Ḥanafi fiqh.

for the coup as being the failure of democracy and progress. What the results of this change may be regarding progress and reform, it is still too early to say. But comparing this event with the overthrow of King Amanullah in 1929, it is noteworthy that while the regime in 1930 condemned Amanullah for radicalism and hasty reforms, in 1973, the case was precisely the reverse. It is therefore important to note that this and similar experiences during the present century, and the relative freedom of press achieved during the 1960's, have on the whole raised the level of expectation and demand for socio-legal change. Beginning with the Nizāmnāma reforms, this is the fourth attempt at reform that Afghanistan has experienced during this century, all of which proclaimed, in varying degrees, one and the same message of progress and change. (1) An overall impression gained is that although little has, to date, been achieved in the form of concrete measures in the area of Sharī'a family law reform, the demand is apparent; and a reformist attitude of mind seems to be developing which is likely to play a more active role in using legislation to reflect and organise the process of social change.

Illustration of the various aspects of the matrimonial problems in each chapter is followed by the relevant modern reforms of the Shari'a effected elsewhere, mainly in the Middle East. Consistent with the process of amalgamation earlier referred to, proposals for possible law reform will be submitted; these proposals are arrived in the light of the social necessity for reform within the confines of the juristic principles involved. The level of social acceptability, and juristic limitations, inevitably impose restrictions on the proposals for change. Some of the problems which are encountered, mainly as a result of the popular practices such as those incurring excessive expenditure in marriage ceremonies, do not necessarily involve juristic reform of the Sharī'a; yet the confines of social acceptability have to be taken into consideration. In this context it should be noted that none of the Afghan Constitutions in this century, nor in fact any statutory law, has acknowledged tribal customs as a source of legal practice in the courts. The courts, under the Sharī'a law, as well as the statutes, are authorized, on the other hand, to reconcile the parties in a civil

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1. These four were namely, the 1920's reforms; the so-called 'liberal parliament' (1949-1952); the Constitution of 1964; and the announcement of the Republic in mid-1973. See more e.g., in Akhramovitch, An Outline History of Afghanistan since W.W.II, 1966; see also V. Gregorian, The Emergence of Modern Afghanistan, Stanford University Press 1969.

dispute. In effecting reconciliation, the court may invoke such acceptable popular customs as it considers appropriate.

Notwithstanding the limitations imposed by the nature of the Shari'a jurisprudence in respect of its being a divine law, one distinct impression gained from the study of the modern reforms of the Shari'a is that the interpretation of the Shari'a principles can be either considerably liberal, or restrictive, dependant on the attitude of mind and the acknowledgement of the need for legal reform. Once this attitude of mind is arrived at, the plurality of juristic schools in the Shari'a and the wide variation of opinions therein, as well as the availability of certain jurisprudential doctrines of law enabling legal change, provide on the whole for considerable choice and flexibility within or outside the province of the established law. Most important of these doctrines which have been extensively relied upon in the modernist legislation of the Shari'a are namely the doctrine of siyāsa (policy); takhayyur (selection); and ijtehād. The existent literature in the area has amply accounted for all of these doctrines, as well as the variation of opinions in Shari'a schools. (1) A brief illustration of the said doctrines will therefore suffice.

The doctrine of siyāsa, or public policy, is a broad doctrine of Islamic public law which authorizes the ruler to determine the manner in which Sharī'a law should be administered. The doctrine grants the ruler to take such administrative steps as he deems to be in the public interest of good government, provided that no substantive principle of the Sharī'a is thereby violated. With the increased functions and responsibilities of Governments, the doctrine of siyāsa finds a similarly expanded zone of applicability in modern times. An important aspect of the discretionary powers of the sovereign under this doctrine, is his power to define the jurisdictions of his courts, in the sense that he may set limits to the sphere of their competence. It also authorises the sovereign to enforce procedures and rules of evidence. These discretionary powers of the ruler are particularly extensive in the area of criminal law. He may thus freely

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1. See e.g. N.J.Coulson, Islamic Surveys, op.cit.

decide on the procedures that he sees fit in order to discover truth and detect guilt. As for substantive law, the sovereign is completely free, outside the hadd offences, to dertemine what behaviour constitutes an offence and what punishment is to be applied in each case. Such discretionary punishment is known as ta'zīr or deterrence, since its purpose is to deter the offender himself or others from similar conduct. (1)

The doctrine of takhayyur permits selection among the variant interpretations of the Sharī'a rules as may be found in the already existent law of the different schools. But it also permits the use of a combination of various juristic opinions, or parts thereof in order to modify the existent rules. As a result, takhayyur may lead to the creation of new rules quite outside the confines of the established law. Takhayyur thus consistitues a prominent link between the various juristic schools of the Shari'a, and in its various capacities provides a basis for juristic innovations. Takhayyur covers the following four varieties of selection: Firstly, to select a variant view within one and the same juristic school. This variety of takhayyur has been widely employed in the Mujelle which is confined to the Hanafi school only.

Secondly, a dominant view of one of the other Sunni schools may be considered as a possible alternative for selection. This variety of takhayyur is found in the adotpion of the Maliki law of judicial divorce by many Hanafi countries.

Thirdly, an authoritative view of an individual jurist may be considered as a possible alternative, however this view may be in conflict with the dominant opinions of the four Sunni schools. An illustration of this variety of takhayyur is found in the circumvention or abolition of child marriage on the well-known authority of Ibn-Shubrama who held that minors could not be contracted in compulsory marriage.

Fourthly, a new legal rule may be developed as a result of a selective combination of the whole or parts of various opinions available within the Sharī'a schools, or of the isolated authority of individual jurists. An example of this variety of takhayyur can be

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1. Ibid: 192.

found in the provision concerning succession between non-Muslims in the Egyptian Law of inheritance 1943. (1)

Sometimes takhayyur would not suffice for the purposes of law reform; the reformers thus resorted to a re-interpretation of the law (ijtehād). In early Islam "this would have been almost a matter of routine, for any competent jurist was held to have the right of ijtehād." (2) According to the classical definition of ijtehād, the mujtahid (person exercising ijtehād) should first seek the solution of legal problems from the original sources i.e. in the specific terms of the Quran and the sunna, applying thereto the accepted rules of interpretation and construction. But with the crystallization of the schools at around the fourth century A.H. the "door of ijtehād" was regarded as being closed: "The life of Muslims has kept on moving, while Islamic law almost stopped its growth after the fourth century, A.H. There is no supportable evidence for clsoing the door of ijtehad. We rather see evidence that the door should have remained open ... there is need for serious re-organisation and hard work to improve traditional Islamic attitudes and education to revise Islamic legal texts." (3) Examples of neo-ijtehād can be found in the imposition of restriction on, or prohibition of polygamy, and in certain of the more radical restrictions on the Muslim husband's right unilaterally to repudiate his wife. Bold juristic innovations effected by some reformers in the areas of polygamy and divorce have at times been criticised as being too radical to be in keeping with the established law; the critics have thus regarded them as unacceptable innovations. Whatever the critics may say, it remains essentially true that it was through such radical reforms that the wide gap which developed between the law and the social necessities, during

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1. According to the Ḥanafi law, no right of inheritance exists between two non-Muslims when one is the subject of a Muslim state and the other of a non-Muslim state; while in Māliki law such difference of domicile raises no bar to inheritance. Under the Egyptian law, such difference of domicile is not a bar provided the laws of the non-Muslim state concerned permit reciprocal treatment, but is a bar if they do not. This in effect fuses the Māliki and the Ḥanafi law in a single legal rule of restricted ambit. (see N.J.Coulson, Islamic Surveys, op.cit: 198).
2. J.N.D. Anderson, Modern Trends in Islam, International and Comparative Law Quarterly, Vol. 20, 1971:1-22.
3. A.S.Sirat, Sharī'a and Islamic Education in Modern Afghanistan, MEJ Vol. 23, 1969:219.

the centuries of juristic stagnation, could be effectively closed. It is also true to say that however radical some of the reform measures were, none of them have proclaimed a total departure from the basic principles of the Sharī'a. The reformers have instead found the juristic bases for their reforms from within the Sharī'a. And this can only be regarded as a credit to the flexibility of the Sharī's and its capacity for change.

It should be noted that the abolition of the 1964 Constitution by the Republican regime in July 1973 (1) did not affect the continued validity of most of the then existing statutes. For according to The Republican Ordinance (No.1) of July 1973 "all the statutes which were in force at the time of the declaration of the Republic are to continue as before provided that they do not contradict Republican Ordinances" (Art. 7). Similarly the status of the Ḥanafi law remained unchanged: The Republican Ordinance (No.3) of July 1973 virtually reproduced article (102) of the 1964 Constitution according to which the Ḥanafi law applies in the absence of statutory law. The Republican Ordinance (No.1) also upheld the section of the 1964 Constitution on the 'Rights of the People.' The same ordinance declared that "the Constitutional Organisation of the State will be left until the promulgation of a new Constitution." As of this writing (Feb. 1975) no Constitution has been promulgated to define the new constitutional order of Afghanistan. Certain changes which have been introduced in the field of the judiciary are briefly illustrated under Appendix (C).

A further point to mention is that the use of present tense in this paper which refer to the provisions of the 1964 Constitution (presuming the continuance of this Constitution) should be related to the date before it was abolished (i.e. 17th July 1973).

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1. Republican Ordinance No.1 (Art. 2) : "The 1964 Constitution is hereby abolished except the parts thereof which are upheld by separate ordinances of the Republic".

## Chapter I

### Excessive Expenditure in Marriage Ceremonies

The practice of excessive expenditure in marriage ceremonies is the source of many socio-legal problems in Afghanistan. Traditionally, the marriage ceremonies were partly used to provide occasions for sociability, hospitality, and to demonstrate the family influence within the community. The amount of expenditure incurred in a marriage related to the social status of the families of both the bride and the groom. The greater the sum of money paid by the groom to the bride's parents for her walwar (brideprice), the more status it gave to both parties. A tribal chief or a local notable would, in view of his position, hold a three-day feast or more and invite his kin and village men who would be entertained with food, music and exchange of presents. In areas where professional bands of musicians were not obtainable, they were often hired from distant provincial capitals. Friends and relatives expressed their generosity and excitement by firing gun shots in the air in a highly competetive form; they often purchased special supplies of bullets for the occasion.

In addition to the brideprice, the groom's side pays a dower to the bride or her family which amounts to similar sums to those involved in the brideprice. The greatest part of expenses are thus met by the groom or his family. As a result of this, the groom is often unable to meet the expenses and, in many cases, needs a long time to work and save in order to raise the necessary sums.

High costs of weddings often cause the groom to delay his marriage and prolong the engagement period for up to twelve years or so. During this period, he is also required to send engagement gifts, of dresses and sweetmeats, to his fiancée at the occasions of 'eid and barāt; and this further undermines his ability to save for his wedding. Some people who cannot raise the money are forced to sell their property or to borrow money at high interest rates. This often leads to severe financial difficulties during the married life of the couple ; whereas the parents of the bride benefit from these customs and tend to use their daughters as a means of improving their financial position.

As wealthier men are usually more advanced in age, the bride's parents often marry their daughters off to older men. This desparity in age develops into social problems of common occurrence in Afghanistan. In a marriage where financial considerations are of prior importance, the question of consent of the prospective spouses is often relegated to second place. In marrying their daughter to wealthy men, parents often justify that marriage to a wealthy man gives her financial security. However, in a short time, the wife or the husband or both, become aware of the fact that marriage was primarily imposed upon them by the parents. This leads to resentment on the part of the spouses should the marriage prove unsatisfactory; and tends to undermine their ability to work at marriage. Often the husband will feel as if he has been deceived into giving up his fortune in paying vast sums to his in-laws. As he has often no power to hit back at the in-laws, he tends to resort to mal-treating his wife and insulting her and her parents. In other cases where the daughter is given to an unsuitable elderly man, she often resents the fact that she has acted as a pawn in her parents' desire to gain wealth. The problem of young widows and orphans who are still in need of protection is a further undesirable consequence of such marriages. Another resultant ill-effect of expensive marriages is that many people find marriage out of their reach. When marriage becomes primarily a question of means, it tends to become the privilege of the wealthy. Consequently, while many people cannot afford a monogamous marriage, the wealthier can afford to marry polygamously. This factor further induces the continued practice of polygamy in Afghanistan.

It is also not unknown of the parents to refuse the man of their daughter's choice in favour of a man of their own choosing. The girl sometimes refuses to abide by her parents' wishes and insists that she should be either allowed to marry the person of her own choice or else she will remain single. Both insist on having their own way; and the result is often that the girl passes the marriageable age.

Expensive marriages also tend to increase child marriage. In a patriarchal environment where girls are regarded as financial assets, parents often rationalize that it is for the good of their

daughter to marry them at an early age. Parents often find child marriage an easier way of attaining their own wishes in the choice of husband for their daughter. Marriages of childhood are frequently arranged in pursuit of either money, family and tribalist alliances, or both.

Almost every legislation on marriage during the past half a century or so in Afghanistan, has attempted to restrict the expenditure incurred in marriage. In order to further develop this discussion the actual traditional practices will be introduced. It is, however, difficult to be accurate in the illustration of these practices, for they vary in different localities (1), and are sometimes liable to sudden modification. The problem of expensive marriages can be conveniently looked at under the following headings:

I. The brideprice (Walwar);
II. Engagement and engagement gifts;
III. Expensive weddings;
IV. Dower (mahr).

I. The Brideprice (walwar) (2)

Traditional attitudes regarding walwar and what may be regarded as the equivalent of walwar (exchange marriage e.g.) have undergone changes especially among the more enlightened people. According to the existent tradition, however, "a man may acquire a wife in any of the three ways: he may inherit a widow, gain a bride in exchange marriage, or pay a brideprice. The last one is the most usual, the other two being variations of this form" (3).

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1. As aptly commented by Mermon, the Afghanistan Womens Society's monthly: "To date, marriage formalities in our society are not practiced in a uniform manner. For certain traditions are general whereas others are particular to different localities of the country". (Mermon No.10, 1350 A.H -1971-:57) Mermon admits its commitment to the promotion of women's rights in Afganistan.
2. The term varies in different parts of the country and in different local languages. Walwar is a pushto term, toyāna and shirbahā are the equivalent Dari names, whereas qalin is the equivalent term in Uzbaki. All terms have been used in the statutes.
3. Nancy Tapper, personal communication, based on her research among the Durranis of Afghanistan 1972.

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Walwar is the sum of money - also occasionally payment in kind - paid by the groom or his family to the family of the bride. Out of this sum, the bride's family may provide jahīz - usually pieces of furniture and ornament - for the bride; but walwar is basically a payment to the bride's family in consideration of the girl who is given in marriage and is not particularly devoted to jahīz. (1).

Despite the fact that the sums paid in walwar vary in different places (2), and even though it is regarded a disgraceful practice among the more educated urbanites (3), nevertheless walwar constitutes a national problem that has received legislation during the last half century or so.

Owing to the wide variation of the sums paid in walwar in different places, no uniform figure can be given. Representative figures quoted usually run from 20,000 Afs or less (4) to 100,000 Afs (5). In the northern provinces, walwar is reported to run between 70,000 Afs and 150,000 Afs (6). Among the Durrani pushtans of Sar-e pul district, it is reported that "normal brideprice for Durrani girls today are about 80,000 Afs; brideprice as low as 40,000 Afs and as high as 150,000 Afs have recently been paid".(7) In the district of Katawāz, as reported by the Kabul Times, walwar is sometimes as high as 150,000 to 200,000 Afs (8).

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1. See Mir Munshi (S.M), Constitution and Laws of Afghanistan, Cambridge 1900: 146; and Martin (F.A), Under the Absolute Amir, London 1907: 320; also Smith (H.H) et al, Area Handbook for Afghanistan, American Universities 1969: 100.
2. "In Qandahār and Paktiā, walwar is very heavy; in Laghmān and Khogyāni and among the Mohmands, it is not easy either; but among the Safis, Shinwaris and Yusufzais, it is moderate ..." (Q. Khadim, Neway Ranā - new light - Kabul 1343 A.H (1964): 44 et seq. (Pushto text).
3. See H.H. Smith, op cit: 99.
4. See H.H. Smith et al, op cit: 99.
5. See Rāziqi, A Brief Look at the Marriage Law, in Mermon, No.10 1350 A.H (1971): 51.
6. See M.O. Andkhoi, W.J.J, No.22, June 1967.
7. Nancy Tapper, loc cit.
8. Kabul Times, 4th, Nov. 1971.

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The father usually regards it his responsibility to ensure that his sons are married during his lifetime, in the absence of father, it is the household head whose responsibility it is to ensure that all household assets (including the capital represented by sisters and daughters) are jointly held and would be used at his discretion for the payment of walwar. The tribesmen in this respect, "hardly operate in terms of a balanced budget, nor is there a concept of average annual income. There are simply bad years and good years according to the incidence of marriages as much as to the climatic extremes" (1).

In Afghanistan, the average national income per capita in 1970 was approximately 5,850 Afs = 78 American dollars (2). Comparing this figure with the usual sums paid in walwar, it is evident that walwar, on the whole, constitutes an intolerable burden for the people of average income in Afghanistan (3).

Legislative measures to discourage the practice of walwar began with the Nizāmnāma legislation of the 1920's. The Nizamnama of Nikāḥ 1921 enacted that "walwar, qalîn, shirbahā and toyâna are forbidden" (4). This provision appeared in toto in the following Nizāmnāma of Nikāḥ 1924. Neither of the two Nizāmnāmas, however, contained further measures as to the manner of enforcement of these prohibitions; nor did they clarify the consequences of infringement. Although King Amânullah, generally speaking, took a personel interest in order to ensure the enforcement of the Nizāmnāmas; he is for example reported for his inspection tours to provinces during which he made a special note of the Nizāmnāmas (5); nevertheless, the absence of legal measures to define the consequences of infringement led to uncertainty in the effectiveness of the Nizāmnāma prohibition on walwar.

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1. Nancy Tapper, ibid.
2. See Statistical Collection, Ministry of Planning publication, 1971: 167.
3. "Experience has shown that the payment of walwar has caused the financial breakdown of numerous households in Afghanistan. Many people incur debts which cause them to be forced to sell up their homes and to wander from one place to another and to endure untold miseries". (See Fidakār in Jumhuriat (Republic) daily, 2nd year, No.88, Nov.1974); note also "Walwar is one of the factors which has ruined the financial status of many families in this country". (See Afghanpūr in Jumhuriat, 2nd year, No.90, Nov. 1974).
4. Rule 15.
5. For an account of these tours and penalties that Amânullah inflicted on negligent officials, see R.T. Stewart. Fire in Afghanistan 1914 - 1929. Doubleday, New York 1973 : 205.

The Marriage Law 1934 defined the marriage contract as complete only "When the offer and acceptance of the spouses has been given", and emphasised that "the contract must take place in the presence of both spouses ; their witnesses, and their parents".(1). The reference to the presence of the spouses and their parents, indicated that the traditional representation of the spouses by the parents (marriage by proxy or wikālat) was discouraged by this law. The preamble of this law, in a reference to traditional practices provided that "tradition usually imposes exaggerated and unnecessary expenditure, in order to reduce these expenditures, limitations are hereby enacted". Concerning walwar, this law, however, enacted no limitations except a vague reference made in article (5) which read that "The trousseau must not be exhibited; this also applies to the sum of money demanded of the husband by the parents of the bride". The latter clause which probably referred to walwar, did not seemingly prohibit its practice. In addition to this, article (5), on the whole, prohibited the exhibition of trousseau, and extended the same prohibition to walwar. A confusion arising from this article is that walwar is usually not exhibited. Exhibition of trousseau on the other hand, has hardly been a problem of wide concern when one compares this with the problem of walwar. In short, this article has ignored the main issue and instead has focused on a relatively subsidiary matter.

The Marriage Law 1949, like the Nizāmnāmas, prohibited the practice of walwar (2). This law also authorized the government authorities to take action in a situation where a valid marriage is already in existence and where the bride's parents in order to procure a brideprice refuse to allow the bride to join her husband:

"Whenever it be proved that a lawful offer and acceptance has taken place, but because of the non-payment of walwar, qalin, peshkash, toyana, the guardian of the wife does not let her join her husband, and the latter complains to the government, the local government will first advise the guardian to release her. But if

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1. Art (1); note also Art (1) of the following Marriage Law 1949 to the similar effect.
2. Art.5: "Except mahr, all other payments in the forms of walwar, qalin, peshkash and toyāna are forbidden".

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the guardian still insists, the government authority will deliver the wife to her husband". (Art.6).

The above article envisaged what would be a rare situation in practice. For the brideprice is usually paid in the early stages of the marriage ceremonies, whereas the nikāḥ is only concluded at the final stages (1). A lawful offer and acceptance, in other words usually takes place after the payment of walwar. This point is illustrated in the following passage: "To start marital cohabitation without a wedding and without the approval of the bride's parents only leads to conflict and hostility. For customarily cohabitation begins after the wedding. Prior to this event the bride usually remains with her parents and can hardly see her prospective husband. Under these conditions, no marital relationship and no personal contact is allowed to develop between the couple before the wedding. In this case, when walwar becomes a subject of dispute between the groom and bride's parents, the latter would normally be in a position of dominance which would make it very difficult for the groom to prove a nikāḥ. Supposing that the groom resorts to the government, or raises a claim of nikāḥ, the bride's parents may deny his claim, and in view of the above-mentioned custom, they would be able to prevent the bride from attending the court even if she is willing to do so" (2). After an emphatic condemnation of the "excessive and non-Sharī'a expenditure in marriage ceremonies", the 1949 law, in its preamble also provided that "the competent authorities shall time and time again take care and refer those who violate this law to Sharī'a Courts for punishment". This clause, in spite of not being clearly defined, implied that the Shari'a discretionary punishment of ta'zīr were made applicable to the violators. In practice, however, criminal prosecution on charges of walwar has rarely been encountered in the court records. It is in fact true to say, on the whole, that the

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1. "Nikāḥ is contracted at the wedding and is conducted late at night by the leader of the local mosque". (M.Ali, Afghanistan, Education Press 1969: 37)
2. See Raziqi, A Look at the Marriage Law, Mermon No.10 1350 AH(1971) : 49.

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courts have not paid enough attention to this problem and have so far hardly attempted to substantiate the statutory prohibitions on walwar. In Din Muhammad.v.Gul Shirin (1) for example Din Muhammad claimed his nikāḥ against Gul Shirin and stated that "On 1/1/1345 Seid Ahmad the father of Gul Shirin in his capacity as legal guardian contracted her in nikāḥ to me while she was a minor of twelve years of age. Seid Ahmad received 2,000 Afs as prompt dower, and 10,000 Afs together with a portable radio of the value of 3,000 Afs as toyāna in the presence of a number of Muslims from me. I hereby demand Gul Shirin my wife who is now a major person to abide by her marital obligations to me. The toyāna which Seid Ahmad received is illegal for him, I hereby also demand Seid Ahmad to return the sum in full and the radio or its price to me ... since the claimant did not produce a nikāḥ khat to support his claim, the primary court of Parwan decided that the claim of nikāḥ was non-hearable. As for toyāna, since the claimant had not clarified the type and make of the radio, and had not explained what kind of bank notes he paid to Seid Ahmad, nor did he explain whether it was Kabuli rupias*, the primary court considered his claim as being vague and decided (settlement No.1/11.11.1348) that it was non-hearable. Din Muhammad appealed to the Provincial Court of Parwan which consequently confirmed the Primary Court's decision. Din Muhammad then appealed to the Cassation Court. This Court observed that the primary court had taken into consideration Din Muhammad's claim in respect of toyāna but the appeal court had not proceeded upon this matter. The matter was communicated in a letter to the Provincial Court in reply to which the latter indicated that the absence of proceedings on toyāna was due to the absence of a claim. Since the Provincial Court has not proceeded on this matter, the Cassation Court cannot proceed either. The apeal court's decision is hereby confirmed".

Judicial proceedings in this case indicate that toyāna has

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1. Settlement No.253/24.12.1350 A.H (1971), Cassation Court for Civil and Criminal Affairs, Kabul.

* Kabuli rupias which preceded Afghanis were in currency until the early years of this century. They are occasionally seen and preserved for their ornamental and silver value.

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been regarded as a purely civil matter like an ordinary debt. This attitude of the Court is not in accord with the terms of the Marriage Law 1971 which clearly rendered toyāna into a punishable offence. Nor is there any reference in the court record to indicate that any criminal proceedings have been effected at any other court. Even in the context of the ad hoc civil proceedings, the courts in the above case have not encouraged the process of evidence to substantiate the claim on account of toyāna. This is suggested in the question raised by the primary court as to whether the money paid by the claimant was Afghanis or Kabuli rupias. For Afghani currency was clearly mentioned in Din Muhammad's claim. In addition to this, Kabuli rupias are hardly seen in modern times, they are in fact out of currency.

Broadly speaking, subsequent legislation has introduced little change in the terms of 1949 law concerning walwar. The following Marriage Law 1960, contained no measures on this subject and in effect confirmed the 1949 Law. Even the more recent Marriage Law 1971 adopted measures which are basically similar to those of the 1949 Law. The basic weakness of all these laws lies in their half-heartedness which is reflected by the absence of any specified sanctions for violators.

The Marriage Law 1971 provided that "no one, including the relatives of the bride, shall ask for or receive any cash or commodity in any form from the bridegroom or his relatives. Violators shall be liable to prosecution and punishment according to the law ..." (1). There is no explicit mention of walwar or of any equivalent term in the above article, but it is obvious from the context that the issue referred to is unmistakeably walwar.

As can be seen the 1971 law does not provide for definite sanctions. Commenting on this point, a Mermon editorial article aptly noted that:"It is not clear how the violators of this law should be prosecuted, in which courts they should be tried and what penalties should be inflicted. For the vague reference to prosecution

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1. Art. 15.

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and punishment in this law does not seem effective enough to discourage its violation". (1).

Constitutionally whenever a gap exists in the statutory law, or even if there is no such law in existence, Hanafi law is applicable in Afghanistan.(2). In the absence of statutory sanctions for the offence of walwar in the 1971 Marriage Law, the Hanafi law of ta'zīr would seem to apply. It should be noted, however, that there is no specific authority in the Qur'an for ta'zīr; the Qur'an in fact, does not know this kind of punishment. Similarly, Tradition (Sunna) has very little to record on this subject. Ta'zīr has found its way into Shari'a law at a comparatively late date. According to the Sharia schools, ta'zīr is inflicted for such transgressions as have no hadd punishment and no kaffara (expiation often by means of fasting or giving charity) prescribed for them. The kind and amount of ta'zīr is left entirely to the discretion of the judge. If it seems advisable, the judge can completely remit the ta'zīr in so far as it concerns the right of God (haq-Allah), but the portion based on the right of man (haq-al-'abd) is not dropped unless the injured person renounces it. The process of trial is simple in contrast to that for hadd; tazīr is inflicted on confession or by various forms of evidence unacceptable to establish a hadd penalty (3).

Ta'zīr has traditionally been exercised in Afghanistan for a variety of offences; not only by 'general courts' which exercise the jurisdiction for Shari'a offences, but also by 'special courts'.(4). In addition to Shari'a offences, ta'zīr has been employed in such areas as traffic offences and contraband. Ta'zīr has, in fact, functioned as a residual source of power in the Afghan courts. In the field of penal law, not only the courts used ta'zīr extensively, but also the legislature frequently adopted ta'zīr as an expedient source of

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1. The Marriage Law should be amended and completed - editorial article, Mermon No.11, 1971.
2. Art (69). Constitution 1964. See more on this article under the Chapter on judiciary at appendices.
3. See details in the Encyclopedia of Islam. Leiden 1934.
4. See more under the Chapter on Judiciary at Appendices.

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reference. Many statutes can be quoted in which new offences were created without any provision made in respect of their penalties. In such instances, the absence of specified statutory penalties usually implied the application of ta'zīr. The currently existent Smuggling Law for example created certain offences, but did not provide for the necessary penalties. Consequently, the Supreme Court issued a circular on this matter which authorized the relevant courts to the effect that "in contraband offences, where the Smuggling Law, and the Customs Law do not specify the penalties, the courts may order ta'zīr punishments under the Hanafi Law" (1).

In Z. Seraj. v.G. Muhayidin (2) for example, "The Central Court of Appeal, Narcotic Division, sentenced the defendant who was caught red-handed on selling 4 kgs. of hashish, per article 102 of the constitution to a tazīr penalty of five month's imprisonment" (3).

Similarly until 1970, no statutory penalties were provided for traffic violations. This matter was raised by the Cassation Court for Public Rights which, in an application to the Supreme Court asked the latter to authorize the use of ta'zīr penalties of imprisonment and fines for traffic violations, and this was consequently granted by the Supreme Court (4). The need for such authorizations was, of course, only felt after the promulgation of the 1964 Constitution which inter alia introduced the principle of legality of offences and punishments (art 26) as also observed in the Law of Judicial Authority and Organization 1967 (5). For prior to these limitations, the courts usually employed ta'zīr without feeling the need to ask for authorization.

If the existent judicial practice in respect of ta'zīr is to continue, then the Supreme Court could extend ta'zīr to the offence of walwar. The question, however, arises as to whether the doctrine

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1. Supreme Court Circular No.554/22.2.1349 A.H (1970); note also Memorandum No.4310/6.6.1347 A.H, Supreme Court Secretariat, to the similar effect.
2. See Islah Daily, Kabul, 4th October, 1972.
3. The point in article (102) of the constitution relevant here is that in the absence of statute law, Ḥanafi law applies.
4. See Qada (Justice), the Supreme Court monthly periodical, No.12, 1349 A.H (1970):9.
5. See more under the chapter on Judiciary at Appendices.

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of ta'zir can be applied by the courts within the confines of the constitutional principle of legality in criminal law. The Sharī'a doctrine of ta'zir authorizes the Ruler to deter conducts that violate the public interest of good government so long as no principle of Sharī'a is violated thereby. This authority is now clearly vested in Parliament which according to the Constitution 1964 has the duty to "legislate for the vital affairs of the country" (art 64). The doctrine of ta'zir in this respect functions as a principle of jurisprudence, and as such does not specify either the type of offence or the kind of punishment for a particular conduct. The Marriage Law 1971 created the offence of walwar, but when leaving the type of punishment as well as the amount thereof for the discretion of the court, the court has been left with excessive responsibility, a task which primarily falls within the province of Parliament. Consequently the provision of the 1971 law concerning walwar fails to fulfill the requirements of the constitutional principle of legality of punishments, and is too vague to provide the necessary guidance for the courts. Further legislation is therefore needed to clarify the category of offence and the type of penalties to be applied to walwar

Although walwar by itself is rarely seen to constitute a subject of litigation before the courts; however, it seems to indirectly provoke disputes that may lead to litigation. In Mirza Hussein v Bobo Gul (1) for example Mirza Hussein claimed that "on 1.1.1344 Khaliqdad the father of Bobo Gul gave Bibi Khanum, his other daughter, in marriage to me. Later on her father gave Bibi Khanum without my divorce to one Sardar, upon which I sued the latter in the three courts. In reconciliation Khaliqdad then gave Bobo Gul's hand in marriage to me and in return Khaliqdad received 50,000 afs. from me and now he has sold Bobo Gul to one Allah Noor". The court then asked the claimant if he had a nikāh khat for proof, but he was unable to produce one, hence the primary court decided that the claim was non-hearable. On appeal the above decision was confirmed but Hussein re-appealed to the Cassation Court which also confirmed the above decision as being in accord with the requirement of article (5)* of the Marriage Law 1960.

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1. Settlement (Feisala) No.61/30.5.1351 A.H (1972), Cassation Court for Civil and Criminal Affairs, Kabul.

* See more on art (5) below at page (61).

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A further example of litigations arising from walwar can be seen in Abdul Magid.v Abdul Ghafur (1) in which Magid claimed that Ghafur his cousin had fraudulently invited Zarina his five year old daughter and her mother to his home where Ghafur detained Zarina and unlawfully prevented her from returning to her parents. This claim was considered to be in conflict with a petition of Magid in which he stated that he had given Zarina in nikāḥ to Fazl Ahmad, the brother of Ghafur and demanded that Zarina, who is incapable of consortium, be delivered to him. The court decided that Magid's claim because of its being in conflict with his petition was non-hearable. Ghafur appealed against this decision, and in a statement he submitted to the appeal court said that the claimant Magid has given his daughter in nikāḥ to the former's brother and now wants to sell her to someone else. Ghafur added in his statement that if it can be ensured that this can be prevented, he will be prepared to deliver Zarina to her father. Magid agreed to this condition and made a statement to that effect. But the appeal court decided that since A. Ghafur did not have a legal wikalat khat (document of proxy) from his brother Fazl Ahmad in order to initiate the claim of nikah, his detention of Zarina, who is a minor, is an aggression which is unauthorised in Hanafi law and he is to immediately release her". Ghafur once again appealed to the Cassation Court upon which the latter confirmed the appeal court's decision and added that "Zarina be delivered to Fazl Ahmad when she reaches the age of majority".

It is common knowledge that cousin marriage in Afghanistan, on the whole, does not involve the payment of a large brideprice. Sometimes a small sum may be paid, but this form of marriage is regarded as a family matter, hence little emphasis is put on the quantity of walwar (2).

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1. Settlement No.20, 5.2.1349 Cassation Court for Civil and Criminal affairs, Kabul.
2. Although walwar receives lesser emphasis in cousin marriage, other expenditures incurred in cousin marriage need not be distinguished from marriages outside the family.

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motivating factor in Magid's alleged plan to contract Zarina in nikāh to someone else. This case, meanwhile, involves child marriage which is a problem in its own right and merits separate consideration. Child marriage is treated in the next chapter, suffice it to note here that the two problems i.e. expensive marriages, and child marriage are often related and tend to mutually feed each other. For child marriage enables the parents to follow their own choice, and in doing so, they are attracted to financial gain. Both are patriarchal practices; the patriarchal component of expensive marriages is reflected in the fact that the high costs of marriage keeps the youth dependant on family resources.

Two other feudalistic practices which may be regarded as variants of walwar are so-called pore and badd. Pore (lit.loan) indicates either financial loan, or unfulfilled vengeance. A man may pay his debts by means of giving a girl in marriage to his creditor. In its second usage, pore is a method of pacifying a feud: an offender may give one or more girls in marriage to the victim or a member of his family and thus compensate for his offence. Badd (lit.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 were often used as methods of reconciliation in crimes of violence (1). Under the Marriage Law 1971, "nikāh cannot be contracted in exchange of pore and badd".(2). Beyond this, there is no further elaboration of the legal position on pore and badd in this law. It seems unjustifiable to see that while walwar is rendered into a punishable offence, pore and badd are not treated at least on a similar basis.

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1. Among the Durrani pushtuns "when different Durrani tribes or sub-tribes have been involved in blood-feud, peacemaking ideally entails the giving of three women for each man killed, or one for each man wounded. Similarly when a woman runs away with another Durrani, the latter must give three women in compensation". (Nancy Tapper, loc cit.).
2. Art (21): note also the Nizammama of Nikāh 1921 (Rule 9), and the Marriage Law 1960 (Art.20) to the similar effect.

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## II ENGAGEMENT AND ENGAGEMENT GIFTS

There are two main problems concerning engagement in Afghanistan. One is the problem of heavy expenditure incurred at the engagement ceremony (namzādi, or shirinikhori) and the subsequent gifts given by the prospective husband to his fiancée on religious occasions (i.e. 'eid, and barāt). The other problem is that engagement is traditionally regarded as a binding relationship which must lead to nikāḥ (1). Both of these problems find their roots in arbitrary practices which have no support in Sharī'a.

In Sharia, engagement is a non-binding promise to marriage, therefore if one of the parties withdraws, he or she is entitled to do so. In order to enable them to acquire knowledge of each other, Sharia allows the engaged parties to see each other without khilwat - valid retirement -. In Ḥanafi law, it is recommended that they should see each other, but all the Sharī'a Jurists are in agreement that visits must not be in a situation of retirement. As for the harm caused by withdrawal, damages are to be met only when such harm is caused in a manner other than by a mere withdrawal from engagement. For to do so is their right. For example, if the fiancée lays down as a condition of the engagement that a certain type of house should be built, and later she abstained, the harm that may follow would not be a result merely of her abstention but of the condition laid down and damages would be due. The dower or any part of it, if it has been paid in advance is recoverable should abstention occur. Gifts given during engagement are in Hanafi law regarded as Hiba and recovery is valid so long as the value is present, no change of ownership occurred, and both parties are alive (2).
In Afghanistan, overtures may commence by a visit from the mother or aunt of the boy or a matchmaker to the girl's parents, and in case of agreement, the respective fathers then meet to discuss the terms.

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1. "Among the Durrani pushtuns of Afghanistan, an engagement (Kozda - the actual ceremony is known variously as a tar, wekray, xoshey, fātiḥa) is considered irrevocable" (Nancy Topper, loc cit).
2. See G.M. Darri, Family Law In Islam, Supreme Court Publication Kabul 1971 pp. 19. Dari text.

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A day for engagement (namzādi) is appointed upon which a ceremony called Shirinikhori is upheld which signifies the formal announcement of the engagement. Educated young men and women, in the cities especially, are beginning to show an independent spirit concerning their marriage, but traditionally it is considered improper for them to take the initiative in their own hands, or to refuse abiding by the parental arrangement (1). Similar to conditions that obtain in other Muslim countries, young men and women in Afghanistan are given little opportunity to get acquainted except within the extended family household (2).

Still widely prevalent in many parts of the country is the traditional practice according to which the engagement period lasted for several years. During this period the parents of the boy have to send expensive gifts to the girl on national and religious occasions. This tradition adversely affected the financial position of the boy and his family (3). The period of engagement is usually long in cases of child engagement. Longer periods of engagement may also be due to the financial inability of the groom to accumulate the money in order to meet the expenditures involved.

In addition to its being expensive, engagement in Afghanistan is deemed to represent an unbreakable tie which must conclude with marriage:

"It is customary in Afghanistan that as soon as someone comes into negotiation with a girl or her family, he is bound to marry the girl and cannot disengage. This leads to problems, as in cases where disagreement follows, the girl is to remain a spinster in her father's house; the boy is also put under considerable pressure to marry her". (4).

This binding character of engagement is substantiated by the existence of a parallel practice according to which, a man in order

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1. M. Ali, Afghanistan, op cit: 34.
2. See H.H. Smith op cit: 98: also M. Ali op cit: 36.
The official abolition of veiling (purdah) in 1959 may be regarded as a milestone of change in the traditional segregation.
3. Q. Taraky, Kabul Times, Nov. 15th 1971.
4. H. Hedaiat, W.J.J., No.22 June 1967.

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to dissolve the engagement, usually pronounces a talāq which suggests that engagement in this respect is treated as a nikah.

The Nizāmnāma of Nikāh 1921 prohibited the ceremonial performance of engagement as follows: "It is common among people to hold ceremonial occasions so-called shirinikhorī and namzādi for engagement, which is then followed, after a period of time, by a further ceremony of Shab-e hena (night of hena) which leads to nikāh. All these ceremonies are imbued with unnecessary festivities which impose considerable hardship on both sides, incurring wasteful expenditure, and constitute a source of various claims in the courts. Therefore, the ceremony of shirinihkori, sometimes called namzadi is hereby absolutely forbidden. Anyone who wishes to marry should come into negotiation with the prospective partner and the relatives and seek the agreement of the partner. Instead of holding shirinikori, the parties are to enter nikah in the presence of witnesses, a mulla who contracts the nikah and close relatives. They are to avoid holding festivities and inviting large numbers of guests".(1).

The 1921 Nizāmnāma also provided that 'the usage of sending gifts in 'eid and barāt to the bride's house is forbidden. (2). A similar provision appeared in the Marriage Law 1934 which provided that "giving of gifts in sacred occasions known as 'eidy, barāty and shācāny are forbidden" (Art.6).

The law of 1949 similarly banned the ceremonial performance of engagement (shirinikhori). This law provided that "the holding of separate majlis for engagement is forbidden, there is to be only one majlis (meeting) which will be for the contract of nikāh".(3)

While debating art.1 of the Marriage Bill (later law 1971) which concerns the popular practices prior to nikah including engagement, the delegates in the Wolesi Jirgah voiced their opinions mainly from two opposing camps. The draft art. 1 read that

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1. Rule 7; this provision appears in toto in the subsequent Nizamnama of Nikāh 1924.
2. Rule 11, which has been reproduced in toto in the Nizāmnāna of 1924 (art.8).
3. Art.2.

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"Nikāḥ is contracted upon the meeting of offer and acceptance by nākiḥ and mankuḥa, while both are major and in possession of their faculties, in the presence of witnesses. Formalities based on custom and usage performed prior to the contract of nikāḥ have no value"(1).

The traditionalists felt strongly that the second clause should be dropped (2).

The modernist view was mainly voiced by Badri and Karmal who argued to the effect that these usages are not supported by Sharia; they also constitute a source of conflict among people, and ruin the financial status of the family- see details of the debate under appendix (A)-. As the result of further debate, the draft article (1) was modified and passed by the House to read as follows: "Nikāḥ is contracted with the offer and acceptance of 'āqidein (contracting parties) in accordance to the sacred Sharī'a. Formalities based on custom and usage which are performed prior to the contract of nikāḥ are of no value".(3). As can be seen, the modernists succeeded to preserve the second clause as above, but the overall outcome tends to represent a compromise. For inspite of the denial of legal value to the said usages, the individual is left free to choose whether to perform them or not. The term 'āqidein, the insertion of which was stressed by the religious leaders, left the traditional powers of the guardians virtually unchanged. For the term 'āqidein allows the prospective spouses as well as their guardians and representatives to contract the nikāḥ.

A corollary of the problem referred to above regarding the traditionally binding character of engagement is that claims of nikāḥ are sometimes initiated in the courts which in reality are

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1. W.J.J. No.22 June 1967.
2. "The second clause is unnecessary in my view" (Fakhruddin W.J.J. ibid). Note also "This law is impractical as Afghanistan has many customs such as namzādi and shirinikhorī ...." (M. Nasim ibid); note also "As the reverable delegates know in the countryside as well as in Kabul engagement is celebrated first which may last for several years and then follows the contract of nikah" (M.Akram ibid). Se also G. Mustafa loc cit to the similar effect.
3. Art (1), Marriage Law 1971.

based on an engagement only. Since engagement is regarded as a form of agreement, it is often inadvertantly or deliberately confused with nikāḥ. The binding force of engagement and its confusion with nikāḥ is substantiated by a practice of somewhat clandestine nature so-called bazi which is practiced in some parts of Afghanistan. According to this practice, when the parties are engaged, the man is allowed to visit his fiancée occasionally for bazi (lit. play) (1). Although bāzi is not supposed to lead to sexual intercourse, it is nevertheless regarded an indication of the tacit approval of the prospective spouses in respect of nikāḥ. In places where bāzi is practiced,

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1. The practice is also called namzād bazi. According to Elphinstone "Among the Eusofzyes; no man sees his wife till the marriage ceremonies are completed; and with all the Berdorounees there is a great reserve between the time when the parties are betrothed and the marriage. Some of them live with their future father-in-law and earn their bride with their services without ever seeing the object of their wishes. But all the rest of the Afghans (i.e. pushtuns, supplied), the Eimauks, the Hazaras, and Tajiks and many of the Hindus have a different practice and permit a secret intercourse between the bride and the bridegroom which is called namzād bazee, or the sport of the betrothed. With them, as soon as the parties are affianced, the lover steals by night to the house of his mistress. The mother or some other of the female relatives favours his design; but it is supposed to be entirely concealed from the men, who would consider it as an affront. He is admitted by the mother and conducted to his fiancée's apartment where they are left alone till the approach of the morning. The freest intercourse, the most unreserved conversation, and all other innocent freedoms are allowed, but the last favour is always withheld; and the strongest cautions and prohibitions are used by the mother to both parties separately". (An account of the Kingdom of Caboul, London 1839, Vol.I: 236).

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an engagement tends to be regarded as binding as nikāḥ. (1).

Under the Marriage Law 1960, a "Claim of nikah could not heard without a valid deed of marriage - nikah khat. (Art.5) This article in effect denied judicial relief to all claims of nikāḥ which were not evidenced by a valid nikāḥ khat regardless of the fact as to whether a claim was based on an engagement or nikāḥ. Numerous examples can be seen in the court records in which this article has been relied upon by the courts in order to deny hearing of the claims of nikāḥ which were not supported by a nikāḥ khat.

The above position has, however, been modified under the following Marriage Law of 1971. According to this law, it has been made possible to prove a claim of nikāḥ without a nikāḥ khat provided that "... there exists between the parties a reputation of marriage or marital cohabitation that satisfies the court by the evidence of a number of reliable persons ..." (Art.37). This provision of the 1971 Law is considered to be capable of giving rise to various forms of claims of nikāḥ which, in reality, may be based on an engagement only (2).

The confusion between engagement and nikah is apparent in Abdullah.v.Mahera Mustamandi (3) in which the claimant Abdullah attempted

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1. The popular attitude among the Maduzai tribe is reflected in the case of Ejab and Daud Shah in which "Ejab was engaged to Daud Shah by her father. Before Daud Shah had paid more than half the walwar, he fell in love with a widow woman ... the widow told Daud Shah to divorce (yela) Ejab ... Daud Shah was inclined to agree with the widow and when he went secretly to bāzi one night and discovered that Ejab, as well as being ugly and dark skinned, was also covered in large boils, he entirely lost interest in taking her for his wife. Some time later Ejab's mother and some other people approached Daud Shah and insisted that he either begin paying the walwar again and come to bāzi, or that he free Ejab so that she might be given to another man. Eventually the village elders were convened and Daud Shah was called before them; he threw down three stones and divorced (talaq) Ejab. He did not receive back any of the brideprice which he had already paid. After this a very poor old man came to the village as a muzdur (servant) and he asked the village headman to try and arrange his engagement to Ejab. No one else had wanted to marry Ejab and equally no one else in the village would give the poor old muzdur a wife; their engagement was arranged and the muzdur offered a very small brideprice and his labour as walwar. The nikāḥ was performed soon afterwards. It was said that no one would ever take a woman who had been to bāzi with another man, but the muzdur was not in a position to worry about that ..." (Nancy Topper, loc loc cit).
2. Confirmed by S.J. Sharafat, head of the Central Office for Registration of Documents (Informal interview, Kabul, Oct.1972)
3. Settlement No.42/17.11.1350 A.H (1971) Central Court of First instance for Civil Affairs, Kabul.

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to persuade the court to the effect that in Afghanistan, an engagement was the equivalent of nikāḥ; he thus attempted to prove a nikāḥ without a nikāḥ khat under the new law (1).

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1. "Abdullah claimed that Mahera while in possession of her faculties gave herself in nikāḥ to me but now refuses to abide by her marital obligations and cohabitation. Mahera utterly denied the claim. Moreover in a separate petition to the Kabul Governor, Abdullah mentioned shirinikhori and namzādi and demanded that Mahera and her father should accede to the conclusion of the contract of nikāḥ. Mahera stated that Abdullah's claim is in conflict with his petition emphasising that per article 176 of the Law of Civil Procedure (usulnāma-e-hoqoqi 'adli) and article (1647) of the Mujallah the claim is contradictory and thus non-hearable. In her denial of Abdullah's claim, Mahera also relied on the fiqh rule which provided that 'asking for nikāḥ of a free woman hinders the claim of her nikāḥ' (Fetāwa-e-Kamiliyya, p 86). Against this the claimant stated that in our 'urf (custom) in Afghanistan the terms namzādi and shirinikhori are used to imply the contract of nikāḥ. Abdullah cited article 36 of the Mujallah that ('ādat is authoritative), and rule 6 of Al-Ishbāh wa al-Nazāer to the same effect contending that 'urf is to be upheld. In current 'urf in Afghanistan in order to ligitimize intercourse and visits between the parties before wedding ('urusi), offer and acceptance usually take place. Moreover by 'asking for nikāḥ' in my petition, I meant the execution of wedding ... Also in my petition I wrote not of the alleged presence of the Head of Protocol but of some of the staff members of the Ministry of Royal Court who lent me a marquee and parasol for the occasion of my namzādi i.e. the meeting of offer and acceptance which are in the dossier together with the photographs I took with my wife testifying my marriage. Mahera again while rejecting the above statement of Abdullah emphasized that namzādi and nikāḥ are distinctly different and even if there were a namzādi, it would be of no value per article 1 of the 1971 Law ... But prior to the court's judgement, Abdullah ceased his claim and stated that since there is no psychological agreement between him and Mahera, and also since he has no valid proof for his claim, the court decided to conclude the case and ordered the parties to cease controversy".

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III EXPENSIVE WEDDINGS

Shari'a recommends walīma, i.e. a feast for the celebration and proclamation of a wedding. The Ḥanafis, and Ḥanabalis consider walīma to be recommendable - mustahab -. The Shāfi'is view this more strictly; according to one Shafi'i view walīma is strongly recommended (sunna muakkada) whereas according to others it is obligatory (wājib).

According to one tradition, the Prophet is reported to have forbidden marriage to be performed in complete quiet (1).

At the Prophet's own wedding feast on the occasion of his marriage to Safiyya, walīma consisted of ḥais - a dish of dates -, curds and fat, to which according to some traditions was added a meal of roasted barley - sawiq - (2).

In one tradition narrated by Abu Kuraira, "a wedding feast attended only by the rich and where the poor are kept away is an evil occasion".(1).

According to a Kabul Times editorial, in Afghanistan the practice is that "wedding parties are fashion parades accompanied by feasts and competitive musical entertainment.(3).

In five hundred weddings performed in Kabul during a period of ten months in 1972," the expenditure on each wedding in the old city of Kabul was about 60,000 Afs.... An inhabitant of the old city said it would be better if the government took measures to abolish such high expenditure on weddings ..."(4).

At a country wedding, almost the whole village will be invited. All must be fed and there must be music and entertainment. Since this is the general practice, a family which is not rich must incur debts in order to cover the costs of such a celebration (5).

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1. See the Encyclopedia of Islam, under 'Urs.
2. Bukhari, Nikāḥ, chap.13.
3. Kabul Times - Editorial Article - Oct.19. 1971.
4. Kabul Times February 19th, 1973.
5. D. Wilber op cit p92; note also"The bridegroom and his family or his parents spend a lot of money on their marriages, holding two, three or four days feasts entertaining the entire village and even nearby villages ... these are the problems in the rural areas. In the cities it is the inability to buy the diamond ring, and throwing a splendid wedding party in one of the most expensive hotels. Only ten years ago gold jewelry was sufficient and holding the party in the back yard would do, today things have drastically changed. Looking from outside weddings today are simpler but they are more expensive". Kabul Times Oct.23. 1971 (by a Staff Writer).

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Additional items usually provided at urban weddings include a diamond ring and fashionable wedding dress. The latter may according to the Kabul Times cost 10,000 Afs.(1) but according to another account for as high as 30,000 Afs.(2).

The 1921 Nizāmnāma introduced specific limitations on wedding expenditures. The Nizāmnāma measures in this respect concerned the shirini (sweets) distributed on the occasion of contracting the nikāh (3); clothes provided by the bridegroom (4); ornaments given to the bride (5), gift to the mullah who contracts the nikāh (6), and the wedding parties (7).

Two of the above limitations, i.e. the limit on the sweets and the limit on the mulla's gift, were dropped in the following Nizāmnāma of 1924 but the other measures remained unchanged in this Nizāmnāma.

Notwithstanding the variation of the local usages, wedding parties are held by both families of the bride and the groom, but expenditures for both are largely met by the groom's family. The groom is thus required to provide the bride's family with the necessary items required for the wedding feast. In this way, often exaggerated quantities of sweets, rice, animals etc., are received by the bride's family.

In an attempt to restrict the incidence and the duration of wedding parties, the Marriage Law 1934 provided that "The expenditure must not be exaggerated, but it is permitted that there should be a wedding ceremony on the day that the contract of marriage is made" (Art.2).

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1. Oct. 23. 1971.
2. "... one often hears of the village traditions but it is just as bad in Kabul and other cities ... A Western style item included nowadays is the wedding dress that may be purchased from abroad for as much as 30,000 Afs". (A. Karzai, W.J.J No.23 op cit).
3. Rule 14: 'the sweets given at the occasion of contracting the nikāh is not to exceed the amount of one charak'. 1 charak = 4 lbs.
4. Rule 16: 'clothes given by the groom are to be as follows: first the wealthy group provides 4 complete silk and 4 complete woollen and cotton costumes; second the middle income group provides 3 complete silk and 3 woollen and cotton costumes; third the low income group provides 3 complete woollen and cotton costumes.
5. Rule 19: 'If after the conclusion of the wedding the husband, his family or the bride's family wish to give to the bride ornaments or household equipment it is up to them but is not a necessity".
6. Rule 21: 'From five to twenty rupias and not above this sum may be given to the mulla who contracts the nikah!
7. Rule 20: "If on the night of Henā either of the bridal parties wish to hold a party to which they invite their friends, male and female, it is not forbidden, however, fruit and sweets provided must not exceed what is necessary for consumption by the guests and the guests must not take anything home".

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This law also introduced some quantitative limitations on the expenditure incurred at a wedding (1). Further to the persuasive measures which attempted to restrict the time of the wedding parties, this law provided that "... the very evening of the ceremony of the contract, the husband is authorized to prepare a meal for his guests so long as he does not incur unnecessary expenses".(Art.4). As can be seen, this provision attempted to restrict the wedding festivities to the evening of the ceremony of the contract. Moreover only the husband was authorized to hold a wedding ceremony. Accordingly the husband did not have to provide the bride's family with the necessary items for a wedding feast.

The 1949 Marriage Law adopted flexible measures on wedding expenditures. With regard to clothes, this law enacted that 'gifts of clothes to the bride are left to the discretion of the groom, and the groom cannot be forced to spend beyond his means'.(2). The 1949 law also provided that 'consumption of excessive sweets, giving of handkerchiefs at the occasion of the contract of nikāh whether it be in the month of Ramaḍān or otherwise are forbidden. At the meeting of nikāh sweets provided should not exceed what is required for consumption. On the Night of Ḥenā if the groom wishes to hold a party as walīma, it is permitted, but it should be in accordance with his social standing and must avoid extravagance'.(3).

The Marriage Law 1971 contains only one clause which provides that 'weddings should be performed in the simple home-made clothes'.(4).

This position in the new law has been aptly criticised by an editorial article of Mermon as follows: "It is not quite understood what is meant by this clause. For if the aim is to limit the excessive expenditure involved in marriage, it is not only the expensive wedding clothes (and even that is not clarified whether clothes for the

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1. "During the settlements of the marriage contract, the cakes served must not exceed 7 kilos in weight ..." (Art.4).
2. Art. 3.
3. Art. 4 ibid.
4. Art. 15.

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bride, groom or both), but several other things such as excessive dower, ceremonies of engagement, nikāh and wedding, as well as ceremonies after the wedding which are all among the unnecessary performances that violate the requirements of our economic welfare. It was expected that the law of 1971 should like the law of 1949 at least have discouraged, or even explicitly forbidden these extravagant ceremonies". (1)

The reference to simple home-made dress in the 1971 law is, probably designed to discourage the recent trend in the cities in respect of buying imported and more expensive dresses. However, there is no justification for the complete silence of this law in regards to other expensive marriage ceremonies.

A basic aim of walīma in Shari'a is to publicise the nikāh. This aim can surely be satisfied by the use of mass media. It would be preferable for the parties to publicise the wedding in the local press. So far no such requirement exists and the matter is left to the individual choice. Publicising the wedding in the press replaces to some extent the need to hold huge parties to advertise the wedding. The Ministry of Justice, who supervises the resgistration offices, could introduce regulations that the nikah should be publicly advertised prior to its registration.

On the other hand the issue could be approached from a more practical angle. This could be through the provision by the Government of registered buildings where marriages can be performed. The buildings can be supervised by the local municipal authorities. The facilities and the type of entertainment provided in these buildings should be planned in a manner as to make them sufficiently appealing to the local people, financially and otherwise, in order to encourage the use of the services. In the planning of the standards of food and services utmost caution should be exercised in order to discourage competition. It is also important to note that the object of this project should not be a commercial one but as part of the social services, hopefully at some stage, it should reach a level at which it becomes self maintaining. And finally, due consideration should be

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1. Mermon, A Look at the Marriage Law, op cit p.74.

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given to the convenient participation of the local women.

A well organized project can surely succeed and would enable the municipal authorities to exercise a measure of control in order to reduce the problem of expensive and competitive weddings. Control and persuasion can be exercised on various levels:

A. In the size of the buildings, so that they can cater for only a certain number of people.

B. In the time of entertainment, and music.

C. On the quantity and variety of food.

D. To encourage registration, advertisement, and the provision of simple bridal clothing.

Moreover the premises could be used for certain alternative purposes; it would in fact be preferable to establish them with this aim in mind.

The project would also seem attractive from the customer's point of view, as very often there is a shortage of party requisites felt in the individual arrangements. (1).

At present, there are a couple of places in Kabul, e.g. the 'Press Club' where wedding parties are usually held. But the Press Club has undoubtedly become a middle-class kind of place. As noted above the success of the proposed project seems largely to depend on its ability to attract people of average income levels.

IV DOWER (Mahr)

The Qurʾan commands to "give women their dower". (2) In Ḥanafi law the marriage contract is valid whether it stipulates a dower or not. If the dower is not stipulated or indeed if the contract expressly states that there shall be no dower, the wife is entitled to the mahr-al-mithl or the proper dower which is calculated with reference to to the mahr received by other female members of the wife's family,

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1. "... Fashionable and expensive wedding dresses are usually only used for one evening. In order to avoid unnecessary expenses, hired wedding dresses should be encouraged and should be made available together with other necessary items such as furniture, cutlery etc". (A readers letter, Jumhuriyat, 2nd year, No.76, Nov. 1974).
2. Sura 4, verse 4.

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and on her personal attributes. The Malikis alone regard a marriage contract which does not stipulate dower or which expressly stipulates that no dower shall be payable, as invalid. According to this school the parties may terminate the contract before consummation but once consummation has occured the invalidity is expunged and the wife becomes entitled to her proper dower.

There is no specified minimum for dower in Shafi'i law, whereas in Hanafi law the minimum dower which may be stipulated is one dinar (or ten dirhams). This sum is given because according to one 'tradition' the Prophet gave to several of his wives a dower of ten dirhams and a number of household necessities, such as a hand-mill, a water jug and furniture. There is, however, no sum as a specified maximum for mahr in Sharī'a.

The doctrine of traditional law is that the parties themselves may stipulate in the marriage contract when the dower should be paid: either on the conclusion of the contract, or at any other time, or a portion on the conclusion of the contract and the remainder on the termination of the marriage by death or divorce. If the parties do not specifically state when the dower should be paid, the Hanafis hold that in the absense of local custom to the contrary, half the dower is due when the contract is concluded and payment of the other half is deferred until the marriage ends.(1).

The claim of the wife or widow for the unpaid portion of dower is an unsecured debt due to her from her husband or his estate. But Shari'a gives to the widow, whose dower has remained unpaid, a special right to enforce her demand. This is known as the 'widow's right of retention'. A widow lawfully in possession of her husband's estate is entitled to retain such possession until her dower debt is satisfied. It is a right to retain and not to obtain, and is a priority of the dower debt against heirs and creditors. But once she loses the possession, she loses her special right and is in no better position than an unsecured creditor.(2).

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1. See more in, e.g. in A. A.A. Fyzee, Outlines of Mohammadan Law Oxford 1964 p.138.
2. See Dr. D. Hinchcliffe, Islamic Law of Marriage and Divorce in India and Pakistan, Ph.D. Thesis, London University, 1971: 123.

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Dower in Afghanistan presents two main problems: non-receipt of dower by the wife, and excessive dowers.

A. Non-receipt of Dower by the Wife:

No data exist to show how often the wife does in fact receive the dower on the terms agreed to in the marriage contract. It is nevertheless common knowledge that "the money or property is rarely acquired by the bride unless she is divorced and goes to court to receive the dower".(1). It is moreover not only the husband who keeps the dower but also the father or guardian of the girl who sometimes receives the dower from the husband but keeps it for himself. This problem has been emphasized in the parliamentary debate on the Marriage Law 1971 as follows: "We must ensure that the bride receives her dower, otherwise we all know that the guardian of the girl receives money for dower from the groom or his guardians and slips it into his own pocket disregarding the bride's Sharī'a right in this respect"(2).

The problem of non-payment of dower to the wife is closely related to the registration of marriage and divorce. Generally speaking, whenever a marriage goes through the registration formalities, the question of the receipt of dower by the wife receives some formal attention. A deed of marriage (nikāḥ khaṭ) normally ensures the receipt of at least the 'prompt' part of dower; and a statement to that effect is recorded in the nikah khaṭ. In the form of nikah khat which is a uniform document, a section is provided for the entry of the whole dower, the part received and the remainder owing. This is illustrated in Shah Baba and Latifa(3) in which it is recorded in the nikāḥ khat that "Latifa while being mature and in possession of her faculties stated that out of the total amount of my mahr (45,000 afs), I received the prompt part of 15,000 afs ... Shah Baba made a statement that 30,000 afs, the deferred dower is my debt to Latifa". In this way the nikāḥ khat registers the terms of the initial agreement of the spouses in respect of dower and serves as a document of proof in the wife's hand should the husband subsequently refuse to acknowledge his debt. The Marriage Law 1960 as well as that of 1971, are explicit to the

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1. Kabul Times, Oct. 23. 1971, ibid.
2. Faizanul-Ḥaq, W.J.J, No.23, July 1967.
3. Nikah khat No.13/23.1.1348 AH(1969), Office for Registration of Documents, Shahr-e Kohna (Old city) Kabul.

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effect that nikāḥ khat while being a document of proof for nikāḥ is meanwhile a document of proof in respect of dower in the hand of the wife. The main question concerning nikāḥ khat is that probably a vast majority of rural marriages are not resgistered at all.

A deed of divorce (ṭalāq khat) on the other hand fails to give adequate attention to the matter of dower. Normally a brief reference as to whether the wife has received her dower or not appears in the talāq khat. Whenever the parties volunteer to settle the dower debt and make a statement to this effect, the statement would be recorded in the talāq khat. But unless the prospective divorcees volunteer to do so, the registration office usually enters a general reference in the talāq khat which in effect leaves the wife free to choose whether she claims her dower or not. Details of the procedure concerning talāq khat and the dower therein will be discussed in a later chapter on divorce. Suffice here to give an example of ṭalāq khat in which the parties voluntarily settled the dower debt. In Ma'sum khan.v.Bibi Gul(1) for example, the ṭalāq khat recorded that "... Bibi Gul while present in this office made a valid statement that she received her dower and to this effect gave a formal receipt to Ma'sum Khan". Records of ṭalāq khat, however, indicate that cases in which the parties voluntarily settle the dower debt are relatively rare. In the majority of cases, dower remains unsettled while the ṭalāq khat is being completed. The basic weakness of the ṭalāq khat procedure in this respect surely lies in its voluntary nature in that it leaves the husband virtually free as to whether he pays the dower debt at the occasion of the registration of talāq khat or not.

The Marriage Law 1971 provides for the dower to be assigned in the meeting of contract (majles - e - 'aqd) and to be inserted in nikāḥ khat(2); it asserts that "dower is the right of the bride and must be paid to her; prompt and deferred dower are to be inserted

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1. Ṭalāq khat No.1/1.1.1351 A.H (1972), ibid.
2. Article 14 Marriage Law 1971.

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in the nikāḥ khat and paid to her or to her legal agent".(1). While defining the value of nikāḥ khat, this law enacted that "nikāḥ khat is a deed of proof for both spouses with regard to nikāḥ, and it is a deed of dower for the wife which is to be handed to her in person upon registration or to be delivered to her through her legal agent. The husband may obtain a replica thereof".(2).

In order to ensure the wife's proprietary rights in respect of mahr, the 1971 law further provided that "the wife can legally make a transaction on her assigned dower in a proprietory capacity"(3).

Two draft articles which were designed to ensure the receipt of the deferred dower by the wife however did not succeed to go through the Wolesi Jirga. The draft article 15 of the Marriage Bill attempted to ensure that "if the deferred dower consists of moveable property and is delivered to the legal agent (wakīl) of the bride, the agent is to deliver the whole of the aforesaid dower to the principal before the Office for Registration of Documents". A further draft article provided that "a statement guaranteeing its receipt by the principal shall be entered under the particular section for moveable dower in the nikāḥ khat. Any claim of the agent about the delivery of the dower shall not be heard except on the basis of a legally valid document"(4). It is common knowledge that the bride usually appoints one of her close relatives, often her father as her agent (wakīl) to receive the dower on her behalf. Traditionally the appointment took place only verbally at some stage before the dower was paid. The above provisions of the Marriage Bill were apparently aimed at ensuring the documentation of agency (wikālat) as well as the delivery of the dower to the person of the bride. They were indeed desirable measures for reducing the problem of non-payment of dower to the wife.

Unfortunately both of the above provisions were dropped by a majority vote soon after one or two objecting voices raised the point

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1. Art. 16 ibid.
2. Art. 24 ibid.
3. Art. 26 ibid.
4. See W.J.J No.23 July 1967.

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that "the coming of the bride to the courts creates a difficulty, especially for the Kochis - nomads -"(1) , and that "it is not feasible that our women should come to the courts and make such statements"(2). Only one view has been recorded as having objected to the above comments by saying that: "Mahr is a right of the bride and if we did not enact provisions to ensure its receipt by her, we all know that the bride does not always receive the dower".(3).

As for the immovable property, the 1971 law in order to ensure documentation of the property included in dower provided that "if the dower consists of immovable property, its four boundaries are to be inserted in the nikāh khat".(4)

The measures adopted in the 1971 Marriage Law on dower closely correspond to those of the previous law of 1960 (5). All provisions discussed above appeared in almost exactly the same form with one or two minor differences concerning moveable property when constituting the subject of dower. The previous law provided that 'upon producing nikāh khat the immovable property included in the dower shall be transferred to the wife's name in the records of the offices of tax and municipality'.(6). Moreover in order to ensure the wife's proprietary rights by means of documentation, it was provided that 'the wife can transfer her assigned dower back to the husband or anyone else by sale, gift, or appropriation - tamlīk -, by means of a deed of ownership - qibāla -, deed of confession - iqrār khat - or deed of appropriation - tamlīk khat.(7).

It thus appears that the 1960 law when tackling the problem of mishandling of the wife's dower, aimed at a higher degree of certainty than did the Marriage Law 1971.

As to the question of how often and what percentage of marriages do in fact go through the registration formalities, no accurate statistics are available. But in view of the relatively small number

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1. Sa'ādat W.J.J No.23 ibid.
2. Dāwary W.J.J ibid.
3. F.Haq W.J.J ibid.
4. Art.14 Marriage Law 1971.
5. See articles 14, 15, 22, and 23 Marriage Law 1960.
6. Art.15 ibid.
7. Art. 23 ibid.

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of nikāḥ khat and ṭalāq khat issued between 1969 and 1973 in Afghanistan, probably only a fraction of marriages and divorces are registered:

| | 1969 | 1970 | 1971 | 1972 | 1973* |
|---|---|---|---|---|---|
| Nikāḥ khat: | 5,374 | 6,212 | 4,899 | 7,730 | 8,046 |
| Ṭalāq khat: | 854 | 1,407 | 1,509 | 1,666 | 1,635 |

The above statement is substantiated when one looks at the breakdown of the figures. Registration is particularly high in Kabul when compared with other provinces such as Kunar and Paktia. In 1972 for example there were 2,061 marriages and 266 divorces registered in Kabul whereas these figures for Kunars in the same year were at 4 and 2 respectively; 38 marriages and 9 divorces were registered in Paktia in 1972. The estimated population of Kabul is roughly twice or three times of those of Kunar and Paktia. Estimated population of Afghanistan in 1971 = 17 millions; 24·12% of this figure were those aged 15-29.

B. Excessive Dower

The dower paid in Afghanistan is often similar in value to walwar(1). A difference is, however, to be noted in the prevailing socio-religious attitudes concerning the two items. Whereas the practice of walwar is often frowned upon among the more enlightened people, dower is accepted by all. This difference in popular attitudes is often reflected in the quantitative variations of the said two items. In rural marriages where patriarchal traditions are observed, walwar tends to exceed the dower. Among the more educated urbanites on the other hand, walwar is sometimes absent but the dower tends to be considerably large.

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* See Statistical Collection 1971, Ministry of Planning, Kabul p.9: "The above figures show only the number of registered incidences. It should be noted that the records of marriages and divorces in Afghanistan like those of births and deaths are not regularised yet". For figures relating to years after 1970 see Statistical Collection 1974, Central Office for Statistics' publication, Kabul: 94-96. Commenting on the above figures, the Central Office for Statistics noted that "It is evident that forced marriages imposed in order to obtain money, family disputes and popular usages constitute the causes of many marital breakdowns in Afghanistan leading to divorce and countless miseries of the families. Despite the efforts of the mass media to enlighten the people, unfortunately antiquated usages are still prevalent and forced marriages continue as a source of miseries in many provinces of Afghanistan. It is hoped that with the improvement of economic conditions and implementation of fundamental social reforms, these problems will find solutions".

(1) See H.H. Smith et al. op cit: 100.

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The problem of excessive dower in Afghanistan is closely related to the problem of the non-receipt of the dower by the wife and in fact the two problems mutually feed each other: "For it is often seen that women who have large dowers have not, due to adverse social conditions and the influence of the husband, benefited from their dower without going through lengthy wrangling in the court".(1)

From his experience as the head of the Cassation Court, Q. Taraky pointed out that "dower has been the main source of dispute between married couples. This is so because at the occasion of signing the marriage contract, the amount of dower is stipulated without taking into consideration the financial status of the boy. This problem becomes more evident when the married couple reach the verge of separation and the wife asks for her dower. Taraky believes that the amount of dower should be legally limited". (2).

Quantitive limitations on dower were in fact introduced under the Nizāmnāma of 1921 (3), and the following Nizāmnāma of 1924 (4), both of which limited the amount of dower to 30 afs. a sum which was considered to be the equivalent of the Hanafi minimum for dower.

The Nizamnama restrictions on the quantity of dower were inspired by King Amanullah's egalitarian views in the reforms he introduced on marriage law. These measures stood in contrast to the limits imposed by his grandfather Amir Abdurrahmán in the late nineteenth century, (i.e. 1883). The latter restricted the amount of dower according to three social categories. The Royal family whose dower "was not to exceed 12,000 rupias and not to be under 3,000; that of the nobility and chiefs and other high officials was to be between 1,000 and 3,000 rupias; and that of the ordinary people between 300 and 900 rupias. But it was possible for a husband to give more should he wish to do so"(5).

The Marriage law of 1934 as well as that of 1949, although discouraging excessive expenditure in marriage ceremonies, however, did not specify any limit to the dower. Nor did indeed the new

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1. Mermon editorial 'A Look at the Marriage Law' - loc cit.
2. The Kabul Times - Interview with Taraky on Marriage Law - November 15th, 1971.
3. Rule 15 'Dower for all categories of people is not to exceed 30 Afs'.
4. Art. 11 as above.
5. See Mir Munshi - op cit, p.112.

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marriage law 1971 attempt to restrict the amount of dower. This is undoubtedly ignoring a problem which has aroused concern for a long time. It is true, of course, that dower is a lesser problem compared to the brideprice. For dower is not only a Sharīá requisite but in practical terms also it often remains as part of the property of the married couple. However, when taking into account the wider socio-legal implications of the problem of excessive dower it is also true that above considerations do not stop a large dower from creating adverse effects. It is considered by some writers that a large dower functions as "a check on the capricious exercise by the husband of his almost unlimited power of divorce"(1). It should be pointed out, however, that in Afghanistan the main problem concerning divorce is not the high frequency of divorce, for "In most parts of Afghanistan divorce is very infrequent as it is socially disapproved of".(2).

In the absence of any reliable evidence, it is difficult to establish whether the low incidence of divorce in Afghanistan is in fact as a result of the practice of excessive dower. Assessment of the precise role of the various factors that restrict the incidence of divorce in Afghanistan is a subject for further research. However, it will be noted that the practice of excessive dower constitutes a social mischief and discrimination in its own right. Because of the excessive sums involved in dower, it usually remains unpaid and the issue itself leads to conflict and frequent litigation. In addition to this, when one is to distinguish the main problem concerning divorce in Afghanistan, it is probably the absence of legislative measures to protect the wife against the capricious exercise of talaq by the husband. Although the low incidence of divorce also suggests the low incidence of the capricious exercise of talaq, it is nevertheless true to say that even in the small number of divorces registered, one can clearly see the legal inequality of the spouses in the matter of divorce. In the absence of

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1. A.A.A. Fyzee - Outlines of Mohammadan Law, op cit: 127.
2. D. Wilber, Afghanistan, New Haven 1962: 94.

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legislative reform of the divorce law which is itself capable of capricious exercise by the husband, it will be unjustified to argue that the practice of excessive dower should continue in order to check the capricious exercise of ṭalāq by the husband. Consequently, the two problems should be distinguished and neither should be tolerated at the expense of the continuation of the other.

Dower does not seem to play a restrictive role in regards to polygamy either: for in Afghanistan, as already pointed out, dower is not usually paid in immediate terms; consequently dower is not likely to constitute an immediate check on polygamy. On the contrary large dower in a sense encourages polygamy in Afghanistan. For excessive dower depends on wealth, the well-to-do who can afford high expenditure can also afford polygamy. Whereas some people because of the lack of means may remain unmarried or marry considerably late (1). This very situation tends to foster polygamy, for a number of marriageable women are likely to remain unmarried until late while their parents wait for more attractive offers. Such offers are, on the other hand, more likely to come from wealthy men including those who wish to marry polygamously and who are usually prepared to incur high expenses(2).

The absence of any restrictions on dower in the 1971 law has been aptly commented upon by an editorial article of Mermon which noted that: "The interest of economizing the national wealth and the training of a new generation, demand not only an enlightened campaign to stop the fanciful and unnecessary expenditure, but also the introduction of maximum practicable legislative limitations and their enforcement. We thought it was time that in the light of the guidance of the holy Prophet who said that "best of women are those whose dower is less", the same Sharia minimum that was fixed at 30 Afs. some years ago would have been upheld or else a just legal limit enacted".(3).

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1. "Afghanistan probably stands out among the countries in its number of old unmarried boys and girls. "Kabul Times editorial, Oct. 23rd 1971.
2. "Excessive dower and other enormous expenditures involved in the ceremonies before and after nikah, constitutes a large barrier in the way of monogamy which is closer to the law of nature. This position is aggravated when polygamy is nowadays propagated by some people as a means of preventing moral corruption". (Mermon editorial, A Look at the Marriage Law 1971, loc cit).
3. Mermon. ibid.

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The new law, on the contrary, indirectly encourages large dower as it exempts dower from the government tax: 'after contracting the nikāḥ, the bride and groom, or their agents, will make a statement, before the court, upon which the deed of nikāḥ shall, like other deeds be recorded and completed. No tax will be taken on dower mentioned in the deed of nikāḥ'.(1).

The exemption of dower from tax as above is probably designed to encourage the registration of marriages as the clause of 'tax exemption' appears in the context of the registration formalities. This consideration, however, does not prevent the above article from functioning as an encouragement to large dower.

CONCLUSION

The Constitution of 1964 in its preamble stated its aim as "... to reorganise the national life of Afghanistan according to the requirements of the time, to achieve justice and equality, to ensure liberty and welfare of the individual, to form ultimately a prosperous and progressive society".

The same Constitution makes it a duty of the legislature - Shurá - to "legislate for organizing the vital affairs of the country"(2).

The initiation of this constitution was pronounced in the press and by public spokesmen as the beginning of an era of reform. Referring to the existent legislative vacuum in Afghanistan, Shafiq the then PM, noted in his policy statement before parliament that "with the promulgation of the 1964 Constitution, the duty of the Government in respect of endorsing and supporting the legislative movement in this country, has started as a distinctive movement. This Government, with due attention to the history of this movement and the valuable measures taken during the transition period and afterwards, promises to work effectively in order to fill the legal vacuum caused by the lack of laws which are necessary for the full realization of a democratic order"(3).

Therefore it is in the nature of this course, and a commitment of the State, to provide a system of laws, and of family law, which is capable of meeting the progressive demands of the time.

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1. Art.17 Marriage Law 1971.
2. Ale 64.
3. 'Shafiq's Policy Statement', The Kabul Times, Dec. 11. 1972.

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The legislature could take decisive measures against the adverse popular usages which constitute and foster social evils and have no positive support in Sharī'a. Legislative measures on walwar, registration, and dower should be introduced. In addition to this comprehensive legislation is required to consolidate the family law as a whole.

Custom* in Sharīa is defined as "those recurring practices which are acceptible to the people of sound nature"(1). A custom, in order to be acceptible, must be reasonable and compatible with good sense and public sentiment. When qualifying these conditions 'custom is authoritative'(2). A custom which is in conflict with the requirement of reason and is disagreeable with the spirit of Sharīa is unequivocally rejectable (3). Having said this, it should also be noted that the Sharīa doctrine of jurisprudence does not recognise custom as one of the sources of the Sharīa law. Hence the authority attached to reasonable custom is of a relatively subsidiary nature (4).

Social evils emanating from excessive expenditure in marriage may be summarized as following.

A) Excessive expenditure in marriage undermines the human dignity of women as it tends to render them into a kind of property of the husband or his family.

B) Excessive expenditure in marriage weakens the financial status of the family and tends to bring or worsen poverty.

C) Excessive expenditure in marriage tends to render the adults highly dependent on the family resources; this in turn weakens their position in regards to the exercise of their right of consent in marriage as well as their freedom of choice for a life partner. Dependence of the youth on the family resources is enormous even without the stimulus of this additional factor.

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* The term stands for both urf and 'ada. Urf and 'ada although literally somewhat different, mean the same in all implications. Al-Atacee Suri, Sharh Al-mujallah Kabul p.88. note also R. Levy, The Social Structure of Islam, Cambridge 1957.

1. See S. Mahmassani, The Philosophy of Jurisprudence in Islam, Leiden 1961 p. 132. A similar definition of urf is "that upon which men have agreed because of the evidence of reason and in its accepting men of all dispositions concur". (R. Levy op cit p. 260).
2. The Mujallah Art.36; also arts. 37, 43, 44 and 45.
3. S. Mahmassani, op cit at p.134 who quotes Ibn Taymiyyah.
4. See Mahmassani op cit, p. 131.

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D) Marriage becomes largely dependant on the possession of financial means; and this leads to intolerable discriminations against the poor (1).

E) Excessive expenditure in marriage deprives many of the right to marry (2); it also leads to late marriages (3), and often brings about wide disparity of age between the spouses.

F) Excessive expenditure in marriage constitutes a source of embitterment and conflict during the course of marital life. As noted by one commentator "experience has shown that when two people are forced into marriage as a result of the parents desire for wealth,

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1. Note a Kabul Times editorial commenting that "... these tiresome traditions have resulted into unfortunate situation. Here is a short story substantiating this statement. He is 21 years of age, intelligent and educated; having been born to a rather poor family, he cannot afford high expenditures. The boy fell in love with a girl who also loved him ... the girl's father who preferred money to anything else was insisting that he will never agree to the marriage of his daughter unless a handsome amount of money was paid to him ... The boy has fallen ill and is still in hospital. Such practices prevail in many towns and villages around this country..." (Jan.22.1973).

2. "... some of our countrymen completely ignore the wishes of their daughters. It seems appropriate to cite the story of an adult girl who lived in our neighbourhood. The girl had her own thoughts and wanted to marry the man of her choice. But her father did not approve of her plan as the man she chose could not afford to pay the sort of money he demanded. The father then decided to marry her to a wealthy man of the village. When she knew of her father's plan, she warned her mother that she would not marry anyone but the man she chose and would insist on this until the day she dies. Her mother fully communicated this to her father, but to no avail ... he started beating and torturing her, but she refused to comply with her father's plan. Consequently the girl stayed unmarried. She is fifty years of age now; her hair is gray, and she has lost most of her teeth ... This is not an untypical case in Afghanistan. Like this, cases happen up and down this country in which girls are forced to remain unmarried until later ages and many die before they realize their legitimate wishes". (See Minnatbar, in Jumhuriyat, 2nd year, No.78. (Nov.1974).

3. On debating the Marriage Bill, one deputy, in rather casual but none the less true language went as far as to suggest that "the Shari'a does not allow fathers to keep their daughters for money and wealth in their homes ... but there is no measure in this Bill to obligate them to seek husbands for their daughters. These laws concentrate on city dwellers; a deep attention to this matter is required". (Subhanqul, W.J.J, No.22.1967).

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they resent this later and this undermines their ability to build a happy marital relationship"(1).

G) Costly marriages contribute to the continuance of the tradition-bound society and tend to slow down the process of reform. For the practice tends to be self-perpetuating. Feasts and invitations are generally reciprocal. When one is invited to a ceremonial party, one feels obliged, especially in the village setting, to match the performance on a competitive basis. This sense of pay-back is equally true with regard to the young men whose marriage expenses are met by their family. Having caused a strain on the family budget, they feel obliged to pay back when they happen to earn. This network favours the continuation of the traditional practices. Extravagance tends to become a mark of success which broadly speaking, reverses the whole scale of values. The most extravagant in turn finds himself in parliament and so on.

With regard to walwar, its rendering as a criminal offence in the 1971 law indicates a responsive legislative attitude. As already pointed out a further legislative enactment to clarify the position regarding the penalties for this offence would be most desirable. Moreover the Law of Criminal Proceedings 1964 provides that 'it is the duty of the Ministry of Justice to enact regulations (ta'limatnamas) for the orderly application of this law"(2). This article primarily concerns the practical aspects of the law-enforcement and this should

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1. See Fidākār in Jumhurijat, 2nd year, No.88 (Nov.1974); note also a letter published in Mermon. Under the heading 'My Father Sold me for 40,000 Afs.', a married woman of 25 years of age wrote that "I was married three years ago and have now a child of two years of age. My marriage has been effected according to my father's wishes. In our society the choice of the marriage partner totally lies in the hands of the father. There is no law to defend the woman's position in this respect and what there is, is only nominal. This is why my father felt free to sell me for 40,000 Afs. Our marital life was relatively good during the first year, but since then my husband became cold towards me; every now and then he offends me by mentioning the walwar he paid for me. He no longer feels my existence alongside himself ... I have thought of suicide many times but the only obstacle is my child. I am now convinced that my life became a play item twice, once in the hands of my father and now in the hands of my husband". (See Mermon No.4 1351 A.H(1972).
2. Art.498.

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be utilized in regards to walwar.

As for engagement and its value in the eyes of the law, the legal position in clause 2 of article 1 of the 1971 law seems justifiable. No law, however, would be capable of providing a complete solution to the problem at issue; it is indeed educative measures, and efforts for the development of healthy public opinion which should be emphasised. Yet in order to achieve this, the law has a considerable part to play. Educative emphasis in this respect requires clarity of the legal language. The wording of article (1) that "formalities based on custom and usage ... are of no value" is vague. It is, therefore. important that the usages referred to should be clearly defined.

Since mahr is a requirement of a valid contract and of the deed of marriage - nikāḥ khat - , greater legal control could be employed. The question of the non-receipt of mahr by the wife is very closely connected with the registration formality. Decisive measures to ensure maximum compliance with registration are urgently required. It will be noted that registration constitutes a root question of legal control not only in respect of mahr but almost all matrimonial problems.

A flexible higher maximum for mahr seems justifiable not only to restrict the quantity of mahr but also to function as a criterion for the exercise of legal control. If a person wished to override the statutory maximum, a statement to the effect that it is his choice and the payment of the assigned mahr is within his means should be recorded in the nikāḥ khat. A further proposition is that any value included in mahr that happens to be above the legal maximum should constitute the prompt (mu'ajjal) part of dower. The payment of the extra-maximum part must be ensured upon registration and a statement of the wife recorded to the effect that it has been received. Moreover, in order to discourage exceeding the statutory maximum, the extra-maximum part should be made subject to the government tax.

As noted above efforts towards the development of healthy public opinion should be intensified. Press, broadcasting and education carry particular responsibility to build up attitudes and warn the public in the frankest possible manner of the impacts of such adverse usages. The press is already to some extent aware of its

role in the matter (1). On the educational level, however, so far no meaningful measures seem to have been effected (2). The matter needs earnest consideration; to add a new subject to the public school curricula incorporating instruction on such problems of public concern seems particularly desirable (3).

Commenting on the enforcement of the marriage laws, an editorial article of Nidā-e Ḥaq (voice of truth) noted that "if the new Marriage Law is not enforced with a new determination on the part of the authorities, it will be like 'pouring cold water on a smeared bowl". Nidā-e Ḥaq also put forward a suggestion that "local councils should be formed from among the people of each locality to adopt resolutions for the enforcement of the new law in collaboration with the local governors. Committees should be appointed to undertake responsibility for the enforcement of such resolutions as may be adopted by the local councils in each administrative district" (4). Essentially the above suggestion is reflected "in the recent resolution adopted by the people of the district of Andar to keep the amount of total expenditure in a marriage to a maximum of 10,000 Afs. Similarly people of the Paktia province have passed a resolution to avoid any other payment in marriage except the Shara'i mahr ; they have agreed to avoid and discourage unnecessary extravagance in marriages which have proved to be all damaging to their welfare"(5).

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1. "The Information and Culture Minister said that the Cabinet meeting of Oct. 25. 1972 has assigned him to take effective measures... for the application of the provisions of the Marriage Law particularly the prevention of expensive weddings". Kabul Times Dec.26. 1972.
2. See the school curricula and their history of development in P.M. Zaheer, The History of Afghan Education (De Afghanistan de Ma'ārif Tarīkh), Education Press, Kabul 1960 Vol.1 pp.66.
3. "... school curricula should be revised ... and the material in school texts should constantly be adjusted to national and international changes ... More attention ought to be paid to the education of women and their further preparation for more positive participation in national life and the implementation of the progressive objectives of our society ..." 'Premier Shafiq's Policy Statement' Kabul Times, Dec. 11, 1972. This statement acknowledges the need for change in school curricula.
4. See Nidā-e Ḥaq periodical, first year, No.7, 1350 A.H(1971).
5. See Sarwarzai in Jumhuriyat, 2nd year, No.96(30th Nov. 1974).

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An editorial article of Jumhuriyat daily aptly welcomed the above resolutions as "civilized measures which truly respond to the stressing needs of the socio-econimic conditions of our society. Because of enormous expenses involved, many adults of this country cannot fulfill their desire for marriage during the best years of their lives. Supposing an adult manages to meet the expenses with extreme hardship. What good is it for him to suffer a lifetime of financial difficulty! The institution of marriage is designed to promote good social relations. When marriage involves onerous expenditure, it tends to undermine its basic purpose and instead of amity, it constitutes a source of mistrust and irresponsibility leading to problems which are indeed very hard and often impossible to overcome".(1).

With the establishment of Reconciliation Councils in 1974 and the pronounced programme of the Ministry of Justice for their expansion (2), it may be further suggested that supervision of the marriage ceremonies and expenditure therein should be included among the essential functions of these Councils.

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1. See Jumhuriyat editorial article (Unnecessary Usages), 2nd year, No.96, Nov. 1974.
2. See more on Reconciliation Council below at page(207)

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## Chapter II

## Child Marriage

This chapter concentrates on the statutory measures on child marriage introduced through the Nizāmnāma reforms, the 1960 Marriage Law and the succeeding Marriage Law of 1971.

It will be noted that a comprehensive reform of the law on child marriage yet remains to be accomplished. The law at present applied in Afghanistan does not respond to the problems encountered in this area; it is vague with regard to the age of marriage, for example, and the restrictions imposed on the power of marriage guardians are not entirely practicable.

Child marriage is exceptional to the legal norm in Shari'a. The norm in Sharī'a is the marriage of majority (nikāh - e bulūgh) which is contracted with the consent of the man and the woman; sanity and majority are the essential requirements of such a contract. There is one exception to this norm, which is embodied in the power of the marriage guardians. That is to say, some persons are empowered to contract certain other persons into marriage for the reason of deficiency in the volition of the latter (1). Thus a minor boy or girl may be contracted into marriage by a guardian. This power of matrimonial constraint (ijbār) is, broadly speaking, subject to the option of puberty, and two other restrictions, the main theme of which, as will be discussed later, is to protect the interests of the wards.

No specific age of majority is prescribed in Sharī'a. It is a general principle of traditional Sharī'a law that legal majority comes with physical puberty. Hence in theory, capacity to conclude a marriage contract depends basically upon proof of sexual maturity established under the normal rules of evidence rather than upon the attainment of a specific age. In practice however majority or minority is usually determined by legal presumptions. There is an irrebuttable presumption of the law that a girl below the age of nine and a boy below the age of twelve have not reached puberty, and are therefore minors. An equally conclusive presumption exists according to which puberty, and therefore majority, is attained for both sexes with the completion of the fifteenth year(2).

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1. See Al-Sa'eed Mustafa al-Sa'eed, Fi Mada Isti'māl Hoqoq al-Zawjiyya (on the use of the rights of marriage) I'timad Press, Egypt,1949 p.162.
2. See N.J.Coulson, Succession in the Muslim Family, Cambridge University Press 1971 p.11.

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The power of matrimonial constraint (ijbār) in Ḥanafi law rests in any 'proper' marriage guardian - i.e, the person so qualified to act under the rules of priority in marriage guardianship. The right belongs first to male agnatic relatives in accordance with a system of priorities broadly parallel to that of priorities in inheritance. When ijbār is exercised by the father or paternal grand father, it is binding and normally not subject to the option of puberty. All Sharī'a schools are however agreed that where the father or paternal grandfather has acted fraudulently or negligently as, for instance, in cases where the minor is married to a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty (1).

The option of puberty in Ḥanafi law is available both for boys and girls; it is however more significant with regard to the latter, for the boys are then enabled to exercise their power of ṭalāq. The option of puberty can be exercised through the court only. Until the court issues a decree the marriage subsists. This is shown by the fact that if either spouse dies after opting for repudiation on attaining puberty but before a decree of the court, the surviving spouse will inherit. A girl contracted in marriage in minority must exercise the option of puberty as soon as she reaches the age of majority. If she is a virgin, as in most cases she will be, she loses her right if she remains silent on being informed of the contract. If she is no longer a virgin, i.e. if her husband has consummated the marriage during her minority, she will lose the right only after expressly consenting to the marriage or by doing something indicative of consent such as asking for dower or maintenance or allowing her husband to continue to have intercourse with her after reaching the age of majority(2).

The basic aim of Sharī'a in providing for the power of matrimonial constraint is the protection of the benefits of the wards and the prevention of harm to them; this is the focal point of the two conditions that follow.

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1. See D.F.Mulla, Principles of Mahomedan Law, Tripathi, Bombay 1968(ed) p 261; see also Tyabji, Principles of Muhammadan Law, London 1919 (ed) p 152.

2. See Dr.Hinchcliffe, Islamic Law of Marriage and Divorce in India and Pakistan, (Ph.D Thesis) London University 1971 : 282.

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A) Ijbār must maintain the advantage of its subject. The fuqaha held the view that ijbār is not to be exercised when there is no advantage accruing thereby. Shafi'i held the view that ijbār of a virgin girl by the father is permissible when it is to her advantage free of any harm, and not permissible when it is to her disadvantage or likely to harm her. It is on this basis that an insane minor may not be married as there is no need for it at the time, nor is there any certainty of the situation after puberty. Similarly the marriage of an insane major is not permitted unless the need for it is felt at the time. Ijbār is also to be used to the extent that it fulfils the intended benefit only. This is why the father is not to marry his minor son to more than one woman for it is considered that more than one nikāḥ is not beneficial to him. The power of matrimonial constraint is further restricted to the extent that the marriage must be to an equal (kufwa). It is also considered that she must not be one whose marriage harms him, and that he must not be one whose cohabitation harms her. This is further explained in the following terms: that there must not be in the husband or in the wife (according to the circumstances) a fault which affords the exercise of the option of cancellation - khiyār al-faskh - had they been competent persons. Should ijbār be exercised in disregard of the above provisions, the nikāḥ is voidable according to the approved view - ra'e mashhūr -. A variant view is that the nikāḥ is valid but subject to the ward's option at puberty, or immediately should she be a major person. The Hanafis however have more to say in this connection: when a minor girl is contracted to an unequal husband, or where there exists an apparent fraud in dower (excess in the dower of a minor boy, or reduced dower for a minor girl), such a nikāḥ, if contracted by a guardian other than father and paternal grandfather, is voidable on general agreement. In the case of father and paternal grandfather, whereas Abu Yusuf and Mohammad regard it voidable, Abu Hanifa regards it voidable only when the father and paternal grandfather are well-known for their ill-transactions (soo' al-ikhtiyār).(1)

B) The ward's advantage must be the aim of ijbār. If ijbār is being exercised by the guardian for a particular interest of his own inconsistent with the above aim, he is to be prevented. This is a corollary

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1. See e.g. S.M.al-Sa'eed op.cit pp 165/168

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of the previous restriction, for when the benefit of the ward is not the aim of ijbār, then it is probable that there is harm involved or at least no benefit to the ward; or in some cases, it may involve benefit to the ward, but the suspicion created on the conduct of the guardian in using his power for his self-interest, irregularises the nikāh. One of the applied instances of this restriction is the so-called nikāh al-shagār ** which is prohibited; it is when one guardian contracts his ward to another on the condition that the latter contracts his ward to the former with no dower in between. Among the explanations offered for the prohibition of this nikāh, the most authoritative is that it is so because neither of the guardians intend the benefit of their wards, but only of their own and as such they use their power for a purpose other than the one prescribed by the Sharī'a.

In Afghanistan "it is an old practice that the parents of the future bride and groom arrange the engagement or contract the nikāh on behalf of their children when they are minors. Often when these boys and girls have reached a marriageable age, they find that they are incompatible." (1). According to the existent attitude, many "parents regard it a disgrace to admit that their daughter has chosen her future husband; they consider this a diminution of their social status".(2). This attitude of the parents directly opposes the Sharī'a norm in respect of the nikāh of majority as referred to above. Parents "often think that sons and daughters should not be given the opportunity to express their views on their marriage."(3) Traditionally "parents regard it a fulfilment of their desire to see their sons and daughters married while they are alive... others are attracted to the wealth and status of the family they wish to relate to. In this way parents often contract their children in nikāh long before they are of marriageable age and while they are only school children."(4)

Parents often arrange for the engagement of their minor children. In view of the traditionally binding character of engagement as discussed before, such engagements are likely to lead to nikāh. Once the parents have arranged an engagement, they usually consider it their commitment that the engagement should lead to nikāh. In order to ensure this, early

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** Shaghār literally means vacuum.

1. See the Kabul Times (Comments on Marriage Law), by a Staff writer. Nov.1 1971.
2. S.Mubariz in Mermon, No.10 1350 A.H.(1971):2.
3. Matin, Forced Marriages, in Jumburiyat daily, 18.3.1353 AH(1974)
4. Matin, ibid.

marriage is preferred. Looking at child marriage in a wider social context, the problem consists of the engagement of minority (1), as well as the nikāḥ of minority.

## The Nizāmnāma Reforms on child marriage

The Marriage Nizāmnāma of 1921 simply enacted that 'nikāḥ of childhood before majority is forbidden'(2). This was further supported by the provision that 'nikāḥ is not to be contracted before attaining the age of thirteen years'(3). In another rule, the Nizāmnāma also banned the hearing of claims of child marriage in the courts(4). Child marriage was thus forbidden for anyone who had not attained majority, and in particular for those below the age of thirteen. The age of thirteen

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1. In an attempt to illustrate the motivating factors in parental engagements, Raziqi describes twelve types of engagements as follows:
"a) Engagement at pregnancy: Friends and relatives sometimes pledge that if a boy and girl are born to them, they should be each other's husband and wife. When this happens, both sides invite their relatives and declare the engagement.
b) Engagement for favour: In order to reciprocate a favour received in times of need, a man may give a girl in nikāḥ as a token of his gratitude to the person he received the favour from.(at this point even Raziqi uses engagement and nikah interchangeably). This form of engagement is rare now.
c) Engagement for inheritance: When the relatives of an orphan girl see the prospects of her inheritance, in order to keep the property within the family, the girl may be engaged to a member of the family.
d) Connecting Engagement: A family in order to gain protection of a more influential family, or to enhance her position against her adversary, may engage a girl to a member of the latter.
e) Bequested Engagement: In order to ensure continued cordial relations, a man may announce on his death bed that he has engaged one person to another.
f) Engagement by Force: It often happens that when a powerful man sees a pretty girl, and sometimes even a married woman, in a poor home, he may force, trick or bribe the latter into marriage.
g) Charitable Engagement: In order to express his loyalty, a believer may as a charitable gesture give a girl to a religious family (to a bābā, or sāḥib).
h) punitive engagement: In order to punish those who resist the patriarch or insist on their own choice, he may suddenly announce the engagement of his son or daughter and thus assert his authority.
i) Engagement by fate: Sometimes when a family feels unable to choose among the several candidates, it will be assumed that one among them will show himself to be worthy of her by performing a good deed in the future.
j)Engagement for Walwar: This form is very common in Afghanistan.Girls are regarded as material assets...(Raziqi, The Parents' Wife or Forced Engagements, in Mermon, No.2.1351 AH(1972):22). Two other forms of engagement described by Raziqi are engagement against pore and badd respectively both of which have been discussed before.
2. Rule (5)
3.Rule 6, ibid.
4. Rule 8:"Whatever disputed marriage and engagements that have taken place during minority previous to this date, are to be settled in Sharīḥ courts before the beginning of the year 1301 AH after the expiry of which no claim shall be heard in the courts".

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thus represented the minimum age of majority for both sexes. In prohibiting child marriage, the Nizâmnâma had also overruled the guardians' power of ijbâr with respect to persons in general who had not attained majority and with regard to those below the age of thirteen specifically.

The basis of the above reform is pointed out in the preamble of the Nizâmnâma as follows: "Marriage of the state of minority is considered to truly constitute a source of various disputes. This is evidenced by the frequent claims aroused in Sharî'a Courts emanating from child marriage; the various forms of such claims also witness the invasion of the husbands in the rights of the helpless wives....Therefore in order to suppress cruelty and conflict, and in pursuit of the equality of women in their rights which is in accordance to the holy Shari'a and agreeable to the Ḥanafi religion, we command the following rules."(1)

The Nizâmnâma reform was however short-lived and soon encountered drastic amendments. In 1924, a tribal rebellion- by Mangal tribe - broke out in the southern province of Paktiâ" which soon assumed dangerous proportions".(2). King Amanullah " in the midst of the rebellion convened a Grand Council (Loya Jirga) of over seven hundred members to rally popular support against it...."(3). The support was obtained and the State finally turned out triumphant. But it was in this Council that certain elements "made use of the critical position of the State and contended to debate some of the reform measures already introduced"(3). The debate included the 1923 Constitution (Nizâmnâma-e-Asâsi) and the 1921 Nizâmnâma of Nikâh. King Amanullah himself, somewhat inadvisably perhaps, presided over the grand council and acted as spokesman for the defensive position in respect of justifying the Nizâmnâma reforms. In his statement on child marriage he mainly emphasized the social basis of the reform showing how child marriage formed a source of hostility

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1. Preamble, ibid.
2. V.Gregorian, The Emergence of Modern Afghanistan, Stanford University Press. 1969, pp 254.
3. G.M.Ghubar, Afghanistan dar Maseere Tarikh (Afghanistan in the course of history) Kabul 1967, pp 798. This book however has been banned after publication, only a few copies (about 40) have been taken out of the Government Press.

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among the people.(1) Some of the religious leaders who spoke on child marriage were divided in their views but on the whole opposed the Nizāmnāma measures and in justifying their position mainly emphasized the Shari'a provisions. They, unlike King Amanullah apparently did not attempt to relate these provisions to the social conditions of the time. Some of the leading voices (Ḥazrat sāhib, e.g.), although they clearly confirmed the validity of King Amanullah's statements, yet insisted that child marriage be upheld.(2)

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(1) "Child marriage has been a source of hostility in this country. Often a person claims that so and so the father or guardian of a certain girl has given her to me while she was a minor. Or else two persons may claim a girl who is not willing to marry either, and yet both in the pursuit of their respective claims resort to all sorts of permissible and non-permissible means. Such claims often lead to conflict and unhappiness. The girl might have been given in her minority to one of the claimants, or in fact to no one, for in many cases it can be proved neither way, as the guardian concerned may already have died and his denial or confirmation may not be obtainable. The other possibility would be that of the two claimants one might somehow win the claim in which case again the winner would be typically liable to the hostility of the party who has lost the claim through litigation but does not cease hostility otherwise. This leads to further hostility, loss of property and life. The helpless girl who finds herself thrown into marriage faces often nothing else but unhappiness for the rest of her life; for she is thrown in the midst of an already strained situation.
Some avaricious folks, once having given their daughter to one person, later because of the subsequent poverty of that person, or further knowledge of his conduct, disapprove of the engagement and rush to give the same girl to someone else, this time to a richer man whose wealth may be his sole attraction; and with such disgraceful behaviour render themselves responsible to Allah...My aim in enacting this Nizāmnāma is effecting the orders of Allah, calling attention of the Muslims to some of their blunders and to curtail the further spread of feud and bloodshed; also to facilitate the amiable expression of the wishes of the marriage partners".(Rooydade Loya Jirga Darussaltana-e-Kabul, 1303 A.H.,pp167-196) -account of the Grand Council 1924, Kabul-.
(2) "The benefits and advantages that His Majesty considers in the abolition of child marriage are obvious to us all. Some people are however critical of this and rightly so, we request that child marriage be permitted". (a mullah) ibid p180. Also "What His Majesty said is very correct, but child marriage is an important provision of fiqh...some scholars, because of the holy Prophet's marriage to A'isha in her minority, consider child marriage even recommendable. Therefore I beg that child marriage be made permissible and its claims hearable in the courts." (Hazrat sahib), ibid p185. Against this it was argued that "Abolition of child marriage is correct and the command of the Ruler becomes incumbent. It is an obvious rule of fiqh that command of the Ruler can turn a weak or minor order into a wājib. Child marriage is mubāḥ and thus subject to the command of the ruler."(Maulawi A.Wāseh)ibid. Another delegate however regarded child marriage as recommendable and argued that "As pointed out by Hazrat sahib, a recommendable - masnūn - can not be prohibited by the Ruler."(a mullah ? no name) ibid. In reply to this it was aptly pointed out that some natural and ordinary doings of the Prophet do not necessarily indicate a sunnah..."(Maulawi A. Wāseh)ibid. An opposing argument to this contended that "The compulsory power of father and grandfather with respect of the marriage of the minors is a privilege and a right granted by Shari'a because of the natural love they have for their children. The Ruler or anyone else has no right to, interfere with this.... "(Qaḍi A.Rashid)ibid.p186.

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As a result of the debate, the Nizāmnāma reformers compromised(1) with the opposition and the prohibition clauses on child marriage were amended. The amendments were incorporated in the 1924 Nizāmnāma of Nikāh with the effect of rendering child marriage permissible in principle but with avoidance recommended.(2) Under this Nizāmnāma, claims of child marriage were made hearable under restricted circumstances.(3) This Nizāmnāma also adopted the Sharī'a provisions regarding the option of puberty.(4)

The Marriage Law 1960 on Child Marriage

In principle, the 1960 Marriage Law permitted child marriage but its dominant feature was the restriction it imposed on child marriage through its provisions on the age of marriage, and those relating to the means of proof. This law provided that: "the legal age of nikāh is fifteen years; nikāh of a girl or boy below fifteen is not a nikāh of majority".(5) As pointed out by a commentator, "Under the 1960 law, nikāh below the age of fifteen is not a nikāh of majority, in other words nikah contracted by those who have not reached majority is not legal. The law does not confirm such a contract and the nikāh would not be registered unless the spouses came for registration after they reached the age of majority. The paternity of a child, if it be the case, will nevertheless be established as it is in the interest of the child. Inheritance and dower cannot be legally granted...this is so notwithstanding the fact that such a nikāh would be valid in Shari'a"(6). The 1960

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1. "The Shah under the threat of rebellion posed a compromising position. In a country where no political parties existed, and in the absence of secret written ballot, members and participants of the Grand Council mostly came from the religious and tribal chiefs, big landowners and businessmen who mainly represented their class interests. The few progressive representatives found themselves in the minority...et seq" G.M.Ghubar op cit p811.
2. Art.3, Nizāmnāma of Nikāh 1924:"Nikāh of minority is permissible, but oh my truthful citizens! experience shows to this spiritual father of yours that child marriage causes disharmony, conflicts, claims and killings amongst you. This was why child marriage has been previously abolished. Your peace and harmony is my aim."
3. Art.5, ibid: "Whatever engagement and khishi - means relationship i.e. marriage,supplied - of childhood that has taken place previously is to be settled in Shari'a Courts until the beginning of the year 1305 A.H. after the expiry of which date any claim not evidenced by a decisive document or proof can only be submitted to the king who may authorize a court for its hearing."
4. Art.9 ibid: "Nikāh of a girl or a boy if contracted by the father or true grandfather is valid and not subject to repudiation, but if contracted by any other relative will be subject to repudiation at the time of majority."
5. Art. 2 Marriage Law 1960.
6. G.M.Darri, Family Law in Islam,op.cit:90.

law moreover enacted that: "the contract of nikāh without such a document, which does not comply with the requirements of this law shall be of no value and the courts will not hear any claims thereof."(1)
It will be seen that this article, although of a general nature, did nevertheless constitute a widely used restriction on child marriage. It will be further noted that this article represents a most important feature of the 1960 law and that it has been relied upon quite frequently by the courts as the sole basis for their decisions. Some of the consequences of this article are summarized in the following passage: With regard to the proof of the contract of nikāh in Afghanistan, in accordance with article 102 of the constitution (1964) the courts apply the law (qānun) in the first place. In the absence of qānun the courts, in a case under their consideration, will resort to the Ḥanafi law. The 1960 Marriage Law is explicit; article five of this law renders any claim without a legal deed of marriage as non-hearable. Therefore if a person possessed a legal document, it will prove the marriage, and he would not need to litigate. But if a person did not hold such a document, his claim of nikāh will not be heard and he would have no basis for litigation. For the deed of marriage (nikāh khat) is the only means of proof of the marriage and the claimant need not resort to other means such as witnesses or oaths etc.. But if the other party to the claim confesses to the alleged marriage, in such an event the marriage will be proved even without a deed of nikāh. An amendment to article (5) has taken place according to which if a child is born to the marriage, in order to safeguard the interest of the child, the courts will hear a claim of such a marriage even without a deed of marriage..."(2).

Among the other restrictions imposed by the 1960 law were that child marriage can only be proved by a deed of marriage obtained by the guardian (3); and that the marriage must comply with the interests of the minor concerned.(4) With regard to ijbār, the 1960 law has no direct ruling but on the whole it seems true to say that this law by recognizing child marriage as dependent on a legal document obtained by the guardian also recognizes the latter's power of ijbār. In terms of judicial practice however the restriction imposed on child marriage through the 1960

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1. Art. 5 Marriage Law 1960.
2. G.M.Darri op.cit: p 90
3. Art. 18 Marriage Law 1960.
4. Art. 19 ibid: "Nikāh cannot be contracted if the guardian has a reputation for moral corruption, or if it is considered that the nikāh is not in the interest of the minor."

law practically resulted in the almost total exclusion of the guardian's role, especially in the claims of nikāḥ where the parties to the claims were major persons at the time of litigation.

In Mohammad Hussein v.Pakeeza(1), for example "Hussein claimed that on 16.4.1339 A.H. one Azizullah, the father of Pakeeza in his capacity of father-guardian contracted Pakeeza while she was a minor of three years of age in marriage to me in consideration of a dower of 30,000 Afs., which I paid to Azizullah. Now that Pakeeza is a mjor and competent person she refuses to abide by her marital obligations to me and I hereby demand her submission.

The court of first instance (Gulistan of Farah province) then asked for the deed of marriage (nikāḥ-khat) to be produced, which the claimant failed to do. The court then decided on the basis of article 5 of the Marriage Law that Hussein's claim is non-hearable....

Hussein appealed and the appeal court consequently confirmed the above decision as legally valid. But Hussein re-appealed to the Cassation Court which also confirmed the decisions of the lower courts."

The Judicial decision in the above case is thus based entirely on the framework of the 1960 Marriage Law and on article (5) specifically. The deed of marriage that Hussein was asked to produce could be of two kinds. One would be under article 18, that is to say a deed obtained by the guardian during the continuance of his power of ijbār. Or alternatively a deed of marriage completed by the parties themselves while both being competent persons which would come under article (9).(2) Although article 18 provides for the deed of marriage obtained by the guardian, there is no further step in that direction nor is there any legal procedure to bring the said guardian into the court in any capacity whatsoever. This is entirely in agreement with the provision that: "In the claim of nikāḥ relating to a major woman where reference is made to giving her in marriage by her father, the presence of the latter is not necessary." (3) In the case of Hussein the deed of marriage obtained by the guardian would in fact be the only possible alternative to prove his

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1. Settlement (Faisala) No.38/26.2.1349 A.H.(1970 AD). Cassation Court for civil and Criminal Affairs, Kabul - translated from the court records in Dari.
2. Article 9 - Marriage Law 1960: "nikāḥ khat is to be written and entered into at the meeting of the contract (majlis-e-aqd) in the presence of the bride and groom or their agents."
3. Article 55 Law of Civil Procedure 1957; see also the contrary where "if a minor be a party to the claim the presence of the guardian or executor (wasi) is sufficient, the minor's presence is not necessary."(Art. 53, ibid.).

claim. For on the basis of Hussein's claim, Pakeeza's age would be about thirteen, in which case under article (2) she would be considered a minor and thus incapable of completing a deed of marriage as a competent person. And as such Pakeeza would still be subject to her father's power of ijbār. Yet there is no mention in the court record as to whether Azizulla, the father of Pakeeza, was still alive or not. Nor is there any record as to his disposition to the litigation involved.

Quite a practical aspect in relation to the exclusion of the guardians from the court proceedings appears to be that in many cases the claimant husband would probably initially approach the wife or her family about the wedding or marital cohabitation and following the decisive rejection by the wife or her family the husband might then resort to litigation. This rather belated dispute occurs typically between the parties when they are major, in which case the guardians would have already lost their power of guardianship.

Similarly in Shirin v.Hoora (1) "Shirin claimed in the court of first instance (Centre of Jozjān Province) that one Jamaluddin, the father of Ḥoora, on 20.5.1343 while in the courtyard of his house, as father-guardian, gave his minor daughter Ḥoora in marriage to me ... later, on the 18.6.1345 this Ḥoora having attained the age of majority also confirmed the marriage verbally. Upon completion of the two year military service I then attempted to obtain the formal deed of marriage, but Hoora on provocation by Jamaluddin and her brother Abdul Jabar denied her nikāḥ to me and refuses to abide by her marital obligations. The court asked Shirin for a legal nikāḥ khat which he did not possess and failed to produce. On the basis of article (5) of the Marriage Law the court then decided (Settlement No.4, 27.2.1350) that Shirin's claim was non-hearable. Shirin appealed and the Appeal Court of Jozjān in a written questionnaire again asked Shirin for the deed of marriage which he failed to produce. Consequently the Appeal Court confirmed (Settlement No.6, 29.6.1350) the decision of the first court. Shirin reappealed to the Cassation Court which decides that: Shirin does not have a legal nikāḥ khat required by article (5) to prove his claim of nikah against Hoora, the result of which was that the lower courts considered his claim non-hearable. The cassation Court, because of the

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1. Settlement No.205, 7.10.1350 (1971) - Cassation Court ibid.

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judicial stipulations, confirms the above decision of the lower courts'. As can be seen, the father or brother of Hoora had no part to play throughout the proceedings. Yet in the social context and considering the dependence of the young on the family, especially in view of the patriarchal and authoritarian pattern of the social structure of Afghanistan, the guardian/relative's influence can hardly be denied as an underlying basis for many litigations. In many cases (in Shirin v.Hoora e.g.) where the disputed wife refuses to abide by her alleged marital obligations, she presumably enjoys the support of her guardian/ relatives in her disagreement to the alleged marriage. Shirin's reference to the said provocation by the father and the brother of Hoora seems not to be untypical in such cases. Such allegations, although unheeded by the courts, nevertheless seem to have constituted a basis for social concern which aroused criticism against the said article (5). This concern must have been one of the factors which finally led to the controversial article (5) being dropped in the succeeding Marriage Law 1971. Social motivation was two-sided. As will be seen later in the relevant parts of the parliamentary debate on the 1971 Marriage Law, the traditionalists were mainly against article (5) on the grounds that broadly speaking it resulted in husbands' losing their properly Shari'a married wives merely because of their failure to obtain a deed of marriage. The modernists too seem to have been largely motivated against article (5) in the sense that it provided a better chance of success for an avaricious guardian/relative, who for some reason or other at a later stage disagreed to the contracted marriage and even encouraged the girl to deny the marriage in the court.

The term 'judicial stipulations' which appeared in the Cassation Court's decision in the above case seems to be a general reference to the jurisdictional limitations of the Cassation Court. The term is of a general nature, but two factors seem to be included in its immediate meaning, viz. the powers of the Cassation Court, and the evidential bases for judicial decisions.

As for the powers of the Cassation Court, the law inter alia provides that Cassation as an integral part of the Supreme Court is the final judicial authority which either on the basis of appeal by one of the parties to a case, or where it is required by the law, reverses or confirms the appeal court's decision (1). Thus the Cassation may not

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1. Art.223 Law of Court Administration 1956.

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hear a whole case anew. Whenever it considers a re-hearing is necessary, the case may be referred after being reversed, to the appeal court. Apart from this "... the cassation has all the powers possessed by the Appeal Court".(1) Upon reversing the appeal decision, the Cassation can refer the case back to the same court of appeal whose decision has been reversed for a review. In case the latter again issues a defective decision, the Cassation may then refer the case to a'resemblant court' (mahkama-e-mumāsil) and if the decision was again defective the Cassation has powers to issue a final decision(2). The last procedure applies also in cases where the Cassation reverses a unanimous decision of the two lower courts.

Regarding the evidential bases for judicial decisions; there are four namely confession, evidence, oath, and denial of oath(3). Evidence is subdivided into three kinds, namely witnesses, documents and decisive clues(4). A judicial decision must inter alia explain the evidence on which it is founded(5). In a more objective sense however the term 'judicial stipulation' is a familiar reference to the article which reads that "on the basis of the Islamic norm, justice is capable of stipulation, specification and dismemberment according to time, place and the subject matter; it is also capable of isolating certain cases to be dealt with in a particular manner". (6) The method adopted in article 5 is in fact a 'stipulation' of the general rules usually applied to evidence in the sense that the courts are to base their judgments solely on the deed of marriage.

As to the age of marriage, in Seid Kamal & Mohammad Mubin v.Shaesta(7) a two-man claim (da'wi rajullein), it was established that at the time of the alleged marriage Shaesta was fourteen years of age and thus per article (2) the marriage was not a marriage of majority#

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1. Art.247 Law of Civil procedure 1957; see also Art.139. "when the appeal court consider the appellant's objections as admissible, or if it finds faults in the settlement of the primary court, it may abrogate the settlement and order a re-hearing, otherwise it confirms the settlement."
2. Art.264 Law of Court Administration 1956.
3. Art.124 Law of Court Administration 1956; see further articles 125-180.
4. Art. 139 ibid.
5. Art. 32 (7) ibid.
6. Art.24 Law of Civil Procedure 1957; see also article 115 and 185.
7. Settlement No.164, 29.9.1348 A.H. Cassation Court for Civil and Criminal Affairs, Kabul.

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"Seid Kamal claimed, in the court of Balkh (centre of Balkh province) against Mubin and Shaesta that in the year 1346 A.H. I was married to Shaesta in consideration of a prompt dower of three thousand afghanis and obtained the deed of marriage (nikāḥ khat No.53/600, 8.7.1346). In Jadi 1346 (Jadi is the ninth month of the year, supplied) this Mubin unrighteously enticed Shaesta my wife and caused her to disobey her marital obligations to me. I hereby demand Shaesta to submit to the requirements of her marriage to me, and Mubin to stop aggression in my rights.

Mubin also claimed that in Dalw 1346 (Dalw is the tenth month of the year, supplied) Shaesta contracted herself in a valid marriage to him in consideration of a dower of thirty thousand afghanis, and that the deed of marriage held by Kamal is forged which has been procured in the absence of Shaesta when she was still a minor. Mubin also claimed that Shaesta as a competent person now wilfully confesses her marriage to him, and therefore he demanded that Kamal must stop his aggression. Consequently the judge asked both claimants for the deed of marriage. Mubin did not possess one and failed to produce it, whereas Kamal presented his deed of marriage. The court finally considered Kamal's deed of marriage as legally valid and decided (settlement No.20, 25.3.1347) that Mubin's claim is per article (5) non-hearable; whereas Kamal's marriage is on the same basis legally valid. The court also ordered Shaesta to abide by her marital obligations to Kamal. Mubin appealed to the provincial court of Balkh where he objected that Kamal's deed of marriage is defective, the legal formalities are incomplete in that the Shari'a conditions of a valid marriage are not recorded therein ... the appeal court stated that earlier, on the basis of Kamal's deed of marriage, Shaesta was examined on 8.7.1346 to determine her age by a nurse and doctor, who stated that Shaesta had not reached puberty. On this basis the appeal court considered that Shaesta's alleged age of seventeen seemed to be false; had she been seventeen at the time of the registration of the marriage, how could she then not have reached puberty! The court then concluded that from her appearance in court Shaesta had not reached majority: she is probably fifteen years of age, in which case at the time of registration of marriage her age would be fourteen. The nikāḥ is therefore per article (2) of the marriage law not a nikāḥ of majority and she would not by law be considered capable of offer and

acceptance .... The appeal court thus considered the deed of marriage as doubtful and of no value according to article (3) of the marriage law.** Consequently the appeal court decided that both the claims of Kamal and Mubin are non-hearable (settlement No.22, 9.11.1347). Both claimants re-appealed to the cassation court. The cassation court for further scrutiny summoned the parties involved, whereupon Kamal in a petition (No.375,144) submitted to this court ceased his claim versus Shaesta and gave an overall absolvance (ibrā). Kamal thus accepted the appeal court's decision and desisted his second appeal ... The cassation court confirms the appeal court's decision that the deed of marriage is doubtful, and that Shaesta, who on the basis of medical opinion and the opinion of the members of the appeal court had not reached majority, was incapable of contracting marriage ... The decision that both claims are non-hearable is hereby confirmed."

The difficulty involved in establishing the age of a person under the 1960 Marriage Law is apparent in the above case. The root of the problem lies in the fact that to date no regular system of birth registration exists in Afghanistan (1). The problem is aggravated by the fact that women are not issued with identity cards (tazkera) which is the usual means of establishing a person's age. In the case of men the identity card does to some extent help identify the age of the holder. Nevertheless, not every man possesses such a means of identification(2). The courts generally speaking have power, as was the case in Kamal - Kamal & Mubin v. Shaesta, to establish the age of the individual in the case under their consideration. Such a judicial enactment is however of an ad hoc value which is valid only in the case under consideration. Moreover the court's power in this respect was until recently limited to minors. It was this limitation that caused the matter to be

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** Note Art.3 Marriage Law 1960: "The deed of marriage which is not completed in accordance with the provisions of this law shall not be enforceable and would be of no value."

1. See above page 42
2. To date the Identity Card is issued to men only; it is mainly concerned with the question of the compulsory military service and may be obtained any time up to the date of being called up or in unusual cases after that date. Not having a specific time basis to identify the accurate date of birth, the calculation of the individual's age and the recording of it in the Identity Card by the pertinent officials is subject to error or misrepresentation. Moreover, there are certain sections of the population, e.g., the nomads, who number at about two million; and certain other peoples of the border areas in the southern and eastern regions who so far have not been issued with identity cards.

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raised in the 1971 judicial seminar(1). The proposal submitted to the seminar read in the pertinent part that: "the courts have powers to decide on the age of miners...cases are often encountered in the courts where a major person's age is questioned; and so far the courts have no powers to establish the age of a major person..." The resolution passed by the seminar stated :

"whenever the question of a major person's age arises in the courts, it should be pointed out that alteration of age in the identity card is a function of the Offices of Registration of Identity Cards (dafāter-e-ihṣā'iyya) and thus falls in the province of the Executive, therefore the case shall be referred to them. But when the establishment of age be a matter connected with the issuing of a judicial settlement, the court may, in case of discrepancy between the age entered in the identity card and the apparent age of a person, ask for an informed/professional opinion and thus establish the age of the individual concerned as it saw appropriate and proceed on it. But this age will not be recordable in the identity card"(2).

Thus the age problem is a manifold one. It is not only the lack of a systematic registration of births and the shortcomings in the issuing of identity cards as referred to previously, but also the variation between the apparent age and the age registered in the identity card which can be considerable. Until the time when a regular system is devised to register births, neither the identity card nor the court's ad hoc power would provide a comprehensive answer to the question of identifying the age. And as such any legal measure enacted regarding the age of marriage would seem to lack the basic starting point for the calculation of the correct age. The lack of such information must have influenced the parliamentary attitude while debating the 1971 Marriage Law in that this la as opposed to the 1960 law does not provide for any specific age of marriage (see a summary of the debate at page 74).

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1. This seminar was arranged by the Supreme Court and was participated by the supreme court justices and presidents of the provincial courts. The seminar lasted nineteen days; it was basically aimed to be a short in-service re-orientation course which inter alia considered such matters of general applicability that were in need of solutions. This seminar was the second of its kind; the first was convened in 1968. See more in The Judicial Training Programme in Afghanistan, prepared by the Research Department of Supreme Court p.11 Kabul 1971 (in English).
2. Qada, especial issue for the judicial seminar 1350 A.H. (1971), Supreme Court publication, Kabul 1971, p.113.

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With regard to the option of puberty, the Marriage Law 1960 is completely silent, nor is there anything explicit in any of the marriage laws of 1934 and 1949 to regularize the exercise of the option of puberty. This legislative silence however did not indicate the non-availability of the option of puberty. For generally speaking these marriage laws have been characteristically of ad hoc nature none of which adopted the form of a comprehensive code, thus leaving the application of the Sharī'a rules with regard to the option of puberty unaffected. It should be noted that legislation on marriage in the past do not seem to pay balanced attention to the merits of the subjects concerned. An obvious imbalance is indeed the very issue in point; that is to say their continued provisions with regard to the recognition of child marriage are matched with but total silence on the option of puberty. Elsewhere in the Law of Civil Procedure 1957 there is however a by-the-way mention of the option of puberty. This law in connection with the subject of 'discovering oath' (yamin-e istizhār), while setting out the instances where such an oath is to be administered by the judge, mentions six occasions, one of which is the event where"....a woman who is entitled to the option of puberty and thus demands the dissolution of her marriage from the court, the judge may not order the dissolution (faskh) unless he puts the woman on oath to ensure whether upon her knowing of her puberty she demanded the dissolution immediately."(1) Two points are apparent in this article:

a) That the exercise of the option of puberty is dependent on the order of a competent court; and b) that the option of puberty must be exercised immediately upon the attainment of puberty. Puberty is not explicitly clarified, but the use of the word 'knowing' (ilm) imply that it is obtained upon the observing of menstruation. The passage noted above moreover appears under article (141) which reads at the outset that "if the defendant objects upon appeal that the primary court has not administered the discovery oath, his objection will be admissible as the basis of appeal." From this context it further appears that in order to establish the option of puberty, an oath is admissible in evidence. An oath in general is only administered when it is demanded by a party to the claim that his opponent be put on

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1. Article 141(b), Law of Civil Procedure 1957.

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oath.(1) The discovery oath is different from other oaths in that "it is a right of the judge who may put the claimant on oath without a demand being made by any party."(2)

It will be noticed that if the option of puberty is at all to be used as an instrument for ensuring the women's consent in marriage, clear and practicable laws would have to be introduced. A legal procedure should be improvised to ensure that women are fully cognisant of their rights. If such rights are not exercised, it must be clear that they are waived deliberately by the woman concerned.

The case law to date does not evidence any reasonable frequency of the exercise of the option of puberty in Afghanistan. The court records indicate that cases in which the option of puberty is exercised are, in fact, of rare occurrence. The strict conditions for the exercise of this right, further aggravated by the absence of an adequate system of legal aid, are certainly among the factors to be held accountable for its rare use. In Abdul Majid v. Abdul Ghafoor (3), the decision of the Cassation Court that "... Zarina is to be delivered upon her reaching majority to her husband Fazl Ahmad, "indicates in this case the non-existence of the option of puberty for Zarina who was given in marriage by her father Abdul Majid while she was a minor of seven years of age. Although the main objective of the claim in the above case is that of 'stop aggression' - daf'e ta'arrud - and there is of course no demand for the exercise of the option of puberty by Zarina as she was only a minor at the time, the decision of the court in ordering the unconditional delivery of Zarina upon her majority nevertheless is indicative of the Court's undivided concern for the application of the Hanafi law where no option of puberty would exist in the case of compulsion (ijbar) by the father.

In Mah Gul v. Raz Mohammad (4) "Mah Gul claimed that on the 12.5.1344 A.H, one Amanullah my maternal uncle contracted me into nikāh while I was a minor to this Raz.Mohammed in consideration of a dower of

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1. "When the claimant expresses his inability to prove his claim otherwise, he has the right to demand that his opponent be put on oath ...." (Art.126(C) Law of Court Administration 1956; also "whenever the defendant takes the oath, the claim against him shall cease and the court will order its conclusion, but if the defendant avoided taking the oath, except in qisās, the object of the claim shall be proved upon him" (Art.126(d), Law of Court Administration 1956).
2. Art.141. Law of Civil Procedure 1957.
3. See above page 23
4. Settlement No.59/ 7.4.1349 A.H.(1970) Cassation Court for Civil & Criminal Affairs, Kabul.

twenty thousand Afs ... subsequently on the 13.2.1348 having attained majority, upon the observance of my second menstruation, I repudiated in the presence of competent witnesses, my nikāh to R.Mohammad and pronounced that 'I freed myself and broke off the nikāh'. I immediately declared to the witnesses then present the exercise of my option of puberty and sought my freedom from R.Mohammad who contrary to my rights is now aggressive and does not cease playing a self-styled husband. I hereby demand the court to order my legal separation from R.Mohammad.

The above claim of Mah Gul was in conflict with her petitions which she submitted to the court of first instance (Centre of Qandahar province)as the result of which the court ordered the claimant to correct her claim. For in her two petitions to the court on the 3.2.1348, and 11.2.1348 respectively, Mah Gul has claimed that R.Mohammad is sexually impotent (da'wi 'innat). Again in her petition of 14.7.1348 the same claimant has initiated a claim of 'stop aggression' against R.Mohammad. Yet again, in conflict with her previous petitions to the court, she has now initiated the claim of the option of puberty. As there was a conflict in claims, the court commissioned Mah Gul three times to correct her claim but she insisted on her option of puberty. Consequently the court issued the decision (settlement No.74/17.10.1348) that Mah Gul's claim was in conflict with her petitions and thus non-hearable.(1) Mah Gul appealed and in her objections she submitted to the provincial court of appeal mentioned that the judge of the first court refused to register her initial claim and ordered her to claim her option of puberty. Mah Gul also objected that the judge did not ask R.Mohammad for a legal deed of marriage. The appeal court rejected the objections since the lower court had more than once commissioned Mah Gul to correct her claim. Also since Mah Gul had initiated a claim, Raz Mohammad had not claimed a nikāh to be asked for a deed of marriage. Consequently the appeal court confirmed the decision of the first court. The Cassation Court on the basis of the same reasons hereby confirmed the decision of the lower courts".

The plain fact in the above case is that at the very end of the judicial hierarchy the true position was still totally unclear. It does not seem to have been established at all whether Mah Gul's claims

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1. "The contents of a claim must be in accord with the petitions..." is among the requirements of a valid claim as set out in article (33) of the Law of Court Administration 1956.

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were all false; and yet the decision imposed upon her resulted in the complete loss of her option of puberty. This is precisely the main criticism of the so-called non-hearable orders so frequently resorted to by the courts. The contention here is not about the existence of this procedure, it is the frequent use of this procedure as a first resort which appears essentially disturbing to the sense of justice and truth. The court's discretion with regard to the initiation of a claim clearly exists from the very outset in that "whenever a claim is considered as correct, the court will receive and register it ... otherwise the claimant is to be commissioned by the court to correct his claim."(1) This point has been aptly raised in the 1971 judicial seminar which passed a six-articled resolution on this matter that read in part: ".... Experience shows that the courts' decisions in respect of rendering certain claims as non-hearable often stem from such minor procedural defects that may have nothing to do with the essence of the claims concerned. This form of judicial settlement often does not obtain justice in a desirable manner, and brings about loss of rights only because the claimant failed to comply with some trivial formality. An evident reality in our society is that many claimants are ignorant of such procedures and their recourse to various claim-writers even adds to the problem. Such shortcomings ought not to cause the loss of rights..." The resolution goes on to emphasise that "in the event where contradiction or vagueness existed in a claim or in some of its conditions, the court has discretion under articles (18) and (69) of the Law of Court Administration 1956 to interrogate the claimant in writing for further clarification so that the contradiction or vagueness be removed and does not lead to the non-hearing of claims..." The petitions that often caused conflict of claims were frequently submitted in the first place to other authorities (provincial governors, e.g) and thus found their place in the files concerned. For this, the resolution provided that "petitions in civil matters are preferably to be made directly to the courts as required by Article 34 of the Law of Court Administration."(2)

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1. Art. 38 Law of Court Administration 1956.
2. Qada, especial issue of the judicial seminar 1971 op.cit. p.8-11; see also art.18, Law of Court Administration:" questioning the parties or witnesses for clarification is the jurisdiction of the judge only."; and art.69 to the similar effect.

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It will be further noted that the search for truth is a distinct requirement of a judicial decision:

> "a judicial decision (qaḍa) is an order issued by the ruler of Shar' in specific terms in relationship to a case where the necessity of it's truth and reality is proved before the judge".(1)

The union of justice and truth is the unequivocable aim of the law in providing that "a judge can refuse to hear claims that he knows are not true and has Sharī'a reason to that effect."(2) Also with regard to the defence of claims" a judge can refuse to hear a defence that is denied by Shari'a, wisdom or apparent evidence."(3)

It seems also interesting to compare the court proceeding in the two cases of A.Majid.v.A.Ghafur and Mah Gul.v.R.Mohammad. Both cases have one aspect in common, namely the conflict of petitions with the claims in each case respectively. Both cases have been decided in the primary courts as non-hearable apparently because of this said conflict. Mah Gul's claim of the option of puberty remained as non-hearable in all the three courts, yet in A.Majid the appeal court quashed the primary court's decision and allowed Majid to make a new statement; thus the said conflict was totally ignored by the appeal court. In both cases however the child marriage remained valid.

The Marriage Law 1971 on Child Marriage

The Marriage Law 1971, somewhat similar to the 1960 law, permitted child marriage. The 1960 law seems on the whole to have functioned as an influential background to the provisions of the 1971 law. This can be seen from the following articles of the 1971 law.

"Nikāh of a bride and groom who have not reached the age of majority is not a nikāh of majority. The groom's age is determined by his identity card. Whereas in the bride's case the court will credit the information given by the bride or her guardian." (Art.3); and

"Nikāh of a minor shall be of no value unless accompanied by a valid deed of marriage by the guardian." (Art.18) ; and

"Nikah cannot be contracted if the guardian of either party has a reputation of being morally corrupt, and if the nikāh is considered

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1. Art.23 Law of Civil Procedure 1957.
2. Art. 168 ibid.
3. Art. 167 ibid.

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not to benefit the minor. Nor can a minor's marriage be contracted when it is performed for the material procurement of the guardian." (Art.19).

Regarding the age of marriage, the draft article (3) provided for the marriageable age to be fifteen. While debating this article, the parliamentary delegates mainly expressed two opinions, one in favour of eighteen years or over, the other in favour of fifteen years of age. A third view which seems to have been raised at the very last stages of the debate argued in favour of leaving the age of marriage unspecified and this was somewhat unexpectedly passed into article three of the Marriage Law. The draft article (3) read as follows:

"The minimum legal age for a nikāh of majority is fifteen years complete; marriage of a person under fifteen years is not a nikāh of majority. The groom's age is to be determined on the basis of the Identity Card whereas for the bride's age the courts shall credit the information given by the bride." (1)

Those who argued in favour of eighteen years or higher emphasized that a lower age would tend to interrupt the normal course of education; that the immaturity of the spouses would severely affect not only the health and stability of the marriage itself but also the offspring of such unions; and that youth of lower ages in Afghanistan are generally subject to the pressure of the family and guardians ( for details of the debate see Appendix B at page 228.)

On the other hand the proponents of fifteen years emphasized that fifteen years as the marriageable age is in consonance with the Sharī'a rules; that any higher age, say eighteen or twenty-two, for marriage would mean depriving major persons from exercising their Sharī'a rights; and that barring major persons from marriage would mean opening a way for moral deviation.

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(1) Legal projects are usually either drafted or examined by the Legislative Office of the Ministry of Justice. Under the law which created this office (De Fitwa Aw Taqnin Qānun, 1964) a Government Ministry or any public body when proposing legislation is required to submit the proposed projects to the Legislative Office. After examination by the Legislative Office the draft may go to the Cabinet upon whose approval the Bill would be laid before the parliament (Articles 5 & 6). This is apart from article '72' of the Constitution 1964 under which any member of Parliament can propose legislation which will be put on the agenda provided that it is supported by ten members at least.

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The main point of the third view, proposing no specified age of marriage, was that any specified age especially a higher one would provide opportunity for abuse by the guardians. On this basis an amendment was proposed to drop the age provision, and that article (3) should be amended to read in part that "... nikāh of bride and groom who are not major is not a nikāh of majority." This amendment, however confusing, was finally adopted as law. Earlier in the debate, a delegate aptly noted that: "even if we permit child marriage in this law, we would still have to solve the question of how to differentiate between minor and major persons"(1). This point is justified also in view of the mention in article (3) of the term 'nikāh of majority'. For the mention of the term 'majority' without specifying an applicable criterion renders the law fundamentally vague.

With regard to the identification of the bride's age, it was argued that: "the draft text requires the prospective brides to go to the court, for it is only her information that is to be credited by the court. This is an impractable proposition for Afghanistan. Therefore I propose that the term 'guardian' should be added to the text to read: 'for the bride's age the courts shall credit the information given by the bride or her guardian.'" (2) This amendment was finally adopted into the law. A main objection raised against the proposed amendment as above was that such an amendment would enable the guardian to report a false age to the court. (see details under appendix B at page 228 ).

The parliamentary debators, while debating articles 18 and 19 were, broadly speaking, divided on the general subject of child marriage into two opposing groups, i.e. those who argued for keeping child marriage as legal; and those who favoured the abolition of child marriage. A general feature of the arguments put forward appears to be that the debators tend to seek justification for their cases mainly from within the Shari'a boundaries.

Those who argued in favour of keeping child marriage legal emphasized that since child marriage is permissible in Islam, it should

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1. M.S.Farhang W.J.J., No.22 1346 (June 1967).
2. Dawary W.J.J., No.22 1346 A.H. (June 1967); see also M.Nasim who supported Dawary, loc sit.

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remain as such (1); and that Islam in granting ijbar for the father e.g. is in consonance with the natural affection of the father for his children (2). Another deputy argued that although Sharī'a permits the Muslim Ruler to stipulate upon permissible matters, there was no authority in Sharī'a on the basis of which a Ruler could render a permissible into an impermissible (3). It was further pointed out that for social reasons, for example taking better care of the children, it is desirable that child marriage should remain legal (4).

Those who argued for the abolition of child marriage, mainly pointed out that child marriage in Afghanistan damaged women's rights; that child marriage is basically a premature transaction; and that the minor's interest is often not pursued by the guardian.(5) It was also emphasized that a minimum physical maturity is justifiable from the view point of physiological growth (6).

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1. "legislation in Afghanistan, being a Muslim State should not contradict Islam. Islam permits child marriage and it shall remain as such." H.Mohammad W.J.J. No.24, 1346 AH (Oct.1967); see also Sa'adat (Said Abad's deputy) and M.Nasim (Bamyan deputy) to the similar effect.
2. Dawaree loc.cit.
3. M.S.Irshad loc.cit.
4. "...Let us suppose that a man upon his death leaves behind no one to look after his child, and in the interest of the child he contracts a child marriage. Also in poor homes, and experience shows that such homes usually get larger shares in the number of their children, a man may think that his minor daughter e.g., will receive better care if given into marriage to a member of some other family..." (Spin, loc.cit).
5. "Islam improved the status of women. We must also pursue this trend and try in the light of Islamic teachings to find solemn ways for solving the problems that have blighted women's rights in this country... With the advance of age and education the child's life is subject to change and it often happens that the parties involved in the child marriage are no longer suitable for each other.
   It is quite frequently observed that the guardians instead of considering the welfare of the minor pursue their own interests" (R.Abu Bakr loc.cit); see also M.S.Farhang and M.I.Mayar arguing to the similar effect.
6. "A sound marriage requires certain physical maturity for which the minimum age of eighteen is strongly recommended." Doctress Anahita loc.cit.

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Another abolitionist argued that the progressive and dominant trend in Islam is towards the marriage of majority and this must be adopted as the guideline for reform. The aims incorporated in the constitution on the national level and the international treaty of Geneva eliminating slavery which has been signed by Afghanistan all in all require the abolition of child marriage.(1)

It was further stated in the debate that "Muslim scholars are in disagreement about the power of ijbār. Three of the fuqaha namely Othman al Batti, Ibn-Shubrama and Abu-Bakr al-asamm do not consider child marriage permissible. They base their reasoning on the Qur'an. The Egyptians have adopted this view in rendering the claims of nikāh inadmissible unless the parties are of sixteen and eighteen years of age respectively (although nikāh is basically valid). On ijbār Abu Hanifa has also certain considerations, one of which is that the father, grandfather and the son should be people of good repute. If they were of ill repute the minors are entitled on reaching the age of majority to repudiate the nikāh. Therefore it is not necessarily anti-Islamic to abolish child marriage... " (2)

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1. "With regard to slavery for example the direction basically taken by Islam was not one of corroborating slavery. Islam instead left ways open to help remove this stain from the human society. Now which direction is advisable to adopt? The one which will gradually remove the position and the system of slavery, or else to tighten it up with even stronger chains. Similarly which is the dominant tendency in Shari'a? The marriage which is contracted by the offer and the acceptance of the couple, or the encouragement of child marriage and likewise other things which drag humanity toward the position of slavery. The 1964 Constitution moreover aims at: 'regularize the national life of Afghanistan in accordance with the demands of the time... to obtain justice and equality ... and finally to facilitate the building of a progressive society.' Article 25 of the constitution also states that all the people of Afghanistan have equal rights and obligations.

With regard to our international standing the 1926 Treaty of Geneva forbids:

Art.1.(C) Any institution or conduct which results in giving or forcing women into marriage or promising to do so in disregard of their right of refusal for money or commodity paid to the family or to the guardian etc. Art.2. of the treaty provides that 'the member states pledge to enact, as they consider appropriate, minimum age for marriage; to facilitate the free consent of the marriage partners before the public authorities and to encourage the registration of marriages.' Parliament ought to attend to these considerations.... In our new democratic order, the Afghan women should be, in all walks of life, equal to men. I propose the enactment of a minimum marriageable age and the abolition of child marriage."
B.Karmal loc.cit. also see Dr.Farzan for a similar proposal.

2. A Ghafur Baher loc.cit.

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Another deputy aptly argued that child marriage, within the conditions witnessed in Afghanistan, tends to function to the disadvantage of the minors. Therefore the abolition of child marriage will not be disagreeable to Sharī'a (1).

"As a memorizer (hāfiz) of the Quran" said another delegate, "I understand that nowehere in the Qurán is there any command on child marriage. The possible benefits of child marriage as referred to by a colleague are of rare occurrence, whereas its adverse effects are threatening the morals and well-being of our society. The device adopted in article 19 for restricting child marriage, and the term 'moral corruption', seem to open up other ways for corruption by the influential people and the courts." (2)

It is striking to see that despite the considerably stronger arguments raised in support of the abolition of child marriage, on social grounds especially, yet child marriage remained legal and the traditional position was upheld. Nevertheless the overall feature of the parliamentary debate indicates the existence of strong feelings for the abolition of child marriage essentially in line with the modern reforms of the Sharia already affected in many Muslim countries of the Middle East.

With regard to the value of registration, it has been mentioned already that article (5) of the 1960 Marriage Law constituted a functional restriction on child marriage. The said article (5) , the controversial features of which has been referred to previously, did not reappear however. The 1971 law instead adopted a somewhat less emphatic device:

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1. "On the subject of minors and dealing with their affairs the fiqh provides for three eventualities: transactions that are purely to the disadvantage of the minors; those that are purely to their advantage; and finally those which fall between the two categories. Transactions of the second and the third type when performed by the guardian, executor or tutor are considered enforceable; but transactions in the first category are per Shari'a not enforceable. I beg the attention of the delegates to the realities we face in our country. We all witness that fathers give their minor daughters in marriage in order to release themselves from debts; we have observed that they give their minor girls in tribal feuds (badd) each of which leads in turn to a variety of bad consequences. We have seen that they give them in exchange to obtain a wife for their sons giving no consideration to the girl's wishes. We have seen the guardians who sell their daughters for their own material benefit. I believe all these transactions are purely to the disadvantage of minors and if we forbid child marriage it will not go against Sharia."(A.W.Sadaqat loc.cit.)
2. "...for as we witness so many unrighteous claims and false oaths, emanating from child marriage, have already darkened the court's atmosphere in this country."(F.Badri loc.cit;see also Shah Nazar to the similar effect, loc.cit.)

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' the claim of marriage shall not be hearable against persons who possess a valid deed of marriage under this law or the 1960 Marriage Law; the decision of the primary court that renders any such claim as non-hearable will be final."(1) ; also

' a claim of marriage the contracting date of which is shown as before or after Qaws 1339 but with no deed of marriage in existence, will be hearable only when there exists between the parties such a reputation of marriage or marital cohabitation that satisfies the court by the evidence of a number of reliable persons. In a case where the above condition is fulfilled, the claim will be heard by the court and proceeded upon in accordance to Sharīh rules.'(2).

As can be seen article (36) merely protects the possessors of a valid deed of marriage, a position that was precisely the same under the previous law (3). What is new under this law is its rendering the primary court's decision as final. It is in fact article (37) that may be considered as the amended counterpart of the said article(5). The use of the term 'only', as also supported by the phrase' in case where the above condition is fulfilled' in article (37), indicates that the case where a claim of marriage can be heard without a deed of marriage is strictly exceptional; exceptional to the normal situation, which can be understood from the phrase "... but no deed of marriage is in existence' indicating that without a deed of marriage a claim of marriage will normally be not hearable.

The specific mention of 'Qaws 1339' in article (37) indicates that this article is retrospectively effective to cases even before the 1960 law. The retrospective clause presumably aroused concern in the Supreme Court, which appointed a committee to make recommendations with regard to the manner of enforcing articles (36) and (37) of the new law and the position of the judge therein. The select committee recommended the following:

"Upon the receipt of petitions and claims of marriage without a deed of marriage, the court must decide whether the claim is to be initiated or not. Whenever the court is satisfied upon evidence as to the merit of the petition, it will then commission the petitioner to present his claim and then the other party to present the defence. In case the court

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1. Art.36 Marriage Law 1971.
2. Art.37 ibid; Qaws is the ninth month of the Afghan year.
3. "a claim of marriage without a deed of marriage shall not be hearable against a marriage that is contracted in accordance to this law. (Art.7 Marriage Law 1960.)

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is not satisfied, it will not have to consider the petition in the first place. Although article (37) has no reference whether such a decision is subject to appeal; it seems, however, in the light of article (36) that the decision should be final. For if the petitioner had no evidence to satisfy the court with regard to his previous marital cohabitation, the petition will cause but a waste of time. Such a petition moreover cannot under article (110)** of the Law of Civil Procedure cause delay of a marriage that is in the process of being contracted. If this device be sanctioned by the Supreme Judicial Council, there will be moreover no basis for the application of article (123)*** of the Law of Court Administration. For when the court registers the petition and assigns the petitioner a respite to present his evidence and he fails to do so, the court may decide in the absence of the petitioner that no claim should be initiated, and communitcate this to the petitioner's residence. It seems advisable however that such a decision when issued in the absence of the petitioner be exceptionally subject to appeal..."(1). The above recommendation has been accepted by the Council who noted:

"It is for the judge to ensure under article (37), from the evidence of a number of reliable witnesses that is brought by the petitioner, the existence of previous marital cohabitation to his satisfaction. In the absence of such reliable evidence, the committee's recommendation shall be enforced.(2).

Thus the emphasis clearly appears to be on 'previous marital cohabitation' which according to the above resolution seems to represent the only grounds on which a claim of marriage without a deed of marriage would qualify as an admissible claim in the courts. It further appears that the court's decision with regard to the initiation of a claim as above is not a judicial settlement per se, for such a decision is reached before the actual claim is received and the parties commissioned to

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** Art 110, Law of Civil Procedure: "A mere petition to an official authority or a claim without evidence shall not cause delay in contracting a marriage."

*** Art. 123 Law of Court Administration "a claim submitted to a court shall be considered as void if within a period of two months it is not attended and pursued by the claimant..."

1. Supreme Court circular No.1991/21.9.1350(1971), published in Collection of Judicial Circulars, vol.III, 1350, Sup/Court Publication, Kabul, pp.162 (text in Dari, compiled by M.U.Zhobal).

(2) Ibid p.165.

present their case. Previous marital cohabitation also indicates that a mere claim of child marriage without subsequent marital cohabitation will not be hearable in the courts. In short, under article (5), nikāh khat was the exclusive means of proof in a claim of nikāh. The only exception to this was where a child had been born to the marriage. Under the 1971 law, marital cohabitation even without the birth of a child can establish the marriage. In addition to this the 1971 law explicitly provided that "the lack of nikāh khat does not constitute a bar to inheritance or to the proof of blood relationship - nasab -"(Art.35).

Regarding the option of puberty, the 1971 law, not unlike its predecessors, makes no explicit mention of the option of puberty. The only reference in this law that can be related to the option of puberty appears in article (35) which broadly provided that "a woman can demand her divorce and separation - tafriq - in the competent court according to the rules of Sharī'a law". The option of puberty is a form of tafriq. This law imposed similar conditions on the exercise of the guardians' power of ijbār as appeared in the previous law. These are spelled out in article (20) according to which the moral ill-repute of the guardian, his pointed material procurement, and disregard of the minor's benefit are the conditions at the existence of which a minor's marriage 'cannot be contracted'. Such conditions, generally speaking although they are familiar to the Sharī'a conditions of the valid exercise of the power of marriage guardianship, cannot be considered as providing for the Sharī'a law of ijbār and the option of puberty per se: The wording of this article is too incomplete to be treated as such. Article (20) does not differentiate among the persons of the guardians and their relationship to the ward. This article moreover renders a marriage when attended by any one of the prescribed conditions as incontractable in the first place, something that can hardly be supported within the Sharī'a concept of the option of puberty. And finally article (20) does not make any reference to the option of puberty. It is therefore contended here that article (20) incorporates statutory conditions for the valid exercise of the power of marriage guardianship that can also find support in Sharī'a, and not a reference to the Sharī'a law of the option of puberty.

It is interesting to note that such immensely important statutory measures of favourably wide potential use against the various abuses of guardianship and adverse practices such as walwar have to date remained but dead letters. It is easy to relate sich inactivism to popular

practices and traditional forces. However undeniable they are, it should nevertheless be emphasised that clarity and determination of the statutory language, as well as specified procedures for the enforcement of legal measures, which fight against traditionally entrenched aspects of social behaviour, can inter alia help save such measures from being considered as part and parcel of the mainstream of tradition.

After the 1971 Marriage Law came into force, the Ministry of Justice introduced a new deed of marriage (1) which among other things, contains a paragraph regarding the option of puberty as follows:

"In accordance with article (20) of the 1971 Marriage Law, the validity of a minor's marriage is conditional upon the deed of marriage of the guardians, their good reputation, and that the marriage is to be in the benefit of the minor. Whenever any of these conditions are not fulfilled, the minor is entitled according to the rules of Ḥanafi fiqh to obtain the repudiation of the marriage concerned by the exercise of the option of puberty upon attaining majority." (2)

Moreover, the following is an extract from a speech by the Deputy Minister of Justice given in a conference held on the new marriage law: "....It must be mentioned that under the present legal system many of our problems still remain to be solved. Nevertheless, the new Marriage law on the whole predicts a few favourable conditions for the limitation of child marriage. Some of these limitations are that the guardians of a minor, he or she, must not have a reputation of moral corruption; that the marriage should be to the advantage of the minor, and that it must not be contracted for material procurement of the guardian. In addition to this under the Shari'a rules minors are entitled to exercise their option of puberty. For instance when a girl has objections with regard to the fulfilment of the above conditions, if she claims upon her reaching the age of majority and proves that the marriage is not to her advantage or that it is contracted for material procurement, such a marriage will be abrogated by the order of the court".(3)

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1. The new deed of marriage is designed in the form of a passport size booklet which consists of fourteen pages as opposed to the previous two-sided form. The new deed of marriage paraphrases, for publicity purposes, some of the main provisions of the 1971 Marriage Law.
2. The new deed of marriage p.13.
3. S.Zhwand (Deputy Minister of Justice) in his speech in Zainab Nandaray Conference, published in Mermon - No.10 p.4 & No.11, p.15 Kabul. 1350A.H.

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The two passages are not entirely in agreement; the former not only contains an attempt to distinguish article (20) with the concept of the option of puberty, but also seem to confuse an entirely different matter, i.e. the deed of marriage of the guardian (the subject of article (19) with both article (20), and the Sharī'a law of the option of puberty respectively. The latter passage seems to be accurate insofar as it differentiates the contents of article (20) from the Sharī'a law of the option of puberty, but not quite so when it attempts to illustrate the manner of enforcement of the conditions incorporated in article (20). Once it is admitted that the conditions of the new law -i.e., of art.20 - are statutory'prediction' as separate from the Sharī'a option of puberty, then it would seem that the two would need to be differentiated in respect of the procedure for their enforcement. For the conditions laid down by the 1971 law have completely different effect when compared with the Sharī'a conditions for the exercise of the option of puberty. The Statutory conditions laid down in article (20) go beyond the confines of the Shari'a option of puberty.

The present position therefore seems to be that the option of puberty continues to exist and to be exercised under the Sharī'a rules as referred to in the Law of Civil Procedure 1957. Article (20) of the 1971 Marriage Law on the other hand need not be enforced under the terms of the option of puberty; this article can instead be enforced, independently, in which case it can be enforced even before majority, or reasonably after, and irrespective of any distinction among the guardians and their relationship to the ward.

The conditions of article (20), however, looked at in the context of the social environment and the opportunities available for girls in Afghanistan are aptly evaluated by a Mermon editorial article as follows: "In our view, initiation of claims by girls contracted in nikāh in their majority is impracticable in the context of the prevailing social conditions of Afghanistan. For it is rare that the groom's family does not transfer the minor bride to their household. Generally speaking all such girls find themselves in the household of their husbands without delay. By the time they realize the nature of the contract imposed upon them, it is not only too late but for various other reasons such as the antiquated usages relating to patriarchal authoritarianism, or because of the child that may be born to the union, the girl cannot raise the

slightest objection to her marriage. Let alone her ability to prove the ill-intention or ill-repute of the guardian. Stories of such helpless girls and the denial of their wishes for education, work and the choice of husband is a matter present in the memory of us all. We can imagine the fate of a girl who rises against the tradition and stands up for her rights against the wishes of her guardian. Moreover to prove the moral ill-repute of parents/guardians which is required to be proved is not a simple task especially in view of the not unknown evils of bribery, exertion of influence and fraudery. It is regrettable that inspite of such unpleasant experiences, the new law did not abolish child marriage. In a country where the obvious rights of major and competent women are being trampled, the rights and human dignity of minor girls is not likely to be revived with one or two conditions incorporated in the new law, and as it is, the sale of girls is likely to continue in one form or another. It was expected that the marriageable age be raised to eighteen, but the new law instead even omitted the age provision that existed in the previous law..."(1)

The above account also aptly suggests how vitally important it is that any device to discourage child marriage must seek its ultimate success in healthy public opinion, the attainment of which is undoubtedly a matter of primary responsibility of the law, mass media and education.

Modern Reforms

In Egypt, a law of 1923 provided that a marriage where the bridegroom was below the age of eighteen or the bride below the age of sixteen could not be registered and therefore could not, if disputed, be the subject of judicial relief. By contrast with this approach, legislation concerning the marriageable age in other Middle Eastern countries has directly affected the validity of marriage. Full competence to marry is acquired, not with the advent of puberty as under traditional Sharī'a law, but on attaining a specified age. This age is almost everywhere eighteen for males, while for females it varies between eighteen (Iraq), seventeen (Syria and Jordan) and fifteen (Tunisia, Morocco and Iran). Marriages below these ages however is permissible

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1. 'The Marriage Law Should be Amended and Completed', editorial article, Mermon, No.11, 1350 pp 15.

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on proof of sexual maturity. Generally, the codes in the above-mentioned countries specify ages below which no claim of sexual maturity will be heard and which therefore represent minimum ages for marriage. The lower limit of puberty laid down in this regard by traditional Sharī'a law - the age of nine for girls and twelve for boys - has been raised in Syria and Iran, for example, to fifteen for males and thirteen for females, in Jordan to fifteen for both sexes and in Iraq to sixteen for both sexes. Young persons who have reached these ages, but not yet the age of full competence to marry, may marry, subject in most cases, to the consent of the marriage guardian, and in all cases to the permission of the court. Failure to obtain the necessary permission precludes registration of the marriage and may render the parties liable to statutory penalties, but it will not invalidate the marriage. It is clear however that the marriage legislation relating to marriageable age has almost completely abolished the right of the marriage guardian to contract a valid marriage by constraint or ijbār. In the Middle East generally as well as in Iran, no legal recognition is any longer afforded to the marriage of a minor who is not physically mature.(1) Most of the middle Eastern reforms referred to above have adopted, generally speaking, the view of Uthman al Batti, Ibn Shubrama and Abu Bakr al Asamm, the early Muslim jurists, that one who has not reached puberty may never be married or given in marriage by his or her guardian.(2)

In India and Pakistan, under the traditional Anglo-Mohammadan law, the Indian Child Marriage Restraint Act 1929 as confirmed by the Pakistani Muslim Family Law Ordinance 1961 rendered child marriage a punishable offence. Notwithstanding the punitive sanctions attached to the marriage of minors (boys below eighteen and girls below sixteen) in both countries, a guardian may still validly contract his minor ward in marriage by ijbār. However a girl so contracted in minority may now repudiate the marriage even if it was contracted by her father or paternal grandfather. Under the terms of the Pakistani Ordinance, she may do this by satisfying the court that she was contracted in marriage by her father or other guardian before

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(1) See N.J.Coulson, Succession in the Muslim Family, Op.cit 12, also see Persian Civil Code, articles (1041-1044) English translation by A.C. Trott 1937; see further J.N.D.Anderson: The Syrian Law of Personal Status, BSOAS Vol.xvii 1955 pp.34-52; and The Tunisian Law of Personal Status, International & Comparative Law Quarterly, April 1958 p.267; and Reforms in Family Law in Morocco, Journal of African Law II 1958 p151; and A Law of Personal Status for Iraq, ICL Quarterly, 1960 p.542-63; also a series of articles largely on Egypt, Recent Developments in Sharī'a Law, The Muslim World 1951-52.

2. See more in J.N.D.Anderson, The Syrian Law of Personal Status, loc cit p.37; see also Mohammad Abu Zahra, Muhadarāt fi aqd al-Zawāj Wa Atharuhu, Egypt 1958, pp 160 et seq (Arabic text).

she was sixteen; that she repudiated the marriage before she was eighteen, and that the marriage had not been consummated.(1)

Summary and Conclusion

The place in Shari'a for the social conditions of the time is evidenced by the fiqh rule that 'change of the time is not deniable'(2). The attempt to improve evil conditions that may have some benefit is also justified by the fiqh rule that 'suppression of evils has priority over the attraction of benefits'(3). The Constitution of 1964 sets out its aim in the preamble as to "organise the national life of Afghanistan according to the requirements of the time". It is contended here that child marriage should be abolished:

A) Child marriage is fundamentally a premature transaction which in most cases involves unnecessary risk. The concept of the minor's benefit is basically vague and almost always subject to doubt and uncertainty. These are further aggravated in modern times by social change, greater mobility, education and the opportunity structures that are becoming increasingly available. The individual has progressively been the recipient of various influences - cultural, intellectual, idealogical, mass media etc. - that are, on the whole, likely to render his individual life style less predictable both physically and mentally.

The guardians' power in respect of forcing their wards into marriage also seem to be progressively less agreeable to individual freedom and liberty of choice that have also marked the current value system (democracy, the individual freedom and equality have received emphasis in the 1964 Constitution, and were proclaimed as the national objectives of Afghanistan.)

B) The emotional/physical immaturity of the spouses in child marriage, throwing the heavy responsibilities of parenthood upon persons who have barely completed their own growth towards maturity, is likely to threaten the health of the married pair (that of the mother especially), of the child and therefore of the society.

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1. N.J.Coulson, Succession in the Muslim Family, op.cit.12; see further N.J.Coulson, Islamic Family Law, Progress in Pakistan, in J.N.D.Anderson(ed) Changing Law in Developing Countries,1963: 240-257, texts of the CMRA1929 and the PFLO 1961 appear in Mulla, Principles of Mahomedan Law, op. cit. (Appendices).
2. Art.39, The Mujalla.
3. Art.30, ibid.

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C) Child marriage undermines the sense of responsibility: disharmony in married life is an ever-present possibility generally. In the case of child marriage, disharmony is even more likely to lead to the deplorable situation often spoken by husbands; for example, 'She is the parents' wife', or 'it is an imposed marriage' etc. Whatever the explanation and the full picture in such circumstances may be, the escape from responsibility cannot be easily disconnected from the imposed nature of the marriage of minority.(1)

D) Child marriage is a source of conflict, some forms of which are reflected in court litigation. In the courts claims are often initiated that are oppressive in nature, unfounded, and selfishly aimed at obstructing a prospective marriage, or used as an instrument of effecting the imposed choice of the guardian/relatives. (2)

E) Evidence suggests that child marriage in Afghanistan is not, on the whole, practiced in the best interests of the minors. The minors' interests are often neglected to the advantage of more visible and immediate interests of the guardians.

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1. "The law-makers of today must not play with the fate of innocent minors. We witness that so many disputes and divorces emanate from the fact that the minors have been thrown into marriage." (G.N.Formolee WJJ, No.24 October 1967).
2. "It frequently occurs that a marriage, while in the process of contract, is objected to by a third party who for various and often unfounded and selfish reasons turns up and submits petitions claiming that so and so the father of this girl has given her in marriage to me while she was a minor; neither party has a proof one way or the other, so the conflict goes on..."(M.S.Irshad in WJJ, No.22, 1346 July 1967). See also "prohibition of child marriage would also relieve courts and prosecution authorities from various claims based on child marriage among which is a typical dispute between the parents, and the chosen husband of the girl who insists upon her own choice as opposed to that of her parents. Parents in order to stop the girls raise claim that the girl has been contracted in marriage to someone else during her childhood." (Mermon editorial article No.11,1350A.H.,p21). See further: "dissenting parents often claim elopement, theft, and the kidnapping of the girl and other criminal accusations against her selected husband." (S.Zhwand in Mermon No.10, 1350 A.H.p.4.)

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The adverse practice of walwar and similar other practices need not be repeated here as they are discussed in a separate chapter. Most child marriages, especially among the non-educated and tribal groups are motivated by material, family, tribal and political interests of the guardian/relatives that are quite alien to the minors' welfare. Minor girls are virtually made objects of business transactions in marrying them to old men and married men; they are given in order to pay the debt owed by the guardian; they are given in order to pacify a feud between families and tribes (see pore and badd etc.); they are given in order to enhance the power position of a family or families versus a common adversary; and they are given and taken as instruments of keeping property/inheritance within or outside the families. Most of such marriages are not accomplished in response to the needs of the wards nor do they appear to heed their benefit. It is contended here that child marriage and the power of marriage guardianship have been largely misused in Afghanistan, and as such have defeated their main purposes of legality in Sharī'a.

The juristic basis in Sharī'a for the abolition of child marriage that has also been invoked by many Muslim countries of the Middle East, is the already-mentioned view of Ibn-Shubrama, Uthman al-Batti and Abu Bakr al-Asamm who held the opinion that ijbār in marriage should be confined to the insane; and that no right over minors could be said to exist at all. For ijbār is based on the need of the ward and a minor has no need for marriage. They thus considered that child marriage is totally impermissible. They further reasoned that there is no benefit in marriage before majority, for marriage is a contract the fruition of which does not emerge until then. A premature marriage on the other hand is to the detriment of the minors, for when they reach majority, they find themselves bound to the obligations of the marriage which is basically a contract to last for the whole of life. They based their reasoning on the Qur'an holding that Allah has rendered attainment of the age of nikāh as a distinguishing mark between capacity and the lack of it:

'and make a trial of orphans, until they reach the age of marriage, and if you perceive in them a sound judgement, then hand over their substance to them... '**

It is considered that the above verse implies that the age suitable

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** sura 4:5

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for marriage is identical with that of financial majority(1).

As for the choice of age at which puberty should be conclusively presumed, juristic support can be found in favour of eighteen and sixteen instead of fifteen for both sexes. Indeed juristic support can be found for eighteen, twenty-two or even twenty five as the maximum age of puberty; Abu Hanifa put the maximum at eighteen for a boy and seventeen for a girl.(2)

It is therefore further proposed that the marriageable age be enacted at seventeen for girls and eighteen for boys. In exceptional circumstances, where a distinct advantage is proved to accrue from an earlier marriage, it must be made subject to the discretion of the court to permit a marriage at the completion of fifteen years for both sexes. The fulfilment of such measures should be made a condition of valid registration, and of judicial relief. Positive legal measures should be taken to ensure the full consent of the persons of the prospective spouses through registration, and full judicial relief to plaintiffs who complain against patriarchal impositions on their right of free consent in marriage. It would be even justified to penalize a child marriage effected without an appropriate judicial order.

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1. See J.N.D.Anderson, Recent Developments in Sharīʿa Law, The Muslim World. 1951 : 115; also Mohammad Abu-Zahra, op.cit: 162.
2. See J.N.D.Anderson ibid.p.117.

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## Chapter III

## Polygamy

At present the traditional Hanafi law of polygamy is applicable in Afghanistan. In the past modern reform of the law of polygamy was introduced under the Nizamnama reforms of the 1920's which were subsequently ended with the fall of King Amanullah in 1929. The Constitution of 1931 restored the applicability of the traditional Sharī'a and thus tacitly cancelled the Nizamnama measures.

The radical reforms of the 1920's are significant as they embodied an authoritative expression of the modernist views as much as they created an example in which the subsueqent reformist thoughts found their historical factualism. The Nizamnamas have in this respect functioned as a basis of the sense of awareness of comparing the present with the past. (1)

No data exist to show the scale and intensity of polygamy for the whole of Afghanistan. Individual research works carried out among the Tajiks of Andarab Valley, and among the Durranis of Sar-e pul area have recorded that the incidence of polygamy was as high as 15% and 9% of all marriages in the two areas respectively. (2) A general impression held by most commentators is that polygamy was more widely practiced in the past. The economic insufficiency of most Afghans as well as the spread of modern ideas and education have probably restricted the practice of polygamy in Afghanistan during the present century. There are nevertheless factors such as tribalism, high rate of infant mortality, lack of legal and

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1. Commenting on the Constitution of 1964 an observer aptly noted: "Afghanistan has experienced some fitful starts for reform before in the 20th century. On two former occasions, during the reforms and attempts at modernization by King Amanullah, and in the brief experiment in liberalization permitted under PM Shah Mahmud between 1949 and 1951, any progress achieved was nullified either by popular opposition or royal fears that popular demands were approaching revolutionary fervor. The problem underlying the cautious pace of the past years developments centres in the fate of the former attempts." (T.S. Gochenour, A New Try for Afghanistan, Middle East Journal, V. 19, 1965: 1).

2. See S. Uberoi, Men, Women and Property in Northern Afghanistan, in S.T. Lokhandwalla, India and Contemporary Islam, Simla, 1971:398: the figure 9% is based in N.Tapper (personal communication, 1972).

social restrictions etc. that foster polygamy, and suggest the oppressive manners of its practice. Legislative inactivity and the fact that polygamy has been left a matter for the individual to decide, have resulted in indiscriminate practices especially among well-to-do people. This, together with the increased impact of the egalitarian ideas incorporated in the Nizāmnāmas as well as in the 1964 Constitution, have on the whole given rise to criticism of the legal position, hence to demand for law reform in order to restrict polygamy in Afghanistan.

After an account of the Sharī'a law, and of the Nizamnama reforms, a discussion of the socio-economic factors relating to polygamy will be followed by an illustration of the current opinions on modern reform.

The Qur'an allows a man to be married to up to four wives simultaneously. But, at the same time husbands are enjoined to treat co-wives equally and not to marry more than one wife if they fear they will be unable to do so. (1) The Qur'an also acknowledges that it is impossible for a man to treat several wives equally in all respects, however much he wishes to do so. Thus it appears from the text of the Qur'an that the word 'adl (justice) is used in its comprehensive sense. Reading the two verses together, the question arises as to how the Qur'an made polygamy dependant upon a condition that was impossible to achieve. As the condition was explicit in the text, the main question that exercised the minds of the early interpreters was to qualify the nature of this condition. The early jurists, in their attempts to qualify 'equal justice', however, chose to minimise the legal implications of this term. Assuming the permissibility of polygamy as a Quar'anic dispensation, two approaches could conceivably be adopted for interpretation.

One possible approach would be to substantiate the Qur'anic standards of 'equal justice' in order to make polygamy legally difficult to obtain. The alternative approach would be not to emphasize 'equal justice' and thus to make polygamy easily obtainable. The Sharī'a schools adopted the latter approach. They minimized the implications of 'equal justice' by rendering it largely a matter for the moral conscience of the

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1. Sura 5:4.

individual rather than a legal matter to be decided upon by the courts of justice. The traditional interpreters also maintained that 'equal justice' can only form a legal consideration after the polygamous marriage rather than a condition to precede it. This was in spite of the Qur'anic wording 'if you fear that you cannot do justice...' The early jurists urged that the equal justice demanded by the 'verse of polygamy' must be interpretated in terms of those favours over which a husband had control, not the instinctive inclinations of his heart (1). The Sharī'a jurists are agreed in principle that the meaning of 'equal justice' in the 'verse of polygamy' does include the favours of one's heart, but added that God has not demanded this kind og equal justice; what is demanded rather is that an attempt should be made in that direction. For Allah does not oblige a man to do what is beyond his capabilities (2). Another aspect of equal justice is that the husband must be able to maintain a second wife. This is indicated in the 'verse of polygamy', the pertinent part of which was construed by Al-Shāfi'i as meaning that "your children may not increase" - alla ta'ulu - according to which if a person is unable to maintain a second wife, he is not permitted to marry polygamously.

The Sharī'a jurists are agreed that when a person fears that he will be unable to maintain impartiality, polygamy is prohibited for him (harām).

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1. See J.N.D.Anderson, Islamic Law in the Modern World - New York, 1959,:1: see further Amir Ali who points out the variant view of the Mu'tazila sect who believed that the conditions under which Islam permitted polygamy are impossible of fulfilment, and this practically amounted to a prohibition of the practice. He shows that the word 'adl' (justice or equity) according to the Mu'tazila does not only mean "equality of treatment in matters of lodgment, clothing and other domestic requisites, but also complete equality in love, affection and esteem. As absolute justice in matters of feeling is impossible, the Qur'anic prescription amounted in reality to a prohibition". (Amir Ali, The Spirit of Islam - London 1965, ed. p. 229).
2. See G.M. Dari, Family Law in Islam, op. cit. p.63.

But if he did in fact marry a second wife he would have committed a sin only. In such a case the polygamous marriage is also legally valid, for the two conditions referred to are not included among the requirements of a valid marriage. They reasoned that the prohibition in this case is a temporary one and does not vitiate the contract. For a man may fear cruelty, but may not incur it, or if he did, he may repent and do justice again (1). Thus the fear of injustice, argued the Shari'a jurists, is a matter for the individual conscience, and such matters are not to form the basis for a valid judicial order. So also is the ability to maintain, which is liable to change in the future, and it is possible that he may subsequently acquire financial ability (2). Thus, neither equality in favours, nor the ability to maintain a second wife were considered worthy of being legal conditions precedent to a polygamous marriage.

A variant view is recorded from Malik and Ahmad who held that the absence of fear of injustice is a condition for the validity of a polygamous marriage, the breach of which vitiates the contract (3).

Maliki texts also indicate that the lack of impartial treatment might amount to "undue prejudice" or darar, and this provides the wife with grounds for judicial dissolution of her marriage.

Although the traditional law does not require an intending polygamist to obtain permission from the court, once a man has married polygamously, the law concerns itself with his wives' rights. Should the husband violate their rights, the wives are entitled to bring the matter before the court. These rights cover her maintenance, lodging and equal division of the husband's time and companionship. (qasm).

The quantum of maintenance in Hanafi law is calculated by taking the mean between the husband's financial capability and the wife's previous standards of living. Thus, the standard of living of each wife, if it varies among them, will affect the amount to which she will be entitled.

A husband is required to provide each of his wives with a dwelling separate from the houses or apartments of her co-wives and free from all

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1. See Al-Sa'eed (M.S.) op. cit. 146.
2. See G.M.Dari op.cit. 64.
3. See Al-Sa'eed: 152.

other members of her husband's family-with the exception of very young children from a previous marriage. The dwelling must be sound in structure and safe for habitation. A wife whose husband offers her accommodation which falls short of the above requirements may refuse to begin co-habitation until he provides her with a dwelling that satisfies the Shari'a requirements. Such a refusal will not be considered disobedience, so the husband will be obligated by law to maintain his wife during this period. Equally a wife, whose husband introduces a co-wife into her apartment will be entitled to leave the matrimonial home, and this will not be considered as desertion, so the husband will be required to maintain her until he provides her with separate accommodation. (1)

Equal partition of time, as mentioned above, indicates the Husband's residence and companionship, not a right to sexual relations. No difference is permitted in this respect whether wives be virgin or non-virgin, new or old, healthy or in ill health, muslim or kitabiyya; all have equal right for companionship. One exception to this rule is when the husband takes a new wife. If the new wife is a virgin, he is entitled to spend seven consecutive nights with her and if she is a non-virgin, only three. The husband is under no obligation to compensate for these nights with his other wives. The basis of this allowance for the new wife is to facilitate familiarity and to prevent hatred at the outset of the marriage, and not because of a preference for the new wife. For if preference were the basis, then the first wife should be more entitled to his attention as she is more vulnerable at this time to feelings of terror and tension. (2)

A further exception to the requirement of equal partition is when a husband is travelling. In such circumstances it is up to the husband to choose one among his co-wives to accompany him in his travels. The majority view recommends that the choice should be made by casting lots. According to Al-Shafi'i, however, lottery is

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1. See Dr. Hinchcliffe, Islamic Law of Marriage and Divorce in India and Pakistan, op. cit: Chapter on Polygamy.
2. See Al-Bayâni (M.Z) Sharh ul-Ahkâm al-Shar'iya - Ṣahb Press, Cairo 1903:221.

incumbent. The necessity of equal partition in law remains unaffected whether the husband be healthy or in poor health, or whether he is capable of sexual relations or not. If the husband fails to effect equal partition he must pay compensation to the wife who has been wronged by giving her the companionship she would normally be entitled to. Equal partition is a right of the co-wife. It is, therefore, her prerogative as to whether she demands it or not. But when she does demand it from her defaulted husband, and the matter is taken before the courts, the court is to order the husband to effect equal partition in future. In case he violates again, the court is to punish him this time under its power of ta'zīr as it sees appropriate, for the husband has committed what is prohibited by Sharī'a. The punishment cannot be imprisonment for the obvious reason that the right of the co-wife could not then be substantiated.

The traditional assertion that consensus - ijmā' - maintained that impartiality is not a condition for the validity of a polygamous nikāh is disputable. The proponents of this view based their reasoning on what is reported from the ulema of jurisprudence - uṣūl - that the prohibition of one thing on account of another does not invalidate the prohibited object. The fact is that the ulema of jurisprudence are not in agreement on this point; for some of them have held the opinion that the prohibition of one thing on account of another does indicate the invalidity of the former. An example of this is the prohibition of sale at the time of the call for the Friday prayer according to which sale at this time is legally invalid. So is polygamy in case of the fear of injustice. It is on this account that Malik and Ahmad have held that impartiality is a condition for the validity of a polygamous contract without the fulfilment of which the contract is invalid. (1)

The traditional assertion that the effecting of marital rights in polygamy is largely a matter for the individual conscience of the husband, as these rights are related to the future and are of an invisible nature, is also disputable. The Ruler is authorized to obstruct the ways that lead to evil so that it may be prevented from occurring. This authority of the Ruler is incorporated under the fiqh term of sadd-al-zarā'e (obstructing the means). It is on this basis that the idiot and prodigal are intradicted. In addition to this, the traditional view is arguable

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1. See M.S. Al-Sa'eed, op. cit: 152 et seq.

when one considers emulation - kifa'a - in marriage which is valid in law inspite of its being a matter for the future and of an invisible nature.

As for the assertion that it is unjustifiable to entrust the qadi with measuring the capacity of a man to support a second wife or assessing his sense of justice, it should be noted that the ability to maintain is a financial question and relatively easy to calculate. Even in monogamous marriage, the court is under the traditional law competent to decide upon the quantum of maintenance after acquiring knowledge of the economic circumstances of the husband. Likewise it will not be so difficult for the court to acquire information regarding the financial circumstances of an intending polygamist. As for the ability of an intending polgamist in respect of impartial treatment, it is admittedly a more difficult matter to decide. But when one looks at the rules of fiqh, one realizes that such instances are not unfamiliar to the function of the qadi. Regarding witnesses for example, on many occasions the qadi is not to admit a testimony unless it is assured, through examination and inquiry, open as well as confidential, that the witnesses are of just character. This indicates that the qadi is authorised to inquire into the personal behaviour of the individuals before the court. After all, the provisions of fiqh, in their greater part, are the opinion - zann - of the fuqaha. And the opinion of a mujtahid is a verdict - hukm - that necessitates compliance. So are judicial orders, most of which are the opinions of judges.

An ethical argument advanced in favour of polygamy is that some people do not find one wife sufficient and want more, otherwise they may commit zina. This argument defeats itself when it mentions vaguely "some people", for "some people" are not satisfied even with four wives; . what is the position then! It is therefore better to abandon this level of argument. It would also be inaccurate to say that polygamy was permitted for the purpose of sexual satisfaction. Indeed sexual satisfaction is not the purpose of polygamy inasmuch as it is not the purpose of marriage, whether monogamous or polygamous. It is the procreation of human beings and their protection rather than sexual satisfaction that constitutes the primary purpose of marriage in Sharī'a. This is clear from the position in Sharī'a that nikāh is

permissible for a person who may have no sexual desire, is impotent, in ill-health or of advanced age. Although the primary aim of nikāḥ is not satisfied when sexual desire is lacking, the Sharī'a nevertheless does not forbid such people from nikāḥ. In adddition to this the Sharī'a punishment for zinā by a muḥsin is stoning, whereas for a non-muḥsin it is lashes. Of the conditions of being a muḥsin, one is marriage. The Sharī'a has not provided that the adulterer, in order to be punished, should be married to more than one wife. This indicates that the Sharī'a jurists did not attend to the question whether some people find one wife sufficient or not; for otherwise marriage, as a qualification for the punishment of stoning in zinā, would have been fixed at four wives. Especially when one notes that the fuqaha have laid down heavy conditions for the application of the hadd punishment for zinā; for the maximum number of polygamous unions would be in line with this policy. This also confirms that the norm in Sharī'a is monogamy and that polygamy is an exception to the norm.

The context in which the 'verse of polygamy' appears in the Qur'an is also worth noticing. The preceding verses emphasize kindness and consideration to orphans, and stress that their persons and their substance must be honoured and guarded carefully so that the loss of a father does not leave them utterly unprotected. It is with this background that the 'verse of polygamy' appears. Therefore one must not lose sight of the fact that the 'verse of polygamy' is revealed in a narrow context. Moreover the meaning of the word women - nisā - in the said verse (... and marry of the women that seem good to you ...) is orphan women. The word yatâma (orphans) in the preceding verse includes both men and women, thus the word nisâ in the succeeding verse of polygamy qualifies the preceding general term for orphans - yatâma - . The word nisâ therefore indicates orphaned women. That this is so is also supported by the explicit mention of yatâma al-nisâ (orphaned women) in a subsequent verse of the same chapter (sura) as referring to the verse of polygamy. (1)

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1. "and when they ask you of women, tell them that Allah has ordered you of what is revealed in the book regarding the orphaned women to whom you do not give what they are entitled and yet you want to marry them." (sura 4:127). The phrase' revealed in the book regarding the orphaned women' refers to the preceding 'verse of polygamy'. See more in M.S. Al-Sa'eed op.cit: 157; and in Sheikh Abu Zeid, Al-Zawāj wa Talāq al-Madani fil Qur'an, (civil marriage and divorce in the Qur'an), Egypt, 1906:23.

The narrow context in which the 'vserse of polygamy' appears, and the limited meaning of the terms therein are yet other issues which, not unlike the condition of impartiality, have not received proper consideration in the traditional views.

As for defining the grounds for polygamy, the authority is vested in the Muslim community and its Ruler to define them in view of the circumstances of the time; they need not be confined to the context in which the 'verse of polygamy' appeared. For the 'verse of polygamy' has taken into consideration the circumstances in which it is revealed. In doing so and with the change of circumstances, the Ruler will consider the public interest. A more general example of such grounds is said to be a drastic outnumbering of men by women. To leave polygamy entirely to the whims and sensuality of individuals has support neither in the Qur'an nor in the prevailing circumstances of the time. The public interest today, in the view of the present writer, requires strict limitations on polygamy.

That monogamy is nearer to the just order of the family is clear in the Qur'an which says, that "... this is better than you do not do injustice (or, that you may not be overburdened with children)." It thus appears that polygamy is subject to what is true of all other rights in Sharī'a, that is to say that its exercise must not give rise to prejudice - ḍarar -. That polygamy is fundamentally prejudicial to the well-being of the family is also clear. Therefore it should not be permitted unless the aim is to prevent a stronger prejudice from occurring. (see more under conclusion to this chapter).

The Nizâmnâmas on Polygamy

The first and the only instance of reform in the laws of polygamy in modern times in Afghanistan was effected through the Nizâmnâmas of the 1920's. The introduction of strict limitations on polygamy represents one of the most outstanding features of the Nizâmnâmas. These reforms were:

"The order of the Almighty is enjoined in the Qur'an (verse 4:3 cited) according to which it is permissible to take up to four wives in nikâh. But if you fear that you cannot render justice and equality among them then marry only one. Therefore any Muslim who violates the Almighty's order causes himself damage in this world and hereafter.

Accordingly, I command that when twenty days have passed after the promulgation of this Nizāmnāma, any person who has one wife, two wives or three wives and wishes to enter a further contract of nikāh is to present upright and pious witnesses before the Peace Court to testify his sense of justice and equality. Only after obtaining the permission of the court in accordance with the following rule can the nikāh be contracted." (1) This rule states: "Any person who, in violation to rule one, entered into a second, third or fourth marriage without the permission of the Peace Court shall be liable to two years imprisonment or a fine of two thousand rupias. Whenever, during the course of marital life of the polygamous marriage, there appears anything unjust and in conflict with the testimony of the witnesses of justice, the latter shall be liable to a fine of one thousand rupias or to one year's imprisonment." (2)

As for those involved in contracting the nikāh, Rule (3) states that: "Anyone who contracts a polygamous marriage in violation of Rule (1) and without the permission of the Peace Court shall be liable to punishments as decreed in Rule 2." (3).

As for marriages already contracted before the Nizāmnāma, whether monogamous or polygamous, Rule (4), ensures that: "Any person who, previous to the Nizāmnāma of Marriage, had more than one wife and in treating and providing maintenance for his wife or wives consequently acts against the Sharī'a. Then in the event that the wife's complaint reaches the Sharī'a Court, inquiry will be made into the matter in accordance to the Sharī'a." (4)

In view of the fact that polygamy is more often practised by the wealthier, the Nizāmnāma quite realistically takes a further step: "Among the offenders liable to imprisonment or fines, those who have financial means and commit the prohibited offence; because of their ability to pay the fine, shall be sentenced to imprisonment and not fined. Those unable to pay the fines shall of course be committed to imprisonment." (5).

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1. Rule (1), Nizamnama of Marriage 1921.
2. Rule (2), ibid.
3. Rule (3), ibid.
4. Rule (4), ibid.
5. Rule (5), ibid.

In addition to the above rulings, the Government had imposed progressive tax on the contracting of the second, third and fourth marriages respectively.

Referring to the social basis of its reform, the Nizāmnāma of 1921 in its preamble mentiones the evil effects of child marriage and polygamous marriage: "Claims are frequently initiated in Sharī'a Courts that emanate from the husband's cruelty and encroachment of the wife's rights. In order to suppress cruelty and conflict and to attain equality for women which is in accordance to the holy Sharī'a, we command these rules."

As already mentioned the Nizāmnāma reforms were short-lived. They soon became the subject of traditionalist controversy which presented itself in the following Grand Assembly (Loya jirga) of 1924. But before giving an account of the 1924 amendments, a brief reference will be made to the manner of enactment of the Nizamnamas including that of the 1923 constitution, and the consequent reaction of the religious leaders to these reforms.

G.M. Ghubar, a living author and a participant of the 1920's reformist movement wrote the following: "Under the 1923 Constitution, which was passed by the Grand Assembly (872 members) of Jalalabad and later of Paghman in 1924, the legislative affairs of the State were entrusted to the State Council. The State Council prepared the legal projects which were then submitted through the Cabinet to the King. The function of the State Council and of the provincial councils were set out in articles 39-49 of the Constitution. The judiciary had vast powers and a kind of personally-orientated independence it had inherited from the past. The Constitution, while respecting the independent status of the courts, nevertheless restricted the traditional powers of the judges. Previously the judges considered themselves all powerful and especially so in criminal affairs. The weapon of ta'zīr in their hands worked as a sharp and flexible tool, for penalties were not specified previous to the perpetration of the offence, and were instead left to the discretion of the judges. The judge could punish the offenders as he pleased, taking into consideration the apparent facts and the social status of the accused to anything from ear-pulling to death. King Amanullah in collaboration with a number of modernist jurists (fuqaha),

the leading figure among whom was Maulawi A. Wāse' Qandahāri (president of the State Council) compiled two volumes called Tamassuk - al - Quddāt (guide for judges) to be applied in the courts. These documents restricted the vast powers of the judges and largely replaced tazir with taqdir (measuring) in the form of a code specifying penalties for offences. This was a fundamental jurisprudential reform in Afghanistan; but owing to the limitations that the Constitution and Tamassuk - al - Quddat imposed on judicial powers, it was received with a lack of enthusiasm by the judges. The judges as a class became alien to the reformist movement of the government." (1)

Ghubar further noted: "The Constitution of 1923, in its clauses on civil rights (articles 8-22), emphasized the individual's equality before the law regardless of race, religion and language. For the organized running of the state affairs, a number of Nizamnamas were passed by the Government and the Grand Assembly*. Some of these Nizāmnāmas, such as the Nizamnama of Basic Organizations and the Nizamnama of Criminal Affairs, were more extensive and significant in their effect on the consolidation of criminal law and the organization of the courts. The importance of the new reforms was, among other things, in their elimination of the various forms of discreminations." (2)

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1. G.M. Ghubar, Afghanistan Dar' Maseer-e Tarikh, op.cit., page 794.
2. Note "...for example, the religious rituals of the Imāmiyya sect were then practised with greater freedom in their own masques. The Hazāra slaves (the legacy of Amir A. Rahman's period) were released from slavery, among whom in Kabul alone over seven hundred slaves and concubines were freed from their masters' households. The provincial councils of Qandahar, Ghazni and Jalalabad, and the Education Academy of Kabul included one elected Hindu member, the Hindus thus partook in the administration. The old restrictions of yellow turbans as the Hindus' distinguishing emblem, and their outstanding taxes of jazya were all abolished by the Ordinance of May 1920 by King Amanullah. The Hindu children were admitted to civil and military schools and to the Army. Among the discriminations abolished were also the tribal subsidies paid to the ruling Mohammad Zai tribe and other tribal chiefs. Privileges of the religious leaders were also abolished." (G.M.Chubar, op. cit. page 794.).

*A list of the various Nizamnamas, numbering sixty four appear in L.B. Poullada, Reform and Rebellion in Afghanistan, 1919-1929, Cornell University Press, 1973:99.

The Grand Assembly of 1924 on the Marriage Nizamnama:

King Amanullah, presiding over the Grand Assembly, said inter alia, in his opening speech: "since the methods of popular representation have not yet been firmly developed in Afghanistan, I have summoned this assembly to consult the ulema and notables of all the provinces on matters concerned with the progress of the country. I do not wish to oppose the holy Sharī'a, however I propose that whatever authority that the Shari'a vests in a Ruler,it is I who should possess it, and not the Ulema. For example, only yesterday,speaking in the public masque of Paghman, a mulla who is probably present said that Sharī'a is delivered to the ulema and belongs completely to the ulema. Nay, Sharī'a belongs to the Almighty. Of course ulema are entrusted to explain the Sharī'a and to throw light thereon." (1)

Concerning polygamy, King Amanullah went on to say: "Just as the Almighty has permitted polygamy, He has also emphasized justice and equality among the wives. But alas, nowadays many of us while totally accepting the first part of the verse (verse of polygamy cited), entirely ignore the last part. My aim in the enactment of the Marriage Nizāmnāma is precisely this: to draw attention to the orders of Allah. As for the Nizāmnāma's requirement of two witnesses, it is designed to prevent injustice to the wives. For in the past the first wife while being faced with hardship had no legal rights enabling her to put forward a complaint." (2)

A religious leader while objecting to the above argued: "The Qur'an has addressed the husband and it is up to him as to whether he choses monogamy or polygamy. In case of injustice, of course, no more than one wife is permitted. But in polygamous marriage, neither the Qur'an nor the sunnah nor the fiqh texts provide for witnesses as such. When a husband invades his wife's rights, the latter is entitled to complain to the courts in person or through an agent. I emphasize again that the Qur'an has addressed the husband and not the Ruler. Therefore, the King has no right to interfere. Besides, the condition of providing witnesses does not seem to be the answer, for it is possible that a man who produces witnesses to testify to his justice at the time of nikāh, can later become unjust." (3)

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1. Roydāde Loya Jirga, 1303 AH (Account of the Grand Assembly, 1924) op. cit. page 50.
2. Ibid. p. 168.
3. Maulawi Fazl Rabi, ibid. p. 170.

Expanding on the subject of justice in polygamy King Amanullah argued: "It is only natural to say that those who enter polygamous marriage never do respect justice and equality, as they have violated it from the very beginning. Besides, the children of one wife, who are brothers and sisters to the children of the other, look upon each other with jealousy and bitterness. The same situation prevails among the wives themselves. This gradually develops into disharmony and conflict, quite against the affection and solidarity as recommended by the Sharī'a." (1)

It is interesting to note that King Amanullah himself was brought up in a polygamous family. His father, Amir Habibullah (assassinated 1919) had several wives; but at the time of ascending the throne kept only four.

Another religious leader urged that: "The tax imposed by the Government earlier this year on the second, third and fourth marriage be abolished." (2)

King Amanullah continued: "We must take our responsibility for the women seriously. My concern, as a monarch especially, extends as much to the well-being of my female subjects as to that of the males. This responsibility also lies heavily upon the uloma. My conscience does not allow me to let the selfish and bestial wishes of a few men take precedence over the rights of my helpless and oppressed female subjects." (3)

An alternative proposition was made by another religious leader who stated: "It appears from the meaning of the Qur'anic verse (4:3) that justice can never be maintained in polygamy. However, as already mentioned, the Qur'an, probably owing to the particular circumstances in early times, permitted polygamy. Whenever justice is not maintained, there is the fear of conflict. This fear of being unable to be impartial exists prior to entering the polygamous marriage. In an another verse (3:36 cited) the Qur'an provides for arbitration in the event of the

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1. King Amanullah, ibid. p. 169.
2. Hazrat Sâhib of Shorbazar, ibid.
3. King Amanullah, ibid. p. 172.

fear of matrimonial conflict occuring. Hence a possible procedure would be to ensure that before contracting a polygamous marriage, arbitrators should be appointed from each side to attempt reconciliation. Whenever the arbitrators succeed in effecting reconciliation, they should be consequently required to assure the continuation of harmonious relations within the marriage by close supervision." (1)

Yet another religious leader emphasized that the Nizâmnâma measures on polygamy were in consonance with the spirit of Sharī'a, and in keeping with the Prophet's sayings. (2)

One of the mullahs, however, proposed that the provision of witnesses be dropped and replaced by an assurance that oppressed wives should be granted, at every possible opportunity, the right to be heard by the court and other authorities. The oppressor should then be made liable to punishment. This proposition, however, attracted clamorous support of the Assembly who then urged for the King's approval. The Assembly also put forward a proposal that husbands who interfere and prevent their wives' complaint from reaching the court should be punished; and in cases where this behaviour is subsequently repeated, the punishment should be more severe. (3)

King Amanullah responded by pointing out that "the difference between us is that my measures were preventative and that your proposition is retributive. I attempted to ensure that theft should be prevented, and you urged that never mind that theft has taken place, sufficient precautions should enable us to find the thief and the property."

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1. Maulawi Mohammad Hussein, ibid, p.173.
2. Maulawi Mohammad Bashir, ibid, p.175, see quote from the Prophet's final speech (Ḥajjat - al - Wida').
3. ibid, p. 174-180; A further proposal made by a delegate was that "Women who go to court and submit unfounded complaints, should also be made subject to punishment." This was rejected by the Assembly whose view is recorded as saying: "Women would not dare go that far."

King Amanulla eventually agreed to the above proposition, and the amendments were consequently incorporated into the 1924 Nizâmnâma of Marriage with an appeal made by the monarch to the religious conscience of the people as follows: "The order of the Almighty is enjoined in the Qur'an (4; verse 3). Any Muslim who violates the Almighty's order causes himself damage in this world and hereafter, Oh my truthful subjects! Observe Allah's order. If you can render justice and equality then you may take into nikāh up to four wives. But if you cannot, then one will suffice. For having more wives in disregard of justice is a great sin." (1)

In this Nizamnama (1924) the following provision appeared in regard to the violators of justice: "... the violators of justice in polygamous marriage shall, upon the court's receiving the report substantiated by proof, be liable to tazir punishment. Moreover, any husband or guardian, forcibly preventing women from complaining or petitioning to the court of the injustice inflicted on them, shall be liable to tazir punishment." (2)

The Grand Assembly of 1924, in a nineteen item resolution, also overruled some reform measures previously passed. For example, it restored the traditional judicial powers of tazir (3), and enhanced the mullahs' status generally. (4)

These resolutions, as well as those on polygamy, were suggested mainly by the religious leaders, however, a definite bias towards tribal attitudes was predominant in the Assembly.

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1. Art. 1, Nizamnama of Marriage, 1924.
2. Art. 2, ibid.
3. However, one important restriction on tazir and the power of judges in criminal affairs was that penal sentences were to be passed not by the individual judge, but by the provincial council (Majlis-e Mashwara), of which the judge was a member (Roydade Loya Jirga, op. cit., p. 311).
4. Among the resolutions were: "Mullas are to be included among the members of the civil servant's courts; muhtasib should carry the duties of Ihtesāb; affairs of the servants of the mosque are to be regularized; instruction of theology in schools is to precede that of foreign languages; women are to study at home etc." (G.M. Ghubar, op. cit., p. 797.)

This is clearly seen in the resolution passed regarding military service: "If the individual does not wish to do his military service, he can alternatively avoid this obligation by paying a sum of money to the Government." The Assembly similarly sanctioned that: "In the Shari'a court litigation, possession of the identity card is no longer necessary." (1) In this way, the tribes could remain fairly independent of the central government.

The Government, faced with crisis, did not resist traditionalist demands. But later on the reform measures were re-introduced. Once a measure of stability had apparently been established, Amanullah set out on an official tour of Europe and the Middle East. In Amanullah's words, this extensive tour - about seven months - was not a voyage of pleasure but one of study and social exploration: a trip that would allow him to "take back to my country the best things that I discover in European civilisation." On his return to Kabul, Amanullah everywhere haranguedthe Afghan masses about progress and attacked the reactionaries and traditionalists who wanted to keep the Afghans shrouded in ignorance. Once in Kabul he addressed an emotional appeal to the nation which read in part "the surest way to progress is to make every effort to have our sons and daughters educated according to modern standards. I am compelled to say that the great secret of progress for our country lies in discarding old and outworn ideas and customs." (2)

In the summer of 1928, the 'Society for the Protection of Women' was formed and administered by twelve representatives of Kabul women. In August 1928 Amanullah convened a Grand Assembly-Loya Jirga- summoning some one thousand notables to hear a report of his tour and to approve his second reform programme. He suggested that substantial changes be made in the 1923 Constitution, amendments that were to make the Government genuinely representative. The Grand Assembly approved many of Amanullah's proposals. New restrictions were imposed on the powers of judges and Governors; being a mulla became conditional upon the possession of an official certificate; freedom of the press was

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1. Roydāde Loya Jirga, ibid.
2. see Gregorian, op. cit. 256.

endorsed; unveiling for women was permitted; to eliminate discrimination, honorary titles were abolished; and the initiation of an elected House of Representatives - Shurá'e Milli-of one hundred and fifty members were sanctioned to replace the State Council. Some military and tax reforms were also approved. The Grand Assembly accepted Amanullah's reform proposals, even though some of them meant a curtailment of the authority of the religious and tribal leaders. With the conclusion of the Grand Assembly, the monarch convened in Kabul - at Stour Lawns - a large meeting of the civil and military officials and notables where he personally explained the Government's future programme. At this occasion he announced the prohibition of polygamy for Government employees. Female education and the establishment of schools for girls in all the provinces was announced to be the aim of the Government. A number of Afghan girls appeared for their farewell ceremony on their way for study abroad - the first group of unveiled female students to go abraod. Religious orders (piri and murshidi) were to be no longer observed in the army. (1)

Factors Relating to the Practice of Polygamy.

As pointed out before, no data exists to show the frequency of the incidence of polygamy for Afghanistan as a whole. The prevailing impression of various writers, however, indicates that because of the high costs incurred in marriages in Afghanistan, and the cost of maintaining several wives and children, most people cannot afford to maintain polygamous households. (2)

A further factor known to have kept the incidence of polygamy at a low level is education, especially female education. The spread of modern education has made women less willing to accept polygamous marriages and husbands less inclined to consider such an arrangement desirable. (3).

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1. see G.M. Ghubar, op. cit: 798.
2. "Tribal practices are changing today as tribesmen find it is becoming too expensive to support several wives and their many children. Tribesmen are turning to monogamy according to numerous informants." M.B.Watkins, Afghanistan, Land in Transition, London, 1963 : 176.
3. "Monogamous marriage is preferred by the educated upper-class." D. Wilber, Afghanistan, op. cit: 92, see also M.Ali, Afghanistan, op. cit: 34: "Monogamy is the general rule, especially in the enlightened circles."

The proportion of male/female population is presumably a further restrictive factor on polygamy. The official estimated statistics show that females constitute 48% of the whole population in which case no surplus of females is available to be redistributed among the males, who outnumber the females by four per cent (1).

A further consideration that has rendered polygamy relatively undesirable is the disharmonising effect of polygamy on the family. (2) It is common knowledge that polygamy entails favouritism on the part of the busband. The younger and newer wife often receives more favours and attention from the husband. Whatever the physical arrangement regarding residence may be, some problems of authority are likely to arise between the co-wives. The co-wives may have different backgrounds (social, economic etc.,) and claim differential status accordingly. Variation in fertility and births among the co-wives can often be the case in polygamous households. The patriarchal pattern of the family also favours male children to the female. A mother of a male child/children is likely to have greater status in the family. Each mother will attempt to obtain favours for her children and to influence the husband to comply. Moreover, the effect of children, their sex and number, with regard to the rules of inheritance, tends to give rise to jealousy among the co-wives. The husband must delegate some responsibility to one of his wives rather than to all. Variation in this respect may cause resentment.

The arrangements for residence and accommodation of the extended family tend to add to the tension involved in polygamy. Despite the emphasis in Sharī'a on the right of separate dwelling for each of the co-wives, the prevailing pattern of residence in Afghanistan indicates that no serious consideration is given to this aspect of the Shari'a. For the extended family usually involves the co-wives and other members of the family all living in the same unit. A household may

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1. Statistical collection, 1971, op. cit.
2. "I have been told that among the Afghans in all 'harems' there is an endless struggle for supremacy among the different wives. And this is why charms and love potions and other magic arts are resorted to by women in an endeavour to concentrate the love of the husband on herself". F.A. Martin, Under the Absolute Amir, op. cit: 287.

"consist of the patriarch and his wife or wives, his unmarried children and his married sons and their children, his unmarried sisters and brothers and their families." (1) Thus the common pattern of residence appears to be that several generations often live under one roof in the same house or compound. Hence, "physical crowding and forced co-existence tends to foster tension in the household." (2)

The restrictive effect of the economic factor on polygamy as mentioned above is prima facie largely operative among the economically less able who cannot afford to maintain more than one household. Thus a function of the economic factor, as will be seen later, is that polygamy has become a priviledge of the wealthy. Yet it should also be noted that polygamy is not always economically burdensome. In fact polygamy may sometimes be economically profitable especially when the prospective wife has some training which enables her to earn. (3) A polygamous marriage may bring an additional source of labour to the household. This is in fact the case among the Turkomens of northern Afghanistan where carpet weaving is mainly an occupation for the women:

> "Polygamy is encountered most frequently among the Turkomens where the income of a second wife through rug weaving tends to offset the cost of her support." (4)

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1. L.Dupree, A Note on Afghanistan, A.U.F.S., op. cit. No.8, 1968.
2. See further "Residence patterns show considerable uniformity. The extended family may include several generations living under one roof in the same house or tent. Sometimes the extended family lives in proximity within the same compound or encampment section." (H.H. Smith, op. cit: 95).
3. "Needless to say. that desirability is estimated not only by beauty but by earning capacity: a carpet weaver is going to be a good investment for the family." Kabul Times, Feb. 12th. 1973.
4. H.H. Smith ibid: 93.

One would normally expect that the earning capacity of a woman is her economic strength and that this would result, as in the West, in her greater independence and self-reliance. But in view of the fact that the income earned from carpet weaving by the Turkomen women usually goes to the husband, (1) employment and earning have not yielded the liberating effects that would be expected from the woman's ability to earn a living. An explanation of this may be that, broadly speaking, women in Afghanistan are traditionally identified with sedentary handicrafts; carpet weaving in this connection may be regarded an extention of the traditional role of the Turkoman women. Carpet weaving is basically a cottage industry, privately operated, and is not subject to the organisational methods familiar to large scale modern indistries. (2)

It is on the other hand true, as already pointed out, that polygamy is infrequent among the more educated. (3) Female education restricts polygamy not only in the sense that enlightened women find polygamy unattractive, but also that educational qualifications create the ability for earning. The earning capacity in this respect, i.e., when co-existent with education, appears to strengthen the status of women and thus restrict polygamy, whereas the earning capacity of women without education, as in the case of the carpet weavers, intensified polygamy.

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1. "The Governor of a district (Chardara in the province of Kunduz) explained to me with some pride the way in which the region's beautiful hand woven carpets were made; how five or six women might work together to make a patterned carpet; and how a man would pay a good brideprice for a girl who was an accomplished carpet weaver. When I asked him who got the money for the carpet, he looked at me in astonishment and replied: 'why, the man of course, the women belongs to the man.' It is this attitude which is the chief obstacle facing the champions of women's emancipation in Afghanistan." (J.C.Griffiths, Afghanistan, Pall Mall Press - London, 1967: 78).
2. "A speciality of the home industry is the weaving of carpets, this is done mostly by the women and children in certain localities and among certain families, each of which has its own design and techniques transmitted from generation to generation ... Although the economic of Afghanistan still resembles a wide sea dotted with islands of economic activities, recent and continuing improvements in transportation are altering this pattern." (Wilber, op. cit: 190, 202).
3. "The enlightened modernized Afghan is monogamous for more than strictly economic reasons; he accepts monogamy in theory as well as in practice." (M.B.Watkins, Afghanistan, op. cit:99).

An instance where polygamy may be motivated by its economic value of providing additional source of labour is in its relationship to the common tradition of hospitality. In order to be hospitable to his people, a tribal chief or a local notable may need additional wives to provide help in domestic chores. Hospitality is an honoured tradition in Afghanistan almost everywhere, and it has a special place in the Pushtun code of behaviour. (1) The tradition of hospitality is more emphathic in the villages where public facilities for food and accommodation are rare or virtually non-existent. Most village and tribal notables keep a separate guesthouse in the vicinity of their household where hospitality is extended to visitors. It is a matter of pride to feed all who come. An important occasion for hospitality arises with the meeting of the tribal council - jirga - which can last for several days. (2)

Further to the bearing of education on polygamy, a counter-effect of increased education meaning less likelihood of polygamy can be conceived in the following situation: Child marriage presumes that the couple will be on a par in terms of communication when adult. Increased education has in some child marriages produced a gap between the husband who has experienced higher education (3) and more stimulating social relationships, and his wife who may be

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1. "The most universally honored tenet of Pushtunwali (tribal code of the pushtuns) continues to be the principle of hospitality - milmastiā -. In the country hospitality is a major factor in the Afghan life, for the guest not only brings joy to his host's heart but prestige to his host's family. It would disgrace a man if his friend came to his village and passed his house to stay somewhere else. In the country hospitality is the basis of competition and the two motives of increased prestige and genuine good will are closely intermingled." (Wilber, op.cit: 119).
2. "Some jirgas continue for several days before a decision is reached. At the close of a jirga a feast is held for members of the tribal group. A jirga may require an offender to give a community feast and ask for forgiveness." (Wilber, op. cit: 117).
3. It should be noted that educational imbalance is not only a consequence of the lesser availability of female education in Afghanistan, but also traditional attitudes: "Religious and social attitudes disapproving of education for women are beginning to change, but still tend to restrict especially in rural areas." (H.H.Smith, op. cit: 123).

tradition-bound and illiterate. Such a situation can lead to divorce. Divorce being considered socially disgraceful, the family is likely to accept polygamy as a last resort rather than seeing the marriage dissolve. The traditionally influential position of the extended family, and the vested interest of the two families of the spouses in the preservation of their selected marriage tends to discourage the occasioning of a possible divorce. This influence can often be hard to ignore especially in cases of marriage among relatives and cousin marriage which are common in Afghanistan (1). Their said interest would, of course, usually discourage divorce as well as polygamy. But in cases where the families are convinced of the threatening possibility of divorce, they are likely to encourage polygamy as a lesser evil in the circumstances. (2)

Thus the restrictive effects of economic and educational factors on polygamy are multifarious. Needless to say, to rely on an economic or an educational laissez-faire to take care of unconditional polygamy would be unjustifiable. This, of course, represents only part of the reason for the need to introduce legislation on polygamy.

There are other factors which have a bearing upon the practice of polygamy in Afghanistan as follows:

Tribalism:

As a result of the warlike (3) character of the tribal milieu, greater emphasis was traditionally put on the proliferation of the male

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1. "Nearly all Afghans prefer that the potential mates be related in one degree or another. Cousin marriages, for example, are widely regarded as ideal." (H.H. Smith et al, op. cit, p.99).
2. Commenting on polygamy H.H.Smith et al have noted somewhat pertinently that "in the cities there has been a trend recently toward taking an additional wife by young men who have left their first wives in their native villages." (H.H.Smith op. cit: 94). The likely situation, in this case, would be that the first wife lives with the husband's family in the village.
3. "Highest in the priority of values established in the Pushtunwali is fearlessness in combat. Pushtun tribes and clans have been organized pre-eminently for struggle against nature and the outsider, whether he be Pushtun or not.... Attitudes bred in this competitive environment ensured incessant conflict. Hence the emphasis that the Pushtunwali places upon warrior values. Elaborate rules apply to the conduct of war and the settlement leading to peace. Crucial to Pushtun acceptance of justifiable violence is the emphasis given to righteous revenge (badal). This concept is responsible for intra and inter-tribal feuds." (R.S. Newell, The Politics of Afghanistan, Cornell U.Press 1972: 15).

population. The existence of a greater number of male members in a family or clan, not only symbolized its power and prestige, but also increased the chances of survival in case of involvement in tribal feuds. (1) Polygamy functioned as a means of greater reproduction of potential warriors. A further contributing factor to polygamy is the high rate of infant mortality in Afghanistan. A greater number of children ensures a higher rate of survivors (2).

Polygamy may also function as a means of tribalist alliances (3), and of settling tribal differences. In this way, a tribal chief may marry a woman polygamously from another clan or family and thereby ensure the improvement of relations.

Barrenness:

Barrenness of the first wife is another factor that is commonly known to motivate polygamy. (4) The question as to how the barrenness of the wife is established often remains subject to doubt. Because of the scarcity of medical facilities and an ignorant attitude to the whole issue, the benefit of the doubt has traditionally gone to the husband. (5) The importance of fertility in Afghanistan is related

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1. "The feuds and the deaths resulting from it affect the attitude of men towards family planning and birth control. A man with three sons might lose them all in a feud and suffer the anguish of an extinguished line. A man with ten sons is almost sure to have male heirs when he dies." (L.Dupree, Population Dynamics in Afghanistan, A.U.F.S. Reports, No.7 1970:2.)
2. "In the absence of quantitive data to the major population limiting factors, we must look to what has been learned by those who have been in long association with non-urban Afghans. Every family I know about reports that many children have died in infancy." (L.Dupree, Population Dyhamics in Afghanistan, op. cit: 2).
3. "Tribal organization is largely founded upon the rationale of the necessity for common defence and is held together by alliances of families and clans....Women are often seen as instruments of exchange by which family power and status may be strengthened." (R.S.Newell, op. cit: 21, 30).
4. "A man may take a second wife if his first wife is barren." (Wilber, Afghanistan, op. cit: 92); see also "In the remote mountain villages of Afghanistan it is customary for a man to take a second wife if he can afford it, particularly if his first wife is childless." (L.Street, Tent Pegs of Heaven, Robert Hale, London 1967; 168).
5. To date there is no provision in the law for obtaining even an initial health certificate at the occasion of marriage registration. Commenting on this, an editorial article of 'Mermon' noted that "cases of psychological and physical illnesses, impotence and barrenness have often led to unfortunate conditions in the families in this country. A thorough medical examination, especially of the blood group of the prospective spouses, has in many countries been included among the legal requirements of registration. It is difficult to understand why this issue has been ignored in the Marriage Law 1971." (No.11. 1350 AH, 1971). The new deed of marriage (nikāh khat), however, contains a section for the health certificate of the spouses to be recorded. A footnote is attached to this section saying that "obtaining of the health certificate, in localities where no official doctors exist, is not required." (see page 10 of the new nikāh khat).

to the birth of male offspring. A woman's fertility is seen as inadequate if she only has female children, in which case a fear can exist of losing part of the inheritance to the more remote male relatives (1). An even more unjustifiable situation is when a man, having one or two children already, still feels the need for polygamy in order to increase his family further. An example of this was the case of a 27 year old graduate who wished to marry another wife, in spite of having two children from his first wife (2).

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1. "The male interest in having sons is only one of the cultural factors to be considered in efforts to expand the idea of family planning in Afghanistan... the birth of a son establishes the fertility of a woman, the virility of a man and promises a continuing family line. Apart from his desire to continue the family line, a man is sharply aware of the economic power he gets through his sons." (L.Dupree, Population Dynamics in Afghanistan, op. cit: 3).

2. "... while I was in school and knew little about married life, I was forced to get married. Now that I have finished my edcuation and have assumed a responsible job, I realize what grave mistakes my parents have committed to fulfill their dreams and wishes to see their son married in very early age. This untimely marriage was about to shatter the course of my education. My wife likes me very much and I have the same feeling towards her. But unfortunately after bringing two children she became ill and the medical treatment resulted in her becoming barren. There is a marked difference between our ages... I am still young and want to have more children. Being kind to me, my wife has agreed that I should marry another wife... The writer regrets... et seq" (Kabul Times, Oct. 25, 1971).

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An example of the traditional Pushtun practices was the case of Asad Khan who married a second and intended a third wife inspite of his having a daughter from his first wife (1).

Lack of Documentary Evidence on Polygamy.

Among the contributing factors to polygamy in Afghanistan is also the lack of an effective system of information on polygamy: "Some men marry polygamously while simply refusing to declare their existent marriage, thus presenting the new wife with a fait accompli." (2). To date there is no readily available and reliable means of discovering an individual's marital status in Afghanistan.

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1. "The simplest way of offering the reader a glimpse of the inner social life of the Pathans will be to conduct him into a well-ordered Bannuchi peasant household: Asad Khan was fairly well off ... His senior wife Fatima bought five years before for two hundred rupees, had as yet only borne him a daughter. Gulijan his younger wife has been married to him three years; but alas! alas! seemed likely to prove childless. Both Asad Khan and Gulijan longed for a man-child, but from different motives; she that her "reproach among men" might be taken away, and that she might secure the affections of her lord and master, who already talked of adding a third wife to his establishment; and besides all this that she might be able to return the taunts of her rival Fatima with interest; and he that on his death his cousin whom he hated might not succeed to his possessions. Gulijan had long given up in despair the remedies prescribed by learned Bannuchi doctors and mollahs.... At last a boy was born; and the proud father rushed out to fire a matchlock to inform his neighbours of the happy event. On hearing the gun the neighbours came trooping in to offer their congratulations, and that evening the women of the village assembled at the house and danced and sang to the music... when about two weeks old, Asad Khan thought he had better name his child. The mollah suggested one of the attributes of God or the Prophet such as 'the exalted one' 'the blessed' or even 'the servant of God' ; but after some wavering the parents preferred a word expressive of some manly virtue and fixed upon that of Sherdil, that is 'the lion-hearted' ... Sherdil was now about fifteen and his father began to busy himself making private inquiries amongst his kith and kin for a maiden. At last Begama was considered to make a good match. A formal deputation was despatched to sound Begama's parents who replied they would agree to the match if Asad Khan would in return give his daughter to their eldest son who wished to take a third wife. Asad Khan replied that the exchange was unequal as his daughter would be wife number three, whereas theirs would be number one. After some haggling he consented, provided he received eighty rupees into the bargain, and the exchange was so arranged .... etc." (S.S. Thorburn, Bannu or Our Afghan Frontier, London 1876: 141).

2. See Mermon, No. 11, 1350 A.H. : 21.

The identity card - tazkira - is to date the only common document that contains a section for the 'civil status' of the bearer to be filled in as need arises. The identity card is also required to be produced and its number recorded at the occasion of obtaining any formal document (sanad-e shara'i) in the courts or in the offices of registration of documents. (1) Yet there is no completely reliable procedure to ensure the recording of the marital status of the bearer in the pertinent section. Once the identity card has been issued to the individual, there is no systematic procedure to assure the revision of the relevant section on marital status as may be appropriate. This is yet another uncertainty in addition to those that have already been pointed out regarding the identity card.

The deed of marriage (nikāh khat) is also silent on the subject of polygamy. Neither the old nikāh khat nor even the new one, which has been issued subsequent to the 1971 Marriage Law with some additional points of detail, provides for any section to be completed by an intending polygamist. The existent rules of registration for nikāh khat require two witnesses to testify to the identity of the spouses concerned. But there is no requirement for the witnesses, nor indeed for anyone who may be present at the actual meeting of the contract (mailis-e 'aqd) (2) to testify whether the marriage is polygamous or not, let alone consider the more remote questions as to whether the husband is capable of impartial treatment and whether he can provide maintenance and separate residence for his new wife.

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1. "In issuing formal documents, the courts are obliged to clearly record the number of the identity card of the party or parties concerned and the witnesses thereof. Any formal document that does not contain such a record shall have no value." (Regulations for the Registration of Formal Documents - De Wasā'eqo de Leekanay Ta'limātnama - 1957, article 11).

2. "The meeting of contract, in municipal districts, shall be held in the presence of the district commissioner (mudir-e nāhiya), or the local councillor and the imām of the masque, and the relatives of the parties. Outside the municipal districts, the meeting of the contract shall take place in the presence of the imām and the relatives. Im case the relatives do not participate, and where the groom and the bride agree, their nikāh shall be contracted before the court" (Art, 10, Marriage Law 1971). The law also require the above participants to sign the nikāh khat upon registration; it is their legal duty to ensure that the requirements of a valid nikāh are satisfied.

The Low Rate of Divorce

Interaction between divorce and polygamy conceivably affects the incidence of polygamy in Afghanistan. To date the traditional Sharī'a law remains applicable with regard to both polygamy and divorce. No significant reform of the Sharī'a has been effected in either of the two areas so far. Hence neither is subject to any positive legal restrictions. The social attitude regarding divorce, however, varies from the legal position. The easy availability of divorce under Sharī'a law has scarcely been paralleled by social practices. Divorce is socially frowned upon and therefore of relatively infrequent occurrence. One reason for the relatively low incidence of divorce is held to be the availability of polygamy. (1)

On the other hand traditional social attitudes regarding polygamy are not particularly prohibitive. Until the early twentieth century polygamy was a popular practice, and still is among the less enlightened; the practice was especially frequent among the well-to-do Afghans. Polygamy was on the whole regarded as a sign of wealth and prestige. It was only in the present century, especially in the light of efforts and reforms in the 1920's under King Amanullah, and the subsequent expansion of modern education, foreign opinion, and egalitarian ideas of the Constitution, that enlightened opinion distinctly turned in favour of monogamy, thus indicating disapproval of polygamy. (2)

Tribal practice relating to widows

The practice of forcing a widow to marry a member of her deceased husband's family is a problem of wide proportion which has been the subject of legislative prohibitions during the past half century or so. Under this practice the widow is denied her own choice in marriage. Her marriage with a stranger is discouraged, and the

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1. "Divorce is rare and is discouraged by social pressure, moreover the possibility of plural marriage offers an alternative." (H.H.Smith et al, op. cit: 100).
2. "Until the early twentieth century, polygamy was fairly common among upper class Afghans. This practice disappeared with King Amanullah partly because of the Western influence." (H.H.Smith et al,op. cit: 93)

members of her deceased husband's family regard it as their obligation to take her in marriage. The practice is sometimes less forceful among the more settled urban people where tribalist ties are non-existent or considerably weak; the widow may accordingly be given the choice of remaining unmarried and living with her in-laws. The custom is, however, more rigid among the Pushtuns who actively impose their wishes on widows. (1) This practice is traditionally known for being a source of conflict between families and their respective clans. (2) The practice is economically convenient in the sense that the widow is regarded as a belonging of her in-laws in which case no brideprice - walwar - or high expenditure is usually incurred. Sometimes only a nominal brideprice is paid to the widow's parents. (3) No data exist to show the extent to which this practice contributes to the incidence of polygamy, for widows may also be married monogamously. Yet it remains true to say that where no unmarried man is available among the in-laws, the widow is likely to be married polygamously. (4) It should also be noted that the practice tends to aggravate the problem of age disparity between the spouses. (5)

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1. "It is a Pushtun practice that the widow is married by the deceased husband's relatives - brother, cousin etc., - the widow is not allowed to marry a stranger." (Q.Khadem, op. cit: 47).
2. "Very often after the death of her husband, the widow did not wish to marry his relatives and as they wished to force her to do so, the result was the taking up of arms between the family of the widow and that of her husband. The quarrel was furthermore taken up by the widow's whole tribe and that of the deceased husband's relatives." (Mir Munshi, S.M. op. cit: 146).
3. "If a man marries his brother's widow, a small nominal bride-price - peshkash - is paid to the father of the bride ... the payment of the bride-price was said to be an extremely important matter. Informants usually gave fantastic figures as to prices they had to pay for brides. In Kundur - Herat region - we noticed many unmarried men who indicated they could not marry because of the lack of money." (Schurman, H.F. The Mongols of Afghanistan, The Hague, Mouton and Company 1961: 195).
4. "The prosperous head of an extended family group may have one or two supplimentary wives, the widows of his brothers or cousins, whom he has married as an obligation." (D. Wilber, op. cit: 92).
5. "... at times the man available may be extremely old or very young. It is not unusual that a thirty or thirty five year old widow is married to a twelve year old boy, or a seventeen year old girl to a seventy seven year old man." (Kabul Times, Oct. 23, 1971).

Legally, 'no one including the relatives of her previous husband, is entitled to contract a widow in nikāh without her consent.' (1) The practice nevertheless continues, it would indeed seem difficult to curb it with this form of legislation. As it is aptly put in a Mermon editorial article, "what is the punishment of those who violate the law and deny the widow the freedom of her consent? It would be better if the law clarified the consequence of its violation. For a number of legal restrictions in this law concern practices that have prevailed for generations whose discontinuation will be impossible without clear laws and explicit sanctions." (2)

Marriage expenditure, and the age disparity

As already discussed, the practice of highly expensive marriages in Afghanistan is the source of a variety of imbalances. When expenditure involved in marriage is so high as to render marriage largely a question of financial means, marriage whether monogamous or polygamous, becomes potentially purchaseable. That wealth has been used in order to practice polygamy is evidenced by the fact that polygamy is, by and large practiced by well-to-do people in Afghanistan. The function of wealth in this respect has offended the sense of social justice. Whereas the financially less able can hardly afford one wife, the more priviledged are set free to obtain several. A further unfavourable aspect of the function of money in practising polygamy, as experience shows, is its effect regarding the kind of treatment that the purchased wife meets. When the price is paid, the unenlightened man regards himself a master rather than a husband. (3)

A more indirect but none-the-less important effect of costly marriage in regard to polygamy is that high costs tend to bring about disparity in age which in turn fosters polygamy.

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1. Art. 24, Marriage Law 1971; note also article 21 of the Marriage Law 1960; article 7 of the 1924, and rule 10 of the 1921 Nizāmnāmas to the similar effect.
2. 'A Look at the Marriage Law', editorial article, Mermon, No.7 & 8, 1350 (1971) ; 74.
3. "Polygamy is practiced in Afghanistan, especially by the wealthy class in such a manner that is offensive to women and their rights." (Do the Ghaheezis Know the Qur'an, editorial article, Mermon, No.10 1350 : 7).

Disparity can exist both in the case of the less economically able as well as in that of the well-to-do. As for the former, "if a man is poor but of a family in which lavish marriages are the rule, he may not be able to afford marriage until thirty or forty. Girls are usually married before sixteen or eighteen". (1) As for the well-to-do, they often happen to be senior in age, and in order to marry a younger girl, either monogamously or polygamously, they tend to use their money to compensate for their disproportionate age. The pattern receives support also from the bride's parents. The bride's parents seem to find it financially more rewarding, for themselves as well as for their daughters, to transact with richer and older men. (2)

"The Marriage Law 1971", writes a 'Mermon' editorial, "contains no mention regarding the relative ages of the prospective spouses. This together with child marriage being permitted in this law, leaves the door open for the marriage of very young girls to much older and richer men. Indeed a considerable percentage of marriages in Afghanistan are widely disproportionate. This leads to a variety of problems, one of which is the problem of young widows... our social welfare requires that legislation should impose necessary restrictions to prevent disproportionate marriages." (3)

The marriage of a young girl to a considerably older man is likely to leave a relatively young widow and possibly children who need security and protection. This is a problem in its own right which can be reduced through legislation. The point to make however is that the existence of this situation is susceptible to the incumbent practice relating to widows as discussed above.

Similarly the marriage of a young man to a considerably older woman tends to nurture a desire for a younger wife and possible polygamy.

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1. H.H. Smith et al, op. cit: 98.
2. "It is necessary to review the notoriety of the prevailing customs and practices. As soon as the girl is in her early teens, she is married or rather given off to the very old guru or any person that the parents may choose ..., As per capita income in the country is hardly $90, many families have a very austere life. When their daughter grows up, they want to make sure her lot during her youth is a better one and make every effort to marry her off to a well-to-do husband. Now since all young have not made their money yet, the prospective husband often ends up to be older than the girl's father. This however does not worry the parents." (Kabul Times, Oct. 23, 1971: op.cit).
3. Mermon, No. 7 & 8, 1350:76 (editorial article, op.cit).

The final but none-the-less significant factor among those relating to the incidence of polygamy is the sensual one. This is probably present either singularly (1) or alongside one or more of the other factors that may be operative in individual cases.

Commenting on polygamous practices in Afghanistan, an informed commentator noted the following:

"Polygamy is one of the critical problems that has brought vast miseries to the family and has seriously affected the normal growth of the children and thus of our social evolution. Today polygamy in Afghanistan is practiced in such fashions that the slightest attention is not paid to the conditions of its permissibility in Islam, nor is there any discrimination exercised with regard to the individual needs for it. Centuries ago when human civilization was passing its relatively juvenile stages, Islam permitted polygamy; but even in those conditions the fear of injustice presented an eminent consideration. In contemporary times that human civilization has seen its unprecedented advance, the needs and standards of living have developed so much so that even a material impartiality in its relative sense can hardly be maintained among several wives and children. Let alone a total and psychological impartiality the implementation of which is virtually impossible. Conditions of life have changed in various stages through history. While the basic principles of Islam can be kept, they should meanwhile be interpreted in the light of the new socio-economic and educational conditions. Islam allowed polygamy for the protection of women and their substance. Yet polygamy in this country is practiced, especially by the wealthy class, in such fashions that are offensive to the rights and interests of women. It is unfortunate to see that even among the enlightened families, polygamy is practiced as a matter of sheer lust and sensuality often masqueraded under the names of so-called adoration and love. I wish to emphasize that my experience in this office, as president of Women's Society has given me close familiarity with the problems of my country women. I feel compelled to say that polygamy constitutes a source of vast miseries to large numbers of families in this country." (2)

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1. "A man may take a second wife or a younger wife when the first one grows old." (D.Wilber, Afghanistan, op. cit: 92).
2. S.F. Etimadi, in Mermon, No. 10, 1350 : 6.

Legislative and Judicial Inactivity

No legislation has been effected since the discontinuation of the Nizámnāmas of the 1920's. As already mentioned, the Nizámnāmas ceased to apply with the abdication of Amanullah. The anti-Government revolt of 1929, followed by the chaotic rule of Bacha-e Saqāo, brought the country to the brink of a total collapse of the civil and political order. Major factors that led to the fall of Amanullah were many, most of which can be seen in the context of the relationships of the central government with the tribes. A point to note here is that the Nizamnama reforms can hardly be regarded among the major factors which led to the downfall of Amanullah. (1) An unfortunate consequence of this whole episode, however, was the fears it created on the part of the subsequent regime with regard to modernization and reform. Reformist activities were thus virtually discontinued, and a Constitution almost empty of the spirit for reform was introduced in 1931 which in its announcing the general applicability of the traditional Hanafi law in the courts, tacitly cancelled the Nizámnáma reforms altogether. The traditional position remained unaffected even under the terms of the following Constitution of 1964. Under this Constitution, Hanafi law would apply whenever no statutory legislation covered a case before the court. Since no legislation has covered polygamy, Hanafi fiqh remained applicable. The Hanafi position that considered polygamy as a matter for the moral conscience of the individual has been maintained in the courts. Reflecting the prevailing judicial attitude, the decision of the Cassation Court in Safiyya. V. Abdul Wahab indicates no attempt to substantiate the Qur'anic requirement of impartiality in a polygamous marriage. Polygamy thus, essentially remains beyond the active rule of law in Afghanistan.

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1. "The irritation and resistance generated by the modernization programme were tangential to the basic conflict between Government and tribes and therefore not a central or proximate cause of the rebellion.. et seq" (L.B. Poullada, in Afghanistan, Some New Approaches, 1969, edited by G. Grassmuck et al : 100). Many Afghan commentators, G.M. Ghubar e.g. hold a similar opinion.

In Safiyya v. Abdul Wahab (1), Safiyya claimed, before the court of first instance (Shahri-Naw, Kabul), the occurrence of divorce between her and A. Wahab. Although divorce constitutes the main theme of this case, polygamy is nevertheless discussed as a contributing factor. Safiyya stated that: "I married Wahab in 1336 AH and from this marriage I have a daughter, Nafisa and a son, Abdul Majid. Later on the 18.11.1342 as a result of a grievance Wahab held against me, he divorced me by 'revocable ṭalāq'. While I was staying with my parents and before the completion of my period of ʿidda, Wahab sent for me in order to resume marital life with him. He then had intercourse with me. He subsequently married another wife, Hajira, and we all lived in the same house. But Wahab was more influenced by his new wife and as a result he persecuted and beat me. Consequently on the 12.11.1344, Wahab divorced me by a 'triple ṭalāq', after which I went to live with my parents and have ever since. Wahab has not paid me any maintenance nor has he paid me my dower. I hereby demand that it should be confirmed that our marriage has ceased to exist and he must no longer regard himself as my husband, or encroach on my freedom. I also demand a documented statement from Wahab confirming the final divorce. that has taken place between us. Wahab was then asked to present his defence which he consequently did and in which he emphasized that the fact that the plaintiff had stated in her petition that: 'I spent five years without the help or maintenance of A. Wahab', indicates that she is still hopeful of receiving maintenance, then she must still consider herself in my nikāh. The court of first instance acknowledged that the plaintiff had in fact made such a statement in writing which indicated that she expected from Wahab, who had three wives at the time, greater affection and consideration in marital life than he gave his other wives. Or else that the plaintiff found the home atmosphere and living with two co-wives unpleasant. In addition to this, Wahab has also failed to maintain equitable treatment among his wives which is why Safiyya has initiated this claim. For it is on record that Ali Ahmad, the father of Safiyya, once suggested that if Wahab acquired

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1. Judicial settlement No. 157/16.9.1348 (1969), Cassation court for civil and criminal affairs, Kabul.

a separate house for Safiyya, their married life might improve. On the basis of the above material, the primary court came to the decision (judicial settlement 5/27.2.1348) that Wahab had not divorced Safiyya in the first place and ordered her to abide by her marital obligations to Wahab. He is hereby also obligated to maintain justice in his treatment of all his wives. Safiyya appealed to the provincial court of Kabul. The appeal court stated that in its opinion the primary court must base its decision upon valid Sharī'a reasoning. In this case the primary court has no such reasons on which to base its decision. The primary court has, moreover, made a decision in regard to a matter which was not in its power to judge. The appeal court quashed the decision of the primary court as it was considered to be in conflict with Sharī'a. The appeal court then asked the appellant to submit her claim anew. Wahab then produced his detailed statement of defence, but this still did not clarify the essential point i.e., the claim of divorce. The appeal court, however, considered Wahab's statement a denial of divorce. The court then asked Safiyya to provide witnesses to support her claim of divorce. The appellant failed to provide witnesses and asked the court to put Wahab on oath. Wahab took the oath to the effect that no divorce has occurred. The appeal court issued its decision of 'cease controversy' (settlement No.7/14.4.1348) and ordered the appellant to cease pestering her husband. Safiyya re-appealed to the Cassation Court. The Cassation Court, after scrutiny, considered that since the appellant has failed to produce any evidence to prove her claim and has put the defendant on oath in accordance to Sharī'a, the appeal court's decision is correct and hereby confirmed. As the institution of marriage and the mutual rights of the spouses are firmly founded in the Sharī'a, therefore Wahab is obligated to provide the plaintiff with maintenance/clothing in accordance with his standards of living and economic ability. He is also obligated to provide a separate residence for Safiyya, and to fulfil all her rights in accordance to the guidance and provisions of the Sharī'a. Safiyya is also obligated to abide by her Sharī'a obligations and to respect his rights over her."

In the above case, the following points should be noted:

a) Wahab's five year desertion of Safiyya, when supposedly no divorce had taken place.

b) No provision of maintenance or dower during this period.

c) No residence provided by Wahab, let alone a separate residence.

d) The primary court's statement that: "Wahab has also failed to maintain equitable treatment among his wives", lends support to the alleged cruelty (persecution and beating) exercised by Wahab. Not to mention Safiyya's claim of repeated divorces by Wahab, which seems hard to be discounted altogether.

e) That a son and a daughter were born to the marriage. This indicates that barrenness, which according to popular feeling may give grounds for polygamy, was certainly not the case here.

It is a recognized rule of procedure that when one claim is under consideration in the court, then that claim only is to be considered, unless there is a link which necessitates the judicial consideration of a separate claim (1). In this case it is understandable that the court had to concentrate only on the claim of divorce. Furthermore, traditionally polygamy alone does not usually form the basis of a judicial claim. This is also clear in the decision of the appeal court when it stated that the primary court "has made a decision in regard to a matter which it was not in its power to judge." On this account the Cassation Court would be equally justified in not referring to the question of polygamy at all. But when reference is made to polygamy in the final verdict of the court, then it would seem justified to argue the court's decision in terms of its effective value.

For the court's decision on the question of polygamy seems to pay no more than lip service to the importance of impartiality in polygamous marriage. Although the Sharī'a schools have left the question of entering a polygamous marriage up to the individual, they are nevertheless agreed that once a man has married polygamously the law concerns itself with the rights of his wives. The loose and general wording of the Cassation Court in its decision that Wahab is obligated

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1. See Law of Civil procedure 1957 (section on the 'subject of claims'.)

"to provide Safiyya with maintenance/clothing according to his standards of living and economic ability ... and to fulfil all her rights in accordance to the guidance and provisions of the Sharī'a etc...", is a reflectionof the unjustifiable attitude of the court. Although the court obligated Wahab to provide a separate residence for Safiyya, there is no assurance in the court's decision of the consequences should he refuse to do so.

That polygamy is a problem which calls for legislative reform is obvious. As noted by an official of the Ministry of Justice: "It must be admitted that the new Marriage Law is not completely responsive to all the problems concerning the legal status of women in Afghanistan. Notwithstanding some favourable measures in this Law in regard to certain adverse marriage traditions, other problems remain to be solved. One among these problems is the rather painful and critical subject of polygamy". (1)

Referring to article (32) of the Marriage Law concerning delegated talaq (talāq-e-tafwid), the same commentator continued: "Before Islam no restrictions existed on polygamy. Islam limited polygamy numerically to four, and this is again conditional upon the implementation of equality. The Qur'an is explicit on this. In the existent law, there is a provision which can be used as a restrictive measure on polygamy quite in line with the spirit of Shari'a in this respect. Under article (32) of the Marriage Law, divorce is a right of the husband, but he is authorized to delegate this power to the wife by means of a legal document either at the outset or during the course of the married life. At the outset the transfer can be effected by means of the deed of marriage - nikāh khat - or failing that, and during the course of the martial life by means of a documented statement (iqrār khat). The wife then could exercise the power at the event of a possible unjust behaviour of the husband including his marrying polygamously; she could prevent him from doing so".
Refelecting the existent egalitarian attitude, Zhwand went on to say:

"Essential changes are bound to occur to the institution of marriage and its legal order. The evolution of laws and legal developments on the international level call for the implementation of certain

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1. S.Zhwand (Deputy Minister of Justice), In Mermon, No.10, 1350:3.

beneficial adjustments. The notion which regarded woman as instruments of pleasure gives place to the belief in her equality in human dignity. In the light of such developments and in accordance with the spirit of the Universal Declaration of Human Rights, and under article 25 of the Constitution which proclaims the equality of sexes, steps will be taken toward further equalization of the rights of women in Afghanistan. For instance during the drafting of the civil code, effort will be made to enact practicable restrictions on polygamy. Benefiting from the experience obtained elsewhere in Muslim countries, one approach that is in line with the Quranic condition of 'justice' would be to make polygamy dependant on the husband's obtaining the formal consent of his first wife."

Referring to the above statement, a'Mermon' editorial aptly commented that:

"Article 32 does not provide a satisfactory basis for restricting polygamy. For this article does not contain anything binding on the husband to delegate the power of ṭalāq to his wife. To leave the question of transfer of the power of talāq entirely to the persuasive influence of the wife is to ask for a contentious process at the outset of marriage which is rather unfamiliar to the tradition of marriage. In our view delegation of talāq could be used as an effective restriction only when delegation formed, like dower, a necessary part of the deed of marriage at its registration. This would require the addition of a new clause to the present Marriage Law.

Moreover, the law with regard to polygamy should be amended sooner than the promised civil code. It is advisable to revise and amend the present law rather than to await the civil code. And to await how many more years! It took several years to pass the Marriage Law; how many more for the civil code?" (1)

Commenting on the verse of polygamy, M.S. Kubbari the then Deputy President of the Council of Learned (Jami'at-ul-ulama) held the following view:

"The verse '... if you feared that you cannot do justice, then take only one wife', is grammatically a conditional statement. In

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1. Mermon editorial, The Marriage Law Should be Amended and Completed, No.11, 1350 (1971): 21.

conditional statements, as far as the rules of logics apply, the fulfilment of predicament is dependant on the fulfilment of the condition. Inasmuch as the condition is satisfied, the predicament will accrue accordingly. If the implementation of the condition is certain, the predicament is certain, but if the former is uncertain, the latter is uncertain accordingly. Since the condition here is the 'fear of injustice', therefore the predicament, i.e. marrying one wife prevails. The verse would hence mean that whenever the fear of injustice exists, only one wife is permitted. As the fear of injustice exists in all cases, i.e. on the part of those who do attempt to render justice as well as on the part of those who do not, therefore monogamy prevails to all cases. Anyone who, at present times, marries additional wife deviates from the verse as above." (1)

A 'Mermon' editorial upheld the above view saying that "this is a well-founded Shari'a reasoning and on this basis we propose the prohibition of polygamy." (1)

The only opposition to the abolitionist view held by 'Mermon' came from 'Ghaheez,' a non-official weekly periodical which in its editorial headed. 'Does Mermon Deny the Qur'an' regarded Mermon's position as 'anti-Islamic' and 'west stricken' and supported polygamy as a favourable means of preventing zina. 'Mermon' in response convened a conference on the subject, and subsequently in an editorial headed 'Do the Ghaheezis Know the Qur'an' rejected the 'Ghaheez' comments as 'incomprehensive and misrepresentative of the Qur'an' (2). Commenting on this clash of views, a 'Kabul Times' editorial wrote the following in part:

"... in its editorial, 'Mermon' answers the unfavourable comments of a private weekly periodical 'Ghaheez'. The 'Mermon' editorial contains a good coverage of the conference held last month at the Women's Institute where a number of women and men spoke about the new Marriage Law. Ghaheez apparently accused Mermon of having pro-Western tendency to ignore the tenets of Islam in an Islamic country.... The Mermon editorial claims that Ghaheez has interpreted

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1. See Mermon No. 10, 1350: 7,9.
2. See More in Mermon, No. 10, 1350 : 6.

a verse of the Qur'an regarding polygamy in such a way to mislead the people. Mermon then interprets the same verse which clearly says that if men can not keep equality and justice among many wives, marrying one wife is allowed. Those who support the idea of polygamy infact act contrary to the holy Qur'an, asserts the Mermon editorial." (1)

This is followed by a statement of Zhwand, the Deputy Minister of Justice, while referring to the need for reforms to be incorporated in the civil code, Zhwand noted:

"The Ministry of Justice considers certain important reforms as necessary to be incorporated in the draft civil code.... Restrictions will be introduced on polygamy which will be in accordance with the spirit of the prescribed justice in the Qur'an and in line with some valuable experiences that have been obtained in other Muslim countries. A practicable measure in this respect for example is the requirement of a formal consent of the first wife before the court, and the enactment of sufficient sanctions to substantiate that consent. In case the husband did not comply with her wishes, the first wife should have the right to dissolve the marriage. Such measures will to some extent obviate some of the tragedies of polygamy. In any case, the present situation, looked at from the vantage of the modern conditions of today, is considered to require the introduction of a new and equitable legal order.... The provision of delegated talâq in the existent Marriage Law, if properly implemented, can prevent the emergence of certain cruel polygamous marriages, but more fundamental reforms should, as already pointed out, be embodied in the civil code." (2)

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1. Kabul Times, Feb. 7th, 1972.
2. The statement added that "the Ministry of Justice also contemplates the introduction of certain fundamental reforms in other areas of the family law. The basic points of reforms to be incorporated in the draft civil code have been proposed by the Ministry of Justice to the Cabinet in Mizan 1350 (1971), and a committee of the Ministry of Justice is presently working on the code. The Ministry of Justice had then emphasised the need for such reforms and the existence of the demand for them under the present Constitution. (see Islah-Anis daily, 9.3. 1352 (1973), p.10).

In view of the present writer, consent of the first wife, however practicable, should not be relied upon as the sole basis of justification. For one can imagine circumstances where a determined husband can pressurize his wife into giving her consent before the court. The weaker socio-economic position of women, differential education, the inability of a wife to give birth to a large number of children as the husband may desire, the threat of divorce etc., can be abused for procuring the consent of the first wife. Her consent nevertheless, ought to constitute an important consideration alongside others to form the basis of a judicial order.

Modern Reforms Relating to Polygamy

Reforming the Sharī'a law on polygamy, modern reformists in Muslim countries have all based their juristic arguments on the Qur'anic "verse of polygamy". An early opinion that inspired the Middle Eastern reformists was formed by Muhammad Abduh, who in turn has founded his argument on al-Shāfi'ī's version of the interpretation of the "verse of polygamy." The point that Abduh particularly emphasized was that a man who already had one wife should be forbidden to marry another, unless the court was satisfied that he would be able to keep to two conditions, namely an equal distribution of his favours, and competence to meet all his financial obligations. This was a departure from the traditional position of the Sharī'a schools which construed the "verse of polygamy" as an essentially moral exhortation appealing to the husband's conscience rather than as a positive legal condition to precede a polygamous marriage. It was Abduh's influence which prompted the Egyptian committee appointed in 1926 to recommend reforms in the laws of marriage and divorce. Legislation to this effect was even accepted by the Egyptian Cabinet in 1927, only to be vetoed by King Fuad.

No further action was taken on this subject in any Arab country until 1953 when the Syrians promulgated their Law of Personal Status. (1) The Syrian reformers maintained that the Qur'anic provision should be regarded as a positive legal condition precedent to the exercise of polygamy and enforced as such by the courts "on the principle that the doors which lead to abuses must be closed." "The real significance of the Syrian provisions", writes Coulson, "lies not so much in their concrete terms as in the juristic basis on which they rest. For the first time independent assessment of the Qur'anic precepts had resulted

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1. See J. N.D. Anderson, Islamic Law in the Modern World - New York Un. Press, 1959: 49.

in a departure from interpretations hallowed by thirteeen centuries of legal tradition.' (1)

Tunisia extended this approach to its extreme. Following Abduh's argument, the Tunisian reformers pointed out that in addition to a husband's financial ability to support a plurality of wives, the Qur'an also required that co-wives should be treated with complete impartiality, and that this Qur'anic injunction should also not be construed simply as a moral exhortation, but as a legal condition precedent to polygamy, in the sense that no second marriage should be permissible unless and until adequate evidence was forthcoming that the wives would in fact be treated impartially. But under modern social and economic conditions, declared the reformers, such impartial treatment was a practical impossibility. This was said to be clear from another verse of the Qur'an which declared complete impartiality as unattainable.

The actual legal measures adopted by various countries may be divided into three categories. At one extreme of the process of reform, as mentioned above, is the Tunisian Law of 1956 which tersely enacted that "polygamy is prohibited." At the other is the Moroccan Law of 1958 which enacts: "If any injustice is to be feared between co-wives, polygamy is not permitted." According to this law, a wife whose husband concludes a second marriage may always (even if she has made no such stipulation or condition in her marriage contract) "refer her case to the court to consider an injury which may have been caused to her." Thus the Moroccan Law allows the court to intervene only retrospectively by granting judicial divorce to a wife who complains of injury suffered as a result of her husband's polygamous marriage.

Syria, Iraq, Pakistan and Iran have adopted a middle course by requiring official permission for polygamous marriage. In Syria, the court may refuse such permission when it is established that the husband is not in a position to properly maintain and support a plurality of wives. To this criterion the Iraqi Law of 1959 adds the proviso that there must be "some lawful benefit involved" in the proposed union, and gives the court discretion to refuse permission "if any failure of equal treatment between co-wives is feared." In Pakistan, the necessary permission is to be given by an

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1. N.J.Coulson, Islamic Surveys - Edinburgh Un.Press 1964: 210.

arbitration council, consisting of the chairman of the local union council, a representative of the husband and a representative of the existing wife, on the basis of whether or not it is "satisfied that the proposed marriage is necessary and just" and "subject to such conditions, if any, as may be deemed fit." In Iran the necessary permission is to be obtained from the court. The permission is to be granted only if the court is satisfied that the husband is financially and otherwise capable of treating his wives equally.

In Tunisia, after a great deal of hesitation, the view gradually prevailed in the courts that a polygamous marriage was invalid; and this was expressly stated to be so by subsequent legislation of 1964. Elsewhere, however, a polygamous marriage contracted in defiance of the various provisions is not invalid per se. This reflects the strength of traditionalist opposition to the reforms, particularly in Iraq where the Court in 1959 dealt with polygamous unions improperly contracted in the context of impediments to a valid marriage. But an amendment of 1963 to the Iraqi Code of Personal Status deliberately removed "marriage with more than one wife without permission of the court" from the list of impediments to a valid marriage. In all cases, however, infringement of the provisions entails statuory penalties.

In Pakistan, polygamy without the permissions of the Arbitration Coucil entails a three-fold sanction. The husband becomes liable to imprisonment for up to one year, or a fine of up to five thousand rupees, or both; he is obliged to pay the entire dower of his existing wife, even though it had been agreed that the payment of a portion thereof was to be deferred; and, finally, the existing wife has a right to judicial dissolution of her marriage. In Iran a polygamous marriage without the permission of the court may be punished by up to two years imprisonment. The court's permission must be obtained even if the existing wife consents. It is interesting to note, however, that even if the court gives its permission for a polygamous marriage, a wife who has not given her consent may make an application to the court on this ground asking for a certificate of impossibility of reconciliation leading to divorce. (1)

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1. See N.J. Coulson, Succession in the Muslim Family, op. cit: 15; and D. Hinchcliffe, The Iranian Family Protection Act, International and Comparative Law Quarterly - London 1968: 521.

Conclusion

The Constitution of 1964 gave men and women equal status in all respects (article 25). Relying on this basis, 'Wahdat' - (lit. unity) a non-official bi-weekly, in a statement of its editorial policy as registered with the Government, adopted the following:

> "The Constitution of 1964 considers women as equal to men in all their civil and political rights without any discrimination whatsoever. In the new democratic order of Afghanistan, the Afghan woman is equal to man in all walks of life (economic, social, political and cultural), and has equal rights in all respects. Our campaign shall seek the amendment and replacement of all undemocratic laws and regulations that do not comply with the interests of the masses. We demand the introduction of democratic and progressive laws, and the abolition of all feudal orders." (1)

Similarly 'Parwana', another unofficial weekly publication, adopted the following as its editorial policy:

> "The publication of this magazine is based in the realities and mentalities of our modern times, and in the values embodied in the Constitution. Obtaining equal rights for the Afghan women constitutes a main topic of our publication. The basis of our campaign is the formula that admits women's total equality to men in all walks of life (economic, social, political and cultural). At present the conditions of women in Afghanistan appears to be dark and undesirable. This magazine will fight for the abolition of all undemocratic laws and orders that contradict the democratic values of the Constitution, social justice and human dignity". (2)

As indicated in the account of the factors relating to polygamy, polygamy in practice has resulted in precisely the kind of injustices that the Qur'an has attempted to prevent. In order to substantiate the Qur'an and to reduce the ill-effects of polygamy on the family as well as to defend the position of the first wife, legislation should aim at

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1. See G. Shindanday, Matbu'āt-e Āzād dar Afghanistan, Kabul 1348 (1969): 7; this is a Kabul University monograph available in the university library.
2. ibid: 63.

reducing polygamy to the minimum possible.

The provision of delegated talaq (ṭalāq-e-tafwid) in the existent Marriage Law (art. 32) which encourages the voluntary delegation, by the husband of his power of unilateral talaq to his wife, has to date largely remained a dead letter. One obvious reason for this is the lack of any regulatory measures to put the law into operation. The opening of sections in the deed of marriage - nikāḥ khat - for example, where the willing party could record the delegation and the condition thereof would be one way of materializing the legal provision. The fundamental weakness of this provision however lies in the fact that it is voluntary. As experience has shown, most husbands are reluctant to volunteer for restricting their open choice of ṭalāq and polygamy at an early stage. The existent provision, therefore, can be considered to be only of a limited value. Polygamy must no longer be left a matter for the individual conscience. It is therefore proposed here that polygamy should be made legally subject to the obtaining of a judicial order. The court should have the discretion to deny permission if it considers that it is in the interest of justice or the prevention of prejudice to do so. The law should clarify adequate sanctions for the violator who enters a polygamous marriage without the required order of the court. It will also be advisable if the law, in order to equip the court with more information regarding the circumstances of the applicant, provided for such sources of information as may be appropriate.

A final point relating to the juristic basis of the above proposition will be noted in the following passage by Professor Coulson, who while commenting on some of the Middle Eastern reforms on polygamy aptly noted:

> "... this attitude toward the divine revelation is comparatively easy to maintain in relation to rules and institutions of the Qur'an which are of a permissive nature, like polygamy or slavery.
> Such matters fall within the ambit of the principle of ibāḥa or 'tolerance' of the Lawgiver; and there has always been considerable support for the view that something which is permitted or tolerated by the divine revelation may be restricted or even prohibited by the political authority if the general public interest so requires. This, it is said is the particular significance

of the Qur'anic command "to obey Allah, his apostle, and those at the head of affairs." (1)

As already pointed out, polygamy should only be permitted when the aim is to prevent a stronger prejudice from occurring. When prevention of darar is the basic aim, the husband's financial ability, and his just character should be the minimal requirements of the court order when authorizing a polygamous marriage. Having satisfied these initial requirements, the applicant should be further required to produce evidence as to whether there is a need for a polygamous marriage. In other words, there should be positive reasons to suggest that polygamy is permitted in order to prevent a stronger prejudice. A possible illustration of this is where the existing wife suffers from severe illness, or becomes a disabled person who is no longer able to maintain normal martial relationship, unable to take the necessary care of child/children and herself is in need of care. To establish the existence of these circumstances may make it necessary for the court to ask for informed opinions. Permitting polygamy under these circumstances would seem to be capable of preventing a stronger prejudice, i.e. the prevention of hardship and suffering to the family, to children and to the person of the wife. Whenever the society is able to provide services independent of the family, the above illustration may no longer apply. To date however, no such services are available in Afghanistan.

A further basis which would seem to present a case for the judicial authorization of polygamy is the lack of children to the union. Marital cohabitation for a minimal period of say eight or ten years should be made a requirement of the admissibility of the formal application of the husband on this grounds. In addition to this, the husband should be required to produce medical evidence to establish his ability in respect of maintaining normal marital relationship, and his fertility to the satisfaction of the court. The court should also have powers to order a thorough medical examination of the spouses. When barrenness of the wife and fertility of the husband are established, the court may authorize the husband's application for polygamy. Consent of the existing wife may be considered as a factor in favour of the husband's application. If, however, after the formal application

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1. N.J. Coulson, Conflicts and Tensions in Islamic Jurisprudence, Univ. of Chicago Press 1969: 103. See more on ibāha, ibid: 28.

of the husband, and the necessary medical evidence, it is proved that the lack of children was due to the infertility of husband alone, the wife should, in this case, have the right to demand a judicial divorce. To clarify the wife's right for a divorce in this respect would also help deterring indiscriminate applications for polygamy. It is on the other hand in the interest of justice that the wife should be given the right for a judicial divorce on the basis of polygamy alone at any times during the course of the married life.

To permit polygamy as above is likely to prevent a possible disintegration of the family at a later stage when the spouses may be of an advanced age while lacking of an offspring who may prove to be the only bread winner or the only source of support to the family. In addition to this, permitting polygamy under such circumstances would seem lilely to prevent a possible divorce which is again a source of social disgrace and suffering espeically for a woman. The prevention of divorce in this case is however an incidental and additional consideration which is not intended here to constitute an independent basis for authorizing polygamy.

## Chapter IV

## Divorce

At present, Ḥanafi law continues to apply to the subject of divorce in Afghanistan. In the past, divorce has undergone very little legislation. The Nizâmnâma legislation of the 1920's which introduced certain interesting reforms in the field of family law did not extend to divorce. Subsequent leglislation is similarly silent on this subject. The only parliamentary legislation to be passed was in the form of six articles incorporated in the 1971 Marriage Law which on the whole leave the substantive Hanafi law unchanged. A description of the Sharī'a law of divorce can be found in several well-known text books (1); a brief account will therefore suffice here (some details are conveniently discussed in relevant parts later).

All the Sharī'a schools recognise the right of a husband unilaterally to repudiate his wife at will. The Sunni law requires no formalities as to the manner in which a repudiation (ṭalāq) may be pronounced. A husband of sound mind who has attained puberty may effect a ṭalāq either orally or in writing without assigning any cause. Any words indicative of repudiation may be used, and witnesses are not necessary to attend their pronouncement. The husband may effect an immediate divorce, or he may declare that divorce would become effective upon the occurrence of some future event. The husband can also delegate his power of ṭalāq to the wife or to a third person either absolutely or conditionally (for a particular period or permanently). The lack of adequate formaility concerning the pronouncement of ṭalāq constitutes a source of various problems relating to its evidence and proof in Afghanistan which will be discussed in this chapter.

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1. Note e.g. D.F. Mulla, principles of Mahommedan Law, Tripathi 1968(ed.); and Syed Ameer Ali, Mahommedan Law, Calcutta; note also 'Ali al-Khafif, Muḥāḍarāt 'an Furaq al-Zawāj fil-Maḍāhib al-Islamiya (on dissolution of Marriage in Sharī'a schools) Egypt 1958.

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In Sunni law, ṭalāq is classified according to the circumstances in which it is pronounced as either "approved" (ṭalāq al-sunna) or "disapproved" (ṭalāq al-bid'a). Talaq al-Sunna may consist of either a single repudiation during a ṭuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of ʿidda; or it may consist of three repudiations made during three successive ṭuhrs. In the former case, ṭalāq becomes irrevccable after the expiry of ʿidda, whereas in the latter, it becomes irrevocable and final upon the third pronouncement. In both of these forms, the husband is entitled to revoke the ṭalāq any time before it becomes legally irrevocable. Ṭalāq al-bid'a on the other hand effects an immediate rupture of the marriage tie and becomes irrevocable upon its pronouncement. This may consist of a single repudiation which is expressly declared to be final, or it may consist of three repudiations pronounced at once. The distinction between 'approved' and 'disapproved' forms of ṭalāq is, however, a purely moral one, for both types are equally valid and effective in law. It is the 'disapproved' form of ṭalāq which is most common in Afghanistan: whereas triple ṭalāq is common among people, the registration offices usually register a single irrevocable talaq only. Current practices relating to the registration of talaq in Afghanistan and problems thereof will be illustrated in the following pages.

All the Sharîʿa schools recognise divorce by mutual agreement of the spouses (called khul'a, and mubāra'a). Khul'a divorce effects with the consent and at the instance of the wife who gives or agrees to give a consideration (usually to return the dower) to the husband for her release from the marriage tie. The terms of the bargain are matters of agreement between the spouses; the wife may return the dower she received, or release her dower debt and other rights, or she may make other agreements for the benefit of the husband. Failure on the part of the wife to pay the consideration does not invalidate the divorce (though the husband can sue her for it). For Khul'a is a contract which is effected by an offer of consideration by the wife for her release, and acceptance by the husband of the offer. Once the offer is accepted, Khul'a operates as a single irrevocable ṭalāq.

Mubāra'a divorce, like Khul'a , is a dissolution of marriage by mutual consent of the spouses. The difference between the two being that when discord is on the side of the wife and she desires a divorce, it is called khul'a, but when discord is mutual and both desire a divorce, it is mubāra'a. The offer in mubāra'a may proceed from the husband or it may proceed from the wife, but once it is accepted, divorce is complete and it operates as a single irrevocable ṭalāq as in the case of Khul'a. The main problem concerning Khul'a and mubāra'a in Afghanistan is that they are rarely registered by the registration offices even in cases which distinctly call for their application (see illustrations later).

The Sharī'a obligates the wife to observe 'idda (waiting period) following any divorce (except divorce following a marriage which is not consummated). Idda normally lasts for three menstrual cycles; if the wife proves to be pregnant, her 'idda lasts until delivery of the child. Idda is primarily designed to provide an opportunity for reconciliation and during it the wife is entitled to maintenance from the husband.

The fundamental rules governing the care and custody of children (ḥaḍāna) are common to all Sharī'a schools. Following a dissolution/ termination of the marriage, the custody of the young children belongs to the mother; but she loses this right if she remarries in which case the custody would belong to the father. The mother's right to custody terminates in Ḥanafi law when her son/s have completed the age of seven years, and when her daughter/s attain puberty. The current procedure concerning the registration of divorce in Afghanistan totally ignores this subject; the deed of divorce (ṭalāq khat) requires absolutely no reference to children and no provision is normally made to ensure their custody and maintenance.

Ḥanafi law does not recognise Judicial divorce. A Hanafi wife is only entitled to a judicial annullment (faskh) of her marriage if the husband is proved totally incapable of consummating it (see more on this subject later). The wife is also entitled to a judicial faskh if her husband becomes a missing person and ninety years elapse since the date of his birth (see more below in public prosecution v Musa & Shaista). Other schools of the Sharī'a, particularly the Maliki, on the other hand, allowsa wife to demand a judicial divorce on the

grounds of the husband's serious disease, his refusal or inability to maintain her, his cruelty, and desertion (details of Mãliki law appear under the Report of the Select Committee on divorce below). As indicated above this chapter concentrates on the problems commonly encountered in the area of divorce in Afghanistan. These fall into two main categories. One in the area of the registration of ṭalãq khat at the Office for Registration of Documents (ORD), and the other in the field of divorce claims in the courts. Talaq khat represents the only registered document, and in fact the only form of documentation on divorce normally obtainable in Afghanistan. It will therefore be looked into from two angles. One to regard ṭalãq khat as a document of proof of the fact of divorce; and the other to consider talãq khat for its wider implications concerning other related matters such as the different kinds of divorce in Sharî'a and their essential requirements, the unpaid dower and the right of maintenance of the wife during the period of ʿidda. Regarding talaq khat as a document of proof, although the 1971 Marriage Law seemingly rendered the registration of divorce as an obligation of the husband, a close look at the provisions of this Law, however, shows that registration of divorce basically remains a voluntary matter in Afghanistan.

Concerning the wider implications of talãq khat, it will be observed that the completion of ṭalãq khat at the ORD is subject to the application of certain customary rules a study of which indicates the existence of rigid andarbitrary practices which can result in the almost total exclusion of certain recognized Sharî'a rights of the wife in divorce. An example of this can be found in the non-registration of divorce by mutual consent of the spouses (khul'a, mubãra'a) in Afghanistan. Talãq khat also fails to give comprehensive consideration to the wife's financial rights, and the custody of the children.

As for the claims of divorce, the main problem in this area derives from the traditional structure of evidence as observed in the Afghan courts. A typical claim of divorce in Afghanistan is initiated by the wife who claims the occurrence of a final ṭalãq against the husband. In a large majority of cases, the claimant fails to produce the necessary evidence for proof. She thus not

only loses the claim, but that during the course of often lengthy litigation (which could be as long as five years), she finds herself in a situation of being neither a wife nor a recognised divorcee. This problem of proof in divorce claims basically arises from the fact that under traditional Sharî'a law, ṭalāq can be effected in a private manner without any evidence or documentation being necessary. This informal character of divorce in the traditional law has remained basically unchanged in Afghanistan.

The substantive Māliki law of divorce, to be discussed later, recognises the wife's right for a judical divorce on certain grounds. As of this writing, no legislation existed in Afghanistan to entitle the wife to judicial divorce. The draft Civil Code (under consideration of the Ministry of Justice since 1971) adopted the Māliki law of divorce. More recently a select committee was set up to make recommendations for legislation to be effected even before the draft Civil Code as a whole passes into law. Consequently a Report has been submitted in 1974 which is mainly based on Maliki law. A look at this Report however indicates that notwithstanding the desirable recommendations it made for introducing judicial divorce, it has made no reference to either of the above-mentioned two problems concerning divorce proceedings in Afghanistan.

I. Registration of divorce

Under the existent practice, ṭalāq khat normally does not require any judicial proceedings, and it is not necessary to obtain a judicial order for effecting a divorce. Exceptions to this are separation on the basis of the option of puberty (khiyār-e bulūgh)(1)., impotence of the husband, imprecation (li'ān) and when the husband is a 'missing person'. In any of these circumstances, a court order is legally required to authorise the separation. Separation on these grounds is, however, a rare occurrence in the

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1. See more on option of puberty in the chapter on child marriage (Abdul Magid v. Abdul Ghafur above).

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Afghan courts (1).

Talāq khat is normally registered with the Office for Registration of Documents (ORD). Prior to the establishment of the ORD in mid 1950's, registration of ṭalāq khat as well as of other formal documents (asnâd-e shara'i) was traditionally the duty of the Sharī'a courts. The establishment of the ORD alongside the courts was aimed at reducing the pressure of work in the courts, especially in urban areas of larger populations, so that the courts are enabled to devote their time

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1. The present writer has not found any case of imprecation in the court records consulted. One reason for this is the existence of a disgusting popular practice in Afghanistan, especially among the Pushtuns, according to which women are often killed for suspected zinā by the husband or relatives (see Q. Khadim, Neway Rana, op cit: 55). Other forms of judicial separation are rare, not only because of the difficult conditions of the Hanafi law, but also because women are traditionally discouraged from going to courts; a woman who goes to court is regarded as incurring disgrace and to be of ill-repute.

The present writer's informal interview with the members of the Cassation Court in September 1972 indicated that they had no knowledge of any case of li'ān being recorded at least during the past decade or so. The nearest case on the Cassation Court records (of five years preceding 1972) in which li'ān could have applied was Aeinuddin v.Shākera. In this case Aeinuddin claimed before the primary court of Kahmard-wa-Seighān that "On 15th.11.1347 A.H. Shakera while a major and competant person contracted herself in nikāh to me in consideration of 50,000 Afs of immediate dower. I gave Shakera the deed of a mortgaged property of the value of 2,000 Afs to benefit from its income, and while I was trying to deliver the remaining of the money, Shakera gave birth to a child. I told her that I had not had a valid retirement (khilwat-e saḥiha) with you, where does the child come from and who has fathered him! Later it became clear that Mohammad Sidiq and Mirza Mohammad had abducted Shakera and had the illegal act of zinā with her. I hereby demand that the offenders should be punished according to Sharī'a. The primary court asked the claimant to produce a valid nikāh khat which he did not. Hence the court, on the basis of article (5) of the Marriage law 1960 decided (Settlement No.1/25.1.1350 A.H) that his claim was non-hearable. Aienuddin appeal ed to the provincial court of Bamyān which consequently confirmed the primary court's decision. Aienuddin re-appeal ed to the Cassation Court. Since the claimant has no valid nikāh khat to prove his nikāh to Shakera, the Cassation Court confirms the above decisions of the lower courts*. (Settlement No.150/25.7.1350 A.H, Cassation Court for Civil and Criminal Affairs, Kabul). The case, as can be seen, has been considered as a mere claim of nikāh which was then decided on the basis of article (5).

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to judicial matters only. The ORD was designed to take over that portion of the court work which was considered to be of non-judicial character. Registration of formal documents of non-judicial character was thus assigned to form the main function of the ORD. Confirming the then existent position, the Marriage Law 1971 provided: "registration of nikāh khat and talāq khat is to be executed in the Courts of Documents - maḥākim wasā'iq - ; in localities where a Court of Documents does not exist, the matter shall be dealt with in the courts of justice".(1). As can be seen, in this article, the term 'Court of Documents' is mentioned twice; the term 'court' has, however, been incorrectly used. For the ORD is not a court, but a registration office which has no judicial powers of a court of law. This is indicated in the Law of Judicial Authority and Organisation 1967 which while dealing with the judiciary, categorically spells out all levels of the courts and their respective powers, but does not include the ORD as part of the judiciary. Further, the non-judicial character of the ORD is clearly indicated in the recent Supreme Court Guide Relating to the Regularisation of Documents (1973)(2), which provides in relevant part that "documents which require the consideration of a competent judicial officer, are to be completed in the primary courts .... Thus, the completion and registration of deed of reconciliation (islāḥ khat), deed of absolvement (ibrā khat), deed of tutorship (wisāyat khat), deed of maintenance (nafaqa khat) and confession of crime is in all circumstances a duty of the competent judges. Offices for registration of documents (idārat-e sabt-e asnād) have no powers to complete and register these documents".

It follows, therefore, that the registration of ṭalāq khat with the ORD is not in itself a judicial procedure and does not involve the exercise of judicial powers. Nor does the second clause of Art 30 alter the non-judicial character of the proceedings of ṭalāq khat. For the court under this clause merely replaces the ORD for reasons

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1. Art.30, Marriage Law 1971.
2. Rahnamā-e marbut ba tanzim-e umur-e wasā'iq, Supreme Court publication, Kabul 1352 AH: sections 4 & 5.

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of convenience (1). Consequently, ṭalâq khat when registered in the local courts, does not call for the exercise of the judicial powers of the court in the matter of divorce. The main point of difference to be noted, of course, is that since the ORD is not a court, whenever an applicant wishes to register a divorce, the ORD is not empowered to refuse its registration on the grounds of justice, public policy and protection of the individual.

According to the Regulation for Registration of Documents, 1957 the courts and the ORD, "when issuing judicial settlements or registering statements and contracts, are obliged to ensure that the Sharī'a requirements for the validity of a particular statement or contract are fully observed in the documents concerned. Otherwise, the document would be reversible in the higher courts and would be of no value" (Art 21). This provision, which is currently applicable to the matter of registration of formal documents, equally applies to the registration of ṭalāq khat.(2) It follows that a ṭalāq khat duly registered is to be consonant with the Sharī'a (Hanafi) law requirements of divorce. From the records of ṭalâq khat it can be seen, however, that the ORD has not only relied on Sharī'a law, but also on certain customary administrative rules, some of which are not entirely in agreement with the Sharī'a. Before continuing, it is necessary to give an account of the position regarding the registration of divorce in the Marriage Law 1971.

Article 33 of this Law provided : "either the wife or the husband can, in the event of the occurrence of divorce, go to court* and ask for a ṭalāq khat. The husband is obligated to complete the ṭalāq khat of the divorce that has occurred. Talaq khat, like other formal documents, shall be registered in the courts and delivered to the divorcee either directly or through her legal representative".

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1. In 1972 there were 26 ORDs in Afghanistan, all located in the provincial capitals. The number of primary courts in the same year was 209. Thus, with the exception of the 26 provincial centres, registration of formal documents in smaller administrative units has always been dealt with in the local primary courts.
2. Since the proceedings of the ORD are largely regulated under the Sharī'a, it has been a policy of the Ministry of Justice to appoint to this office such personnel as are knowledgeable of Sharī'a law. The ORD has thus developed a Sharī'a-oriented character. This is probably a reason why it is commonly called the Court of Documents and its head officer is called the qāzi of documents (qāzi wasā'iq).

*The term 'court' presumably also includes the ORD.

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There are two problems arising from the above provision. Firstly, the fact that registration of divorce is only voluntary. Secondly, the distinction made between the registration and the occurrence of divorce undermines the effectiveness of registration. For this provision, which is the only one in this law dealing with the registration of divorce, is worded that "either of the spouses can go to court and ask for a ṭalāq khat". It should also be noted that this clause enables either of the spouses to go to court and ask for a talaq khat. This, at first glance, seems encouraging insofar as it indicates the existence of an opportunity for the wife to initiate the registration and ask for a ṭalāq khat. Similarly encouraging is the clause which states "the husband is obligated to complete the ṭalāq khat ...", which appears to mean that it is the husband's legal obligation to complete the ṭalāq khat. These terms are not in fact substantiated when it comes to the practical aspect of registration; and this is where the above article fails to prove as effective as it might be.

The wife's opportunity to obtain a ṭalāq khat is purely theoretical and non-existent in the cases where the husband did not wish to register the divorce. This is so, primarily because the law has explicitly recognised ṭalāq as the unilateral right of the husband. Article (32) of the 1971 Marriage Law provided that 'ṭalāq is a Shari'a right of the husband; the husband can delegate this right to his wife by means of a formal document". It is, consequently, the husband who initiates the ṭalāq khat as a normal exercise of his legal right. The impact of this legal recognition on the actual proceedings of registration is that it renders registration totally dependent on the request of the husband. It would, therefore, seem unrealistic to expect the wife to start the registration of divorce on her own initiative. Under these conditions, supposing the wife, on her own initiative, should request the registration of a divorce which she reports has occurred, her request will be of little effect unless it is supported by her husband. The ORD is likely to give credit to the husband rather than to the wife. Thus, in the event of the husband not wishing to register the occurred ṭaláq, the wife is left only with the alternative of initiating a claim of ṭalāq before the court. She would then, as a claimant, have to prove her

claim; and this is not a question of registration, but an entirely different process i.e. litigation of ṭalāq, a judicial matter which falls outside the competence of the ORD. It is in this light that the practical effect of the above legal provision has to be evaluated.

As to the husband's obligation to complete the talāq khat, this is also a nominal one. For there is no measure, either in this article or anywhere else in this law, to ensure that the husband complies. Therefore, the choice to register the divorce is left to his discretion. The second problem concerning registration in Article 33 stems from the distinction made between the occurrence and the registration of ṭalāq. When the occurrence of ṭalāq is distinguished from its registration, instead of the two being simultaneous, it implies that a talāq can occur before registration and without registration. The value of registration is, therefore, reduced. This is a fundamental inconsistency in the essential terms of Article 33. For this article, on the one hand, attempts to emphasize registration by rendering it an obligation of the husband and, on the other hand, reduces that emphasis by rendering registration irrelevant to the occurrence of ṭalāq (1).

The fundamental weakness of Article 33 on registration appears to be that it is not sufficiently emphatic in regards to registration by either of the parties. A husband who divorces his wife and then refuses to complete a talāq khat is not put under any legal pressure

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1. According to the traditional Shari'a law, the occurrence of divorce in certain circumstances is a matter which is beyond the control of the husband. Divorce of a drunken person, divorce pronounced under duress and divorce pronounced in jest are instances at point. An additional interpretation of Article 33 could therefore be that by enacting the clause "the husband is obligated to register the occurred ṭalāq", the legislator meant to include the divorce that has occurred even if its occurrence was not intended by the husband.

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to complete the registration. He may refuse to register it altogether or he may not register it for a very long time; in either case he is not under the threat of incurring any legal consequences of particular disadvantage to his interest. A woman may consequently find herself in a position of prolonged suspense and insecurity of being neither a recognised wife nor a divorcee. And this is not a matter of mere theoretical interest, but a very real possibility which represents a familiar experience in Afghanistan. This is illustrated in the case of Alamtāb.v.Mohammad Shah(1). In this case Alamtab claimed her divorce against M Shah in the primary court of Baricot of Kabul stating that "I was the lawfully married wife of this M Shah, who had consummated his marriage with me. On 15.4.1346 (1967) this M Shah, while a competent person and in possession of his capacities, divorced me by a triple ṭalāq and rendered me prohibited (harām) to himself. M Shah then went to court to obtain a ṭalāq khat, his statement of ṭalāq was entered in the ṭalāq khat (No.9/26.9.1346) which was then taken by M Shah for the completion of the required formalities. But he did not return the ṭalāq khat for registration. Notwithstanding the occurrence of a triple ṭalāq and the expiry of my period of ʿidda and while I am prohibited to him, M Shah has disregarded my right to freedom and wants to have valid retirement (khilwat-e saḥiḥa) with me. I hereby demand M Shah to cease his encroachment on my rights. The primary court of Baricot considered Alamtab's claim as contradictory, and issued its decision (No.73/29.5.1348) which rendered the claim as non-hearable. Alamtab appealed to the provincial court of Kabul. The appeal court authorised a re-hearing of the case. The claimant submitted her claim of ṭalāq, the defendant denied the occurrence of ṭalāq; the claimant was then asked for evidence to prove her claim, but she expressed her inability to present witnesses to support her claim before the court. She also chose not to put the defendant on oath and waived her right to this effect. The provincial court of Kabul, therefore, issued its decision (No.7/30.1.1349)

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1. Settlement No.329/17.11.1350 AH (1971), Cassation Court for Civil and Criminal Affairs, Kabul.

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against the claimant. Alamtab re-appealed to the Cassation Court. The Cassation Court, after consideration, noted that the appeal court had not recorded the testimony of witnesses of identity and, therefore, reversed the decision of the appeal court and referred the case to the resemblant court (mahkama-e mumāsil), i.e. the provincial court of Parwān. The latter took the case under consideration and allowed the claimant to present her case anew. After the claim has been entered in the court records, the defendant M Shah did not appear before the court, as a result of which the court summoned M Shah and after this failed the summon was announced on the radio. Eventually M Shah appeared before the court and gave excuses which were not legally valid. In regards to the claim of Alamtab he stated that if Alamtab, my lawfully wedded wife, with whom I have consummated marriage waived her dower and maintenance and releases me from the payment thereof, I will dissolve the marriage by ṭalāq. Subsequently Alamtab also made a statement to the effect that if M Shah divorces me, I will waive my dower and other rights and will release him from his debts. Both parties accepted each other's statements and M Shah divorced Alamtab by triple ṭalāq; Alamtab accepted the ṭalāq and absolved him of the dower and other financial obligations. The provincial court of Parwān in its decision (No.11/20.6.1350 AH) confirmed the above statements of the parties as legally valid and ordered thereby that the parties be separated. M Shah, however, appealed to the Cassation Court against the decision of the court of Parwan. The Cassation Court considered the latter and issues its decision as follows .... The decision of the provincial court of Parwan based on the statements of the parties is legally valid and in accordance with the Sharī'a provisions. The Cassation Court, therefore, confirms it".

As can be observed, Alamtab's position during the period of litigation from 1967 to mid 1971 has been one of uncertainty and suspense. She was unable to prove the facts of divorce, despite of M Shah's having initiated the registration formalities, which he then refused to complete. He was presumably able to do so because of the lack of any emphatic measures in the law to ensure the immediate registration of divorce. As a consequence of this legislative gap, M. Shah also found himself in a position to put

pressure on Alamtab to waive her rights to her dower and maintenance in his favour.

A similar case is that of Safiyya.v.Ali Ahmad (vide supra, p : 123) in which Safiyya claimed her ṭalāq against Ali Ahmad, she spent five years in her parent's house while the litigation continued during which time she received no maintenance from Ali Ahmad and, at the end of this period, lost her case.

Having discussed the problems concerning registration under the Marriage Law 1971, it is now important to consider the actual proceedings of ṭalāq khat and its characteristic features in Afghanistan.

Registration of ṭalāq khat in the ORD normally begins with a petition by the husband, who while giving his identity and that of his wife, puts forward a formal request for a talāq to be registered. This petition, in effect, forms the basis for the subsequent proceedings of registration. The head officer usually refers the petition to the clerk, authorising the latter to proceed with the matter of registration. This authorisation of the head officer is an administrative routine. The only occasion when the head officer would not receive a petition would be when the petitioner is not competent to effect a divorce, or when he is a resident of the area which falls outside the administrative zone of the office concerned. The petitioner is not usually required to produce a nikāh khat. It is, in fact, evident from the records of the ORD of Kabul, Shahr-e Kohna (the Old City) that possession of a nikāh khat is not a requirement of the registration of ṭalāq khat.

This office, for example, had registered (50) talaq khats during the year 1350 AH (1971). Of this number, in only one case (1) is the head officer on record as having written to the clerk to examine the nikāh khat concerned prior to the registration of the divorce. The clerk consequently made a record of the statement of divorce by the applicant, and the latter was then required to

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1. Talaq khat No.9/2.4.1350 AH (1971) ORD Kabul, Shahr-e Kohna (Old City).

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complete the necessary formalities (1). A study of the records shows certain salient points in the registration proceedings of ṭalāq khat in Afghanistan. These are:-

a) Petitions for the registration of divorce are normally received from the husband. This is a general rule, the applicability of which is unaffected by the variations in the particular terms of individual cases. There are, for example, many petitions on record which expressly mentioned the existence of mutual agreement of the spouses on divorce. In other cases, the husband, in his petition, made a conditional statement to the effect that if his wife was willing to release him of her unpaid dower and maintenance for the period of ʿidda, he would divorce her. In certain other cases, the husband stated that it was on the insistence of his wife that he was registering a divorce. In all these cases, however, the petition was submitted by the husband alone; the ORD required neither a separate petition to be submitted by the wife, nor the wife's confirmation.

b) The proceedings of registration of divorce, as a whole, could be completed by the husband alone. From the submission of the petition to the stage where the ṭalāq khat is completed, nowhere is there a part in the whole process which requires the presence of the wife or a positive role to be played by her. There are many ṭalāq khats on record which were completed in the absence of the wife. Whenever this was the case, however, a note normally appeared in the record indicating her presence or absence during the completion of the ṭalāq khat.

The only reference in the Marriage Law 1971 that relates to the point in question is the clause in Article 33 concerning the delivery of the ṭalāq khat, when completed, to the divorcée either directly or through her legal representative. Delivery of the

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1. The husband is then required to produce two witnesses of identity, whose testimoney is recorded. The form of ṭalaq khat is then given to the husband to obtain the written affirmation of the local Councillor or headman certifying the identity of the parties and witnesses. This had then to be confirmed by the District Officer (mudir-e nāhiya) and the Municipal Authority. Having completed this, the ṭalāq khat was then due for registration and a final check by the head officer as to the authenticity of the contents.

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ṭalāq khat, however, still leaves the then existent practice, which did not require the wife to participate in the registration formalities, basically unaffected. In addition to this, the said clause seems to presume the wife's willingness to receive the completed ṭalāq khat. Such a presumption falls short of providing an answer to the question of her unwillingness to attend the office for receiving the ṭalāq khat, or to authorise a representative for doing so. The significance of the legal requirement regarding the delivery of the ṭalāq khat is that it is the only legal provision which ensures that the wife is notified of the completion of the ṭalāq khat. A somewhat similar provision of a more general nature existed in the 1957 Regulations for Registration of Formal Documents, which required that "upon their registration, formal documents are to be delivered to the party in whose interest the deed was made". (Art 2). Since the ṭalāq khat constitutes a deed which is important for the wife particularly, the above clause of the 1971 Marriage Law, therefore, merely specifies the already existent requirement of the 1957 Regulations. In practice, however, no mention is usually made of the delivery of the ṭalāq khat to the wife in the records of the ORD. Neither in the ṭalāq khats, which were completed prior to 1971, nor in those which were registered after this date was there any reference to this point. The only information indirectly relating to it on the records was the note made as to the wife's presence or absence during the registration. In cases where it was recorded that the wife was present during registration, her knowledge in respect of the completion of ṭalāq khat could, therefore, be taken for granted. This, of course, is not the case when it was stated in the records that the wife was absent during the registration. In the latter case there wasno information recorded as to whether the wife did in fact know of the ṭalāq khat.

In Mohammad Anwar.v.Latifa, (1) M Anwar is on record as having petitioned to the head officer stating that "because of incompatibility that exists between us, I wish to divorce my lawfully married wife,

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1. Talāq khat No.10/6.4.1350 AH (1971) the ORD for The Old City, Kabul.

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Latifa, and to complete a ṭalaq khat to this effect". The head officer referred the petition to the clerk ordering the latter to "proceed according to the law". The ṭalāq khat consequently completed, contained the statement of Anwar to the effect of divorcing Latifa by an irrevocable single ṭalāq. The ṭalāq khat continued in part that"the divorcee, Latifa was not present during the registration ... as for her Sharī'a rights of maintenance, clothing and dower, Latifa has the option to choose for herself". The ṭalāq khat was thus completed in the absence of Latifa. There is no information on record about the delivery of the ṭalāq khat to her, nor whether she had any knowledge of it. 'Her option to choose for herself' is another way of saying that there is no proof available either way; and in case she had not received her dower and maintenance, she would be free to claim them.

Talāq in Ḥanafi law may be effected by words or by writing. Although this law does not necessitate the presence of the wife at the time of the effecting of ṭalāq by the husband, as a general rule in Sharī'a law, it is necessary that ṭalāq whether by words or by writing should come to her knowledge. When a ṭalāq is given by writing, it will take effect only when it is communicated to the wife and understood by her (1).

c) In making the petition for the registration of divorce, the husband is not normally required to give any explanation for the divorce. The majority of petitions on record, nevertheless, contained a brief reference to the basis of the divorce. The most common reasons given by the husband were incompatability, mutual agreement of the spouses to divorce, and the financial inability of the husband to maintain his wife (2). The petitioner usually

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1. See e.g. Ameer Ali, Mahommedan Law, op.cit, vol. 2:544.
2. The head officer of the ORD for the Old City, Kabul, in an informal interview, while speaking of his experience, confirmed that psychological incompatability between the spouses and economic reasons constituted the main factors behind the majority of divorce cases registered. One other factor was considered to be the husband's inclination to take a new wife. Occasionally, the wife desired a divorce which was probably motivated by her wish to remarry (Kabul, September 1972). The wives' account in describing the factors leading to divorce, however, varied from those usually given by husbands. This was revealed in a report in the'Kabul Times', as follows: "In interviews of 44 women divorcees carried out by the Kabul ORD it has been found that the following factors make up the core of a divorce issue: (Continued on next page)

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gave one reason only and no additional explanation was furnished. Whenever the husband gave incompatability as the basis of his petition, the registered ṭalāq khat contained a reference to that effect. With the exception of incompatability, the reasons given are not recorded in the ṭalāq khat. It is perhaps understandable why no mention is made of the husband's financial inability to maintain the wife in the ṭalāq khat, for there is usually no evidence that this is really the case. It is, however, difficult to understand why the ṭalāq khats do not make any reference to the mutual agreement of the spouses as the basis of divorce. For this does not pose the problem of the need to establish the validity of the statement given.

d) Notwithstanding the distinction made in the 1971 Marriage Law between the occurrence and the registration of divorce, the records gave a uniform indication that the registration of and the occurrence of ṭalāq took place simultaneously. The head officer had not ever received a petition indicating the occurrence of ṭalāq prior to registration. The typical petition contained a statement by the husband to the effect that he intended the ṭalāq to take place simultaneously to the registration.

e) An irrevocable single ṭalāq (ṭalāq-e bā'in-e wāḥid) is the only form of divorce registered in Afghanistan. Customarily, all ṭalāq khats registered at the ORD uniformly effect an irrevocable single ṭalāq to the exclusion of all other forms of divorce that are obtainable in Ḥanafi law. This has been so in spite of the fact that to date there has been no legislation which singles out the irrevocable single ṭalāq as the only form of divorce. Recourse is not made to the other forms of dissolution of marriage, although these too are valid in the Sharī'a. Needless to say, an irrevocable single ṭalāq is a final divorce which severs the marriage tie

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(Footnote 2 continued from previous page)

The majority of these women stated that their husbands treated them very cruelly. Due to their low level of education, these husbands resorted to beating them to settle family discussions. Some of these women stated that they asked for a divorce because of the poor economic situation of their husbands. These women complained of not being able to keep up a level of dress and make-up equal to their relatives. A quarter of these women gave forced marriage as the cause of quarrels and troubles. Some of the divorcees pointed out that their husbands were very much older than themselves. There were cases where the age difference was as great as fifty years". (Kabul Times, February 12th, 1973).

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completely and which excludes the possibility of a subsequent attempt for reconciliation. A reunion is permissible only by means of a new marriage contract.

f) 'Triple ṭalāq' not registered.

As a consequence of item (e) above, the ORD do not register a triple ṭaláq even if the husband requests it. In Din Mohammad.v. Ḥabiba (1), Din Mohammad is on record as having stated in his petition that "I am a messenger in Ali Abād Hospital with a monthly salary of 500 afs. As my pay does not cover the expenditure incurred in maintaining a household, my life has become difficult. I, therefore, wish to divorce my wife, Habiba with whom I have consumated the marriage, by registering a ṭriple ṭalāq (2). Whereas the ṭalāq khat reads" ... I, Din Mohammad, hereby divorce my lawfully married wife, Habiba, by an irrevocable single ṭalāq. Habiba was present and accepted the above statement of D Mohammad. Regarding her rights of maintenance, clothing for the period of ʿidda and both her dowers (prompt and deferred), she has the option to choose". Nowhere else is there any information on record to explain the variation in regards to the form of ṭalāq on the petition and in the records (3). It is probably true to say that the primary purpose of the above custom concerning the uniform registration of irrevocable single ṭalāq is to avoid the registration of triple ṭalāq, which is regarded as an abominable form of divorce in Sharīʿa as it effects an immediate rupture of the marriage tie and excludes the opportunity for reconciliation. To this extent, it is a desirable custom. The existent evidence, however, shows that this is not the only effect of this custom. It also serves as a

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1. Talāq khat No.9/2.4.1350 AH(1971) The ORD for The Old City, Kabul.
2. The head officer wrote to the clerk "to check whether the petitioner holds a nikāh khat". The clerk reported back that "the petitioner said that his nikah khat, which was obtained in 1953, has been lost". The head officer then authorised that "the ṭalaq khat should be completed according to law".
3. In an informal interview with the head officer, the present writer asked him to explain the variation between the petition and the ṭalāq khat. He replied: petitions are sometimes written by ignorant petition-writers and that many husbands are unaware of the difference between a triple and a single ṭalāq: "We have even come across a request to register nine talaq. Customarily, we register only an irrevocable single talaq." (Kabul, September 1972).

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means of excluding the other forms of ṭalāq, some of which would be favourable, e.g. divorce by mutual consent. The custom, therefore, overrules the other forms of dissolution and hides the true facts upon which they may be based.

g) The ṭalāq khat basically certifies the occurrence of ṭalāq; other related matters such as dower and maintenance are usually left unsettled unless the parties volunteer to make a formal statement about them. In instances where the wife receives her dower, she normally gives a formal receipt to the husband to which a reference is also made in the ṭalāq khat. Whenever the wife waives her dower/maintenance in favour of the husband, she is normally required to give a formal deed of release (ibrā khat), a reference to which is again made in the ṭalāq khat concerned. But, whenever the parties do not volunteer to settle the question of dower/maintenance, the following uniform statement appears in the talaq khat: "with regard to her dower and maintenance the divorcee has the option to choose for herself".

The main reason why the dower debt does not receive comprehensive consideration at the occasion of registration of divorce is because of the frequent lack of a document to indicate the agreed upon dower and the terms of its payment. This is, of course, related to the issue of the registration of the marriage and the fact that only a small proportion of marriages are registered in the first place (1). In instances where parties to a divorce do possess a nikāḥ khat and produce it, the ORD are enabled to verify the terms of the dower as indicated in the nikāḥ khat. But in the absence of the nikāḥ khat, the ORD cannot be certain of the facts and can thus only make a vague reference to the matter. A consequence of the absence of a definitive legal measure to ensure the settlement of the unpaid dower

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1. "From my experience, I can assure you that in Afghanistan probably about 10% of marriages are attended by a nikāḥ khat, the remaining of about 90% contract their marriages in the traditional way by the Imam of the mosque and in the presence of relatives". (Maqsudi, WJJ Oct. 1967).

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is the high rate of claims of dower debts in the courts by the wives (1).

It should also be noted that the settlement of maintenance is a judicial matter which falls outside the competence of the ORD. According to the records, no attention is focused on the payment of maintenance, except in the cases where the wife waives her right to maintenance or when the parties agree upon an advance payment (by means of a formal document). Since the ORD has no powers in the area of maintenance, the divorcée is as a result left at the mercy of her ex-husband and in the case where he refuses to pay, the only alternative for her is to sue him in court.

The petitions on record indicated that in almost fifty percent of cases the husband made it a condition of divorce that the wife should waive her unpaid dower as well as maintenance in his favour. But, unless a formal settlement was arranged by the parties, the usual procedure was to insert the aforesaid statement which gave the wife the option to choose whether or not to claim her dower and maintenance. This was presumably designed to protect a wife's rights. Thus the divorce was usually registered but the condition laid down by the husband to elicit a waiver from the wife in respect of her dower and maintenance was omitted in the ṭalāq khat.

More important probably is the fact that the ṭalāq khat is completely silent on the existence of children of the marriage. The custody of the children (ḥaḍānat) is again a matter for the courts, and the ORD has no jurisdiction for its consideration. In the absence of any procedure to ensure the care and custody of children at the occasion of the registration of divorce, the only opportunity where the matter can be raised is to initiate a claim of ḥaḍānat before the court. An illustration of the case where the mother

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1. This is confirmed by a report of the 'Kabul Times', as follows: "In the Kabul ORD 1, 116 marriages and 94 divorce cases have been registered during the current Afghan year (1352 AH - starting March 1972). A spokesman for the ORD told this reporter that divorce cases present a problem in the sense that expenses of maintenance for the three months of idda, and the accepted dower of the woman have to be paid by the husband. Sometimes a husband claims that he has already paid the dower or that the wife has waived the payment of it". (February 6th, 1973).

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complained about the disregard of her Sharī'a right of ḥaḍānat by the paternal grandfather of her minor son can be seen in Ṣāliḥa.v. Mohammad Kabal in which the final decision of the court was issued in favour of the mother whose right of custody over her minor son was thereby established (1).

h) Delegated ṭalāq (ṭalāq-e tafwiḍ) not registered. In spite of the availability of a delegated ṭalāq in Sharī'a, which is substantiated in the Marriage Law 1971 (Art 33 supra), there is no case of delegated ṭalāq in the ORD records. Neither in the petitions, nor in the ṭalāq khats was there any indication of a situation where the husband had delegated his power of ṭalāq to the wife.

i) Another area where the ORD proceedings ignore the Marriage Law 1971 is the registration of ṭalāq khat after engagement and prior

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1. In this case Sāliḥa claimed that "I have the right to the custody of Habibullah the child of my marriage to the late Mohammad Afḍal. My son Habibullah is a minor of seven months of age, and since the death of Afḍal I have remained unmarried to this day. The Sharī'a law is explicit in that 'the mother has priority to the ḥaḍānat of a minor both during the continuance of the marriage or after its dissolution' - Fitawa-e 'Alamgiri, p.141 - Kabal, the paternal grandfather of Habibullah has unlawfully kept my son under his custody; I hereby demand Kabal to deliver Habibullah to me. In reply to this claim, Kabal stated that Sāliḥa is the daughter of the murderer of Afḍal and I have no confidence in her; being the paternal grandfather of Habibullah, I am entitled to his custody and at present he is in my custody. On the basis of the above fiqh rule, the primary court of Parwan issued its decision (No.9/17.7.1350 AH) in favour of Sāliḥa. Kabal appealed to the provincial court of Parwan which also confirmed the Primary court's decision. Kabal re-appealed to Cassation Court. The decision of this court is as follows: According to the preferred version of the Ḥanafi law, the mother has priority to the ḥaḍānat of her minor son until he reaches seven years of age; Sāliḥa has remained unmarried. Kabal has confessed that he has kept Habibullah. Sāliḥa's right to the custody of Habibullah is inviolable. Kabal is hereby obligated to deliver Habibullah to his mother and he will stay under Sāliḥa's custody until he completes seven years of age." (Settlement No.227/16.11.1350 AH Cassation Court for Civil and Criminal Affairs, Kabul).

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to nikah. An illustration of this is Mohammad Hussein.v.Safra (1) in which Hussein petitioned that "owing to incompatability, I wish to divorce my fiancée, Safra, with whom I had no sexual intercourse, by a Shari'a talāq ..." The talaq khat consequently completed also read that "I, M Hussein, hereby divorce Safra, my fiancée with whom I had no sexual intercourse by an irrevocable single talāq". The definition of nikāh as given in the very first article of the 1971 Marriage Law is that nikāh is contracted with the offer and acceptance of the parties in the presence of witnesses. Until this is effected, in the eyes of the law, no nikāh exists. Therefore, to register a talāq is not applicable. It has been discussed earlier that one of the main purposes of this article was to deny legal validity to a popular practice according to which engagement is as binding as marriage. This practice has the adverse effect of restricting those, who are engaged when minors, from being able to choose freely as to whether to contract a nikāh or not.

j) Dissolution by mutual consent (Khul'a and mubāra'a) not registered:

As pointed out before, Shari'a allows divorce by mutual consent. Khul'a is in fact the only form of divorce in Shari'a in which the wife has a right to initiate the divorce. This right of the wife is of a limited significance in Hanafi law, simply because under this law khul'a can only be effected with the husband's consent. The wife's right to khul'a in Maliki law is developed further as under this law, khul'a can be effected by arbitrators even without the husband's consent (2). According to Ibn-Rush, khul'a is a right of the wife

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1. Talaq khat No.11/24.4.1350 AH (1971) the ORD for the Old City, Kabul. Similarly note Sultan Ahmad.v.Niyaz Bibi (talaq khat No.6/31.1.1349 AH, loc cit) S Ahmad is on record to have stated in his petition that "Shir Mohammad, the father of Niyaz Bibi, has betrothed his daughter to me. I have not contracted the nikah so far. As I already have a wife and cannot provide maintenance for a second wife, I wish to complete a talāq khat". The head officer is on record as having authorised the completion of the talāq khat, in spite of the lack of a nikāh. Note also Azizullah.v.Zira (talaq khat No.8/1.2.1349 AH loc cit) to the similar effect.
2. When discord arises between the spouses, two arbitrators will be appointed from the families of both of the spouses. When they fail at their attempt at reconciliation, the arbitrators will decree a divorce for the wife if it is found that the fault for the discord lies mainly with the husband. But when the arbitrators find that the blame for the discord rests clearly with the wife, they are empowered to enforce khul'a by which the wife is obligated to pay a consideration.

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against ṭalāq which is the husband's right: In case the husband wishes to terminate the marriage, he has the right to ṭalāq, whereas if the wife wishes to do so, she is entitled to exercise her right to Khul'a provided that two arbitrators have failed to effect reconciliation between them. Modern reforms of the Sharī'a in various countries are either based on Maliki law, or else have sought a reinterpretation of the Qur'anic 'verse of Khul'a' in favour of enhancing the wife's position (see more below under modern reforms). In short, the institution of Khul'a has been utilized by modernist reformers as a positive instrument to redress the traditional imbalance in the rights of the spouses. In Afghanistan, no such reform has been accomplished. The fact is that even the traditional Hanafi law of Khul'a is not being enforced. A look at the records of talaq khat indicates that Khul'a is almost deliberately denied registration. This is clearly a denial of the legal right of the wife and as such constitues a social mischief: since Hanafi law does not recognise a judicial divorce, there is virtually no other way for the wife to obtain a divorce whatever mal-treatment and cruelty she may be suffering. Notwithstanding the continued applicability of the Hanafi law, and in spite of the fact that a sample of khuľa nāma (deed of khul'a) appears in A.Bāqi's Guide for Formal Documents (1), khul'a nāma is almost unknown to the records of divorce in Afghanistan (2).

Non-registration of khul'a is also unrealistic, for there is no

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1. This book contains samples of almost all formal documents and is in current use at the registration offices.
2. The present writer has not found a single khul'a nama in the five years records (preceding 1972) of divorce at the Kabul Offices of Registration. A partial explanation for this may be that since dower is usually not paid to the wife before divorce; she is therefore, it may be said, unable to give a financial consideration. Against this, however, there are cases in which financial consideration is received by the husband and yet khul'a is not registered. I am however informed that khul'a is occassionally registered in the province of Herāt.

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evidence to indicate that divorce by mutual consent is obsolete (1). The records themselves provide ample evidence in favour of the application of both khul'a and mubara'a There are, in fact, many petitions on record in which the husband has clearly stated the existence of mutual agreement of the spouses on divorce. There are also petitions on record in which the petitioners have indicated their willingness to a divorce on condition of obtaining financial consideration from the wife. Yet, in both of these cases the completed ṭalāq khat uniformly registers a unilateral ṭalāq of the husband with no reference to mubāra'a whatsoever. In Aminullah.v. Rabi'a, (2) for example, Aminullah is on record as having stated in his petition "I and my lawfully married wife, Rabi'a have mutually agreed on a final ṭalāq. I, therefore, request that a ṭalāq khat should be issued to this effect". The ṭalāq khat completed, however, reads in part "I, Aminullah, while a major and competant person, hereby divorce Rabi'a ... by an irrevocable single ṭalāq without consideration ... upon the expiry of her period of ʿidda the divorcee will have the option to freely choose whether to remarry. Rabi'a was present at this office and regarding her dower and maintenance she has the option to choose for herself". This divorce is obviously a unilateral ṭalāq by the husband and not a mubāra'a. Similarly, in Mirza Mohammad.v.Aziza (3) the petitioner is on record as having stated that "Aziza is my lawfully wedded wife; we have both agreed to a final talāq and wish to complete a ṭalāq khat to this effect".

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1. Divorce with consideration is a recognised popular practice in some parts of Afghanistan. In the district of Shinwār, for example, Q Khadim reported the following: "Divorce is quite an easy matter among the Shinwāris. When disagreement between the spouses prevails, the husband usually agrees to receive a sum of money from his wife and divorces her". (Naway Rana, op cit: 56).
2. Talāq khat No.4/2.3.1350 AH, ORD. The Old City, Kabul.
3. Talāq khat No.7/19.3.1350 AH the ORD for The Old City, Kabul. For a similar example see the following example in another office: Ali Mohammad.v.Begum (Talaq khat No.6/31.3.1349 AH the ORD, Baricot, Kabul), where the petitioner is on record as having stated "Begum is my lawfully married wife, with whom I have consummated the marriage As a result of our mutual agreement, I hereby wish to divorce Begum and to complete a talāq khat". The completed ṭalāq khat reads "because of incompatability, I, Ali Mohammad, hereby divorce Begum ... by a single irrevocable talaq without consideration".

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The talāq khat consequently completed contains no reference to the mutual agreement of the parties and reads in part that "I, M Mohammad, while a major and competent person, hereby divorce Aziza, my lawfully married wife, with whom I have consummated the marriage by an irrevocable single ṭalāq ... Aziza was present at the time. Regarding her dower and right to maintenance she has the option to choose for herself". In both of the above cases, the petitioner's statement about the mutual agreement of the spouses to divorce is supported by the fact that the wife was present at the registration of the ṭalāq khat.

There are also petitions on record which present a case for the application of khul'a divorce, in none of these cases has a khul'a divorce been registered. An illustration of this is Nake Mohammad.v.Aziza (1) in which N Mohammad is on record as having stated that "I have agreed with my wife, Aziza, about separation on the condition that she waives her right to dower and maintenance for her 'idda and releases me from the payment thereof. I hereby wish to complete a talaq khat to this effect". The completed ṭalāq khat, however, contains the following: "Because of incompatability between us, I, Nake Mohammad, ... hereby divorce my wife Aziza, with whom I have consummated the marriage, by an irrevocable single ṭalāq without consideration in accordance to Sharī'a. Aziza was present and accepted the above statement of Nake Mohammad. She also gave him a formal receipt (rasīd khat No.148/2.8.1350 AH) for her dower and maintenance". The facts of this case undoubtedly call for the application of khul'a, yet it has not been registered in the talāq khat. Considering the petition of Nake Mohammad and the condition he laid down for the divorce, Aziza's receipt was probably a cancellation of the dower debt and her right to maintenance, rather than the actual receipt of them (2).

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1. Talaq khat No.26/25.7.1350 AH the ORD for the Old City, Kabul.
2. A probable reason why Aziza gave a formal receipt to N Mohammad, instead of a deed of release (ibrā khat) which should really be the case, is because it was convenient in the circumstances to do so. For the ORD is not competent to register a deed of release. The parties thus found it convenient to avoid going to a court and registered a formal receipt instead. The ORD did not discourage this arrangement, probably because a formal receipt is liable to stamp duty, whereas a deed of release is not.

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The difference between khul'a and a single final divorce at the instance of the husband should be noted. Since khul'a in effect is a single final divorce, the two are sometimes confused. The confusion is aggravated, especially to a layman, in cases where the wife attends the registration office which is sometimes regarded to imply her consent to a divorce. A similar confusion can arise in cases where the wife releases her husband from the payment of her dower and registers an ibrā khat (deed of release) to this effect; for this can also be mistaken for financial consideration paid to the husband as required in a khul'a divorce. Although Nake Mohammad.v.Aziza is an irrevocable single divorce, it is not a khul'a:

a) Whereas, according to the dominant view of the Hanafi School, khul'a is contracted by the word khul'a or mubara'a or terms that imply their meaning (1), there is no mention in the above ṭalāq khat of these words or any similar term. The talāq khat above uses the terms of unilateral ṭalāq.

b) Whereas khul'a is a divorce with consideration, the above talāq khat is explicit in that it is a ṭalāq without consideration.

c) Had it been a khul'a divorce, some consideration (i.e. dower) would be payable to the husband. The fact that the wife gave a receipt for the dower and maintenance is the reverse of what would be the usual procedure in khul'a.

d) The presence of the wife and the mention of her acceptance of N.Mohammad's statement, is circumstantial and is not indicative of the divorce being a khul'a. The reference to her presence and acceptance appeared in the ṭalāq khat, presumably as a result of her being present if only for the completion of the formal receipt. This ṭalāq khat is explicitly a unilateral ṭalāq by the husband, in which the wife's acceptance is not normally required. This can be seen in the case of Mohammad Ismā'il.v.Karima, (2) in which the wife was absent during registration. The petitioner in this

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1. See : Ali al-Khafif, Muhadarāt 'An Furaq Al-Zawāj Fil-Maḍahib Al-Islamiyyah (Dissolution of marriage in Islamic schools), op cit:123.
2. Talāq khat No.36/14.9.1350 AH the ORD for The Old City, Kabul.

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case is on record as having stated that "Karima, my lawfully married wife, has asked me to divorce her; she is willing to waive her dower and maintenance for her period of idda. Since she has asked for a divorce, I agree to her proposition". The ṭalāq khat consequently completed reads in part that "I, M Ismā'il, ... hereby divorce my wife, Karima, with whom I have consummated the marriage by an irrevocable single ṭalāq without consideration ... Karima was not present and regarding her dower and maintenance for idda, she has the option to choose for herself". The petition, in this case, presented an occasion for the application of khul'a, but the divorce subsequently registered is clearly not a khul'a divorce.

One possible motive for the non-registration of khul'a divorce by the ORD may be the protection of the wife's financial interests in respect of her dower and maintenance. This has, however, not been the case in Shir Mohammad.v.Karima (1), where the wife has waived her dower and maintenance in favour of the husband and gave a formal deed of release to this effect. Yet, the ṭalāq khat consequently completed does not register a khul'a divorce. Shir Mohammad is on record as having stated in his petition that "I am willing to divorce my wife, Karima, who has agreed to release me of the payment of her dower and maintenance. I wish to complete a ṭalāq khat to this effect". The completed ṭalāq khat registered an irrevocable single ṭalāq by the husband, which reads in part that "... the divorcee, Karima, waived her dower, and maintenance for her period of 'idda in favour of S Mohammad and gave him a formal deed of reslease (Ibrā khat No.23/10.12.1349 AH, The Primary Court for Transactions, Kabul). There is no mention either of khul'a or of the mutual agreement of the parties on divorce in this ṭalāq khat.

A general rule in Hanafi law, applicable to all forms of divorce, is that ta'liq (suspending) in divorce takes the nature of an oath on the part of the husband which may not be retracted or revoked by him. For an oath, once taken, is not retractable. This rule is applicable to suspended divorce, to delegated divorce and to khul'a. Consequently, when the husband suspends the divorce

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1. Ṭalāq khat No.22/8.12.1349 AH the ORD, Baricot, Kabul.

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or when he delegates it to the wife, he is not permitted to retract these measures. Similarly, in khul'a when the husband makes an offer to divorce his wife for a financial consideration, this offer takes the nature of an oath which may not be retracted or revoked before the wife has given an answer. The husband may make the offer in the presence of the wife or in her absence. She can accept the offer when she is informed of it. But, when she leaves the majlis (meeting) during which the offer is communicated to her without her having accepted it, the offer lapses (1). Applying this rule to the proceedings of the ORD, a petition by the husband to divorce his wife for a financial consideration is, in effect, an offer which takes the nature of an oath. Such an offer, whether it is considered as an offer for khul'a or for any form of divorce, is a suspending (ta'liq) on the part of the husband which is not retractable or revokable in law.

The following case illustrates a situation where khul'a could provide a desirable solution, yet no mention of it has been made throughout the entire proceedings which involved not only the decisions of the three courts but also a royal decree and a resolution of the parliament at the time. In July 1967 while debate over the Marriage Bill (now Marriage Law 1971) was in progress, the Complaints Committee of the Wolesi Jirga (House of People) put forward a motion to the House asking the latter to grant immediate consideration to a petition submitted by one Abdul Khāliq. The motion was consequently carried and the case was received. A Khaliq stated in his petition that "Mohammad Na'īm, my father-in-law, had contracted his daughter Ruḥ Afzā into valid nikāḥ to me. After two years of our marital cohabitation, M.Na'im became involved in a political case and was imprisoned for several years. After his release from prison, Na'im suspected me of having caused his imprisonment. He then provoked Ruh Afza against me; she consequently refused to abide by her marital obligations to me. I sued her in court; the case led to protracted litigation in the three courts; a decision of the Cassation Court was finally issued to the

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1. See Abu-Zahra,M. Aḥwāl al-Shakhṣiyah (personal status), Dār-al Fikr al-Arabi, Egypt 1957 ed. p:352 (Arabic text).

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effect that my wife was at fault and that she should resume her marital obligations to me. Ruh Afza however refused to comply with the court order. In addition to the court decision, a resolution of the Juristic Council of the Ministry of Justice, and finally a royal decree communicated their support of the court decision and ordered the Governor of Kabul to send Ruh Afza to me. But so far this has not occurred"(1). The Secretary of the House, after reading out the petition, went on to say:

"The Kabul Governor has been asked to appear before the House Committee, and while answering questions, the Governor expressed the opinion that A. Khāliq's wife was in disagreement with her husband and did not wish to cohabit with him. The Governor added that he did not have the authority to compel her to go to her husband. In addition, he said, there exists an executive order in the file which expressly requires that Ruh Afzā should not be forced but that she should agree to be sent to her husband. The case went to and fro between various departments over a period of years, but the judicial decisions have not been executed yet. More recently, Ruh Afza herself appeared before the House Committee and described her incompatability with A. Khaliq and her unwillingness for cohabitation with him. In her petition to the Committee Ruh Afza has stated that if she is compelled to cohabit with A. Khaliq, she would commit suicide.

According to article 103 of the Constitution, judicial decisions of the Cassation Court are final and enforceable. Article 94 of the Constitution assigns to the Executive the duty of carrying out of judicial orders. As the Executive has failed to fulfill its constitutional duty, those officers of the Government who have caused the delay in enforcement ought to be prosecuted under the terms of article 77 of the Law of Criminal Proceedings".

One delegate, while criticising the Executive attitude in this case, confirmed the above view and considered the case as a neglect

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1. See WJJ. No.24 & 25, Kabul, July 1967.

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of duty on the part of the Executive (1). Another delegate expressed the view that Parliament should not enter into the details of the matter and it should only communicate to the Government that the enforcement of the decision of the court is its duty under the Constitution (2).

A member of the Complaints Committee voiced a point of information stating that when the enforcement authorities of the Kabul province summoned Ruh Afza, she complied with the summon but emphasized that she would commit suicide if she were forcibly sent to A. Khāliq. Consequently Ruḥ Afzā was put in prison for contempt of court (tamarrud); she accepted imprisonment but was not willing to cohabit with A. Khaliq. After her release, she still resisted a forcible cohabitation. The case has thus remained in circulation for some four years (3).

Another delegate argued : this case may be just an isolated incident but it is of major importance in that it reflects the backward-looking attitude of Afghanistan. The court's final decision is, of course, enforceable but this is not a complete answer to the problem arising from this case. The problem has to be looked at in its wider and national perspective. We must surely arrive at a solution that is in the interest of the people. Suppose that this case leads to a violent situation that may involve bloodshed and killing. Parliament has powers to inquire into the matter both within the Executive and the courts"(4). The last point was further pursued by a delegate who commented that "there is no doubt that, owing to certain factors, the courts of Afghanistan at times issue decisions that are not legal and are not justifiable. Parliament is therefore justified in investigating this matter in depth and ascertaining whether the decision taken by the court, in A. Khaliq and Ruh Afza is in fact a legal decision (5). The Wolesi Jirga, however, finally

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1. "When a court sentences a person to a term of imprisonment, how do the police go about it, and how do they put him in prison? Similarly a final decision of the court has been issued in this case according to which Ruh Afza is the lawful wife of A. Khaliq".(R.Dawary),ibid.
2. G.P. Ulfat, ibid.
3. A.G. Bāyani, ibid.
4. B. Kārmal, ibid.
5. M.Z. Yunusi, ibid.

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passed a resolution that the Executive be told to execute the court decision according to the requirement of the Constitution. There was, unfortunately, no reference in this resolution to the possibility of khul'a being invoked in the above case.

A similar case in question was Alamtab.v.Mohammad Shah (see above) where the mutual agreement of the spouses to divorce, and the fact that the demand was made by M. Shah for Alamtab to waive her financial rights arising from the marriage in his favour, presented an occasion for the application of khul'a. The court, however, registered a triple ṭalāq pronounced by M. Shah, without making any reference to khul'a or the possibility of its application. As pointed out before, if there is one institution in the Ḥanafi law of divorce which can be utilized in favour of the wife, it is khul'a divorce. Instead of expanding this institution as a positive method of improving the wife's position, and reducing the imbalance observed in the Hanafi law of divorce, the Afghan courts and registration offices discouraged khul'a even in cases which clearly called for its application. Alamtab.v.Mohammad Shah moreover, illustrates another point: the customary rule generally applied by the ORD regarding the non-registration of triple ṭalāq, is not being observed in the courts. In turn, this is indicative of the need for legislation if triple ṭalāq is to be discouraged.

II Claims of Divorce

Whereas registration of ṭalāq, as a non-judicial matter, falls within the province of the ORD, divorce claims are dealt with exclusively in the courts. This is provided for in the 1971 Marriage Law stating that "the competent court for the claims of ṭalāq and separation (tafriq) is the primary court in the locality of the claimant's residence". (Art.38). The latter is the only jurisdiction for dealing with divorce claims, and no other jurisdiction for family disputes exists in Afghanistan.

A feature of divorce claims in the Afghan courts is that they are primarily initiated for the purpose of establishing whether the divorce actually occurred or not. The central theme of divorce claims therefore revolves around the question of evidence and proof. The main reason for this derives from the general position of the Hanafi law on divorce: as pointed out before this law does not

recognize judicial divorce, it is therefore not within the rights of the wife to ask for one. On the other hand, the Hanafi law recognises ṭalāq as the unilateral and extra-judicial right of the husband. In other words, the wife is not normally entitled to ask the court for divorce; whereas the husband is not even required to go to court to effect a divorce. Consequently neither of the spouses would normally resort to court for the purpose of obtaining a divorce. Hence the only common form of proceeding that the wife is likely to initiate before the court takes the form of a claim that a ṭalāq has already occurred. This is primarily a question of establishing the facts by means of the necessary evidence.

Related to the above, another feature of divorce claims in the Afghan courts is that these claims are usually initiated by the wife. Typically it is the wife who is pleading that she has been divorced by her estranged husband but who still refuses to abide by the legal consequences of his pronounced divorce. The wife, being the claimant, has to carry the burden of proof and provide the necessary evidence in order to establish her claim. Instances in which the husband initiates a claim of divorce are of rare occurrence in the Afghan courts. For the husband is legally permitted to pronounce a ṭalāq almost any time he chooses to do so.

Another characteristic feature of divorce claims as evidenced in the court records is that in the vast majority of cases, the wife who initiates litigation fails to produce positive evidence in support of her claim. Most women find it extremely difficult to produce the required evidence; they are therefore likely to lose their claims. There are many factors to explain this. One is the absence of legal aid. To date there is no comprehensive scheme of legal aid available in Afghanistan, neither in civil litigation, nor in fact in crimes. Most women lack independent financial resources. A woman in such circumstances, who may also lack the support of her parents and relatives (as divorce is socially frowned upon), and who is likely to find herself in a difficult situation when her estranged husband is fighting against her, often fails to find witnesses of irreproachable character to support her claim before the court. In addition to this, the Hanafi law

does not make it a formal requirement of divorce that it should be pronounced in the presence of witnesses. This leads to an anomalous situation. Consequently the ability of a claimant, to produce witnesses for an event which legally takes place in the absence of witnesses, must represent an exceptional circumstance.

The court records concerning the claims of divorce indicate the fact that among the admissible forms of evidence, oath and refusal of oath are far more frequently applied than admission, witnesses and documentaty evidence. Admission of the husband to a claim of ṭalāq by the wife is a rare occurrence. An explanation for this is presumably that in most cases the wife's initiation of a claim in the court represents her last resort. Had the husband been willing to admit to her claim, she would not need to go to court in the first place. An additional factor that offers a partial explanation to the rare occurrence of admission is that many husbands may try to avoid meeting their financial obligations in respect of the unpaid dower, maintenance for the period of ʿidda or the outstanding maintenance as may be the case. Similarly, ṭalāq khat is rarely if ever presented in evidence by the wife in divorce claims. For when the wife possesses a ṭalāq khat, it would be automatically enforceable and she would not need to prove the occurrence of divorce in court at all. Here it may be said that the real value of ṭalāq khat is that it prevents the occurrence of a divorce claim in the first place. The only possible situation where a ṭalāq khat can exist in a claim of divorce is where the validity of the ṭalāq khat and the completion of the necessary formalities therein are questioned by the defendant.

As discussed above, witnesses are also infrequently presented in the evidence of the divorce claims. Most divorces take place without witnesses. Even when witnesses do exist, unless the claimant is an influential person, or she receives positive support from her parental family or kin group, they are usually reluctant to interfere in the matter and testify before the court. A typical case which illustrates the process of evidence is Qalam Nisa.v. Sabz Mohammad (1). Q. Nisa claimed the occurrence of ṭalāq against

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1. Settlement No.54/31.4.1351 A.H(1971), Cassation Court for Civil & Criminal Affairs, Kabul.

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Sabz Mohammad in the Central Primary Court of Takhār stating that "I was the lawfully married wife of this S. Mohammad who had consummated the marriage with me. On the day of 25.11.1349 A.H (1970), S. Mohammad while being a competent person and in full possession of his faculties divorced me by a triple ṭalāq. After the occurrence of ṭalāq, S. Mohammad expelled me from his house and I went to my parents' house where I still live to this day. But he does not abide by the consequences of ṭalāq and has not ceased interfering with my freedom. I hereby demand that S. Mohammad should cease his encroachment on my freedom and that he should pay me maintenance for my period of ʿidda. The court then asked S. Mohammad for his reply against Q. Nisa's claim; he completely denied the occurrence of ṭalāq. The court consequently asked the claimant if she had witnesses to support her claim. She expressed her inability to present witnesses, but demanded that the court put the defendant on oath. The court served the oath on the defendant who took it and yet again denied the occurrence of ṭalāq. The court therefore issued its decision against the claimant. The latter appealed to the provincial court of Takhar; the appeal court confirmed the decision of the primary court as being legally valid and in accordance with the Sharī'a. Q. Nisa re-appealed to the Cassation Court; the decision of this court is as follows: Q. Nisa has claimed her ṭalāq against S. Mohammad but has not produced just witnesses to prove her claim; she then had the defendant put on oath. He took the oath and denied the occurrence of ṭalāq. The claimant has thus failed to prove her claim. The Cassation Court therefore confirms the above decision of the appeal court as being valid and according to the Sharī'a".

The traditional formalism that prevails in the process of evidence has become so rigid that any information or evidence, outside the admissible forms, simply does not find any place in the decisions of the court. The fact that Q. Nisa had been expelled by S. Mohammad and was living with her parents for some seventeen months seem to present circumstances that merit investigation. Circumstantial

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1. Settlement No.54/31.4.1351 A.H(1971), Cassation Court for Civil & Criminal Affairs, Kabul.

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evidence, unless it amounts to a complete presumptive proof (qarina-e qāti'a), is not admissible in courts. As a result of this high degree of formalism, decisions of the courts (in most of divorce claims) are strikingly similar in form.

Another example of the wife's difficulty in securing witnesses to support her claim before the court is Niyāz Bibi.v. Mohammad Zāhir (1) in which N. Bibi claimed the occurrence of her triple ṭalāq against Zahir in the primary court of Arghandāb and stated that "I was the lawfully married wife of this Zahir who had consummated the marriage with me. On the day of 21.8.1348(1969), Zahir divorced me by a triple ṭalāq but he does not abide by the legal consequences of the pronounced ṭalāq ... I hereby demand that Zahir should cease his encroachment on my right of freedom ...." The court asked the claimant to produce witnesses which she was unable to do; she then demanded that Zahir should be put on oath. Zahir was put on oath and he denied the ṭalāq. The court consequently issued its decision against the claimant and ordered her to abide by her marital duties to Zahir". Niyaz Bibi appealed to the provincial court of Qandahar, but since she was unable to produce evidence, the appeal court confirmed the decision of the primary court. She then re-appealed to the Cassation Court which upon consideration noted that "in the appellate decision, the claimant has been referred to by the word hāza (this man, instead of hāzihi - this woman); in addition to this no witnesses of identity have been produced in the lower courts to identify the claimant. Article 37 of the Regulations for Registration of Documents, and the fiqh rule cited in Takmila-e Radd al-Mukhtar (p.58) require that women should be identified by two witnesses". The Cassation Court therefore reversed the appeal court's decision and referred the case for review to the resemblant court - maḥkama-e mumāsil - of Hilmand. The claimant presented her claim and was subsequently asked by the court to present her evidence. In reply, N. Bibi said : "while I was on my way to secure witnesses, Zāhir made a threat on my life and said : Dont you know me, who

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1. Settlement No.200/11.2.1349(1970), Cassation Court for Civil & Criminal Affairs, Kabul.

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is there to testify for you? Therefore I am unable to find witnesses. On the request of the claimant, the court then put Zāhir on oath but he denied the occurrence of ṭalāq. The appeal court of Hilmand issued its decision against the claimant and ordered her to abide by her marital obligations to Zahir ..." N. Bibi once again appealed to the Cassation Court; this court also confirmed the above decision of the provincial court of Hilmand.

In this case, as noted, Niyāz Bibi was unable to produce witnesses either for the purposes of her identification, or to substantiate her claim of divorce. Article 37 of the Regulations for Registration of Documents (RRD) as referred to by the court, provided that "In registering formal documents (asnād-e shara'i), women will be required to produce two witnesses who know them personally to testify their identity, and one person to certify as to the witnesses' identity". These precautionary measures have been introduced in the RRD probably because women have not been issued identity cards (tazkira) in Afghanistan. In these circumstances, this proviso of the RRD might seem justifiable. It is, however, to be noted that the lack of an identity card further weakened a womans ability to produce witnesses for her identity.

Considering a woman's difficulty in proving a divorce claim, a question can be asked as to why the 1971 Marriage Law did not make the registration of divorce strictly obligatory. The Law for example could emphasize the husband's obligation regarding the registration of divorce with some form of legal sanction. An alternative question can be asked as to why the law did not deny judicial relief to claims relating to divorce not supported by a ṭalāq khat. A discussion of these two questions is interesting insofar as it has bearing on the traditional means of evidence applied in the courts.

The suggestion that a ṭalāq khat should be a necessary condition for the hearing of a claim relating to divorce can only be justified if reference is made to claims relating to divorce where one of the parties is deceased. Claims of divorce made in retrospect are usually directed to the settlement of debts and inheritance. As the death of a spouse terminates the marriage; therefore continuation of the marital life is no longer the issue. Any claim to prove or disprove a divorce after a spouse has died is likely to relate to property

and inheritance. This type of claim should be denied hearing unless it is supported by reliable documentary evidence. The matter is obviously different when both parties to a divorce claim are alive. In this case, ṭalāq khat should not be the only admissible form of evidence to establish a divorce. The claimant should instead be free to prove the occurrence of divorce by any form of evidence. Supposing that a divorce has actually occurred but the husband refuses to free the divorcee. If the latter's claim of divorce is denied a hearing merely because of the lack of ṭalāq khat, the hearing of her claim would be made dependant on a condition the fulfilment of which is beyond her ability.

The second proposition is whether or not the law should compel the registration of divorce. This approach may secure a reliable and more extensive system of registration; but its effectiveness in the long run remains questionable. An illustration of a law supported by a punitive measure can be found in the Pakistan Family Law Ordinance of 1961*. Under this Ordinance, a husband intending divorce is required to report his proposed divorce to the Chairman of the Arbitration Council set up under the Ordinance. Failure to do so is punishable by one year imprisonment, or a fine of 5,000 rupees or both. The weakness of this approach is that a divorce pronounced by the husband without an advance notice or registration is still regarded effective in law. Supposing a husband pronounces a divorce without giving any notice to the Council, and then the wife complains of his failure to abide by the consequences of his pronounced divorce. The husband will presumably be liable to the prescribed punishments. But supposing he then denies the pronouncement of divorce, the wife would then need to prove the occurrence of divorce by means of admissible evidence before the punishment can be imposed. This alone can prove a difficult task for her, and even if the punishment is carried out, until then, her problem of remaining an unrecognized divorcee is not solved.

A further disadvantage of a punitive approach toward registration would be the undesirable effect it can have on the traditional means of proof especially concerning the 'denial of oath' as a form of admissible evidence in divorce claims. The above

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* See below at page (200)

statements can be illustrated in Farouqa.v.Mohammad Farouq (1) in which Farouqa claimed in the primary court of Kabul that "I was the lawfully married wife of this Farouq who had consummated the marriage with me and from whom I have given birth to six children all of whom are alive. On the day of 15.8.1348(1969), Farouq while a competent person divorced me by a triple ṭalāq; but Farouq does not abide by the legal consequences of his pronounced ṭalāq. I hereby demand that Farouq should free me and cease interfering with my freedom. The court asked Farouq for his reply; he completely denied the occurrence of ṭalāq. The court then asked the claimant for evidence; she expressed her inability to present witnesses and requested that the defendant should be put on oath. The court served the oath on the defendant three times, but he refused to take it. Consequently the court informed the defendant that according to article 126 of the Law of Court Administration and article 126 of the Law of Civil Procedure, this court hereby orders separation between the parties and the freedom of the claimant from the marital tie".

Had the law denied the hearing of a divorce claim without producing a ṭalāq khat, Farouqa would have been prevented from proving the divorce. A woman, once divorced should have the right to re-marry without an unnecessary and protracted delay. Had Farouqa's claim been non-hearable because of the lack of a ṭalāq khat, her position of suspense could have continued not only for nearly three years, as it in fact did, but for as long as Farouq refused to acknowledge the divorce.

Supposing the law had provided for penal sanctions to be applied to the husband for failure to register a divorce, the sanctions would presumably be applicable to Farouq in the above case. Farouq, in other words, would be placed under the threat of punishment. Being aware of this, Farouq would be likely to resist the claim of divorce being proved against him. Enactment of penal measures is in other words, likely to influence the process of discovery of truth through Sharî'a evidence. In short, neither of the above-mentioned

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1. Settlement No.9/28.3.1351, Primary Court of Kabul for Civil Affairs.

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propositions provide a satisfactory solution to the problem of proof in divorce claims.

A possible solution can be derived from the Qur'an. A verse of the Qur'an (discussed below) explicitly provides for the presence of two witnesses in divorce. This part of the Qur'an has, however, been rendered ineffective by the majority of Sunni jurists who saw it as a moral proviso rather than a positive law. The majority view in this respect has nevertheless been disputed by a number of other jurists who considered the presence of two witnesses an essential requirement for the validity of divorce. The relevant verse of the Qur'an reads: "When they are about to reach their prescribed period ... keep them with kindness or put them away with kindness, and call two just witnesses from among you and bear true witness for Allah".(65:3).

The majority view is that the presence of witnesses is recommended (mandūb) both in divorce and revocation (rij'a). Proponents of this view reason that no evidence exists to indicate that the Prophet or any of his companions made witnesses a condition for the occurrence of divorce, nor did they prevent anyone from effecting divorce for this reason alone. Had it been a condition to produce witnesses in order for a divorce to be valid, a record of it would have reached us. The Qur'anic command for witnesses in divorce can therefore only be regarded as a recommendation (1). Some jurists attribute the requirement of witnesses to divorce only, whereas others attribute it to revocation and not to divorce. The reason given by the former group is that the verse appears in the context of divorce (in the Sura of Ṭalāq); whereas the latter group reasoned that revocation involves a positive act by the husband, it is therefore amenable to witnesses; divorce on the other hand involves abandonment of the wife by the husband until the completion of 'idda and this is a negative act that lasts for the whole period of 'idda and therefore not amenable to witnessing. The Quar'anic verse therefore is not referring to divorce but to revocation (this view is recorded in Tafsir al-Qurṭabi).

Other jurists held the opinion that the Qur'anic verse is a command and this is implied by the phrase 'bear true witness for Allah'; there is nothing in the whole verse to contradict this meaning. Proponents of this view asserted that either divorce or revocation

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1. See Al-Khafif, op cit:129.

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without witnesses is transgression of the limits prescribed by Allah and cannot be valid (this view is recorded in Tafsir al-Ṭibari attributed to Ibn-Abbās and others). According to Shi'a law (Ja'faris), the presence of two just witnesses is a condition for the occurrence of a valid ṭalāq. According to Ibn-Ḥazm witnesses are a condition of both divorce and revocation: The Qur'anic requirement of witnesses applies to both equally; Allah has not differentiated between ṭalāq and revocation in this respect. Any one who divorces without the presence of two just witnesses or revokes without them, is a transgressor of the limits prescribed by Allah.

There can be no doubt that the basic purpose of the Qur'anic verse above is to prevent subsequent disputes concerning the proof of divorce - and revocation - and its possible denial by the parties. The requirement of witnesses seems to have a further advantage: the restrictive effect it is likely to have on the incidence of impulsive pronouncements of ṭalāq. A feasible solution to the problem of proof concerning divorce claims in Afghanistan would be for the legislator to provide that witnesses be an essential requirement for the validity of divorce. Divorce without witnesses should be of no effect, and the marriage tie therefore be considered as subsisting. Further development of this formula would fall within the competence of the Ruler. Considering the fact that verbal testimony without documentation is always subject to doubt and its accessability uncertain in the course of time and events, documentation of witnesses of divorce seems essential; it should therefore be made a necessary requirement. As such it would be in the interest of the wife as well as that of the husband. This is illustrated in Maulawi Dawlat Mohammad.v.Maulawi Abdussamad (1). This case also shows the inadequacy of verbal testimony in a divorce claim. D. Mohammad claimed against Abdussamad (Abdussamad representing his daughter Shah Sultān) that "Shah Sultan is my lawfully married wife with whom I have consummated the marriage and have a daughter of eleven months born to our marriage. When Abdussamad contracted his daughter in nikāḥ

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1. Settlement No.110/23.5.1350(1971), Cassation Court for Civil & Criminal Affairs, Kabul.

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to me, he asked me to live in his house which I accepted ... but during our residence in Abdussamad's house, my wife showed heedlessness and behaved carelessly towards me. Hence I decided to take her to my parental house to Samandān. But Abdussamad disagreed with me and the matter became the subject of dispute between us. When I petitioned to the local authorities, Shah Sultan under the influence of her father and brothers raised a claim of divorce against me. The purpose of Abdussamad in this was to keep the 50,000 afs dower that he received from me, and what's more to acquire an equivalent sum of money from someone else and plead the occurrence of ṭalāq against me. Since I have not divorced my wife, I hereby demand her to abide by her marriage to me. Abdussamad was asked by the court for his reply. He stated that Shah Sultan was the lawfully wedded wife of the claimant. When he wanted to take her away to Samandan, he said that he would go by himself but told me that I should send her on after him. I replied that I could not go and told him that 'you are sending your wife to a strange place, who should I send her with'? Thereupon the claimant divorced his wife .... Later on the day of 2.10.1350(1971) when I was busy teaching in tadris, there was a commotion in the house; when I came I saw the claimant trying to take my client to Samandan. I then said that it is a long distance, she would need to prepare herself; the claimant then said that if she did not go immediately, she is divorced from me by a triple ṭalāq. Since a final ṭalāq occurred according to Sharī'a, I therefore demand the claimant to cease further encroachment of my client's rights. The court then asked D. Mohammad (now the defendant) for his reply regarding the claim of triple ṭalāq which he denied. Consequently Abdussamad was asked for evidence; he presented two witnesses but their testimony did not fulfill the necessary conditions. The court then asked Abdussamad if he wished the defendant to be put on oath, he said he did not. On this basis, the Primary Court of Andarāb issued its decision (No.2/14.1.1348 - 1969 -) against Abdussamad and his client shah Sultan. Abdussamad appealed against this decision and in the appeal court objected that the testimony of his witnesses has not been recorded in the same way as it was given before the court. In addition to this, Abdussamad objected that the primary court's judge was partial in favour of his opponent and stated that he was unable to produce witnesses. The appeal court did not

consider these objections valid and confirmed the primary court's decision. Abdussamad re-appealed to the Cassation Court; this court considered that the appellant had not expressed his inability to present witnesses. The appeal court's decision has therefore been reversed and the case referred to the 'resemblant court' of Takhār. In the court of Takhār, the claimant D. Mohammad presented his claim ..." The case was thus given fresh hearing and the process of litigation and evidence followed the same course once again. Abdussamad claimed the occurrence of a triple talāq by D. Mohammad. Abdussamad's witnesses were this time accepted by the court of Takhar. But when the court asked D. Mohammad about the witnesses, he replied that "one of the witnesses, Abdul Hādi was the brother of Shah Sultān, hence his testimony is not admissible. Against this Abdussamad stated that this relationship does not constitute an impediment and to this effect relied on the Takmila-e Radd al-Mukhtar*. The court admitted the testimony of Abdul Hādi for his sister and on the basis of article 2 of Regulations for Examining Witnesses (ta'limātnāma-e tazkiya-e shuhūd) ensured the irreproachability of witnesses through open and confidential examination as the result of which the witnesses appeared to be acceptible for testimony. Consequently the appeal court of Takhar issued its decision against Dawlat Mohammad. D. Mohammad appealed against this decision to the Cassation Court which finally confirmed the decision of the appeal court and the occurrence of triple talāq by D. Mohammad was thus proved.

As can be seen in this case, unless the testimony of witnesses is recorded at the very earliest stage, it can be disputed and the admissibility of witnesses can be subjected to questioning in various ways which provide a field for litigatory exercise.

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* The rule cited is that testimony of brother and sister for each other is admissible so long as there does not incur the avoidance of harm or production of gain in favour of the witness. A further condition is that there must be no enmity between the witness and the person against whom evidence is given.

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Report of the Select Committee on Divorce:

In July 1973 the Supreme Judicial Council received a petition submitted by Aziza the wife of Mohammad Ghawth in which she stated that Ghawth was inflicted with chronic madness and on this basis she demanded a judicial separation. In her petition, Aziza stated that "the professional evidence of several qualified doctors consistently confirm that Ghawth's madness is of a permanent nature. During the past ten years, Ghawth's mental conditions have progressively deteriorated and there has been no improvement in his disease during this time. Marital life with Ghawth has become intolerable for me and cohabitation with him involves physical danger to my life".(1) In a detailed statement enclosed with her petition, Aziza further stated that although Abu Hanifa himself did not recognise madness as a grounds for the dissolution of marriage, all the other leaders of the three Sharī'a schools, as well as Imam Muhammad, the disciple of Abu Ḥanifa recognised the wife's right for a dissolution of marriage on this grounds. Aziza clarified in her statement that notwithstanding the fact that divorce is a right of the husband, justice and fairness requires that the wife should also be entitled to divorce especially in circumstances where a disease of the husband renders continuation of marital life very difficult for her. The Sharī'a jurists have different opinions on this matter which can be summarised as follows:-

1. According to Ibn-Hazm, leader of the Zāhiris, once a marriage is validly contracted, it may not be dissolved on the grounds of any disease either on the part of the husband or on the part of the wife (see Muhalli, Vol.10.p 109).
2. With the above exception, all other Sharī'a jurists are agreed that three defects (ʿaib) of the husband namely his sexual impotence (ʿinna), mutilation of procreative organ (jubb) and mutilation of testicles (khisā) entitles the wife to dissolve the marriage on the basis of a judicial decree. Muhammad the disciple of Abu Ḥanifa considered three diseases namely madness, leprosy and elephantiasis as grounds for dissolution.
3. Shāfi'is, Mālikis and Ḥanbalis confirm the above opinion of imam Muhammad.

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(1) See judicial circular No.607/1.7.1353 A.H. (April 1974), published in Qada No.7. 1353 A.H.

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According to Imam Zahri and some other jurists, any defect of the husband entitles the wife to a judicial faskh (lit.recission) of her marriage; the Hanbali jurists authorise a judicial faskh on grounds of such defects as bad breath, piles and gangrene (nāsūr) - see Kashaf Al-Qanna', Vol.3.p.14 -

Disagreement of the Shari'a jurists on the types and number of diseases suggest that it will be advisable to arrive at a rule of general applicability to various diseases rather than specifying any particular disease. Some jurists have in fact adopted this wider approach. An example of this is the opinion recorded in Bahr-e Zukhār (Vol.3, p.61) according to which defects that constitute valid grounds for dissolution are not restricted to any particular types; any defect abhorrent to human nature may form the grounds of a dissolution. Similarly according to Ibn al-Qayyim, analogy (qiyās) requires that any defect which abhors the human nature and impedes the basic purpose of nikāh i.e. mutual love and compassion, can form the basis of a dissolution. Ibn al-Qayyim has also quoted Imam Zahri who permitted judicial faskh on the grounds of any incurable defect . In short, madness of the husband is a valid ground for dissolution according to the opinion of the majority of Shari'a schools including the Hanafi jurist Imam Muhammad.

A look at the legislations currently enforced in many Muslim countries indicate wide support for adopting a comprehensive approach to the issue at point. The Egyptians who for sometime practiced the view of Abu Ḥanifa and Abu Yūsuf, have under the 1920 law only qualified the general attributes of the defects of the husband that constitute grounds for dissolution. Under this law "a chronic (mudāwim) and continuous (mustahkam)defect of the husband which is either incurable or may cure only after a long time of treatment" entitles the wife to demand a faskh of her marriage even if the defect existed prior to the contract of nikāh and the wife had knowledge thereof. In evaluating these defects, the court will rely on medical and professional evidence.

On the basis of the above argument presented by Aziza, her case eventually led to the setting up of a Committee of nine members consisting of professors, senior judges and lawyers to prepare a report and make recommendations for legislation on the subject of divorce. The terms of reference specified in the resolution focused on the problems

of "women whose husbands were afflicted with incurable disease; or where the husband was declared a missing person for several years, or where he was a person of ill-repute who failed to fulfil his marital obligations ... Recommendations of the committee are to be based on the principles of the Sharī'a of Islam." Report of the committee came out in August 1974 (1) while this chapter was in the process of being written. The present writer considered it worthwhile to include this Report even though it has not been passed into a law. The Report is dominantly based on Mālikī law. Having received a wide support in almost all the Middle Eastern legislations, Mālikī law is likely to form the basis of a possible future reform of divorce law in Afghanistan. It seems therefore relevant to give an account of this Report and of its bearing on the problems of divorce discussed in this Chapter.(2) The social basis of the proposed reforms in this report is illustrated in an Explanatory Memorandum of the Ministry of Justice attached to the Report which is based on the experience of the Provincial Court of Kabul* as follows:

"The Provincial Court of Kabul has encountered cases in which the continuation of the traditional attitudes of the courts concerning matrimonial disputes not only failed to satisfy the aims of justice but they resulted in obvious cruelty and injustice. In typical cases involving cruelty of the husband, the courts encountered situation in which the husband violently attacked his wife by stabbing her, mutilating of her nose, ear and shaving of her head. The wife as a result refused to continue cohabitation with him. The same offender then went to court and pleaded that since he had not divorced his wife, she should be forced to abide by her marital obligations to cohabit with him. The husband often so pleaded only to further persecute her. The wife in such circumstances often chose to go to prison rather than to cohabit with him. The court, although well aware that to 'live in kindness', a Quranic obligation of the husband, would not succeed in the circumstances; and while the court knew that the husband's motives were simply to torture and persecute his wife, it was powerless to take any alternative measures but to order the wife to resume marital cohabitation with her husband.

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(1) Report of the Select Committee on Divorce, published by the Ministry of Justice, Kabul (Dari Text).

(2) It will be further noted that the Report has incorporated the chapter of the draft Civil Code on divorce. The draft code has been under deliberation for over three years during which time it received the support of three successive committees, which is indicative of the existence of a climate of opinion in Afghanistan in favour of adopting the Maliki law of divorce.

* President of the Provincial Court of Kabul has been a member of the Select Committee on Divorce.

In the event where the wife did not comply with the court order, she would face imprisonment for contempt of court (tamarrud). The wife would thus come into close contact with convicted criminals, and this could damage her personality even further.

In other cases involving injustice, the husband would be sentenced to long periods of imprisonment sometimes as long as fifteen or twenty years. The young wife, during this time, would find it impossible to wait while lacking in means and the company and protection of her husband. The wife would then go to court for judicial relief, and when she received no satisfaction, came away disillusioned by the court's attitude. She would consequently prefer to opt out of her responsibilities and to find her way out of the intolerable situation and would often end up leading a disreputable life. Cases are also known in which the husband refused to provide maintenance and support for his wife. The wife, in order to find a solution, went to court and initiated litigation to secure her right for maintenance. When both parties attended the court, the latter observed that the husband would not show his willingness to provide for her maintenance, nor would he divorce her. Even when he did express willingness to support her, he often persecuted her to such a degree that many wives eventually attempted to commit suicide. These and other cases were examples of injustice and unfairness that were observed in the courts, and we witnessed this regrettable state of affairs over the years. The Provincial Court of Kabul was anxious to find an opening to lead to the implementation of justice in these problems ... "

Concerning the juristic basis of the proposed reform, the Explanatory Memorandum continued that "one point which is important to notice is the position in the Sharia concerning the adoption, by the followers of one school, of the juristic opinions of other schools. The author of Radd al-Mukhtar has recorded the view that disagreement among jurists in details of Islamic principles is a sign of the bounty of Allah. The wider this variation of opinion is, the greater there is the possibility of improving the lot of the people. According to a tradition (ḥadīth), whenever it was possible, the Prophet, as a rule, chose the solution which would lead to the relief of hardship to the people. This is in keeping with the Qur'anic dictum that Allah "does not will hardship for you" and in accordance with the well-known fiqh principle that "hardship invites relief". Thus when a Muslim community chooses to adopt one

particular school, and confines itself to the pursuit of one particular discipline, the meaning of the above-mentioned principles is not achieved. It is on this basis that not one of the leaders (imams) of the different Sharī'a schools have ordered their followers to observe their school of thought to the exclusion of others. Instead, Muslims are allowed to choose for themselves. An illustration of this was when the Caliph of the time, Al-Manṣūr, asked Mālik for his Muattā to be distributed in the Islamic lands and the people to be obligated to act upon it. Malik did not agree to this proposition and told the Caliph to leave the people free to choose for themselves and act upon that which proves of most value to them. The Hanafi jurists have also expressed the view that taqlīd (lit.immitation) and the observance of one particular school is not obligatory; and it is permissible to follow one school on one occasion and a different school on another. To do so does not affect the theological integrity of the practitioner in any way."

The Report, in its actual contents, merely re-iterated the section of the draft Civil Code relating to divorce which has been under consideration for some three years.(1) In this Report which mainly adopted the Maliki law, divorce by judicial decree falls into four categories as follows:

1. Divorce on the basis of physical or mental defect ('eib) of the husband:

Article (1) of the Report provided "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 married life injurious for the wife". The Explanatory Memorandum stated that this article adopted the majority view of the Sharī'a schools which does not specify the disease. Abu Hanifa and Abu Yūsuf, however, restricted the disease to instances where the husband is impotent or a eunoch, or lacking of procreative organ. To this, his disciple Mohammad added madness, leprosy and elephantiasis. "The Egyptian legislation", stated the Explanatory Memorandum, "is similarly based on the majority view." The wife is, however, disqualified from demanding 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, explicitly or implicitly, to continue the marriage relationship after the disability developed, she may not demand a judicial divorce.(Art.2). Whenever it is proved that a disease is incurable, the

(1) See a passage in the introduction of this Report: "The committee studied the section of the draft Civil Code on divorce which was prepared by the Legislative Department of the Ministry of Justice as also approved by a group of competent lawyers on second reading. The committee's recommendation on its findings is that this section of the draft Civil Code should be reproduced."

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.4). In establishing the nature and existence of a disease, "the court is to refer to informed opinion". Divorce effected under the above provisions is a final divorce. This however does not create a bar to a subsequent marriage between the parties whether during the period of iddā or afterwards. This final divorce nevertheless creates an immediate bar to inheritance between the parties (Arts 5-7).

2. Divorce on the basis of injury (darar)

According to article 8 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. The subsequent articles grant the wife a right to judicial divorce in injurious circumstances both on the basis of a proof that she may furnish, as well as on the mere insistence of the wife for a divorce:

When the alleged injury is proved and reconciliation between the spouses seems impossible, the court is to order a divorce, taking effect as an irrevocable single talāq. Whenever the wife's allegation of injurious treatment is not proved, but she still insists that this is the case, the court is to appoint two arbitrators to attempt reconciliation between the spouses. The arbitrators must be appointed from among persons of just character; to be appointed one from among the husband's relatives and one from the wife's.* It is the duty of the arbitrators to discover the causes of the conflict and the ways in which reconciliation may be feasible, and to effect it. The arbitrators will submit their decision to the court which will then be adopted as the basis of the court decision. Article 13 provides for the final alternative "when the arbitrators did not succeed to effect reconciliation, or when the cause of discord is attributable to the husband or to both sides, or is not clearly ascertainable, the court shall decree a divorce." The second clause of article 13 basically provides for khul'a divorce in stating : "But when the discord originates from the wife's side, the decree of divorce is issued ordering the return by the wife of the part or the whole of the dower to the husband." The Explanatory Memorandum, while commenting on the above articles

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* If there were no relatives, arbitrators are to be appointed from among such persons who are sufficiently informed of the conditions of the spouses and be capable to reconcile them.

referred to the Qurʾanic obligation of the husband "to retain them (i.e. the wives) in kindness or put them away in a becoming manner" and stated: "Accordingly the husband is not permitted to discipline his wife unless she ill-treats him and thereby embitters family life in which case he is within his rights to punish her in accordance to the provision of the Sharīʿa. In circumstances where the husband injures the wife by beating her constantly, or by insulting her and her parents without reason, it is not usually recognised by jurists as sufficient grounds for divorce. The majority view instead permits the wife to complain to the court so that the husband can be punished. While the majority of jurists of the Sharīʿa schools are of this opinion, Mālik has adopted a different standpoint which is that the wife may appeal to the court to punish her husband, or alternatively that the court should effect a judicial divorce". The Memorandum continues : "this opinion is better suited to the welfare of the people. For when the wife is denied the right to demand judicial divorce, the husband will tend to subjugate her and even when the wife complains to the courts and they punish the husband accordingly, tension is likely to arise between the spouses and this would further undermine the tranquility of family life. The legislation in Egypt is based on Maliki law ..."

3. Divorce on the basis of failure to maintain:

Failure of the husband to support his wife, either by wilful refusal or simply by his inability to do so, constitutes a basis of divorce as follows:

a/ A wife may apply to the court for divorce when her husband has no known property and his inability to provide for her maintenance cannot be proved.

b/ If the husband proved his inability for the payment of maintenance the court is to grant him a respite not exceeding three months; but if he was still unable to maintain her, the court is to issue the decree of divorce.

Divorce effected for failure to maintain is a ṭalāq which is revocable; the husband can therefore resume the marital relationship during the period of ʿidda provided that he proves his ability to maintain her.(1)

The Memorandum stated that the above provisions adopted the majority view of the Sharīʿa schools which recognised the wife's right for a divorce when her husband fails to support her. The Hanafi law, however,

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(1) See articles 16-18 of the Report.

denies the existence of such a right. The Memorandum also noted the opinion of Ibn al-Qayyim, the Hanbali jurist, according to which if the wife, at the time of the marriage contract, had knowledge of the financial inability of the husband, or if he had financial ability for her maintenance at the outset but poverty occurred later on to the marriage, the wife may not demand a divorce. On the other hand, if he had deceived her by showing himself financially able and then turned out to be the opposite, she is entitled to demand a judicial divorce. Many people, while they may have a financially comfortable life, may later become insolvent. The wife, in such circumstances, ought to show loyalty and co-operation. In the case of deception, the Hanafis are basically in agreement with Ibn al-Qayyim in the sense that if the husband falsely implies that he has the ability to pay the dower and maintenance, the wife has the right to demand the annulment of the marriage. The legislation in Egypt (Law of 1920) is based on the majority view of the Shari'a schools.

4. Desertion:

According to article 19 if a husband disappears for a period of four years or more without reasonable excuse, the wife may demand the court for a divorce if she has suffered darar from his absence even if the husband owns property from which the wife may obtain maintenance.

Article 20 stated : "in case of the absence of the husband, when the court receives the wife's application for divorce, it shall communicate the matter to the husband by written means of communication and assign him a respite during which he is ordered to return to her or to send for her to join him. If he fails to take action or to return to her inspite of the court's warning and without reasonable excuse, or if he cannot be contacted, the court shall decree a divorce." Divorce decreed under article 19 and 20 effects a revocable (raj'i) divorce.

As above, article 19 applies to the case of a missing person of unknown whereabouts; the court is therefore not obligated to warn him or to communicate the matter to him. The court instead bases its decision on the given criterion of the four year's absence of the husband.

Article 20 on the other hand covers desertion in general. This article does not specify any period of time and allows the court to exercise discretion in the matter. Relating to article 20, the

Explanatory Memorandum noted that according to Abu Hanifa and Shāfi'i, an extended absence of the husband, however injurious to the wife, does not afford her the right to judicial divorce; she is obligated to exert patience and tolerance. But according to Mālik, if the wife has suffered injury from his absence, she is entitled to seek judicial divorce. The time of absence after which the wife may apply for divorce is specified at three years in one view, and at one year in another Maliki view. According to some Mālikis, the mere absence of the husband even with an acceptible excuse constitutes a basis for divorce. For example when the husband is serving a long sentence of imprisonment, the wife may apply for divorce. Hanbali law is basically similar to Māliki law except where the husband has a reasonable excuse in which case the Ḥanbalis deny the right of the wife for divorce. The legislation in Egypt adopted the Maliki law which entitles the wife to divorce after one year desertion.

Relating to Art.19, the Explanatory Memorandum stated : "according to the opinion of Malik which is also the preferred opinion of the Hanafi school, the court orders separation after the expiry of four years from the date of disappearance of the missing person. This view is recorded in Radd al-Mukhtar (vol.3, p.456), as well as in al-Bazāziyya and states that in our time the opinion of Malik is to be preferred. Similarly Al-Zāhidi has stated that some of our jurists have supported this view on the basis of necessity."

The above Report which took some nine months of preparation was eventually submitted to the Supreme Judicial Council (Shura-e 'ali Qada). In its resolution of September 1974 (16.6.1353.A.H.), the Council however refused the recommendations of the Select Committee and instead adopted the following:

"1 - After contracting the marriage, whenever the husband is inflicted with any of the three defects namely impotence ('inna), mutilation of the procreative organ, and of testicles (jubb, khisā), the wife is entitled to demand the faskh of her marriage. The court will order separation upon the proof of these defects: Whereas in cases of mutilation (jubb) the court will order an immediate separation, in cases of sexual impotence ('inna, and khisā) the separation order will be suspended for a period of one year after the receipt of the wife's demand for dissolution. If during this time, the husband recovers, the matter will be settled, otherwise the court will order separation.

2) According to Imam Muhammad, the wife is entitled to demand the dissolution of her marriage on any of the three grounds as follows:
a - Madness of the husband: If the madness is proved to be chronic (mutbiq)*, the court will dissolve the nikāh after the expiry of one month, whereas in cases of inchronic (gheir-e mutbiq) madness, the marriage may be dissolved after the expiry of one year;
b - when the husband is inflicted with leprosy; and
c - when the husband is inflicted with elephantiasis.

3) The wife is entitled to demand the dissolution (faskh) of her marriage when her husband is a missing person for four consecutive years and no news is heard of his life or death or of his whereabouts. This is the opinion of Malik. Since Sharī'a is founded on ease (yusr) and not on hardship ('usr) for the people, the Hanafi jurists have supported the above view of Malik as preferable and permit the Hanafi judge to order faskh after four years.

As above the court will act upon the preferred juristic views ..." (1).

Considering the background developments which led to the said Report, the above resolution of the Council unfortunately falls short of responding to the need and expectation for wider reforms as recommended by the Select Committee. This restrictive judicial outlook is substantiated in the case of Musa & Shāista (2) in which the courts paid no attention to either the Maliki or the Hanafi views as noted above. In this case, one Mohammad Musā, the son of Mohammad Ghaws, a resident of Farāh, left home and his young wife Shāista and went away for business purposes. Twelve years elapsed during which time no news came of the whereabouts of Musa. It had, however, been rumoured that the missing husband was alive and lived in the district of Bādghis. Relatives of the missing person were told by the local authorities of Farah to find him and a cousin of the missing person was assigned a respite during which time he went to Badghis to search for him, but to no avail. A brother of the missing person also helped his cousin in the search. Eventually Shāista married one Mohammad Musa the son of Zikriā; but at this the local government ordered an inquiry into the matter. In the course of the inquiry fifty people from

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* mutbiq is the antonym of hādith, the latter meaning nascent.

(1) See Qadā No.7 1353 A.H. ibid.
(2) Settlement No.478/25.11.1349(1970), Cassation Court for Civil and Criminal Affairs, Kabul.

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the village of Shurāb stated that Shaista was the lawfully married wife of Musa the son of M.Ghaws and that they were present at the nikāh. Later this Musa the son of Zikria married Shaista in the presence of witnesses, the village headman and some other people. In result, the committee of inquiry held Musa the son of Zikria and other participants of the nikāh as responsible for the crime of abduction (ikhtiṭāf). The case was considered at the Central Primary Court of Farah where the accused persons rejected the charge and stated that Shaista had no existent husband at the time of her nikāh to Musa the son of Zikria, but the court rejected this defence on the basis of article 5 of the Marriage Law 1960 which denied hearing to a claim of nikāh when not supported by a valid nikāh khat. Consequently Musa and Shaista were each sentenced to two years of imprisonment; Shaist's father to three years imprisonment; the village headman to fines of 4,000 afs; and three other participants each to fines of 3,000 afs. All the defendants appealed to the provincial court of Farah where it was ruled that Musa the son of M.Ghaws was missing for twelve years but not reported to be dead. The court cited the Hanafi rule that "separation is not to be ordered between the missing person and his wife until the lapsing of (120) years counting from the date of his birth after which the court will declare him as dead; but the preferred view is that of 90 years before the completion of which a subsequent nikāh is not permissible..." The court therefore sentenced Musa and Shaista each to four years imprisonment; Dost.Mohammad the father of Shaista to one year; the village headman to an additional imprisonment of three months; and the rest to fines of 3,000 afs each. But Judge A.Bāḥis, a member of the provincial court of Farah dissented and wrote : "based on the rules of fiqh and the statutes, I do not consider that this case qualifies for prosecution and indictment. Prosecution by the public prosecutor and punishment under ta'zīr by the court in this case are in my opinion insupportable. I therefore acquit all the defendants in this case." In his commentary published in 'Payām-e Wijdān', a periodical publication, Judge Bāḥis further noted : "In my opinion, this decision is not a just one. People do not often live for more than 60 or 70 years and as the woman advances in age, should she stay unmarried to the end of her life or until such a time when she is no longer marriageable? This would in itself constitute a source of moral deviation. In any case the periods of time referred to impose a life-long torture, and are intolerably

excessive by any standard. According to Mālik, if after the lapse of four years (according to Hanbal two years), no news of the husband's whereabouts are heard, the wife is allowed to remarry. This nikāh has been contracted, not after four, but after twelve years; hence no crime has been committed. It is to be further noted that one reason for the enactment of article 5 of the Marriage Law has been the fact that our people are women-sellers who give women in nikāh often for financial gain forcing them without their consent. The said article has indeed been introduced for the protection of women and to prevent the forcible selling of women into marriage. That is to say if someone claims his nikāh to a certain woman and the latter denies the claim, the claim would be unhearable without a nikah khat. In this particular case, suppose that Musa the son of M.Ghaws were present at the time of this litigation, and had claimed his nikāh to Shaista; as a consequence of article 5, the court would not have heard his claim, since Shaista admitted her nikah to Musa the son of Zikria, her admission to this effect would automatically establish her nikāh to Musa the son of Zikria. The court therefore can not regard such a nikāh which is contracted in accordance to Sharī'a and is undeniable under the statute law, as nil and non-existent.(1)

The defendants reappealed to the Cassation Court; this court sentenced the defendants, on the charge of abduction or being a party to it as follows: Musa and Shaista each to five years of imprisonment and 39 lashes; Dost Mohammed the father of Shaista to one year of imprisonment; the village headman to fines of 4,000 afs; and three others (Malham, 'iwaz, and Wali Jān) to six months of imprisonment each.

As aptly put by Judge Bāhis, this case represents an unjustifiable attitude of the courts. It will be further noticed that article 5 has been wrongly invoked in this case: This article rendered a claim of nikāh without a nikāh khat as non-hearable; when such a claim is denied a hearing in court, the primary purpose of the article is fulfilled. Nowhere is there in the Marriage Law 1960, nor in any other statute any enactment to authorize the use of article 5 as a basis of conviction and imprisonment.

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1. See Payām-e Wijdān (message of conscience), No.30, 1349 (1970), Kabul.

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Modern Reforms Relating to Divorce

Modern reforms of divorce law in the Hanafi areas of the Middle East and the Indian sub-continent have been directed towards the two principal objectives of increasing the remedies available to the wife in case of marital injury on the one hand and restricting the husband's power of talāq on the other. As regards to the wife's petition for judicial divorce, it is broadly the Maliki law which now applies in the Middle East. In Egypt, salient reforms of divorce law were introduced in the Law of 1929. Relating to the wife's right for judicial relief, this law mainly adopted the Maliki law. Accordingly, the wife's right to petition for a judicial divorce falls under four major heads. These are namely, physical and mental disease of the husband, his failure to maintain, desertion, and injury (darar).(1) Other points of reform in the Law of 1929 were provisions which required the intent of divorce as a condition for its validity,(2) and the abolition of an immediate and final divorce.(3).

The Syrian Law of Personal Status 1953, in the preamble to its section on divorce stated that the true purposes of divorce in Islam had been misconstrued and perverted by the jurists of the past, whose doctrine has led to an appalling lack of security in married life. In this situation the proper policy was to "return to the origins of the law of divorce in Islam and adopt from outside (the four schools) provisions which will conduce to the public welfare." But "after this clarion call of the preamble," as Coulson aptly commented,"the two major departures from the traditional law of talāq come perhaps as something of an anti-climax."(4)

First, the repudiation repeated three times, or the triple talāq, was no longer to operate as an immediate and final rupture of the marital tie. It was to count as a single repudiation which could be revoked by

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1. Details of the 1929 Law on divorce may be seen in J.N.D.Anderson, Recent Developments in Sharīa Law, Muslim World, October 1951 : 271-288.
2. "Formulae of divorce uttered in intoxication or under compulsion are invalid." (Art.1, Law of 1929); and Art.4:"methaphorical expression which may or may not carry that meaning shall not effect divorce unless this was intended."
3. "Every divorce shall be revocable except a third divorce, a divorce before consummation and a divorce for money." (Art.5); and "a divorce completed by words or sign with a number shall only be regarded as single". (Art.3).
4. N.J. Coulson, Islamic Surveys, op.cit: 46.

the husband. The provision finds its juristic basis in the fact that there is no specific support for the traditional institution of triple talāq to be found in the Qur'ān or Sunna; it was indeed argued that the triple talāq was manifestly contrary to the spirit of the Qur'ānic texts which deal with divorce, and represented one of the perversions of the pure divine law referred to in the preamble.

Second, and more important, article 117 of the Syrian Law states that where the court considers that a husband has repudiated his wife without reasonable cause and the wife has suffered material damage thereby, it may order the husband to pay the wife compensation not exceeding one year's maintenance. In enacting this measure, the Syrian jurists claimed that by doing so, they were giving proper implementation to general Qur'ānic injunctions which urge husbands both to exercise their right to repudiate "with consideration" and to make "a fair provision" for the wives they have repudiated. A limited practical effect to this Qur'ānic injunction had been given by those jurists who regarded the provision of a small gift of consolation (mut'a) for divorced wives, as obligatory on the husband; but the Hanafis maintained that this mut'a was payable only when no dower had been specified in a marriage and a repudiation had been pronounced before consummation. In any event the Syrian Law certainly provides the first instance of a husband's motive for repudiation being subject to the scrutiny of a court, which may then penalise him for the abuse of his power.

The need to "return to the origin of the law of divorce in Islam" as acknowledged by the Syrian Law certainly poses the question of re-interpretation of the Qur'ān. A dominant feature of the traditional law, and of the Hanafi law especially is the obvious inequality observed in the rights of the spouses to divorce. The most significant Qur'ānic principle in this respect which can be given a fresh interpretation is incorporated in verse (2:228) which reads:

> "and they (the women) have rights similar to those (of men) over them".

This is one of those versus of the Qur'ān which received little attention from the traditionalist. It is reported from ibn-Abbās who said that "I wish to be pleasing in appearance in the same way as I would wish my wife to be; for Allah entitled them to similar rights ...(verse 2:228 cited)."(1)

(1) See Ibn-Kathir, Tafsir al-Qur'ān, Beirut 1966, Vol.1: 478.

It seems that this is the only level of interpretation which has followed the concept of similarity in mutual rights of the spouses. The significance of this interpretation is however reduced by the triviality of its subject-matter, i.e. appearance and dress. A look at the various interpretations of the Qur'an (Tafsir) indicates that similar attempts have been made by many commentators to give some substance to the principle of equality in the above verse. But unfortunately almost all have chosen as their focal theme for the equality of rights, such matters as good companionship, mannerism, pleasant dress etc. which are too trivial and too vague to be considered a basis on which to establish legal equality. Sheikh Rashid Radā (in Tafsir al-Munār) is atypical of the existent commentators on this verse; this is indeed the only version which broach the idea of equality of rights as follows:

"... this is truly a significant verse, a full interpretation of which requires a lengthy discussion. This verse incorporates a maxim - qā'ida kulliyya - to the effect that woman is equal to man in all rights except one matter which is singled out in the succeeding clause that 'men have a rank above that of women'. This last clause is a reference to another verse of the Qur'an which renders men as overseers of women[1]; for men provide the maintenance. Mutual rights of man and woman (in transactions, marriage, companionship) are dependent, as implied by the use of word bil-ma'rūf, on the current customs among people. This maxim provides man with a standard on which to evaluate his treatment of his wife and to reciprocate her behaviour towards him. Customs are authoritative as long as they do not contravene what is enjoined in the text - - nas - and they vary during the course of time..." (2)

The above interpretation is also unprecedented in the sense that it regards the said verse as a Qur'anic maxim. Some rather cursory commentaries that appear in the classical texts seem, on the whole, to evade, rather than develop the central theme of equality in this verse. Tibari's interpretation seems typical of the traditional works. Verse (2:228) reads:

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(1) Verse (3:35)
(2) Muhammad Rashid Rada, Tafsir al-Qur'an, Munar press. Egypt 1346 A.H. Vol.1: 377 (Arabic).

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. ." And the divorced women shall await three courses (Clause 1);* and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the last day (clause 2); and their husbands have greater right to take them back during that period, provided they intend reconciliation (Clause 3). And they (the women) have rights similar to those (of men) over them in a becoming manner - or according to approved custom (Clause 4); but men have a rank above them (Clause 5). And Allah is mighty, wise (Clause 6)" Tibari commented:
" The wife is entitled to good companionship of her husband; similarly the husband is entitled to the obedience of his wife in those matters that Allah has obligated her. It is reported from Duḥāk that she is obligated to be pleasant in manner and speech; he is obligated to avoid prejudice and to provide her with maintenance. One report from Abu-zeid indicates that both spouses are enjoined to fear Allah in observing each others rights. Others have viewed that both are equally entitled to pleasant appearance and companionship of each other. But according to Abu-Jafar which is the preferred interpretation, the husband is enjoined to avoid prejudice and not to revoke the talāq during 'idda unless he intends reconciliation. The husband has a similar right over his wife in that she should avoid prejudice: when he intends reconciliation, she must not conceal her pregnancy or menstruation during her idda. Both are thus obligated, in a similar manner, to avoid prejudice to the other spouse."(1)

The above commentary is obviously an attempt to confine the implications of Clause (4) to the two preceding clauses. This is the main feature of the 'preferred' version. Other commentators, on the whole, have attempted to render Clause (4) as a mere reference to the general rights and obligations of the spouses in a manner as to confirm inequality of the spouses in their legal rights. By doing so, the classical interpreters have totally ignored the central point of Clause (4), i.e. similarity in mutual rights in general including the subject of divorce which is the main context of the verse as a whole. It is on the contrary submitted that Clause (4) is a norm by itself and merits individual attention. A close look at the grammatical structure and logical implications of the verse indicates that similarity/equality in the rights of

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* Clauses supplied for the sake of convenience.
(1) See Tafir Al-Tibari, Vol.4: 530.

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the spouses in general and in respect of divorce in particular is the main point of this verse:

Firstly, Clause (4) in its grammatical structure is a complete and separate statement.
Secondly, in its semantic order, Clause (4) is not a complementary part to any of the preceding or succeeding clauses. Clause (4) in fact introduces a different theme of its own. The two preceding Clauses (i.e. 2 and 3) are complementary to Clause (1) in the sense that Clause (2) and (3) complete the subject (i.e. of idda) which is introduced in Clause (1)*. Clause (4) introduces a new theme (i.e. of equality); and Clause (5) is complementary to Clause (4) as the former incorporates an exception to the latter.

It is submitted that unlike Ṭibari's assertion, the reference to the mutual rights of the spouses in Clause (4) cannot be confined to the subjects of the two preceding clauses only. Ṭibari tends to assume that the pronoun lahumna (i.e. rights for women) refers to Clause (3); and that the pronoun 'aleihinna (i.e. rights of men over women) refer to Clause (2). In this way the wife's right over the husband, per Ṭibari is that he must avoid prejudice to her and not revoke the ṭalāq unless he intends reconciliation; and the husband's right over the wife is that she must reveal the truth to him in respect of her pregnancy.

There are certain inaccuracies in the above assertion:
Firstly, Ṭibari tends to suggest that Clause (2) and (3) incorporate mutual rights of the spouses over each other. A fresh look at the verse would indicate that both of the 'rights' that Ṭibari refers to are not rights, they are obligations. The confusion is aggravated when Ṭibari assumes the existence of the order of mutuality between the two 'rights'. For he tends to assume that the 'right' of the one spouse in this respect, at the same time, represents the obligation of the other spouse. It is further contended that the two obligations in Clause (2) and (3) are not mutually related as such. The basic confusion in Ṭibari's approach thus seems to lie in the attempt to exclusively relate the two pronouns in clause (4) to the two preceding clauses.

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* Clause (2) and (3) explain the purpose of Clause (1). Clause (1) obligated the wife to observe idda; the purpose of this is to facilitate the knowledge of any possible pregnancy (Clause 2); and to facilitate the existence or realization of the intention for reconciliation (Clause 3). The following Clause (i.e.4) introduces a theme which is basically alien to the subject of idda.

Clause (2) which prohibits the wife from concealing the truth regarding her pregnancy during her 'idda is an objective obligation for the wife to tell the truth. That this is so is clear from the second part of the same clause, i.e. "if they believe in God and the last day". It is therefore her responsibility to God which does not represent any particular right of the husband. Her responsibility in this respect is unaffected whether the husband intends reconciliation (at the instance of his revoking the talāq) or not. Telling the truth is certainly not a mutual 'right' of the husband over her in relation to his intention for reconciliation. There is nothing in the whole verse to relate the obligations incorporated in Clauses (2) and (3) to each other. Both are in fact obligations which are independent of each other. (1) Supposing that the wife does abide by her duty and reveals the truth, this would not necessarily create an obligation on the husband's part to resume marital life. Should he resume marital life, it can be motivated by good intentions or ill. Conversely even if she conceals the truth, it will in no way affect the husband's right to revoke the talāq, or his obligation to attempt only a genuine reconciliation. The pronouns in Clause (4), of course, refer to the similar rights of the spouses over each other. Now if Tibari's assumption is admitted to the effect that lahunna refers to the subject-matter of Clause (2) and 'aleihinna refers to that of Clause (3), the verse, as a whole, does not make any sense. For in this case, it would follow that the wives' 'right' is that "it is not permissible for them to conceal what Allah has created in their wombs." Needless to say that the wives' responsibility in this respect cannot be a "right of the wives" and afortiori cannot be the correct implication of lahunna. Nor could 'aleihinna be accepted as referring to the good intent of the husbands for reconciliation, for this too is a responsibility of the husbands and not their right over the wives.

The only alternative approach in order to discover the implications of the two pronouns in the verse would be to say that lahunna refers to the second part of Clause (3), and that 'aleihinna refers to Clause (2). This would mean that the wives' right over the

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(1) Clause (3), of course, establishes one right of the husband, namely his right in respect of revoking the talāq. This right is however not Tibari's immediate concern. Even this right has no mutual relationship with the wife's duty in respect of revealing the truth: the use of this right by the husband does not necessarily create the wife's duty in regard to revealing the truth.

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husbands is that the latter should revoke the talāq only when they intend reconciliation, and the husbands' right over the wives is that the latter should reveal the truth. A look at the wording of the verse would indicate a further difficulty in adopting this approach. For lahunna cannot be said to be referring to "in arādu islāhā" - if they intend reconciliation -, for the latter is a condition to the statement immediately preceding it - i.e. the first part of Clause (3) -; the condition does not make any sense if separated from the predicate, and afortiori it cannot indicate the existence of any right. This is in addition to the fact that intent is an abstract; the intention of one person cannot constitute the subject for the right of another. Nor indeed can it be said that lahunna refers to the whole of Clause (3). For the latter spells out the exclusive right of the husband in respect of revocation rather than any right for the wife. Consequently the pronoun lahunna does not refer to any right of the wives within the verse as a whole. In the absence of any right for the wives, in the whole of this verse, no similarity or equality of rights can be established. Indeed neither the concept of similarity, nor of mutuality of rights can find any place in the verse (2:228). And this cannot be said to represent the correct meaning of Clause (4) which clearly refers to similar rights of the spouses in a mutual manner. For the word mithl in Clause (4) indicates the existence of close similarity, whereas the Clause as a whole "and they have rights similar to those of men over them" distinctly means that these rights are mutual.

The use of the term bil-ma'rūf (in becoming manner, or according to approved custom) confirms the above analysis, i.e. Clause (4) is a general principle and not a mere reference to the preceding clauses. Clause (2) and (3) in fact incorporate subjects of specific nature which are not amenable to the implications of custom or proper behaviour. If Clause (2) and (3) were to incorporate the implications of the two pronouns in Clause (4), then there would be no need for the phrase bil-ma'rūf. For if Tibari's assumption is admitted then the phrase bil-ma'rūf would have to be attributed to the two preceding clauses which would mean that the obligations of the spouses would be subject to either good manner, or custom; both would seem irrelevant. (1). If on the other hand

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(1) Revealing the truth for example cannot be made subject to custom, or good manner. Nor can the husband's responsibility in respect of genuine reconciliation or his right of revocation can be said to be particularly amenable to custom and good manner.

Clause (4) is admitted to incorporate a general principle, the phrase bil-ma'rūf would have a positive meaning. Either of the two meanings of the term gives Clause (4) the characteristics of a general formula. That is to say that this Clause lays down a norm., details of which can be elaborated in the light of either becoming manner or approved custom or both.

The normative nature of Clause (4) is further confirmed by Clause (5) in the sense that the latter makes an exception to the norm: men have been given a rank above that of women as overseers in respect of maintenance.

As already pointed out a most important area where obvious inequality exists between the spouses is divorce. An order of near-equality in this respect can be achieved by means of re-interpreting the 'verse of Khul'a to the effect of establishing a similar right of divorce for the wife. Indeed the Qur'anic 'verse of khul'a is capable of receiving this line of construction. As discussed below, considerable progress in this direction has already been made by the Supreme Court of Pakistan which by re-interpreting the Qur'an, considered khul'a a right of the wife even without the consent of the husband provided that she gives consideration to the husband for her release (usually to return the dower to him).(1). Tunisia has already effected legislation which grants the spouses a complete equality in the matter of divorce. These reforms have found their juristic justifications in various verses of the Qur'an. Indeed there is no Qur'anic injunction to render ṭalāq an exclusive right of the husband. Similarly there is no positive support for the extra-judiciality of ṭalāq in the Qur'an as maintained in the traditional law especially of the Ḥanafi school.

The significance of the reform introduced by the Tunisian Law of Personal Status 1956 lies in the complete abolition of extra-judicial divorce whether by ṭalāq or by mutual consent. This law briefly provides that : "Any divorce outside a court of law is devoid of legal effect". Section (31) of the Tunisian law enacts that a decree of divorce will be granted: first, on a petition by the husband or wife based on any of the grounds specified in the law (broadly the grounds known in the traditional Mālikī law); second, in cases of mutual consent;

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(1) See more below.

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and third, when either husband or wife insists on ending the marriage, in which case the court will determine "what financial idemnity the wife shall be granted, or what compensation she shall pay to her husband". The Tunisian Law empowers the court to decide, taking all the circumstances into account, the amount of such compensation, without any limit being fixed by the law.

Section 32 of the Tunisian Law then provides that "A decree of divorce shall not be given until the court has first exerted itself to the utmost in investigating the causes of discord between the spouses and has failed to reconcile them."

The Tunisian Law, thus entirely sweeps away the traditional distinction between a revocable and irrevocable form of divorce. In all cases the marriage continues to exist until the court issues a decree of divorce, which is final in all cases.

In support of this major innovation, the requirement that talāq should now be effective only by judicial process, the Tunisian jurists claimed the authority of the verse of the Qur'an which states "where discord arises between spouses then appoint arbitrators". Since there could be no clearer indication of the state of discord than the desire of a husband to repudiate his wife, and since the courts were the most appropriate organ to fulfil the duty of arbitration enjoined in these circumstances by the Qur'an, what more positive authority could there be for judicial intervention in all cases of talāq? Concerning the equality effected between the spouses, Coulson aptly commented : " ... it could be claimed that the Quran itself provided the necessary authority, particularly in the verse (2:228): (And women have rights similar to those that the men have over them."(1)

The Moroccan Code of 1958, on the subject of divorce, hardly goes beyond orthodox Maliki practice. Main points of reform of the divorce law in this Code are the abolition of the traditional institution of triple repudiation as well as the single but final repudiation. The formula adopted by this Code is that every pronouncement of talāq which is not the third in a series of separate pronouncements shall take effect only as a revocable divorce. This measure is, of course, primarily designed to afford greater opportunity for reconciliation between an

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(1) N.J.Coulson - Islamic Surveys - op.cit : 49.

estranged couple. Compensation for the wife in cases of injurious repudiation is another point of reform introduced by this Code. But extra-judicial repudiation remains perfectly valid and effective.

The Iraqi Law of Personal Status of 1959 also grants judicial relief for the wife on the grounds as known in the traditional Maliki law. The position adopted in this Law concerning the abolition of a final and immediate repudiation is similar to that in the Morrocan Code. An important point of reform in the Iraqi Law is incorporated in its article 36 according to which a husband, seeking to repudiate his wife, is required, in normal circumstances to obtain a decree of the court to this effect. The Iraqi Code, however, gives no powers to the court to order compensation in the case of injurious repudiation.

The Indian Dissolution of Muslim Marriages Act* of 1939 which now applies in India and Pakistan granted the wife the right to seek for a judicial divorce on substantially similar grounds to those recognised in traditional Maliki law. But since this Act was not a conscious or direct application of Mālikī principles as was the legislation in the Middle East, there are significant variations in both the substantive and procedural aspects of the law. For example, a judicial decree granted under the Indian Act is always final and absolute including a judicial divorce for failure to maintain. Further reform of the divorce law in Pakistan has been introduced under the Muslim Family Law Ordinance 1961. Under this Ordnance a husband is required to give written notice of his having pronounced a talāq both to his wife and to Chairman of the Arbitration Council set up under the Ordinance. A talāq pronounced" in any form whatsoever" will not be absolute until "ninety days after the dlivery of this written notice to the Chairman, or where the repudiated wife is pregnant, until delivery of the child, whichever period be longer." It appears therefore that even if a husband gives notice of a third repudiation, this will no longer constitute an immediate and final divorce. Furthermore the same procedure is to apply "where either of the parties to a marriage wishes to dissolve the marriage otherwise than by talāq." This clearly covers the case of extra-judicial divorce by mutual agreement, which will accordingly no longer constitute a final and irrevocable divorce as it does under traditional

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* This Act is based on English Law.

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Sharī'a law. On the other hand, when the husband does not give the requisite notice of his ṭalāq, or the spouses do not give notice of divorce by agreement, the divorce will apparently be valid and effective under the terms of the traditional Hanafi law. The sanction for failure to comply with the provisions of the Ordinance is purely punitive - the offender being liable to imprisonment for a term of up to one year, or a fine of up to 5,000 rupees or both.

The Ordinance has thus abolished those forms of repudiation which were final and irrevocable, such as the triple ṭalāq; it has also attempted to ensure the existence of a cooling-off period for arbitration. But the husband's right to effect a unilateral ṭalāq still remains basically unaffected; and there is no provision for any compensation being payable by the husband in the case of injurious repudiation. An important development of the law of divorce has nevertheless been effected by the Supreme Court of Pakistan. The doctrine of stare decisis being applicable in Pakistan, the courts have accordingly attempted to even the balance between the spouses by giving the wife an almost parallel right to end the marriage unilaterally. This, they did by giving an independent interpretation to the law concerning the traditional institution of khul'a. In Balqis Fatima v. Najm-ul-ikram Qureshi decided by the H. Court of Lahore 1959, it was argued that the verse of the Qur'an upon which the institution of khul'a divorce is grounded allows the court, in certain circumstances, to enforce khul'a divorce upon the parties even without the husband's agreement thereto. The relevant text of the Qur'an reads: "If you fear that the spouses can not keep within the bounds set by Allah, then there is no blame on them if the wife provides some consideration for her release." This verse, it was argued, must be addressed to the judge who is asked to determine whether the spouse can keep within the bounds set by Allah - or, in other words whether the rift between the parties is so serious as to make married life intolerable. Now since a khul'a divorce by agreement between the parties is effective whether the married life is tolerable or not, the only explanation of this reference to the judge must be that he has the power to end the marriage if in fact it has become intolerable to the wife. If the judge could not do so, if khul'a could take place only with the agreement of the husband, any decision of the court that the parties could not keep within the bounds set by Allah

because their marriage had in fact broken down, would be wholly pointless. On the basis of this argument the H.Court ruled that a Muslim wife may demand a khul'a divorce as a right, though not, the court was careful to add, "for every passing impulse," but only "where the judge apprehends that the limits of God will not be observed, that is that a harmonious married state, as envisaged by Islam, will not be possible." The wife is obliged to restore to the husband what she received from him in consideration of marriage. Fatima had in fact received 2,500 rupees and this sum she paid to her husband. The ratio decidendi of this decision was later confirmed by the Supreme Court of Pakistan in Khurshid Bibi.V.Mohammad Amin (1967), and it now represents the applicable law in Pakistan. In this case the complaining wife, K.Bibi, alleged ill-treatment by her husband. But her petition for divorce on the ground of cruelty failed, because the acts complained of, or at least those which were held proved by the court, did not amount to the necessary degree of legal cruelty. Nevertheless the Supreme Court gave its blessing to the previous decision of the H.Court in Fatima's case. It was consequently held that K.Bibi could demand a divorce, as of right, provided she was prepared, as indeed she was, to return to the husband the dower she had received from him.

In Iran, under the Family Protection Act promulgated in 1967, extra-judicial divorce has been abolished altogether. According to the procedure laid down by this Act, the party/parties intending divorce are initially required to apply to the court for a certificate confirming the impossibility of reconciliation. After attempts for reconciliation as emphasised in the Act are made the court issues this certificate only when it is satisfied that reconciliation between the spouses is impossible. The court is empowered to refuse the application and the certificate applied for. Once the certificate is issued, the divorce notary then registers the divorce. In cases of mutual agreement of the spouses to divorce, the said certificate is issued only on the condition that suitable arrangements have been made for the care of the children of the marriage. Other matters to be settled by the court when granting a certificate includes the custody of children, the right of access to children, and the amount of the maintenance to be paid to the wife for her period of idda. The Act authorised either of the spouses to apply to the court for a certificate

of impossibility of reconciliation in any of the following circumstances:

a. Where one spouse is sentenced to five years imprisonment or more;
b. Where one spouse suffers from an addiction which is "injurious to marital life";
c. When one of the spouses deserts the family;
d. When one spouse commits an offence which is "repugnant to the family honour and prestige of the other".

The court has the final decision as to what constitutes a desertion, or an offence sufficiently "repugnant to the family..." In addition to above, the existing wife has been granted the right to apply for a certificate of impossibility of reconciliation when the husband marries polygamously without securing her consent.(1)

Under the traditional Shari'a law as applied in Iran, talāq was the prerogative of the husband and the spouses could only be put on a footing of equality if the husband desired this and was prepared to delegate his power of talāq to the wife. It was this traditional institution of a delegated power of divorce which was ostensibly invoked by the framers of the Family Protection Act as the basis of their reform. For the Act states, in sum, that the marriage contract henceforth must contain a compulsory agreement under which the husband authorizes the wife to apply to the court for a divorce in specified circumstances; and these circumstances are precisely the grounds of divorce laid down by the Act.(2)

## Conclusion

Modern reforms in the divorce laws of other countries suggest the possibility of changes which could be introduced in Afghanistan. The recently compiled Report on divorce was undoubtedly an attempt in the right direction. It should however be noted that divorce outside the confines of this Report would remain basically an extra-judicial procedure whereby the husband's rights are predominant. The Report moreover contained no provision to grant compensation to the

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(1) Art 11, Family Protection Act of Iran.
(2) For Modern reforms see N.J.Coulson, Islamic Surveys, Op.cit; and Conflicts and Tension in Islamic Jurisprudence, University of Chicago Press 1969; and Succession in the Muslim Family, op.cit.

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wife in cases of the husband's abuse of his power of talaq. The Report thus aimed at amending only one of the two areas in need of reform: While it proposed to improve the position of the wife by granting her the right for judicial divorce, it made no attempt to protect her or compensate her from the abuse incurred by the husband in exercising his power of ṭalâq. In addition to this, the Report totally ignored the problem of proof and registration. The wife's position of suspense during protracted and often futile litigation has also been totally overlooked. The section of the Report concerning the wife's right to divorce on the basis of failure to provide maintenance did not touch upon the problem of protracted litigation during which time the wife usually receives no maintenance. For once she has claimed the occurrence of a final talâq, she is unlikely to claim maintenance for any period other than her 'idda. Even in cases where the wife does claim maintenance for 'idda, when she loses her case, her claim for maintenance for the period of 'idda automatically ceases as the divorce is then regarded to be non-existent. The wife is unlikely to claim maintenance except for the period of 'idda; as if she did, it would appear contradictory to her claim in respect of the occurrence of a divorce. As a result, in most cases, the wife ends by losing her right to maintenance. It will also be noted that virtually in every divorce claim where the wife has lost her claim and the court finally ordered the wife to abide by her marital obligations to her husband, the court paid no attention to the issue of maintenance throughout the period of her litigation. This was neglected even in cases where the wife was physically expelled by the husband.

Unless further legislation is introduced to make the documentation of witnesses an essential requirement of a valid divorce, the problem of proof in divorce claims and the wife's problem of a lengthy period of suspense together with the issue of maintenance will still be present. A positive effect of such legislation regarding these problems would be that a claim of divorce unless supported by the necessary document would not be hearable in the first place; and the marriage tie would therefore be presumed to subsist. This would mean that the wife's right for maintenance would continue, and in case the husband failed to fulfil his obligation to this effect, the wife would then have the right to demand a judicial divorce on the basis of the husband's failure to maintain. This would have been possible under the proposed

provisions of the Report concerning judicial divorce on the basis of failure to maintain. A further gap in this Report was that it contained no provision regarding the question of jurisdiction: the existent arrangement concerning the registration of divorce at the ORD is entirely inadequate. It has already been noted that because of the administrative nature of the registration of the ṭalāq at the ORD and the fact that the ORD is a non-judicial office, certain important issues relating to divorce such as the custody of children (ḥaḍānat) and their maintenance, and the maintenance of the wife for ʿidda, are usually left without receiving adequate attention. Whereas registration of ṭalāq khat is a normal duty of the ORD, under the current regulations, this office is incompetent for making a maintenance order (nafaqa khat) or deciding on the custody of children. In addition to this, the ORD has no powers to attempt a reconciliation between the spouses or to appoint arbitrators for that matter. The usual practice of the ORD in respect of the uniform registration of an irrevocable single ṭalāq, excludes the possibility of effecting a reconciliation, simply because it is irrevocable (bāʾin).

No Marriage Law to date, including the 1971 Marriage Law made any reference to the subject of reconciliation. Article (30) of the Marriage Law 1971 which deals with the function of the ORD concerning the registration of divorce, and article (38) of this Law which deals with the function of the primary courts concerning the claims of ṭalāq, do not touch upon the subject of reconciliation. Consequently the opportunity for reconciliation is barred to the couple in both areas of the proceedings relating to divorce in Afghanistan. For a divorce claim when initiated in the court is even more unlikely to provide any opportunity for reconciling the couple. This is because of the nature of such claims which are presented to the court as a fait accompli, that is to say that a final divorce has already occurred; reconciliation thus becomes a legal impossibility.(1)

(1) The complete lack of legal measures in the area of reconciliation on the one hand, and the attitude which prevails at the ORD and in the courts on the other, positively discouraged reconciliation. The position is however different regarding other civil disputes in general where the courts are authorized to reconcile the parties and issue an islāḥ khat (deed of reconciliation) to that effect. Note eg. articles in the Law of Court Administration:"in transactions, when the court feels that the parties are inclined to reconciliation, it shall advise them to appoint arbitrators; whenever the parties reach a mutual agreement, an islāḥ khat will be issued and the case will be concluded" and "Whenever the parties to a claim do not reach agreement to reconcile, the court will then take the matter into consideration and adjudicate." (Arts.93,95).

It is now important to relate this problem to the proviso concerning reconciliation as proposed in the Report. With regard to reconciliation at the registration stage, the Report introduced no new measures and failed to give emphasis to the most important matter of allowing and encouraging reconciliation wherever possible. Nor does the Report proposed any change in the purely administrative character of the ṭalāq khat proceedings. The only instance where the Report proposed reconciliation measure was in relationship to the wife's application for a judicial divorce on the basis of darar. A question may be asked as to whether the opportunity for reconciliation should be limited to this individual occasion, or should it be extended to other instances where it may seem to apply. There is for example no reason why reconciliation should not be made possible prior to the registration of any divorce where the spouses are deemed to be amenable to it. In order to make reconciliation generally available, further legislation will be needed to ban the registration of a final and immediate divorce, and instead to provide for the general application of revocable divorce. The registration of a revocable divorce will thus by itself be regarded as a convenient starting point for an attempt to reconciliation. The question as to which cases qualify for reconciliation and where does it seem to provide a feasible course of action, is itself a matter to be decided by a judicial authority. It is therefore further proposed that the existent arrangement at the ORD relating to the registration of ṭalāq khat should be abolished altogether and the subject of divorce as a whole should be considered solely in the courts competent to deal with all matters relating to divorce. The claims of divorce have already been a matter which fell under the jurisdiction of the courts. So was the proposed judicial divorce in the recent Report which would be a matter for the courts. An advisable course of action would be to transfer all ṭalāq khat proceedings to these courts. A further proposition that seems necessary is that the contents of the ṭalāq khat should be revised in such a way as to allow for a comprehensive consideration of the substantive law including definitive consideration on the care and custody of children, and the right of the wife for maintenance during the period of 'idda. Separate forms of ṭalāq khat should be drawn up for the different kinds of divorce; this will in turn inform the public of the different types of divorce available.

An interesting development concerning reconciliation can be seen in the recent formation of Reconciliation Council (jirga-e sulh) on an experimental basis. In June 1974, the Ministry of Justice initiated a scheme under which two R.Councils (and five more later in the same year) were set up in seven districts of the province of Kabul. The pronounced aim of R.Council is "the settlement of minor civil disputes - property disputes not exceeding the value of 1,000 afs, disputes relating to marriage and divorce -: and petty offences at the initial stage prior to the court proceedings. Members are selected by the presiding judge of the local primary court from among educated local dignitaries to operate on a rota basis so that the Council members are replaced regularly by new members. Four to eight members, the precise number depending on the size of the locality, sit in the Council at a time....The Council operates in collaboration with the local primary courts. Documentation of the settlements effected by the Council takes place at these courts. Parties to a settlement of the R.Council may resort to the courts which will take into consideration the settlement effected by the Council".(1) According to the pronouncement made by the Ministry of Justice, the Government plans to expand the R.Council throughout Afghanistan. It is hoped that matrimonial discords in which reconciliation is considered feasible should be referred to Reconciliation Councils where the adversarial process and formalism of the court room could be increasingly avoided.

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(1) See Jumhoriyat (republic) daily, first year No.258,26.3.1353(1974); and 2nd year No.10, 23.5.1353A.H(1974), Afghanistan.

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## Chapter V

## Conclusion

Tribalism and religious traditionalism are the two major factors which not only featured prominently in the downfall of Amanullah and the Nizāmnâma reforms of the 1920's, but they also represent main aspects of the social climate for family law reform in contemprary Afghanistan. Historically, tribal pluralism has slowed down the process of political integration of Afghanistan. While a full discussion of tribalism and the efforts of the central government authority to build a modern nation can easily provide the subject of a separate volume, only a few of the developments that have reduced or are likely to reduce tribalism in Afghanistan can be mentioned here. In the second part of this chapter I will briefly discuss similar developments relating to the subjects of religious traditionalism. The two factors are however inter-related. The link between Islam and tribalism stems from the fundamental fact that Islam was revealed in a tribal society. The new belief structure and legal order of Islam naturally challenged many of the then prevailing traditions. Islam attached little importance to popular or tribal customs. It also positively introduced fundamental reforms which enhanced the socio-legal status of women hitherto unknown to the patriarchal customs of the Arabian people. Having said this, Islam nevertheless left many aspects of the then existent tribal social structure basically unchanged. In the area of inheritance, Qur'an prescribed fixed shares to close female relatives (dho-al-furud), yet the emphasis put on the agnatic tie is a prominent feature of the Islamic law of succession. Although Islam recognised the right of consent to adults in marriage, child marriage and the power of the guardians is legally recognised. The law concerning polygamy and divorce has been already described. It is not contended here that the above legal institutions were particularly designed to perpetuate tribalism, it remains, neveretheless true that Islam was super-imposed on a patriarchal society and did not seek radical changes in many of its institutions. Tribalism therefore survived under Islam, and its traditions continued sometimes violating the laws of Islam.

Islam designed the creation of a religious community (Umma) which is founded primarily on ideology with no recognition given to tribal identity. The Qur'an recognises piety and propriety (taqwā) as the

only basis of moral and religious eminence of the individual which is equally required of the person of the Muslim Ruler.

I. Tribalism

There are six main ethnic groups in Afghanistan, namely Pushtun, Tajik, Aimaq, Uzbek, Hazara and Turkman; Pushtuns constitute roughly half of the population. With the exception of some three million Tajiks and one million Uzbeks who are no longer tribal, each of the ethnic groups are divided into numerous tribal groups largely independent of each other. Traditional codes of behaviour prescribed the mores and standards of individual behaviour. Among the Pushtuns for example, Pushtunwali (the Pushtun tribal code) sets the standards of acceptible behaviour both within the tribe and between the tribes. The institution of jirga (tribal council) functions as an instrument of enforcement of Pushtunwali as well as a tribunal for settling conflicts. Based on the concept of communal authority, and committed to accommodate regional interests, jirgas defied political integration. Other features of Pushtunwali particularly the institution of badal (revenge) impeded the development of modern laws. Rawāj (custom) varied from tribe to tribe, and not only circumvented the laws of the State, but also modified certain tenets of the Shari'a. Rigid patriarchal traditions violated the Shari'a rights of women in inheritance and denied them the right of consent in marriage. Child marriage, polygamy, widow inheritance, and various other forms of forcible marriage were practiced largely as instruments of tribal politics. Pore, and badd were other institutions of Pushtunwali which authorized the jirga to settle tribal feuds by means of forcing women into marriage. Lack of any form of documentation in the process of decision-making by the jirga and inaccuracies in the evidential bases of its decisions, seriously undermined the value of jirga as a tribunal for settling conflicts.

The basic political tension between the tribes and the central government authority was particularly aggravated during Amanullah's reign; he introduced certain reforms such as changing conscription from a tribally-based system to a system of national service "which challenged and offended the influential chiefs particularly when some of their own sons began to be drafted." (1) Amanullah also abolished the ranks and titles of the tribal aristocracy, and abolished or drastically reduced many

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1. See more in Poullada, Afghanistan, Reform and Rebellion, 1919-1929, op. cit: 116.

of their financial priviledges.

The main areas of activity of the central government that merit mention are its military and administrative expansion, migration policies, development of transport and communication, public education, land reform and constitutional reform of the Loya Jirga. The relative progress that has been achieved in these areas especially during the second half of this century, has led to considerable alterations in the military, administrative and political powers of the tribes.

It is considered that since the reign of Amir Abdurrahman (1880-1901) who is known for his policies of centralization and loose unification, the clan community based on communal ownership of the land, has generally ceased to exist in Afghanistan. Since then, the family has emerged as the main socio-economic unit. The landlord tenant system which developed after the 1880's gradually broke down the socio-economic and political functions of the clan and tribe. (1) Peasants sign tenancy agreements annually; often a tenant farmer will live in one village and farm in another. Broadly speaking, this lack of roots in the land makes it easier for a farmer to move his family to a new locality for economic gain. This situation provided a favourable atmosphere for the movement of population as well as the creation of an urban labour force. The Government was thus enabled to employ migration policies which were aimed at effecting a mixed residence of more than one tribal group in one and the same locality. Amir Abdurrahman forced tens of thousands of Pushtun tribesmen to migrate from south to the north of the Hidu Kush. Post World War II internal migrations of large numbers of Pushtuns to the north, as they settled among other ethnic groups further weakened the territorial exclusiveness of the tribes. (2) Another category of internal migration has been the mainly voluntary movements associated with the opening up of agricultural land

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1. See L. Dupree, in K.H. Silvert, The Expectant Peoples, op. cit: 116.
2. Note an additional aim of migration: "Post W.W.II internal migrations have occasionally been forced as e.g., in the case of the shift of large numbers of Safi Pushtuns from south to north after the Safi revolt of 1949. External political as well as internal economic reasons motivate the current large-scale northward movement of the Pushtuns. For the central government hopes to establish Pushtun colonies among more numerous Uzbecks, Tajiks and Turkman groups all with their counter-part Soviet Socialist Republics across the border...": L.Dupree, Population Review 1970, A.U.F.S. Reports, South Asia Series, No. 1. 1970.

made available under the irrigation projects. (1) When tribesmen leave their homelands, rights and obligations tend to shift from larger social units to the immediate family.

In the area of administration, the Government's policy is to replace tribalism with a centrally administered provincial authority. To achieve this, the Government has attempted to eliminate the powers of the tribal chiefs and to make the tribesmen to conform to the Government's rule. Amir Abdurrahman drew up new provincial boundaries which cut through the tribal territories; he also established the royal prerogative of appointing and removing tribal chiefs. The administrative structure of the country has, in the past, been subject to change. During the 1960's for example, the number of provinces was increased from thirteen to twenty eight. While there were about eighty sub-provincial administrative units, this number has been increased to over two hundred. Expansion of the administration, tends to divest the tribes of their adninistrative functions and creation of new provincial centres also tends to increase urbanisation which in turn weakens tribalism. Through its employment policies, the central government has attempted to absorb tribal leaders into the government hierarchy, or dislocated them by employing them outside their own home regions. Such tactics "strip the tribal leaders of their original basis of independence, but they preserve the tradition of leadership in a manner which encourages national loyalty". (2) Respect for the authority of a chief is a tribal tradition which helps stablise the Government. Economic and social changes requiring new types of labour are taking place. Thus in the field of industrial employment, "the Government has tried consistently to create conditions encouraging industrial workers to orient themselves toward occupations instead of family and tribal groups." (3)

As for the development of a national army, it suffices to say that until the early 1930's, the conscription systems of Qawmi

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1. Irregation projects were built, primarily in the north (Kunduz, Baghlan, Pul-e-Khumri) but also in the Hilmand Arghandab valley of the south, and near Jalalabad in the East, near Charikar, and east of Herat.
2. See R.S.Newell, The Politics of Afghanistan, op. cit: 81.
3. Ibid: 289.

(lit. tribal) and later Hasht-nafari ( 8 men from each tribal group) were based on voluntary or semi-voluntary contributions of the tribes. A marked development in the army took place with its modernization in the 1950's which decisively altered the balance of power in favour of the central government.

Difficulties in transportation, especially in view of the fact that Afghanistan is a highly mountainous country, have contributed to tribal isolationism and retarded development of administrative efficiency. With the beginning of the development plans (Five-Year Plans) in the 1950's, the Government made a concentrated effort to build roads and improve communications. As a result "transportation has made spectacular progress within the past fifteen years. Northern Afghanistan is now linked throughout the year to the Kabul region by a few hours of highway travel. Airline service and radio and telephone communications complete a network which allows government and private agencies to coordinate activities on a nearly instantaneous basis." (1)

In the long run, the impact of education is probably the most significant factor in modifying the inward-looking attitudes characteristic of the tribal environment in favour of a more enlightened outlook to national problems and a greater awareness of the necessity for socio-legal change. During the past decade education became "the nation's fastest growing industry." (2) By the end of the 1960's, it was estimated that "30% of school-age children were receiving formal education. The expansion of the school system was accompanied by strenuous efforts to improve and extend the facilities for secondary and higher education." (3)

The tribal social patterns have been subject to change; "during the present century, Afghanistan has witnessed a stage of transition from a traditional to a 'modern' society. New socio-economic classes began to structure and undermine the traditional ethno-tribal groups." (4) In this transitional stage old and new values co-exist. One obvious characteristic is the urban outlook of the new socio-economic groups.

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1. See R.S. Newell, The Politics of Afghanistan, op. cit: 85.
2. L.Dupree, Population Review 1970, AUFS Reports, No.1, 1970:7.
3. See R.S. Newell, ibid.
4. See more in L.B. Poullada; note also "Afghanistan has witnessed the emergence of new social groups, institutions and socio-political philosophies, the formation of new loyalties and the examination and re-interpretation of many traditional tenets" (V.Gregorian, The Emergence of Modern Afghanistan, op. cit:1. et. seq.).

While ties to land or village are often preserved, these tend to become attenuated and less binding on the individual, The institution of jirga which functioned as an instrument of the tribal rule is diminished in effectiveness to a forum of discussion largely incapable of making binding decisions. (1) A general breakdown in the organizational structure of the various tribes has occurred and tribalism has lost many of its traditional roles in contemporary Afghanistah. (2)

The Government has also employed devices for ensuring traditional forms of allegiance from the tribes. In addition to the Department of Tribal Affairs which functioned as a liasion between the Gobernment and the tribes, the institution of Loya Jirga constituted a direct link between the tribes and the Government. Prior to 1964, the precise function and composition of the Loya Jirga were constitutionally undefined. The Government was thus constitutionally free to exercise selection in the membership, time of meeting, and agenda of the L.Jirga. Hence the L.Jirga functioned as a formal basis for the authority of the regime. (3) The 1964 Constitution defined composition of the L.Jirga, as well as the exclusive items for which a L.Jirga can be assembled. As a body to consist of the combined session of both Houses and chairmen of Provincial Councils, the L.Jirga was automatically rendered into an elected body of MPs who had greater interests at stake, and perhaps greater skill in legislative affairs. They also tend to have a vested interest in the security of State in general. Confining the L.Jirga to specified constitutional matters indicates the preclusion of detailed matters to be dealt with through ordinary legislation.

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1. A participant observer in the Maduzai (Pushtun) tribe noted that "Jirga assemblies of agnates are held at several levels over more or less important matters, but jirga is essentially a forum for the public expression of differences. Decisions are made but rarely unanimously and no elder can compel any junior agnate who is a household head to change his mind..." (N.S. Tapper - personal communication).
2. "Under the Government pressure, the larger tribes in the south-central and western regions have practically lost their organisations as tribal units." (H.H.Smith et al, Area Hand Book for Afghanistan, op.cit: 191; note also "Among the sedentary Uzbeks, the process of breakdown has gone so far that many merely call themselves Uzbeks without aligning themselves with some specific common decent group ... The Hazaras too are in a state of transition, there are strong indications of a new balance along lines of Tajik social and economic organization being developed..." (H.F.Schurmann, The Mongols of Afghanistan, Muton & Co. 1962: 170,179).
3. Somewhat exceptional was probably the L.Jirga of 1924. For unlike most other L.Jirgas (eight convened so far), the agenda of the 1924 L.Jirga contained contentious matters such as female schooling, abolition of polygamy, national conscription at a time of crisis and tribal revolts in the south.

A similar measure which may be regarded as a step toward the coordination of activities between the Government and tribal notables, is the recent initiation of Reconciliation Councils* for settling minor disputes. This scheme seems to be based on the underlying objective of facilitating a beneficial use of the traditional institution of jirga under the supervision of the local Primary Courts.

In the long run, land reform is likely to have fundamental socio-economic effects including the further reduction of tribalism. Considerable areas of land have been reclaimed under the irrigation projects of the past three Five-Year Plans. The distribution of land to the landless farmers, a pronounced policy of the Government, enables the latter to form and implement policy measures to encourage settlement of nomads, migration, and more significantly to reduce the dependancy of the landless farmer on the tribal chief landlord. It is worth noticing that "compared to its neighbours, Afghanistan has been fortunate not to have inherited a system of great land owners or a large tenant farm population. In the southwest a feudalistic system does exist, but as land re-settlement schemes, and the result of greater employment opportunities come into effect, we may expect to see the gradual disappearance of this fact". (1) During the past two decades or so, almost every successive Government has pronounced land reforms as part of its policy objectives. Some reclaimed land has been distributed (or sold on favourable terms)[2], and official pronouncements contemplated the widening of the land reform programme. A point of policy of the present Government appeared in a statement of President M. Daud: "The Republic will institute land reforms as one of its major aims in the programme for fundamental reforms. The state will take steps, as far as possible, for re-settling nomads and allotting state land to landless people... traces of nomadic and tribal life will be eliminated." (3). Hadaf ( lit. target), a non-official paper, in a statement of its

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1. T.S.Gouchenour, A New Try for Afghanistan, MEJ, Vol. 19, 1965:15.
2. By Dec. 1971, state land has been sold to some 35,865 settlers (see Kabul Times, 21 and 25 Dec. 1971). According to a recent report, since mid 1973 distribution of reclaimed lands has been extended to an additional number of 32,500 nomads and landless farmers (see Jumhuriyat editorial, 2nd year, No.84 Nov. 1974).
3. See Kabul Times 26 Aug. 1973 (President Addresses the Nation).

* See above page ( 207).

editorial policies, asserted "we consider land reform a necessary and effective means of combating the age-old discriminations of tribalism and tribal chieftancy. (1)

II. Religious Traditionalism

Two areas where this factor can be seen in operation will be briefly discussed:

A. Juristic conformism (taqlīd) in the Constitution 1964;

B. Government versus the religious leaders.

A. Juristic conformism in the Constitution 1964:

Article (102)** of the Constitution which enjoined the courts to apply the Ḥanafi fiqh in the absence of statutory legislation, clearly restricted the courts' freedom to resort to the opinions of other Sharī'a schools. The same article of the Constitution made it a duty of the courts to reach a decision, within the principles of the Hanafi fiqh and the Constitution that 'in their opinion, secures justice in the best possible way.' The best possible justice could surely have a better chance if it were to be derived from the wider sources of the Sharī'a. The restrictive scope of this article is not quite consistent with its pronounced aim of objectivity in securing justice. A main argument in support of this constritutional measure is the avoidance of dispersion in legal sources hence of disparity in court decisions. But this must surely be a matter for legislation in the first place. A uniform statutory text is a most important means of achieving uniformity. The Constitution has failed to enact definitive measures in this respect; it has not obligated the legislature to codify the laws (civil and criminal etc.) The time has certainly arrived for a legislative

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1. See G. Shindandi, Matbouat-e Azad dar Afghanistan, op. cit: 65; similarly Wahdat (unity), a non-Official paper stated in its editorial policies that "we consider the introduction of progressive and democratic laws to abolish all feudalistic relations and institutions as necessary", ibid: 15; Note also Jabh-e Milli (national front) asserting that "Our motto is that no owner should have more land than he could not develop", ibid: 80.

** Art. 102 reads: "The courts, in cases under their consideration, shall apply the provisions of this Constitution and the laws of the State. Whenever no provision exists in the Constitution or the laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi Jurisprudence of the Shari'at of Islam, and within the limitations set forth in this Constitution, render a decision that in their opinion secures justice in the best possible way."

programme to replace the medieval Arabic texts with statutory legislation. When the legislaure fails, as it has to date, to unify the laws, it seems unjustifiable to place the task of achieving uniformity in legal sources entirely with the courts. In addition, it is uncertain whether uniformity in legal practice, even within the Hanafi fiqh, is at all possible without legislation, for the classical Hanafi texts and fitāwas applied in the courts, themselves provide for a situation of diversity, Confining the judicial practice to the Hanafi fiqh only, cannot fail, as shown by experience, to lend constitutional support to a major limb of taqlid, namely conformity to only one school of the Shari'a. Uniformity in judicial practice, in effect, represents the only major argument in support of the above-mentioned constitutional measure. In this case, it is possible that the Constitution has attached an undue priority to the objective of uniformity. One might diagnose the main problem of justice in Afghanistan as rigidity and harshness, rather than diversity. Uniformity is primarily concerned with the sense of comparative justice in similar cases. This is, of course, a desirable aim, but the objective of essential justice, i.e. of avoiding harshness and cruelty, should nevertheless come first. As an illustration of this point within the Sharī'a justice may be given the position of the Hanafi law concerning judicial divorce as compared with Maliki law. Whereas the latter recognises the right of the wife to judicial divorce, the former does not. The Hanafi law in this respect is clearly harsh and unduly restrictive on the wife. Which is to be given priority, uniformity or justice?

Also relating to the subject of juristic traditionalism is article (64) of the Constitution. This article inter alia provided that 'There shall be no law repugnant to the basic principles of the sacred religion of Islam...' In examining the practical effects of this, it will be noted that a fundamental ambiguity in it is the lack of any precise definition of the terms 'basic principles of the sacred religion of Islam'. Because of this amiguity, this constitutional proviso has proved capable of being used as an instrument in the hand of the traditionalists and anti-reformists. It may well be argued that the very existence of this constitutional formula encourages reform of the Sharī'a, for in its absence, a complete departure from the Sharī'a would be constitutionally possible. Having forbidden this, the necessary legal reform has to be found within the Sharī'a boundaries.

And this could stimulate Sharī'a law reform. In practice, however, it has not achieved this positive purpose. During the debate on the Marriage Bill (later Marriage Law 1971) for example, some parliamentary delegates successfully used this constitutional article in their opposition to the enactment of a statutory marriageable age and the abolition of child marriage. Essentially the same constitutional position has been refelected in the format and scope of the said Marriage Bill. For the latter was totally silent on the subject of polygamy, and although it did contain certain provisions on the subject of divorce, it proposed no change whatsoever in the traditional Ḥanafi law of divorce. Elsewhere in article 25, the Constitution had provided for the equality of citizens before the law without discrimination, including discremination on the basis of sex. This latter provision could have been adopted as a basis of family law reform and the improvement of the position of women therein. Unfortunately, no step has been taken in the direction of equality. In the absence of positive and determined measures to encourage juristic ijtehād, compliance to the principles of Islam, as encorporated in article 64, has in practice meant the continuation of the existing traditional law. In the absence of a clear definition of the term of article 64, traditionalist zeal has succeeded in applying and extending the negative implications of this proviso to almost any triviality of the Sharī'a.

The conflicting ideas incorporated in the Constitution, namely the ideal of equality in article 25, and the traditional inequality favoured in article 64, led to conflict of attitudes and indecisiveness in Parliament. Both traditionalists and modernists found their justification in the Constitution. One result was the legislative impasse reflected in the four year delay of the Marriage Bill in Parliament. The modernist attitude in this respect was pointed out in an editorial article of Mermon ; relying on article 25 as well as the Preamble of the Constitution, Mermon commented that: "The new Marriage Law, on the whole, does not comply with the spirit of the Constitution. The Preamble of the Constitution proclaimed as its objective 'to re-organize the national life of Afghanistan in accordance with requirements of the time... to form a progressive society based on social co-operation and preservation of human dignity.' Submission of the Marriage Bill to Parliament aroused new hopes for family law reforms. It was

hoped that new legislation would offer solutions to problems arising from oppressive unilateral talāqs, registration of ṭalāq, care and custody of children, dower and maintenance, and a general disregard of the human dignity of women in this country... Statutes that do not respond to the new demands and do not fit the pattern of today and tomorrow, will soon turn into useless and barren provisions." (1)

An essentially similar ambivalence existed regarding articles 26 and 64 of the Constitution. Among other things, article 26 prohibited the imposition of punishment against human dignity. With no further clarification given about the precise implications of this provision, it was not clear whether the Shari'a hadd penalties, especially for the principal offences of theft and fornication (zina) would be considered as punishments against human dignity! And if so, would a departure from the said hadd penalties in legislation be justified under the terms of article 64! Notwithstanding the existence of some authority in the Shari'a legal tradition which permitted a measure of flexibility in the administration of hadd penalties particularly for drinking and theft, (2) further clarification of the constitutional position was distinctly required. This ambivalence in ideals of the Constitution, and lack of a directed legislative policy in this connection, is reflected in the prolonged delay in the progress of the draft Penal Code. After some five years the draft Penal Code has still not found its way to Parliament. The original draft was submitted to the Cabinet in 1971, but the latter did not authorize its submission to Parliament, probably because the draft code, in following the requirement of article 64 of the Constitution, had virtually reproduced the Shari'a law of crimes including hadd penalties. Ans this was a source of disagreement between the traditionalists and modernists. It was apparently the former who prevailed at the drafting stage, but the latter who were recognized in the Cabinet's decision.

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1. Mermon editorial article, A Look at the Marriage Law, No.7 & 8, 1350 A.H. (1970): 2.
2. "Changes in hadd were made from time to time as a part of public policy. Thus in the time of the Prophet, the punishment for shurb (drinking) was not a fixed one. The Prophet used to have the person flogged but used to stop the punishment when he considered it to be sufficiently deterrent. In the time of Abu Bakr, the limit was placed at 40 lashes ... but Omar increased it to 80 lashes." (see Mulla, Principles of Mahomedan Law: Introduction); It is also reported that in time of drought and hunger, 'Omar did not apply the hadd for theft.

In the opinion of Justice M.A.Wāhidi, President of the Central Court of Appeal, the incorporation of ḥadd penalties in the draft Penal Code was primarily a matter of principle which did not reflect the existence of a zeal for their enforcement. In saying this, Wahidi, J. referred to the established judicial practice in Afghanistan according to which ḥadd punishments for theft and zinā are not enforced. In the opinion of Wahidi, J., this practice was likely to continue even if the draft Penal Code were promulgated into law. The courts would thus continue to penalize these offences under the discretionary power of ta'zīr which was provided for in the draft Penal Code. (1) It is also arguable whether the keeping of wide discretionary powers of ta'zīr was in agreement with the requirements of the modern principle of legality in crimes and penalties as incorporated in article 26 of the Constitution,* for "the principle of legality involves rejecting 'criminal equity' as a mode of extending the law" (2) It should be noted that abolition of ta'zīr or its replacement with taqdir (measurement) or indeed any change in this area is a matter which falls within the administrative powers of the political authority under the doctrine of siyāsa. Legislative departure from ta'zīr does not pose any question of repugnancy to the Shari'a rules.

Ambivalence in the constitutional attitude towards law reform in general and Sharī'a law reform in particular has not facilitated the necessary legal change. In those areas of the law where reform is considered to be necessary, it would seem advisable that the Constitution should explicitly say so; if for example improvement in the legal status of women in the area of family law is to be desired, then the Constitution should formulate necessary general directives to this effect.

As for article 64 and the repugnancy clause therein, two alternative courses will be proposed: Either the phrase 'basic principles of Islam' and its implications should be clarified; if this proves to be too difficult then an alternative could be to revive the formula adopted in the Constitution of 1923 which provided for the Shari'a to form a principal source of legislation. (3)

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1. Informal interview with Justice, Wahidi (Kabul, September 1972).
2. See more in Glanville Williams, Criminal Law, the General Part, London 1961 (ed): 575.
3. For the relevant text see below (chapter on Judiciary at page 235.)

* "...no deed is considered a crime except by virtue of a law in force before its commission... no one may be punished except under the provisions of the law that has come into effect before the commission of the offence ... et seq."

It is worth mentioning that a major problem of juristic reform of the Shari'a concerns the understanding of the Shari'a. Quite often, traditionalist opposition develops largely because of the lack of the necessary understanding on the part of the mulla and his audience or both. In order to develop a better understanding of the law, it is proposed that a commission for Shari'a law reform should be set up on a permanent basis to study and recommend such reforms of the Shari'a as may be necessary. The already familiar practice in recent years, of attaching memoranda to legislative Bills explaining the social and juristic bases of the proposed legislation, is one that merits greater attention. (1)

A point of general interest that may be added here is the relationship of party organization to law reform. In a parliamentary system, political party organization constitutes a prominent link between the executive and the legislature which can be utlizied in the interest of greater coordination of activities for reform. The Constitution of 1964 provide for the formation of political parties for the first time. The political parties Bill was passed by Parliament in mid-1960's, but when submitted for royal assent, it was unfortunately postponed indefinitely. Countless differences of opinion which are time consuming and produce few results, has been a discouraging feature of the Afghan parliament in recent years. (2) In a party organization, once a policy is framed, the party in power usually supports it in parliament. The party structure, in this capacity, tends to add to the sense of purpose and direction of the parliamentary practice.

## B. Government Versus the Religious leaders

The process of building a modern state has brought about the widening of the secular functions of the State. Much of what has been said in the discussion on tribalism also relates to this context. Prior to the development of a national army for example, the religious leaders played an important military role in the declaration of holy war (jihād).

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1. At present, the Legislative Dept. of the Ministry of Justice, generally deals with the preparation of legislative Bills, often with the cooperation of the Research Department. They are however too generic for the ad hoc purpose. The Council of Ulama (jami'at ul- 'ulama) still exists, but has little to do with legislation; its existence is generally nominal.

2. See more in L. Dupree, Afghanistan Continues its Experiment in Democracy, AUFS Reports, S. Asia Series, No.3: 1971; also see Comparative Profiles of Recent Parliaments in Afghanistan, ibid. No.4, 1971).

against external as well as internal 'infidels'. (1) Similarly, before the development of public education, the mosque represented the main institution for literacy and learning. Mullas were thus particularly influential in the community, as religious leaders and teachers, as holders of religious endowment (waqf); and for the major part they take in marriage and funeral ceremonies. But a most important area dominated by the religious leaders was the judiciary. An account of developments in areas of court organization, development of secular jurisdictions, legal education and employment of judges, can be seen under Appendix (C). As already pointed out, under the Sharī'a doctrine of siyāsa, the sovereign is authorized to determine the jurisdictions of the courts and the manner in which the Sharī'a should be administered. This authority of the sovereign has hardly been granted to him by traditionalist religious leaders of the past in Afghanistan. In the latter's view, continuation of the universal jurisdictions of the Sharī'a courts, for example, virtually symbolized the Islamic character of the State and the continued existence of the Sharī'a. Similarly, judgeship was supposed to be a speciality of the religious leaders. Reduction of the jurisdictions of the Shari'a courts and the creation of administrative jurisdictions, development of institutions for modern legal studies, and the opening of judicial posts to other professionals though all acceptable within the doctrine of siyāsa, were neveretheless opposed and resented by religious leaders. This struggle between the Government and the religious establishment, during the building of the modern state, meanwhile represents a course of struggle with religious traditionalism which is not always the same as a struggle against the religion itself.

It has to be borne in mind that in the background of this process of gradual modernization lies a tradition of dominantly amicable relations between the political authority and the religious establishment. In this pattern of relations, the religious leaders were, broadly speaking, the potential allies of the political authority. (2) Because

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1. Many instances can be found in history where the Amir obtained a fitwā of the mullas legitimising the waging of war against rebel tribesmen in the name of rebellion against the king of Islam.
2. In the context of tribal politics, the mullas have at times supported the tribal chiefs against the Government. This has however occurred only where the Government radically opposed the mullas.

of the Qurʾanic injunction commanding obedience to the Ruler, because of their employment in the judiciary and education etc., because they received grants, subsidies, and held control of the religious endowments with the consent of the Government, (1) and because the Amirs proclaimed themselves as patrons of religion, the interests of the Government and those of religious leaders often coincided. In the area of the administration of justice, the qadis, muftis, (jurisconsults) and muhtasibs (religious overseers), were keen enforcers of the Sharīʿa which was meanwhile the authoritative law of the land. As part of their religious duties, imams of the masques in Friday sermons (khutba) uttered their continued allegiance to the Ruler of the time. In time of war against the 'infidels', the religious leaders and the Ruler joined hands in pursuit of their common objective. In the light of this traditional pattern, and because of the piecemeal and mixed nature of the modernization programmes, the Government has often been able to maintain a level of good relations with the religious leaders. Many of the religious leaders also adapted and softened their attitude towards modernization. In short, so long as the Government avoided radical measures against the religious leaders, the latter were, unlike the tribal chiefs, potential allies rather than opponents of its authority. The rulers also differed in their attitudes; while Amir Abdurrahman, for example, successfully reduced certain financial priviledges of the mullas and took control of the religious endowments, his successor Amir Habibullah is known for his lenient attitude toward the mullas. Amanullah's reign, in the present century, probably represents the only period during which the Government adopted measures which radically opposed the religious leaders. Even during the first five years of Amanullah's rule, his relationship with the religious leaders remained generally uneventful. It was during the subsequent years of Amanullah's rule

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1. Until the mid-1880's, religious groups in Afghanistan known as mullas, sāhibzādas, khojazādas, and fiqirs "received nearly half the revenue of the country from the state, and 1/10th of the land produce directly from the land-owners as charity. Among them the mullas were most influential with the people..." (see H.Kakar, The Consolidation of the Central Authority in Afghanistan under Amir 'Abd al-Rahman,1880-1896,London Uni. Thesis,1968:163.

that a pattern of hostility developed towards the religious establishment.(1) In addition to the Government's measures designed to emancipate women legally and socially, Amanullah took certain steps that directly affected the mullas. (2)

In the wake of the rebellion of 1929, King M. Nadir (1930-1933) adopted a policy of rapproachement towards both the tribal and religious leaders. Considerable concessions to the latter were made, for example, in the Constitution of 1931 and in other measures such as the setting up of a Department of Ihtesāb, and the establishment of a Council Ulama. Some such measures may have been justified in view of the generally precarious situation of the government. After some years of stabilization and later expansion, the Government gradually showed greater confidence in its relationship with the religious leaders. A trend in the Government's attitude since 1930's is a move away from the policy of conformity to the wishes of the religious leaders towards a position where the Government tries to persuade them to cooperate in the gradual efforts to modernize. (3) This gradualism seems to have affected not only the pace but also the priorities of the modernization

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1. "Amanullah, upon his coming to the throne, declared the external independence of Afghanistan from G.B. In this, he could not have touched a more vital cord in the Afghan heart. People flocked to him lovingly and especially aftorhe did succeed to gain the complete independence of Afghanistan in 1919, he was regarded as a national hero by all people and by the mullas. Amanullah went a step further in his professing a deep interest in pan-Islamic affairs...the financial aid of the state towards the upkeep of religious institutions, as well as the annual allowances of mullas, were appreciably increased.... In 1925, however, Amanullah appeared in a completely different colour; he made it plain that the only people who resisted the innovations were the priests andhenceforth he decided a war on them and addressed himself to the task of dethroning the hierarchy of the mullas." (I.A.Shah, The Tragedy of Amanullah, London 1933: 106, 177).

2. Religious leadership (i.e. to be a mulla) or teaching (tadris) was made dependent on examination and the possession of official certificate. Amanullah refused to grant important jobs or subsidies to certain mullas and attempted to limit their influence in the judiciary and education; he also denied them the right to study at orthodox Deoband school in India; and continued maintaining control of the waqf.

3. "The regime has set out to enlist support of the religious leaders in the process of state-building, and profiting from Amanullah's experience has succeeded to a large extent... their hostility to the growing power and secularization of the central Government appears to have softened." (R.S.Newell, The Politics of Afghanistan, op. cit: 75).

programme. Military, economic and administrative reforms seem to have been given priority over social and legal reforms. The economic aspects of the Five-Year Plans for example outweigh the attention given therein to socio-legal reforms. The roles of the religious leaders have, nevertheless, been declining. The Department of Ihtesāb for example disappeared in the 1950's, and the Council of Ulama has functioned largely as an instrument of the Government in religious matters. The official unveiling of women in 1959 and the recent expansion of women's education were accepted with no organised opposition by the religious leaders. One or two incidents of relatively minor importance occurred in 1959 when the traditionalists and religious leaders opposed the official unveiling, but they were quickly silenced by the army troops. (1)

An effort has been made to re-orient the training of religious professionals toward a wider outlook and greater toleration of non-traditional values, particularly in the specialised secondary schools (madrassas), in the Faculty of Islamic Laws, the Faculty of Law and Politicial Science, and the Judicial Training Course.* The Government also set up a new organisation for the administration of religious affairs to be known as the Awqaf Administration. The organisation is to carry out religious policy and provide financial support for the operation of masques, shrines and monasteries. It would appear to be a means of "centralising and coordinating government relationships with Afghanistan's traditional religious leaders. It can also monitor and influence their political behaviour." (2) A similar purpose can be seen in the setting up of the Commission for the Affairs of Holy Places in 1970 under the honorary chairmanship of King M. Zahir. Although the primary purpose of this Commission as it appears in its Constitution, was the preservation and improvement of holy places, it nevertheless seems,

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1. "The reduced status of the mullas was dramatised in late 1959 when civil disturbances were touched off, in part by ultra-conservative mullas, were quickly suppressed by army troops. This show of public defiance against Government's modernising efforts failed to evoke any significant public sympathy elsewhere in the country. The Government however continued to recognise the integrative force of Islam and the constructive role which the mullas could play." (H.H. Smith et al, Area Hand Book for Afghanistan, op. cit: 203).

* See details under chapter on judiciary, Appendix (C).

2. R.S. Newell, ibid: 173.

from the composition of the Commission, that it was designed to function as a highly placed policy-making body in religious affairs. (1) In this way, the Government tended to emphasise the religious component of its authority as a means of supervising the activities of the religious leaders.

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1. Art. 9, Constitution of the Commission for the Affairs of Holy Places: " Members of the Commission are: the Prime Minister, Chief Justice, Minister of Interior, Minister of Justice, Minister of Information and Culture, Deputy Minister of Foreign Affairs, President of the Awqaf Administration, President of the Council of Ulama, and other such persons as may be selected... "See the Afghan Year Book (De Afghanistan Kalanay) for 1349 (1970); 319.

# Appendices

## Appendix (A)

### Excerpts from the parliamentary debate on article (1) of the Marriage Bill 1967 referred to at page (28)

"If we upheld such customary practices, we would infact be opening the door to a host of unrighteous claims and increased tension among people. Moreover such practices may be popular in certain parts but not so in other parts of the country. Therefore I confirm the drafted form of article (1) in its entirety." (H.Badri, W.J.J. No,22, June 1967). This was followed by Karmal who argued:

"Let us look at the issue from the point of view of both Shari'a and modern civil laws. In Sharia, as I understand, any usage that causes undue pressure, compulsion and cruelty on the individual and undermines the well-being of the public while also lacking in explicit authority in Sharia, would be a form of bed'at - innovation -. Most appalling among such usages are those related to marriage. I know hundreds of families from my village who owned average sizes of land property and were forced to sell them in order to meet the expenses of engagement, wedding and the compulsory brideprice, and I think this is the common pattern in the whole of Afghanistan. I beg the revered deputies to pay attention to this matter. The public interest requires the legislature to fight these recurrent social mischiefs. To prohibit these practices would be entirely in accordance to Shari'a and the requirements of social justice. From the viewpoint of modern civil law, there is a difference between civil and criminal laws, in the former the public prosecutor can initiate prosecution whereas in civil matters there needs to be an individual complaint. Since most of the said popular practices about marriage fall under the civil category, judicial process can only begin by an individual claim. It is in this context that the law ought to ensure adequate judicial relief to the plaintiff. No recognition to these usages should be given in the courts of law. But a party who suffers financial damage because of these usages or if a girl is forced into marriage against her consent the law ought to provide for their judicial relief. In my view art.1 is sound in its drafted form." (B.Karmal). ibid. Note also:

"To date the rights of women in regard to marriage are downtrodden. They are not given their civil rights, nor their Sharia rights: The father forces his adult daughter in marriage, the brother does the same

to his sister and so do other relatives. They usually do so without taking any notice of her consent or obtaining a legal document of agency from the girl. It is in view of these problems that article (1) had been drafted." (H.Hidāiat, ibid).

Confirming the above views, another deputy commented:

"The second clause is correct for the reason that among the people of Afghanistan many practices exist which are wholly anti-Sharī'a and utterly oppressive." (S.M.H. Fazeli, ibid).

This was followed by a traditionalist view arguing that:

"If we replace the phrase 'nākiḥ and mankuḥa' with 'the contracting parties' ('aqedein) it would make it more comprehensive, as the latter includes agent and guardian. I propose the text should read 'nekāḥ is contracted upon the offer and acceptance of the 'aqedein in the presence of witnesses.'" (A.W.Sadāqat, ibid). The above proposition received wide support among the delegates and was finally adopted. Relating to the often arbitrary practices observed on the part of the guardians, one deputy commented: "I agree with Sadāqat's proposal only when this phrase 'in accordance to the Islamic Sharī'a' is added, for the parties may contract nikāḥ in an un-Sharī'a manner, which is not unknown in this country." (A.Wāsefi, ibid). In an attempt to illustrate the implications of article (1), Karzai commented : "Usages should be of no value, for among the Pushtuns there are many adverse usages. For instance, zhagh-kawol (calling), when a man fires a shot in the air near the residence of the woman he wishes to marry. Neither the girl nor her family may be in favour of the match, and yet the wooer will spread the word that he fired the shot and in this way puts pressure on the girl's family to comply with his wishes." (A.A. Karzai, ibid). This practice of zhagh-kawol is resorted to as a last resort when no other means have proved successful. See M.Ali (Manners and Customs of the Afghans) Kabul, 1958 : 12.

## Appendix (B)

## Excerpts from the Parliamentary Debates on Marriage Bill 1967 relating to Child Marriage as referred to on page 74.

"....Considering education, one ought to allow the prospective spouse to complete at least the lycee and this would mean up to about eighteen; to enact fifteen as the legal age for marriage would seem to interrupt the course of education." (G.Mustapha W.J.J. No.22, 1346 - June 1967): see also M.O.Andkoee loc.cit. to the similar effect. It was argued against this : "the enactment of marriageable age at fifteen does not imply any compulsion; it will still be up to the individuals to delay their marriage as long as they wish ..." (Dawary loc.cit). This was again disputed in that " ...from the point of view of the biological growth, such a low age would lead to unhealthy families. Also the immaturity of the young couple would severely affect the offspring of such a union ... I propose that the age of marriage be enacted at twenty-two ..."(Dr.Farzan loc.cit). But this was objected to : "fifteen seems appropriate although argument can be raised in favour of a lower age for girls... twenty two is against Islam, the Prophet married 'A'isha, and Ali married Fatima both at much lower ages ... " (Fazeli loc.cit). Another delegate argued: "fifteen years is justifiable as a minimum... as for the proposition that the term 'guardian' be added, I disagree. For it would make it possible for a guardian to report a minor girl as major and vice versa to the court...."(G.P.Ulfat loc.cit). Farhang put forward his opinion that"It is our duty to avail ourselves to the maximum of the rights granted in Sharī'a for women. Adding the term 'guardian' would render the law into something short of this ideal. The basic feature of nikāh in Islam is the nikāh of majority. In view of the corrupt morals of denying women their rights which are prevalent in our society, I think the basic step is to abolish child marriage altogether and specify nikāh to major persons only ..." (M.S.Farhang loc.cit.).

The above proposition was however objected to by a delegate who inter alia emphasized that "Sharī'a clearly permitted child marriage... I beg the revered delegates not to contradict Sharia in this parliament ..." (Fazeli loc.cit). This was pursued by Sadaqat who argued:

"assuming that we allow child marriage, as is the case in the draft before us, then to adopt the marriageable age on this basis as eighteen or twenty-two, in that case we would have entitled the guardian to contract girls in marriage even at twenty-two as minor persons, and this would be a blatant denial to major persons of their Shari'a rights; the Shurā (Parliament) is not entitled to do this. Therefore the marriageable age cannot be specified, we may specify the age of majority and this is fifteen years per agreed upon (mufta bihi) religion, above which the guardian has no right of ijbār ..."(A.W. Sadaqat, loc.cit.).

Another religious leader commented : "Before I come to the point I would like to thank my colleague Fazeli for his earnest defence of Islam; this is in fact a duty of all Muslims...stopping major persons from marriage would mean opening the way to moral corruption. This is why Shari'a has adopted a middle term of fifteen years. Moreover my point is that we cannot entertain a proposition or a procedure which indicates a difference between the state law and Shari'a law or even to make such a discrepancy palpable"(H.Hedāyat loc. cit.) To this a dissenting voice answered: "In my view the age of fifteen years is not adequate generally for the boys and girls in Afghanistan who at this age are on the whole economically and mentally dependent on their families and are subject to the pressure and compulsion of their guardians. In practice such compulsion has undermined the psychological compatability of the spouses. I think eighteen is a preferable age." (K.Ahmad loc.cit.).

Another religious leader argued that no age should be specified: "The age of fifteen was fixed in early Islam basically for barren women. For fertile girls majority is established upon the signs of puberty. As for the possible consequences of a specified age for marriage, say at fifteen, we would in fact give the guardians a still greater opportunity for abuse. For instance a girl may obtain puberty at thirteen, fourteen or fifteen; if we did not consider this a nikāh of majority we would have entitled the guardian to contract her in marriage as a minor. Therefore I think the wisdom of Shari'a is loftier than our estimations. Just as Shari'a has not fixed any age for majority, we leave it vague too, and I propose that the text be amended to read: "....nikāh of a nākih and mankuha who are not majors is not a nikāh of majority."(M.S.Irshad loc.cit).

H.Hedayat aptly considered the above statement as incomplete in saying that: "basically majority is of two kinds, one is natural majority and the other is jurisprudential majority. The former of course varies in persons and environments; it was because of this variability that the fiqh assigned a jurisprudential criterion for majority which is deemed to be certain at fifteen years of age."

## Appendix (C)

## (The Judiciary)

Introduction:

The long-standing domination of the judicial hierarchy by the religious leaders in Afghanistan has functioned as an obstacle to the efforts for legal reform and healthy adaptation to social change.

References have been made, in the previous chapters, to the traditionalist resistances against the modernization programmes of King Amanullah during the 1920's and how the religious leaders defied the Nizamnama reforms.

The downfall of Amanullah and its aetiology is a vast area for inquiry and a subject of considerable disagreement among contemporary commentators. Religious conservatism is by no means suggested to be the only factor to be held responsible for the apparent failure of the 1920's reformist activities. It seems however true to say that the rebellion against Amanullah, probably tribalist in origin, was actively endorsed and expanded by the religious leaders. (1)

This chapter is an attempt to illustrate the gradual changes that have been effected in the judiciary since 1920's. The existent tendency in this field appears to be that Afghanistan is moving in the direction of modernizing the judiciary in three ways. One is the organizational change of replacing the religious jurisdictions with secular jurisdictions, the other is the secularization of the law, and the third is the instrumental change of opening the judicial posts to fresh university graduates and the formally educated.

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1. A form of subversive propaganda by the mullas directed to the Nizāmnāmas is noted in the following passage: "As early as 1923 legislation assured Afghan women certain hitherto denied rights such as the freedom to marry the man of their choice. This legislation had already been used effectively as propaganda by mullas in southern Afghanistan who during the 1924 Khost rebellion by the Mangal tribe went about the tribal areas brandishing in one hand the Qur'an and in the other the Nizamnama, inviting true Muslims to choose between them.... By 1928 the mullas had generated a good deal of propaganda to the effect that the uprising was a holy war against the infidel King." (L.B.Poullada, Reform and Rebellion in Afghanistan, 1919-1929, Cornell University Press 1973: 85, 171). This book as a whole gives a detailed account of the rebellion against Amanullah with particular reference to tribal politics as the root cause of the rebellion.

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Constitutional References to Shari'a

A main feature of the three constitutions of Afghanistan promulgated during the present century is their references to Islam. The references to Islam on the whole relate to two general themes. One is the question of adopting a particular school of Islam as the state religion to the exclusion of the other Shari'a schools, thus determining the constitutional position of the religious minorities. The second and still related theme is the constitutional position of Shari'a, or a particular school thereof, vis a vis the State laws.

The Constitution of 1923, in its original version, i.e, before it was amended in 1924, was probably the most liberal in both of the above respects. Two articles of this Constitution relating to the official religion were:

> "The religion of Afghanistan is the sacred religion of Islam. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the State provided they do not disturb the public peace". (art. 2); and
>
> "All subjects of Afghanistan are endowed with personal liberty and are prohibited from encroaching on the liberty of others." (art.9).

Both of the above articles aroused criticism on the part of the religious leaders and were consequently amended by the Grand Assembly (loya jirga) of 1924. The background to these amendments is briefly illustrated in the following passage:

"The amendments were a direct result of the rebellion of the Mangal tribe in 1924. This rebellion was given a religious flavour by certain religious leaders who sided with the rebels. In order to expose this King Amanullah offered to send a delegation of religious scholars from Kabul to discuss the objections of the Mangal mullas and promised to make changes that may be agreed upon. The discussion took place but no agreement was reached; it became evident that the tribal mullas simply wanted a pretext in order to justify the rebellion. Nevertheless on returning to Kabul, Amanullah's delegates recommended that certain provisions of the Constitution and some other laws be amended so that

the mullas' pretext could be removed..." (1)

This, together with the hope to rally the popular support against the Mangal tribe, led Amanullah to summon the Grand Assembly of 1924.

It will be further noted that article (2) above represented a favourable departure from the earlier position maintained under Amir Abrurrahman and his successor Amir Habibullah: It was the custom for Hindus, Sikhs and Jews in Afghanistan to wear distinctive clothing and headdress. This customary practice was, however, later made the subject of a compulsory anddiscriminatory order. According to a decree issued by Amir Habibullah (1901-1919) the Hindus were obligated, in addition to the payment of a special tax (jazya), to wear yellow turbans and their women to wear yellow veils. Under the same decree a non-Muslim converted to Islam was to be given a sum of 300 to 600 Rupias and a suit of clothes as a premium by the government. (2)

Against this, King Amanullah issued an ordinance (May 1920) which abolished both the practice of compulsory clothing and the special tax for non-Muslim minorities including their hitherto outstanding sums of jazya.

The religious leaders of the 1924 Grand Assembly urged that article (2) of the Constitution should be amended to declare the Hanafi rite as the official religion of Afghanistan; they also insisted that the restrictions on non-Muslim groups as maintained under the previous Amir should be reinstated. (3)

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1. See L.B.Poullada, Reform and Rebellion in Afghanistan, 1919-1929; 290.
2. See Ghubar, Afghanistan dar maseer-e tarikh (Afghanistan in the Course of History) op.cit: 699.
3. The religious leaders argued that the adoption of the Hanafi rite after 'the religion of Islam' would be desirable insofar as it excludes other unorthodox variations of Islam. This would also, they argued, prevent the spread of the heretic sect of Qadyani in Afghanistan. They further argued that just as the Constitution of Iran has made a reference to the Shi'a school, in the similar fashion, a reference should be incorporated to the Hanafi school in the Afghan Constitution. An additional proposition put forward was that the phrase 'sunna wa jamā'a' should be added so that the Hanafi rite is confined to that version which is approved in the tradition of the Prophet and the consensus of the traditional jurists (see Maulawi Fazl Rabi, M.Bashir, Faiz Mohammad etc., in the Roydad-e Loya Jirga 1303, op. cit: 149 et seq.).

King Amanullah in his comment emphasised that to adopt such restrictive terms, as proposed by the religious leaders, in the Constitution would be in disharmony with the sense of national unity, and lacking of consideration to non-Muslim subjects of Afghanistan as well as to the Shi'a followers of Islam. (1)

Notwithstanding the more progressive views of Amanullah, the religious leaders insisted in their proposition. Consequently article (2) was amended to read:

'The religion of Afghanistan is the sacred religion of Islam ... and its official religious rite is the sublime Hanafi rite. Hindus and Jews must pay the special tax and wear distinctive clothing'. (2)

Consequent to this amendment, article (2) was also amended by adding to it the following:

'.... Afghan subjects are bound by the religious rite and political institutions of Afghanistan.'

The 1923 Constitution contained several provisions concerning the status of the Shari'a versus the State laws. Under this Constitution the requirements of the Shari'a were to be particularly considered in

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1. "We ought not to take back the consideration we have given to the position of the religious minorities in the Constitution. Adding of these restrictions to the Constitution, in reality, opposes the sense of unity and co-operation between the Muslims and non-Muslims and causes split and sectarianism. For the religious minorities of Afghanistan, like other inhabitants of this country, respect and defend the Afghan national honour. In addition to this, a considerable part of the people of Afghanistan are Shi'a Muslims. What will we say to them? And what manner and treatment shall we then adopt to pay consideration to their position! The addition of the suggested terms of sunna wa jamā'a is particularly exclusive of such a consideration. To include such restrictive terms would also seem inconsistent to the context of amiable relations and the treaty you have rederred with our neighbour Iran (only the previous day, the Loya Jirga sanctioned a treaty of friendship with Iran).... In my opinion a provision to the effect that religions of longstanding existence such as Shi'a are protected and new religions to be excluded, would suffice our purpose here." (see Roydād-e Loya Jirga, ibid.)

2. Maulawi A. Wasi' commented : "We ought to emphasise concensus with regard to the basic principles of Islam and not the subsidiary details. Nizamnamas should not be restricted to one but all the four orthodox schools of Islam. This is indicated by the mention of the religion of Islam preceding the Ḥanafi rite...." (ibid).

the process of legislation. (1) This provision of the 1923 Constitution is considerably more liberal when compared to the repugnancy clauses incorporated in the two succeeding Constitutions. 'Both the 1931 and the 1964 constitutions restricted the legislative prerogative of the parliament by enacting that parliamentary legislation is not to contravene the principles of Islam. (2)

Supremacy of the Constitution was emphasised in article (69) of the 1923 Constitution according to which no cause was permitted to render any part of the Constitution inoperative. (3) This position was abandoned in the succeeding Constitution of 1931 which had no equivalent provision to article (69). Considering the numerous other references made to Islam in the Constitution of 1931 as a whole it appears that this Constitution granted a du jure recognition to the supremacy of the Hanafi law as the authoritative law of the State. This position has been again reversed in the following Constitution of 1964 which in turn explicitly pronounced the priority of the Constitution and of the State laws over the Hanafi law (see articles 69 and 102 discussed below).

The 1923 Constitution moreover encouraged statutory legislation by making specific references to certain areas which were to be regularized under the State laws. This was the case for example with regard to public taxation, (4) expropriation of the individual property, (5) organization of the courts, (6) curricula for public

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1. Art. 72: 'In the process of legislation, the actual living conditions of the people, the exigencies of the time, and particularly the requirements of the laws of Shari'a will be given careful consideration'.
2. Article 65 (Constitution 1931), and article 64 (Constitution 1964).
3. Art. 69: 'None of the articles of this Constitution may be cancelled or suspended for whatever reason or cause.'
4. Art 58: 'Collection of all State taxes will be in accordance with general laws on taxation.'
5. Art. 19: 'Expropriation of the individual property for a public purpose may be effected'... in accordance to the provisions of a special law.'
6. Art. 54: 'The various types and hierarchy of courts are set forth in the Law of Basic Organizations of the Government.'

education, (1) and various other affairs of the state. (2) The 1923 Constitution also provides for a State Council, the duties of this were, on the whole, left as a matter to be regularized under the Nizâmnâma of Basic Organizations; the Constitution only mentioned certain areas namely industry, commerce, agriculture and education to be developed by the State Council. (3) Since a major function of the State Council was the preparation of Nizāmnāmas, it was thus indicated that the above-mentioned areas were to be developed under the Nizamnamas.

A particularly interesting provision of the 1923 Constitution was the principle of legality of punishments as incorporated in article (27): "All types of torture are hereby prohibited. No punishment may be imposed on any person except as provided in the General Penal Code (Nizamnama-e 'umomi jaza) and the Military Penal Code."

This article was also amended later by the Loya Jirga of 1924. The religious leaders of the Loya Jirga argued that the General Penal Code should be revised by a committee of ulema and should be compiled in the form of a collection of opinions (fitāwa) to be named as Fitāwa-e Amaniya. What was therefore indicated in this proposition was that such a fitāwa should be regarded as a scholarly work of a persuasive nature only. A further and a particularly unjustifiable proposition was put forward by the Mulla of Chaknawar who asserted that this fitāwa should be written

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1. Art. 68: 'Elementary education is compulsory for all citizens of Afghanistan. The various curricula and branches of knowledge are detailed in a special law and they will be implemented.'
2. Note references in article 37 to the duties and responsibilities of the government officials that were to be determined under special Nizāmnāmas; and article 66 which made a similar reference to the Municipal officials. Similarly article 57 provided that 'organization and function of the Special Court for the trial of Ministers shall be prescribed in a special Nizāmnāma'. So were article (61) and (62) which prescribed the enactment of special Nizāmnāmas for the functioning of the Government Auditing Office, and for the implementation of the Government budget respectively.
3. Art. 42: 'The State Council and Local Councils, in addition to those duties prescribed in the Nizāmnāma of Basic Organizations, will:

a. Make suggestions to the government for the improvement of industry, commerce, agriculture and education...'.

in Arabic rather than in Farsi (now called Dari). (1)

To this assertion Amanullah replied "our purpose is surely to inform the ordinary people of the laws and the activities of the government. The vast majority of the people in Afghanistan do not know Arabic, and knowledgeable persons like yourselves are not available at all places." (1)

Commenting on the value of the Nizāmnāmas, Maulawi A. Wāse', the then President of the State Council is reported to have said that: "The direction of our movement is clear, that is to say that the Nizāmnāma enactments are guided by the Sharī'a principles. Shari'a is however an endless river; finding the authoritative rules from the fiqh books and their proper implementation is a demanding task. The ulema have, of course a major role and reponsibility in this respect. In our time however not only the number of ulema is insufficient but also that many ulema must be in need of some guidance in order to distinguish the various versions of the approved rules of the fiqh.

Moreover, in instances where juristic ijtehād has advanced in several but all justifiable directions, the Ruler has the authority to chose among them. In administrative and political affairs also, the Ruler has the authority to regularize such affairs in accordance to the conditions of the time." (1)

Article 24 was finally amended by adding to it the following: "except those punishments which are in accordance with the Sharī'a and other public laws which are codified according to the rules of Sharī'a."

Amanullah tried even before convening The Loya Jirga of 1924, to persuade the mullas and the judges that the Nizāmnāma legislation was not contrary to Sharī'a. For example in his 'eid speech earlier in 1922, which he gave at the principal masque in Kabul, Amanullah explained

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1. See Roydād-e Loya Jirga 1303, op.cit. pp 112-117. It will be further noted that earlier Amir Habibullah commissioned a group of ulama to write a compendium of the Hanafi law to be practiced in the courts. The work was accomplished in four volumes called Sirāj ul- Aḥkām written in Farsi. This was however compiled in the traditional style of the Sharī'a texts; classification of Sirāj ul-Aḥkām was less then adequate for practical purposes of the courts. A counter-part of this work, but with improved classification (of a code style) was completed in 1921 under Amanullah (Tamassuk ul-Qudāt-e Amāniya). Hence the contention of the ulama of the 1924 loya jirga seems unfounded to that extent. This was probably why the mulla of Cheknawar, as supported by some others, raised the question of Arabic language.

his proposed reforms and assured the congregation of religious leaders that all the laws to be promulgated would be based on Shari'a and the spirit of progress; that the purpose of the laws was to protect the weak from the powerful and from the whims and abuses of rulers so that the government would be one of laws and not of men. Thus in Amanullah's view, the Nizāmnāmas simply codified the Shari'a and made it easily comprehensible for the purposes of enforcement which would in turn facilitate control over the actions of officials. (1)

Amanullah also willingly aprroved the proposition put forward by the 'ulema of the 1924 Loya Jirga to appoint a committee of 'ulema to sanction future legislation and certify their compliance with the principle of Sharī'a. (2) Consequently members of the proposed committee were nominated by the Loya Jirga. Amanullah while approving the nominees to the Committee of Ulama, also appointed the same ulemaı as Judges of the Cassation.

Against the immediate background of the overthrow of the Government in 1929 as followed by the ten-month irresponsible rule of Bacha-e Saqāo, the framers of the 1931 Constitution felt compelled to appease the traditionalists by giving a fullsome response to their assertions. Strict observance of the principles of Islam was made a responsibility of the Government, and the Ḥanafi law was on the whole recognized as the authoritative law of the country. Freedom of the individual was recognized within the framework of the Shari'a. Religious principles were also to be observed by the public press and education. King Nādir Shah also established a Department of Ihtesāb to supervise adherence to Muslim moral and religious duties as well as the Council of Ulama whose duty was to ensure the observance of Islamic principles in State laws. One liberal measure taken in this Constitution however was in its article (1) concerning the position of non-Muslim minorities. This article dropped all mention of the distinctive clothing and tax as was enacted in 1924, and recognized the freedom of religion for non-Muslims.

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1. See Poullada, Reform and Rebellion in Afghanistan, op. cit: 106.
2. See Roydād-e Loya Jirga 1303, op. cit: 302.

Sharī'a Jurisdictions During the 1920's:

The structure and jurisdictions of Shari'a Courts in Afghanistan has been subject to gradual change over the years. In the late 19th century, Amir Abdurrahman introduced certain legal and judicial reforms which concerned the organization and powers of the Sharī'a courts. As part of his well-known policy of restricting the traditional priviledges of the religious establishment, Abdurrahman also imposed certain restrictions over the jurisdictions of the Shari'a Courts. The Courts of Kotwal (basically police courts) for example acquired powers for dealing with a variety of criminal claims. A board of commerce (panchat) was established in Kabul for settling commercial disputes. The Amir himself dealt with offences committed by the government officials, and political offences. A two-tiered system of Sharī'a Courts (district level, and provincial level) existed in the country. There was however no regular jurisdiction for second appeal (what is now called the cassation court); instead Amir Abdurrahman himself, and later his successor Habibullah, sat in court (darbār) for dealing with important disputes referred to it by the lower courts. It was up to the Amir to decide as to which cases to consider and adjudicate. At times the darbar issued the first and final decision in disputes before its consideration. The position remained much the same during the reign of Amir Habibullah. (1)

The Constitution of 1923 (art. 50-57) and the Nizāmnāma of Basic Organizations (art. 213-226) provided for a three-tiered system of Sharī'a Courts; further details of the jurisdiction and proceedings of these courts were set out in the General Penal Code and various other Nizamnamas. Under the Nizamnama of Basic Organizations, a primary court (maḥkama-e ibtedāya) was to exist in each administrative unit of sub-governorate level (ḥokumat-e maḥali) and in provincial capitals, composed of one qāḍi, two muftis (Juris consults) and a clerk. Jurisdictions of the primary courts extended to all criminal, civil and commerical disputes. The latter two were, however, dealt with at the initial stages by the Courts of Reconcilliation (discussed below). Only in civil and commercial claims of pecuniary value of up to 200 Rupias (300 for primary courts in provincial capitals) could a primary court issue final decisions that were not subject to appeal.

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1. See Gregorian, op. cit: 136; and Mir Munshi, op. cit: 88 ff.

Criminal claims were generally subject to the right of appeal by the convict. Death sentences and sentences of life imprisonment were to be automatically referred to all the three courts and the approval of the monarch. As a rule, felonies (Jenayat)were regularly referred to the higher courts. (1)

A court of appeal (mahkama-e murâfi'a) existed in each administrative area (i.e. wilâyat, hokumat-e a'lâ, and hokumat-e kalân) composed of a qadi and four muftis which dealt with the appeals from primary courts. As a general rule all decisions of the appeal courts could be taken for a further consideration to the Cassation Committee (heiat-e 'aliya-e tamiz) in Kabul.

The Cassation Committee consisted of four members presided by the Minister of Justice (also called qazi ul-quzzat). The Cassation Committee sat in a combined session with the judges of the Kabul Court of Appeal. In the event, however, when the latter had itself participated in a decision, that particular Chamber which had issued the decision could not take part in its review by the Cassation Committee. Instead the Minister of Justice was to ask an alternative Chamber of the Kabul Court to participate in the Cassation Committee (the Kabul ourt of ppeal had three Chambers each for civil, criminal, and commerical disputes respectively). Final decisions of the Cassation Committee were to be approved by the monarch. Amnesty from penal sentences could be effected by a proposal of the Minister of Justice and the approval of the monarch.

The Constitution of 1923 also provided: "No especial court may be established outside the framework of the regular judiciary". (art. 55). Under this Constitution, Sharî'a Courts were to apply Sharî'a alongside the State laws. Further to this, the Nizamnama of Basic Organizations provided that: 'In criminal affairs, the Sharî'a Courts are to order penalties in accordance to the provisions of the General Penal Code; in civil and commercial claims their decisions shall be rendered in accordance to the provisions of Tamassuk ul-Quadât. Both of the above-mentioned are in agreement with the Sharî'a.' (art. 226)

Judges of the Cassation Committee, appeal courts and primary courts, and muftis of the appeal courts were to be appointed by the

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1. See Seir-e takamul-e radriji Qada dar nim qarn-e akhir (Gradual Evolution of Justice During the Past Half Century) Supreme Court publication Kabul, 1967:15.

King. Other judges and personnel of the courts for the province of Kabul were appointed by the Minister of Justice on the basis of recommendation of the Commission of Appointments (commission-e ta'inât). Similar Commissions existed in other provinces whose recommendations were considered by the Governors.

Administrative Jurisdictions (1920-1964).

Administrative courts were devloped under the Nizamnama reforms of the 1920's. Under the 1923 Constitution, the State Council, in addition to its legislative functions, embodied and supervised the administrative courts for civil servants in Afghanistan. Articles (39 -49) of this Constitution provided for the establishment of the State Council and Provincial Councils. These were composed of an equal number of appointed and elected members. The duties, recruitment and election of these Councils were spelled out in the Nizamnama of Basic Organizations. The State Council consisted of fifty members twenty five of which were to be elected from all provinces for a period of three years. Appointed members could be drawn "from among civil servants and military officers above the rank of district and provincial governors and governors-generals, and from the military rank of lewa mishr (brigadier-general) respectively." (1) President of the State Council and his three deputies were to be elected by the Council with the approval of the monarch; president of the State Council was meanwhile a member of the Cabinet. The State Council consisted of three Divisions, namely Division for Reforms, Administrative Division, and Judical Division. It was the Judicial Division that contained a three-tiered court for civil servants. Four members of the Council under the presidency of the Second Deputy composed the court of appeal. The President with his First Deputy and five members composed the Cassation Court for civil servants. Two members presided by the Third Deputy composed the primary court for Kabul whereas in other provinces the Provincial Councils functioned as primary courts for each individual province.

It will be noted that under the Nizamnamas, the organization and membership of the administrative courts was designed in a fashion that ensured their independence from the Shari'a courts. The State Council and provincial councils were secular jurisdictions of distinctive

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1. Art. 47, Constitution 1923.

status and membership based in the Constitution, And this indicated a favourable start for the development of secular courts outside the religious establishment in Afghanistan.

The composition and membership of the State Council was criticised by some religious leaders of the 1924 Grand Assembly (loya Jirga) who asserted that "membership of the State Council and of the Cabinet should be amended to include ulema so that the observance of Islamic principles be ensured in the activities of the government." To this Amanullah replied that "it is fundamentally incorrect to presume that members of the State Council or the Cabinet Ministers are ignorant of the Islamic principles." (1)

The 1923 Constitution (art. 56-58) also provided for a High Court for the trial of misdemeanours by Cabinet Ministers. This was a temporary organization to be set up for the purpose as the occasion arose. Membership of this court was dealt with in the Nizamnama of Basic Organizations according to which fifteen members of the State Council were to be nominated by the monarch; six investigators and nine judges to consider the matter before them.

The Nizamnama of Basic Organizations also provided for Courts of Reconciliation (Mahakim-e- Islāhiyya). These were to be established one in every province (wilāyat), major districts (hokumat-e-a'la), and medium-sized districts (hokumat-e Kalān). Reconciliation Courts were basically courts of summary jurisdiction whose main function was to effect reconciliation in civil disputes. Jurisdiction of the Courts of Reconciliation extended to civil and commerical disputes only. In cases where an attempt to reconciliation did not succeed, Reconciliation Courts were empowered to refer them for adjudication to the primary courts. Decisions of the Reconciliation Courts which were based on the agreement of the parties were final and not subject to appeal. The Kabul Court of Reconciliation was composed of a president and four judges, whereas in other provinces and localities it consisted of a president and two judges. All judges were to be appointed by the monarch on the basis of a proposal by the local governor and the recommendation of the Minister of Justice. In making their proposal, the governors were to choose the candidates from among "respectable persons known for their trustworthiness." (2)

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1. See Roydāde Loya Jirga (account of the Grand Assembly) 1924 op. cit: 165
2. Nizāmnāma of Basic Organisations 1923 (article 212).

It was thus indicated that judges of Reconciliation Courts need not be selected from among the religious leaders. This was further substantiated by the provision referred to above that the decisions of these courts were not subject to review by the Shari'a courts which, on the whole, indicated the independent status of the Reconciliation Courts. As all civil and commercial disputes fell within the jurisdiction of the Court of Reconciliation at the initial stage, this court in effect exercised a considerable part of the jurisdictions that were previously exercised by the Shari'a courts.

Reconciliation Courts continued until late 1930's (1). With the establishment of regular commercial courts (discussed later), jurisdiction of Reconciliation Courts relating to commercial disputes were later transferred to commercial courts, and their jurisdictions relating to civil disputes were transferred back to Shari'a courts.

Non-Muslim religious communities namely Hindus and Jews have historically played a major role in the trade of Afghanistan as merchants, moneylenders, shopkeepers and officers of the government treasury. This had created a demand to put their commercial activities outside the applicability of Islamic law. Hence a board of Commerce (Punchat) was established in Kabul which was staffed by members of the merchant community and presided by a punchat Bashee who was elected for a period of three years (often a Hindu merchant was elected for this office). In settling the disputes before it, Punchat relied on commercial customs, contracts and registered documents. The fact that the proceedings in Punchat were not governed by the Shari'a, and that its membership was dominated by the non-Muslim minorities was disapproved by the religious leaders of the 1924 Grand Assembly who among

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1. Customary practices of settling disputes through local and tribal councils (jirga) continued to function at the non-official level in most parts of Afghanistan. In case of dissatisfaction with the tribal adjudication, litigations were taken before the courts. Estimate figures of the case work in courts for the year 1935 for example show cases settled in:
Kabul court of reconciliation 188; in all courts, i.e. courts of reconciliation, primary, appeal, and cassation courts 8089 cases (see Seir-e takamul-e tadriyi dada dar noem qarne akhir (Gradual Evolution of Justice During the Past Half Century) op. cit: 22.

their proposed amendments urged the government that commercial jurisdictions should be exclusively vested in the Sharī'a courts. The amendment was carried and a resolution passed to this effect restored the Punchat's commercial jurisdiction to the Sharī'a courts (1). Consequently a Commercial Chamber was established within the framework of the Sharī'a courts. Under the Nizāmnāmas, the Sharī'a courts, at the primary level, were thus consisted of three chambers, namely, civil, criminal and commercial. Proceedings of the commercial chamber were regularized under the Nizāmnāma Concerning Commercial Cases in Sharī'a Courts (Nizāmnāma-e Maḥākim-e Sharī'a dar Bab-e Mu'āmelāt-e Tejarati). In 1931 a separate tribunal for commercial disputes (Feisala-e Munazi'at-e Tijarati) was set up in Kabul and later in two other provinces - Qandahar and Mazare Sharif-. Appeals from these tribunals went to the Chamber of Commerce (Otāq-e Tijarat) and the final appeal to the Council of the Ministry of Commerce. A few parliamentary Acts were later effected which, on the whole governed proceedings of the Commercial Courts. A further reorganization of the Commercial Courts took place in 1949 when the previous arrangement was replaced by a more regular three-tiered system of courts. The number of primary commercial courts was increased in the provinces, and the Commercial Court of Appeal was established in Kabul which dealt with the appeals for the whole of Afghanistan. The Cassation Court of Commerce was also established in Kabul for dealing with the appeals in the final stage. A consolidation of commercial laws was subsequently effected under the Law of Commerce 1955 about 1000 articles - and Law of Commercial Courts 1962 based on the Swiss experience which are currently operative.

One other administrative jurisdiction which will be discussed in some detail is the Provincial Council (Majlis-e Mashwara-e Wila'yat). This, as already mentioned, was originally provided for in the Nizamnama of Basic Organisation 1923 which in addition to the administrative functions it vested in the Provincial Council also conferred upon this council the jurisdiction to function as primary court for civil servants. Gradually however, the Provincial Council acquired wider judicial powers, outside of its

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1. Details may be seen in the Roydāde Loya Jirga 1303 : 309 (Account of the Grand Assembly 1924).

capacity as the court for civil servants, of such proportions that it virtually controlled the Sharī'a courts. Under the 1923 Nizāmnāma, a Council had to be established in every provincial capital (viz, wilayat, hokumat-e a'la, and hokumate kalan). The Council consisted of members who were locally elected for a period of three years, and of ex-officio members who were the heads of local offices each representing a department of the central government.

An important expansion of the judicial powers of the Provincial Council was the control it acquired over the sentencing of ta'zīr punishments:

It has already been pointed out that the religious leaders disapproved of the Nizamnama legislation as they felt that such legislation attempted to over-rule the Shari'a. Their disapproval was expressed in the Grand Assembly of 1924 when they criticised the introduction of the General Penal Code (Nizāmnāma-e 'Umomee Jazā) which enacted specified penalties for offences. The religious leaders asserted that stipulation of penalties before the actual commission of an offence is disagreeable with the Shari'a doctrine of ta'zīr; that with the exception of the principal offences for which the Shari'a itself had provided specified hadd penalties, ta'zīr penalties were left to the discretion of the qāḍi ; and that the qāḍi had powers under ta'zīr to sentence the offender according to his individual circumstances. This was, as they asserted, the whole philosophy of ta'zīr in Sharī'a. Against this, Amanullah asserted that specified penalties facilitated predictability and therefore greater deterrence; and wide discretion opened the door to individual arbitrariness of the judges. The debate finally led to a compromise solution according to which ta'zīr was permitted to apply, not by the individual qāḍi but by the Provincial Council. (1)

The Provincial Council was a predominantly administrative body whose main function was "to consult the local administrative affairs." (2) Under the presidency of the local governor, the Council facilitated the implementation of the policies of the central government. Decisions of the Council were taken by the majority vote of its members among whom the provincial qadi had only one vote.

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1. Details may be seen in Roydāde Loya Jirga 1303 - 1924 - op. cit: 311.
2. Art. 111 Nizāmnāma of Basic Organizations 1923.

After the abdication of Amanullah and the conclusion of the Nizamnama period, the Constitution of 1931 once again provided for the Provincial Councils to function in all major districts as before (art. 70). Later in 1957 an Act (Usulnāma-e Majalis-e Mashwara) was put into effect which dealt with the organization and function of the Provincial Council in more detail. The organization of the Council under this Act remained the same as before but its judicial powers were increased. The Council was to meet at least once a week, additional meetings were left to the discretion of the Governor in whose absence the Commissioner of Finance (Mostawfi) was to preside over the Council. Whereas the administrative decisions of the Council required a relative majority of over 50%, a judicial decision required a majority of two-thirds. (1) Judicial functions of the Council were:

A. To act as tribunal for the trial of offences committed by civil servants during the execution of their duties. (2)

B. In the area of the ordinary offences, the Council had the exclusive powers of sentencing the right-of-God aspect (haq-ullāh) of the offence; the right-of-man aspect of the offence (haq-ul'abd) such as damages and pecuniary liabilities incurred was to be settled in the Shari'a courts.

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1. With the expansion of the central government over the years, similar expansion occurred in its local branches. Hence the number of ex-officio members of the Council increased from six to someten members.

2. The Constitution of 1931 provided for a bicameral parliament which basically replaced the State Council. With this a change also occurred in the structure of the courts for civil servants. Until 1946, the appellate jurisdiction for these courts was exercised by the 'council' of each respective Ministry which supervised the suspect civil servant in question; the final appellate jurisdiction was exercised by the Prime Minister's office. In 1946 a separate Court of Appeal and a Cassation Court for civil servants were established in Kabul which replaced the earlier arrangement with the exception that the Provincial Council remained to function in its judicial capacities as before. In fact the Provincial Council was now given additional powers to function as an appeal tribunal for sentences issued by its correspondent councils in sub-provincial districts. In cases where the Provincial Council itself issued sentence as primary court, appellate jurisdiction vested in the above-mentioned courts in Kabul.

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In rendering its sentences, the Council made extensive use of the ta'zīr penalties.

C. Whenever the statutes prescribed ta'zīr or fines of over one hundred Afghanis but did not specify the sentencing authority, the case automatically fell within the jurisdiction of the Provincial Council.

In addition, some statutes contained specific references empowering the provincial councils with regard to certain activities especially those disturbing the public safety, cases of vice and immorality, and certain types of sentences such as banishment had to be considered before the provincial councils. (1)

Similarly, certain high ranking officials acquired and exercised extended powers with regard to fines and detention: The Minister of Security (Wazir-e Amniya), the provincial Governor, and the Governor of major district (Hakim-e A'la) had powers to order detention for upto one month and fines of upto 200 Afghanis. Heads of smaller administrative units had also powers of detention ranging from three up to fifteen days and fines, depending on the grade and size of the administrative units they supervised. (2)

A principal critcism of the judicial powers being exercised by provincial councils and other officials was that it violated the independence of the courts as granted in the Constitution of 1923 (3) as well as in that of the 1931. (4) Anomalies were observed in the field of ordinary crimes in which decisions of the Provincial Council could be taken for appellate consideration to the provincial court of appeal and for final appeal to the Cassation Court for Civil and Criminal Affairs in Kabul. (5). The provincial qadi, in his capacity

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1. See A.R.Wasiq, Tashkeelāt wa Salahiyyat ha'e Qadā'ee (judicial powers and organizations), a Kabul University monograph 1969: 12.
2. See Seir-e takamul-e tadriji qadā (Gradual Evolution of Justice) op. cit: 15.
3. Art. 53: "All courts are free from all types of interference."
4. Art. 89 as above.
5. As a general rule, in ordinary criminal cases, the local governors were authorised to appeal against judicial sentences; appeal from a decision of the primary court to the provincial court as well as from the latter to Cassation Court had to be authorized by them. Exceptions to this were death sentences (i'dām), life imprisonment, qisas, and sentences that involved minors which were to be automatically referred to higher courts.

as the appeal judge, at times overruled the decisions of the Provincial Council in which the qāḍi himself had taken part at the primary stage. The Shari'a courts, including the Cassation Court for Civil and Criminal Affairs, on the whole, felt critical of the executive interference in their traditional powers. This situation led to wide disparities in sentencing. Commenting on this point and how it led to the creation of an independent judiciary by the Constitution of 1964, an informed source noted the following:

> "As the role of the government increased in administering the affairs of the country, a provincial council comprised of representatives of various administrative units of the government came to control and often to exercise some of the judicial functions of the state. Executive influence in judicial functions became an increasing source of dissatisfaction... the Constitution of 1964 provided for separation of powers in the government and established an entirely independent Supreme Court ...." (1)

The Judiciary After 1964:

A principal aim of the judicial reform declared by the Constitution was uniformity in judicial practice and organization which was set out in article (104) as follows:

"Subject to the provisions of this Constitution, rules relating to the organization and function of the courts, and matters concerning judges shall be regulated by law.

The principal aim of these laws shall be the establishment of uniformity in judicial practice, organization, jurisdiction, and procedures of the courts."

The above article, in effect pronounced two principal aims, one is uniformity in the second paragraph, the other, and probably the more important is that all matters of judicial practice and organization etc.,

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1. Judicial Training Program in Afghanistan, Research Dept. of Supreme Court, Kabul 1971: 1 (English). It is worth noticing that a practical advantage of the Provincial Council exercising judicial powers appeared to be the admissability of circumstantial evidence therein. Whereas the Sharī'a courts in relying on the Sharī'a rules of evidence, at times did not attach sufficient weight to police evidence and the opinion of investigators; the Provincial Council admitted the Sharī'a as well as other forms of evidence.

are to be regulated by law. Law was defined in article (69) as follows:

"Excepting the conditions for which specific provisions have been made in this Constitution, a law is a resolution passed by both Houses, and signed by the King. In the area where no such law exists, the provisions of the Hanafi jurisprudence of the Shari'at of Islam shall be considered as law."

Article 69 represented a significant jursiprudential step toward the secularization of law in Afghanistan. For the priority attached in this article to statutory legislation stands in contrast with the previous Constitution of 1931 which, on the whole, maintained the supremacy of the Hanafi Law.

With the exception of a few statutes of somewhat limited coverage that were enacted later in the 1950's (mainly the Law of Civil Procedure, and the Law of Court Administration) that consolidated parts of the Hanafi law relating to evidence, validity of claims and procedures thereof, the Hanafi Law remained largely unconsolidated. Problems emanating from this were manifold, one of which was that because of the diversity of the Hanafi legal sources, diversity in judicial practice prevailed. Judges often found it laborious and time consuming to search for various interpretations and commentaries in order to verify the authoritative law.

A further aim of this Constitution was to establish the independence of the judiciary as a separate organ of the State with full competence for conducting the judicial affairs of the country. As provided in article (97) of The Constitution:

'The judiciary is an independent organ of the State and discharges its duties side by side with the Legislative and Executive Organs.'

Whereas previously the courts were supervised by the Ministry of Justice as part of the Executive, and certain administrative bodies mainly the Provincial Councils, provincial and local governors were vested with considerable judicial powers, the 1964 Constitution enacted that:

'It is within the jurisdiction of the judiciary to adjudicate in all litigations brought before it according to the rules of law, in which real or legal persons, including the State, are involved either as

plaintiff or defendant.

Under no circumstances shall a law execlude from the jurisdiction of the judiciary, as defined in this Title, a case or sphere, and assign it to other authorities. This provision does not prevent the establishment of military courts; but the jurisdiction of these courts is confined to offences related to armed forces of Afghanistan. The jurisdiction of the military courts shall be determined by law." (art. 98).

Under the Constitution "the Judiciary consists of a Supreme Court and other courts." This has been elaborated by the Law of Judicial Authority and Organization (LJAO) according to which "the Judiciary of Afghanistan is composed of the following courts:
A- General Courts: These are the Supreme Court, Cassation Court, Central High Court of Appeal, Provincail Courts and Primary Courts.

The Supreme Court may establish itinerary courts of ordinary jurisdiction as the necessity arises.
B- Especial Courts: These are juveniles' courts, labour courts and other courts that may be established by the Supreme Court as the necessity arises." (art. 3) The various courts referred to in this article will be briefly introduced in the following pages.

1. General Courts

1.1 The Supreme Court

The Supreme Court consisted of nine judges appointed by the monarch in the manner as prescribed in the Constitution (qualifications for the appointment of Sup/Court judges are discussed later under the employment of judges). The Constitution ensured the security of the office of the Chief Justice and other justices of the Sup/Court from arbitrary interferences. Two methods were prescribed according to which a justice of the Sup/Court could be removed from his office. One was the normal procedure according to which the King could review the appointment of the Chief Justice and the justices of the Sup/Court after the lapse of ten years from the date of their appointment to office. The second method was the

impeachment procedure as prescribed in article 106. (1)

The procedure for the prosecution and trial of judges, prior to the LJAO, did not differ from what was the case for other civil servants. The Civil Servant's Courts were equally competent for the trial of judges. Similarly the prosecution of judges was conducted by Government prosecutors (later by member of the Attorney General's Office when this office was established in 1962). Under the LJAO, the prosecution of judges is to be conducted, not by the members of the Attorney General's Office, but by the Judicial Prosecutor (Sāranwāl-e Qaḍāi) who is an officer of the judiciary. The jurisdiction for the trial of judges, other than Supreme Court justices, under the LJAO was vested exclusively in the Supreme Court Chamber for the Trial of Judges. According to article (10) of the LJAO, this Chamber is composed of three Supreme Court judges who are appointed by the Chief Jutsice. The Chamber is an extraordinary tribunal whose decisions are not subject to appeal. (2)

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1. Under this article impeachment was to be demanded by more than one-third of the members of the Wolesi Jirga on a charge of crime during the execution of office. In case the demand for impeachment was approved by a two-thirds majority of the W/Jirga, the accused was to be suspended from office and a Grand Assembly (Loya Jirga) to be convened to appoint a Commission of Enquiry. In the event where the Loya Jirga decided by a majority of two-thirds, that prosecution was necessary, it would then appoint a panel of eight persons to act as a tribunal presided by the President of Meshrano Jirga, (House of Elders) and one person among the members of the Loya Jirga to prosecute the case before this tribunal.
2. Proceedings at the initial stage normally begin in the office of Judicial Inspectorate whose duty is to watch over the affairs of the courts. In the event a miscarriage of justice is detected, the said office charges one of its 12 groups to take up the case and submit a report of its findings to the Research Department. In case the charge is established, the file is submitted to the Chief Justice for his authority. Upon the obtaining of this authority, the Judicial Prosecutor submits his case to the Chamber for the Trial of Judges and demands that the suspect be suspended from office. The Chamber holds a hearing of the case and makes the initial decision as to whether a trial is necessary at all. The Chamber may dismiss the case, authorize further inquiry, or authorize a trial. In the latter event, the Chief Justice submits a proposal to the head of the State to the effect that the accused be suspended from office. If the proposal is approved, the accused is removed from office by virtue of a decree by the head of the State and his case is brought before the Chamber for trial. Disciplinary action against judges of primary courts and their assistants are usually commenced on the basis of a report by the presidents of provincial courts to the Sup/Court as part of their periodical reports to the latter. (see Hoqoqi, Judicial Organization in Afghanistan, op. cit.)

The Supreme Court Chamber for Resolving Conflicts of Jurisdiction is also composed of three justices of the Sup/Court who are appointed by the Chief Justice for a period of one year that may be extended as appropriate. The main function of this Chamber, as evident from its name, is resolving of conflicts of jurisdiction (territorial, and subject-matter) among courts. This is also an extraordinary tribunal whose decisions are final and not subject to appeal.

An important aspect of the LJAO was its definition of the powers of the judiciary which substantiated the latter's independence from the Executive rule. Powers of the Supreme Court under this law were spelled out under two categories, namely judicial and administrative. (1)

With the exception of matters that fall within the jurisdiction of the respective Chambers of the Sup/Court, all major judicial and administrative powers of the Sup/Court are exercised by the Supreme

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"A. Judicial powers:

1. Issuing of decisive orders on conflicts of jurisdiction among courts;
2. Abnegation from the enforcement of laws disagreeable to the Constitution;
3. Interpretation of statutes;
4. Extradition of criminals to foreign countries;
5. Transfer of a criminal case from one court to another on the basis of application by the Attorney General or the local Governor (wali).... Application for such a transfer in civil disputes may be initiated either by the party concerned, or the local Governor on the basis of strong and logical reasons. A transfer may only be authorized by a two-thirds majority of the present judges of the Sup/Court;
6. Other decisions as may be prescribed in the statutes.
7. Inquiry into offences of presidents of provincial courts and the Central High Court of Appeal during the execution of their duties must be authorized by the Chief Justice;
8. Initiation of prosecution against persons mentioned in item (7) above, by the Judicial Prosecutor, must be authorized by the Chief Justice;
9. Prosecution and trial of the administrative personnel of the judiciary, during the execution of duty, is to be conducted in courts (i.e., civil servants courts), prosecution of these officials fall within the province of the Attorney General's Office." (Art. 13 (a), LJAO, 1967).

B. Administrative powers: Under article 13 (b) of the LJAO these are:

Regulating the organizations and proceedings of the courts according to the Law; enacting regulations (lawāyih) for the administrative affairs of the courts; preparation of the budget of the judiciary in consultation with the Executive and its implementation; transfer and retirement of judges according to the law; and drafting of Bills on judicial matters to be submitted to parliament.

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Judicial Council. This is 'composed of all the justices of the Sup/Court who sit, as may be required, under the presidency of the Chief Justice and consider the administrative affair of the judiciary; proceedings of this Council are conducted in accordance to its internal regulations.' (1)

In addition to the statutory powers of the Sup/Court, the LJAO provided that 'whenever the Sup/Court considers a matter for which there is no provision in the statutes, decision may be taken by a majority vote of all the justices of the Sup/Court. (2) This provision equally applies to both judicial and administrative decisions of the Supreme Court. (3)

It should be noted that with the exception of the two above-mentioned Chambers, and the Cassation Court (discussed below), the Sup/Court itself is not a court per se, for it does not normally adjudicate a case before it. It is in fact a supervisory body in charge mainly of administrative and regulatory affairs of the judiciary. The same is true of the S/J/Council which is a council rather than a court. The only exception when the Sup/Court sits as a bench and adjudicates is the event where Ministers of the government are accused of high treason as provided for in the Constitution. (4)

Some clarification of the Sup/Court's level of supervision over the processes of adjudication in the lower courts, can be seen in a circular of the Sup/Court as follows:

"Whenever a judge finds that an order issued to him from a superior judicial authority is in conflict with the statutes or the Shari'a, he is obligated to suspend the order and report the matter in writing

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1. Art. (9). LJAO 1967.
2. Art. 15, ibid.
3. Art. 16, ibid.
4. Art. 93, Constitution 1964: "When more than one-third of the members of the Wolesi Jirga demand the impeachment of the Prime Minister or of a majority of the members of the Government on a charge of high treason, and the W/Jirga approves this demand by a two-thirds majority of its members, the Government falls and a meeting of the Loya Jirga is called to appoint an Enquiry Commission. If after studying the report of the Commission, the L/Jirga decides by a two-thirds majority vote of its members that prosecution is necessary, it commissions a member of the Wolesi Jirga to file a suit against the accused in the Supreme Court.

The above provision shall also apply to one or a few Minister numbering less than half who are accused of high treason. As a result of the accusation, the accused shall be relieved of his duties but the Government shall not fall."

to the Sup/Court for further clarification." (1)
Certain related points have also beencommunicated in another circular of the Sup/Court as follows:
"Any civil or criminal claim received in the courts are to be taken into consideration in the manner as provided in article (102) of the Constitution, i.e. the courts are to apply the statutes, whenever a statutory guidance is lacking, the courts are to apply the provisions of the Hanafi jurisprudence.

When judges are faced with problems that in their view emanate from a conflict in statutory articles, vagueness or absolute difficulty therein which require interpretation, they are to refer the matter to the Research Department of the Sup/Court in the form of a three-itemed presentation:
The first item willbe devoted to the facts and nature of the problem in full details; the second item will be devoted to the opinion of the judge arrived at as a result of his inquiry of the laws and the Hanafi fiqh as far as possible; and the third item will be devoted to the points of doubt and the need felt for an interpretation of the law. All related documents are to be enclosed. Matters of interpretation are submitted by the Office of Legal Counsels to the S/J/Council.

When the Research Department is convinced that the matter was of an ordinary nature which could be resolved under the existent laws and well-known sources, it will legally reply and return the matter as appropriate. The incidence will, however, be recorded in a special file of the Research Department. If this is repeated three times, the matter will be reported to the Administrative Department of the Sup/Court where a note will be inserted in the records (sawānih) of the judge concerned and will be taken into consideration in relationship to his promotion.

All courts are hereby notified that any reply they may receive from the Research Department, will be considered in the form of an opinion only. Such an opinion cannot affect anyone's responsibility in regards to the enforcement of the law.

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1. Sup/Court circular No. 818 4.9.1346. (1967), item 13.

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Article (117) of the Law of Hearing of Claims 1957 (usulnāma-e istemā'e da'āwi) and its amendment according to which the primary courts were to ask the appeal courts for guidance regarding the problems they encountered, and which required the latter to seek guidance from Cassation Court in a similar manner, has been abolished. The reason for this was that expression of opinions by the higher courts as sought for by the lower courts in effect amounted to a form of interference in judicial affairs. This function was for some time rendered by the Academic Council of the Ministry of Justice (mailis-e 'ilmi wizārat-e 'adliya) and later by the Directorate of Juristic Opinions. At present the Research Department deals with this matter. In the past, it has been observed that many courts, without making an adequate effort to inquire into the issue, or in order to postpone a case, often asked for an unncessary guidance. Consequently the Research Department find it time consuming and feels that judges, in this way, avoid the task that has been enjoined upon them by article 102 of the Constitution; and this perhaps also result in a decline of their academic standards and the sense of jursitic inquiry..." (1)

The above circular, meanwhile, confirms the more basic problem earlier referred to, i.e. the diverse and unconsolidated state of the Hanafi fiqh and the underdeveloped state of the statutory legislation in Afghanistan.

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1. Sup/Court circular No. 959/18.2.1347 (1968).

1.2 The Cassation Court

This is an integral part of the Supreme Court. The Cassation Court consists of three chambers each of which is presided by a justice of the Sup/Court selected by the Chief Justice for a period of three years extendable for further periods as may be appropriate (1). The three chambers are:

A. The Cassation Chamber for Civil and Criminal Affairs

This is composed of seven judges. As the court of final appeals, all ordinary civil disputes and crimes fall within the jurisdiction of this Chamber.* This in effect means that the jurisdiction of this Chamber extends to all areas other than those that are expressly reserved for the jurisdiction of the other two chambers of the Cassation Court.

Currently there are a few statutes operative in the fields of ordinary civil disputes and crimes; these areas are nevertheless extensively governed by the Hanafi fiqh. As provided in article 102 of the Constitution, Hanafi fiqh applies only where a case, under the court's consideration, is not regularized by the existent statutes. This Constitutional formula is, of course, of a general applicability to all courts regardless of their jurisdictional variations. In practice, however, its application varies in the sense that Hanafi fiqh is more extensively applied in the jurisdictions for ordinary civil and criminal affairs (in all the three levels), than it is in other jurisdictions. Consequently judges appointed in jurisdictions for ordinary civil and criminal disputes, are as a matter of policy, to by fully knowledgeable in Sharî'a (2).

B. The Cassation Chamber of Commerce

This is composed of three judges, and it considers, as the court of final appeal, "all commercial and labour disputes in accordance to the provisions of this and other statutes (LJAO, art.19)." The terms commercial and labour disputes, in this connection, include

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* Ordinary civil disputes, generally speaking, include disputes relating to personal status - marriage, divorce, inheritance, etc., - obligations and ordinary contracts as provided for in Sharî'a, disputes over real property and related matters. Ordinary crimes include principal Sharî'a offences, taʿzīr offences, felony, misdemeanour, and petty offences as provided for in the Law of Criminal Proceedings.

1. Art. 20, LJAO.
2. See Dr. Hoqoqi, Judicial Organization in Afghanistan, op cit: 7.

industrial disputes, and disputes in the areas of transportation, patents, and insurance (1).

C. The Cassation Chamber for Public Rights

This is also composed of three judges. The jurisdiction of this Chamber, as a court of final appeal extend to "all tax disputes between the individual and the State, disputes between the individual and the Administration (idāra), expropriation, disputes arising from public elections, Municipal elections, and elections for provincial councils (jirga-e wilāyat), offences by civil servants and Government employees, press offences and smuggling offences"(2). Similarly political offences and offences against the national security, disputes concerning the constitutional rights of the citizens versus the State fall within the jurisdiction of this Chamber. According to a resolution of the S/J/Council, traffic offences also fall within the jurisdiction of this Chamber(3).

As a general rule, the Cassation Court"considers the disputes before it, from the points of law and the Shari'a, and the implementation thereof only"(4). The substance of claims, their forms, and the establishment of facts therein fall outside the jurisdiction of the Cassation Court except as provided otherwise by law (5). In cases where the Cassation Court observes a defect relating to the substance or facts of a claim, in the proceedings of the lower courts, it will reverse the appeal court's decision and explain the reasons for the reversal. The Court may then refer the case, to a resemblant court of appeal (mahkama-e mumāsil) for settlement. In the event where the latter confirms the decision which has been reversed by the Cassation Court, the latter, in a plenary session of all of its members, will issue the final decision by a two-thirds majority of all of its members (i.e. all members of the three Chambers). But if the 'resemblant court' considered a review of the initial

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1. See Hoqoqi ibid: 9.
2. Art. 19, LJAO.
3. See Dr. Hoqoqi, Judicial Organization in Afghanistan, op cit: 8.
4. Art. 30, LJAO.
5. Art. 31, ibid.

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decision of the appeal court as necessary and renders a new decision which is then brought before the Cassation Court on a second appeal, the pertinent Chamber of the Cassation Court will issue the final decision. In the event where the Cassation Court observes a defect related to the fact, substance or form of the claim in the decision of the 'resemblant court', the Cassation Court will render the final decision in a plenary session of all of its members (1).

All the three Chambers of the Cassation Court are presided by the President of the Cassation Court who is the Chief Justice himself. The latter is authorized, in addition to the circumstances referred to above, "to participate and vote in the decisions of the Cassation Chamber of Commerce, and the Cassation Chamber for Public Rights, as he sees appropriate (2). One other occasion which requires a plenary session of all the members of the Cassation Court is the event "where a Chamber of the Cassation Court alters its own judicial policy, or renders a decision that overrules any of its previous decisions"(3).

All decisions of the Cassation Court are final and enforceable except as provided in the Constitution (death sentence requires the approval of the head of the State). Although a decision of the Cassation Court is not binding, in its principles, on the lower courts, it nevertheless bears a persuasive effect which has been referred to in the LJAO enacting that "other courts can follow the judicial policy of the Cassation Court" (art.24).

A change that has been effected in the structure of the Cassation Court under the LJAO, as noted above, is the unification of this Court into one body. Prior to this law, there were in fact three Cassation Courts independant of each other. Under this law they have been unified into one Court but separated chamber-wise. The Cassation Court has, in turn, been made an integral part of the Sup/Court. Further to this, the LJAO, as noted above, prescribed certain instances where decisions of the Cassation Court are to be taken in plenary sessions participated by all the members of this Court.

The LJAO maintained the plurality of judges in all the three Chambers of the Cassation Court. This is spelled out in article (21)

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1. Art. 33, LJAO.
2. Art. 22, ibid.
3. Art. 34, ibid.

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which provided that "the quorum for judicial sessions, is three members in the Cassation Chamber for Civil and Criminal Affairs, and two members in other Chambers".

Plurality of judges is not a peculiarity of the Cassation Court; it has in fact been maintained in all courts, and this represents another characteristic feature of the LJAO. Under this law, virtually all courts in Afghanistan are composed of more than one judge. Previously the courts, on the whole, consisted in addition to one presiding judge, of one or more muftis who were counsellors to the presiding judge. Under the LJAO, judicial members of the court (they are no longer called muftis) are individual judges fully responsible for their own opinions who are not presumed to follow the opinions of the presiding judges. According to the LJAO, "decisions of the courts are to be taken by the majority of judges therein; decisions of those courts which are composed of various chambers are to be taken by the majority of judges of each particular chamber. Only those judges and members who have followed the course of proceedings of a claim from the outset, shall participate in the decision". (art.72). Further to this, "general sessions of a court, consist of all judges of that court in the presence of the public prosecutor who conducts his duties in accordance to the Law of Public Prosecution 1963 (Qânun-e sâranwâlay)". (art.66). 'General session' in this context indicates the presence of the members of the various chambers; the quorum of decision-making in such sessions is, as a general rule, two-thirds majority of the present members. The Law of Public Prosecution and the Law of Criminal Proceedings, as a whole, require the public prosecutor to submit his case at the very outset of the proceedings, and this is a general rule applicable to all criminal claims and other disputes that involves the public, i.e. the government as a party therein.

Originally, the Ordinance of Judicial Authority and Organization 1964 had not clarified the position of the judicial members of the courts versus their presidents; the Ordinance was later amended on this point as it passed into the LJAO. The following passage appears in a booklet published by the Sup/Court:

"An important point that had not received explicit ruling in the original version of the LJAO was the independence of opinions of the

members of the courts versus their presidents in judicial settlements. In order to avoid ambiguity on this point, an amendment was proposed by the Supreme Court which is now incorporated in the LJAO. This amendment endorses the independent expression of opinion of the judicial members of the courts. It is hoped that this would help preventing imbalances in the court decisions. Presidents and members of the courts are each legally and morally responsible for their decisions"(1).

A problem relating to the implementation of article (72) was raised by the Provincial Court of Bamyan which in a memorandum to the Sup/Court noted:

"In the event where among the members of the Provincial Court, only one member is present at the time but who in the case under consideration dissents with the opinion of the President of the Court. In such circumstances, a majority opinion cannot be obtained. Could the Court, in such circumstances, ask a judge of the primary court, who has not taken part in the case at the primary stage, to participate in the decision of the Provincial Court?"

To this, the Administrative Chief of the Sup/Court who was meanwhile a justice of the Sup/Court issued the following directive which was then communicated in the form of a circular:

"According to article (43) of the LJAO, a provincial court is composed of a president and at least three judicial members. Therefore the presidents have no powers to issue a judial settlement on their own. In the event of a temporary absence of one or two members of the court, and where the existent member dissents with the opinion of the President, the latter cannot issue a judicial settlement. For according to article (72) of the LJAO, a judicial decision is to be issued only when it has the support of the majority of the court members".(2).

1.3 The Central High Court of Appeal

This is the only court of its kind for the whole of Afghanistan which has been established under the LJAO. Somewhat similar in structure to the Cassation Court, this Court is also composed of three Chambers as follows:

A. The Penal Chamber (diwān-e jazā): This Chamber considers criminal cases related to civil servants and government employees, press

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1. See Seir-e takāmul-e tadriji qadā (Gradual Evolution of Justice During the Past Half Century), op cit: 44.
2. Sup/Court circular No.4435/7.7.1347 (1968).

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offences, smuggling offences and traffic offences at the appellate level.

B. The Chamber for Public Rights: Appeals in tax disputes between the individual and the State, civil and administrative disputes between the individual and the Administration, expropriation disputes, disputes arising in public elections (parliamentary, Municipal, and provincial jirgas) fall within the exclusive jurisdiction of this Chamber.

C. Commercial Chamber: All cases of appeal in commercial and labour disputes, as noted under the Cassation Chamber of Commerce, exclusively fall within the jurisdiction of this Chamber.

Under the LJAO, the number of judges in the C/H/C of Appeal, as a whole, may not be less than six judges. All Chambers operate under the supervision of the President of the C/H/C of Appeal who participates in the judicial settlements of each Chamber.

Jurisdiction of the C/H/C of Appeal extends to all cases in which the pertinent chamber of the provincial courts (each provincial court, as discussed later consists of similar chambers) has issued its decision in the capacity of the court of first instance. And this, in effect, cover all cases other than ordinary civil and criminal disputes. In other words, ordinary civil and criminal disputes fall outside the jurisdiction of the C/H/C of Appeal. Ordinary civil and criminal disputes are considered by the local Primary Courts (maḥakim-e ibtidāiyya) for the first instance, appeals from which go to the Chamber for Civil and Criminal Affairs of the pertinent Provincial Court. The final appeal from the latter goes, not to the C/H/C of Appeal, but to the Cassation Chamber for Civil and Criminal Affairs.

Since ordinary civil and criminal disputes lie outside the jurisdiction of the C/H/C of Appeal; this Court is consequently a statutory jurisdiction as a whole. For proceedings in all of its respective Chambers are largely regulated under the statutes.

1.4 Provincial Courts

Before 1964, Afghanistan was divided by thirteen provincial units with an equal number of provincial courts. A revision of the administrative structure was effected during the early 1960's which divided the country into twenty-eight provinces, a provincial court residing in each provincial capital. The structure of the provincial courts has also been reviewed under the LJAO. Under this law, each provincial court is composed of the following Chambers:

A. Chamber for Ordinary Civil and Criminal Affairs:

This Chamber considers "appeals in ordinary civil and criminal claims pertaining to the law of objects (hoqoq-e 'ainee), law of obligations, law of inheritance and family law".(1).

B. Penal Chamber: This Chamber considers cases mentioned under 1.3(A) above at the primary stage.

C. Chamber for Public Rights: This Chamber considers matters referred to under 1.3(B) above at the primary stage.

The establishment of a "Commercial Chamber and other additional chambers within the framework of the provincial courts is up to the discretion of the Chief Justice as he sees appropriate".(2). In doing so, the Chief Justice usually considers the volume of work in the fields of labour and commercial disputes. Many provincial courts, especially in major provinces, had separate commercial courts before the promulgation of the LJAO. Under this law they have been incorporated within the framework of the provincial courts and currently function as a respective Chamber thereof. In the event, however, where a "Commercial Chamber does not exist in a provincial court, commercial and labour disputes are to be considered before the Chamber for Public Rights".(3).

Each respective Chamber of the provincial courts is composed of at least two judges presided by the President of the Provincial Court. The total number of judges in a provincial court may not be less than three judges.

The LJAO also provided that "until the establishment of juvenile courts, presidents of the provincial courts are to appoint one of the judges for dealing with juvenile offences" (art.48). All decisions of the Juveniles' Judge are final.

As above each Chamber operates in its respective field of jurisdiction. Exception to this are "administrative decisions and matters that involve the declaration of a policy of the Provincial Court which are to be decided by a full session of the judges of the various Chambers thereof".

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1. Art. 44, the LJAO.
2. Art. 47, ibid.
3. Art. 49, ibid.

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Whenever the Provincial Court functions as a court of appeal, its jurisdiction extends to the review of all aspects of a claim. The Provincial Court in this capacity may confirm, reverse, or adjust the primary court's decision.

In sum, developments that took place in the structure of the provincial court under the LJAO are its unification into one body, and the setting up of new jurisdictions, i.e. for Public Rights, and the juveniles' jurisdiction. The latter may at this stage be regarded, as indicated in the LJAO above, as an initial step in the direction of establishing separate juveniles' courts. A separate juveniles' courts has so far been established in Kabul only (Kabul's Juveniles' Court). Proceedings of the juvenile courts have been regulated under the 1969 Provisions Concerning Disciplinary Trial and Proceedings of Juveniles (moqarārāt-e marbut ba ijrāāt wa mohakima-e tadibi khord sālān).

1.5 Primary Courts

In 1971 there were (209) primary courts in Afghanistan. This number is however subject to the discretion of the Chief Justice who is authorized to establish additional courts as necessity arises. Each primary court is to consist of one judge and two judicial assistants. The latter may be reduced to one depending on the volume of work in the locality concerned. In the absence of the presiding judge, that member who has the longer judicial background is to temporarily preside over the court.

The law vests presidents of the provincial courts with certain measures of supervision over the affairs of the primary courts in their respective provinces. This supervision is largely administrative in character. An example of this is the absence of the presiding judge in a primary court in which case the president of the provincial court may commission a judge of the provincial court to preside the vacant court on a temporary basis. This power of the president of the provincial court has been extended by a circular of the Sup/Court which authorizes the president who may, in the case of a vacancy in the provincial court, temporarily commission a judge of the primary court to fill it. The President, however, may not commission a judge of the primary court to participate in the latter's own decision which he has issued at the primary level; nor he may exercise this power in such a manner as to decisively influence a decision of the appeal court in which the president and the only other judge of the court are in disagreement (1). Under the LJAO "the provincial courts are to assist the primary courts in administrative matters, and to provide administrative guidance as may be required"(art.60).

With the exception of areas that fall within the jurisdiction of the provincial court for the first instance, primary courts are competent for considering all other claims. In other words all ordinary civil disputes and crimes fall within the exclusive jurisdiction of the primary court; appeal from which, as noted above, goes to the pertinent chambers of the provincial court and the Cassation Court respectively.

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1. See Sup/Court circular No.4435/7.7.1347 A.H(1968).

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A decision of the Primary Court is final in the following circumstances:

1. When both of the parties express their satisfaction; or when the legally prescribed time for appeal is expired.

2. When the value of the subject of a claim does not exceed 5,000 Afghanis.

3. In petty offences, when a decision of the primary court declares the claim as non-hearable.

Since the substantive law of Sharī'a in the fields of ordinary civil and criminal disputes has not been to date either codified or replaced by parliamentary legislation, proceedings of the primary courts whose jurisdiction is exclusive in these areas are largely governed by the Sharī'a.

A major change in the jurisdiction of the primary courts was introduced under the Ordinance of Judicial Authority and Organisation 1964. Under this Ordinance jurisdiction for sentencing in felonies (jināyāt) was transferred from the primary courts to the provincial courts. Felonious crimes were accordingly to be considered before the provincial courts at the first instance. Appeals from the decisions of the latter were to be dealt with by three respective courts of appeal (mahākim-e isteenāf) established in 1964. Appeal Courts A, B, and C (Isteenāf-e alif, bey, jeem) were established in the three provincial capitals of Kabul, Qandahar, and Mazar respectively and were designed to deal with appeals in certain areas including felonies brought before them from all the provinces. Each of the three courts dealt with some eight or nine provinces which located in their respective geographical zones. After nearly three years of experience, it was however, observed that the new arrangement gave rise to problems mainly concerned with transportation. Many people had to travel long distances to attend their cases and this in turn caused protracted delays in the processes of adjudication, and considerable hardship to individuals. Consequently in 1968, an amendment was introduced which abolished the said three courts and jurisdictions of the primary courts were transferred back to them as was the case before 1964. All sections of the Law of Criminal Proceedings and of the LJAO relating to the function of the said

three courts were consequently abolished (1).

A principal purpose of this experience was to relieve the higher courts (i.e. the Cassation Court) of at least a part of its case load so that the higher judicial authorities can devote more time to important disputes, and more significantly to the improvement of the administration of justice in the country.

A further aim of the above experience was to facilitate better consideration to cases of greater concern. For the Primary Courts were composed of one judge assisted by a mufti, and the occasional absence of one of them would leave the other entirely on his own (2).

By 1971, the main problem as already referred to regarding the consolidation of the Sharī'a remained essentially similar in nature to what it was during the 1920's. This is borne out by the Judicial Seminar 1971. The main objective of this seminar as put by Chief Justice Ziyāee in his opening speech was: "search for greater possibilities for unifying the judicial proceedings in the courts of Afghanistan as enjoined by the 1964 Constitution. The experience obtained during the past three years (a seminar was held in 1968) will be a guide for our study of some basic difficulties felt by the judges ..."(3).

The Seminar was divided into two main committees, namely the committee for fiqh and qānun, and the committee for public rights and formal documents. A number of resolutions were passed in both areas (65 in the former, and 59 in the latter). A resolution of the Seminar concerning ordinary civil and criminal affairs was as follows: "The field of civil law, including personal status is, consequent to article 69 and 102 of the Constitution regularized under the Hanafi fiqh. The plaintiff in his claim, the defendant in his defence, and the judge in his decision rely on the agreed upon rules (masāel-e muftā biha) of the Hanafi fiqh. The sources of the Hanafi fiqh are

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1. The amendments may be seen in Rasmi Jarida (official gazette), No.117, 6th Nov. 1968, Ministry of Justice, Kabul.
2. See Seir-e takamul-e tadriji qadā (Gradual Evolution of Justice) op.cit: 31.
3. See Qadā, Especial Issue for the Judicial Seminar 1971: 1.

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numerous and the agreed upon opinions sometimes consist of the preferred (rājiḥ) and most preferred (arjaḥ) variations. Similarly the authoritative opinions attributed to Abu Ḥanifa and his disciples have received divergent commentaries. Hence in preparing their claims and defences, parties to litigations often resort to various texts and rely on differential positions therein. The Judge in order to verify the validity or otherwise of the versions adopted by the parties and whether a particular rule is an agreed upon one or not, is forced to consult various other books often several times. This has caused a considerable waste of time on the part of the judges, hence excessive delays of the case load. According to the requirement of the fiqh, and of the qānun, a claimant must know his claim. Since most fiqh sources are available in Arabic, this has caused problems of communication. Consequently what the attorneys write is not always comprehensible to the parties, the position of the latter is not always elaborated and brought in harmony with the fiqh.

In order to reduce this problem, and in the interest of uniformity in judicial practice, it is hereby provided, consequent to article 69 and 102 of the Constitution that Al-Atasi's book of Sharh-e Mujallat ul-Ahkām which is a unified collection of the preferred Ḥanafi opinions shall be relied upon in the courts. A complete translation of this book in a national language will be provided for the use of the courts.

In the event where in a particular case, some other source of fiqh provided a preferable opinion, the judge may resort to it. But for the sake of uniformity and dissemination of that particular opinion, the judge will be required to send his reference and the reasons for resorting to it to the Sup/Court.

For further references the Sup/Court has also published Rahnumā-e Mu'āmilāt (guide for transactions) which is in consensus with the Mujallah; a translation of the Hidāya; and Ahamm-e Adilla-e Ithbāt dar Islam (authoritative means of proof in Islam) have also been provided.

A similar problem prevails in the field of criminal law. Consolidation of the principles of fiqh for guidance in criminal matters is necessary. In order to reduce the existent problem, the Sup/Court, consequent to article 69 and 102 of the Constitution, provided the

Rahnumā-e Qawā'id-e Jazāee (guide on criminal matters) for practice in the courts"(1).

2. Especial Courts

The LJAO, as noted above, authorized the Sup/Court to establish especial courts as the necessity arises. The law, however, ensured that "powers of itinery courts and especial courts are limited to those particular cases for which they are established"(2). The sphere of jurisdiction of especial courts and their proceedings are, under the LJAO, to be regularized and limited by regulations (Lawāiḥ) in accordance to law.

Instances where the Sup/Court has used these powers are, for example, the establishment of additional Chamber for traffic cases within the framework of the Provincial Court of Kabul, as well as in the Central High Court of Appeal. The Sup/Court has also at times appointed judges to travel as circuit judges in certain areas. These instances are, however, restricted to exceptional circumstances.

Having discussed the court organization under the LJAO and the unification accomplished thereby, one other aspect of this unification that requires consideration is the transition of the judicial structure of Afghanistan from a dichotomy of courts to a unified national courts:

As already discussed, the Constitution of 1923 and the Nizāmnàma of Basic Organizations provided for two types of courts namely Sharī'a courts and administrative courts. The latter included the State Council and the Provincial Council as courts for offences by civil servants and government employees, Courts of Reconciliation, Special Court for trial of Ministers and military courts. Whereas the administrative courts had especial jurisdictions assigned to them under the Nizāmnāmas, the Sharī'a courts were courts of general jurisdiction for all other cases.

This dichotomy was later maintained under the Constitution of 1931 which mentioned of Sharī'a Courts (Maḥākim-e Shar'iyya) as distinct from Civil Courts (Maḥàkim-e 'adliyya). This Constitution also provided for Provincial Councils, Special Court (Diwān-e 'ali)

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1. See Qadā, Especial Issue for the Judicial Seminar 1971: 103.
2. Art. 64, LJAO 1967.

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for the trial of Ministers and military courts. Although there was no mention of commercial courts in the Constitution, they were soon established in 1931. Courts for civil servants were re-organized, and wider judicial powers were vested in the provincial councils and certain other administrative bodies as discussed before.

The Constitution of 1964, on the other hand, made no mention of the former Sharî'a Courts. The only courts that are called by name in this Constitution are the Sup/Court (Stera Mahkama) and military courts. In all other cases, the Constitution uses the term 'court' uniformly. Similarly even the more detailed LJAO has no mention whatsoever of the former Shari'a Courts. This silence of the Constitution and of the LJAO as well as the emphasis on judicial uniformity therein indicates a discontinuation of the earlier duality and its replacement by unified national courts.

This is further supported by the fact that except for the judges of the Sup/Court whose terms of office are separately dealt with in the Constitution, neither the Constitution nor the LJAO has made any further distinction among judges. All judges and their terms of office are dealt with under uniform provisions with no distinction in status, jurisdiction and terms of office in any one category of courts.

That a departure has been made from the then existent status quo in the field of judicial organizations is implicitly indicated in the text of the Constitution. Article 98 for example reads in part that "the Judiciary consists of the Supreme Court and other courts, the number of which shall be determined by law ...". No further provision appears in this Constitution to refer to or acknowledge the then existent network of courts which was operative at the time of its promulgation. What is, therefore, understood from the above wording of article 98 is that the law was to determine the contents of the judiciary as from the start. Whereas the above provision spoke of the contents of the judiciary, article 104 referred to rules relating to the function and organization of the courts to be regularized by law: "Rules relating to the organization and the function of the courts and matters concerning judges shall be regulated by law..." Departure from the earlier status quo is further evidenced by the fact that reorganization of the courts was included among the matters that were assigned for immediate consideration by the Constitution:

Under article 126, it has been made a duty of the Government during the interim period* to "prepare ordinances relating to ... judicial organization and jurisdiction".

All the above provisions have equally emphasized the statutory character of the judicial organization envisaged therein.

Unification of the courts into a system of national courts on the one hand, and that all courts under this Constitution derived their jurisdictions from statutory leglislation (which was effected through the LJAO) justify the conclusion that the existent courts in Afghanistan are national courts of statutory jurisdictions.

The position of Sharī'a in the courts has been dealt with in the Constitution under its section on the judiciary as follows:

"The courts, in cases under their consideration, shall apply the provisions of this Constitution and the laws of the State. Whenever no provision exists in the Constitution or the laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi Jurisprudence of the Sharī'a of Islam and within the limitations set forth in this Constitution, render a decision that in their opinion secures justice in the best possible way" (art.102).

This article in essence repeats article (69) which defined the law and provided that in the absence of law Ḥanafi law shall apply. This subsequent repetition of the same point but with a particular reference to the position of the Sharī'a in courts, seems to be an effort to bring home, once again, the pronounced aim of uniformity in judicial practice. For article 102 is explicit to the effect that all courts are to apply the Constitution and the laws of the State in the first place. Both article 69 and 102 speak in equal terms of the priority they attach to the State laws; so is the position of the Sharī'a which is pronounced in similar terms in both articles. The only difference being that whereas article 69 authorizes resort to the 'provisions of the Hanafi Jurisprudence' in the absence of law in general, article 102 authorizes the courts, in the similar event, to resort to 'the basic principles of the Hanafi Jurisprudence'. The more flexible terms of this latter article

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*That is to say until the inauguration of the next Parliament. (Oct. 14, 1965).

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as well as the reference it has made to the opinion of the individual judge has been considered by Chief Justice Ziyaee to have laid down the constitutional foundation of judicial ijtehād in Afghanistan (1).

In relation to the duties of the parliament, article (64) of the Constitution enacted :

'The Shurā legislates for organising the vital affairs of the country in accordance with the provisions of this Constitution.

There shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this Constitution...'

An interesting incidence concerning the implementation of article (64) of the Constitution regarding the parliament's legislative duty took place during the parliamentary debate on the marriage Bill as later passed into Marriage Law 1971. At the outset of debate on this Bill, one delegate argued, in a somewhat over-simplified fashion, that no law need be passed by Parliament and that the Sharī'a should apply:

"Sharī'a is comprehensive on the subject of marriage and divorce. Statutory legislation would either comply with the Sharī'a or differentiate therewith. In the former event, there is no great need for legislation, whereas in the latter it would be unconstitutional. Moreover this Bill is too brief to exhaust the whole area. Therefore I propose that the present Bill together with all the existent leglislation in this area should be abrogated and the Sharī'a be recognized applicable as a whole"(2).

Against this proposition another delegate aptly argued that "article 64 of the Constitution made it a duty of the Parliament to legislate. Now if Parliament abstains from leglislation in 'vital affairs of the country' it would amount, in effect, to the negation of the philosophy of its existence, hence unconstitutional"(3).

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1. See Qada No.10,1349, Ziyayee's Statement. It will be noticed that in the past, the judicial practice in Afghanistan has been one of taqlīd rather than ijtehād. Note article (20) of the Law of Civil procedure 1957 for example: "The qāḍi is forbidden to render decisions contrary to the authoritative religion (madhab-e Hanafi), or to rely on weak opinions thereof. Otherwise his decision will be reversible".
2. G. Rabani, WJJ. No.22, June 1967.
3. S. Farhang, ibid.

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The latter argument prevailed and the debate continued.

Another illustration of the implementation of articles (64) and (69) of the Constitution can be found in resolution (53) of the Judicial Seminar 1971. The Seminar was presided by the Chief Justice and participated by Justices of the Sup/Court and presidents of provincial courts. The Provincial Court of Qandahar, in its proposal submitted to the Seminar argued that article (222) of the Law of Criminal Proceedings was in conflict with the Hanafi fiqh, hence with article (64) of the Constitution; the proposal urged a ruling of the Seminar to clarify the alleged conflict.(1). The resolution passed to this effect reasoned that no necessary conflict existed between article (222) and the Hanafi fiqh, hence between the law and the Constitution. Declaring the principle involved, the resolution went on to say that "moreover, the constitutional provision is a norm in itself; whenever a statute is lacking, and in order to render justice in the best possible way, resort will be made to the Hanafi fiqh." The resolution implied, in other words, that priority of the statutory law is a norm which will be upheld anyway.

A further area that may be looked at in the light of the repugnancy clause of article (64) of the Constitution is the sections on the execution of judicial orders in the Law of Criminal Proceedings 1964. The range of enforceable judicial orders dealt with in this law (arts.395-447) comprise reformatory orders to dar-uttādib (house of discipline), custody and detention orders, fines, imprisonment, and hanging respectively. There is no reference, neither under this section nor in any other part of this law to Sharī'a ḥadd penalties or a judicial order thereof. This law is silent on penalties such as the mutilation of hand for the principal offence of theft, stoning for zinā, lashes either for drinking wine or for

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1. The proposal argued that "article 222 permits the hearing of the witnesses of negation (shohud-e nafya) after the witnesses of proof (shohud-e ithbat) without any stipulation for continuity (tawātur) and this is in conflict with the Hanafi fiqh." The resolution however in its main theme focused on the grammatical interpretation of the wording of article (222) without commenting on the position of the Hanafi fiqh on the matter. The point made was that the terms of the said article that 'witnesses of negation will be heard after the witnesses of proof', does not necessarily mean that hearing would amount to admission. Hearing of a witness is to be regarded as a different matter from its acceptance or credibility and the result effected thereby. It is clear from the context of the Law of Criminal Proceedings that witnesses of negation are hearable. The distinction as to whether the testimony is acceptable or inacceptable is, after acquiring information as required by law, the discretion and duty of the judge. Therefore the law in its spirit is not in conflict with the Hanafi fiqh, nor is it in conflict with the Constitution." (see Qadā, Especial Issue for the Judicial Seminar 1971:110).

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qadhaf (accusation) and the manner of their enforcement. In practice too, such penalties have rarely if ever been enforced during the past few decades in Afghanistan(1).

As already mentioned, the LJAO authorizes the Sup/Court to enact regulations for organizing the administrative and judicial affairs of the judiciary. Exercising this power, in the light of article (69) of the Constitution, the Sup/Court enacted the Guiding Rules on Criminal Matters 1971. These Rules are in fact complimentary to the Law of Criminal Proceedings. The latter largely dealt with the procedural aspects of crimes and matters of enforcement and did not provide for the actual definitions of offences. The Sup/Court therefore, as a stop-gap measure, enacted the said Rules which are largely dealing with the substantive law of crimes. In the introduction to these Rules, it is mentioned that "under article 69 of the Constitution wherever a statute is lacking, Hanafi law is applicable. The Sup/Court according to article (13) of the LJAO enacted these Rules..." The Sup/Court, in other words, indicated that the Rules merely consolidate the Ḥanafi fiqh which in the absence of law is constitutionally applicable anyway. Powers of the Sup/Court in enacting the Rules therefore could not go beyond the confines of the Hanafi fiqh. Consequently some principal aspects of the Hanafi law of crimes were incorporated in these Rules. Under the sections on the definition of offences, the Rules however, merely refer to the Hanafi fiqh without actually going into it. Offences are divided into three categories:

"A. Ḥadd offences: These are offences the perpetrator of which is liable to ḥadd penalties in accordance to the provisions of Sharī'a. Ḥadd offences are heresy, highway robbery, theft, adultery and drinking wine.

B. Qiṣáṣ and diyat offences: these are offences the perpetrator of which is liable to qiṣāṣ and diyat in accordance to Sharī'a. These offences are homicide (five varieties mentioned), intended and erroneous wounding.

C. Ta'zīr offences...." Taẓīr offences are subdivided into three categories, namely felony, misdemeanour, and petty offences, the range of penalty for all three categories run from one month up to twenty years of imprisonment and various fines. The Rules then proceed to enact in article 16 that "the execution of penalties shall be in accordance to the provisions of the Law of Criminal Proceedings".

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1. Confirmed by G.M.Niyazi, Dean of the Faculty of Islamic Studies in an informal interview (Kabul,Sept.,1972).

This article in effect brings the whole structure and execution of penalties to the offences referred to, under the statutory umbrella of the Law of Criminal Proceedings. It is therefore understood that whereas the elements of responsibility and matters of definitions of the above-mentioned offences will be determined under the Hanafi fiqh, punishments of these offences may not go beyond the confines of the Law of Criminal Proceedings. No further explanation is given as to whether the reticent attitude of the Law regarding the enforcement of hadd penalties, as confirmed in the Rules would be repugnant to the basic principles of Islam and whether silence as such is a form of repugnency or not. ( No authoritative definition of the terms of article (64) has been provided.)

Gradual Reduction in the powers of Sharī'a Jurisdictions

Relating to the context of judicial secularization, a tendency can be observed in various decisions of the S/J/Council regarding the transfer of jurisdiction of certain matters from the courts for ordinary civil and criminal affairs (COCCA) to other courts.

The gradual development of statutory jurisdictions alongside the Sharī'a courts has given rise to frequent problems of jurisdiction between them. Such problems continued to exist, partly because of the lack of comprehensive legislation on matters of jurisdiction but also as a consequence of the process that has been adopted for the establishment of statutory jurisdictions: Traditionally Sharī'a courts possessed universal jurisdictions for almost all kinds of disputes; whenever a new jurisdiction was set up for dealing with especial matters, the latter had to be transferred from the Sharī'a courts to the newly established jurisdiction. In this process of transfer, the Shari'a courts resisted the diminution of their jurisdiction and therefore a complete transfer has rarely been achieved.

Now that the COCCA exercise major parts of the jurisdiction earlier exercised by the Sharī'a courts, similar problems of jurisdictions continued to arise. An example of this is the 1968 circular of the S/J/ Council concerning the jurisdiction for dealing with disputes arising from salam, shirkat (partnership), and mudāribat. As these transactions were recognized and provided for in the Sharī'a, disputes arising thereof were continuedly dealt with by the COCCA. This was so notwithstanding the existence of commercial courts ever since 1931. The matter was

raised in a proposal submitted to this effect to the S/J/Council by Maulawi O.Safi the then head of the Sup/Court Chamber for Conflicts of Jurisdictions.* The proposal noted in part: "it has been observed that some of the dossiers received in this Chamber relate to the claims of salam, shirkat and mudāribat. Since these are Sharī'a contracts, claims arising thereof should therefore be regarded as Shari'a claims... The fiqh has dealt with these transactions in considerable details..." In this way, the basis for the division of jurisdiction, in Safi's opinion seemed to be whether the Shari'a books contained provisions on certain categories of cases or not. The S/J/Council apparently varied with this view. In a resolution passed on the matter the S/J/ Council provided:

"1. Mudāribat is a contract that authorises a person to use the capital of another for trade on the condition that the profit and loss be shared by both. This is clearly a commercial transaction and a matter that falls under the jurisdiction of commercial courts.

2. In accordance to article 19(8) of Commercial Law (Qanun-e Tijarat) transactions of commercial partnerships are commercial regardless of the intention of the parties.

3. Salam is basically not a commercial transaction ... but wherever goods of salam are purchased for the purpose of trade, claims emanating therefrom may be regarded as commercial."(1)

A similar case for transfer of jurisdiction concerned the farmers' disputes. The LJAO provided that "labour and commercial disputes are to be dealt with by the commercial courts". The point as to whether 'labour' included farmers was raised by the provincial court of Qandahar which in a memorandum to the Supreme Court noted that "... if the disputes of farmers involving claims of non-payment of their wages are to be regarded a province of the commercial courts, their cases would have to be summoned to the provincial capitals as smaller districts do not have local commercial courts. This would seem to cause considerable hardship for the people involved". The above memorandum was considered by the S/J Council who decided:

"Disputes of all factory labourers and those working in the Government work-houses, or in semi-Governmental, and private enterprises are to be settled in commercial courts. As for the farmers and farm workers, since

*It will be noticed that whereas conflicts of jurisdiction fall within the province of the Chamber for Conflicts of Jurisdictions; transfers of jurisdiction are, under the LJAO, to be decided by the S/J/Council.

1. Supreme Court Circular No.1234/24.2.1347.

the farmer-landlord relations have not been so far regularised by law and their legal status (waz'e qānuni) has not been elaborated, therefore claims of farmers and agricultural wage earners and similar claims are to be settled in the primary courts in accordance to the Sharī'a provisions".(1)

It thus appears that the lack of legislation on the subject in question has significantly influenced the above decision of the S/J Council. For it has been implied that with the introduction of a law to regularize the area, the matter is likely to present a case for reconsideration.

A problem of jurisdiction was also encountered with regard to criminal libel (jerm-e ifterā). The issue was raised by the provincial court of Legar which in a memorandum to the Supreme Court asked for the latter's authority to clarify the competent court for libel disputes. Libel disputes were usually heard in the COCCA, The memorandum was considered by the S/J Council which in a resolution, after elaborating certain points concerning the definition of ifterā, went on to provide that:

"As the Law of Crimes by Civil Servants and Offences Against Public Security 1962 (Usulnáma-e jará'em-e Mámurin wa Amni'yat-e 'ámma) provides for the punishment of libel by civil servants (art.142); libel by other persons in general, shall by analogy to this article, be punished accordingly. Hence the matter will be dealt with by the Court of Civil Servants"(2)

Traffic offences presented a similar case for a transfer of jurisdiction. In a proposal submitted to the S/J Council on this matter, the Secretariat of this Council which seem to have initiated the proposal, reasoned its case as follows: "Traffic violations have a direct bearing on the public peace and security. They also present a different kind of situation as far as the rules of evidence are concerned. Evidence such as maps, photos, and opinions of the informants often play a decisive role in determining the drivers' responsibility. Under the existent statutes, the drivers' responsibility has already been regularized to some extent. It would therefore seem advisable to transfer the jurisdiction for dealing with traffic violations from the COCCA to the Courts for Public Rights".

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1. Supreme Court circular No.1676/7.3.1347. Both circulars may be seen in Majmo'a-e muttahidul ma'āl ha'e qadā'i wa idārī (collection of judicial and administrative circulars for 13468,1347), Supreme Court, Kabul:95,103.
2. Supreme Court circular No.282/8.12.1346(1967); see Collection of Circulars, ibid: 57.

Based on the above proposal, the S/J Council issued the following judicial circular:

"Traffic offences, with the exception of those disciplinary violations that can be handled, according to the existent laws, by other authorities than the courts, are to be considered before the Penal Chamber of the Provincial Courts, appeal from which will be considered before the pertinent chamber of the Central High Court of Appeal, and finally before the Cassation Court for Public Rights. Cases that are currently under consideration in the primary courts shall upon receiving the latters decision, in the event of appeal, be directly submitted to the Central High Court of Appeal.(1)

Another area that presented a case for a transfer of jurisdiction concerned the officials of banks and joint-stock companies (Shirkats). The issue was raised by the Central High Court of Appeal which in a memorandum to the Supreme Court noted the following:

" The existent statutes have not clarified the court jurisdiction regarding the officials of banks and Shirkats. It is understood from the meaning of article (182) of the Law of Crimes By Civil Servants and Offences Against Public Security that this law is applicable to certain specified categories of persons only. Article 182 reads:

"Provisions of this law shall also apply to officials of Municipalities, and officials of State enterprises (tasaddi hā'e dawlati)."

Article 183 of the above Law has exceptionally mentioned certain other persons whose trial is to be held before the civil servants' courts. This law is therefore of a specified applicability which applies to civil servants (as defined in the Law for Employment of Civil Servants (Usulnāma-e istikhdām-e māmurin-e mulki), officials of Municipalities and of State enterprises. Banks and joint-stock companies are not enterprises, hence a clarification is required regarding the competent courts for their trial. Moreover, banks and joint-stock companies often have regulations of their own; some of these regulations provide for disciplinary actions for certain violations. Ordinary crimes of the officials of banks and joint-stock companies have customarily been dealt with in the COCCA. In some banks such as the Commercial Bank, as well as in some Shirkats such as the Textile Shirkat, Spin Zar Shirkat and the Bus Shirkat, the Government holds part of the shares. Hence a further clarification seems to be

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1. Supreme Court circular No.248/8.12.1346 (1967); see Collection of Circulars, ibid: 55.

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needed as to whether cases involving monetary misappropriation in such semi-governmental shirkats and banks fall under the jurisdiction of COCCA or of the Civil Servants' Courts." To this Dr.Hoqoqi, the then Administrative Chief, and Justice of the Supreme Court wrote the following: "These cases fall within the jurisdiction of the court for civil servants and public security. For according to the Constitution, no statute can take a case or a sphere out of the jurisdiction of the judiciary. In crimes, the competent court nevertheless can apply a specific law that covers the case under its consideration. Whenever no statute existed to govern the case, Sharī'a provisions shall apply".(1)

This was in effect an administrative order which authorized the civil servants' courts for dealing with the cases in question. Hoqoqi also pointed out that notwithstanding the lack of a specific law to cover the areas referred to, the jurisdiction is that of the Civil Servants' courts which in the absence of law are to resort to the Sharī'a.

Fraud and forgery presented a similar case for a transfer of jurisdiction. The Central High Court of Appeal, in a proposal to the S/J Council reasoned in favour of such a transfer as follows:
"A cardinal objective of law(qānun) is the protection of public interest. Offences disturbing the public order, and acts that violate the public interest ought to be regularized by statutes and violators be made subject to statutory penalties.

Offences of fraud and forgery and the evil effects thereof have direct bearings on the public interest, as much as they affect the interests of the individual. The subject has, however, not received comprehensive legislation insofar as the varieties of fraud and forgery and their penalties are concerned. Some provisions nevertheless do exist in the current statutes which provide for offences very similar to ordinary fraud and forgery. For example certain articles of the Civil Servants' Law (155, 165, 167), and chapter (6) of the Law of Criminal Proceedings, cover situations which indicate no qualitative or quantitative difference with ordinary fraud and forgery. Also chapter (6) of the Law of Commerce renders all forms of commercial swindling, fraud and forgery into punishable offences. In our opinion, fraud and forgery whether in commerce or otherwise can be reasonably included under one and the same category of offences. It therefore seems advisable and in the interest of judicial uniformity that jurisdiction

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1. Supreme Court circular No.3876/2.3.1347 (1968), see in Collection of Circulars, ibid:132.

for fraud and forgery should be transferred to the Penal Chamber of the provincial courts...".

The S/J/Council accepted the above recommendation and issued a circular as follows:

"Claims of fraud shall henceforth be considered before the Penal Chambers of the Provincial Courts at the primary stage, appeals from which shall be submitted to the pertinent Chamber of the Central High Court of Appeal, and the final appeal to the Cassation Chamber for Public Rights.

Claims that are currently under consideration in the primary courts will be decided by the same courts. For appellate consideration, as the case may be, they will be directly referred to the Central High Court of Appeal."(1)

Claims relating to the theft of the Government property, and property of the Municipalities as well as cases of assault and battery of the privates - security soldiers - (afrâd -e amniya) were usually dealt with in the COCCA. Since 1968 all these areas have been incorporated within the jurisdiction of the Penal Chamber of the provincial courts.(2)

The above-mentioned examples, on the whole, suggest the existence of a tendency on the part of the Sup/Court to bring the administration of justice increasingly under the rule of statutory legislation.

A similar tendency appears to exist in the Executive branch of the Government. Referring to the need for legislative activism, Dr.Zahir the then Prime Minister (1971-1972) in his policy statement before the parliamentary session for the vote of confidence, inter alia, noted that: "The economic and social problems we are confronted with at present emanate from various causes..." Among an eleven-itemed list of causes identified by Dr.Zahir, the very first was "the absence of certain laws for regulating some vital phases of life in Afghanistan."(3).

Similarly , Shafiq, Prime Minister (1972-1973), in his policy statement before the parliamentary session for the vote of confidence considered it "the duty of the Government to endorse and expand the legislative movement which has received emphasis in the Constitution..." Shafiq promised that his Government "would work effectively so that the legal vacuum caused by the lack of laws can be filled."(4)

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1. Sup/Court circular No.8155/23.10.1347; See Collection of Circulars, ibid:185.
2. Sup/Court circular No.6536/16.5.1348; and No.29/8.2.1349.
3. See L.Dupree, A Note on Afghanistan, American Universities Field Staff Reports, South Asia Series, No.2, 1971 (Apx B).
4. Shafiq's Policy Statement, Kabul Times, 11, Dec., 1972.

## Legal Education, and Employment of Judges

### 1. Legal Education

Traditionally, qādis and their assistants (muftis) were appointed from among the religious leaders well versed is Islamic studies and jurisprudence; candidates for judicial posts were examined by the Givernment for their competence in Sharī'a laws. (1)

Before the development of formal education, learning and education in Afghanistan was on the whole religious oriented and devoted chiefly to religious instructions. Traditional education was mainly maintained in the mosques and conducted by the mullahs. In the rural areas, the mullahs drew their maintenance from small land holdings allotted to them by the village; in urban centres they received waqf (religious endowment.) In both the rural and city areas they also collected small contributions from their students. Often the well-to-do hired a mullah for private tutoring.(2)

A form of scholastic learning of relatively more advanced standards was so-called tadris. This was conducted by reputable religious leaders in the local mosques and financed by charitable contributions. In order to become a mullah, it was necessary for a student to complete a course of studies consisting of a number of recognised Arabic texts in grammar and syntax which led to the study of other subjects such as fiqh, interpretation of the Qurʾān, hadīth (traditions of the prophet), logic etc.. At the end of the course the student was awarded the status of mullah in a ceremonial rolling of a white turban round the student's head (dastār bandi). The number of students in a tadris group varied estimately from five to fifteen or more. The senior pupils were often required to relieve the tutor of some of his work. With the expansion of formal education, however, tadris has gradually diminished in Afghanistan(3).

A more institutionalized form of tadris was practiced in madrassas. A madrassa was in effect a collection of a few tadris circles each concentrating on certain individual disciplines of Islamic learnings. With

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1. Dr.W.Hoqoqi, Training of Judges, Prosecutors and Attorneys in Afghanistan, op.cit.:1.
2. V.Gregorian, The Emergence of Modern Afghanistan, op.cit.:70.
3. One informant, a maulawi who conducted a tadris group in the Hazar Naw village - Maulawi Sami'uddin - commented that many tadris groups in his neighbouring areas have been disbanded in recent years. Foremost among the reasons he gave for this were the availability of formal education in public schools as well as in the official madrassas, and the lack of stable financial resources (Informal interview, Kabul September 1972).

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a relatively more regular financial backing, many madrassas had separate accommodation facilities outside the mosques. A number of small madrassas - usually catering for 20 to 30 students - currently exist in various parts of Afghanistan(1). Two of the relatively larger madrass s are the Hamidiyya Madrassa in Tagab, and Noor al-Madaris in Ghazni. In 1972, the former had about one hundred students, and the latter about three hundred; both are run by charitable contributions and both provide maintenance and residence for their students. Hamidiyya still maintains the traditional form of tadris circles in which the completion of a course of study is signified by the completion of certain recognized texts which a student is supposed to read. It may take up to fourteen years for a student to complete the prescribed curricula. Noor al-Madaris has on the other hand adopted the annual system of classification, the range of classes run to up to fourteenth. A main difference in the curricula of these madrassas, as compared with those of the official madrassas discussed later is that whereas the latter include studies in modern sciences, the former are almost exclusively devoted to religious and traditional studies. Unlike the other smaller madrassas which are not recognized officially, graduates of the two above-mentioned madrassas are enabled, by the Ministry of Education, to register, subject to examinations, in the eleventh grade of any of the official madrassas and study for two years before they can be awarded a certificate by the latter. To do so, however, takes a long time; consequently many prospective candidates find it prohibitive to continue their studies in the official madrassas after their graduation from Hamidiyya or Noor al-Madaris. As discussed below, under a 1971 legislation, employment in the government offices including the judiciary requires a minimal qualification of a baccalauriate. As qualification from private madrassas are officially regarded below this level, their graduates are therefore unable to seek employment with the government or the judiciary.

Until the 1920's, aspirants of Islamic learnings who wished to further their education abroad mainly studied in the madrassas of India;

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1. The precise number of local madrassas is unknown. To mention some for example; Shams ul-Madaris in Hod Khel; Madrass-e Karizak in Paghman district, Madrassa-e Ghawsiyya in Chardahi district, Madrass-e Bazi Khel in Arghanday, Madrassa-e Mohammad Agha in Logar, and Madrassa-e Farzan etc., each cater for 20 to 30 students at a time (see Nidā-e Haq, a Kabul periodical publication, issues 4-12, October and November 1971).

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Bokhara, Samarkand and Tashkand (now parts of Russian Republics). A few went to Lahore Mesopotamia, or Arabia(1). Unfortunately, "whether they studied in the Afghan madrassas, or in those of India and Bokhara, their studies of the Qur'an, jurisprudence, logic and philosophy were all based on Muslim scholastic sources of the middle ages. It was felt that all truth has already been discovered; to guide ones life, one had to search for some proper authority in the past. Free juristic enquiry ceased except the quarrel of commentators about inessential details."(2).

During the past half a century or so the government opened official madrassas for religious instructions. Originally the curricula in these madrassas concentrated exclusively on Islamic studies. More recently however, under the supervision of the Ministry of Education, these curricula have been occasionally reviewed. In 1964 for example a review of the currucula has been announced by the government which was aimed at "getting the students in these schools better acquainted with modern sciences and to establish a healthy contact between religious schools and other educational institutions."(3) Current curricula of the official madrassas include interpretation of the Qur'an (tafsir), hadith, jurisprudence (fiqh), Islamic ideology (ʿaqāid), Arabic (grammar, syntax, elocution), and English language as principal courses.(4) Other subjects studied at certain stages include essentials of mathematics, natural science, history, geography, psychology and sociology.

At present there are ten official madrassas in Afghanistan (two were established in 1971 in Qandahar and Gardez respectively) with an enrolment of 2,469 students - 1971 -. These madrassas are operative at the secondary school level (from fifth to twelfth grade); graduates of which are eligible for admission in the Faculty of Islamic Studies (Faculta-e Shar'iyyāt) at Kabul University. Yet the standards of instruction in the official madrassas, especially regarding Islamic studies, are roughly equivalent to those obtainable in the Faculty of Islamic studies. As will be discussed later, graduates of the official

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1. Students interested in teaching; and judicial posts mainly went to India whereas aspirant s of sophism, Quran readings and memorization mainly went to Bukhara. See A.S.Sirat, Shari'a and Islamic Education in Modern Afghanistan, MEJ., Vol.23(1969):217.
2. V.Gregorian, op.cit: 71.
3. See T.S.Gouchenour, A New Try for Afghanistan, op.cit.12.
4. Some of the well-known Arabic texts studied in full are:
In tafsir: Jalalein, Baidawi, Tafsir-e Madarik, Muntakhabat-e Atqan.
In hadith: Mishkat, Termidi, Bukhari, Sharh-e Nukhba, Tawdih ul-Talwih.
In 'Aqa'ed (Islamic ideology): Fiqh-e Akbar, Sharh-e 'Aqa'ed, Risalat ul-Tawhid, Siraji.
In elocution (balāghat): Mukhtasar ul-Ma'ani.
In logic: Tasaworāt ul-Qutbi; Mirqāt;
In Syntax: Hidāyat ul-Nahwa, Kāfiya, Sharh-e Jami.

madrassas are afforded the opportunity, subject to the regulations, for entry into the Judicial Training Course alongside with law graduates from the university faculties.

House of Arabic Learnings (Dar ul 'olun-e 'arabi) is also a secondary level school in Kabul devoted to instructions in Islamic studies. Standards of teachings and curricula in this school are similar to those of the official madrassas. Occasional review of the curricula of this school especially since 1957 has led to the opening of such courses as history, geography, physics, chemistry and mathematics which are studied side by side with Arabic and Sharī'a disciplines. Graduates of this school are also eligible for admission to the Faculty of Islamic Studies.

The Faculty of Law and Political Science (FLPS) was opened at Kabul University in 1938. This is a four-year course of study which concentrates on modern and Western laws although it includes fiqh as a basic subject. Principal subjects taught in this faculty are constitutional law, the law of obligations, criminal law, administrative law, commercial law, family law, international law and fiqh. Other subjects studied at certain parts of the course include essentials of political economy, political science, history, sociology, statistics and accountancy. Curricula for each individual year include an average of ten subjects each year all of which are, as a rule, compulsory; roughly two-thirds of the curricula and of the 28-hour week of class-work is devoted to the principal subjects, and the remainder to subsidiary subjects.

The FLPS, although one of the most prestigious in Kabul University, did not in the past constitute a training ground for judges. Until 1964, graduates of this faculty were mainly employed in administrative and diplomatic branches of the government. The reorganization of the judiciary brought about under the Constitution and the LJAO, put a new demand on the FLPS to coordinate its programmes with the need for lawyers and judicial personnel. A departure from the previous position was indicated in the Constitution as well as in the LJAO. The latter explicitly admitted graduates of the FLPS as eligible for entry to the judicial cadre. Similarly the Law Relating to Advocates 1964 (Qānun-e tanzim-e omur mudāfi'in) provided that candidates for advocacy must possess a law degree; "a licentiate of the Faculty of Law or of the Faculty of Shar'iyyat of the university, or that the latter certifies his equivolant knowledge thereof.'(1) This was however different under the 1957

1. Art(6),Law Relating to Advocates; this law also requires a candidate for advocacy to obtain the authorization of the Committee for Advocates at the Ministry of Justice. The candidate is then required to practice under a registered advocate for one year before he can defend a case in the primary courts.

Regulations for Advocates (Ṭalimātnāma-e wikālat-e da'wā) which enacted among its conditions for becoming an advocate 'the possession of a licence of the Faculty of Shar'iyyat, or its equivalent knowledge of Sharī'a laws.'(1)

A measure of specialization was introduced in 1956 according to which FLPS was divided, in its final two years, into two sections namely, 'administration' and 'diplomacy'. This division was discontinued in early 1960's as the result of which a uniform programme of study was then maintained for all students. This position was again revised in 1965, this time in the light of the new developments in the judiciary. Accordingly, the FLPS during its final two years is divided into two branches of 'public law' (hoquq-e 'ama)and 'private law' (hoqoq-e khososi); the latter is also called the judicial branch (rishta-e qadā-i). Whereas the curricula for the public law section include, besides the legal subjects such other subjects as political science, economics and sociology, curricula for the private law section concentrates on legal studies.(2)

In 1961, on the basis of an agreement, the FLPS was affiliated with the French University of Sorbonne. Curricula of the FLPS were accordingly assimilated, to a large extent, to those of its Sorbonne counterpart,(3)

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1. Art(34) Regulation for Advocates 1957.
2. Note for example current curricula for the 'private law' section:

| 3rd year | | 4th year | |
|---|---|---|---|
| Subjects | Hrs.per week | Subjects | Hrs.per week |
| Muslim family law | 4 | Principles of fiqh | 4 |
| comparative family law | 4 | Muslim criminal law | 3 |
| Administrative law | 3 | especial criminal law | 3 |
| commercial law | 3 | law of property | 4 |
| labour law | 3 | private international law | 2 |
| general criminal law | 2 | labour law | 3 |
| Muslim criminal law; procedures of criminal trial | 2 | administrative law | 3 |
| comparative civil litigation | 2 | comparative civil litigation; comparative civil law | 2 |

3. Change of curricula is a domain of the Academic Council of the Faculty which consists of all members of the academic cadre. A 1968 revision of the faculty regulations emphasized the holding of additional seminars and discussion groups to compliment the class room instructions; this regulation also required all students to write a minimum of two papers a year in each subject. This was in addition to the long-standing rule which required the writing of a monograph to be submitted upon the completion of the course. A review of the examination system by the university in 1969 raised the minimum pass-mark from 45 to 55% in each subject. A difficulty that has affected the quality and the methods of instruction in the FLPS was the lack of adequate library facilities. Study of the Western laws naturally required wider reading facilities as well as the instruction of foreign languages.Some effort has been made along these lines especially since 1963 when Kabul University moved to its new campuses. Nevertheless the relative shortage of texts in Dari and Pushto has resulted into an excessive dependency of the student on the instructor.

and graduates of the FLPS were since then admitted as of equivalent qualification for further studies in France. Currently, Afghan graduates from Sorbonne as well as French instructors form greater part of the academic cadre of the FLPS.

The Faculty of Islamic Studies (FIS), which is also a four year course, was opened at Kabul University in 1951. Sharī'a studies constitute the principal part of this course whereas modern and Western laws are taught only briefly. Sharī'a subjects taught in the FIS are, generally speaking, the same as in the official madrassas albeit in more detail.(1) Principal subjects of this course are tafsīr, hadīth, fiqh, Arabic and English languages.(2) The FIS is currently divided into two sections, namely the section for 'fiqh and law' (fiqh wa qānun), and the section for 'higher Islamic teachings' (ta'limāt-e 'āli islami). Unlike the FLPS, departmental division in this faculty is maintained throughout the whole length of the course commencing in the first year. This is probably because most of the FIS students come from official madrassas and other religious schools who would already have some background in Sharī'a studies. This however does not represent a condition of admission to the FIS. A baccalauriate from any secondary school (lycee) is normally admissible in the FIS. This mixed background of the students who come to the FIS lead to certain anomalies when one compares the FIS curricula with those of the religious madrassas. Students who come from the latter are likely to find parts of the course somewhat repetitive.

The principal subjects taught in both sections of the course are the same as mentioned above. As for subsidiary subjects, whereas the department of 'fiqh and law' concentrates on legal studies, the department of 'higher Islamic teaching' includes such other subjects as philosophy, sociology, literature and history. Gradual modification of the curricula have been recently effected in favour of modern legal studies. In this connection, the curricula include fundamentals of law, constitutional law, principles of torts (mabādi hoquq-e madani), law of obligations, commercial law, criminal procedure, and essentials of political economy, which are studied at various stages of the course.

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1. See Dr.Hoqoqi, The Training of Judges, Prosecutors and Attorneys in Afghanistan, Government Printing House, Kabul 1971:5.
2. Most of the Shari'a texts that have been earlier noted under the official madrassas are also studied in the FIS.

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Although graduates of either section of the FIS are normally admissible to the Judicial Training Course (hence to the judicial cadre), curricula of the department for 'higher Islamic teachings' suggest that the emphasis in this department is put on the training of teachers in Islamic studies. The department of 'higher Islamic teachings' is again divided into two sections for males and females respectively. There are minor differences of curricula as applied to these sections. The difference, however, appears to be insignificant as the overall coverage for both sections is very similar. The division therefore seems to be based on sexual segregation. The FIS is unique in this respect, for no other college of the Kabul University, nor indeed any other institution of higher education in Afghanistan, maintain separate sections for women.

The FIS has maintained academic relations with the Egyptian University of Al-Azhar. Afghan graduates of Al-Azhar as well as instructors from that university form part of the academic cadre of the FIS. In 1971 there were 310 students in the FIS, and 498 in the FLPS.

In view of the changes introduced in the judiciary, the existent institutions for legal education fell short of the increased demand for better qualified personnel. According to the Research Department of the Supreme Court:

"An immediate problem faced by the new judicial system was the lack of properly qualified personnel...A discouraging picture emerged when the Supreme Court considered the number of positions it had to fill throughout the country and the lack of qualified personnel to draw from. In the absence of a well developed legal profession, it became apparent that new judges had to be recruited from among the graduates of the existing schools. These were the secondary level religious schools and two faculties of law at Kabul University. Unfortunately, the religious schools and the Islamic law faculty only concentrated on Islamic laws whereas the FLPS almost exclusively concentrated on Western legal and political disciplines. Consequently, none of the existing educational institutions provided the balanced legal training which is required of a judge in a modern court system. The existent legal education pursued, on the whole, a theoretical approach which afforded the students little opportunity for acquiring practical skills. The absence of a legal profession in Afghanistan made the demand for judicial skills all the more acute. For this deprived the judge of the assistance that can be

provided by professional prosecutors and advocates in preparing cases for presentation to the court and in questioning witnesses etc.. In short the judge, in such circumstances, would be required to bear the full load of the entire adjudication process and would therefore have even greater need for comprehensive pre-service training."(1)

The Supreme Court therefore initiated the Judicial Training Course. This course, opened in 1968, is designed to "meet the particular need of the judiciary for the training of judicial personnel which emanates from the new social conditions of Afghanistan."(2). The training programme in this course is organized in a fashion as to afford greater opportunity for trainees with wider background in Shari'a to further their knowledge of modern laws, whereas trainees with wider background in modern laws are given instruction in Shari'a. Study of the existent statutes, participation in court observation and case study are equally emphasized for both groups. The training programme lasts for a full calendar year; trainees are selected from among the graduates of the university and of the official madrassas.

Experience during the first two years of the Judicial Training Course (JTC) indicated the need for a re-organization of the training programme. Consequently the Supreme Court introduced the new Regulations for Judicial Training Course 1971. Under these regulations, the JTC is put under the direct supervision of a committee headed by a justice of the Supreme Court. Membership of this committee include one judge from each of the three chambers of the Cassation Court, one judge from the Central High Court of Appeal and one judge from each of the provincial Court and the Primary Court of Kabul respectively. The training programme is organized on an annual basis so that each successive year may incorporate improvements that could be derived from the previous year's experience.

Whereas during the first two years, larger numbers have been admitted to the course (36 and 53 respectively), the new regulation restricted this number to twenty five per annum. Candidates are accordingly selected: eight from the FIS, eight from the FLPS, and nine from the various official madrassas or from persons who pass an examination administered by the Sup/Court. Applicants are to be chosen on the basis of their records:

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1. The Judicial Training Program in Afghanistan, op.cit:3.
2. Art(1), Regulations for the Judicial Training Course 1971.

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The eight applicants holding the best academic record from each of the two faculties of law are selected subject to a condition that in no case will an applicant with less than an average of 75% be admitted for training. As pointed already, the course is run by the Sup/Court, trainees who are admitted to the course are employees of the Sup/Court who are entitled to their full salaries during the year of training.

The training programme is divided into four phases, each lasting for three months. The first phase is class room instruction consisting of both specialized instruction to graduates of the varying kinds of schools, and general instruction to all trainees. For the specialized instructions, trainees are divided into three sections. The Islamic law students form one group who receive instruction in principles of Western laws, introductory constitutional law, law of succession, Law of Criminal Proceedings and the draft Criminal Code. Trainees from the FLPS are divided into two sections, namely 'public law' and 'commercial law'. The former concentrate on the Law of Criminal Proceedings, Law of Crimes by Civil Servants and Offences Against Public Security, Land Survey Law, Anti-Smuggling Law, Electoral Law and Procedure of Government Cases. The 'commercial law' group concentrate on the Law of Commercial Procedure, Private Investment Law, Labour Law, and the Law of Commerce. These two sections are then combined to receive instruction in judicial doctrines of the Qur'an, hadith, and Islamic jurisprudence. Finally the three sections are combined into one to study the Afghan Constitution, the Law of Judicial Authority and Organization, regulations concerning the registration of formal documents, and the Law of Court Administration.

The second phase of the training is devoted to practical observation and apprenticeship in the courts. According to the regulations, a group of four trainees may be assigned to the court in which they will ultimately be employed for judicial service. Presiding judges in these courts are obligated to acquaint and brief the trainees with the general functioning of the court, and give them full access to decisions rendered in cases under consideration. Presiding judges are also required to report the progress of the individual trainees to the Sup/Court.

The third phase involves the actual study of court decisions. The trainees are again divided into sections according to the type of court they will be ultimately serving in. In this way each section study cases that have been decided in those courts.

The fourth phase of the training programme consists of three months

of exercise in model trials in which the trainees themselves act as judges, prosecutors, advocates and parties to litigations.

At the end of the course, the trainees are to sit for an examination. Only those who pass this examination are eligible for employment to judicial posts. Those who do not succeed will be eligible for administrative positions in the courts, and are to be given a chance to take the examination a second time the following year.

An extension of the training programme has recently been authorized for trainees in the 'commercial law' group. Because of "the technical nature of commercial law and the relatively weak background of the trainees in this field, the training programme for this section has been extended to two years. For the first year the commercial law trainees follow the usual programme of training as applied to all trainees. They then spend an additional year of apprenticeship passing through each of the three levels of the commercial courts".(1)

The Sup/Court has also held occasional judicial seminars in the form of brief "in-service judicial training programme".(2). In 1968, a ten-day seminar was held in Kabul for the presidents of the provincial courts. Uniformity and standardization of judicial proceedings as well as consultation on judicial problems of wider concern formed the main theme of this seminar. A similar 19-day seminar was also held in 1971. Certain accomplishments of these seminars reported were, "developing of uniformity in writing and reporting* of court decisions, reducing the time of the trial and adoption of a procedure for pre-trial judicial conferences." (2).

Besides the JTC, the Sup/Court has opened a course for the training of clerks. According to the 1971 Regulations Relating to the Training of Clerks, the course lasts for a period of twelve months; admission to which is restricted to persons who qualify under article (8) of the Law of State Servants 1970. The main requirements of this article are the completion of eighteen years of age; possession of a baccalauriate; completion of the military service, and a certificate of health. In addition to this, priority is to be given, for admission to this course to the following:

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1. The Judicial Training Program in Afghanistan, Sup/Court's Research Dept., op.cit;11.
2. Ibid:12.

* As of this writing, there is no systematic law reporting in existence in Afghanistan. Reporting in the above context means the sending of a copy of the final decisions to the Sup/Court by the courts which issue such decisions.

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1 - Graduates of the FIS, and of the judicial section of the FLPS.

2 - Graduates of religious madrassas whose average marks do not fall below 75%.

3 - Graduates of other Lycees whose average marks do not fall below 75%.

4 - Clerks and administrative personnel who pass the examination administered by the Research Dept. of the Sup/Court.

The number of candidates for this examination may not exceed one-third of the total, and the latter may not exceed thirty persons per year. The curricula for this course are to be regularized by the same committee who supervises the curricula for the JTC. Only successful trainees who pass the final examination are eligible for employment as clerks of the courts. The Regulations also provide that graduates of this course who show outstanding competence and who also hold a license of the FLPS or of the FIS may, after a minimum of five years of service, be admitted to the JTC.

The Sup/Court also facilitated the training of judicial personnel abroad. The need for this is emphasized in the 1970 Regulations Relating to the Study and Observation of Judges and Officials of the Judiciary.(1) The Regulations on the whole spell out the manner of distribution of the scholarships and study visits which are received in the form of international assistance as well as those financed by the Sup/Court itself. Study abroad, under these Regulations, is not restricted to any particular country or university. Matters concerning study abroad are to be regularized under the supervision of a select committee (comita-e bourse ha) to be presided by a justice of the Sup/Court.

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1. The introduction to these regulations reads: "In order to regularize the judiciary in accordance to the requirements of the time in a manner to enable it for meeting the problems of contemporary life in Afghanistan; and to formulate a firm foundation for the future of justice in Afghanistan, the Sup/Court, by the requirement of law, ought to be attentive of all the activities that take place, for the improvement of justice, in international communities and professional institutions. These regulations are enacted in order to facilitate the training of judicial personnel in various judicial branches in accordance to the specific needs of the judiciary, as well as for the just distribution of the opportunities for study abroad on the basis of the individual merits of its recipients."

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II. Employment of Judges

As already noted, the Constitution of 1931 maintained a du jure recognition of the religious custom and law. This Constitution recognised Sharī'a Courts as courts of general jurisdictions. The Law of Civil Procedure 1957 more specifically defined the qāḍi as "the ruler of Sharī'a who is appointed by the sovereign or his regent, and who settles the disputes before him in accordance to the provisions of Shari'a". (Art.2). This Law also laid it down as a condition for the appointment of "qāḍi to be fully knowledgeable in fiqh, especially in Hanafi fiqh and be able to apply the authoritative rules thereof in settling the disputes before him". (Art.3). Similarly the "qadi must be knowledgeable of the customs of the people and be able to distinguish their position in the life of the people".(Art.4). As a commentary - tabṣira - to article (4), this law provided that "qāḍi must have full information of the state laws (uṣulnāmas), especially of those concerning judicial affairs". Notwithstanding the existence of two law colleges in Kabul University, this law provided for no further qualifications for the employment of qadis. The above provisions in effect confirmed the continued domination of the judiciary by the religious leaders.

While debating the draft Constitution, a considerable number of delegates of the 1964 Grand Assembly (Loya Jirga) expressed dissatisfaction of the old system of justice and the working of the qāḍis:
"On no other issue discussed in the Loya Jirga of 1964 was there such spontaneous outporing of emotion among the delegates as on the judiciary. The Loya Jirga began article 97 (the first article on the judiciary) on September 15th, and forty six people arose to cite personally experienced injustices. The next day as article 98 was read, twenty four delegates demanded their denunciation of the local muftis and qāḍis, and one advanced on the Minister of Justice taking him by the collar told him that he trusted the Minister and his deputy but that something must be done about the lower courts."(1)

The Constitution of 1964 only dealt with the terms of office and employment of the Sup/Court judges (other judges were dealt with later in the LJAO). Chief Justice and other justices of the Sup/Court were to be appointed by the Sovereign. Among the qualifications required of a justice of the Sup/Court in this Constitution, one was to "have

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1. See T.S.Gouchenour, A New Try for Afghanistan, MEJ 1968:11.

sufficient knowledge of the science of jurisprudence (*'ilm-e ḥoqoq*), the national objectives, and the laws and legal system of Afghanistan"(1). An interesting aspect of this constitutional provision thus appears to be its mentioning of the knowledge of laws in general. An immediate effect of this general approach may be regarded the subsequent appointment of the Chief Justice (Professor, Dr.A.H.Ziyayee) and other justices of the Sup/Court in 1967. The Chief Justice, and three other justices of the Sup/Court (Dr.W.Hoqoqi, Dr.N.Ansari, and M.A.Karimi,M.A.) all had their higher education in Western universities; the latter two were not even lawyers by profession. Two justices of the Sup/Court appointed at the same time (Maulawi A.Basir, and Maulawi O.Safi) were judges of long-standing judicial experience. The remaining three positions stayed vacant until 1970, two of which were then filled one by M.Ash'ari (an Al-Azhar graduate, earlier President of the Central High Court of Appeal) and Maulawi Fazlurrahman (formerly President of the Kabul Provincial Court).

As for other judges, the Constitution provided that "judges are appointed by the King on the recommendation of the Chief Justice" (art.99). The LJAO further spelled out certain conditions for admission into the judicial cadre which include "the possession of a lissance of the Faculty of Law or of the Faculty of Shar'iyyat; or a certificate of the official *madrassas* not to be less than baccalauriate" (art.75).(2).

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1. Art.105, Constitution 1964; other conditions that a justice of the Sup/Court must qualify under this article are:
A. To be an Afghan citizen at least for ten years before the date of appointment.
B. To be not less than thirty five years of age; the Chief Justice must not be less than forty and more than sixty years of age at the time of appointment.
C. From the date of the promulgation of the Constitution he must not have been deprived of any of his political rights by a sentence of the competent court. During the duration of office and thereafter, Chief Justice and justices of the Sup/Court are forbidden from participation in political parties. Similarly,after the completion of their office, they are forbidden from becoming head or member of the government or of the civil service. After the normal termination of office, justices of the Sup/Court are entitled for the rest of their life, to all the financial privileges as if they were in office.
2. Other qualifications for employment of judges under article 75 are:
A - To be Afghan citizens at least for ten years before the date of appointment to a judicial post.
B - Completion of the age of 25 for judges of primary courts and of thirty for judges of the provincial courts,presidents of the latter must have completed the age of 32.
C - Must not be affected by contagious disease,or illness that obstructs them from judicial duties.
D - To possess moral integrity and good behaviour.
E - Completion of military service,or a certificate of exemption thereof.
F - Must not be a member of political parties.

The LJAO also permitted entry to the judicial cadre on the basis of an examination to be administered by the Sup/Court (1). This possibility has however been later restricted under the 1972 Sup/Court Regulations for the Employment of Judges and Members of Primary Courts, and Members of Provincial Courts on the Basis of Examination.* Under these regulations, admission on the basis of examination is restricted to "law graduates of the university and graduates of the official madrassas who have been graduated before 1967. Those who graduated after this date fall under the Regulations for the Judicial Training Course"(2). The 1972 regulations further provided that applicants for examination must not exceed forty years of age at the date of application. And finally as evident from the title of the said regulations, applicants may only be employed in the primary courts, and as members of the provincial courts.

The above requirements of the LJAO were further developed in a policy statement of the Chief Justice who stated that : "According to the Law of Judicial Authority and Organization, selection and appointment of judges depend on the proposal of the Chief Justice and the approval of the monarch. In making such proposals, the Chief Justice will, in addition to the requirements of article 75 of the LJAO consider a further point, that is to say that greater number of prospective judges will be selected from among the young university graduates who have also completed their studies at the Judicial Training Course".(3)

A more general requirement has been recently introduced by the Law of State Servants 1970 (Qānun-e māmurin-e dawlat). Under this law as noted above possession of a baccalauriate has been laid down as a minimum qualification for employment into the civil service which equally applies to the judiciary.

Graduates of the JTC are normally employed as assistant judges in the primary courts. They are required to serve in this capacity for a period of time; their successful performance at this stage may lead to their appointment as head of the courts.(4)

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1. Art.76 LJAO 1967.
2. Ibid, art.1.
3. See Qadā No. 10 & 11, 1349(1970):1.
4. See Dr.Hoqoqi, Training of Judges, Prosecutors and Attorneys in Afghanistan, op.cit.,p.13,17.

* Moqarārāt-e marbut ba imtehān barā-e istekhdām-e quḍāt wa a'dā-e maḥākim-e ibtidāia wa a'dā-e riyāsat ha-e maḥākim, 1351.

The LJAO also facilitated the selection of judges from among the instructors of the law colleges. A lecturer of the FIS or of the FLPS who has attained the academic rank of pohanmal(1) may be appointed after the discontinuation of their office as members of the provincial courts. Presidents of the provincial courts and of the Central High Court of Appeal are to be appointed "from among the judges of long-standing judicial service; they may also be appointed from among those instructors of the Faculty of Law or the Faculty of Shar'iyyat who have attained the academic rank of pohandoy".(2) This provision of the LJAO is presumably designed to attract the more formally educated to the judiciary. In practice however "heads of the provincial courts are appointed from among judges of long-standing and proven qualifications."(3).

As a result of the above developments regarding the employment of judges, private study or experience will no longer be sufficient for employment into the judicial cadre. This tends to suggest the beginning of an end to the domination of the judiciary by religious leaders and others who did not qualify the prescribed qualifications.

It is however worth noticing that article 79 of the LJAO which gave priority to judges of long-standing experience for serving in senior judicial posts, in effect meant that many senior posts will be continuedly occupied for some time by judges who were there before the introduction of the recent changes.

An amendment to the law concerning the retirement of judges was effected in 1973. The amendment which was initially proposed by the Sup/ Court, empowered the latter to prolong the term of office of those judges who have reached the age of compulsory retirement for a period of up to ten years provided that "they have judicial ability and competence and have served on the bench for not less than ten years"(4). This confirms

1. The academic hierarchy begins at namzad pohialay and follows as pohialay pohanyar, pohanmal, pohandoy, pohanwal and pohand.
2. Art.79 LJAO.
3. See Dr.Hoqoqi, ibid:13.
4. The amendment was pursuant to the provision of article 87 of the LJAO and article 87 of the State Servants Law. According to article 87 of the LJAO "judges of the Sup/Court and other judges shall promote and retire, in accordance to the provisions of the Law of Promotion & Retirement of Civil Servants". The latter has been since replaced by the Law of State Servants 1970, article 87 of this law divides civil servants into four categories of A,B,C and D ranging from grade one to ten. Category A include grades 1 & 2 whose age of retirement is the completion of 60; B include grades 3,4 and 5 who are to be retired at the completion of 55; C include grades 6,7 and 8 who are to be retired by 50; category D are to retire by the age of 45. In case of need for their skill, the State may prolong the age of retirement for up to five years.

the point made earlier regarding the presence of older judges in senior judicial posts including some of the Sup/Court judges themselves who were presumably approaching the age of retirement by 1973. The amendment is nevertheless a stop-gap measure that affords the Sup/Court the discretion to select and which does not alter the existent conditions of employment to the judicial cadre in the first place.

In 1972, of six hundred and seventy nine judges and assistant judges, about 53% had background of private studies in Sharī'a law with no formal education(1). This figure stood at about 80% in 1968;(2) comparison between the two figures indicates a somewhat rapid increase of some 7% a year in the number of formally educated employed in judicial posts, and an increase of some five hundred percent in the number of licentiates since 1968.

An unprecented development concerning the employment of judges in Afghanistan took place in 1969 when for the first time women were appointed to judicial posts. The controversial position of the Sharī'a jurists on this point (3) has been commented upon by a justice of the Sup/Court as follows:

"The Qurʾan in no way forbids women from participating in public functions including the very important function of the judiciary. Although there were many reasons in favour of employing women in judicial functions, fanaticism practically foreclosed the possibility of womens participation..."(4).

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1. The 679 figure consisted of:
graduate of the FIS = 185
graduate of FLPS = 65
graduate of official madrassas = 70
private study 359.
Source: Courtesy of the Employment Office of the Sup/Court, Sept.1972.
2. "In 1968 there were (641) judges in the judiciary; of this number(13) held qualifications of doctorate and other post-lissance levels. Estimately (42) held a lissance; the rest were graduated from the religious madrassas, and who had studied privately." (See De Afghanistan Kalanay - Afghanistan Year Book -, No.36, 1968: 180).
3. The Sharī'a jurists are in disagreement. The majority view forbids women from judgeship altogether. Ibn Jorcir Tibari on the other hand has expressed the view that women are allowed to become judges absolutely. According to Abu Hanifa, women are eligible for judgeship except in ḥodūd and qiṣās. This view is based on the position in Sharī'a regarding the admissibility of testimony by women. Since the Sharī'a permits this except in ḥodūd and qiṣās where their testimony is not admissible, Abu Hanifa has extended this rule with regard to their judgeship accordingly.
4. Dr.W.Hoqoqi, Judicial Organization in Afghanistan, op.cit: 15.

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As already pointed out, in July 1973 Afghanistan was declared "a Republican State which is in agreement with the true spirit of Islam."(1) The Republican Ordinance No.1 which abolished the 1964 Constitution provided that "all powers of the King that were assigned to him under the 1964 Constitution are, until the promulgation of a new Constitution, transferred to the President of the Republican State."(Art.4) "The Government, in order to regularize its affairs"; provided a presidential decree" enacts regulations in the form of Republican Ordinances which will be enforceable after the authorization of the PM. No law can be enacted except when authorised by the president of the Republic."(2) Soon after its declaration, a Republican Ordinance of July 1973 abolished the Supreme Court and provided that "all powers of the King assigned to him under Title (7) of the 1964 Constitution relating to the judiciary, are transferred to the President of the Republic"(3). Similarly all powers of the Chief Justice spelled out under Title (7) of the 1964 Constitution were transferred to the Minister of Justice. All powers of the Supreme Court were to be exercised by a new body created within the framework of the Ministry of Justice namely the Judicial Council of the Ministry of Justice. Under the presidency of the Minister of Justice, members of this Council consist of the President of the Cassation Court, Deputy Minister of Justice, Deputy Attorney-General and "such other additional members who may be appointed by the PM as he sees appropriate."(4) The judiciary which has been given a fully independent status under the 1964 Constitution has thus been put under the direct Executive rule. Organisation of the courts, other than the Supreme Court, however, remains by and large the same as set out in the LJAO 1967. The latter was nominally repealed "but those provisions of the Law of Judicial Authority and Organization which do not contravene the requirements of this Ordinance are hereby enforceable."(5)

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1. Art.1, Republican Ordinance No.1, 4·5·1352 A.H. (July 1973).
2. Arts 8 & 9 ibid.
3. Art.2 Republican Ordinance No.3,4·5·1352 A.H.
4. Art.6 ibid.
5. Art.10, Republican Ordinance No.3, ibid.

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Extension of the Executive control over the Judiciary is probably motivated by political considerations. The new regime, initiated as the result of a coup, presumably attached an absolute priority to the objective of acquiring a total control over the various organs of the State. The totalitarian nature of this drive could only be justified on an emergency basis for a temporary and minimal period of time. Any excessive delay in restoring the normal constitutional order tends to increase the risk to the security of the State, the individual freedom, and to the rule of law. The promulgation of a new Constitution is long overdue, and it is hoped that the promised "democratic and progressive Constitution" (1) will restore the independent status of the judiciary.

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(1) See President Daud speaks to Editor of Statesman, The Kabul Times May 2, 1974.

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