

MAX PLANCK INSTITUTE  
FOR COMPARATIVE PUBLIC LAW  
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MAX PLANCK INSTITUTE  
FOR COMPARATIVE AND INTERNATIONAL  
PRIVATE LAW



# **Max Planck Manual on Family Law in Afghanistan**

Amended 2<sup>nd</sup> edition  
(July 2012)

**Authors:**  
**Kabeh Rastin-Tehrani**  
**Nadjma Yassari**



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# **SUMMARY OF CONTENTS**

## **INTRODUCTION**

### **PART 1. SOURCES OF LAW AND HISTORICAL DEVELOPMENT OF FAMILY LAW IN AFGHANISTAN**

#### **A. SOURCES OF AFGHAN FAMILY LAW**

#### **B. HISTORICAL DEVELOPMENT OF FAMILY LAW IN AFGHANISTAN**

### **PART 2. CONTEMPORARY AFGHAN FAMILY LAW**

#### **A. SUBJECT AND PURPOSE OF THE FAMILY LAW**

#### **B. DEFINITION OF ‘FAMILY’**

#### **C. FAMILY LAW AND CONSTITUTIONAL LAW**

#### **D. FAMILY LAW AND PRIVATE INTERNATIONAL LAW**

### **PART 3. AFGHAN MARRIAGE LAW**

#### **A. SCOPE OF APPLICATION**

#### **B. STAGES BEFORE MARRIAGE**

#### **C. MARRIAGE**

#### **D. EFFECTS OF MARRIAGE**

#### **E. DISSOLUTION OF MARRIAGE**

#### **F. CONSEQUENCES OF MARRIAGE DISSOLUTION**

### **PART 4. CHILD LAW, GUARDIANSHIP AND CUSTODY**

#### **A. CHILD LAW**

#### **B. GUARDIANSHIP IN CASE OF LEGAL INCAPACITATION (*HĀJR*)**

## **BIBLIOGRAPHY**

# TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>PART 1. SOURCES OF LAW AND HISTORICAL DEVELOPMENT OF FAMILY LAW IN AFGHANISTAN .....</b>	<b>2</b>
<b>A. SOURCES OF AFGHAN FAMILY LAW.....</b>	<b>2</b>
I. LEGAL PLURALISM.....	2
II. LEGAL SOURCES OF AFGHAN FAMILY LAW .....	3
1. <i>Sharia and state law</i> .....	3
2. <i>Customary law</i> .....	3
3. <i>International conventions</i> .....	4
III. HIERARCHY OF SOURCES OF LAW .....	5
IV. INTERPRETATION OF THE CONSTITUTION AND STATUTORY LAW.....	5
V. CONCLUSION .....	6
<b>B. HISTORICAL DEVELOPMENT OF FAMILY LAW IN AFGHANISTAN.....</b>	<b>7</b>
I. HISTORICAL DEVELOPMENT .....	7
1. <i>The 1921 and 1926 Marriage Laws</i> .....	7
a) Polygyny .....	7
b) Child marriage and forced marriage.....	8
c) <i>Badd</i> .....	8
d) Expenditure of wedding .....	8
e) Effects of the 1921 Marriage Law and changes in the 1926 Marriage Law .....	8
2. <i>The 1934 Marriage Law</i> .....	9
3. <i>The 1949 Marriage Law</i> .....	9
a) Marriage .....	9
b) Wedding expenditure .....	9
4. <i>The 1960 Marriage Law</i> .....	10
a) Marriage .....	10
b) Marriage certificate .....	10
c) Wedding expenditure .....	10
5. <i>The 1971 Marriage Law</i> .....	10
a) Marriage .....	11
b) Marriage certificate .....	11
c) Marriage and polygyny.....	11
6. <i>The 1977 Civil Code</i> .....	11
7. <i>Decree No. 7/1978</i> .....	12
a) Wedding expenditure .....	12
b) Marriage, child marriage .....	12
8. <i>Laws under the rules of Mujahedeen and Taliban</i> .....	12
II. FAMILY LAW CURRENTLY OPERATING IN AFGHANISTAN .....	12
III. CONCLUSION .....	13
<b>PART 2. CONTEMPORARY AFGHAN FAMILY LAW .....</b>	<b>14</b>
<b>A. SUBJECT AND PURPOSE OF THE FAMILY LAW .....</b>	<b>14</b>
<b>B. DEFINITION OF ‘FAMILY’ .....</b>	<b>14</b>
<b>C. FAMILY LAW AND CONSTITUTIONAL LAW.....</b>	<b>15</b>
<b>D. FAMILY LAW AND PRIVATE INTERNATIONAL LAW .....</b>	<b>15</b>
<b>PART 3. AFGHAN MARRIAGE LAW .....</b>	<b>17</b>
<b>A. SCOPE OF APPLICATION.....</b>	<b>17</b>
I. SUBSTANTIVE SCOPE OF APPLICATION.....	17

II. PERSONAL SCOPE OF APPLICATION .....	17
<b>B. STAGES BEFORE MARRIAGE .....</b>	<b>17</b>
I. MATCHMAKING ( <i>KHĀSTGĀRĪ</i> ).....	17
1. <i>Meaning of the term</i> .....	17
2. <i>Significance of khāstgārī in Afghan society</i> .....	18
3. <i>Bride price (walwar)</i> .....	18
a) <i>Legal basis</i> .....	19
b) <i>Omission of the bride price</i> .....	19
II. ENGAGEMENT .....	20
1. <i>Definition and legal nature of engagement</i> .....	20
2. <i>Conditions for a valid engagement</i> .....	20
3. <i>Termination of engagement</i> .....	20
a) <i>Withdrawal from the engagement</i> .....	20
b) <i>Legal consequences of the withdrawal</i> .....	21
aa) <i>Material and immaterial compensation</i> .....	21
(1) <i>Legal requirements</i> .....	21
(2) <i>Fault</i> .....	22
bb) <i>Return of gifts</i> .....	22
4. <i>Procedural regulations</i> .....	22
5. <i>Significance of engagement in the Afghan society</i> .....	22
6. <i>Reasons and motivation for early engagement</i> .....	23
a) <i>Engagement during pregnancy of the mother</i> .....	23
b) <i>Engagement in exchange for support</i> .....	23
c) <i>Engagement in the hope of inheritance</i> .....	23
d) <i>Engagement for benefit</i> .....	23
e) <i>Engagement based on a will</i> .....	23
f) <i>Engagement by force</i> .....	23
g) <i>Engagement based on loyalty</i> .....	24
h) <i>Engagement as punishment</i> .....	24
i) <i>Engagement at random</i> .....	24
III. CONCLUSION .....	24
IV. PROVISIONS ON ENGAGEMENT IN OTHER ISLAMIC COUNTRIES .....	24
1. <i>Definition of the term ‘engagement’</i> .....	24
2. <i>Legal consequences of withdrawal from an engagement</i> .....	25
<b>C. MARRIAGE .....</b>	<b>27</b>
I. DEFINITION OF MARRIAGE.....	27
1. <i>Definition of marriage in the Afghan Civil Code</i> .....	27
2. <i>Definition of marriage in other Islamic countries</i> .....	27
II. CONDITIONS FOR A VALID MARRIAGE.....	27
1. <i>General</i> .....	27
2. <i>Conditions for a valid marriage</i> .....	28
a) <i>Offer and acceptance</i> .....	28
aa) <i>Intention to marry</i> .....	29
bb) <i>Declaration of intention</i> .....	29
cc) <i>Immediateness and permanence of marriage</i> .....	29
dd) <i>Time and place</i> .....	30
ee) <i>Forced marriage</i> .....	30
(1) <i>Prohibition of forced marriage by national laws and its legal consequences</i> .....	30
(2) <i>Prohibition of forced marriage by international agreements</i> .....	31
(3) <i>Forced marriage in the Afghan society</i> .....	32
(4) <i>Forced marriage in other Islamic countries</i> .....	32
b) <i>Capacity to marry</i> .....	33

aa) Legal marriage age .....	33
bb) Mental health .....	34
(1) Absence or lack of qualifications .....	34
(2) Prodigal, credulous and neglectful persons .....	34
cc) Permission of the legal guardian .....	35
dd) Legal marriage age in international agreements.....	36
ee) Marriages before reaching the legal marriage age in Afghan society.....	36
ff) Regulations on the legal marriage age in other Islamic countries .....	36
c) Marriage concluded by a third party, legal and contractual representation .....	37
aa) Legal guardianship in marriage .....	37
(1) General .....	37
(2) Guardianship in marriage in the Afghan Civil Code .....	38
(3) Guardianship in marriage of girls aged between 15 and 16.....	38
(4) Guardianship in marriage of a girl who has reached the legal age of marriage .....	38
(5) Guardianship in marriage in other Islamic countries .....	38
bb) Marriage by proxy.....	40
(1) Legitimacy.....	40
(2) Declaration of intention by the proxy.....	40
(3) Limits to the power of representation.....	40
(i) Restricted power of representation.....	40
(ii) Unrestricted power of representation .....	41
(4) Effects of representation by proxy in marriage.....	41
(5) Representation by proxy in marriage in other Islamic countries .....	41
3. <i>Presence of witnesses</i> .....	42
a) Legal capacity of the witnesses .....	42
b) Number of witnesses .....	42
c) Religion of the witnesses.....	42
4. <i>Impediments to marriage</i> .....	42
a) Permanent impediments to marriage .....	43
aa) Impediment of blood-relationship .....	43
bb) Impediment of affinity .....	43
cc) Impediment of extramarital sexual intercourse.....	43
dd) Impediment of milk kinship.....	44
b) Temporary impediments to marriage .....	44
aa) Impediment to marriage upon entering into another marriage.....	44
bb) Impediment to marriage after three successive repudiations.....	44
cc) Impediment to marriage during the waiting period .....	45
dd) Impediment to marriage upon invoking a curse .....	45
ee) Impediment to marriage due to difference of religion .....	45
III. POLYGYNY .....	45
1. <i>Legitimacy of polygyny under Afghan law</i> .....	45
2. <i>Conditions for polygyny</i> .....	46
3. <i>Polygyny in Afghan society</i> .....	46
4. <i>Polygyny in other Islamic countries</i> .....	47
IV. CONDITIONS IN THE MARRIAGE CONTRACT.....	48
1. <i>Party autonomy</i> .....	48
2. <i>Standard marriage contracts</i> .....	49
3. <i>Conditions in marriage contracts in other Islamic countries</i> .....	49
V. REGISTRATION OF MARRIAGE.....	50
1. <i>General</i> .....	50
2. <i>Obligation to register marriage</i> .....	51
3. <i>Registration offices</i> .....	51
4. <i>Registration of marriage in Afghanistan</i> .....	52
5. <i>Registration of marriage in other Islamic countries</i> .....	52

<b>D. EFFECTS OF MARRIAGE.....</b>	<b>55</b>
I. THE EFFECTS OF MARRIAGE IN GENERAL .....	55
1. <i>Common rights and obligations of the spouses</i> .....	55
2. <i>The different rights and obligations of the spouses</i> .....	55
II. DOWER (MAHR).....	56
1. <i>Legal nature and creation of dower</i> .....	56
2. <i>Types of dower</i> .....	56
a) <i>Specified dower</i> .....	56
b) <i>Proper dower</i> .....	56
3. <i>Amount of the dower</i> .....	57
4. <i>Maturity of the dower</i> .....	57
5. <i>The right to dower before consummation of marriage</i> .....	58
6. <i>Complete loss of the right to dower</i> .....	59
7. <i>Waiver of the dower</i> .....	59
8. <i>Right to mof'e or basic necessities</i> .....	59
9. <i>The significance of dower in Afghan society</i> .....	60
10. <i>Dower in other Islamic countries</i> .....	61
III. MAINTENANCE (NAFAQE).....	66
1. <i>Form and amount of maintenance</i> .....	66
2. <i>Legal consequences of refusal to pay maintenance</i> .....	66
3. <i>Forfeiture of the right to maintenance</i> .....	66
a) <i>Leaving the marital home without the permission of the husband</i> .....	66
b) <i>Disobedience of the wife in marital matters</i> .....	67
c) <i>Obstacles to the accommodation of the wife in the husband's residence</i> .....	67
4. <i>Performance of maintenance obligation</i> .....	67
5. <i>Spouse maintenance in other Islamic countries</i> .....	68
IV. MARITAL PROPERTY REGIME .....	68
1. <i>Marital property regime under Afghan law</i> .....	68
2. <i>Marital property regime in other Islamic countries</i> .....	69
V. THE INHERITANCE RIGHTS OF THE SURVIVING SPOUSE.....	69
<b>E. DISSOLUTION OF MARRIAGE .....</b>	<b>71</b>
I. ANNULMENT OF MARRIAGE ( <i>FASKH</i> ) .....	71
1. <i>Definition</i> .....	71
2. <i>Conditions for annulment</i> .....	71
a) <i>Existence of a defect at the time of the marriage</i> .....	71
b) <i>Occurrence of a defect after the conclusion of marriage</i> .....	72
3. <i>The act of marriage annulment</i> .....	72
II. REPUDIATION ( <i>TALĀQ</i> ).....	73
1. <i>Definition</i> .....	73
2. <i>Types of repudiation</i> .....	73
a) <i>Revocable repudiation</i> .....	73
b) <i>Irrevocable repudiation</i> .....	74
aa) <i>Minor irrevocable repudiation</i> .....	74
bb) <i>Major irrevocable repudiation</i> .....	75
3. <i>Conditions for repudiation</i> .....	75
a) <i>A valid marriage</i> .....	75
b) <i>Conditions in the person of the husband</i> .....	75
c) <i>Conditions in the person of the wife</i> .....	76
d) <i>Pronouncement of the repudiation formula</i> .....	76
e) <i>Repudiation by proxy</i> .....	76
f) <i>Presence of witnesses</i> .....	77
4. <i>Registration of repudiation</i> .....	77

5. Repudiation in other Islamic countries.....	77
a) Petition for repudiation.....	77
b) Registration of repudiation.....	78
III. DIVORCE BY MUTUAL CONSENT ( <i>KHOL<sup>c</sup></i> ) .....	79
1. Definition.....	79
2. Conditions for divorce by mutual consent.....	79
a) Valid marriage.....	79
b) Conditions in the persons of the spouses.....	79
c) Conditions for compensation.....	80
aa) Suitability of the compensation .....	80
bb) Kinds of compensation .....	80
(1) The dower as compensation .....	80
(2) Breastfeeding the common child as a compensation .....	80
(3) Maintenance for the couple's common children as compensation .....	81
(4) Care of the couple's common child as compensation.....	81
d) Non-determination and exclusion of compensation.....	81
3. Revocation of <i>khol<sup>c</sup></i> .....	81
4. Effect of <i>khol<sup>c</sup></i> .....	82
5. <i>Khol<sup>c</sup></i> in other Islamic countries .....	82
IV. JUDICIAL DIVORCE ( <i>TAFRĪQ</i> ).....	82
1. Grounds for a judicial divorce .....	83
a) Divorce due to a defect ( <i>tafrīq be sabab-e 'eyb</i> ).....	83
b) Divorce because of a harm ( <i>tafrīq be sabab-e ḍarar</i> ) .....	83
c) Divorce due to non-payment of maintenance .....	84
d) Divorce due to absence .....	84
2. Judicial divorce by the wife in other Islamic countries .....	85
V. PRELIMINARY CONCILIATION PROCEEDINGS IN DIVORCE LAW .....	86
1. Conciliation proceedings in Afghan divorce law .....	86
2. Conciliation proceedings in the divorce law of other Islamic countries .....	86
<b>F. CONSEQUENCES OF MARRIAGE DISSOLUTION.....</b>	<b>87</b>
I. WAITING PERIOD.....	87
1. Definition of the waiting period.....	87
2. Purpose of the waiting period.....	88
3. Consequences of the waiting period.....	88
4. Duration of the waiting period.....	88
a) Menstruating women .....	89
b) Menopausal women or women not yet menstruating .....	89
c) Non-menstruating women .....	89
d) Constantly menstruating women .....	89
e) Pregnant women.....	89
f) Widows.....	89
II. MAINTENANCE OBLIGATION DURING THE WAITING PERIOD.....	90
1. The husband's obligation to provide maintenance.....	90
2. The forfeiture of maintenance.....	90
III. COMPENSATION ( <i>MOT<sup>c</sup>E</i> ) .....	91
<b>PART 4. CHILD LAW, GUARDIANSHIP AND CUSTODY .....</b>	<b>93</b>
<b>A. CHILD LAW .....</b>	<b>93</b>
I. INTRODUCTION .....	93
II. DESCENT .....	93
1. Proof of descent from a valid marriage.....	93
2. Proof of descent after dissolution of the marriage or after the husband's death .....	94
3. Proof of descent from a defective marriage and mistaken sexual intercourse .....	94

4. Proof of descent by recognition.....	95
a) Recognition by the father .....	95
b) Recognition by the mother .....	96
c) Recognition by the child.....	96
III. LEGAL STATUS OF CHILDREN IN GENERAL.....	96
1. Nationality of the child .....	96
2. Legal capacity of the child (ahliyat).....	97
3. Residence of the child.....	98
4. Maintenance obligation of the child.....	99
5. Inheritance.....	99
a) General .....	99
b) Children's and parents' rights to inherit from each other .....	100
IV. OBLIGATIONS OF THE PARENTS TO THE CHILD .....	100
1. Breastfeeding.....	101
a) Breastfeeding as an obligation of the mother .....	101
b) Remuneration by the father for breastfeeding .....	101
2. Obligation to pay child maintenance.....	102
a) Obligation of the father to pay maintenance.....	102
b) Obligation of other relatives to pay maintenance .....	102
c) Scope of the obligation to pay maintenance .....	103
3. Parental custody for minors .....	103
a) Custody ( <i>ḥeḍānat</i> ) .....	103
aa) Definition .....	103
bb) Entitled persons.....	104
cc) Loss of custody.....	105
dd) Obligation for reimbursement of costs.....	106
b) Guardianship of person ( <i>velāyat-e tarbiyat</i> or <i>velāyat-e nafs</i> ) .....	106
aa) Definition .....	106
bb) Entitled persons.....	106
cc) Duration of the guardianship of person .....	107
c) Guardianship of property ( <i>velāyat-e amvāl</i> ).....	107
aa) Legal guardian .....	108
(1) Preconditions and beginning of the guardianship.....	108
(2) Administration of the property by the guardian.....	108
(3) Limitations of the father's right of disposal as guardian .....	109
(4) Limitations of the true grandfather's right of disposal as guardian .....	109
(5) Liability for damages caused by the guardian .....	110
(6) Permission for business activity of the ward .....	110
(7) Termination of the guardianship.....	110
bb) Testamentary guardian .....	111
(1) General .....	111
(2) Personal requirements of the testamentary guardian .....	111
(3) Rights and obligations of the testamentary guardian .....	111
(4) Remuneration .....	113
(5) Permission for the ward to administer the property .....	113
(6) Termination of the testamentary guardianship .....	113
cc) Court-appointed guardian .....	114
(1) General .....	114
(2) Special and temporary guardian and guardian <i>ad litem</i> .....	115
(3) Rights and obligations of the guardian, termination of the guardianship .....	115
d) Parental custody in other Islamic countries .....	115
V. ADOPTION .....	117
<b>B. GUARDIANSHIP IN CASE OF LEGAL INCAPACITATION (<i>ḤAJR</i>).....</b>	<b>118</b>



# INTRODUCTION

The purpose of this Manual is to provide an introduction to the family law in Afghanistan.<sup>1</sup> In order to better understand this law, it is necessary to first outline the sources of the laws of Afghanistan in general and the sources of the Afghan family law in particular. Since the legal system in Afghanistan has evolved on the basis of several legal sources which operate in Afghanistan, applying the law can sometimes lead to conflicts between the law in the books and its application in reality. Academic discussion of family law in Afghanistan has focused on the provisions included in the Civil Code and statutory law, with little regard to its practical application in reality. However, efforts have been made to broaden the discussion to aspects of applied law, where such information was available.

This Manual was prepared by using legal references written in Dari, Pashto, English, German and other European languages; the current laws in Afghanistan, including international treaties and conventions ratified by Afghanistan; reports by national and international governmental and non-governmental organisations operating in Afghanistan, such as Amnesty International, Medica Mondiale, USAID, amongst others. The Manual also draws on facts collected during a study made by the Max Planck Institute for Comparative and International Private Law, Hamburg, in Afghanistan from January to March 2005 (hereafter “Max Planck Report 2005”), as well as a workshop on family law conducted by the Max Planck Institute in Kabul in June 2006 (hereafter “Max Planck Workshop on Family Law 2006”).

This Manual does not claim to be exhaustive.<sup>2</sup> Rather, its aim is to help the reader to interpret and apply the provisions of the operating laws and the day-to-day legal business in accordance with the rule of law. As Afghanistan is involved in the process of globalism, the Manual has a comparative perspective, enabling lawyers practising in Afghanistan to learn about the legislation of other Islamic countries. Endeavours to reform their family laws may be of particular interest for the Afghan jurist, as attempts have been made to adapt the law to the evolving conditions of their societies.

The Manual is divided into four parts. Part 1 deals with the legal sources and the historical development of family law in Afghanistan. Part 2 gives a general overview of contemporary Afghan family law. Parts 3 and 4 focus on the provisions of the Afghan family law in detail. The main topics are marriage and divorce law, and legal issues concerning children.

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<sup>1</sup> This version is the English translation of the Manual originally written in Dari and used for training purposes in Afghanistan since 2008.

<sup>2</sup> In particular it deals only with the family law rules of the Civil Code that are applicable to Sunni Afghans. The Personal Status Law of Shiite Afghan will not be dealt with in depth in this Manual.

# PART 1. SOURCES OF LAW AND HISTORICAL DEVELOPMENT OF FAMILY LAW IN AFGHANISTAN

## A. SOURCES OF AFGHAN FAMILY LAW

### I. LEGAL PLURALISM

Legal pluralism is the existence of several legal sources in a given country, each claiming priority of application on the same case. It is also possible that different legal regimes prevail in a country with their scope of application covering only certain rights, or being applicable only on a specific territory or a specific group of people. Furthermore, legal traditions of various ethnic groups or religious communities may accept the application of different rules or standards in the same case. On the other hand, a state legal system may contradict a regional legal system as each one has its own source of legitimacy. Finally, a difference may exist between statutory law and the applied law. All these forms of legal pluralism have been observed in Afghanistan. This plurality is rooted in the historical, social and demographic conditions of the country.

Following the emergence of Islam in Afghanistan in the 8<sup>th</sup> century, Islamic sharia, particularly the Hanafi jurisprudence was applied in Afghanistan. In the early 1920s, a wave of codification started with the first Afghan Constitution adopted in 1923 under King Amanullah who ruled from 1919 to 1929. These endeavours did not include family law. Historically, the era of legislation began in Afghanistan at the time when the neighbouring states Iran and Turkey tried to introduce written laws and organised their legal systems. King Amanullah wanted to follow the same path, like Reza Shah in Iran or Ataturk in Turkey, by adopting legislation and reinforcing central government. However, the majority of these efforts failed.

The first comprehensive codification of private law, the Afghan Civil Code, was adopted under President Mohammad Daoud in 1977. It is in fact a collection of Hanafi jurisprudence principles. Though many efforts have been made in the past century to build an authoritative central government in Afghanistan, a unified legal system has not yet emerged. Moreover, before 1826 when Amir Dost Mohammad established a central government (1826-1863), Afghanistan was divided into various ethnic groups,<sup>3</sup> which were controlled by a system of chieftains). Most Afghans still resolve their family disputes according to their ethnic customs and traditions, as in the past. Thus, customary law and the decisions made by the tribal shuras<sup>4</sup> and jirgas<sup>5</sup> continue to serve as a legal source in Afghanistan. In summary, the Afghan

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<sup>3</sup> The ethnic groups include Pashtoon, Tajik, Hazara, Ozbek, Turkman, Baluch, Pashai, Nuristani, Aimaq, Arab, Kirghiz, Qezelbash, Gujar, Brahawi and others (see Article 4, Afghan Constitution 2004).

<sup>4</sup> The term *shūrā* is derived from an Arabic word which also means advice or consultation.

<sup>5</sup> The term *jirga* is an original Pashto word referring to the gathering of a few or a large number of people. It also means consultation. The word *jirga* is also used in Persian/Dari to refer to a circle or a gathering of people. Other scholars believe that the *jirga* originates from Turkish with a very similar meaning.

legal system applicable to family law consists of Islamic law, regional customary law, traditional ethnic rules and state law.

The variety of mechanisms to settle a dispute adds fuel to the above mentioned problems of legal plurality. Besides state courts, which are governed by the Law on Civil Procedure of 1990, there are other alternative, non-state mechanisms to settle disputes. According to international reports, only 15% of disputes are brought to state courts. Therefore, most criminal cases and private disputes, including family law cases, are settled outside the law courts and state bodies. The reason behind this is the fact that judicial institutions do not exist or are not active in many areas of the country and lack legitimacy in the eyes of the people.

## II. LEGAL SOURCES OF AFGHAN FAMILY LAW

### 1. Sharia and state law

Sharia is an Arabic term derived from *sharʿa* meaning ‘road’ or ‘way’. It connotes ‘the way to the source’ or ‘the clear road’. In legal terms, sharia is defined as a collection of Islamic law. The majority of Afghan people are followers of the Hanafi creed. Since no official census has been carried out in Afghanistan for several decades, however, no reliable data is available.

Prior to the constitutional monarchy, Afghanistan had a dual legal system, like other Islamic nations. State and administrative issues were governed by state law and cases pertaining to private law were settled according to sharia regulations. The process of legislation and codification of laws in Afghanistan began in the early 20<sup>th</sup> century. The purpose of this process was not only to organise those fields of law which were not covered by sharia, but also to include those which were subject to sharia, such as family law, property law and contracts, so that judges and lawyers have a better access to sharia principles. In fact, the process of legislation in Afghanistan has a relatively short history. The term *qānūn* meaning “statutory law” was defined for the first time in the 6<sup>th</sup> Afghan Constitution adopted under King Mohammad Zahir in 1964. Article 69 of this Constitution states:

“Excepting the conditions for which specific provisions have been made in this Constitution, 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’a of Islam shall be considered as law.”

Though this important article was based on the prevailing Afghan doctrine, it proved ineffective in practice. The new Constitution of 2004 has a similar provision in its Article 94:

“Law is that which both Houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise.”

### 2. Customary law

Afghanistan is a nation with diverse ethnicities and cultures, hosting various tribes and languages. There are some 53 ethnic groups, all with their own customary traditions and rules. Customary law is understood as a collection of standards which are culturally and ethnically valid for the adherents of a particular group as accepted norms. These rules are generally used by local shuras and jirgas to settle disputes.

Despite the fact that customary laws differ in terms of ethnicity or geographical location, there are some similarities between them. For example, almost all tribes refer to mediation authorities to settle disputes. According to national and international reports, domestic

violence, divorce, inheritance and marital disputes are first settled within the sphere of the Afghan family without the involvement of local/tribal or state institutions. However, should these disputes become public or a burden for the society, they are resolved by public institutions at local and tribal levels. These institutions are called *jirga*, or *shura*. Their oral decisions are binding on the parties involved. Many Afghan people have preferred *jirga/shura* to formal justice structures, as the former are conducted by respected elders with established social status and a reputation for piety and fairness, compared to state appointed, unknown judges. In addition, in the context of *jirga/shura*, elders reach decisions in accordance with accepted local traditions and values which are deeply ingrained in the collective conscience of the village or tribe – they have a profound existence in the collective mind of the village and of its individual members.

Further common points in customary laws are the fundamental principles of forgiveness and compensation. The society abides by these principles as they provide the frame for harmony in the families and the community. It is, however, a matter of concern that many of the customary norms are compatible neither with Islamic nor statutory law or human rights. Nonetheless, according to some reports, they are often perceived as Islamic or in accordance with Islamic law. Examples of customary practice which are contradictory to statutory law, human rights and the sharia are *badal* or *badd*,<sup>6</sup> the non-payment of *mahr* (dower) and the ignoring of women's inheritance rights. Child marriage is also contrary to both Afghan statutory law and human rights, and shall be discussed in Part 3 C II 2 a ee below.

### **3. International conventions**

International conventions, treaties and agreements signed and ratified by Afghanistan are also part of the Afghan legal system. These instruments are binding in Afghanistan only when they are ratified by the National Assembly in accordance with Article 90 Afghan Constitution of 2004.

The most significant conventions relating to family law which Afghanistan has acceded to and ratified are:

1. Convention on the Rights of the Child, adopted on 5 December 1989, and ratified by Afghanistan on 27 April 1994.
2. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted on 25 May 2000, ratified by Afghanistan on 19 October 2002.
3. International Covenant on Civil and Political Rights, adopted on 16 December 1966. Afghanistan ratified this convention on 24 April 1983.
4. Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), adopted on 16 December 1979 and ratified by Afghanistan on 5 March 2003.

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<sup>6</sup> According to reports, the pattern of *badd* continues to exist. It is an option used for compensation of murder in Afghanistan. The murderer's family offers two beautiful and virgin girls for marriage to the victim's family. The main concept underlying this practice is to bring both families together by marriage and thereby making their intense animosity turn into friendship. How such a marriage will affect the women is not taken into consideration. Such a deal violates the human rights conventions to which Afghanistan is a signatory.

The ratification of the CEDAW is of particular importance. State parties to the convention are obliged to report to the CEDAW Committee, which monitors the implementation of the Convention. Reports must be submitted one year after ratification and every four years. Afghanistan has thus a responsibility and is bound to align its legislations with the Convention.

### **III. HIERARCHY OF SOURCES OF LAW**

The relationship between Islamic law and statutory law, which, for more than a century, operated next to each other, and the hierarchy between these legal sources are issues which are not easy to handle.

Article 1 of the Afghan Constitution of 2004 (AC) establishes that Afghanistan is an Islamic republic. Article 2 AC stipulates that Islam is the official religion of the country and, unlike previous constitutions, does not give preference to the Hanafi school of law. Article 3 AC states that no law shall be contrary to the beliefs and provisions of the sacred religion of Islam, whereas no explicit definition is given to the terms “beliefs and provisions of the sacred religion of Islam” and “Islamic republic”.

Only Article 130 AC sees to some extent a classification of legal rules to be applied by the judiciary. According to this article, the courts shall apply laws enacted by the state and refer to Hanafi jurisprudence only if they see a legal vacuum. The article states:

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

The above provision is more specifically stipulated by Article 1 (2) of the Civil Code which equally binds the courts to refer to Hanafi jurisprudence principles only in the absence of legal regulations. Article 2 of the Civil Code establishes that in the case of a legal vacuum with no provision existing in Hanafi jurisprudence, customs (*‘orf-e ‘omūmī*) may be referred to with certain restrictions. Thus, custom and traditions are employed as the last resort in order to fill the legal vacuum. The above article limits the application of customary law, it may only be referred to when its rules are in accordance and do not contradict with the law and with the principles of justice.

### **IV. INTERPRETATION OF THE CONSTITUTION AND STATUTORY LAW**

As highlighted above, Article 3 AC does not allow any law in Afghanistan to be in contradiction with the beliefs and provisions of the sacred religion of Islam. Since “the beliefs and provisions of the sacred religion of Islam” have multiple meanings, the question arises as to who will be authorised to evaluate the compliance of laws with the Constitution, as well as with Article 3 AC.

No central body currently exists which is authorised to interpret Islamic law, such as the Supreme Constitutional Court in Egypt<sup>7</sup> or the Council of Guardians<sup>8</sup> in Iran. A proposal to set up a Constitutional Council in Afghanistan was rejected during the drafting process of the Afghan Constitution of 2004. As such, who will be competent to interpret Islamic law in Afghanistan is not yet clear.

The new Constitution does not provide a clear answer on this question, as it provides for two bodies having to some extent the same duties. According to Article 157 AC, an independent commission has to be formed to supervise the implementation of the constitution. Moreover, Article 121 AC determines that the Supreme Court is responsible for verifying at the request of the Government or the courts whether the laws, acts of the legislature, international agreements and conventions are compatible with the Constitution and for interpreting them in accordance with the laws.

## V. CONCLUSION

Family law in Afghanistan is a mix of customary, Islamic and statutory laws. The courts in this country are duty-bound to apply the statutory law in the first instance. In case there is no statutory provision found for a given case, the courts should refer to the principles of the Hanafi jurisprudence. They may use customs and traditions at the last stage in a restricted form.

In legal practice, however, this hierarchy has failed to be applied. As in other developing countries, statutory law is, in fact, not decisive in the life of the majority of the Afghan people. All reports on the Afghan legal system testify to the fact that state law and regulations have existed on paper only. Moreover, the hierarchy envisaged by law to first apply statutory law and refer to customs and traditions only if no legal regulation or provision of the Hanafi school of law can be found is scarcely followed. Rather, it is observed that mainly customary law is applied, particularly regarding matters of family law.

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<sup>7</sup> According to Article 175 of the Egyptian Constitution and Act 48 of 29 August 1979 on the Supreme Constitutional Court of Egypt, the latter has the duty to monitor the compatibility of laws with the constitution.

<sup>8</sup> According to Article 98 of the Constitution of the Islamic Republic of Iran, the duty of interpreting the constitution lies with the Council of Guardians. Similarly, according to Article 94 of the Constitution of the Islamic Republic of Iran, the conformity of all decisions taken by the parliament with Islam and the constitution shall be controlled by the Council of Guardians.

## **B. HISTORICAL DEVELOPMENT OF FAMILY LAW IN AFGHANISTAN**

### **I. HISTORICAL DEVELOPMENT**

Six laws and one decree (Decree No. 7 of 1978 issued under Nour Mohammad Taraki) were enacted from 1921 to 1977 to govern family law issues. It is worth mentioning that not all the original texts of these documents were available during preparation of this Manual, translations and secondary literature were used when these were not accessible.

The marriage laws of 1921 to 1971 and Decree No. 7 of 1978 did not cover family law comprehensively, being often too short and containing a restricted amount of regulations to prohibit bad deeds or, at least, to promote their rejection. These laws were meant to do away with unfavourable marital customs and traditions. As such, they attempt to limit child and forced marriage, excessive expenses for engagement or wedding ceremonies, the bride price (*walwar*), excessive dower (*mahr*) and polygyny through law. Sadly, all these texts have failed to provide effective tools for the courts and other bodies involved in family issues to successfully achieve their aim. Moreover, the gap between the demands of the ruling systems to introduce amendments in family law on the one hand, and the state of development of the society and the interests of various groups on the other hand have resulted in the majority of these laws remaining ineffective.

#### **1. The 1921 and 1926 Marriage Laws**

The Law on Marriage, Wedding and Circumcision adopted in 1921 (“1921 Marriage Law”), which was inspired particularly by the reforms introduced in Turkey, is the first document on family law in Afghanistan. Regrettably, the original text of this document has not been found. The following explanations are based on the findings of Professor Hashem Mohammed Kamali, professor of law at the Islamic University of Malaysia, in his book *Law in Afghanistan*, printed in English in 1985, and Erica Knabe, anthropologist, in her book *The Emancipation of Women in Afghanistan*, published in German in 1977. The 1921 Marriage Law focused particularly on the following topics:

1. child and forced marriages;
2. polygyny;
3. excessive expenses for engagement or wedding ceremonies;
4. exchange of females to settle disputes (*badd*).

##### **a) Polygyny**

The aim of the 1921 Marriage Law is mentioned in its preamble, stressing that this law was adopted on the premises that disputes usually arise from wedding expenditures, husbands’ violence against their wives and suppression of women’s rights. Thus, the 1921 Marriage Law established the rule that, prior to the conclusion of every further marriage, honest witnesses shall be brought to testify before the court that the polygynous marriage was justified and complied with the principle of equal treatment. Only after obtaining the court’s permission, the new marriage could be contracted. Without such a permission, the husband could be

sentenced to up to two years imprisonment or a fine. The second marriage, however, remained valid.

### **b) Child marriage and forced marriage**

The preamble of the 1921 Marriage Law condemns child marriage as a source of social unrest and dispute. Therefore, Article 5 of this law prohibited child marriage and Article 6 determined the minimum age for marriage, according to which marriage before the age of 13 was prohibited. This rule was applicable to both males and females.

The 1921 Marriage Law granted women and girls many freedoms which are also endorsed by the Hanafi school of law. By introducing the condition of explicit consent to marriage by the woman and the man, the traditional meaning of marriage as a means for connecting families gave way to the idea that marriage was a relationship between two persons: the bride and the groom.

### **c) *Badd***

One of the principle rules of the 1921 Marriage Law was Article 9 which prohibited the delivery of a woman to the contesting party for the sake of settling a dispute.

### **d) Expenditure of wedding**

The 1921 Marriage Law required the limitation of wedding expenditure. Unnecessary expenses for engagement, the ceremonial night of *hena* and wedding ceremonies were outlawed. The *mahr* was limited to 30 Afghanis and the costs for the dresses the groom had to pay for the marriage were fixed. Moreover, the bride price (*walwar*) was prohibited.

### **e) Effects of the 1921 Marriage Law and changes in the 1926 Marriage Law**

Islamic scholars criticised the 1921 Marriage Law, as the reforms introduced by King Amanullah threatened to jeopardise their power. They accused him of endorsing laws which were contrary to the sharia. Moreover, some Afghan tribes began to oppose the legal reforms. In order to prevent uprisings, King Amanullah called a loya jirga attended by 700 delegates who, following long discussions, introduced amendments to the 1923 Constitution, as well as to the 1921 Marriage Law.

The amended marriage law was adopted on 31 August 1926 and was also named the Law on Marriage, Wedding and Circumcision. The original text consisted of a preamble and 22 articles. Article 21 explicitly repealed the 1921 Marriage Law.

Article 3 of the 1926 Marriage Law eased the conditions for child marriage. It was permitted again, but recommended to avoid. In addition, Article 9 allowed marriage of children under the age of majority and introduced the right to dissolve the marriage when the age of majority was reached. Moreover, the regulations governing polygyny were eased. It was not necessary to obtain the court's permission for a second marriage. The law simply required believers to observe the principle of equal treatment mentioned in the Quran, a requirement which was not legally binding. According to Article 2 of the 1926 Marriage Law, the only possibility left for the woman was to sue her husband for having married another woman, which could possibly result in convicting him to punishment.

According to Article 6 of the 1926 Marriage Law, the practice of *badd* continued to be prohibited:

“The custom to deliver a woman in exchange for settling a dispute or inheriting a woman forcefully or considering the wife of a [deceased] person as one’s inherited wife is absolutely forbidden and outlawed.”

Article 7 of the 1926 Marriage Law provided for the widow’s right to remarriage. Accordingly, it was not permitted to force a widow or divorced woman to refrain from a second marriage.

## **2. The 1934 Marriage Law**

On 24 May 1934, a new family act, the Law on Marriage, Wedding and Circumcision, hereafter referred to as the 1934 Marriage Law, was introduced. This law also focused on marriage customs and ceremonies which had negative economic effects on the families. According to Professor Kamali, the preamble of the 1934 Marriage Law condemned extravagant and unnecessary wedding expenses and demanded that they be avoided. However, most of its rules were drafted in non-binding language. They did not explicitly prohibit the bride price, but rather the bridal gift giving ceremony, and there were no sanctions in case of contravention.

## **3. The 1949 Marriage Law**

On 28 March 1949, a further marriage law was adopted, again under the title of Law on Marriage, Wedding and Circumcision, consisting of one preamble and 12 articles.

According to the preamble, this law pursues the same goals as its predecessors. It is stated in the preamble that it was adopted in order to prevent unlawful celebrations and unnecessary expenses for weddings ceremonies.<sup>9</sup> Moreover, state authorities and responsible authorities were obliged to explain this law to the people and deliver offenders to the sharia court for prosecution.

### **a) Marriage**

Article 1 of the 1949 Marriage Law states that a marriage shall be concluded according to the principles of the religious law and with the consent of both the man and the woman.

### **b) Wedding expenditure**

Article 2 of this law prohibited celebrations before the actual marriage. Article 3 limited the expenses for the bride’s clothing which had to be borne by the groom. Article 4 limited the expenses for food and prohibited the supply of too many sweets during the wedding ceremony. Article 7 and 8 banned extravagant gifts on the occasion of a wedding ceremony.

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<sup>9</sup> “[...] put an end to the unlawful ceremonies, competition, hypocrisy and useless expenses in marriage, wedding and circumcision celebrations; and in order to carry out the provisions of these regulations, after having explained them to the people, the governors, mayors and heads of villages are responsible and charged with arranging meetings of religious scholars and dignitaries in which they shall personally participate and explain to the people the great damage caused by these ceremonies and the great expenses which are contrary to law and the economic interests and the morals of the people.” The Law on Mourning Ceremonies of 1949 has similar wording, stating that mourning ceremonies shall be carried out in accordance with religious provisions in order to prevent all improper customs, useless expenses and unlawful customs and habits which are detrimental to the moral and finances of the people.

Similarly, Article 5 of the 1949 Marriage Law provided that the bride might not take any gifts or bride price except for the *mahr*. It is interesting to see, however, that Article 6 enabled the groom to complain legally against his father-in-law should the latter prevent the bride from going to the groom's house on account of non-payment of the bride price. If the legislative intent was to relieve the groom of the burden of bride price, this provision would, according to Kamali, not attain its purpose, as the bride price is usually paid prior to the conclusion of a marriage and upon whose refusal the marriage will not be concluded.

#### **4. The 1960 Marriage Law**

A new important marriage law was enacted on 19 October 1960. A German translation of its contents on marriage and issuing of marriage certificates was published by Erica Knabe, which consists of 27 articles and covers only marriage and marriage certificates – the first marriage document in Afghanistan.

##### **a) Marriage**

Article 1 of the 1960 Marriage Law states that a marriage shall come into effect by the consent of bride and groom. Article 2 of this law defined the age of 15 as the legal age for marriage. Any marriage concluded before this age was called a minor marriage. It did not, however, entail any legal consequences, as this provision did not include any prohibition, but was rather without any binding legal force, recommending to refrain from marriage to children. However, pursuant to Article 19, the parents could only oblige their children to marry if it was considered to be for their benefit. In addition, Article 20 states that a marriage was not allowed to be concluded as a debt relief or in the form of a *badd*.

##### **b) Marriage certificate**

The 1960 Marriage Law focused for the first time on the need for a marriage certificate. Article 5 states that only marital cases shall be heard by the court which stem from a marriage certified by a marriage certificate. Thus, a marriage certificate was the only valid evidence to prove a marriage. Witnesses, confessions and the like were not considered as a valid proof. Only the acknowledgement of the marriage by the other party was also allowed as a proof. However, the court could decide on cases filed by a couple who already had a child, despite the absence of a marriage certificate.

In addition, there were some rules on the *mahr* in this law. Article 14 stated that the amount of the *mahr* shall be specified in the marriage certificate, allowing the bride to claim it according to the provisions of Article 22.

##### **c) Wedding expenditure**

The 1960 Marriage Law repealed the earlier laws and introduced significant changes with regard to legal marriage age and the marriage certificate. It did not, however, include any provisions on bride price and extravagant expenses for wedding ceremonies.

#### **5. The 1971 Marriage Law**

A new marriage law was brought in on 8 August 1971. It is available in both Dari and English and consists of 42 articles. It contained some new elements compared to its predecessors. For

the first time it set up rules on repudiation (*ṭalāq*) and judicial divorce (*tafrīq*), as well as on the proceedings of marriage, repudiation, judicial divorce and the proof of marriage.

### **a) Marriage**

The 1971 Marriage Law first stressed the necessity of consent in marriage, nullifying marriages based on customs and traditions, without the consent of the spouses. Nevertheless, child marriage continued to remain valid under this law. It did not abolish the legal marriage age of 15, which had been envisaged by the 1960 Marriage Law, but only stated that marriages concluded between persons not having reached majority age shall not have the validity of a majority age marriage. This law did not provide for any consequences for those not abiding by these provisions.

### **b) Marriage certificate**

The need for enforcing the practice of marriage certificate had become more pressing. In order to have people register their marriages Article 36 Marriage Law 1971 stated that marriage disputes could be heard by the court only on the basis of a legal marriage certificate. However, contrary to the 1960 Marriage Law, a marriage dispute might also be heard by the court if the marital relationship between husband and wife was attested by some trustworthy persons on whom the court could rely or if a marriage was evident.

### **c) Marriage and polygyny**

Provisions on repudiation and judicial divorce, based on the Hanafi jurisprudence principles, were formulated for the first time in statutory law. Referring repeatedly to Islamic principles, the 1971 Marriage Law defined repudiation and judicial divorce in four articles. Article 32 states that on the basis of sharia, *ṭalāq* is the privilege of the husband, allowing him to grant this right in writing to his wife, who could then, according to Article 34, ask a competent court at any time to issue a divorce certificate. As for polygyny, the only relevant provision was the possibility of granting the authority to repudiate to the wife in case of a polygynious marriage.

## **6. The 1977 Civil Code**

The first comprehensive legislation on family and inheritance law was embodied in the first Civil Code of Afghanistan adopted in January 1977, consisting of 2416 articles. Article 1416 explicitly abrogated the previous legislations, including the 1971 Marriage Law. Family law provisions are stipulated in Articles 56-336 CC. Articles 60-216 also include provisions on marriage and are divided into four sections:

1. Conclusion of Marriage;
2. Effects of marriage;
3. Dissolution of marriage;
4. Consequences of marriage dissolution.

Moreover, the Code includes provisions concerning child law, custody and guardianship.

The Civil Code is essentially based on Hanafi jurisprudence, inspired mainly by the legal provisions of civil legislations in various Islamic countries, particularly Egypt. Some issues, such as legal capacity, conditions for registration of marriage and divorce, birth and kinship

evidence, and place of residence, are influenced by the French Code Civil. The family law of Afghanistan also includes some provisions on divorce originating from the Maliki school of law. The provisions of the Afghan Civil Code will be discussed in more detail below.

## **7. Decree No. 7/1978**

At the close of the 1970s, the new government tried to set up a legal system similar to the one of the Soviet Union to be in conformity with its socialist objectives and political and economic ideology. The Revolutionary Council as a legislative body announced the Decree No. 7 on Bride Price and Expenditure for Wedding, hereafter referred to as Decree No. 7, on 18 October 1978. The original text of this decree is available, consisting of 41 articles.

### **a) Wedding expenditure**

Decree No. 7 banned bride price, imposing the punishment of up to three years of imprisonment for violations of its provisions (Article 1.2, Article 6.1 Decree No. 7). The amount of the *mahr* was also fixed. According to Article 3, neither the bride nor her guardian or proxy were allowed to take a dower of more than 300 Afs. In addition, it was not permitted to force the groom to provide clothing and gifts for the girl and her family on the occasion of celebrating engagement or wedding (Article 2 Decree No. 7).

### **b) Marriage, child marriage**

Article 4 Decree No. 7 explicitly stated that engagement and marriage shall take place only with the consent of the parties and that nobody shall be forced to marry. Like in the 1977 Civil Code, the legal marriage age was 16 years for females and 18 years for males (Article 5 Decree No. 7). It was also stipulated that the nonconformity with these provisions could be sentenced to 6 months up to 3 years in prison, depending on the circumstances (Article 6 Decree No. 7).

The question arises whether these provisions embodied in the above decree, which complemented the 1977 Civil Code, are still valid or not. Though an official annulment of the decree is not known, according to some sources the then President, Babrak Karmal, abolished it due to strong resistance shown by the population. At present, it cannot be said conclusively whether it is still valid and as such complementary to the Civil Code.

## **8. Laws under the rules of Mujahedeen and Taliban**

Following the collapse of the Marxist regime, the Mujahedeen (being in power from 1992 – 1996) declared Islamic sharia as the basis of the Islamic state of Afghanistan. No essential laws were adopted under the Mujahedeen rule. Similarly, under the Taliban, who ruled from 1996 – 2001 in Afghanistan, sharia was officially the basis of law; however in a perverted and radical form.

## **II. FAMILY LAW CURRENTLY OPERATING IN AFGHANISTAN**

Following the fall of the Taliban regime in autumn 2001, the foundation of a new political and legal system was laid down by an agreement concluded in Petersberg, Bonn (Germany)

on 5 December 2001 (Bonn Agreement). According to this agreement, the 1964 Constitution was declared valid until the promulgation of a new constitution.

The new Constitution of Afghanistan was adopted on 26 January 2004. The Bonn Agreement asserted that all laws and regulations shall be valid until the adoption of new legislation, provided that they do not infringe on the Afghan legal commitments under international law (Part I, Section 2 Bonn Agreement).

Article 162 of the new Afghan Constitution stipulates that laws and decrees contrary to the provisions of this constitution are invalid. Therefore, the former statutory laws, including the Civil Code of 1977, are valid until the adoption of new legislations, provided they are not contrary to the new constitution.

Thus, the current family law provisions embodied in the Civil Code provide the basis for judgements on family matters.

### **III. CONCLUSION**

One can conclude that the Marriage Laws from 1921 to 1971 were only piecemeal legislation, aimed to do away with the traditional marriage customs and practices, without intending to formulate a comprehensive legal system of family law. Moreover, most of the texts were legally not binding, being very similar to disciplinary or educational measures, whose realisation did not prove practical without penal provisions. They were to a large extent focussed on the negative economic and personal consequences of marriage, trying particularly to prevent or at a minimum to consider improper child marriage, as well as unwarranted and extravagant expenditure of the wedding ceremonies. However, it is unclear whether these laws affected people's attitudes. New reports on family law in Afghanistan reveal that bride price and *badd* practices still exist and have not disappeared.

Surprisingly, the 1977 Civil Code does not touch upon any of these issues. No article regulates the bride price or *badd* or other similar practices the previous marriage laws tried to regulate for over fifty years. It seems as if the family legal provisions enshrined in the Civil Code evaded the pressures of Afghan society, being in fact a compilation of Hanafi jurisprudence, without taking the legal and social conditions of Afghan society into consideration. As such, there are significant gaps in this law which will certainly have to be discussed in the future.

On the other hand, the Afghan Civil Code embodies important provisions, which until 1977 either did not exist in the statutory laws or were weak, including regulations on polygyny, the legal marriage age and the prevention or prohibition of child marriage. However, those rules fall short of the objectives set in the new Constitution, namely to observe the minimum requirements of gender equality.

# **PART 2. CONTEMPORARY AFGHAN FAMILY LAW**

## **A. SUBJECT AND PURPOSE OF THE FAMILY LAW**

Family law regulates the particular legal relations resulting from marriage and their association with third parties and kinship. It encompasses provisions on the family, its rights and obligations, as well as the ties between family members. In addition, these regulations also govern matters of guardianship. Family law regulates the conditions under which a marriage can be concluded or dissolved, a kinship is established or terminated, a guardian is assigned or dismissed.

## **B. DEFINITION OF ‘FAMILY’**

Article 56 CC defines the family as consisting of relatives united by a common bond of kinship. Moreover, Article 57 CC differentiates between direct and indirect kinship. Direct kinship is the relationship between ascendants and descendants, for example between child and father. Indirect kinship refers to the relationship between persons sharing an ascendant without one being the descendant of the other, such as brother and sister. Article 59 CC considers relatives of the husband to be related to the wife in the same way.

The term ‘family’ refers to a group of people who are united by marriage or kinship. The family as a whole does not have a legal personality, nor can it own property. Only individuals can. Afghan family law covers the following issues:

1. Engagement;
2. Marriage and its effects;
3. Impediments to marriage;
4. Property effects of marriage;
5. Dissolution of marriage and its consequences;
6. Maintenance;
7. Filiation of children;
8. Milk kinship;
9. Custody;
10. Financial care;
11. Guardianship;
12. Inheritance.

## **C. FAMILY LAW AND CONSTITUTIONAL LAW**

Articles 22 to 50 of the Afghan Constitution of 2004 establishes a number of rights relevant to family law. Article 54 AC gives particular support to the family, especially to mothers and children. The state plays an essential role in guaranteeing these fundamental constitutional rights. Article 54 AC states:

“The family is a fundamental unit of society and is supported by the state. The state adopts necessary measures to ensure the physical and spiritual well-being of the family, especially the child and the mother, the upbringing of children and the elimination of traditions contrary to the principles of the sacred religion of Islam.”

In addition, Article 22 AC prohibits all forms of discrimination or preference among the Afghan citizens, stipulating that men and women have equal rights and obligations before the law. As such, the Afghan Constitution of 2004 is more progressive than the 1964 Constitution. The explicit reference to both men and women was something demanded by many female delegates during consultations on the draft constitution.

## **D. FAMILY LAW AND PRIVATE INTERNATIONAL LAW**

The Civil Code is applicable to the whole population of Afghanistan. According to Article 1(2) CC, legal gaps shall be filled by Hanafi jurisprudence, ruling out any other school of law. In other words, Afghan family law, unlike the law of other Islamic countries, is based on Islamic principles and applies to all Afghan citizens irrespective of their faith and conviction.

Except for the 1980 Afghan Constitution adopted under the Communist regime, all other previous constitutions recognised Hanafi jurisprudence as the operating jurisprudence of Afghanistan. Article 2 of the new Afghan Constitution of 2004 recognises Islam as the official religion of Afghanistan, but does not explicitly emphasise the Hanafi jurisprudence. However, Article 130 AC obliges the courts to refer to Hanafi jurisprudence in the case of any legal gap. Despite this provision, a new development can be observed in the 2004 Constitution; Article 131 AC recognises the Shiite jurisprudence alongside the Hanafi jurisprudence, Article 131 AC states:

“Courts shall apply Shiite law in cases dealing with personal matters involving followers of the Shiite sect in accordance with the provisions of law.

In other cases, if no clarification by this constitution and other laws exists, courts shall resolve the matter according to laws of this sect.”

In response to Article 131 AC, a Code of Personal Status of Shiite Afghans was published in July 2009, applicable to Shiite Afghans only. There was a general consensus among Afghans that the law as such was a positive development giving rights and recognition to a historically excluded and persecuted minority. The content of some provisions of the bill, which included several restrictions on the rights of Shiite women, however caught the attention of national and international human rights groups and media, causing the law to soon be dubbed the ‘rape law’ by Western journalists. Following considerable public outcry, the bill was amended and

some of the contested provisions, such as the rules on temporary marriage, were omitted; the amended Code of Personal Status of Shiite Afghans (CPS) with its 236 articles came into force on 27 July 2009. Article 1 states that the Code was drafted in response to Articles 54 and 131 of the 2004 Constitution to regulate the personal status of Shiite Afghans. Accordingly, the Supreme Court must appoint eligible Shiite judges to implement the Code (Article 2). Whenever issues arise which are not addressed by the provisions of the CPS, the court shall decide in accordance with the Shiite Ja'fari school of law as endorsed in the writings (*fatwas*) of its most renowned and recognised religious authority, the so-called 'source of imitation' (*marja<sup>c</sup>-e taqlid*) (Article 3).

According to Article 123 of the CPS, the husband is the head of the family. This kind of regulation is found in almost all family codes in Islamic countries. However, Article 123 further provides that the court may appoint the wife as head of the household, if it is established that the husband is intellectually unable to assume this position. The much contested Article 132(4) of the first draft of the Code, which provided that the wife had to be sexually available whenever the man so wished, was omitted in the final version, as was the chapter on temporary marriage, which is recognised under Shiite law, but prohibited under all Sunni schools of law. Furthermore, Article 94 CPS stipulates that the marriage age for women is 16 and for men 18, which is remarkable considering the Shiite rules allowing for marriage from the age of puberty, i.e. 9 for girls and 15 for boys.

## **PART 3. AFGHAN MARRIAGE LAW**

### **A. SCOPE OF APPLICATION**

#### **I. SUBSTANTIVE SCOPE OF APPLICATION**

Marriage law aims at regulating legal relations between the parties involved in a marriage. Its substantive provisions are mainly in Article 60 to 216 of chapter 2 (“Persons”) of the Civil Code. Part 1 of this chapter deals with natural persons, and includes 10 sections, out of which sections 6 - 9 relate to marriage law.

Section 6 contains rules governing the requirements of a valid marriage. The effects of marriage are defined in section 7, followed by the dissolution of marriage in section 8 and the consequences of marriage dissolution in section 9. Matchmaking and engagement are considered as premarital stages, and briefly defined in section 6. Procedural provisions relating to family law are also established in Article 101 – 120 Code of Civil Procedure of 1990.

#### **II. PERSONAL SCOPE OF APPLICATION**

As mentioned above, the rules of the Civil Code on family law are applicable to all Afghans, except for the Shiite Afghans. According to Article 131 AC, in cases of personal status related to the Shiite population, the Code of Personal Status of the Shiites shall be applicable, rather than the statutory law, which is based to a large extent on Hanafi jurisprudence. In the following, details will be given only on the rules of the Civil Code.

### **B. STAGES BEFORE MARRIAGE**

Matchmaking and engagement are the significant premarital stages. The provisions regulating matchmaking and engagement will be the focus of the next section. This will be followed by a comparison of similar legal principles on matchmaking and engagement in other Islamic countries.

#### **I. MATCHMAKING (*KHĀSTGĀRĪ*)**

##### **1. Meaning of the term**

Matchmaking (*khāstgārī*) is a common tradition in Afghanistan. However, the Civil Code lacks a clear definition. Article 63 CC only refers to the courting of a woman who is in her waiting period (*‘eddat*). *‘Eddat* is a specified period following a woman’s divorce or demise of her husband in which she shall not get married. According to this provision, it is forbidden to court a woman who is in her *‘eddat* following a revocable or irrevocable repudiation.<sup>10</sup> Likewise, it is also forbidden to explicitly court a woman who is in the period of *‘eddat*

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<sup>10</sup> See Part 3 E II “Repudiation (*talāq*)” below.

following the death of her husband. However, the implicit courting of a woman being in this period is admissible.

Accordingly, *khāstgārī* can be defined as an explicit or implicit proposal of marriage, made by a man to a woman who can marry him. An example of explicit expression of *khāstgārī* would be: “I would like to marry you” or “I ask you to become my wife”. An implicit matchmaking may be expressed by phrases such as “I want to marry a beautiful and good lady” or “I intend to marry (or find) an appropriate woman”.

Matchmaking is only permissible where marriage is legally permissible. No impediments to the marriage, either permanent or temporary, should exist for the matchmaking to be valid. Moreover, it is prohibited to court a woman who is already engaged, or who is not a follower of a monotheistic religion,<sup>11</sup> or already courted by another man and has not yet responded to that proposal. However, a prohibited matchmaking does not entail any legal consequences as it is a social tradition with no legal import.

## **2. Significance of *khāstgārī* in Afghan society**

In many regions of Afghanistan, it is uncommon for the man and the woman to meet each other prior to marriage. Any understanding or appointment between them before marriage is considered contrary to social standards and may produce difficulties for the couple. Particularly in the rural areas, women are considered a part of their husband’s honour and dignity and are therefore not free to act as they please. Furthermore, segregation of women and men in society prevents contact between women and men eligible for marriage.

Essentially, very often neither the female nor the male may independently choose her/his future spouse. In fact, marriage is rather a family matter, and normally, the heads of the families arrange the marriage for their children, particularly in rural areas.

An appropriate spouse will be searched first of all within the sphere of close relatives, then among more distant relatives and neighbours and at last in other families. Often, female relatives of the future groom start negotiating with the female relatives of the woman, followed by a meeting between the two families discussing the bride price (*walwar*). This is a pattern of matchmaking. If the woman’s family does not show any interest, the matchmaking will end after the first meeting. If the deal is made without the consent and agreement of the couple, it may lead to a forced marriage. As soon as the woman’s family agrees to the marriage, the woman and the man are hereafter considered engaged.

## **3. Bride price (*walwar*)**

A very important issue during negotiation on marriage matching is the bride price, or *walwar*, a Pashto term meaning wedding expenditure or advance payment; another expression is *shīrbahā* (gift to a bride’s mother for having nursed her). The term *qālīn* is commonly referred to in this context among Uzbeks.

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<sup>11</sup> This includes Islam, Jewry and Christianity.

## a) Legal basis

The bride price has no legal basis, neither in Islamic law nor in statutory law.<sup>12</sup> Agreements on bride price and its payment stem from tradition. It consists of a sum of money or other monetary value paid to the head of the woman's family. The amount of the bride price depends on the social and economic situation of the woman's family. The higher the amount of the bride price, the higher the level of respect and honour the man's family bestows on the woman's family. The Hamburg Max Planck Institute's Report 2005 shows that a bride price may start from ninety thousand Afghanis and reach up to two million Afghanis.<sup>13</sup>

Traditionally, the bride price is financial support to the bride's family. Some claim it to be a reward to the parents for having supported her until marriage. Theoretically, it is supposed to enable the bride's family to buy jewels, clothing and *jehāz* (dowry, i.e. the goods a bride brings with her to her husband's house). This financial support is not legally compulsory. In most cases, the bride price does not benefit the bride or is used to cover the expenditure of the wedding; rather it goes into the possession of the bride's father or her guardian, who may use it, for example, as an investment for their own business activities.

Despite the fact that most of the marriage laws enacted prior to the Civil Code of 1977 contained provisions prohibiting the bride price (see Part 1 B I above), the Civil Code itself does not include any rules to regulate or prohibit it. According to Afghan lawyers participating in the Max Planck Institute's Family Law Workshop 2006, although the bride price does not play a significant role among educated and well-off families, the demand for and payment of the bride price is still observed among poor and illiterate or uneducated rich families. Participants in the workshop believed that this makes marriages more business deals, resulting in an increase in age difference between the bride and the groom, as poor young men are financially unable to pay a bride price.

## b) Omission of the bride price

The obligation of the bride price may be customarily omitted by certain traditionally recognised practices. These cases are as follows:

1. Forced marriage of a widow with a male family member of her deceased husband (usually his brother), who will economically benefit from it, as he does not have to pay a bride price to the bride's family.
2. Marriage in the case of *badal*, a situation in which women are exchanged between two families. In other words, the daughter or any other female family member of a man marrying a woman should in exchange marry a male member of the woman's family.
3. Marriage in the case of *por* and *badd*: it is a practice usually employed in the process of mediation between two disputing parties to settle differences and ensure reconciliation, particularly disputes resulting from violence. *Por* literally means

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<sup>12</sup> Some Islamic legal systems contain provisions on the bride price, as for example Jordan. Article 62 Jordanian Personal Status Law of 1976 states that neither the parents of the woman nor any of her relatives are permitted to accept money or other things in exchange for her marriage.

<sup>13</sup> According to the *jirga* held in Gardez, centre of Paktia province, the quantity of the bride price depends also on whether the man is already married and intends to marry for the second, third or fourth time. In addition, personal qualities of the woman, such as charm, and her family's cultural and social status play a role in determining the amount of the bride price.

“debt”, connoting both financial debts and compensation for damages. A man may repay such a debt by marrying off one of his family’s female members to his creditor. Moreover, *por* is a traditional tribal legal practice exercised to remove animosity and belligerence. Thus, a criminal may offer to the victim one or more girls of his family as a means of compensation. *Badd* literally means “animosity” or “hostility” and is understood in this context similarly to *por*; one or more women from a tribe are offered for marriage to the hostile tribe as a sign of peace and goodwill.

More details on these traditional practices, which infringe both the codified family law and Islamic law, as well as the international agreements Afghanistan acceded to, will be given in the section on forced marriage in this Manual.

## **II. ENGAGEMENT**

### **1. Definition and legal nature of engagement**

Following a successful matchmaking, usually the next premarital stage, the phase of engagement (Pashto *kozhdā*; Dari *nāmzadī*), begins.

The Civil Code devotes three articles to engagement. Article 62, Article 64 and Article 65 include provisions on the definition of engagement, impediments to engagement and legal consequences of refraining from these provisions.

Article 64 defines engagement as a promise of marriage, allowing the parties to dissolve it, as they may wish to do so. Article 754 CC defines the word “promise” as one’s own commitment *vis-à-vis* another person in the future. A promise may be expressed both for concluding a contract or for doing an action. Article 64 CC defines engagement only as a promise of marriage which by itself does not create a marital relationship.

### **2. Conditions for a valid engagement**

Conditions for a valid engagement are not comprehensively covered by the Civil Code. According to the general provisions on contractual rights, the parties should consent to enter into an engagement and be eligible.

Article 62 CC stipulates that a man may enter into an engagement with a woman only if she is not married or in her waiting period. Since engagement is a premarital stage, there should not be any impediment to marriage between the engaged parties.

### **3. Termination of engagement**

An engagement may be terminated either by the conclusion of the marriage between the parties, the death of one of the parties, or by withdrawal from the engagement by the parties themselves.

#### **a) Withdrawal from the engagement**

Each party may informally break off the engagement prior to the conclusion of marriage by withdrawal. This removes the promise of marriage and ends the relationship between the engaged parties.

According to Article 62 CC, each party may withdraw his/her promise of marriage without giving any reasons. This rule is notwithstanding the provision in Article 755 CC, which

stipulates that a person who has given a promise shall keep it until his/her death. However, marriage is considered to have more than just a "contractual" character. With this article, the legislator has given the parties the chance to withdraw their promise of marriage at any time prior to marriage. Therefore, it is not possible to sue for the conclusion of marriage based on an engagement.

## **b) Legal consequences of the withdrawal**

The withdrawal from the engagement may cause material or immaterial damages to one or both of the parties. In this case, the question arises as to what extent such damages will be compensated.

The Civil Code does not contain a provision which explicitly regulates compensation of damages resulting from a dissolved engagement. Therefore, the general rules on the right to compensation will be applied to cases involving compensation for damages caused by withdrawal from engagement.

As far as gifts are concerned, Article 65 CC explicitly regulates their fate in case of withdrawal from the engagement.

### ***aa) Material and immaterial compensation***

#### **(1) Legal requirements**

According to Article 776 CC, a person who has caused damage to another person by an unlawful act (Pers. *khaṭā'*) or fault (*taqṣīr*) is liable to pay compensation.

Accordingly, the withdrawal from an engagement entails liability for damages if the withdrawing party commits an unlawful act by withdrawing or is responsible for the withdrawal. Since breaking off an engagement in itself is not unlawful, but legally permissible, it cannot constitute an unlawful act as defined by Article 776 CC. Thus, only the second possibility, i.e. withdrawal by fault which caused damage to the other party, can be applicable. For example, if a fiancé has spent money or borrowed funds in view of the marriage or has taken other measures related to the engagement, these may lead to material damages should the other party remove the basis of these expenditures or liabilities by breaking off the engagement.

The victim is also entitled to claim moral compensation under Article 778 CC. Moral damages could include, for example, the harm incurred by a woman as a result of her reduced chances of marriage caused by the withdrawal from the engagement, as its consequences for women are severer than for men. This stems from the social and cultural importance of engagement in Afghanistan. Under Article 778(3) CC, the right to moral compensation is not transferable to others unless an agreement of the parties or a decision of the court states otherwise. Article 781 CC stipulates that the quality and quantity of compensation shall be determined by the court, the law assuming a monetary compensation.

Both material and moral compensation resulting from the withdrawal from the engagement may only be compensated if the fault is on the part of the withdrawing party (Article 774 and 778(1) CC).

## **(2) Fault**

There is no definition of the term 'fault' in the Civil Code. However, Article 783 CC stipulates that no one shall be held liable if they prove that the damages were caused by external circumstances they are not responsible for, or by an accident, or by a force majeure, or by fault on the part of the person incurring the damages, or by others, unless the law or the agreement of the parties provide otherwise. If this principle is applied to withdrawal from an engagement, the withdrawing party has to pay compensation unless Article 783 CC applies. Moreover, the judge may reduce or entirely reject the compensation for incurred damages on the basis of Article 782 CC if the victim has contributed to the damages.

It cannot be said for sure how the amount of such compensations in withdrawals from engagement is decided or whether the general provisions governing the right to compensation are applied at all in the courts of Afghanistan in these cases. However, withdrawals from engagements are actually very rare. This originates from the character of engagement being traditionally perceived as binding in Afghan society. According to widespread opinion, the engagement is an obligation to marriage which cannot be broken off easily. A withdrawal from an engagement is considered as offending the honour of a family because marriage is considered as a bond connecting two families, rather than just the bride and the groom. Since the withdrawal from an engagement is considered as a loss of face, few would claim compensation before the courts.

### ***bb) Return of gifts***

Article 65 CC regulates explicitly how to deal with gifts exchanged during the period of engagement once it is broken off. It differentiates between whether the giver or the receiver of the gift withdraws from the engagement and whether the gift still exists or not.

If the receiver of the gift withdraws from the engagement, the giver is entitled to recall his/her gifts, provided they still exist. If the gifts do not exist anymore because, for example, they have been consumed, the giver is entitled to the objective value at the time of acquisition. If, however, the giver breaks off the engagement, they are not entitled to a return of the gifts.

The Civil Code does not differentiate between movable and immovable objects with regard to compensation, which means that both movable and immovable gifts will be included.

It is not common in Afghanistan to return gifts or to sue someone for the return of such gifts, as taking legal action is generally considered dishonourable.

## **4. Procedural regulations**

It is the court's competence to decide on a dispute concerning the engagement and its dismissal, according to Article 102(1) of the Afghan Code of Civil Procedure. The decision of the court will be final and there is no appeal. Regarding the essential conditions for the return of gifts, Article 103 of the Code of Civil Procedure refers to Article 65 CC.

## **5. Significance of engagement in the Afghan society**

The period of engagement provides an opportunity for the bride and the groom to get to know each other better and to decide whether they want to marry. However, in Afghanistan, the parents traditionally arrange the engagement of their children. Individual search for a suitable spouse, especially on the part of the daughter, is generally considered a disgraceful act.

However, negotiations taking place between matchmaking and engagement are usually lengthy and difficult, during which not only the expenditures for the wedding, i.e. *walwar* and *mahr*, but also the gifts which are to be exchanged will be determined. These negotiations are followed by an extravagant engagement festivity in which both families participate and are served tea and sweets or complete meals required for a celebration. The groom's family presents jewels and clothes to the future bride. From this time on, she may expect from her fiancé expensive gifts on every national or religious celebration, which are called *eydī*, *baratī*, *nūrūzī*, etc.

These attitudes place heavy financial burdens on the future husband. This is particularly true when it concerns the engagement of a minor or when the fiancé needs time to collect the costs of the wedding. The period of engagement may then last for several years causing double costs for both bride and groom, as presents and gifts have to be offered at every occasion. Furthermore in many cases the difference of age between bride and groom widens.

## **6. Reasons and motivation for early engagement**

The reasons why parents prearrange the engagement of their children very early are different. In his book, Kamali describes numerous reasons:

### **a) Engagement during pregnancy of the mother**

Friends and relatives reciprocally promise that if a baby boy and a baby girl are born in their families, they should later get married.

### **b) Engagement in exchange for support**

For the support a person has received from another person in times of need, the former agrees to the engagement of his daughter to a male member of the latter's family as a sign of gratitude.

### **c) Engagement in the hope of inheritance**

Friends and relatives are very keen to have a girl engaged with a person from whom she may expect inheritance. So they force the girl into a pre-engagement. Conversely, a girl who is expected to inherit is in great demand among friends and relatives who may press for an early engagement.

### **d) Engagement for benefit**

A family is very much in favour of marrying a girl into an influential family so that they may benefit from this relationship.

### **e) Engagement based on a will**

In order to ensure a continued good relationship between given families, the head of a family announces the engagement of a couple before his death.

### **f) Engagement by force**

Sometimes, a powerful man forces the parents of a girl by violence, deceit or bribery to agree to the engagement of their daughter to him or another male member of his family.

### **g) Engagement based on loyalty**

A person agrees to the engagement of his daughter to a member of a religious family in order to prove his loyalty to this family.

### **h) Engagement as punishment**

In order to punish those who defy the head of the family by insisting on their own decision, the head of the family will impose his own will by spontaneously engaging him/her to another person.

### **i) Engagement at random**

A family may not be able to make a choice between the applicants. Therefore, it will select the one proving worthy by some deed on his part.

## **III. CONCLUSION**

Matchmaking and engagement are important social events in Afghanistan. The legislator, however, attached little importance to them while drawing the Civil Code. Although practically all the marriage laws since 1921 tried to do away with the economically and socially adverse practices of extravagant wedding expenses, *badd*, etc, the Civil Code does not cover these issues. Since in many regions people believe that engagements are binding and already create a bond similar to marriage, the regulations should be clearer in order to avoid doubt about the legal nature of engagement. The Afghan legislator should endeavour to bridge these gaps, and have the Civil Code address these issues to reflect the social realities of Afghanistan. Moreover, the legislator may study the legal principles operating in other Islamic nations in order to know how they have managed to deal with these issues.

## **IV. PROVISIONS ON ENGAGEMENT IN OTHER ISLAMIC COUNTRIES**

### **1. Definition of the term ‘engagement’**

In most Islamic countries, engagement has been defined as a mutual promise between a man and a woman to marry. Some countries have clearly differentiated engagement from marriage in order to distinguish the differences between the two institutions from each other, emphasising the non-binding character of engagement.

Similarly to the Afghan Civil Code, Article 5 of the Moroccan Moudawana Law No. 3/70 of 3 February 2004 defines engagement as a mutual promise of marriage between a man and a woman. It takes effect only if both parties announce the mutual promise.

The Syrian law clearly differentiates between engagement and marriage. Article 2 of the Law on Personal Status, Law No. 59/1953 states that engagement, the recitation of the *fātiḥa* verse, the receipt of the *mahr* and the acceptance of gifts do not correspond to marriage.

Similarly, Article 1 Tunisian Law on Personal Status 1956 points out that engagement is a mere promise to marry and does not constitute marriage.

In the same way, Article 2 of the Yemenite Law on Personal Status of 29 March 1992 defines engagement as a promise of marriage. That article unequivocally determines that a man can only be engaged with a woman if there are no permanent or temporary impediments to their marriage.

Finally, the United Arab Emirates' (UAE) Law on Personal Status of 2005 considers engagement as a mere mutual promise of marriage.

## **2. Legal consequences of withdrawal from an engagement**

The withdrawal from an engagement and its legal consequences are regulated differently in the various Islamic countries. Besides the obligation to return the gifts, some legal systems provide for a right to compensation if an engagement results in damages to one of the parties. Some have even defined the fate of *mahr*, whether paid completely or partially, should an engagement be broken off. However, what all these legal systems have in common is the fact that the termination of an engagement is always possible and does not require a reason.

Article 6 of the Moroccan Moudawana stipulates that the parties are considered engaged until a marriage is duly contracted. Each party has the right to break off the engagement at any time prior to marriage. Article 7 states that the termination of an engagement shall not entail the right to compensation. However, if one of the parties inflicts damage on the other party, the injured party has the right to claim a compensation for the damage incurred. According to Article 8, each party may ask for the return of their gifts provided that they have not broken off the engagement. According to Article 9, upon the termination of an engagement or upon the death of a party, the fiancé who has completely or partially paid the *mahr* may claim the return of what he has already given to his fiancée as *mahr* or its value at the time it was handed over. If she refuses to return the respective amount by which she has already bought her dowry, the loss will be borne by the party who has broken off the engagement.

Article 3 of the Syrian Law on Personal Status provides that each party may withdraw from the engagement. If the fiancé who is breaking off the engagement has already paid the *mahr* and the fiancée has spent part of it for her dowry, she may choose between paying the equivalent amount in cash or returning the dowry to him in kind. However, if it is the woman who has broken off the engagement, she must return the whole amount of the *mahr* either in cash or kind. As for voluntary benefits, the regulations for gifts will apply. The Syrian Court of Cassation has made the following decision on the withdrawal from an engagement: "If the fiancé is not responsible for the withdrawal, he may reclaim gifts he has given during the engagement." Thereby, the Syrian Court of Cassation proceeds on the assumption that "the purpose of giving gifts during an engagement is to consolidate the relations between the couple, paving the way for a marriage. A withdrawal from the engagement removes the reason for giving a gift. Therefore, a fiancé is entitled to claim back his gifts."<sup>14</sup>

Article 2 of the Tunisian Law on Personal Status stipulates that each party may reclaim gifts given to the other party following the termination of the engagement, unless the claiming party itself has broken off the engagement or agreed upon it otherwise.

In Yemen, both parties may withdraw from the engagement according to Article 4(1) Law on Personal Status of Yemen. Gifts given to each other during the engagement shall be returned according to Article 4(2). Like in other Arab states, a party shall return the gifts only if that

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<sup>14</sup> Court of Cassation – Civil Chamber, Case No. 706, Decision No. 617 of 5/12/1967, quoted as in: *Istānbūlī* I (1989), 50.

party broke off the engagement. According to Article 5, potential damages incurred on account of the withdrawal shall be compensated.

Article 18 Law on Personal Status of the UAE defines three types of termination of an engagement:

1. Unilateral termination of the engagement;
2. Bilateral termination of the engagement;
3. Termination of the engagement through the death of one of the parties.

Whenever an engagement is broken off by a party without any due reason, causing material or moral damages to the other party, the victim may ask for compensation (Article 18(1)(a) UAE Law on Personal Status). In addition, a fiancé may reclaim the *mahr* he has already paid to his fiancée if the termination of the engagement was caused by her. If the *mahr* does not exist anymore, its value shall be returned. If it is proven that the gifts given during engagement were an advance payment of *mahr*, their return is mandatory (Article 18(4) UAE Law on Personal Status). If the engagement is terminated by the man and the woman has already purchased the dowry from the money paid to her as *mahr*, she may return the *mahr* or hand over the items she has bought (Article 18(3) UAE Law on Personal Status). If a party breaks off the engagement without any due reason, they are not entitled to claim the return of gifts given to the other party. Only the deserted party is entitled to such (Article 18(5) UAE Law on Personal Status). If the withdrawal from the engagement is well-grounded and substantiated, the other party shall return the things they have received, and if these are not available anymore, their price shall be repaid (Article 18(6) UAE Law on Personal Status). If the engagement is broken off by common consent, each side shall return the available engagement gifts to the other side (Article 18(7) UAE Law on Personal Status). If the engagement is terminated on account of the demise of one of the parties or due to any other reason beyond the responsibility of the two, or because of an impediment to marriage, none of the parties shall be obliged to return the gifts (Article 18(8) UAE Law on Personal Status).

## C. MARRIAGE

### I. DEFINITION OF MARRIAGE

#### 1. Definition of marriage in the Afghan Civil Code

If the matchmaking leads to an engagement, the engaged couple may then, if the legal requirements are met, terminate the engagement by marriage.

Article 60 CC defines marriage as a contract legitimising the cohabitation of a man and a woman for the purpose of starting a family, and creating rights and obligations for the parties. Like any other civil contract, marriage shall, according to Article 66 CC, take effect by offer and acceptance. Entering into marriage legitimises cohabitation of a man and a woman in order to build a family. The validity of a marriage depends on its compliance with the requirements stipulated in the Civil Code.

#### 2. Definition of marriage in other Islamic countries

A legal definition of marriage can also be found in the legislations of other Islamic countries. There are two elements with regard to the definition of marriage which all Islamic countries including Afghanistan have in common. Firstly, it is a civil contract, and secondly, its objective is to build a family.

Article 1 of the Syrian Law on Personal Status stipulates that marriage is a contract between a man and a woman eligible for marriage for the purpose of cohabitation and procreation. Article 2 of the Syrian Law on Personal Status names the forms that are not considered marriage:

“The following cases shall not be considered as marriage: engagement, promise of marriage, the recitation of the *fātiḥa*, receipt of *mahr* and acceptance of gifts.”

Article 1 of the Jordanian Law on Personal Status No. 61, adopted in 1976, defines marriage as a contract between a man and a woman for the purpose of building a family and begetting offspring.

Article 6(2) and Article 7 of the Yemeni Law on Personal Status considers marriage as a consensual agreement for the purpose of building a family and legitimising the sexual relations between a man and a woman, which becomes valid by offer and acceptance in the course of contract negotiation.

A rather comprehensive definition of marriage may be found in the Moroccan Moudawana. Article 4 defines marriage as a civil contract by which a man and a woman agree to join for a common and permanent marital life. The purpose of marriage is to lead a life of fidelity and purity and to build a stable family under the guidance of both partners in accordance with the provisions of the law.

### II. CONDITIONS FOR A VALID MARRIAGE

#### 1. General

The conditions for a valid marriage can be divided into two categories: first, offer and acceptance by persons of the opposite gender, and second, other conditions to be met for the marriage to be valid.

A marriage can only be concluded between a man and a woman under Article 60 CC, which states that marriage is a contract which shall legitimise cohabitation of two persons of the opposite sex for the purpose of procreation.

Accordingly, a marriage concluded between two persons of the same sex by deception, mistake or any other circumstance is null and void and does not produce any legal effects. Similarly, marriage with a transsexual person is not permissible and is null and void.

If the necessary conditions are not met, the marriage will be either void (*bāṭel*) or legally defective (*fāsed*), depending on the kind of condition which is missing.

A void marriage does not entail any legal effects, even if the marriage has been consummated (Article 95 CC).

A legally defective marriage is defined in Article 96 CC as one in which offer and acceptance have been exercised, but other conditions have not been completely met. A legally defective marriage will produce effects only if the marriage has been consummated (Article 97 CC). Under these circumstances, the right to *mahr*, the proof of legitimate descent, the marital impediment of affinity, the waiting period and the right to maintenance will take effect. However, if the legally defective marriage has not been consummated, according to the above article, it will be considered void according to Article 95 CC.

Furthermore, Afghan law differentiates between a legally valid (*ṣaḥīḥ*) and a legally effective (*nāfedh*) marriage. If all the conditions for a marriage are met, it is a legally valid marriage. In order for the legally valid marriage to become legally effective, both parties to the marriage must be marriageable and of legal capacity. Moreover, if the consent of the legal guardian or the represented person, in case of marriage by proxy, has not yet been given, such a marriage is considered a provisionally invalid marriage (*mūqūf*). If both the conditions for legal validity and effectiveness are fulfilled, this marriage is a binding one (*lāzem*).

## **2. Conditions for a valid marriage**

Marriage is a consensual agreement. Besides its substantial components, such as offer and acceptance, other conditions should be met for the marriage to become valid. According to Article 77 CC, the following conditions shall be met:

1. The offer and the acceptance must be expressed either by the contracting parties or their legal guardians or proxies;
2. Two witnesses of legal capacity must be present;
3. No permanent or temporary impediments to marriage must exist.

According to Article 77 CC, in order for a marriage to become legally valid and effective, it is necessary that offer and acceptance are expressed either by the marrying parties, or their legal guardians, or their proxies. Since a declaration of intention can be delegated to a third party, the presence of bride and groom is not absolutely necessary. Furthermore, two persons must witness to the marriage and no impediments to marriage should exist. Since marriage is an agreement, apart from particular marriage regulations, in accordance with Article 504 CC, the General Provisions on Contracts may also apply (see Article 497 and the following articles).

### **a) Offer and acceptance**

The conditions for expressing the offer and acceptance of marriage are regulated in Article 66 CC:

1. A marriage takes effect after an explicit offer is made and an unequivocal acceptance is expressed;

2. A declaration of intention should denote immediateness and permanence without setting a time limit;
3. Offer and acceptance should be expressed in one session.

***aa) Intention to marry***

According to Article 77(1) CC, the contracting parties may express the offer and acceptance of marriage either personally or through their proxies. Apart from provisions on mutual consent as mentioned above, other conditions should also be met. Since marriage is more than a mere contract, not only the intention of the parties to conclude it is essential, but also their qualifications for marriage, such as legal marriage age, etc.

These provisions can be found in Articles 497 to 533 CC. Article 497 defines a contract as a correspondence between two intentions to create, amend, transfer or remove a right within the limits of law. Article 505 CC requires the mutual consent of the contracting parties to be expressed without any duress or coercion.

***bb) Declaration of intention***

Marriage is a legal transaction which comes into effect by the declarations of intention of two persons to marry which should agree in terms of content and relate to each other. Therefore, the declaration of their intention is a substantial condition for the validity of a marriage.

The offer is the proposal of marriage made by one party to the other, which has to be accepted by the other party, no matter whether it is made by the man or the woman. The person making the offer is called the offeror and the one accepting the offer is called the acceptor. For a mutual consent, offer and acceptance have to correspond in terms of their contents. According to Article 521 CC, this will be the case only if they reach a consensus on all the integral components of the contract. It is not necessary for the declarations of intention to be identical in content or even match in wording. But their contents should match as to the intended legal result. In other words, they should denote that the parties are willing to marry each other. Should the acceptance differ from the offer in terms of content, no agreement will be made. In this case, a new offer will be made to be accepted by the other party (Article 520 CC). An offeror may, at any time prior to acceptance, withdraw their offer (Article 17 CC).

According to Article 506(2) CC, the offer and acceptance are expressed in wording which is often used in customary law for the conclusion of contracts. While a declaration of intention may, according to Article 510 CC, be expressed implicitly, under Article 66 CC the offer and acceptance of marriage must be expressed explicitly. Any ironic or implicit declaration of intention produces no legal effect. Moreover, silence will not be considered as an acceptance (Article 525 CC). Only if there is a legal obligation to make a declaration of intention, silence may exceptionally be interpreted as an acceptance. Since this is not the case with marriage, silence with regard to an offer of marriage is not considered as an acceptance.

***cc) Immediateness and permanence of marriage***

Article 66 CC stipulates that offer and acceptance must clearly denote the immediateness and permanence of a marriage without setting any time limit. Because of the express provision

that marriage has to be permanent and without any time limit, any marriage concluded for a specified period (*šīghe*) is not permissible for Sunni Afghans at least.<sup>15</sup> It remains questionable whether this also applies to Shiite Afghans or if temporary marriage is considered contrary to the Afghan public order (for details on Article 131 Afghan Constitution, see Part 2 D above).

The declarations of intention by both parties should have an immediate effect. Article 67 CC stipulates that marriage shall not be subjected to a condition or a time limit. Thus it cannot become legally valid if it depends on the occurrence of a contingent condition or is agreed upon for some time in the future.

#### ***dd) Time and place***

According to Article 66 CC, the offer and the acceptance shall be expressed in one session at the same time. Therefore, the declarations of intention should also be expressed at the same time.

If both parties are present and one party leaves the session after hearing the offer, but accepts it only upon return to the session, no mutual consent between the parties exists. However, the declaration of intention may be considered as a new offer to be accepted by the other party. In fact, both parties may be in different places during the declaration of intention. Thus, it is possible that in the absence of one party their offer is conveyed by a messenger or in written form to the other party. In this regard, Article 523 CC has to be consulted in order to determine the time and place of the marriage. Accordingly, a contract between absent parties shall take effect, both in terms of time and place, as soon as the offeror is informed of the other party's acceptance, provided that the parties or the law have not specified otherwise. In addition, it is open to the contracting parties whose marriage is concluded through a messenger or in writing to agree that the marriage shall take effect, both in terms of time and place, as soon as the offer is accepted by the other party.

Under Afghan law, a declaration of intention by telephone is also permissible. In terms of time, Article 524 CC treats the conclusion of a contract via telephone like a contract between present parties. In terms of place, it is treated like a contract between absent parties.

#### ***ee) Forced marriage***

A bride and a groom must express their intention to marry with full consent. If they are forced to agree to a marriage against their will, it is a forced marriage. An arranged marriage should not be mistaken for a forced marriage. If a marriage between two eligible persons is arranged by their families without any pressure and both of the marrying parties freely agree to this arrangement, it is not a forced marriage.

### **(1) Prohibition of forced marriage by national laws and its legal consequences**

There is a clear provision prohibiting and including a sanction for forced marriage in the Afghan Penal Code of 1976. However, those provisions only refer to forced marriages of

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<sup>15</sup> A temporary marriage is a distinctive feature of the Shiite religion, which is followed in the family law of Iran. Article 1075 Iranian Civil Law stipulates that a marriage shall be considered temporary if it is concluded for a certain period of time.

widows or women of full age. Article 517 Penal Code stipulates that if a person forces a widow or a girl over 18 to marry someone else or himself against her own free will, that person will be sentenced to a short-term imprisonment. If the offence is committed due to *badd*, the perpetrator will be punished with a medium-term imprisonment not exceeding 2 years.

Furthermore, Article 429(1) Penal Code stipulates that if a person commits or attempts rape on either a female or a male person by force, threat or deceit, he shall be punished with a long-term imprisonment of not more than seven years. A forced child marriage may also be punished under this provision, as it can be considered as a violation of a person's free will.

Other provisions of the Civil Code also suggest that a forced marriage is contrary to law. Article 44 CC considers freedom as the natural indispensable right of human beings. A person whose rights are violated may, according to Article 45 CC, not only demand injunction against such a violation, but also ask for compensation if they incurred any damages.

With regard to the legal consequences of a marriage being considered forced, Article 505 CC stipulates that, for a contract to be legally valid, the mutual consent of the parties to the contract without any duress or coercion is required. It reads:

“The prerequisite of legal validity of a contract is the mutual consent of the concluding parties without any duress or coercion.”

Article 551 CC defines the term “duress” as unlawfully forcing a person to do something against their own free will, no matter if it is material or immaterial duress.

In the above context, force has not been legally defined. However, it can be inferred from Article 551 CC that, in the case of duress, the acting person resorts to force or, by employing means of coercion, forces another person to do something. Emotional abuse, blackmail and intense family and social pressure are means of coercion, to name a few, which could lead to any subsequent marriage being considered to be forced. Article 553 CC explicitly mentions physical or financial threats as means of coercion. In some extreme cases, even physical violence, abuse, kidnapping, illegal restraint and murder of persons are used as means of coercion.

A contract concluded under duress is defective, according to Article 558 CC. Therefore, any marriage concluded under duress or coercion will be defective. According to Article 133(1)(a) CC, a marriage may be annulled if one of the conditions for its validity is not fulfilled. If the legally defective marriage has not been consummated yet, it is considered void by Article 97 CC.

## **(2) Prohibition of forced marriage by international agreements**

The Universal Declaration of Human Rights (UDHR) of 10 December 1948 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 18 December 1979 both prohibit forced marriage. Article 16(1) UDHR states that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They have equal rights as to the conclusion of marriage, during marriage and at its dissolution. Article 16(2) UDHR stipulates that marriage shall be entered into only with the free and full consent of the future spouses.

Furthermore, Article 16(1) CEDAW emphasises the elimination of all forms of discrimination against women in issues concerning marriage and family to be addressed with the full and free mutual consent of the parties. States parties shall take all appropriate measures to

eliminate discrimination against women in all matters of marriage and family relations and, in particular, shall ensure, on the basis of the equality of men and women, the same right to enter into marriage, the same right to freely choose a spouse and to enter into marriage only with their own free and full consent.

### **(3) Forced marriage in the Afghan society**

According to observations reported by national and international organisations, forced marriages do take place in Afghanistan. These are marriages of under-age children, married by their parents or other persons, as well as marriages of adults, mostly women, against their free will and consent. According to the Afghan Independent Human Rights Commission, 60-80% of the marriages in Afghanistan are concluded without the consent or against the will of one of the spouses.

In an investigation by Amnesty International, people said that poor families accept offers of marriage for their young daughters in order to have their debts abated. Moreover, the general anarchy and impunity of armed groups have created an atmosphere in which early marriages of young girls are considered a means to secure their future. The reasons behind forced marriages are thus diverse and include, but are not limited to, abatement of a debt, threats by armed groups in regions not controlled by the government and where people have no access to courts, exercise of *badd* or *por*.

Another type of forced marriage is to have a widow marry her brother-in-law, even if he is already married. The widow, who is usually considered as the property of her husband's family, is forced to accept this customary option.

The consequences of forced marriages are disastrous. The Afghan Independent Human Rights Commission has registered 644 cases of self-immolation in Herat from September 2003 to December 2004, mostly lethal. The majority of these events were caused by family violence including forced marriage. It is, however, not always clear whether the women and girls were burned by themselves or by their family members.

### **(4) Forced marriage in other Islamic countries**

In some Islamic countries, legislators have taken actions against forced marriage. The legislation in Iraq explicitly prohibits forced marriage, making it a punishable offence. Article 9(1) Iraqi Personal Status Law No. 188 of 1959 stipulates:

“No relative or any other person is entitled to force a man or a woman into marriage. If such a marriage has not been consummated, it is considered null and void. Moreover, according to the above law, no relative or any other person is entitled to prevent a marriageable person of full age from marrying.”

Similarly, Article 2(2) of the Iraqi Personal Status Law makes duress and coercion a punishable offence. It also stipulates that the Personal Status Court shall notify the Prosecutor's Office in order to take legal measures against anyone forcing a person into marriage. They may also arrest such a person to ensure their appearance before the authorities mentioned. A person who has been subjected to coercion has the right to directly refer to the investigating authorities (Article 9(1) Iraqi Personal Status Law).

Article 13 of the Algerian Family Law of 27 February 2005 states that the *wali*, i.e. guardian, whether her father or someone else, is not allowed to force a girl under his guardianship who

is under the age of majority to marry or to arrange her compulsory marriage without her consent.

Kuwaiti law stipulates that a virgin girl between the age of puberty and 25 needs a guardian in marriage. The guardian in marriage will be a person who is a residuary in their own right (Arab. *‘aṣaba bin-nafs*) according to the order of succession. In the absence of such a person, a judge will act as guardian in marriage in accordance with Article 29 of the Kuwaiti Personal Status Law No. 51 of 7 July 1984. A divorced woman has no such constraints. However, she is recommended to delegate the conclusion of her marriage to her guardian (Article 30 Kuwaiti Personal Status Law).

In Syria, Jordan and Morocco, all forms of forced marriage are banned by law. However, a guardian may refer to the court for a decision against the marriage of the person under their guardianship. Article 63 of the Moroccan Moudawana stipulates that if a person is forced to enter into a marriage, they may file a petition for annulment of marriage both before and after consummation. That person is also entitled to claim compensation for the forced marriage.

According to Article 21 of the Tunisian Personal Status Law, forced marriage is considered null and void as well. However, Article 22 establishes that a void marriage may, after consummation, also entail the following effects:

1. Entitlement to *mahr* for the bride;
2. Creation of an ancestral bond;
3. Observation of the waiting period;
4. Emergence of impediments to marriage due to affinity.

In Yemen, a marriage is considered null and void if the requirements and conditions for marriage are not met (Article 31 Yemeni Personal Status Law). The consent of the couple is a precondition for a valid marriage. If this condition was not fulfilled at the time of the conclusion of the marriage, the couple shall be separated by a ruling of the court, unless the consent lacking in the beginning has been given later on. In such a case, the void marriage becomes valid (Article 31 Yemeni Personal Status Law). However, according to Article 320 of the Yemeni Personal Status Law, a void marriage which has already been consummated shall entail the following legal effects:

1. Entitlement to the *mahr*;
2. Creation of an ancestral bond;
3. Observation of the waiting period upon separation or death;
4. Creation of an affinity relationship;
5. Omission of *ḥadd* punishment for sexual intercourse of the spouse who was unaware of the invalidity of the marriage.

## **b) Capacity to marry**

A man or a woman has the capacity to marry when they reach the legal marriage age. Apart from age, the general legal capacity and mental health of the parties are to be considered.

### ***aa) Legal marriage age***

Article 70 CC regulates the legal marriage age. According to this article, the legal marriage ages for men and women are 18 and 16 respectively. The legal marriage age does not match the age of majority or full legal capacity, which is stipulated in Article 39 CC to be 18 for both men and women.

Therefore, men reaching the age of 18 become marriageable and acquire legal capacity at the same time. Women, on the other hand, are already marriageable at 16, but acquire full legal capacity only at 18, and therefore, are still lacking full legal capacity.

A marriage which is concluded prior to the marriageable age is defective and may be annulled by the court upon request. If a minor girl who has not yet reached full age, but is marriageable, in other words, a girl between 16 and 18 years of age, wants to get married, she requires the consent of her legal guardian. Article 108 Code of Civil Procedure can be applied here, which stipulates that, after the woman turned 17, it is not permissible anymore to file a petition for annulment of marriage on account of her not having been of marriageable age at the time of marriage. In other words, once she has reached the age of 17 and has not yet reacted, her consent to the marriage will be presumed.

### ***bb) Mental health***

Apart from marriage age, the qualification for marriage requires mental health of the parties to the marriage. Thus, it is possible for a person to be of marriageable age, but lacking the capacity to make a valid declaration of intention to marry.

#### **(1) Absence or lack of qualifications**

According to Article 40 CC, all persons under the age of 7 are considered undiscerning (*gheyr-e momayyez*) and thus cannot perform legal transactions (*mo<sup>c</sup>āmalāt-e hoqūqī*).

Additionally persons suffering from mental deficiency (*ma<sup>c</sup>tūh*) or insanity (*jonūn*) cannot perform legal transactions (Art. 40 CC). The insane (*majnūn*) is not able to render a sound judgement or act rationally. This state may be temporary or permanent. A person is considered mentally deficient (*ma<sup>c</sup>tūh*) when he has a mental disability which makes him speak partly rational and partly irrational. An insane or mentally deficient person who has reached the age of majority is considered void of legal capacity and cannot enter independently into a legal transaction. Therefore, they may not by themselves enter into marriage either. Article 545(1) CC stipulates that dispositions of insane or mentally deficient persons will become void only after their legal incapacitation has been registered by the court. If an insane or mentally deficient person has married prior to the registration of the incapacitation, Article 545(2) CC stipulates that the dispositions will not become void, unless his/her state of insanity or mental deficiency was evident at the time of the marriage or the other party was aware of it.

According to Article 39 CC, the stage of full legal capacity (*ahliyat-e hoqūqī-ye kāmel*) will be reached at the age of 18 for a mentally sane person. A person of legal capacity may enter into legal transactions (*mo<sup>c</sup>āmalāt*) and, therefore, into marriage as well. According to Article 41 CC, discerning minors, i.e. from age 7 to 18, possess only limited legal capacity (*nāqeṣ-e ahliyat*). This article also applies to those who, although having reached majority age, are prodigal or credulous (*safīh*) or neglectful (*ghaflatkārī*).

#### **(2) Prodigal, credulous and neglectful persons**

If a person of marriageable age wants to marry, one has to make sure whether that person is of sound mind, or prodigal, credulous or neglectful, in which case they cannot marry without a guardian.

A person is considered prodigal or credulous (*safīh*) if they are wasteful or extravagant and unreasonably generous. Such people do not possess sound judgement, although they are basically discerning and mentally healthy. A person considered neglectful (*ghaflatkārī*) is, on account of his/her naivety and simple-mindedness, not in a position to exercise his/her pecuniary interests. According to Article 546(1)CC, dispositions of such a person will be subjected to the provisions on dispositions of the discerning minor following the registration of their legal incapacitation by the court. This refers to Article 544(1) CC according to which exclusively advantageous dispositions of discerning minors are permissible without the legal guardian's consent. If the disposition is to the detriment of a discerning minor, it will be considered void, even if the legal guardian has declared their consent (Article 544(2) CC). The validity of dispositions both beneficial and detrimental to the discerning minor will be subjected to the legal guardian's consent (Article 544(2) CC).

According to Article 544(2) CC, a marriage creates both rights and obligations for the parties who are prodigal, credulous or neglectful. If the legal incapacitation is registered, a marriage will require the legal guardian's consent even if the party is of majority age. Dispositions prior to the registration of the incapacitation are valid and will not be considered void, unless they are made following exploitation or conspiracy (Article 546(2) CC).

#### ***cc) Permission of the legal guardian***

According to Article 246 CC, the father shall be the legal guardian and in his absence or incapacity, the male ascendants of the father. In the case of a conclusion of marriage between minors having no father or other guardian, the judge will exercise the guardianship according to Article 78 CC. The judge himself is not allowed to marry those who, according to Article 78 CC, are under his guardianship or to get his ascendants or descendants married to them (Article 79 CC). The Civil Code follows the Hanafi school of law here, according to which a guardianship in marriage lasts until the girl reaches full age. Article 80 CC stipulates:

“If a sane girl of full age gets married without the consent of her legal guardian, this marriage shall be valid and binding.”

As noted above, if a minor but marriageable girl, in other words, a girl between 16 and 18 years of age, wants to get married, she requires the consent of her legal guardian. This can also be inferred from Article 544 CC, which states that the consent of the legal guardian is required for dispositions of discerning minors that can be both, in the interest and to the detriment of the minor. If a contract is concluded by such a person without the consent of its legal guardian, the contract will be considered provisionally invalid (*mūqūf*). Its validity depends on the later consent of its legal guardian or the confirmation by the minor after they reach the age of majority. Thus, if a girl gets married without the consent of her legal guardian, her marriage will become valid either if her legal guardian gives his consent or by her own confirmation when she reaches full age. If the legal guardian does not give his consent, or if the girl has not reached full age yet or does not confirm the contract upon reaching full age, the marriage will be considered legally defective, according to Article 94 CC, and can be annulled upon request. If the marriage has not been consummated yet, it constitutes a void marriage (Article 97(1) CC). If the marriage has already been consummated, Article 97(2) shall apply.

***dd) Legal marriage age in international agreements***

According to Article 16(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the betrothal and marriage of a child shall have no legal effect. According to a definition by the Convention on the Rights of the Child, a child is every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier (Article 1 Convention on the Rights of the Child, 5 December 1989). Moreover, according to the CEDAW, all necessary action, including legislative measures, shall be taken in order to specify a minimum age for marriage and to make the registration of marriages in an official register statutory.

***ee) Marriages before reaching the legal marriage age in Afghan society***

Despite regulations on marriage age, child marriage has become a serious problem in Afghan society, entailing serious negative effects. Research carried out in Afghanistan after the fall of the Taliban show that child marriage is widespread. However, official data about the actual marriage age is not available because in many regions neither births nor marriages are registered. Many people do not even know their exact age. The marriage age in rural and urban areas varies, depending also on ethnic affiliation and the economic situation of the families. However, a pattern is emerging, showing that marriage of minor girls is very common, especially in rural areas. Many examples of such marriages demonstrate their devastating effects.

Entering into marriage prior to attaining the legal marriage age prevents the child bride from going to school. Due to early marriages, child brides are prone to early pregnancies. These girls may have to face serious physical and psychological consequences because they have not yet attained the necessary physical and mental maturity. According to the UN Population Fund in Afghanistan, two women die while giving birth every hour, which makes Afghanistan the highest maternal mortality rate in Asia. The reasons behind this are deplorable sanitary conditions and physically and mentally unprepared young mothers who are still children themselves.

The reasons behind child marriage in Afghanistan are manifold. Large numbers of people in this country are ignorant of the statutory laws and influenced by customary traditions and practices; the poor economic conditions are another factor. In such a situation, children are seen as commodities and are sold to the highest bidder for a lucrative bride price. The reasons for early marriage mentioned above also apply to child marriage.

In order to facilitate the enforcement of provisions on legal marriage age, it is necessary to implement the rule of birth and marriage registration. A prerequisite for the observance of the legal marriage age is, however, the existence of valid birth certificates. As long as age is determined on the basis of estimations which cannot be verified dependably, it is rather difficult to think of preventive or repressive measures to stop child marriage.

***ff) Regulations on the legal marriage age in other Islamic countries***

Other Islamic countries have also been trying to fight child marriage with their civil law and criminal provisions. Article 17(1) Law No. 1 of 29 January 2000 of Egypt regulates certain litigation procedures in matters of personal status, stating that disputes emanating from marriages cannot be heard if the female spouse has not reached the age of 16 and the male spouse the age of 18 at the time the action is brought. The aim of this is to make child marriage *de facto* more difficult.

In Jordan, the 2001 amendment of the Personal Status Law of 1976 raised the legal marriage age for both spouses up to 18 years. A judge may permit marriage for those who have attained the age of 15 if he is of the view that it is in the interest of both parties. Moreover, he relies on relevant instructions given to him by the Islamic Chief Justice (*qāḍī al-quḍāt*) (Article 2 Jordanian Personal Status Law). If the bride and the groom have not yet attained the legal marriage age, their marriage will be considered legally defective (Article 34 Jordanian Personal Status Law). However, Article 43 of the Jordanian Personal Status Law stipulates that an action for declaration of defectiveness of a marriage on account of non-compliance with the legal marriage age will be dismissed if the female spouse has already given birth to a child, or is pregnant, or if the spouses have attained the legal marriage age at the time of the action. The Sharia Court of Appeals of Jordan has ruled with regard to annulment of marriage on account of nonattainment of the legal marriage age: “If a woman argues that she had not attained the legal marriage age at the time of the marriage and wants the dissolution of her marriage where no sexual intercourse has taken place, the judge shall dissolve the marriage, unless her husband proves otherwise.”<sup>16</sup>

In Morocco, the legal marriage age for men and women is 18 years (Article 19 Moroccan Moudawana). The Moroccan legislation differentiates between void and legally defective marriages. An under-age marriage is not considered void (Article 57 Moroccan Moudawana), but a legally defective marriage. It can be validated after the spouses attain the legal marriage age and reconfirm it (option of majority).

### **c) Marriage concluded by a third party, legal and contractual representation**

#### ***aa) Legal guardianship in marriage***

##### **(1) General**

The guardian is obliged to take care of the education, upbringing, growth, well-being and security of the minor ward. This is called ‘guardianship of person’ (Dari *velāyat-e tarbiyat* or *velāyat-e nafs*).<sup>17</sup> Guardianship in marriage (*velāyat-e ezdevāj*) is also included in this duty.

According to Islamic law, there are two types of guardianship in marriage: (1) guardianship with the right of compulsion (*velāyat-e ejbār*) and (2) guardianship without the right of compulsion (*velāyat-e ekhtiyār*).<sup>18</sup>

The guardian with the right of compulsion may marry the minor off without the ward’s consent. The guardian without the right of compulsion, on the contrary, may not do so. Marriage is concluded by the guardian only with the consent of the ward. Guardianship with the right of compulsion applies to a situation in which the ward is legally incapable or has limited legal capacity,<sup>19</sup> and the guardian is allowed to conclude the marriage without the ward’s consent. Thus, the marriage can be imposed on the ward. Guardianship without the right of compulsion, on the contrary, is applicable when the guardian undertakes the marriage

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<sup>16</sup> Sharia Court of Appeals of Jordan, Decision No. 19541, quoted in: *Malham*, p.57.

<sup>17</sup> The difference between ‘guardianship of person’ and ‘guardianship of property’ will be discussed in more detail below in Part 4 A IV 3 b/c.

<sup>18</sup> According to the Decision No. 8809 of the Sharia Court of Appeals of Jordan, quoted in: *Malham*, p.57.

<sup>19</sup> See Part 4 A III 2 “Legal capacity of the child (*ahliyat*)” below.

of persons of full age and full legal capacity who, in deference to social customs and traditions, delegate the conclusion of their marriage to a guardian. This approach is principally marriage by proxy.

## **(2) Guardianship in marriage in the Afghan Civil Code**

The Civil Code defines neither the terms *velāyat-e tarbiyat* or *velāyat-e nafs* nor the term *velāyat-e ezdevāj*. Article 42 CC only refers to the provisions on the legal, testamentary or court-appointed guardian and custody when it comes to legally incapable persons or those of limited legal capacity. Articles 268 and 288 (section 10) regulate the administration of the property of a minor by the legal guardian. However, guardianship of person, which includes guardianship in marriage, has not been regulated by law. The only provision relevant to guardianship of person in the Civil Code refers to the father's guardianship in marriage of a girl between 15 and 16 years of age. As far as other aspects of the guardianship of person are concerned, there is a legal loophole, which will be explained in detail in Part 4 A IV 3 b below. In the following, the guardianship in marriage with regard to girls aged between 15 and 16 will be discussed.

## **(3) Guardianship in marriage of girls aged between 15 and 16**

In accordance with Article 71(2) CC, marriage of girls under 15 is forbidden. As ruled in Article 71(1), the right to guardianship in marriage of girls aged between 15 and 16 belongs to the authorised guardian or the competent court. Other persons are excluded from this right. The text of the law does not indicate whether the consent of the girl is necessary or whether a guardian can exercise guardianship with the right of compulsion and conclude the marriage without the girl's consent. However, in accordance with Article 505 CC, in order to conclude a valid marriage, as it is the case in any legal transaction, the consent of both parties is required. The question is whether, for the marriage of a girl aged between 15 and 16, the consent of the authorised guardian can replace the consent of the girl. There is no ruling in the Civil Code making the minor girl's consent a condition for the marriage.

Moreover, it is still not clear whether this rule also applies to those cases in which a girl aged between 15 and 16 wishes to get married, but her father refuses his consent. Here, the question arises whether the permission of the competent court can replace the consent of the father, or whether the permission of the court can be sought only when the father is dead or when he is legally or practically not able to fulfill his duty as a guardian.

## **(4) Guardianship in marriage of a girl who has reached the legal age of marriage**

With regard to girls who are between 16 and 18 years old, the consent of the legal guardian is required. In accordance with Article 80 CC, only the marriage of a woman of full age and legal capacity does not require the consent of the guardian.

## **(5) Guardianship in marriage in other Islamic countries**

In Tunisia, the legal marriage age is 18 for both males and females. In accordance with Article 153 of the Tunisian Law of Personal Status, majority is reached at the age of 18 (as amended in 2010). As stipulated by Article 6 of the Tunisian Law of Personal Status, minor fiancés need the consent of both the guardian in marriage and the mother. Article 8 of this law defines the guardian in marriage as the closest male ascendant. If the guardian and the mother

refuse their consent and the engaged couple insists on it, the judge will decide (Article 6 Tunisian Law of Personal Status).

With regard to the guardianship in marriage in Morocco, marriage of minors and that of majors must be differentiated. The legal marriage age in Morocco for both sexes is 18, i.e. the same as the age of majority. In accordance with Article 20 of the Moroccan Moudawana, the judge can permit the marriage of minors (less than 18 years old). For this purpose, the approval of the minor's parents or legal guardian is required (Article 21(1) Moroccan Moudawana). To legalise their consent, the parents or the legal guardian should give their consent to the marriage in writing (Article 21(2) Moroccan Moudawana). Following the judge's consent to the marriage, the guardian of the minor should sign the marriage certificate (Article 67 Moroccan Moudawana). If the guardian refuses to sign the document, the minor who wants to marry can submit his application directly to the judge. However, the judge will decide on the basis of the minor's interests (Article 21(3) Moroccan Moudawana).

Before the amendment of the Moroccan Moudawana in 2004, women of full age needed the assistance of an agnatic guardian in marriage to be able to marry as well. However, Article 24 of the new law states that the guardianship in marriage is a right of the female. The guardian in marriage is only selected by the woman of full age to act in her interest. According to the explanatory memorandum to the Moroccan Moudawana, the woman of full age can conclude a marriage by herself, with no need for the consent of a relative. However, she can authorise her father or a close relative to conclude the marriage on her behalf. In this case, the relative chosen by the woman will attend the marriage ceremony and sign the marriage certificate along with the woman.

In Algeria, despite numerous amendments made to Algerian law, the presence of a guardian at the marriage of a woman of full age is still required. However, the guardian's power has been considerably restricted. The guardian in marriage cannot conclude a marriage on behalf of a woman of full age anymore. He just needs to be present during the marriage ceremony. In accordance with Article 11(1) of the Algerian Family Law, the woman no longer needs to accept a certain man from her family who has been assigned by law. She can freely choose a man, even from outside the family circle, to act as her guardian (Article 11(1) Algerian Family Law). The marriage of a minor will be concluded by a guardian in marriage, who is either the father or a close relative of the minor. The judge is considered as the guardian of a person without a guardian (Article 11(2) Algerian Family Law).

In the United Arab Emirates (UAE), the marriage is concluded between the groom and the guardian in marriage of the bride, not herself (Article 38(1) UAE Law of Personal Status). The guardian in marriage should obtain the consent of the woman to the marriage only where she is of full age (Article 39 UAE Law of Personal Status). The guardian cannot conclude the marriage of a person without legal capacity or a minor without the permission of a judge (Article 28 and Article 30(2) UAE Law of Personal Status). If a woman of full age concludes a marriage without a guardian in marriage, the marriage is considered void. If the marriage had been consummated, the parties have to be divorced. However, the filiation of any children will be secured (Article 39 UAE Law of Personal Status). The guardian in marriage of a woman, as ruled by Article 23 of the UAE Law of Personal Status, is her father and in the absence of the father a male relative of the bride, in accordance with the inheritance hierarchy. With regard to guardianship in marriage, the law in Kuwait differentiates between two statuses. If the ward is sexually mature, but has not yet attained the age of 25, the guardian

concludes the ward's marriage (Article 29(1) Kuwaiti Law of Personal Status). However, in such cases, the consent of the ward is required (Article 29(2) Kuwaiti Law of Personal Status). Non-virgin women and those over 25 years of age enjoy the right to express their opinion on the marriage. However, their marriages are concluded by their guardians on their behalf (Article 30 Kuwaiti Law of Personal Status).

## ***bb) Marriage by proxy***

### **(1) Legitimacy**

In accordance with the general rules of Article 1554 CC and the subsequent articles, any transaction that can be performed directly by a principal is allowed to be concluded by a proxy as well (see further Article 1559 CC). According to Article 1554 CC, representation is a contract by which the principal appoints a proxy to represent them. Articles 534 and 541 CC also contain provisions which govern representation in concluding contracts. In accordance with Article 1574 CC, the representation provisions which are envisaged in Articles 534 and 541 CC also cover the interests of the proxy, the principal and any third party dealing with the proxy. In addition to this, according to Article 72(1) and Article 77(1) CC, choosing a proxy in a marriage is clearly permitted.

In order for a marriage by proxy to become legally valid, specific requirements should be complied with alongside the general rules of representation, which are stipulated in Articles 72 to 75 CC.

### **(2) Declaration of intention by the proxy**

As the proxy conducts legal transactions, they have to possess legal capacity. Therefore, the persons included in Article 40 CC cannot conclude a marriage on behalf of someone else.

### **(3) Limits to the power of representation**

The authority to conclude a marriage can be granted unrestrictedly or restrictedly (Article 1557 CC). In addition to this, representation can be confined to a single condition or to a future occasion.

#### **(i) Restricted power of representation**

The power of representation is restricted if the proxy concludes a marriage on behalf of the principal with a certain person on certain terms determined by the principal. In this case, the proxy is not entitled to choose someone else for the marriage or to negotiate other terms, for example with regard to dower. If the proxy acts beyond their given authority, under Article 74 CC, the action is considered an unauthorised act and its validity depends on the subsequent approval of the principal. Therefore, the principal can enforce the contract or nullify it.

If the proxy appoints someone else to act on their behalf, without the principal's knowledge, the action will be treated as exceeding their power of representation. In accordance with Article 73 CC, the proxy cannot substitute themselves without being authorised or permitted by the principal.

#### (ii) Unrestricted power of representation

The power of representation is unrestricted if the principal authorises the proxy unconditionally to choose a spouse for them and to conclude the marriage in their name. In relation to this, Article 72(2) CC has to be observed, which forbids self-contracting. According to this Article, the proxy is not entitled to marry the principal, unless it has been clearly agreed otherwise. Therefore, if on granting the authority, it has been clearly agreed that the proxy can also marry the principal, such a marriage is valid.

#### **(4) Effects of representation by proxy in marriage**

If the proxy conducts legal transactions in the name of the principal, legally allowed and within their authority, the transaction will directly affect the principal favourably or adversely. As ruled by Article 538 CC, the rights and obligations emanating from the contract affect the principal. Therefore, the principal will be married, not the proxy.

In addition to this, Article 75 CC provides that the proxy bears no responsibility with regard to the wife's conveyance to the husband and the payment of the dower, unless the payment is guaranteed by the proxy. If, in such a case the proxy has paid the dower, the proxy cannot claim it from the husband, unless the guarantee has been given with the consent of the husband.

#### **(5) Representation by proxy in marriage in other Islamic countries**

In the majority of the Islamic countries, the conclusion of marriages through a proxy is allowed. Only in Algeria has it been abolished, following reforms in 2005 (refer to Article 20, former Algerian Family Code).

In the United Arab Emirates, a marriage can be concluded by a proxy (Article 37(1) UAE Law of Personal Status). The proxy cannot marry the principal, unless the authorisation provides for such a possibility.

On the basis of the Kuwaiti law, representation by proxy in marriage is allowed as well (Article 27(1) Kuwaiti Law of Personal Status). The validity of a marriage concluded by a proxy without the power of representation depends on the consent of the principal. This applies also to cases in which the proxy exceeds the limits of their authority (Article 28 Kuwaiti Law of Personal Status).

In Tunisia, any person who wishes to get married can conclude a marriage personally or through a proxy according to Article 9 of the Tunisian Law of Personal Status. As stated in Article 10 of the Tunisian Law of Personal Status, the proxy is not restricted to specific limits. However, the proxy is not entitled to delegate their authority to another person without the consent of the principal. The authorisation should clearly identify the wife and husband and should be recorded by a notary.

Article 17 of the Moroccan Moudawana provides that the marriage will be concluded in the presence of both signatories. However, the court can permit such a delegation of authority under the following conditions:

1. The existence of particular circumstances preventing the principal from concluding the marriage themselves;
2. The authority is conferred by a notarial deed or private document with authenticated signature of the principal;

3. The principal is of full age and full legal capacity. If the authorisation is conferred by the guardian in marriage, he should meet the conditions for the guardianship in marriage;
4. The principal will include, in the letter of authorisation, the name of the other spouse and any other information they find necessary;
5. In the letter of authorisation, the amount of the prompt as well the deferred dower should be specified. In addition to this, the principal should state the conditions they require to be met as well as the conditions of the other side the proxy is ready to meet;
6. The letter of authorisation, containing the above requirements, will be signed by the judge.

### **3. Presence of witnesses**

Article 77(2) CC rules that in order for the marriage to become legally valid and entail legal effects, two witnesses should attend the process of the marriage. The witnesses should not be deaf and must give evidence during the marriage.

#### **a) Legal capacity of the witnesses**

The legal capacity of witnesses is defined in Article 39 CC. According to it, there are two conditions to be met by a person to be recognised as possessing legal capacity. They should be 18 years old to be able to conduct legal transactions. Moreover, they should be of unimpaired mental faculties. As such, a sane person of full age is considered as possessing full legal capacity.

#### **b) Number of witnesses**

Article 77(2) CC provides that two witnesses of legal capacity should be present during the marriage. The Code does not contain any ruling with regard to the sex of the witnesses. In accordance with Islamic law, they would have to include two men or one man and two women. However, this interpretation would contradict the international treaties Afghanistan has signed and ratified, and which aim to abolish all kinds of discrimination against women.

#### **c) Religion of the witnesses**

If the bride and the groom are followers of Islam, the witnesses should also be Muslims. In accordance with Article 92(2) CC, when a woman who is a follower of a book (religion) marries a Muslim man, the marriage should be concluded by her legal guardian in the presence of two witnesses who are also followers of the same book (religion).

### **4. Impediments to marriage**

In order to conclude a marriage correctly, no impediment or prohibition should exist at the time of the marriage. Impediments to marriage are either permanent or temporary. In case of a permanent impediment to marriage, the marriage is not allowed under any circumstances. If there is a temporary impediment to marriage, the marriage is not allowed until the impediment is removed. If the reason for the temporary impediment is eliminated, the marriage can be concluded.

### **a) Permanent impediments to marriage**

A permanent impediment to marriage prohibits a marriage between the parties in any circumstance. The permanent impediments to marriage are elaborated in Articles 81 to 84 CC and are divided into the four following categories:

1. Impediment of blood-relationship;
2. Impediment of affinity;
3. Impediment of extramarital sexual intercourse;
4. Impediment of milk kinship.

These will be explained in turn in the section below.

#### ***aa) Impediment of blood-relationship***

The impediment of blood-relationship as a permanent impediment to marriage is explained in Article 81 CC. In accordance with this article, a person's marriage to their own ascendants and descendants or to those of the father or mother and the first parentela of the grandfather's descendants is permanently prohibited. On the basis of this ruling, marriage to the following women and to those of any higher or lower degree is permanently prohibited: mother, grandmother, daughter, daughter's daughter, son's daughter, sister, sister's daughter, brother's daughter, parents' and grandparents' aunts. However, marriage to paternal and maternal cousins is allowed.

#### ***bb) Impediment of affinity***

The impediment to marriage due to affinity is dealt with in Article 82 CC. In accordance with this article, a person's marriage to the wives of his ascendants or descendants is permanently prohibited. Likewise, a person's marriage to the ascendants or descendants of his wife is permanently prohibited as well, provided the marriage has been consummated. As such, the following persons cannot be married due to the impediment of affinity:

1. Wives of ascendants, i.e. father's wife (stepmother), grandfather's wife (stepgrandmother) and so forth;
2. Wives of descendants, i.e. daughter-in-law, son's daughter-in-law, wife of daughter's son and so forth;
3. Ascendants of the wife, i.e. mother-in-law, wife's maternal and paternal grandmothers;
4. Descendants of the wife (provided that sexual intercourse takes place with the wife), i.e. wife's daughter, wife's granddaughters and so forth.

In relation to this, the provision of Article 94 should be taken into consideration:

“If, in a legally defective marriage, judicial divorce takes place between husband and wife before sexual intercourse and its preparation, such state of affair shall not prevent the spouse to marry those prohibited by reason of marriage.”

#### ***cc) Impediment of extramarital sexual intercourse***

The impediment which arises from extramarital sexual intercourse is regulated in Article 83 CC which provides that:

“The marriage of a person having extramarital sexual intercourse to ascendants and descendants of the sexual partner is prohibited. The marriage of ascendants and

descendants of a person having extramarital sexual intercourse to ascendants and descendants of the sexual partner is exempted from the prohibition.”

***dd) Impediment of milk kinship***

The impediment to marriage of milk kinship in Article 84 CC is equated with the one of blood-relationship in Article 81. Milk kinship, in accordance with Article 235 CC, is formed when a woman breastfeeds a child before they are two years old. The woman is considered the child’s milk-mother and the man whom the woman is in a relationship with is considered the milk-father. Milk kinship, according to the Hanafi school of law, is formed even if the child only once suckles a woman who is producing milk.

Article 84 CC exceptionally allows marriage to the sister of the milk-son, the mother of the milk-sister or the milk-brother, the grandmother of the milk-son or the milk-daughter, and finally to the sister of the milk-brother. In all other cases, a permanent impediment to marriage prevails.

**b) Temporary impediments to marriage**

Article 85 CC determines situations in which temporary impediments to marriage exist. A temporary impediment to marriage is characterised by the existence of a marriage possibility whilst a temporary situation prevents it. Temporary impediments to marriage arise in the following circumstances:

1. Upon entering into another marriage;
2. After three successive repudiations;
3. During the waiting period (*‘eddat*);
4. Upon invoking a curse (*li‘ān*);
5. In case of difference in religion.

***aa) Impediment to marriage upon entering into another marriage***

In accordance with Article 85 CC, if a man decides to marry a second wife whilst still married to the first one, there is a temporary impediment to the marriage if an impediment of affinity existed between the two women assuming that one was a man.<sup>20</sup> This would be the case if, for example, a man wished marry his sister-in-law. There would be a permanent impediment to marriage if one of these two sisters was assumed to be a man. Therefore, in order for the man to marry his sister-in-law, his first wife would have to be dead or divorced from him. Likewise, in accordance with the above provision, a combination of a wife and her niece or aunt is prohibited in a second marriage. However, a combination of a wife and her cousin is allowed.

***bb) Impediment to marriage after three successive repudiations***

If a man repudiated his wife three times and decides to remarry her, an impediment to marriage exists as long as the woman, in accordance with Article 85 CC, has not married

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<sup>20</sup> A hypothetical scheme for the purpose of deduction. The kind of relationship between a man and a woman which would prevent their marrying each other due to affinity, would in case of two women related in the same way prevent their both marrying the same man.

another man in the meantime. The rule has been specified further in Article 147 CC. Accordingly, a man cannot remarry the woman he has repudiated three times,<sup>21</sup> unless she marries another man and is divorced after consummation of the marriage and observes the waiting period.<sup>22</sup>

***cc) Impediment to marriage during the waiting period***

If a woman is married or observing a waiting period (*‘eddat*), a temporary impediment to marriage arises in accordance with Article 85 (3) CC. The waiting period is the period of time in which a woman, after a repudiation, death of her husband, annulment of marriage or judicial divorce (*tafrīq*) or separation following a legally defective marriage, has to wait until marrying again.

***dd) Impediment to marriage upon invoking a curse***

If a man accuses his wife of adultery, confirming his claim with a cursing oath (*li‘ān* or *la‘ān*),<sup>23</sup> and divorces from the woman as a result, he cannot remarry her, unless in accordance with Article 85(4) CC, he withdraws the allegation.

***ee) Impediment to marriage due to difference of religion***

The last temporary impediment to marriage mentioned in Article 85 CC is the case in which a Muslim wishes to marry a woman who does not belong to the people of the book (Islam, Christianity, Judaism) (Article 85(5) CC). If the woman converts to one of these religions, the impediment is removed. Indeed, in accordance with Article 92(1) CC, the marriage of a Muslim man to a woman who belongs to the people of the book is permitted. However, the marriage of a Muslim man to a woman who does not belong to the people of the book is a void marriage and will thus not entail any legal effects.

Although Article 85 CC is not clear with regard to whether this provision applies to the marriage of a Muslim woman to a non-Muslim man as well, it can be concluded from the law that, in this case, a temporary impediment exists as well. The first sentence of Article 92(1) CC clearly states that the marriage of a Muslim woman to a non-Muslim man is void. Such a marriage will not entail any legal effects. Therefore, in a Muslim woman’s marriage to a non-Muslim man, his affiliation to a book religion is not sufficient; the man has to be a Muslim. In this case, in order to remove the temporary impediment, the man who belongs to the people of the book should convert to Islam.

### **III. POLYGYNY**

#### **1. Legitimacy of polygyny under Afghan law**

Article 86 CC allows a man to marry more than one wife at the same time. The law is silent about the number of wives a man may get married to. However, according to all schools of

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<sup>21</sup> See Part 3 E II “Repudiation (*talāq*)” below.

<sup>22</sup> See Part 3 F I “Waiting period” below.

<sup>23</sup> A sworn allegation whereby the husband can accuse his wife of adultery and deny paternity of her child without legal evidence.

Islamic law, permanent marriage to more than four wives is prohibited. Polygyny is allowed only under certain conditions, which are regulated in Article 86 CC.

## **2. Conditions for polygyny**

A man, in accordance with Article 86 CC, can marry more than one wife under the three following conditions:

1. No fear for injustice to the wives should exist. It means that the man should ensure that equality is safeguarded among the wives, from all points of view including welfare, sexual relationships etc.;
2. The man should be financially capable of supporting his wives (food, clothing, housing and appropriate medical care);
3. A legitimate reason for another marriage should exist, such as infertility or incurable illness of the first wife.

However, a polygamous marriage concluded against these conditions is not considered invalid. Ignoring these conditions only provides the first wife with a ground for divorce. The first wife can, in accordance with the provisions of Article 183 CC, demand a divorce on the grounds of loss (Article 87 CC). However, she needs to prove that due to her husband's new marriage she has suffered a real loss.

Likewise, in accordance with Article 88 CC, the first wife can make her marriage subject to a condition in the marriage contract that if her husband marries another woman contrary to the provisions of Article 86 CC, the authority to divorce be transferred to her. If the first wife does so and her husband gets married again, she can demand a divorce without having to prove any loss. It should be taken into account that this agreement is valid only if it is stipulated in the marriage contract.

With regard to the second wife, Article 89 CC provides that if a married man conceals his marital status from the second wife, in case of discontentment and in accordance with Article 183 she can demand a divorce on the basis of loss.

In accordance with Article 93 CC, the marriage of a woman belonging to the people of the book to a man married to a Muslim wife and vice versa is permissible.

## **3. Polygyny in Afghan society**

No reliable statistics are available with regard to polygyny in Afghanistan. However, observations indicate that in the majority of polygynous marriages, the conditions stipulated in the Civil Code have not been complied with. Moreover, it is questionable whether the remedy for breach - i.e. divorce - is an option to many Afghan women. In many cases, a woman may prefer putting up with the polygamous marriage of her husband to demanding a divorce that leaves her without financial means.

Likewise, it is noteworthy that in accordance with Article 16 CEDAW all State parties should adopt all necessary measures to eliminate discriminations against women in marriage and family issues and guarantee the legal equality between men and women as well as the equality of rights and duties in marriage and divorce (Article 16(1)(c)). The question is whether polygyny is compatible with the provisions of the CEDAW.

#### 4. Polygyny in other Islamic countries

Concluding polygynous marriages with up to four wives is permissible under certain conditions in most of the Sunni and Shiite countries. At the same time, there is a movement towards curbing and even prohibiting polygyny. Opposition to polygyny began in the early 1920s. Modern religious reformers, who considered polygynous marriages as an injustice against women, advocated restrictive measures aimed at curbing polygyny. Some of the reformers believed that polygyny should be prohibited by law. They based their argument on the Quran, sura *AN-NISĀ'* (The Women),<sup>24</sup> verse 129, which reads: “Ye are never able to be fair and just as between women, even if it is your ardent desire”. Furthermore, this chapter reads: “...but if ye fear that ye shall not be able to deal justly, then only one...” (verse 3).

Tunisia has explicitly prohibited polygyny since 1956, the only Islamic country to do so. Article 18 of the Tunisian Law of Personal Status prohibits polygynous marriages and even punishes them with fines and imprisonment. Article 18 of the Personal Status contains the following five clauses:

1. Polygyny is prohibited;
2. A married man who marries again before dissolving his first marriage will be sentenced to one year imprisonment and/or a fine of 200 Dinars, even if the new marriage complies with the legal requirements;
3. If a man who has married out of the framework of the Law of Personal Status concludes a second marriage and continues living with his wives, he will be punished in the same way;
4. A person who knowingly marries someone incurring a penalty in accordance with the above two clauses will be punished in the same way;
5. Article 57 of the Penal Code will not apply to the penalties provided for here.

The Egyptian legislator has not dared to prohibit polygyny. However, efforts have been made through a variety of provisions to curb polygynous marriages. According to Article 11 of the Decree No. 25, dated 10/03/1929, the husband is obliged to declare his marital status at the time of marriage to the authorised person. If he is already married, he has to give his wife's/wives' names and addresses. The authorised person is obliged to inform the wife/wives of the new marriage. Article 11(2) of the Decree No. 25 allows the wife in this case to demand a divorce. She should prove that the new marriage will cause for her a major material or moral loss which makes it equally difficult for both of them to live any longer as husband and wife. This provision is enforceable even if the marriage contract contains no such agreement. Likewise, the second or the new wife enjoys the right to demand a divorce as well, if she has not been aware of her husband's marital status at the time of her marriage (Article 17(4) Decree No. 25). A husband who gives wrong information regarding his marital status at the time of the marriage will be punished. If the authorised person does not inform the first or other wife about the new marriage, he will be punished as well (Article 23 Decree No. 25).

In Syria, the husband can marry up to four wives in accordance with Article 37 of the Law of Personal Status. However, the approval of the court is required for a new marriage. The judge

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<sup>24</sup> This is the same chapter which in principle allows polygyny.

will allow a polygynous marriage only if it is proven that a legal reason exists for it and the husband is able to fulfill his duties with regard to the financial support of the wives (Article 17 Syrian Law of Personal Status). This provision was added to the law when it was amended in 1975.

In Jordan, as a result of an amendment made to the Law of Personal Status in 2001, it is required that, for a second marriage, the judge makes sure that the man is in a position to pay dowry and maintenance to the second wife (Article 3 Jordanian Law of Personal Status).

In Morocco, marriage to more than one wife also requires judicial consent. Article 40 Moroccan Moudawana provides that polygynous marriages are prohibited if both women are exposed to injustice. Likewise, if there is a monogamy clause in the marriage contract, it is prohibited as well. In case its necessity is not proven and the husband lacks the means to support two families and guarantee all their rights including maintenance, housing and equal treatment of both wives, the court will not allow a polygynous marriage (Article 41 Moroccan Moudawana).

According to Iraqi law as well, the consent of the court is required for polygynous marriages. Article 3(4) of the Iraqi Law of Personal Status stipulates that marriages to more than one wife are permissible only by leave of the court, which can be obtained under the two following conditions:

1. The husband should be financially capable of supporting more than one wife;
2. A legal reason should exist.

Clause 5 of this article states that if there is a possibility that the women may not be treated equally, polygynous marriage will not be permitted. The decision will be left to the judge's discretion. The judge will also assess whether the man will treat his wives equally or not. If equality proves unachievable, the court will not grant the permission. In case of any breach of these rules, the Iraqi law envisages one year imprisonment or a fine of 100 Iraqi Dinars for the perpetrator (Article 3(6) Iraqi Law of Personal Status).

## **IV. CONDITIONS IN THE MARRIAGE CONTRACT**

### **1. Party autonomy**

The bride and the groom can include conditions in their marriage contract regulating the details of their marriage. However, it is not established by law which specific conditions can be included in a marriage contract. The Civil Code includes a few isolated provisions referring to conditions in a marriage contract.

Generally speaking, any condition in a marriage contract can be valid if it is not violating the law and the purposes of marriage. This is governed by Article 68 CC. Conditions in a marriage contract should first of all contribute to the awareness of both sides of their mutual rights and duties in their married life and particularly of the personal effects of the marriage.

According to Article 88 CC, one of the conditions a bride and groom can agree upon at the time of their marriage is that the right to divorce will be transferred to the first wife if her husband, in contradiction to Article 86 CC, marries another woman.

There is a general rule with regard to the transfer of the right to divorce in the Civil Code, which can be considered as part of the conditions of the marriage. In accordance with the provisions of Article 142 CC, the husband can divorce his wife by a legal proxy or by

transferring the right to divorce to her. The right to divorce once transferred cannot be revoked, unless the woman has not accepted it (Article 143 CC).

## **2. Standard marriage contracts**

At present (April 2009), no standardised, official marriage contracts are available to be accepted and signed by both parties.

A Canadian human rights organisation (RIGHTS AND DEMOCRACY)<sup>25</sup> is currently working on a draft which will set conditions for marriage in Afghanistan, and which has already been approved by the Supreme Court in Kabul.

## **3. Conditions in marriage contracts in other Islamic countries**

There are rules in some other Islamic countries which allow contractual conditions of the couple to be included in their marriage contract in certain circumstances. In this, the legislators in the Muslim world today are trying more and more to promote party autonomy to the highest possible extent.

In accordance with Article 19 of the Jordanian Law of Personal Status, the parties can reach individual agreements. Conditions contained in the marriage contract should not violate the law or the purposes of marriage. They can be in favour of one of the parties, provided they do not cause any harm to the rights of the other. The conditions should be expressly written in the marriage contract. If the agreement meets all these requirements, it will be valid and the parties are bound by it. In this provision of the Jordanian law, there are examples of some possible conditions the man and woman can agree upon. For instance, the woman can reserve the right that the husband should not take her away from her home country, or should not marry a second wife, or should transfer the right of divorce to her. If the husband does not comply with these conditions, the marriage can be dissolved at the request of the wife and the man has to meet all the woman's claims arising from the marriage (Article 19(2) Jordanian Law of Personal Status). If the wife fails to observe a condition inserted by the husband into the marriage contract, the marriage can be dissolved at the request of the man. In this case, the husband is no longer obliged to pay maintenance to the woman during the waiting period (Article 19(2) Jordanian Law of Personal Status). If the condition violates the law or the purposes of marriage, the marriage will be considered valid and the condition as invalid (Article 19(3)). The Sharia Court of Appeals of Jordan have ruled that those conditions which are not recorded in the marriage contract are not valid.<sup>26</sup>

Article 14 of the Syrian Law of Personal Status rules that if one of the conditions of the marriage contract is against the purpose of the marriage, it is considered invalid, but the contract remains valid. According to a judgement by the Syrian Court of Cassation, a condition by the spouses that they cannot get divorced is void because such a condition

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<sup>25</sup> Rights & Democracy (International Centre for Human Rights and Democratic Development), is a non-partisan organisation with an international mandate. It was created by Canada's parliament in 1988 to encourage and support the universal values of human rights and the promotion of democratic institutions and practices around the world. Although its mandate is wide-ranging, Rights & Democracy currently focuses on women's rights as well.

<sup>26</sup> Jordanian Sharia Court of Appeals, Decision No. 7684, quoted as in: *Malham*, p. 34.

prevents the exercise of a right guaranteed in family law.<sup>27</sup> Likewise, the husband cannot make it a proviso that his wife has to travel with him. The law permits conditions to be included in the marriage contract, as far as they are in the woman's favour.<sup>28</sup>

Article 11 of the Tunisian Law of Personal Status provides that in a marriage contract, any condition with regard to the person and property can be included. In the event of non-compliance with these conditions, the dissolution of the marriage through divorce can be demanded. However, no specific examples of possible conditions are mentioned.

In the corresponding Egyptian laws, there is no direct provision with respect to possible conditions in a marriage contract. In fact, if a man marries a second wife, in accordance with Article 11a of the Decree No. 25 of 1929, his first wife can demand a divorce, even if there is no condition in the contract limiting the number of wives. This rule indirectly implies that it is legally possible to make such an agreement in the marriage contract.

Article 47 of the Moroccan Moudawana provides that all the conditions in a contract are binding, unless they contravene the provisions or aims of the mandatory law and the marriage contract. Such clauses are invalid, whilst the marriage contract remains valid. Moreover, Article 48(1) of the Moroccan Moudawana provides that conditions beneficial to one side are binding if the other side has agreed to them at the time of their conclusion. However, in the event of circumstances or facts occurring which make the application of a clause appear unreasonable, the other side can demand exoneration or adjustment from the court while these specific circumstances or facts prevail. In this regard, the provisions of Article 40 of the Moudawana are to be observed (Article 48(2)). As provided by Article 40 of the Moudawana, a polygynous marriage is prohibited if the woman has made that a condition in the marriage contract. It can be concluded from Articles 40 and 48 of the Moudawana that prohibition of polygyny is a possible contract clause. Moreover, this clause enjoys a particular significance because the husband cannot be exonerated from it by judicial proceedings.

The Iranian Civil Code of 1928/1935 permits in its Article 1119 those agreements in a marriage contract that are not contradictory to the nature of marriage. In Iran, standardised marriage contracts are distributed by the registration offices, containing conditions the parties adhere to by signing them. These clauses include a condition whereby the husband agrees to transfer up to half of the wealth earned during marriage to his wife upon repudiation. Furthermore, the marriage contract provides for additional contractual divorce reasons. As the principle of freedom of contract in marriage law is accepted, the parties can add individual and supplementary conditions to the contract.

## **V. REGISTRATION OF MARRIAGE**

### **1. General**

The Afghan Civil Code has provided clear rules for the registration of marriages, the registration procedure and the competent authorities.

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<sup>27</sup> Syrian Court of Cassation, case no. 33, decision no. 330 of 13/6/1966, quoted as in: *az-Zāhir*, al-mahāmūn 66 (2001), 1050.

<sup>28</sup> Syrian Court of Cassation, Decision No. 31 of 3/2/1968, quoted as in: *az-Zāhir*, al-mahāmūn 66 (2001), p. 1050.

As Article 46 CC states, the marital status of persons over 18 years of age should be registered (in accordance with Articles 47 to 50) in special registration offices. As provided by Article 47(1) CC, the marital status, is registered on an identity form, which can be obtained on demand. The identity form should include the following details: first name, family name, date and place of birth, occupation, nationality, place of residence, names of spouse and children with their dates and places of birth. Any changes in the status, including death, change of address and occupation, are registered in the identity form, as provided by Article 47(2) CC.

The documents related to marriage and divorce, recognition and proof of descent, which are drawn up by special bodies, are registered in accordance with the provisions of Article 48 in the offices mentioned in Article 46 CC. Those bodies are duty-bound to inform the competent bodies of these matters in writing for registration purposes.

All the matters mentioned in Articles 46 to 49 CC, which have been registered in special offices or entered in the National Identity Card, are considered established *vis-à-vis* third parties, in accordance with Article 50 CC. There can be no objections to information contained in these documents, unless the objection regards the genuineness of the document itself.

## **2. Obligation to register marriage**

According to Article 61 CC, every marriage has to be registered. It should also be certified by the competent authority in an official marriage contract in triplicate. The original is retained by the competent authority and each party to the contract receives a copy. Once it has been registered by the register office (Article 48 CC), the marriage is communicated to the competent identity registration office specified in Article 46.

Whenever the registration of a marriage is not possible in this way, it will be effected as provided by Article 61 CC regarding the registration of public documents. However, it should be added that failing to register a marriage does not affect its validity. A registered certificate facilitates establishing the existence of a marriage. In addition, the registration of a marriage guarantees that the relevant legal provisions, such as legal marriage age, are observed.

In legal proceedings concerning marriages, the court, first of all needs to establish if there is a marriage at all (Article 104(1) Afghan Law of Civil Courts Procedure). As stated in Article 104(2), the information on the existence of a marriage is obtained from those attending the ceremony. Under Article 105 of the Law of Civil Courts Procedure, the court then decides whether a trial should be held or whether the action should be dismissed. The registration of marriages would facilitate the court performance to some extent.

## **3. Registration offices**

The competent body for the registration of marriages is currently the district court of the area where the parties reside. Here, all the particulars of the wife and the husband are taken. The court provides the couple with a questionnaire, which should be filled with answers about their previous marriages, legal capacity and other particulars. The answers provided by the couple will be certified, signed and stamped by a notary and are sent to the competent court. The court will receive two photos of each of the spouses and hears the witnesses. Finally, the certificate is completed and registered by a competent civil servant. The judge of the district

court stamps the marriage contract and sends it to the Supreme Court. The certificate is handed over to the couple after having been signed at the Supreme Court.

#### **4. Registration of marriage in Afghanistan**

Current reports and surveys with regard to the marriage registration in Afghanistan indicate that in most parts of the country marriages are neither certified nor registered. According to interviews, only 5% of all marriages in Afghanistan have been registered. In spite of the existing regulations, registration authorities which could function systematically have not yet been created in Afghanistan.

The registration of births, marriages, divorces and deaths are indispensable for determining the population number and ensuring legal security in a modern state. Due to the lack of reliable registration, it is not possible to collect statistics with regard to the marriage of minors. Likewise, in marital disputes, the lack of official documents makes it difficult to prove the existence of a marriage.

The participants of the workshop on family law conducted by the Hamburg Max Planck Institute in 2006 stated that one of the reasons why people do not register their marriages is their distrust in courts. According to these participants, it is against the Afghans' way of thinking, habits and traditions to begin their marital life by going to a court, even if it is only in order to register the marriage.

The other reason for not registering marriages is the fact that there is no need for it in daily life. Presenting certified documents is rarely necessary in Afghanistan. According to the participants in the workshop, a simple but effective method for promoting registration would be a compulsory presentation of the marriage certificate to employers and landlords. For this purpose, trustworthy, perhaps extrajudicial, registration authorities should be set up all over Afghanistan.

#### **5. Registration of marriage in other Islamic countries**

The Egyptian law in Article 17(2) of Law No. 1/2000 rules that claims arising from an uncertified marriage will not be enforceable by law in case of a denial. A public document is one that has been executed by a competent official in exercise of his office.

In accordance with Article 18/19 of the regulations related to the Legal Decree of 1955 on the marriage registrars, *ma'dhūnīn*, solely the *ma'dhūn* is fully competent to notarially certify and register the marriage of Muslim Egyptians. Even though the official certification of a marriage does not constitute a condition for validity, certifying a marriage has indirectly been made obligatory due to the above rule. Therefore, claims arising from uncertified marriages cannot be heard in a court. Petitions for divorce or dissolution of marriage constitute an exception. In such situations, a written unofficial document is sufficient (Article 17(2) Egyptian Law No. 1/2000). The dominant academic opinion is that a letter can also be considered a written document in which a man acknowledges his marriage to the relevant woman. Claims not eligible for hearing are those which arise from uncertified marriages which cannot be proven by a written document either under Article 17(2). This approach is not applicable to proceedings concerning the legitimacy of children (Article 15 of the Law No. 25 of 1929).

In Syria, for the purpose of entering into a marriage, first of all, an application has to be submitted to the district judge in order to obtain the permission to marry (Article 40 Syrian Law of Personal Status). In accordance with Article 41, after having examined the submitted documents, the judge gives his consent to the marriage. Following this, the marriage is concluded by the judge or a registrar authorised by the judge (Article 43 Syrian Law of Personal Status). The Syrian law also determines the information to be recorded in the marriage certificate (Article 44 Syrian Law of Personal Status). The information which should be included in the document is, in accordance with Article 44, the following:

1. The full names and addresses of the parties;
2. The date and place of the marriage;
3. The full names and addresses of the witnesses and proxies;
4. The amount of the dower (*mahr mu'ajjal* and *mahr mu'ajjal*) and information on whether the *mahr mu'ajjal* (immediately payable portion) has been paid or not;
5. The signature of the parties and the person authorised to conclude the marriage and the certification by the judge.

The registrar prepares the marriage certificate and sends a copy of it to the demography office within ten days after the marriage (Article 45(1) Syrian Law of Personal Status). Sending the copy relieves the parties of the duty of informing the register office of their marriage (Article 45(2) Syrian Law of Personal Status). A marriage concluded out of court is recognised only if the necessary administrative requirements are complied with. In this regard, under Article 40(1) of the Syrian Law of Personal Status, the following documents should be produced:

1. A certificate from the chief of the district or the eldest person of the area, which should contain the names of the couple, their ages and addresses, the name of the guardian in marriage and a declaration of there being no legal impediment to the marriage;
2. Certified copies of the couple's birth certificates;
3. A health certificate issued by a doctor of the couple's free choice. The doctor should clarify that they are not carrying any contagious diseases and that there are no medical objections to their marriage. The judge can have the diagnosis checked by a doctor of his choice;
4. Approval of the security authorities if one of the parties contracting the marriage is a foreigner.

According to settled case law of the Syrian Court of Cassation, the application for recognition of the unregistered marriage can be admitted by a court only if both parties have reached the minimum age for marriage.<sup>29</sup>

In case a child is born or there are clear signs of pregnancy, the marriage will be recognised despite non-compliance with the above administrative requirements. In such circumstances, the possibility of punishment provided for by statute remains unaffected (Article 40(2) Syrian Law of Personal Status).

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<sup>29</sup> Syrian Court of Cassation – Sharia Chamber, case no. 337, Decision No. 326 of 1966, quoted as in: *Istānbūlī* I (1989), p. 110.

With regard to the penal provisions mentioned in Article 45 of the Syrian Law of Personal Status, the Syrian judicial procedure refers to Articles 470 to 472 of the Penal Code of 22 June 1949, under which any cleric who concludes a marriage without meeting the legal requirements will be punished with a fine of 25 to 250 Syrian pounds. This punishment will be enforced on the couple, their proxies and the witnesses as well.

The Sharia Court of Appeals of Jordan has ruled that legal actions relating to marriage or to claims to inheritance arising from the marriage are admissible even if the marriage is not registered.<sup>30</sup>

In Iran, marriages are not registered in a court building, but at marriage and divorce offices. The competent manager of the marriage and divorce office who officiates the wedding of the couple immediately enters the marriage in the register of marriages.

Moving the registration authorities from court buildings to official notary's offices can be considered in Afghanistan as well. Registering a marriage at such an office conforms better to the common mentality of the Afghan people and could encourage them to register their marriages. Likewise, it is possible to make standardised marriage contracts available to those religious jurists who usually officiate the weddings in Afghanistan. These contracts should be signed by the parties and registered by the imam with the competent authorities. Wife and husband can decide which conditions of the standardised contract they want to agree to. Penal measures would also be conceivable in case of a failure to register a marriage.

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<sup>30</sup> Jordanian Sharia Court of Appeals, Decision No. 27987, quoted as in: *Malham*, p. 31.

## **D. EFFECTS OF MARRIAGE**

### **I. THE EFFECTS OF MARRIAGE IN GENERAL**

A valid and effective marriage entails rights and obligations for both wife and husband, which are known as the effects of the marriage. Rules related to the effects of marriage are dealt with in the second chapter, section seven, Articles 90 to 130 CC. Examples of the effects of marriage are given in Article 90. In accordance with these provisions, a valid and effective marriage entails maintenance for the wife, the right to inheritance and the proof of descent. Dower and matrimonial property regime are also considered part of the effects of marriage. However, there are no provisions in the Civil Code which clearly govern the matrimonial property regime. This can be explained by the fact that the Hanafi school of law, like other schools of Islamic law, starts from the principle of separate property. Nevertheless, the couple can agree on another matrimonial property regime, such as community of property, provided that it does not violate the law or the purposes of marriage.

Articles 90 to 97 CC include general provisions with regard to the effects of marriage and Articles 98 to 114 contain detailed rules on dower. Articles 115 and 116 regulate the obligation of the husband to provide accommodation for the wife. Articles 117 to 130 include rules which deal with the obligation of the husband to maintain his wife. The impediment of affinity is regulated by law in the framework of impediments to marriage and has already been discussed above. The rules for proving descent will be discussed later in the chapter on Child Law.

As stated above, the parties can include conditions in the contract, which will regulate the form of their future relationship and their rights and obligations towards each other in their joint life. As noted, in general any agreement that does not violate the law or the purposes of marriage can be included in the marriage contract (Article 68 CC).

#### **1. Common rights and obligations of the spouses**

The wife and husband are obliged to treat each other with consideration and respect. It is their common obligation to take care of the well-being and upbringing of the children resulting from their marriage. The right to sexual intercourse is constituted exclusively by marriage. Here, it is noteworthy that Article 91 CC considers full privacy between the spouses as equal to consummation of marriage. In an Islamic legal context, the term ‘full privacy’ is used to refer to the presumption of sexual intercourse. This presumption is raised in a situation where bride and groom are together in a private place, out of other people’s sight and without any disturbance which could prevent sexual intercourse. This matter is connected to the husband’s obligations with regard to the payment of dower, the proof of descent, maintenance and the impediment of affinity. Finally, the couple’s right to inheritance is also considered as their common right.

#### **2. The different rights and obligations of the spouses**

With the conclusion of marriage, the wife and the husband assume certain different rights and obligations, which are mutually dependent. Whilst the wife becomes entitled to dower and maintenance, she is obliged to obey her husband, stay in his residence and to not leave it without his permission.

These obligations of the wife are derived from the concept of Article 122 CC, in accordance with which her right to maintenance will lapse if she does not fulfill her marital duties. Thus, the rights of the woman and the obligations of the man are mutually dependent, and vice versa. Paying dower and maintenance are some of the husband's obligations.

## **II. DOWER (*MAHR*)**

### **1. Legal nature and creation of dower**

Dower (*mahr*) is an asset the husband owes his wife as a result of the marriage. *Mahr* should not be confused with bride price, which is called *walwar* in Pashtu. Bride price has no legal basis in either Islamic or state law (see Part 3 B I 3 above).

The dower is not a condition for validity of the marriage. A marriage is valid even if no *mahr* has been agreed on, provided the general conditions for its validity are met. In accordance with Article 110 CC, upon conclusion of the marriage the wife becomes the owner of the dower. Therefore, *mahr* is an indispensable as well as non-transferable right of a woman when getting married.

The Civil Code has devoted a relatively significant number of its provisions to the *mahr*. It is regulated by the first sentence of Article 91 and Articles 98 to 114 CC.

### **2. Types of dower**

There are two kinds of *mahr*: specified dower (*mahr-e mosammā*) and proper dower (*mahr-e methl*).

#### **a) Specified dower**

This is a dower which is determined by mutual agreement at the time of marriage. In accordance with Article 99 CC, the woman is primarily entitled to the specified dower. As stated by Article 100 CC, any asset which is transferable can be used as a dower.

An asset chosen as a dower should conform to the three following conditions:

1. The property should be of value, i.e. the asset should exist, be subject to legal trade and have a price. Therefore, this asset should be acquirable;
2. The asset should be deliverable, i.e. the owner should be able to submit it to his wife;
3. The property should be real, i.e. it should not be virtual or imaginary, and its quantity, quality and specifications must be shown, unless it comes under the provisions of Article 104 which will be discussed below.

In accordance with Article 104 CC, a woman can leave the determination of the dower to her husband. She can ask for its determination after the conclusion of the marriage or before consummation of the marriage. In this case, the husband is obliged to make a decision as soon as possible. If he refuses to do so, the woman can demand a competent court to determine the proper dower.

#### **b) Proper dower**

If at the time of the marriage, the dower has not been agreed on or has been eliminated, the woman becomes entitled to a proper dower, that is a customary dower. Therefore, a condition

of the parties to eliminate it is invalid. Similarly, in case of an unspecified decision with regard to the dower, the woman is entitled to a proper dower.

The law does not provide any rule for how to determine the proper dower. According to the Sunni Hanafi and Shiite schools of law, in order to settle this matter, the social status of the woman's family will be taken into consideration. The dower of a female paternal relative, such as a sister, paternal aunt or paternal cousin, who is her equal will be taken into account as a reference.

In case of an exchange marriage (see Part 3 B I 3 b above), Article 69 CC provides that every woman is entitled to a proper dower. The reason why this matter has been legally settled is that in such marriages, women are often exchanged without any *mahr* being paid out to them.

### **3. Amount of the dower**

The Civil Code does not provide any rule with regard to the amount of the dower. Therefore, the parties are free to settle it themselves. Article 100 CC only states that any property which is transferable can be used as a dower.

In addition to this, Article 102 CC permits the husband to increase the dower after the conclusion of marriage. Such an increase is subject to the three following conditions:

1. The increase should be specified;
2. The wife or her guardian should accept the increase;
3. The marriage must still be in force.

### **4. Maturity of the dower**

In accordance with Article 98 CC, the whole dower becomes due after consummation of the marriage or full privacy (*khalvat-e ṣaḥīḥ*) between the couple. The Civil Code considers full privacy as equal to consummation of marriage, even if the husband is impotent. Moreover, the dower also becomes due upon the death of one of the spouses, regardless of its occurring before or after full privacy.

Furthermore, in accordance with Article 101(1) CC, the spouses may agree to defer the payment of the whole or parts of the mahr. If no such agreement has been reached, in accordance with Article 101(2), one can resort to customary law for the time of maturity of the dower. In the event of the husband's death, the deferred dower becomes due, unless a specified due date has been determined at the time of the marriage (Article 101(2) CC).

If the wife dies before obtaining the whole dower, her heirs can demand the remainder of the dower from the husband, in accordance with the Article 114(2) CC. If the husband has died too, the heirs of the wife can demand the remainder of the dower after deducting the wife's share of the inheritance from his heirs. In the event of the husband's death, the provisions of Article 109 are also applicable. If a person is suffering from a fatal illness during the marriage and dies as a result, and if the wife's dower is determined to be more than a customary one, under Article 109, the surplus is subject to the provisions on the will.

## 5. The right to dower before consummation of marriage

Article 105 CC provides that if a judicial divorce (*tafrīq*) occurs before the consummation of marriage or full privacy, the woman is only entitled to half of the specified dower, otherwise half of the proper one.

Moreover, Article 105 uses the term *tafrīq*, which is used by the court in the event of the wife's demand for a divorce and a court's ruling based on specific reasons. However, the wording of the Article 106 raises doubts with regard to the meaning of the term *tafrīq* in Article 105. Article 106 reads:

“If judicial divorce (*tafrīq*) takes place by request of the wife prior to the consummation of marriage or full privacy, her right to dower will expire completely.”

In accordance with the provisions of Article 176 CC et seqq., *tafrīq* can be demanded from the court only by the woman if certain reasons for divorce exist. As a result of this, the relationship between Articles 105 and 106 seems very vague. On the one hand, Article 105 provides that in case of a judicial divorce - which can be obtained legally only by the woman - before the consummation of marriage or before full privacy, the wife is entitled to half of the dower. On the other hand, in Article 106, it is established that as a result of a judicial divorce before the consummation of marriage or full privacy, the wife's right to dower is entirely forfeited.

For a better understanding of these two provisions, more attention should be paid to the relationship between Articles 105 and 106 in order to determine more clearly those situations in which a wife is entitled to half of the specified dower before the consummation of marriage or full privacy. Later, the legal provisions which govern the situations where no dower has been determined and no consummation of the marriage has taken place will be discussed.

In order to understand the relationship between Articles 105 and 106, the Hanafi legal doctrine should be taken into consideration, as the source of these provisions. According to Hanafi law, a woman is entitled to half of the dower when she is repudiated by the husband before any actual or assumed consummation of the marriage, or if the dissolution of the marriage is caused by the husband, for instance by taking an oath of abstinence from sexual intercourse, invoking a curse upon his wife, his impotence, apostasy or his refusal to convert to Islam after his wife has done so. Therefore, Article 106 has to be understood to mean that a judicial divorce deprives a woman of half of the dower when she herself is responsible for the dissolution of the marriage before consummation or full privacy. Thus, the term *tafrīq* in Articles 105 and 106 CC refers to the dissolution of marriage in general.

The wife's right to half of the specified dower arises definitely when she is repudiated by her husband before the consummation of marriage or full privacy.

In short, the woman will be entitled to half of the specified dower under the following conditions:

1. The marriage is valid;
2. The dower has been determined validly at the time of the marriage;
3. The divorce takes place before the consummation of marriage or full privacy of the spouses;
4. The divorce has been initiated by the husband.

In order to protect women from a double financial loss in the event of being repudiated by the husband, Article 111 CC provides that if the wife gives all or part of the dower, before or after

obtaining it, to the husband as a present and is repudiated before consummation of the marriage, the husband cannot demand half of the dower.

Similarly, Article 112 CC states that where the dower is neither cash nor equivalent object, and the woman gives all or part of it to her husband as a present, when a repudiation takes place before consummation of marriage, the man cannot claim anything as a dower.

## **6. Complete loss of the right to dower**

In addition to the situation envisaged in Article 106 CC, the woman in a *khol<sup>c</sup>* divorce<sup>31</sup> loses her right to dower, regardless of whether the *khol<sup>c</sup>* takes place before or after consummation of the marriage. According to the provisions of Article 163 CC, where the *khol<sup>c</sup>* is granted in return for the whole dower, the woman is obliged to return whatever she has already received of it. On the contrary, if nothing has been paid yet, the husband is released from the obligation, regardless of the time of the *khol<sup>c</sup>*, i.e. before or after consummation of the marriage.

Moreover, it should be taken into consideration that if the dissolution takes place before the consummation of marriage or full privacy of the spouses, the right to dower is abolished because a legally defective marriage which has not been consummated is considered void under Article 97(1) CC. In accordance with Article 95, no effects of a valid and effective marriage apply to a legally defective one which ends before its consummation.

## **7. Waiver of the dower**

A woman of full and marriageable age who is physically as well as mentally fit, can in accordance with Article 103(1) voluntarily waive all or part of the dower determined in cash. It is noteworthy that this provision is applicable only to those cases where the dower includes cash because if the dower is an object, the wife already acquires a title to it due to the agreement. If the dower is a claim to money, the wife acquires a pecuniary claim against the husband from the day of the agreement on.

In addition to this, Article 103(2) provides that the father of a minor girl can in no way waive the dower on her behalf. Therefore, this provision applies to the guardianship in marriage by the father if the girl is between 15 and 16 years of age at the time of marriage as provided by Article 70 CC because the marriage of those under the age of 15 is prohibited.

Article 103(2) is completed by Article 113 in that the father is not allowed to give away all or part of his daughter's dower. Likewise, Article 114(1) CC clearly prohibits forcing a woman to cede all or part of her dower to her husband or someone else.

## **8. Right to *mot<sup>e</sup>* or basic necessities**

If no dower is determined and the divorce takes place before consummation of the marriage or full privacy, Article 105 CC rules that in such a case the woman is entitled to half of the proper dower. In addition to this, Article 107 states:

“In the event that the divorce of the spouses takes place prior to the consummation of marriage or full privacy, the wife shall be entitled to a compensation (*mot<sup>e</sup>*) consisting

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<sup>31</sup> A divorce where the wife waives her monetary rights in exchange for a divorce.

of ordinary clothing and the like. When determining the compensation, the financial situation of the husband shall be taken into account and the costs shall in no way exceed half of the proper dower.”

The question arises whether the *mot'e* is granted in addition to half of the (specified or proper) dower, or if it replaces them. Additionally it cannot be concluded from the wording of Article 107 whether the husband is obliged to provide *mot'e* only where no dower is determined or if it also includes those marriages where dower is determined.

In order to comprehend the spirit and purpose of these provisions, one has to refer to the Hanafi legal doctrine. There the right to the proper dower arises under the following circumstances: where no dower has been determined; where it is negated; or where an illegal dower has been determined. On the other hand under Hanafi law, where the dower is not determined the woman cannot claim half of the proper dower if she is repudiated before consummation of the marriage. In such cases, the husband is only obliged to provide for a compensation, *mot'e*, which includes gifts, especially clothing. The wife loses the right to *mot'e* if she has obtained the dissolution of the marriage before its consummation.

When choosing the clothes as part of the *mot'e*, local customs must be observed (i.e. kind of clothing women wear when they leave their parents' house), as well as the husband's financial means. Instead of clothing or gifts, cash can also be paid. However, the amount of money or the value of the gifts cannot exceed half of the proper dower, regardless of whether the husband is rich or poor.

As such, the provisions of Article 107 are only applicable in those circumstances where no dower has been determined at the time of the marriage and the marriage is dissolved before its consummation, provided that the dissolution of the marriage has not been initiated by the woman.

This conclusion can also be drawn from Article 108(1) CC, which provides that if the repudiation takes place before the consummation of marriage and if a dower has been determined or if the husband dies before the consummation, the woman will not be entitled to *mot'e*.

In principle, the husband is not obliged to provide *mot'e* if he repudiates his wife after the consummation of marriage. But Article 108(2) CC provides that if the repudiation takes place after the consummation of marriage, regardless of a dower being specified or not, the husband is allowed to provide the wife with *mot'e*. According to this provision, the woman has no legal claim to the *mot'e* in addition to the dower because in such a case, she is entitled to the entire specified or proper dower. Only the Hanafi school of law recommends *mot'e* in the case of repudiation after the consummation of marriage. Therefore, the provision of *mot'e* by the husband is not obligatory in such cases, but is recommended.

## **9. The significance of dower in Afghan society**

Although the Civil Code provides that the dower is owned by the wife, who may freely dispose of it, it is customary in Afghanistan that the dower is handed over to the wife's father, rather than directly to her. In most cases, the wife is not even aware of whether a dower has been determined and whether it has already been paid or not. In addition, most women are entirely oblivious to the legal and religious reasons behind their right to dower and its significance.

According to the report issued by the Max Planck Institute in 2005, even educated women did not know whether an agreement was made at the time of their marriage with regard to their dower, or how much it was. In rural areas, the situation is even more unfavourable to women, since in most cases they do not know that they are entitled to the payment of dower. In general, Afghan women undervalue the dower because they do not perceive it as a woman's right arising from the marriage. It is associated with financial emergency assistance after a divorce. To mention dower during matchmaking or at the time of engagement would mean to contemplate divorce even before getting married.

## **10. Dower in other Islamic countries**

The husband's obligation to pay dower to his wife is recognised in all Islamic legal systems. However, the systematic classification of the dower is assessed differently. The Tunisian legal system, for instance, considers the dower on the basis of the Maliki law as a condition for the validity of a marriage, while most of the other Islamic legal systems regard it as a legal effect of the marriage. All the Islamic legal systems recognise the dower as belonging exclusively to the woman, who may freely dispose of it.

In most legal systems, the amount of the dower can be determined freely and its payment, totally or partially, can be agreed in the forms of prompt or deferred dower. As soon as the woman marries, she becomes the owner of the dower, which can be in the form of gold coins or jewellery, even if it has been deferred. If the dower is determined in cash, the wife can demand it from her husband as soon as she gets married, unless the payment is agreed to be made sometime in the future.

### **Syria**

In Syria, the woman is entitled to a dower on the basis of a valid marriage, regardless of it being determined, not determined or excluded at the time of the contract conclusion (Article 53 Syrian Law of Personal Status). Moreover, according to Article 54, no minimum or maximum limit has been put on the dower. Any legally permissible object can be considered as a dower. Under Article 55 of the Syrian Law of Personal Status, the whole dower or part of it can be due immediately or be deferred. If there is no written agreement, the matter will be dealt with according to custom. Article 57 provides that any increase, reduction or waiver of the dower during the marriage or the waiting period after a divorce is void, unless the parties declare the modification to the judge and renew the text of the contract in his presence. Where the dower is stipulated in a valid marriage contract and the marriage is dissolved before consummation or full privacy, the woman is entitled to half of the dower (Article 58).

If no dower is provided for or an incorrect one is stipulated in a valid marriage contract, Syrian law provides under Article 61(1) of the Law of Personal Status that a proper dower is payable. If the divorce takes place before consummation of the marriage or full privacy, compensation (*mo'fe*) will have to be paid to the woman (Article 61(2)). According to this provision, the *mo'fe* includes decent clothing corresponding to the woman's social status at the time of her leaving her parents' house. The husband's interests will also be taken into account in determining the value of the *mo'fe* and it should not exceed half of the proper dower. If the divorce before consummation of the marriage or full privacy results from the wife's behaviour, her right to the whole dower will lapse (Article 59 Syrian Law of Personal Status).

In order to ensure that the woman really obtains the dower, the Syrian law provides that not only it is due to the woman alone (Article 59 Law of Personal Status), but also that the husband can only liberate himself from the obligation to pay the dower by paying it to the person of the wife, provided that the woman is of full age and no proxy is included in the marriage contract in order to accept the dower (Article 60).

### **Jordan**

In Jordan, Article 44 of the Law of Personal Status divides the dower into two types: specified dower and proper dower. The specified dower is one which is agreed by both parties at the time of the marriage. If the dower has not been determined in a valid marriage, or the husband marries on condition that the woman is not entitled to a dower, or a deficient dower has been determined, under Article 54 of the Law of Personal Status, the woman will be entitled to proper dower. This law determines how to establish the proper dower. According to this provision, the proper dower corresponds to the dowers which have been obtained by paternal female relatives of the same social level as the bride. If no such woman is found among the paternal relatives of the bride, the dower of a similar woman from the same town will be used as a criterion.

The Jordanian law does not prohibit the father or grandfather from accepting the dower. They are allowed to accept the dower even if the woman has full legal capacity. Unless the woman clearly prohibits the payment of the dower to her guardian in marriage, the guardian can receive it in accordance with Article 64 of the Law of Personal Status.

The dower can be paid totally or partially as either prompt or deferred dower, which should be confirmed in writing (Article 45 Law of Personal Status). Where it is not explicitly defined as a deferred one, the dower has to be paid immediately.

According to Article 51 of the Law of Personal Status, in all cases where the dissolution of marriage is initiated by the husband before consummation of the marriage or full privacy, only half of the specified dower is due. These cases are: dissolution of the marriage by repudiation, through an oath of *li'ān*, the husband's impotence, his apostasy from Islam or his refusal to convert to Islam in case of his wife's conversion, or an action of the husband causing a marriage impediment of affinity. If, however, it is the wife who initiated the dissolution of marriage before consummation, she will not be entitled to half of the dower. If prior to consummation or full privacy the marriage is dissolved before a dower has been determined, the woman will be entitled to *mo'ē* (Article 55 of the Jordanian Law of Personal Status). The *mo'ē* will be determined, according to custom, on the basis of the husband's financial means and should not exceed half of the proper dower.

### **United Arab Emirates**

In the United Arab Emirates, Article 49 of the Law of Personal Status provides that the word "dower" (*mahr*) represents a property which is given by the husband to his wife upon the marriage. There is no minimum rate of dower, but its maximum limit is determined under Article 1 of the Law Number 21/1997. This law came into force on 31 December 1997 and also covers the maximum limit for wedding expenditure. In accordance with this provision, the dower payable on the occasion of the marriage is limited to 20,000 Dirhams and the one payable at the end of the marriage, due to divorce or death of the husband, is limited to 30,000 Dirhams. If any amount higher than that is agreed, this does not invalidate the marriage, but no claims with regard to higher amounts can be enforced in Emirati courts. In addition, Article 5 of this law provides that stipulating any higher amount is punishable by a fine of 500,000 Dirhams.

According to Article 50 of the Law of Personal Status, the dower belongs to the wife and she can dispose of it as she pleases. Deviating contractual agreements are irrelevant. Generally, the woman is entitled to the dower agreed upon in the marriage contract (Article 51). If no dower has been determined in the contract, if it is defective, or if it has been agreed that no dower should be paid, the woman will be entitled to the proper dower, as provided by Article 51(2).

According to the provisions of Article 52(1) of the Law of Personal Status, the dower can be paid totally or partially at the time of the marriage or at an agreed time. Article 52(2) provides that the right to dower is created by a valid marriage. The dower becomes due in full after the consummation of marriage or full privacy or after the death of the husband. The deferred part of the dower becomes due upon the death of the husband or an irrevocable repudiation. If the wife does not obtain a dower, she can refuse the consummation of marriage (Article 53(1) Law of Personal Status). If she accepts to consummate the marriage before obtaining the dower, the amount will become a debt the husband owes his wife (Article 53(2)).

Similarly, Article 52(3) of the Law of Personal Status provides that if a woman has been repudiated before the consummation of marriage, she will be entitled to half of the dower. If no dower has been stipulated, the judge will oblige the husband to pay a compensation not exceeding the proper dower.

### **Kuwait**

Kuwaiti law, like that of many other Islamic countries, provides that the dower is owed to the wife on the basis of a valid marriage (Article 52 Kuwaiti Law of Personal Status). Likewise, in accordance with Article 53, no minimum or maximum limit is provided for the dower. Article 54 states that anything which can be the object of a valid contract can be used as a dower, provided it is not against the nature of the marriage. Thus, assets, services and rights of use are possible.

Article 55 of the Law of Personal Status differentiates between specified and proper dower. Specified dower is based on a valid contractual provision. Proper dower is owed in those cases where a dower is not determined, is invalid or has been entirely excluded. Under Article 61, the dower should be paid in full after the consummation of marriage or full privacy or after the death of the husband.

According to Article 64 of the Law of Personal Status, where no dower has been determined, a woman can demand a compensation (*mot'e*) determined by the judge. In the event of the marriage being dissolved before consummation or full privacy, the amount of the compensation must not exceed half of the proper dower. In addition to this, Article 65 states that the right to the full dower or compensation (*mot'e*) lapses if the marriage is dissolved because of the woman's behaviour prior to consummation or full privacy.

### **Yemen**

Article 33(1) of the Yemeni Law of Personal Status describes the dower as a compulsory consequence of the valid marriage. The dower can be any property which can be owned or which is of legitimate use. If no dower is determined or its amount has been forgotten, the proper dower is payable. Article 33(2) provides that the dower is the property of the wife who can dispose of it as she pleases. Contractual agreements to the contrary are legally irrelevant. According to Article 34, the parties can freely agree whether the whole or part of the dower will be paid immediately at the time of the marriage or if it should be paid later. If the guardian in marriage agrees to a deferred dower without the consent of the woman, she can demand its immediate payment.

Under Article 34, the woman's right to a dower arises if the marriage has been consummated. In addition, the dower is due after the death of one or both of the spouses, even if the marriage has not been consummated. Article 36 states that if the husband repudiates his wife prior to consummation of the marriage or if the marriage is dissolved at his request half of the dower becomes due. If the dissolution takes place on demand of the wife or both spouses no dower becomes due and the woman must return whatever she already received.

Article 39 of the Yemeni Law of Personal Status provides that a woman is entitled to refuse to consummate the marriage until the dower is determined. Likewise, she can demand to be given the due dower. If the payment of dower has been deferred for a specific period, she cannot refuse the consummation until the time of payment has become due. With regard to this matter, Article 34 of the above Yemeni law is applicable.

In case no dower has been determined and the woman is repudiated before consummation of the marriage, Article 37 provides that she is entitled to *mof'e*. The *mof'e* should be in proportion to that of a woman with a similar status divorced from a man with the same status as the husband. The *mof'e* cannot exceed the value of half of the proper dower.

### **Morocco**

As provided by Article 26 of the Moroccan Moudawana, the dower is anything the man gives to his future wife with the aim of expressing his intention to marry, found a stable family and strengthen their relationship in a joint life.<sup>32</sup> Moreover, Article 26(2) provides that the *ratio juris* of the dower is not in its financial value, but in its symbolic and moral significance. According to Moroccan law, the dower is not a condition of validity for the conclusion of marriage. Thus, if the dower is not determined in a marriage contract, it is still valid. However, a clause in the marriage contract stating that no dower is payable is invalid.

Under Article 27 of the Moroccan Moudawana, the dower is determined in the marriage contract. If no dower has been provided for in the marriage contract and if the couple has not agreed upon one at a later time, the court will determine it according to the social status of the couple. Moreover, anything which, according to law, can be object of an obligation can be used as a dower (Article 28 Moroccan Moudawana). Similarly, the law requires that the dower should not be set disproportionately high (Article 28 Moroccan Moudawana). By this approach, the Moroccan legislator emphasises the symbolic role of the dower.

Article 29 of the Moroccan Moudawana provides that the dower is the property of the wife and that she may dispose of it as she pleases. The husband is not entitled to have the wife bring anything into the marriage, such as house wares, furniture or clothes, in return for the dower.

The consummation of the marriage or the death of the husband prior to consummation entitles the wife to the full dower (Article 32 Moroccan Moudawana). Generally, if a divorce takes place before the consummation of marriage, the wife is entitled to half of the dower (Article 32(2)). However, Article 32(3) states that the woman will lose her right to even half of the dower if the marriage is dissolved before consummation and due to one of the following reasons:

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<sup>32</sup> *Mahr* is called *ṣadāq* in Morocco.

1. If the marriage is annulled as defective because it lacks one of the conditions of validity;
2. If the marriage is dissolved due to a defect in the man's or the woman's person;
3. If, in case of a divorce, no dower has been determined in the contract.

Therefore, if the marriage is dissolved (Article 32(2)), or if no dower has been determined in the marriage contract (Article 32(3)), the wife is not entitled to half of the specified dower as a result of the marriage dissolution before its consummation. The law in Morocco, contrary to the laws in other Islamic countries, does not include any provision with regard to the payment of compensation (*mot'e*) in case of repudiation before the consummation of marriage where no dower has been determined.

### **Tunisia**

In Tunisia, the legal situation is different. Firstly, on the basis of the Maliki school of Islamic law, in order for the marriage to become valid it is necessary to determine a dower in favour of the wife. Article 3 of the Tunisian Law of Personal Status mentions the dower among the formal conditions of a valid marriage. If it is not determined in the marriage contract, the marriage is considered as defective and can be dissolved at the request of the wife.

According to Article 12 of the Law of Personal Status, anything of a certain value can be used as a dower, which is a property of the wife. The immediate payment of the dower at the time of the wedding or its deferral to a later time can be determined by the couple. If there is no such agreement, the full dower must be paid at the time of the wedding and before consummation of the marriage. Article 3 of this Tunisian law provides that the wife is not obliged to consummate the marriage if she has not received the dower. If its payment is delayed, the wife can demand the payment of the dower after the consummation of marriage, but not a divorce.

### **Egypt**

Contrary to other Islamic countries, there are few provisions with regard to dower in Egyptian law. Only Article 19 of the Law No. 25/1929 deals with the dower, which is applicable to the related disputes between couples. According to this article, if the couple disagrees about the amount of the dower, the burden of proof rests with the wife. If the woman fails to discharge this burden, the matter will be solved by a declaration in lieu of an oath of the husband. If the husband acknowledges an amount which is lower than what the woman's status requires, it will be determined by a judicial ruling on the basis of a proper dower of women with similar social positions.

Legal loopholes in Egypt have been filled by court rulings and Hanafi law. In accordance with a ruling by the Court of First Instance of Giza, if no dower has been determined, the wife will be entitled to the proper one.<sup>33</sup> However, if the divorce happens before consummation of marriage or full privacy (Arab. *khalwa ṣahīḥa*), the wife will not be entitled to any dower.

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<sup>33</sup> Decision of the Court of First Instance of Giza of 10/2/1953, Case No. 495 of 1953, quoted as in: *Kamāl*, p. 597.

According to a ruling by the Egyptian Court of Cassation, if it has not been agreed that payment of the dower will be deferred, the whole specified dower will be due at the time of the marriage.<sup>34</sup>

### **III. MAINTENANCE (*NAFAQE*)**

#### **1. Form and amount of maintenance**

Maintenance is the legitimate right of the wife from her husband. In accordance with Article 117(1) CC, the wife becomes entitled to maintenance in a valid and effective marriage. Article 118 states that this includes food, clothing, accommodation and medical care in proportion to the husband's financial ability. Under Article 115, the accommodation provided by the husband should be appropriate. In addition, Article 116 provides that if a man is married to more than one wife, he cannot make them live in the same residence without their consent.

According to Article 123 CC, the wife's maintenance claim depends on the husband's financial capacity, provided the maintenance is not less than the minimum requirements of the wife. The maintenance claim can increase or decrease. Any increase or decrease will depend on the husband's financial capacity as well as on the change in prices (Article 124). An action for increase or decrease of maintenance cannot be heard before the end of six months since the last determination (Article 124(2) CC).

#### **2. Legal consequences of refusal to pay maintenance**

If the husband refuses to pay maintenance or is proved to be negligent in payment, the competent court can force him to pay it under Article 119 CC. Under Article 125, he is obliged to pay maintenance to his wife from the time of omission on.

The husband will not be discharged from his obligation to pay maintenance to his wife because of imprisonment, even if he is no longer able to provide it (Article 120 CC). In such a case, the husband is also liable for the omission of the payment.

If the husband is absent, the maintenance for his wife will be provided from his property.

#### **3. Forfeiture of the right to maintenance**

The wife's right to maintenance arises from her obligation to subordinate herself to her husband as the head of the family and to be at his disposal at any legitimate time (*tamkīn*). Marital disobedience (*nushūz*) of the wife leads to forfeiture of her right to maintenance. Article 122 CC provides three situations in which a wife will lose her right to maintenance:

##### **a) Leaving the marital home without the permission of the husband**

If a wife leaves home without her husband's permission or for forbidden purposes, she loses her right to maintenance (Article 122(1)).

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<sup>34</sup> Egyptian Court of Cassation, Decision No. 88 of 27/10/1987, quoted as in: *al-Bakrī*, p. 318.

Although not provided explicitly, it is accepted that the husband - in return for his maintenance obligation - enjoys the right to determine whom his wife can visit or who can visit her in his home. These are only close relatives.

If the wife works outside the home and the husband consents to it, providing maintenance to his wife remains his obligation. However, if the husband disapproves of his wife working outside the home, the wife is considered a disobedient woman and therefore she will lose her right to maintenance.

#### **b) Disobedience of the wife in marital matters**

The wife loses her right to maintenance if she is disobedient in marital matters (Article 122(2)). This includes sexual disobedience. However, this is only the case if her conduct has no religious legitimacy.

#### **c) Obstacles to the accommodation of the wife in the husband's residence**

Where there is an obstacle which lies with the person of the wife preventing her accommodation in her husband's residence, the wife's right to maintenance lapses under Article 122(3). If the obstacle lies with the husband, Article 117 provides that he remains obliged to provide the maintenance.

An obstacle which prevents a woman from staying in her husband's home is, for example, imprisonment of the woman. If the woman goes on a journey without her husband, the period she is away falls under the provision of Article 122(3), in which she is not entitled to maintenance. If the wife is ill and stays at her father's house despite the husband wanting to take her home and there being no health risk in doing so, she loses her right to maintenance if she refuses.

If the wife refuses to stay in her husband's home without any lawful reason, Article 117(2) provides that his obligation to provide maintenance ceases. The reasons for which a wife can refuse to stay in her husband's residence are detailed in Article 117(2). According to this provision, the wife can refrain from going to her husband's home if the residence is not appropriate (as anticipated by Article 115 and 116), or if her prompt dower has not been paid. In these cases, the husband has to provide maintenance, even if his wife stays with her relatives (Article 117(1) CC).

### **4. Performance of maintenance obligation**

Under Article 128 CC, the husband is obliged to provide maintenance. Maintenance can be determined either by consent or judicial order. The husband may be discharged from this obligation only before it is determined (Article 129(1) CC). Moreover, Article 129(2) provides that a discharge from the maintenance obligation after its determination is only valid provided the discharge applies to maintenance in the past. A discharge from the obligation for the next day, week, month or year is valid only if it is determined as daily, weekly, monthly or yearly respectively (Article 129(3)).

According to Article 130 CC, maintenance can be used to clear a wife's debts to her husband, if demanded by either party.

## **5. Spouse maintenance in other Islamic countries**

In Kuwait, Article 87 of the Law of Personal Status provides that the wife's right to maintenance will lapse if she refuses to move into her husband's home without any justified reason. The conditions in which the wife is allowed to refuse are:

1. If the husband betrays his wife's trust;
2. If the husband does not pay the prompt dower; or
3. If the husband fails to provide appropriate living conditions.

Moreover, Article 89 of the Kuwaiti Law of Personal Status provides that a woman can engage in an acceptable job outside the home, provided the work is in harmony with the family's interests. Likewise, the woman is allowed to go on pilgrimage with one of her close relatives, even without the husband's permission. During the journey, she remains entitled to maintenance (Article 91 Kuwaiti Law of Personal Status).

There are some Islamic countries in which women who work outside the home - even against their husbands' will - are entitled to maintenance. For example, according to Egyptian law, a woman is entitled to maintenance if her job is not against the family's interests and if it is a legitimate work, regardless of the husband's opposition (Article 1, Law No. 25 of 12 July 1920 Concerning Maintenance and Some Questions of Personal Status, which has been amended and supplemented by the Law No. 100 of 3 July 1985).

In Tunisia, women are no longer obliged to obey their husbands. Instead, Article 23 of the new Tunisian Law of Personal Status obligates both spouses to maintain a good relationship with each other.<sup>35</sup> Therefore, the woman can work outside the home without her husband's permission. In spite of this, according to Article 138 of the Law of Personal Status, the husband is obliged to provide maintenance.

Article 67 of the Jordanian Law of Personal Status provides that women who work outside the home without their husband's consent are not entitled to maintenance. However, the Sharia Court of Appeals of Jordan has ruled to the contrary, confirming that a woman working outside the home is entitled to maintenance, regardless of her husband's consent or refusal.<sup>36</sup>

## **IV. MARITAL PROPERTY REGIME**

### **1. Marital property regime under Afghan law**

The marital property regime is not explicitly regulated in the Afghan Civil Code. However, all schools of Islamic law have recognised the principle of separation of property. The marriage does not result in a community of property. The husband and wife will remain the owners of their individual assets acquired before and in the course of their marriage. According to the Hanafi school of law, the woman can dispose of her property as she pleases, without being obliged to obtain her husband's permission. In economic and business matters, she has full discretion to act, provided that she has full legal capacity. It can also be concluded that the couple can at the time of the marriage or at a later date agree on a different marital property

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<sup>35</sup> Since the amendment of the Law on Personal Status on 12 July 1993.

<sup>36</sup> Jordanian Sharia Court of Appeals, Decision No. 18900, quoted as in: *Malham*, p. 101.

regime, provided it does not violate the law or the purposes of marriage. For example, they can stipulate the community of property in the marriage contract.

## **2. Marital property regime in other Islamic countries**

Other Islamic countries also permit couples to agree on marital property regimes other than the statutory separation of property in their marriage contracts.

In the Moroccan Moudawana, it is permitted to choose the community of property as marital property regime. Article 49 Moroccan Moudawana provides that the couple can agree on the use and division of the goods acquired in the course of the marriage. Such an agreement will be included in a document separate from the marriage contract. At the time a marriage has been concluded, the civil status notaries inform the parties on the possibility of such an agreement. The agreements will also specify their shares in the goods acquired after the marriage. However, in the absence of such an agreement it is possible to take into account the work of the spouses for the benefit of the family assets, their efforts and the burden they have borne (Article 49(4) Moroccan Moudawana). This provision is considered as ambiguous by the doctrine. Therefore, the judges are granted broad discretionary powers. However, it is understood that no judicial ruling exists with regard to this matter. It is only emphasised in the practical guide to the Family Code (an explanatory memorandum issued by the Ministry of Justice) that in a dispute where an agreement on the division of goods does not exist, both wife and husband should prove the amount of their contribution to the surplus of the other. It will then be the task of the judge to deliberate on how much their respective work and efforts have contributed to the surplus. In addition, it has been clarified in the memorandum that ‘taking into account’ the work and efforts of the two parties does not necessarily mean a division of the goods acquired after marriage into two equal parts.

The new Algerian Family Law of 2005 provides couples with the opportunity to agree in the marriage contract, or a subsequent document certified by a public notary, upon the community of the goods acquired in the course of the marriage and their respective shares (Article 37(2) Algerian Family Law).

## **V. THE INHERITANCE RIGHTS OF THE SURVIVING SPOUSE**

Under Article 90 of the Afghanistan Civil Code, the inheritance rights of the surviving spouse are one of the effects of a marriage. Despite this, it is above all a part of the inheritance chapter on which the Civil Code does not elaborate when discussing the effects of marriage. However, the regulations with regard to the inheritance rights of the surviving spouse are included in the provisions of property transfer due to death in Article 1993 CC.

Article 2001 CC presents two reasons for the nomination as an heir: marriage and blood relationship. Basically, heirs are divided into quranic heirs (*mīrāth be ṭarīq-e farḍ*) and residuaries (*mīrāth be ṭarīq-e ʿoṣūbat*). Quranic heirs are those who receive a specified portion of the inheritance (Article 2004 CC). This category can be traced back to explicit provisions in the Quran.

Quranic heirs receive a specified share of the inheritance, based on the degree of their relationship or due to a marriage. They are entitled to receive their shares prior to the other heirs and after the funeral expenses, debts and bequests of the deceased are settled. After the deduction of the shares of the quranic heirs, the rest of the inheritance (or in the absence of a

quranic heir, the whole of it) is divided among the residuaries (Article 2013 CC). Therefore, the quranic heirs are the first and most important group of heirs.

Article 2002 CC provides that inheritance on the basis of marriage is possible only as a quranic heir. Thus, upon the death of wife or husband, the other is always entitled to a specified inheritance as a quranic heir.

The amount of the wife's and husband's inheritance is determined in detail in Article 2007 CC. According to Article 2007(1) CC, where the deceased wife has no descendants or male descendants of the son, the husband receives half of her estate. If the deceased wife has descendants or male descendants of her son, the husband receives one-fourth of the estate. On the basis of Article 2007(2) CC, the wife receives one-fourth of the estate if the husband leaves no descendants or male descendants of his son, otherwise she is entitled to one-eighth of it. If the wife is irrevocably repudiated and the husband dies during her waiting period, she has the same claim to inheritance as in a valid marriage.

## E. DISSOLUTION OF MARRIAGE

In accordance with the provisions of Article 131 CC, a marriage can be dissolved during the lifetime of the couple by annulment (*faskh*), repudiation (*talāq*), divorce by mutual consent (*khol<sup>c</sup>*) or judicial divorce (*tafrīq*). These four types of marriage dissolution are regulated in detail in Articles 132-197 CC, which will be discussed in the following

### I. ANNULMENT OF MARRIAGE (*FASKH*)

#### 1. Definition

Annulment (*faskh*) of marriage is its dissolution due to a defect occurring either at the time of conclusion of the marriage or afterwards in such a way as to render its continuation impossible (Article 132 CC). A list of such defects is given in Article 133 CC.

Regulations concerning the faulty conclusion of marriage are contained in the Civil Code in the framework of the provisions on marriage effects. As well as the requirement of offer and acceptance, certain other conditions must be met for the marriage to be valid (Article 96 CC). However, consummation of the marriage heals these defects giving rise to all the legal effects of a valid marriage, such as the right to a dower, the proof of legitimate descent, the marriage impediment of affinity, the waiting period, and the right to maintenance (Article 97 CC).

#### 2. Conditions for annulment

In order for a marriage to be annulled, there should be grounds for the annulment. A ground for annulment is acceptable if, at the time of the marriage or after its conclusion, a circumstance occurred which makes the marriage defective.

##### a) Existence of a defect at the time of the marriage

Article 133(1) CC determines which defects (*ḥalal*) at the time of the marriage conclusion cause an annulment. These are:

1. Lack of any condition for validity (*shorūṭ-e sehḥat*) at the conclusion of the marriage;
2. Insanity (*zavāl-e jonūn*) or mental deficiency (*ḥ<sup>c</sup>atah*); or
3. A specified dower which is lower than the proper dower.

Article 133(1)(1) CC includes, for example, the lack of consensus of the parties at the marriage conclusion, the existence of a permanent or temporary impediment to marriage or the non-observance of the legal marriage age (especially the conclusion of marriages between underage children by their legal guardians). Therefore, a marriage which is concluded before the marriageable age has been reached can be annulled by the court upon request. As mentioned above, Article 108 CC provides that a legal action for annulment due to age is not permitted if the wife is over 17 years old. When the woman reaches this age, her consent to the marriage is presumed.

Article 133(1)(2) CC refers to cases of legal incapacity or limited legal capacity due to insanity (*zavāl-e jonūn*) or mental deficiency (*ḥ<sup>c</sup>atah*).

If a dower lower than the proper dower has been determined, it is considered as a defect in the conclusion of the marriage and offers the possibility to annul the marriage. This is explicitly

stated in Article 133(3) CC, although the determination of a dower is no condition for validity of the marriage.

### **b) Occurrence of a defect after the conclusion of marriage**

Article 133(2) lists the defects occurring after the conclusion of the marriage which makes its continuation unsustainable and allows for an annulment:

1. The marriage impediment of affinity;
2. The sworn allegation of adultery (*li<sup>c</sup>ān*); or
3. The wife's refusal to convert to Islam if she is not a follower of the book, while her husband has already converted.

The marriage impediment of affinity is one of the permanent impediments to marriage, which are regulated in Article 82 CC. In accordance with this provision, a man's marriage to the former wives of his ascendants and descendants is permanently prohibited. Furthermore, it is unexceptionally prohibited for a person to marry the ascendants of his wife and, where the marriage has been consummated, permanently prohibited to marry the descendants of his wife. Article 94 CC provides that if a defective marriage is dissolved by court before its consummation, this does not result in a marriage impediment of affinity. If it becomes known after the marriage conclusion that there is a marriage impediment of affinity between the spouses, this fact will constitute a ground for annulment after marriage under Article 133(2)(a) CC.

Cursing the wife with an oath or the "sworn allegation of adultery" (*li<sup>c</sup>ān*) is not thoroughly regulated in the Civil Code of 1977, but it is recognised in Article 133(2)(b) CC as a defect occurring after the conclusion of marriage preventing its continuation. In accordance with Hanafi principles of law, cursing a wife means that the husband accuses her of adultery or refuses to acknowledge a child born by her as his own and proves the accusation by taking an oath in court. If the husband accuses his wife of adultery and there are not four witnesses to confirm the accusation, the curse is still successful if he knows for sure that his wife has committed adultery. This would be the case if the husband himself has witnessed the adultery or if the woman confesses to it.

Where a husband converts to Islam and his wife, who is neither Christian nor Jewish, refuses to embrace Islam, the marriage may be annulled according to Article 133(2)(c) CC. This situation emanates from the provision that the marriage of a Muslim man to a woman who is not a follower of a book religion is void.

### **3. The act of marriage annulment**

Under Article 134(1) CC, the annulment of a marriage is effected by the competent court's final judgement. However, if a defect occurs after the marriage, the marriage can be annulled without a court's ruling by the couple's mutual consent (Article 133(2)). If they are unable to consent, the annulment of the marriage must be ordered by the court.

## II. REPUDIATION (*TALĀQ*)

### 1. Definition

In Afghan law, repudiation - in accordance with Article 135(1) CC - is the dissolution of a marital relationship validly established between the husband and the wife, with immediate or future effect, using words which clearly express the repudiation. Repudiation is the right of the husband. He may end the marriage without giving any reasons but in compliance with certain conditions. However, the wife may also dissolve the marriage. She may repudiate herself in particular when her husband has granted her the right to repudiation (Article 142 CC). As such, *talāq* may be exercised by a woman if she has reserved this right for herself in the marriage contract or if the husband authorizes her after the conclusion of the marriage.

Repudiation by the husband requires no specific reasons or the assistance of the court. The wife however always needs the assistance of the court for the dissolution of her marriage, whether she has been granted the right to *talāq* or for a judicial divorce on certain legal grounds.<sup>37</sup> According to Article 135(2) CC, the repudiation can be pronounced either by the husband or the competent court at the demand of the wife.

### 2. Types of repudiation

The law in Afghanistan differentiates between revocable and irrevocable repudiation. An irrevocable repudiation is again divided into major and minor irrevocable repudiation.

#### a) Revocable repudiation

In accordance with Article 146 CC, repudiation is generally revocable. A revocable repudiation means that the husband is entitled to review his decision and may return to his wife before the waiting period has expired, without any need for a new marriage and regardless of the wife's consent. Thus, a revocable repudiation causes marriage dissolution only when the waiting period is over.<sup>38</sup> Under Article 151 CC, the waiting period expires with the wife's third menstruation. During this period, the husband can revoke the repudiation explicitly or implicitly at any time by resuming the marital relationship. No new marriage or dower is required if the husband returns during the waiting period.

If the waiting period expires without the husband revoking the repudiation, he loses the right to revoke and the marriage will be dissolved (Article 151 CC).

Under Article 144 CC, the husband is entitled to repudiate his wife three times. Multiple utterance of the repudiation at one time - whether expressed by words or signs - are considered as one single repudiation (Article 145 CC). Therefore, if the husband says three times that "you are repudiated, you are repudiated, you are repudiated", it is counted as one single repudiation. In order to become a triple repudiation, three separate repudiations have to be pronounced, with separate waiting periods to be observed. When the repudiation is pronounced for the third time, it is no longer revocable, as the third repudiation is irrevocable (Article 146(1) CC).

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<sup>37</sup> See Part 3 E IV "Judicial divorce (*tafrīq*)" below.

<sup>38</sup> See below for further information on the waiting period.

The full legal effects of the marriage and the rights of the husband do not cease with the first or second revocable repudiation. These effects and rights remain unaffected until the waiting period of the first or second repudiation expires.

In accordance Article 150(1) CC, it is not permissible to postpone a revocation to a future time or to make it subject to a condition. The presence of witnesses is not required for the repudiation to be valid (Article 150(2) CC).

## **b) Irrevocable repudiation**

Irrevocable repudiation is explained in Article 146 CC. According to this article, repudiation is considered irrevocable in one of the following four cases:

1. It is already the third repudiation of the same wife;
2. The repudiation occurs before consummation of the marriage;
3. The repudiation is exercised in exchange for compensation (*khol<sup>c</sup>*);<sup>39</sup>
4. The repudiation is defined as irrevocable in the Civil Code.

An irrevocable repudiation immediately dissolves the marriage and all its effects, except the waiting period, cease to exist. If the payment of the dower has been deferred fully or partially to the time of divorce, it should be paid immediately.

Moreover, the spousal inheritance rights cease, unless the husband has had a fatal illness when he repudiated his wife irrevocably. In such a situation, provided that the husband dies during the waiting period, the irrevocable repudiation does not constitute an impediment to inheritance for the wife. However, this provision only applies if the wife has not forfeited this right for another reason during the period between the repudiation and the death of her husband (Article 155 CC).

As well as differentiating between revocable and irrevocable repudiation, the law further distinguishes between minor and major irrevocable repudiation.

### **aa) Minor irrevocable repudiation**

According to Article 148 CC, minor irrevocable repudiation is a repudiation of the wife before the consummation of marriage. First and second repudiations which have not been revoked are also considered to be minor irrevocable repudiations. Likewise, repudiation in exchange for a *khol<sup>c</sup>* divorce is also considered a minor irrevocable repudiation.

A minor irrevocable repudiation dissolves the marriage and removes its effects pursuant to Article 152 CC. The authority of the husband and the marital relationship, except the waiting period, ceases.

Article 153(1) CC provides that a minor irrevocable repudiation does not create a marriage impediment between the repudiated wife and the husband. In accordance with Article 153(2), the husband can revoke the divorce from his wife he had repudiated by a minor irrevocable repudiation during the waiting period and after it, provided that this marriage is concluded with the woman's consent by a new marriage and a new dower.

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<sup>39</sup> For more information on this see Part 3 E III "Divorce by mutual consent (*khol<sup>c</sup>*)" below.

### **bb) Major irrevocable repudiation**

A major irrevocable repudiation is when the husband repudiates his wife for the third time. In such a case, a temporary impediment to marriage arises.<sup>40</sup> The husband can only remarry the wife he repudiated three times if she first marries another man who either repudiates her after consummation of the marriage or dies. After the expiration of the waiting period, the first husband can then remarry his former wife (Article 147 CC).

If the repudiated wife marries another man and is repudiated by the latter after the consummation of marriage, she can marry her first husband again after the waiting period under Article 154 CC. In this case, previous repudiations become obsolete and the husband obtains a new right to a triple repudiation.

## **3. Conditions for repudiation**

### **a) A valid marriage**

The dissolution of a marriage by repudiation requires that the marriage is valid. If the marriage was not validly concluded, it may only be annulled.

### **b) Conditions in the person of the husband**

As provided in Article 137 CC, only a husband who is sane (*‘āqel*) and of full age (*bālegh*) can repudiate his wife. This also applies if the husband is *safīh*, i.e. prodigal or credulous, or ill, provided it is not a mental illness. Moreover, Article 140 provides that the minor wife (*qāṣer*) cannot be repudiated by either the husband or his father.

Articles 138 and 141 CC list the cases in which a husband cannot repudiate his wife because of some deficiencies rooted in his person.

According to Article 138 CC, a repudiation is invalid if pronounced in a state of intoxication. Furthermore, under Article 141 CC repudiation by the following persons is invalid:

1. Insane (*majnūn*) persons, unless the repudiation had been subjected to a condition prior to insanity, and the condition has then come into existence during the time of insanity. A repudiation by an insane person is not valid because it is an intentional act requiring understanding and reason;
2. Mentally deficient (*ma‘tūh*) persons;
3. Persons under duress because they lack intention and divorce unwillingly;
4. Sleeping persons, due to a lack of intention;
5. Persons who, due to old age or illness, are mentally deranged;
6. Irrational persons who due to anger or other reasons lose their ability to discern and do not realise the consequences of their own words. Thus, for example, a repudiation pronounced by a person affected by grief, fury or unconsciousness has no effect.

If the repudiation is pronounced by the husband in one of the cases mentioned above, that repudiation will not have any legal effect. For repudiation to become valid, a number of

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<sup>40</sup> For more information on temporary marriage impediments, see Part 3 C II 4 b “Temporary impediments to marriage“ above.

conditions including intention, consent, willingness and legal capacity of the husband are required.

### **c) Conditions in the person of the wife**

Under Article 136 CC, a wife can be repudiated by her husband only if she is in a valid marriage or in the waiting period after a revocable repudiation. Therefore, if a marriage is not valid, the woman cannot be repudiated. In such cases, the marriage will be dissolved by annulment.

In order for a repudiation to be valid, the Civil Code does not require the woman to have legal capacity. A legally incapable woman can also be repudiated by her husband.

A woman who is in the waiting period after a revocable repudiation can be repudiated again by her husband because she is considered his wife until the waiting period is over and the husband can return to her at any time until it expires. If the woman is in the waiting period after an irrevocable repudiation, a further repudiation during this period is not permissible.

### **d) Pronouncement of the repudiation formula**

Under Article 139(1) CC, the husband can repudiate his wife orally or in writing. If he is unable to convey his intention in such ways (being deaf or mute), he can repudiate with usual signs clearly expressing a repudiation.

Article 139(2) CC further provides that a repudiation is effected by the pronouncement of clear words which usually express the meaning of repudiation, regardless of the husband's intention. As such, if a husband does not really want to repudiate his wife, but uses the terms which generally indicate it, the repudiation is valid.

Repudiation can have immediate effect or be pronounced to take effect at a future date (Article 135 CC). Moreover, the Sunni schools of law also recognize contingent repudiation. Contingent repudiation is where the husband makes a future event or development a condition for the repudiation, such as he may say "If you leave home, you shall be divorced" or "If you release me of your deferred dower you shall be repudiated For the validity of a contingent repudiation it suffices that the future event is possible to occur."<sup>41</sup>

### **e) Repudiation by proxy**

Under Article 142 CC, the husband can repudiate his wife through a legal proxy. Repudiation by proxy is similar to any other legal transaction by proxy. Therefore, the provisions of Articles 534 and 1554 CC and their subsequent articles are also applicable with regard to repudiation by proxy.

The husband can also authorise his wife to repudiate herself. The husband cannot revoke this authority after granting it to the wife, unless the wife did not accept it (Article 143 CC). This authority can be granted to the wife without any restrictions, i.e. without being subject to a condition such as a specified time or place, and the competent court will issue the divorce whenever and wherever the wife wishes. However, a wife's authority to repudiate herself can

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<sup>41</sup> Shiites, unlike Sunnis, recognize only the unconditional formula. The repudiation can only be made subject to a condition, if the occurrence or existence of the condition is certain.

also be restricted to a specific time and place. For example, in accordance with Article 88 CC, the wife can make it a condition that the authority to repudiate will be transferred to her when her husband marries another woman.

#### **f) Presence of witnesses**

As noted above, the presence of witnesses when the husband pronounces a repudiation is not a condition for its validity in Afghan law.<sup>42</sup> Difficulties may therefore arise when the woman has to prove that her husband repudiated her in a legal dispute resulting from the divorce, while he denies it. Moreover, according to the Hanafi school of law, even the presence of the wife herself is not required when the repudiation is pronounced. However, she should be informed of it. A written repudiation becomes valid when it is submitted to the woman.

### **4. Registration of repudiation**

The registration of repudiation and need for a repudiation certificate are not regulated by law. However, avoiding registration can cause numerous problems. As the involvement of the court and witnesses as well as the presence of the wife is not required for the validity of the repudiation, it is very difficult for the wife to prove the repudiation in a legal dispute if the husband denies it. As various problems may arise from failing to register a repudiation, filling this significant legal vacuum as well as enforcing the registration of repudiations in Afghanistan is imperative to guarantee legal security.

## **5. Repudiation in other Islamic countries**

### **a) Petition for repudiation**

In the majority of the Islamic countries, the right to divorce is recognised as an exclusive right of the husband to end the marriage. The exercise of the right to divorce by the husband, without giving reasons and without court involvement, creates many problems. Some Islamic legislators are combatting or abating those problems by making divorce possible only by judicial ruling, regardless of whether the wife or the husband demands it. Other Islamic countries do not see any need for court involvement in repudiation by the husband. At the same time, there is an increasing tendency in the Islamic countries towards restricting the husband's right to divorce. This means that repudiation outside the court should not produce any effect or be permitted.

In Tunisia, both spouses are equally entitled to demand a divorce and only a divorce by court order is possible (Articles 29-31 Tunisian Law of Personal Status).

In Algeria, under Article 49 of the Family Law, and in Iraq, in Article 39(1) and (2) of the Law of Personal Status, in order for repudiation to be lawful, a judicial ruling has to be obtained. Such a ruling is considered as judicial recognition. Without this ruling, the repudiation is invalid. Similarly, in Syria, Article 85(2) and 88 of the Law of Personal Status provide that a judicial ruling is required in order for a repudiation to be lawful. The position is

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<sup>42</sup> In accordance with all Sunni schools of law, the presence of witnesses is not necessary for pronouncing a repudiation. On the contrary, Shiite legal principles require the presence of two impartial male witnesses. Therefore, Article 1134 of the Iranian Civil Code, based on Shiite legal principles, requires two impartial male witnesses.

the same under Moroccan law as well, and the husband needs leave of the court for a repudiation.

In Iran, since 1967, divorces are only possible by leave of the court, regardless of their being petitioned for by the husband or the wife.<sup>43</sup> After the revolution of 1979, this provision was included in the Special Civil Courts Act. Due to an amendment made to Article 1133 Iranian CC, dated 10 November 2002, the Iranian Civil Code now also states that repudiation can be petitioned for in court by the husband in compliance with the legal requirements.

## **b) Registration of repudiation**

In many Islamic countries, the registration of repudiation has been made compulsory.

In Egypt, Article 21 of Law No. 1/2000 states that repudiation can be proved only by certified written confirmation. The repudiation can be certified by persons who have been assigned by the government with notarial tasks in the range of marriage and divorce. The certifier has to inform both spouses of the consequences of the repudiation and ask them to each name a mediator from among their family members for reconciliation. If both spouses insist on an immediate repudiation, or agree that repudiation has taken place, or if the husband confirms that he has pronounced the repudiation, the repudiation has to be certified after a confirmation in writing. Under Article 5 of the Egyptian Law No. 25/1929, the repudiation has to be certified within 30 days after its pronouncement before the notary in charge.

These regulations are also applicable when the repudiation is demanded by the wife, provided that she has reserved that right for herself in the marriage contract.

These measures must be certified with the date of performance on a form prepared exclusively for this purpose (Article 21 Egyptian Law No. 1/2000). Repudiation can only affect the rights of the spouses if the husband has been present personally or has been represented by a proxy assigned by him at the certification. If the husband has concealed the repudiation from his wife, it only produces effects with regard to inheritance and financial obligations from the time when the woman has been informed of it (Article 5 Law No. 25/1929). Article 23 Law No. 25/1929 provides that violating the obligation of certifying a repudiation is punishable by up to six months imprisonment and/or a fine. The certifier will also be punished if he fails to fulfill the legal obligations stated in Article 5 Law No. 25/1929. The punishment provided for such an offence is up to one month of imprisonment and a fine. Similarly, the revocation of a repudiation also has to be officially certified. Article 22 of the Egyptian Law No. 1/2000 provides that, without prejudice to the wife's right to prove with all available evidence that her husband has revoked the repudiation, if the wife denies the revocation claimed by the husband, it can be considered only if the husband has announced the revocation to his wife in a public document before the expiration of a 60 day deadline. This deadline is counted from the wife's first menstruation, in case of a menstruating woman, and otherwise before the expiration of a 90 day deadline during the waiting period measured in months since the date the repudiation has been certified. This does not apply to pregnant wives and those who acknowledge that they had been informed of the revocation before the

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<sup>43</sup> The leave of the court, which constitutes a confirmation of the impossibility of reconciliation, should be submitted to the head of the Notary's Office for Marriages and Divorces when pronouncing and registering the divorce.

waiting period expired. The purpose of this rule is to avoid uncertainties in determining whether a revocation has been declared implicitly. Thus, the husband will be compelled to ensure clarity.

In Jordan, the husband is obliged to register the repudiation of his wife with a Sharia Court within 15 days. If the repudiation has been pronounced in the absence of the wife, the court is duty-bound to deliver the registration of the repudiation to her within a week. If the husband fails to meet his obligation of registering the repudiation, he will be punished (Article 101 Jordanian Law of Personal Status).

In Saudi Arabia, a draft law has been presented to the parliament which aims at making the registration of repudiation and providing this information to the wife obligatory.

### **III. DIVORCE BY MUTUAL CONSENT (*KHOL<sup>c</sup>*)**

Besides repudiation, the Afghan Family Law recognises *khol<sup>c</sup>* (divorce by mutual consent), which has been regulated in detail in Article 156 CC and the subsequent articles.

#### **1. Definition**

In accordance with the provisions of Article 156(1) CC, *khol<sup>c</sup>* is the dissolution of marriage in exchange for assets transferred by the wife to her husband. This is done either explicitly or by other statements expressing the intention to divorce by mutual consent (Article 156(2) CC). A court's ruling is not required in a *khol<sup>c</sup>* under the provisions of Article 160 CC.

#### **2. Conditions for divorce by mutual consent**

##### **a) Valid marriage**

*Khol<sup>c</sup>*, like repudiation, requires that the marriage has been concluded validly. If the marriage is not valid, annulment of the marriage is the appropriate approach for its termination.

If the spouses dissolve their marriage by *khol<sup>c</sup>*, although the marriage was defective, Article 166 CC stipulates two consequences to this. First, the *khol<sup>c</sup>* is invalid if the marriage is legally defective. Second, the wife is entitled to demand the return of what the husband has already received wrongfully as a compensation for the divorce by mutual consent.

##### **b) Conditions in the persons of the spouses**

According to Article 157 CC, *khol<sup>c</sup>* is valid if the husband is legally entitled to repudiate and if the wife can be repudiated. The conditions for a valid repudiation, with regard to the persons of the husband and the wife, which have already been discussed, have to be observed as well.

Generally, a legally incapable wife can be divorced by *khol<sup>c</sup>*, but she cannot be forced to pay the compensation for the divorce by mutual consent without the consent of her property guardian (Article 159 CC). If she agrees to a *khol<sup>c</sup>* and hands over the compensation to her husband, he must return it, unless the guardian of the woman has agreed to it.

Moreover, there are provisions in Article 175 CC concerning the *khol<sup>c</sup>* of a terminally ill woman. If a woman suffering from a fatal illness agrees to a *khol<sup>c</sup>*, it will be valid and, as a result, an irrevocable divorce takes place (Article 175(1) CC). If the wife dies during the waiting period, the husband will be entitled to either the quranic share of inheritance, or the

compensation for the *khol<sup>c</sup>*, or to one-third of the estate disposed of by will, whichever is less. If she dies after the expiration of the waiting period, he will be entitled to either one-third of the estate disposed of by will or to the compensation for the *khol<sup>c</sup>*, whichever is less. According to Article 175(2) CC, if the woman recovers, the husband will be entitled to the full compensation agreed upon for the *khol<sup>c</sup>*.

### **c) Conditions for compensation**

#### ***aa) Suitability of the compensation***

Article 158 CC provides that any asset acceptable as a dower is also acceptable as a compensation for a *khol<sup>c</sup>*. Therefore, the compensation can be the dower as well as any other asset, provided it would be suitable as a dower as well. If the *khol<sup>c</sup>* is performed in exchange for a certain asset other than the dower, the wife will be obliged to pay it (Article 162 CC). However the compensation may not include any other claim derived from the marital relationship, such as maintenance for past times (Article 162 CC).

#### ***bb) Kinds of compensation***

Besides the dower or any other asset the wife is obliged to pay to her husband, the *khol<sup>c</sup>* can also be substituted by services such as providing accommodation, breastfeeding, custody or maintenance of their common child or waiver of the maintenance during the waiting period.

If the compensation for the *khol<sup>c</sup>* is destroyed before its delivery to the husband, the wife is obliged to provide an equivalent or pay the value under Article 167 CC.

Four popular types of compensation for *khol<sup>c</sup>* are dower, breastfeeding, maintenance and custody for common children, which will be briefly discussed below.

#### **(1) The dower as compensation**

If the *khol<sup>c</sup>* has been performed in return for the whole dower, Article 163 CC obligates the wife to return whatever part of the dower she has already received. If the dower has not been paid to the wife yet, the husband will be released from the obligation to pay it, regardless of the *khol<sup>c</sup>* having been performed before or after consummation of the marriage.

#### **(2) Breastfeeding the common child as a compensation**

If the wife assumes the costs of the wet nurse for the child during the breastfeeding period or the care of the child including maintenance for a certain time in return for *khol<sup>c</sup>*, the wife is obliged to fulfill her obligations (Article 169 CC).

If the woman fails to fulfill her obligation with regard to breastfeeding, care and maintenance of the child because, for example, she marries someone else, runs away, or because she or her child dies, the husband can demand the remainder of the costs for breastfeeding and maintenance (Article 170 CC). However, the parties may agree at the time of the *khol<sup>c</sup>* that if the woman or child dies it will not be claimed back.

If breastfeeding the child has been determined as a compensation for *khol<sup>c</sup>* before its birth and it is later proven that the woman was not pregnant, or that she had a miscarriage, or the child dies before the two years of breastfeeding have expired, the husband can claim the whole or the remaining amount of the costs for breastfeeding (Article 171 CC).

### **(3) Maintenance for the couple's common children as compensation**

According to Article 174(1) CC, the husband may not charge expenses he has to pay for the care and protection of their child against the money his wife may owe him. However, Article 174(2) CC confirms that the child maintenance can serve as compensation for *khol<sup>c</sup>*. If the child maintenance is determined as compensation for *khol<sup>c</sup>* and the wife is poor, the husband is obliged to provide for the maintenance of the child. If the wife becomes rich, the husband can demand its repayment.

If the woman fails to fulfill her obligation of maintaining the child because she marries someone else, runs away or she or the child dies, the husband can demand the remainder of the payment, unless otherwise agreed at the time of *khol<sup>c</sup>* (Article 170 CC).

### **(4) Care of the couple's common child as compensation**

Under Article 172 CC, the woman can offer to care for the child as a compensation for *khol<sup>c</sup>*, provided the child is a girl. If the wife marries someone else before the child reaches puberty, the girl's father can take his child away from the wife and demand the remaining amount for the maintenance, regardless of any previous agreement allowing the child to stay with her mother.

If at the time of the *khol<sup>c</sup>* it has been agreed that the child would stay with the husband during the time of the mother's personal custody, the *khol<sup>c</sup>* is valid, but the agreement is void (Article 173(1) CC). The wife can keep the child within her care until the period of personal custody expires, provided that this right has not been forfeited for another reason. If the child is poor, the father bears the costs for personal custody and maintenance of the child (Article 173(2) CC).

If the woman fails to fulfill her obligation of maintaining the child because she marries someone else, runs away or she or the child dies, the husband can demand the remainder of the payment, unless otherwise agreed at the time of *khol<sup>c</sup>* (Articles 170 and 172 CC).

### **d) Non-determination and exclusion of compensation**

If at the time of *khol<sup>c</sup>* no compensation is determined, both spouses are released from their obligations arising from the marital relationship. The husband cannot reclaim whatever has been given to the wife. Likewise, the wife cannot demand the fulfillment of outstanding obligations from the husband, regardless of whether the *khol<sup>c</sup>* has taken place before or after consummation of marriage.

However, Article 165 CC provides that in the event of an exclusion of compensation, the *khol<sup>c</sup>* will be considered as an irrevocable repudiation, which does not lead to the loss of rights still existing between the spouses.

## **3. Revocation of *khol<sup>c</sup>***

*Khol<sup>c</sup>* is a mutual legal transaction. It comes into effect when two corresponding declarations of intention are expressed. Article 161 CC entitles each of the spouses to withdraw his/her offer before it is accepted by the other spouse. As such, if one of the spouses offers a *khol<sup>c</sup>*, but withdraws his/her offer before it is accepted by the other spouse, the marital relationship remains in effect.

#### **4. Effect of *khol<sup>c</sup>***

Under Article 160 CC *khol<sup>c</sup>* is an irrevocable repudiation. Therefore, the provisions related to the effects of a minor irrevocable repudiation are applicable. According to Article 168 and Article 212(2) CC, the right to maintenance during the waiting period does not lapse in *khol<sup>c</sup>*, unless the couple has explicitly agreed upon the exclusion of the maintenance right at the time of the *khol<sup>c</sup>*.

#### **5. *Khol<sup>c</sup>* in other Islamic countries**

Following the reforms of 2000 in Egypt and 2001 in Jordan, a wife may be granted *khol<sup>c</sup>* by the judge even if the husband does not accept his wife's offer of *khol<sup>c</sup>*.<sup>44</sup>

As a result of the reform to the Egyptian law, the consent of the husband is not an essential condition for the validity of the *khol<sup>c</sup>*. It has to be highlighted, though, that the waiver of actual custody, maintenance or of any other right of minor children cannot be determined as a compensation for *khol<sup>c</sup>*. The ruling is final and is not subject to appeal. Otherwise, the woman could be trapped in the marriage by long judicial proceedings without the husband having any financial obligation such as maintenance. The wife is not required to prove her husband's fault. However, she has to explicitly declare before the judge that she abhors living with her husband so much that the continuation of marital life with him is no longer possible and that she is afraid of not being able to observe the limits set by God because of this abhorrence (Article 20(2) Egyptian Law No. 1/2000).

The wife has to return the dower she has received from her husband and, under Article 20(1) of Law No. 1/2000, she must renounce all her legal pecuniary claims, including maintenance during the waiting period, the right to *mo<sup>c</sup>e* or the deferred part of the dower.

The court cannot grant *khol<sup>c</sup>* without the obligatory attempts at reconciliation in accordance with Article 19(1) and (2) of Law No. 1/2000.<sup>45</sup> Only when all these conditions are met will the court grant the divorce. Such a divorce is irrevocable.

### **IV. JUDICIAL DIVORCE (*TAFRĪQ*)**

Under Afghan law, a woman can always obtain a divorce by court ruling on certain legal grounds. This kind of divorce is called *tafrīq*. However, the woman needs to prove that a legal ground for the divorce exists. Judicial divorce is imposed by a judge on a husband who refuses to divorce his wife who is lacking the means for a *khol<sup>c</sup>*. Based on Maliki jurisprudence, the law recognises four grounds for a divorce. The Hanafi school of law allows judicial divorce only in the case of the husband's impotence or castration. Afghan law follows Maliki jurisprudence here, which has a more liberal approach to this matter and allows judicial divorce on further grounds.

Judicial divorce is allowed if the woman proves that it is not possible for her to continue the matrimonial relationship due to:

1. a defect in or incurable disease of the husband;

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<sup>44</sup> This rule has been enacted in Article 20 of the Egyptian Law No. 1/2000 and in Jordanian law in Article 6 Law No. 83 of 2001.

<sup>45</sup> Refer to the following for the methods of reconciliatory efforts in the Egyptian law.

2. a harm done to her by the husband;
3. the maintenance not being paid by the husband; or
4. the husband's absence.

A judicial divorce due to a defect or harm is dealt with as an irrevocable repudiation. A divorce due to the husband's inability to provide maintenance or due to his absence is considered as a revocable repudiation. If these reasons are removed before the expiration of the waiting period, the divorce can be revoked and the marital relationship revived.

## **1. Grounds for a judicial divorce**

### **a) Divorce due to a defect (*tafrīq be sabab-e 'eyb*)**

Under Article 176 CC, a woman can petition for divorce if her husband is suffering from a disease which is incurable or requires long-term treatment, making it impossible to maintain the matrimonial relationship with the husband without suffering serious harm.

If the woman has been aware of the defect mentioned in Article 176 CC before or at the time of the marriage, or expresses explicit or implicit consent to a defect occurring during the marriage, she cannot demand the divorce (Article 177 CC).

In order to ascertain these defects, expert opinion should be sought (Article 178 CC). If it is found that the disease is incurable, the court will immediately grant the divorce (Article 179 CC). If it is curable and requires long-term treatment, the court will postpone the divorce for no more than a year. If the husband's defect is not cured within one year, the court will grant the divorce, in accordance with Article 114 of the Code of Civil Procedure and Article 179 CC.

Divorce on the grounds of a defect does not cause a permanent impediment to marriage (Article 181 CC). The spouses can remarry after the divorce, either during the waiting period or after it. If the spouses decide to marry again after the waiting period, their marriage needs to be concluded again with a new dower.

Where one of the divorced spouses dies because of a defect during the waiting period, the other one will not be entitled to inherit from the deceased (Article 182 CC). Under Article 180 CC, divorce on the grounds of a defect is considered an irrevocable repudiation, upon which all the effects of marriage except waiting period cease (see Article 152 CC).

### **b) Divorce because of a harm (*tafrīq be sabab-e qarar*)**

The wife can ask the court for a divorce in case of harm suffered in the marital relationship with her husband, making it impossible to maintain the matrimonial bond (Article 183 CC).

Such harm includes being bullied verbally or physically, by swearing, beating, or forcing her to commit illegal actions or refraining from talking or sharing the same bed without any reason.

If the alleged harm is proven and reconciliation proves impossible, the court will grant a divorce under Article 184(1) CC.

If the alleged harm is not proven and the woman insists on the application, the court will assign two arbitrators to reconcile the couple (Article 185(1) CC). Under Article 186(1) CC, the arbitrators should be integrated persons; one a relative of the husband and the other a relative of the wife. If there are no relatives of the spouses, the arbitrators will be chosen from among those persons who know the couple very well and are capable of achieving

reconciliation between them. The appointment of an arbitrator in a divorce action on the grounds of harm where the harm cannot be proven has been confirmed in Article 110 of the Code of Civil Procedure. Therefore, if, in a divorce action on the grounds of harm, the harm cannot be proven and the court fears that this may cause further estrangement and differences between the couple, it will appoint two just persons, one from among the wife's relatives and the other from among the husband's relatives to achieve a reconciliation between the two.

Under Article 186 CC, the arbitrators must take an oath in the court that they will perform their duty lawfully and faithfully. The persons appointed as arbitrators should attempt to find out the causes of the dispute, as well as the ways to solve it and endeavour to reconcile the couple (Article 187 CC).

If the arbitrators fail to achieve reconciliation between the spouses, and if one or both of the spouses are the source of the dispute or if the source is unknown, the court will grant the divorce (Article 188(1) CC). If the woman is the source of the dispute, she has to return the full dower or part of it (Article 188(2) CC).

If the arbitrators differ in their opinions, they will be called upon by the court to review their opinions under Article 189(1) CC. If they fail to overcome their difference of opinion, the court will appoint new arbitrators on the basis of Article 186(2) CC. However, Article 111 of the Code of Civil Procedure provides that in a divorce action on the grounds of harm, arbitrators cannot be appointed more than twice.

In accordance with Article 190 CC and Article 112 of the Code of Civil Procedure, the arbitrators will submit their decisions and statement of grounds to the court and the court will pronounce its judgement accordingly. If the court grants a divorce on the grounds of harm, this will have the effects of an irrevocable repudiation (Article 184(2) CC).

### **c) Divorce due to non-payment of maintenance**

If the husband refuses to pay maintenance to his wife, but his inability to provide maintenance cannot be proven, the wife can petition for divorce under Article 191 CC. If the husband proves his inability to provide maintenance, the court will grant an extension not exceeding three months (Article 192). If the husband is still unable to pay the maintenance after that, the court will grant the divorce.

A divorce by court order on the grounds of non-payment of maintenance is considered as a revocable repudiation and the husband can return to his wife during the waiting period, provided he proves his financial capability and readiness to pay the maintenance (Article 193 CC).

### **d) Divorce due to absence**

If the husband is absent for three years or more without any justifiable reason and the wife, suffers any harm due to his absence, she can petition for divorce in the court under Article 194 CC, regardless of the husband being rich and able to provide maintenance for his wife.

In accordance with the provisions of Article 195 CC, the court must inform the husband in writing of the wife's petition for divorce and fix a time limit during which the husband should return to the family residence or take his wife to the place where he resides. The Code of Civil Procedure also contains procedural provisions relating to divorce due to absence, which should be observed by the court. According to Article 115 of the Code of Civil Procedure, in a divorce action on the grounds of absence, the court informs the husband in writing if his

whereabouts are known, setting a deadline for the husband to return to his wife's residence or to take his wife to the place where he resides.

If the husband remains absent, despite notice by the court and without any justifiable reason, or if service of the notice is impossible, the court will grant the divorce (Article 195(2) CC). Those cases are regulated in more detail in the Code of Civil Procedure. If the husband, despite receipt of the court's notice and after expiration of the deadline, remains absent, the court will rule on the case after appointing a proxy for the absent husband (Article 116 Code of Civil Procedure (?)).

If the whereabouts of the absent husband are not known, or if it is not possible for the husband to receive the written notice, the deadline for his appearance, under Article 117 of the Code of Civil Procedure, will be announced on the radio. This deadline for appearance should not be less than one month from the date of the announcement.

If the absent husband, despite the radio announcement, fails to appear without any legal reason, the court will appoint a proxy for him and will rule on the case and decree the divorce (Article 118 Code of Civil Procedure).

In the case of a petition for marriage dissolution on the grounds of the prolonged disappearance of the husband whose life or death is not established, under Article 119 of the Code of Civil Procedure and Article 326 CC, the divorce is not permitted before four years of absence.

Similarly, if the husband has been sentenced to ten or more years of imprisonment by a final judgement, the wife can petition for a divorce after five years, even if the imprisoned husband is able to pay the maintenance (Article 196 CC).

Article 197(1) CC states that divorce on the grounds of absence is considered as a revocable repudiation. If an absent husband appears or an imprisoned husband is released, he can return to his wife until the waiting period expires (Article 197 (2) CC).

## **2. Judicial divorce by the wife in other Islamic countries**

According to the laws of other Islamic countries, women can also petition the courts for a divorce on the grounds of certain reasons. In some Islamic countries, judicial divorce by the wife is called *tatliq*. If a woman demands a divorce without being granted the right to repudiate herself by her husband, in many Islamic countries she is required by the law to prove a ground for divorce.

Tunisia is an exception. In the Tunisian Law of Personal Status, both husband and wife enjoy an equal right to demand a divorce from the court (Articles 29-31). Under Article 31, a divorce can be petitioned for in the following three cases:

1. By mutual consent of the spouses;
2. Upon the request of one of the spouses on the grounds of harm;
3. Upon request of the husband or the wife.

As provided Article 31(3), men and women do not need to specify grounds for a divorce. However, this article provides for the possibility of a compensation for a spouse who suffers harm due to the divorce. In Tunisia, divorce is consistently called *talāq* (repudiation).

In Syria, Morocco, Iraq, Jordan, Algeria, Kuwait, Sudan and Oman, the grounds for a divorce advanced by the wife correspond to those in Afghanistan. A petition for judicial divorce can succeed only when it is based on harm, a defect in the husband, refusal to pay maintenance or unjustified absence of the husband. Any ground for the divorce has to be proven.

The Iranian law speaks consistently of *talāq*, even if the divorce is demanded by the wife. The wife can either invoke legal grounds for a divorce included in the country's civil code or those

agreed upon in the marriage contract. If there is a ground for the divorce, the husband will be compelled by the court to pronounce a repudiation or the court can pronounce the repudiation formula on his behalf. There are three legal grounds for a divorce which a woman can raise:

1. If the husband is missing (Article 1029 Iranian Civil Code);
2. If the husband refuses to provide maintenance (Article 1129 Iranian Civil Code);
3. If the wife is suffering from hardship (Article 1130 Iranian Civil Code).

The wife is suffering from hardship if the continuation of the married life is intolerable for her. It is incumbent on the court to determine whether hardship exists.

## V. PRELIMINARY CONCILIATION PROCEEDINGS IN DIVORCE LAW

### 1. Conciliation proceedings in Afghan divorce law

Where a wife requests a judicial divorce due to harm and the harm is not proven and the woman insists on being divorced, two arbitrators are legally appointed by the court to achieve reconciliation between the spouses. In relation to the other grounds of divorce the wife can base her request upon, no conciliation proceedings are regulated by law. Likewise, no conciliation proceedings are provided for in case of repudiation or *khol<sup>c</sup>* (divorce by mutual consent) because in these cases not even the involvement of the court is legally required. The social backlashes have been discussed in the previous chapters.

### 2. Conciliation proceedings in the divorce law of other Islamic countries

Some Islamic countries allow conciliation proceedings in other types of marriage dissolution as well. For example, Article 21 of the Egyptian Law No. 1 of 2000 regulating certain litigation procedures in matters of personal status provides that the certifier of the repudiation is obliged to inform both spouses of the risks of *ṭalāq* and ask them to each name one arbitrator from among their families for conciliation. Moreover, Article 18(2) of the same law states that the court can rule on petitions for divorce only when judicial conciliation proceedings have failed. If the couple has a minor child, the court should offer conciliation at least twice at an interval of 30 to 60 days. Article 19 defines the obligatory conciliation proceedings as follows:

“In divorce suits (petition for *taṭlīq*) where the law requires two arbitrators, the court should obligate both spouses to each name one arbitrator from among their families at the next session if possible. If one of the spouses fails to name an arbitrator or to attend the setting, the court will appoint an arbitrator for him/her. The court can resolve on what the two arbitrators agree upon or what each of them says, or otherwise what can be inferred from the case files.”

In Jordan, conciliation proceedings are obligatory before a divorce in two cases: for *khol<sup>c</sup>*, following an amendment to the law in 2001 (Article 6 Jordanian Law of Personal Status), and for dissolution of marriage on the grounds of disagreements. The petition for a divorce on the grounds of disagreements can be submitted by either husband or wife claiming that the other has verbally or physically harmed him/her in a way which makes the continuation of the married life impossible (Article 133 Jordanian Law of Personal Status). In such a case, the judge tries to reconcile the couple. If they fail to reconcile the couple, the judge will postpone the proceedings for at least one month.

If after expiration of the deadline, no reconciliation has been achieved, the judge will refer the case to the two arbitrators. If possible, the judge appoints one arbitrator from the wife's family and one from the husband's family. The arbitrators should try to reconcile the couple. If they fail and determine which one of the spouses is responsible for the disagreements, the arbitrators will decide to dissolve the marriage in exchange for a consideration they deem appropriate. This consideration can be regarded as a kind of compensation. If the responsibility lies solely with the wife, the consideration must not be less than the dower. If the husband is found to be solely responsible, the arbitrators will decide to dissolve the marriage through an irrevocable repudiation. In this case, the woman is entitled to assert all her matrimonial claims as if the divorce had been initiated by the husband. Both arbitrators will present a report on the results of their efforts to the judge. The judge should deliver the judgement accordingly (Article 133 Jordanian Law of Personal Status). In the case of *khol<sup>c</sup>*, returning the wife's dower to the husband is accepted as a consideration.

In Syria, a divorce is preceded by conciliation proceedings if a unilateral divorce or divorce by mutual consent is pending in court. A divorce on the grounds of harm is preceded by long and complicated conciliation proceedings, for which two arbitrators are appointed by the judge (Article 112 (3) and Articles 113 and 114 of the Syrian Law of Personal Status). The decision of the arbitrators is not binding for the judge. The judge can take it as a basis for his decision or reject it. If he rejects the arbitrator's decision, the judge must appoint another two arbitrators. No further arbitrators can be appointed following this.

In Iran, the petition for divorce of both husband and wife requires mandatory conciliation proceedings. In such conciliation proceedings, selected arbitrators from among the families of the spouses shall attempt to reconcile them (Article 3 Law of Special Civil Courts, 1979). If the reconciliation attempts prove unsuccessful, the court will issue a certificate of impossibility of reconciliation. The certificate is submitted to the Marriage and Divorce Registration Office by the couple for the pronouncement and registration of the divorce. The pronouncement will be performed in the presence of two witnesses and the divorce will be recorded by the Head of the Registration Office. If the husband refuses to attend the hearing or to accept the divorce (if the divorce has been petitioned for by the wife), at the request of the wife the court can pronounce the repudiation and order its registration and announcement by the Registration Office (Law for Determining the Duration of the Validity of the Certificate of Impossibility of Reconciliation of 2 November 1997).

## **F. CONSEQUENCES OF MARRIAGE DISSOLUTION**

The effects of marriage dissolution are regulated in Article 197 and the subsequent articles of the Civil Code. Legally, these effects are the waiting period and maintenance obligation during this period.

### **I. WAITING PERIOD**

#### **1. Definition of the waiting period**

The term "waiting period" (*‘eddat*) is derived from the Arabic word *‘adda*, which means "to count". Article 198 of the Afghan Civil Code provides that *‘eddat* is a specified period of time, upon the expiration of which all effects of the marriage cease. In accordance with Article 211 CC, the waiting period begins with the pronouncement of the repudiation, death, annulment of a marriage, judicial divorce or separation in a defective marriage.

## 2. Purpose of the waiting period

The purpose of observing a waiting period is to establish whether a woman is pregnant. It is particularly important for the determination of paternity. Moreover, during the waiting period for a revocable repudiation, the husband can revoke the repudiation and resume the marital relationship at any time.

## 3. Consequences of the waiting period

Article 199(1) CC provides that during the waiting period only the husband can (re)marry the woman. Article 199(2) and Article 200 CC deal with cases in which the waiting period becomes obligatory for the woman. However, the Civil Code again uses the term *tafrīq* for the separation, which, from a legal point of view, is not accurate. As already mentioned above, *tafrīq* in a legal context means judicial divorce at the request of the wife for certain reasons. In the following discussion, the term *tafrīq* will be used, in accordance with the Afghan Civil Code, to denote separation in general. With this meaning in mind and as stated in Article 199(2) and Article 200 CC, the waiting period becomes relevant in the following circumstances:

1. If the separation (*tafrīq*) took place after a valid or defective conclusion of marriage after its consummation or full privacy, or in a valid marriage without full privacy, whether this separation has been effected as a revocable, minor irrevocable or major irrevocable repudiation (Article 199 CC);
2. If the separation (*tafrīq*) took place due to a sworn allegation of adultery (*li'ān*), a defect, lacking determination of an appropriate dower, authority arising from reaching marriageable age or recovery of mental health, annulment, separation after a defective conclusion of marriage or mistaken sexual intercourse<sup>46</sup> (Article 199);
3. When the husband in a valid marriage dies before or after its consummation, the waiting period becomes obligatory for the wife before a new marriage (Article 200).

## 4. Duration of the waiting period

The duration of the waiting period can differ depending on the situation, as provided in Articles 201 to 210 CC. To determine the duration, women in different situations should be treated differently: a menstruating woman, a menopausal woman or a married woman who has reached puberty age but has not yet begun menstruating, a woman not menstruating, a woman constantly menstruating, a pregnant woman and a widow.

In relation to the costs incurred during the waiting period, the provisions of Article 210 CC are noteworthy. According to this provision, if the husband remarries his wife after a minor irrevocable repudiation during the waiting period and repudiates her again, the woman will be entitled to the full dower and has to observe a new waiting period, even if the repudiation has occurred before the consummation of marriage. Although the provisions of the Civil Code

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<sup>46</sup> Mistaken sexual intercourse refers to a situation in which a man and a woman mistakenly believe that they are married and, due to this wrong assumption, engage in sexual intercourse. For example, if they are oblivious of a marriage impediment between them, marry and then consummate the marriage. As it is a void marriage, the sexual interaction between these two can be considered as a mistaken intercourse.

regarding the waiting period mention divorce and all types of annulment, it is noteworthy that these articles cover separation as well.

#### **a) Menstruating women**

In accordance with Article 201(1) CC, the waiting period after a repudiation (or *tafrīq*) and all other types of annulment after a valid conclusion of marriage is three menstrual cycles for a woman with whom the marriage had been consummated, but who is not pregnant and menstruates. Article 201(2) CC provides that a menstruation, during which a repudiation or judicial divorce occurred, will not be counted in the waiting period..

#### **b) Menopausal women or women not yet menstruating**

The waiting period after a repudiation (and *tafrīq*) or annulment is three complete months for a married woman who is in the menopause or who has reached puberty age, but does not menstruate under Article 202 CC. If a woman of puberty age who does not menstruate yet or a menopausal woman should menstruate during the waiting period, her waiting period will be three complete menstruations (Article 203 CC).

#### **c) Non-menstruating women**

The waiting period for a non-menstruating woman is a whole year, provided that the woman does not menstruate during this period (Article 204(1) CC). If the woman does menstruate in the first year, the waiting period will expire at the end of the second year during which there is no menstruation. Article 204(2) CC provides that if the woman menstruates in the second year as well, the waiting period will expire at the end of the third year again provided there is no menstruation.

#### **d) Constantly menstruating women**

The waiting period for a constantly menstruating woman who is not sure about her menstruation cycle is seven months after a repudiation (or *tafrīq*) or annulment (Article 205 CC).

#### **e) Pregnant women**

Under Article 206 CC, the waiting period for a pregnant woman expires upon the birth of the child, provided that the formation of the child's organs is wholly or partially visible.

#### **f) Widows**

Under Article 207 CC, the waiting period after the death of the husband is four months and 10 days. However, if the wife is pregnant, the provisions of Article 206 CC will be applicable, according to which the waiting period expires upon the birth of the child.

If the husband dies after the repudiation of his wife and before her waiting period is over, the waiting period for the repudiation ceases to apply and, under Article 207 CC, a waiting period for the death of the husband is applicable, regardless of whether the repudiation was pronounced in good health or during a fatal illness.

If a dying husband repudiates his wife irrevocably without her consent and dies during her waiting period, the wife is entitled to inheritance under Article 109 CC. She must observe either the waiting period for repudiation or for death of the husband, whichever is longer.

## II. MAINTENANCE OBLIGATION DURING THE WAITING PERIOD

The husband must provide maintenance to his wife during the waiting period. Under Article 212 CC, no type of marriage dissolution<sup>47</sup> initiated by the husband, be it repudiation or annulment, precludes the right to maintenance during the waiting period, even if the husband is not at fault.

### 1. The husband's obligation to provide maintenance

In accordance with Article 212 CC, the husband is obligated to provide maintenance during the waiting period in the following cases:

1. In a waiting period after a revocable or a minor or major irrevocable repudiation of the marriage, regardless of the woman being pregnant or not. Similarly, Article 126 CC states that the repudiated woman is entitled to maintenance from the time of repudiation until the end of the waiting period;
2. In a waiting period after a *li<sup>c</sup>ān* (sworn allegation of adultery), *'ilā'*<sup>48</sup> and *khol<sup>c</sup>*, unless the woman has waived her claim to maintenance;
3. In a waiting period following a dissolution of marriage due to the husband's refusal to convert to Islam;
4. In a waiting period following the annulment of the marriage by the husband in exercise of the option of puberty;
5. In a waiting period following a dissolution of marriage due to the husband's apostasy or because of a marriage impediment of affinity arising from an act of the husband.

### 2. The forfeiture of maintenance

As Article 214 CC states that any judicial divorce (*tafrīq*) which takes place due to the wife's fault and at her request will entail the lapse of the right to maintenance during the waiting period. In such a case, even if the ground for the divorce is removed before the waiting period is completed, the woman will not become entitled to maintenance again. However, under Article 213 CC, the right to maintenance of a woman in the waiting period who dissolves the marriage due to authority arising from reaching marriageable age, lacking determination of an appropriate dower or a defect in the husband will not be forfeited, provided that she is not at fault with regard to these situations.

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<sup>47</sup> Here, the word *tafrīq* is used, while, as already mentioned before, the concept of *tafrīq* in some provisions of the law (as well as later in Article 212 CC) means judicial divorce.

<sup>48</sup> *'Ilā'* has neither been defined nor regulated in the Civil Code. In accordance with Islamic law, *'ilā'* refers to an oath of abstinence the husband takes to refrain from sexual intercourse with his wife for four months or longer. According to the Hanafī school of law, at the end of the four months, during which the husband has refrained from sexual intercourse with his wife, an irrevocable repudiation applies.

If the husband dies, the wife will not be entitled to maintenance, regardless of her being pregnant or not (Article 215 CC).

If the amount of the wife's maintenance in the waiting period has not been determined and she does not demand it before the end of the waiting period, it lapses in accordance with Article 216 CC. Moreover, Article 127 CC states that if a repudiated woman claims maintenance for the waiting period more than one year from the date of the repudiation, she will not be entitled to it. Therefore, she has only one year to submit her claim to the court.

### III. COMPENSATION (*MOT<sup>c</sup>E*)

The husband's obligation to provide compensation (*mot<sup>c</sup>e*) when a marriage is dissolved before the consummation where no dowry has been determined has been discussed above in the chapter on dowry.<sup>49</sup> In addition to this, the Afghan law mentions that compensation (*mot<sup>c</sup>e*) could be provided even after a repudiation. However, the husband is not obliged to do so. In such a situation, the Hanafi school of law only recommends its payment.

Article 108(2) CC states with regard to this:

“If the repudiation takes place after consummation of the marriage, regardless of whether the dowry has been determined or not, providing compensation (*mot<sup>c</sup>e*) to the wife is permissible.”

In other Islamic countries, following the dissolution of a marriage there will also be a waiting period and the husband's obligation to provide maintenance during this period. Some of these countries have also legislated for the payment of compensation (*mot<sup>c</sup>e*) to the wife in case of an unjustified repudiation by the husband.

In Egypt, Art. 18a Law No. 25/1929 states that the husband, apart from providing maintenance during the waiting period, is obliged to pay *mot<sup>c</sup>e* to the amount of at least maintenance payments for two years, provided that the marriage is valid and has been consummated and the husband repudiates his wife without her consent or any reason on her part. The husband's financial circumstances and the duration of the marriage will be taken into consideration in determining this. The husband may be permitted to pay the sum by instalments.

In Kuwait, Article 165(a) of the Law of Personal Status provides that the woman is entitled to compensation (*mot<sup>c</sup>e*) as well as maintenance during the waiting period if a legally valid marriage is dissolved after its consummation. The amount of the *mot<sup>c</sup>e* is calculated by the husband's financial status. However, it cannot exceed one year of maintenance. The payment for the *mot<sup>c</sup>e* begins as soon as the waiting period ends.

The *mot<sup>c</sup>e* is normally paid by monthly instalments, unless the couple agrees on a different mode of payment. At variance with this rule, Article 165(b) of the Kuwaiti Law of Personal Status mentions the following five situations in which the husband is not obliged to pay compensation to the wife:

1. In a judicial divorce on the grounds of the husband's inability to pay;
2. In a judicial divorce on the grounds of matrimonial offence by the wife;
3. In an extrajudicial divorce with the wife's consent;

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<sup>49</sup> See Part 3 D II 8 “Right to *mot<sup>c</sup>e* or basic necessities” above.

4. In case of annulment of the marriage at the wife's request;
5. Upon the death of one of the spouses.

The Syrian legislator uses the word *ta<sup>c</sup>wīd*, which means compensation or indemnification, instead of *mo<sup>f</sup>e*. According to the provisions of Article 117 of the Syrian Law of Personal Status, the judge can obligate the husband to pay compensation to the wife if he repudiates her arbitrarily (i.e. without reasonable cause), as a result of which the wife is subjected to poverty and deprivation. The amount of the compensation is calculated by the husband's financial circumstances and the degree of arbitrariness. The compensation cannot exceed the amount a woman of an equivalent social status is entitled to as maintenance for three years. Likewise, the husband's obligation to pay the compensation is independent of his obligation to provide maintenance during the waiting period. The judge can decide, depending on the individual case, whether the compensation is payable in full or by monthly instalments.

The Jordanian legislator also uses the term *ta<sup>c</sup>wīd* and, in Article 134 of the Law of Personal Status, obligates the husband to compensate the wife he has repudiated abusively. The right to repudiate can be abused by the husband by repudiating his wife without any reasonable cause. Repudiation because of infertility or deficiency in sight or hearing is also considered abusive repudiation, according to the statement of the Sharia Court of Appeals of Jordan.<sup>50</sup> In these cases, the repudiated wife is entitled to compensation.<sup>51</sup> The compensation has to be paid either in full or by installments, with the husband's financial circumstances being taken into account. All other marital claims of the divorcee, including maintenance during the waiting period, remain unaffected.

In Iranian law, another type of compensation is known for services the wife has rendered during the marriage without being obligated to - the right to *ojrat ol-methl*. As a woman is not obliged to breastfeed the couple's common children (Article 1176 Iranian Civil Code), or to take care of them beyond the legal age, or even to do housework, she is entitled to remuneration for such services. Until recently, such compensation was paid on the condition that the wife is divorced without having neglected her duty and while insisting to continue the marriage (Article 1 note 6 Divorce Law). In 2007, the right to *ojrat ol-methl* was formulated more generously in favour of the women. A note was added to Article 336 CC according to which wives can claim remuneration for housework done at their husbands' behest. The wording of this provision goes further than Article 1 note 6 of the Divorce Law, since it does not take over the restriction of the latter. This claim can be enforced at any time and continues to exist even in the event of the husband's death. Since all his liabilities would become due upon the death of the testator, this claim can be enforced against the estate as a liability of the estate.

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<sup>50</sup> Sharia Court of Appeals, Decision No. 22299, quoted as in: *Malham*, p. 203.

<sup>51</sup> *Ibid.*

# **PART 4. CHILD LAW, GUARDIANSHIP AND CUSTODY**

## **A. CHILD LAW**

### **I. INTRODUCTION**

The child law comprises those legal norms which concern the child and the relations with its family. It essentially regulates the parent-child relationship. In the law of Afghanistan, child law is regulated as part of the Family Law in section 10, chapter 2, volume 1 of the Civil Code of 1977. According to this law, the proof of the child's descent, the obligation to breastfeed the child, the entitlement of the child and the parents to maintenance, the custody, guardianship of person and property of a minor are important legal consequences which arise from the birth of a child. Among the legal provisions is also the right of the child to inherit from the parents and vice versa.

In the following, the legal consequences of the parent-child relationship in the law of Afghanistan are explained in detail.

### **II. DESCENT**

Descent is regulated in Articles 217 to 228 CC. The law differentiates between descent from a valid marriage (Articles 217-219 CC), descent after dissolution of the marriage or the husband's death (Articles 220 and 221 CC), descent from a defective marriage (Article 222 and 223 CC) and, finally, descent established by recognition (Articles 222-225 CC).

One of the most important legal consequences of marriage is the determination of a child's descent, i.e. the determination of its parents. This legal relation between the children and the parents entails mutual rights and obligations and grants legitimacy to a child.

Maternity is proven by the birth of the child which nobody can deny, regardless of whether it is the result of a valid or a defective marriage or from a situation where no marriage existed.

Paternity cannot be created in case of an illegitimate birth (from extramarital intercourse). Therefore, apart from descent by recognition, paternity is established either on the grounds of a valid or deficient marriage or mistaken sexual intercourse.

#### **1. Proof of descent from a valid marriage**

A valid marriage is the basis for the proof of a child's descent from its father. In accordance with the provisions of Article 218 CC, the offspring of a wife living in a valid marriage is considered as the child of the husband as well, provided the minimum period of pregnancy is spent within a marriage and sexual intercourse and full privacy between the spouses have taken place.

The minimum and maximum duration of pregnancy is determined in Article 217 CC, so that the difference of opinion among Muslim legal scholars with regard to the maximum duration of pregnancy remains irrelevant. In accordance with this article, the minimum duration is six months and the maximum is one year. The date of the conclusion of the marriage is essential for determining the duration of the pregnancy. This can be inferred from Article 219(1) CC which determines the legal consequences of a birth less than six months after the marriage. With regard to the maximum duration, the law in Afghanistan does not follow the Hanafi

school of law which considers even the child of a widow or a divorcee born two years after the dissolution of the marriage as legitimate issue of the marriage. In this case, it follows the Maliki school of law.

To prove the sexual intercourse and full privacy, a subjective as well as an objective component is required. The subjective component is that the husband has to have reached puberty age and have been physically capable of performing sexual intercourse. The objective component is that, at least, the consummation of the marriage must have been possible.

If the wife gives birth less than six months after the marriage, the child is not considered as illegitimate *per se*. Such children are awarded the status of a legitimate child if the husband or the previous husband or, in case of his death, his heirs testify that the child has been conceived within a legitimate relationship between the husband or previous husband and the mother of the child. This means that the child has not been conceived out of wedlock. This matter has been clearly determined in Article 219(2) CC. Accordingly, such a child will not be attributed to the husband, unless he admits that the child is his own legitimate offspring. In such a case, the child's descent can be proven by recognition of paternity, the conditions and legal consequences of which will be discussed later.

## **2. Proof of descent after dissolution of the marriage or after the husband's death**

The regulations relating to proof of descent after dissolution of marriage or the husband's death are included in Articles 220 and 221 CC. This law uses the term *tafrīq* in the title and *ṭalāq* in the text of the law. However, it can be assumed that the legislator wanted to include all types of marriage dissolution entailing a waiting period. If the woman gives birth more than one year after the repudiation or the husband's death, under Article 220 her action for determination of the child's descent will not be heard. In case of repudiation, the husband, or his heirs if the husband has died, must acknowledge the child's descent from him. Therefore, in such a case as well, the descent can be proved only by recognition.

If the repudiated wife or the widow admits the completion of her waiting period, the child's descent from her husband is considered proven if the birth occurs less than six months after her confession or less than a year after the repudiation or the death of her husband.

## **3. Proof of descent from a defective marriage and mistaken sexual intercourse**

Article 222 and 223 CC regulate proof of descent from a defective marriage or mistaken sexual intercourse.<sup>52</sup> As provided by Article 222(1) CC, a wife's child from a defective marriage can be attributed to the husband if it is born at least six months after consummation of the marriage. In a defective marriage, the date of its consummation is essential for counting the six months pregnancy period whereas in a valid marriage, the date of the marriage is decisive. The other necessary conditions are similar to those in a valid marriage, however. The husband has to have reached puberty age and been physically capable of performing sexual intercourse, and the consummation of the marriage must, at least, have been possible.

In case of separation (*motāreke*) or dissolution (*tafrīq*) of the defective marriage, the child is attributed to the husband if, further Article 222(2) CC, it is born no later than one year after

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<sup>52</sup> For mistaken sexual intercourse, see footnote 46 above.

the marriage dissolution. Although the law uses the terms *motāreke* and *tafrīq* as possibilities for a separation in case of a defective marriage, these terms are not accurate from a legal point of view because *de jure*, in case of a defective marriage, there is only one option, i.e. annulment of the marriage.<sup>53</sup>

The law does not explicitly state whether Article 222 CC is applicable in cases of mistaken sexual intercourse as well. However, from the title of the law it seems that this article covers both defective marriages and mistaken sexual intercourse. Therefore, if the sexual intercourse has taken place mistakenly - for example, when the husband believes that the woman is his lawful wife or in case there is a marriage impediment, but the man believes that the marriage is legally permissible - the child born by this woman will be attributed to the man, provided the child is born at least six months after the sexual intercourse.

Likewise, it becomes apparent from Article 223 CC that cases of mistaken sexual intercourse are also subjected to Article 222 CC. According to this, if the child's descent from a defective marriage or mistaken sexual intercourse is proven, all the effects of a legitimate relationship, including inheritance, maintenance, marriage impediments, etc. will arise.

#### **4. Proof of descent by recognition**

If the conditions for proving descent from a valid or defective marriage, after its dissolution or the husband's death, or in case of mistaken sexual intercourse, are not fulfilled, descent can be proved by recognition as well. The recognition of descent is essential when the existence of a marriage - valid or defective - between the mother of the child and its presumed father at the time of conception and the time of birth can be neither proven nor excluded.

Descent can be proven by recognition by either the father or the mother or the child. The Civil Code includes provisions regarding this matter in Articles 224 to 228.

Descent can only be acknowledged in relation to paternity or maternity to a child, unless it is confirmed by the person who has been recognised. For example, this situation arises when a person claims the child in question is his/her sibling, uncle/aunt or grandchild. Such recognition is valid only if the person whose descent is concerned confirms the recognition and all other legal requirements related to this recognition are met.

##### **a) Recognition by the father**

Article 224 CC provides that descent is proven by recognition of paternity if the following conditions are fulfilled, even if the recognising party is suffering from a fatal disease:

1. The recognising person should be at an age at which he could possibly be the father of the child;
2. The child to be recognised should be of unknown descent;
3. The discerning child to be recognised should confirm the claim of the recognising person.

The child should also be the product of a legitimate relationship and not extramarital intercourse.

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<sup>53</sup> For marriage annulment see Part 3 E I "Annulment of marriage (*faskh*)" above.

## **b) Recognition by the mother**

Proof of descent by recognition by the mother is regulated in Article 225 CC. According to this, the descent by recognition by the wife or the woman in the waiting period is proven when the husband confirms it or the wife produces positive evidence.

## **c) Recognition by the child**

A person's descent which is unknown and who claims that a certain person is his/her father or mother can be proved if, in accordance with the provisions of Article 226 CC, the following conditions are fulfilled:

1. The recognising person (the child) should be at an age at which they could possibly be the child of the person to be recognised (father or mother);
2. The person to be recognised (father or mother) should confirm the claim of the recognising person (the child).

In this case, mutual legal relations arise from paternity and childship.

The confirmation of the claim of descent can be replaced by positive evidence, such as two discerning Muslim men of full age or one man and two women who testify to the relationship.

# **III. LEGAL STATUS OF CHILDREN IN GENERAL**

When a parent-child relationship is created by the proof of descent, rights and obligations arise on the part of both the child and the parents. In the following, the legal status of children in general and the obligations of the parents towards the child will be discussed in detail.

## **1. Nationality of the child**

Citizenship is a legal relationship between an individual and the state from which rights and obligations emanate. In order to obtain citizenship, either the principle of *jus sanguinis* or the principle of territoriality is essential. The first Afghan Citizenship Law was enacted on 8 November 1936. Later in 1986, a new citizenship law was introduced, which was amended in the year 2000. According to the United Nations High Commissioner for Refugees (UNHCR), this amendment only resulted in the name "Democratic Republic of Afghanistan" being changed to "Islamic Republic of Afghanistan", and the rest of the content remained untouched.

At present, there is dissent as to which citizenship law is applicable in Afghanistan, the law of 1936 or the one enacted by the Taliban as amended in 2000.

Albeit, both laws follow the principle of *jus sanguinis*. Article 2 of the 1936 legislation and Article 9 of the 2000 legislation rule that any person born to Afghan parents is an Afghan citizen, regardless of the place of birth. However, there are differences between the laws regarding the determination of citizenship of children, if one or both of the parents are foreign citizens.

According to Article 5 of the 1936 legislation, persons who are born by a foreign father or a foreign mother, or by foreign parents in Afghanistan and who have lived of their own accord the whole time in Afghanistan, even after attaining full age (completed 18th year), are considered Afghan citizens. This does not apply to children of envoys, ambassadors and diplomats. If both parents are foreign citizens, Article 4 of the 1936 legislation provides that the child will be an Afghan citizen, provided one parent was born in Afghanistan and subsequently resided there without interruption. Thus, Articles 4 and 5 of the 1936 legislation can be considered as a breach with the *jus sanguinis*, if both parents are foreign citizens.

However, persons falling under Articles 4 and 5 of the 1936 legislation may within one year after attaining full age assume their father's citizenship, provided the country of which the father is a citizen recognises them as citizens upon application. Moreover, it is noteworthy that according to Article 12 of the 1936 legislation, a female foreign citizen who marries an Afghan man acquires Afghan citizenship, so that under Article 2 of the 1936 legislation, children of such marriages are also considered Afghan citizens.

In comparison to 1936 legislation, the 2000 legislation provides that children of a marriage between an Afghan citizen and a foreign citizen will be recognised as Afghan citizens under Article 10 of that law if:

1. The child is born in the territory of Afghanistan;
2. The child is born outside the territory of Afghanistan, but at least one of the parents is a permanent resident of Afghanistan at the time of the child's birth; or
3. The child is born outside the territory of Afghanistan and his/her parents are permanently residing in a foreign country, but they choose Afghan citizenship for their child.

However, if a child upon reaching the legal age submits a written application within six months accepting his/her parents' former citizenship, they will be deprived of Afghan citizenship from the date of application.

A foreign woman whose husband is a citizen of Afghanistan does not automatically obtain Afghan citizenship under the 2000 legislation. In accordance with Article 19 of the 2000 legislation, she has to apply for it in writing. If the wife is granted citizenship, the children from such a marriage will be subjected to the provisions of Article 9 of the same law. The same applies in case of a marriage between a female Afghan citizen and a foreign man.

Finally, Article 13 of the 2000 legislation provides that children of foreign parents who are born in the territory of Afghanistan and have their permanent residence there will be granted Afghan citizenship when they are 18 years old, provided that they do not apply for any foreign citizenship until one year after they are 18. The children of the heads and members of foreign diplomatic missions and consular representations and representatives of international organisations are excluded from this rule.

## **2. Legal capacity of the child (*ahliyat*)**

In Islamic countries, two forms of legal capacity (*ahliyat*) are differentiated. *Ahliyat-e vojūb* refers to the 'capacity of obligation', i.e. the capacity to acquire rights and duties. *Ahliyat-e adā'*, on the other hand, refers to the 'capacity of execution', which is the capacity to enter into a contract, dispose and validly fulfil one's obligations

The capacity of obligation (*ahliyat-e vojūb*) is the capacity to be a subject of rights and duties. Every human being, even before birth and beyond death, has the capacity of obligation, i.e. from when they are just embryos until their estate is distributed and their debts are cleared. Therefore, a certain age or level of intelligence is not required. Thus, capacity of obligation, on the basis of most modern Civil Codes in Islamic countries, covers a longer period of time than legal personality (*shakhsīyat-e ensān*), which begins with the completion of the birth of a living child and ends with death. The legal personality is described in the first clause of Article 36 CC as follows:

“The personality of man begins with the completion of his birth, provided he is born alive, and ends with his death.”

In the second clause, this article provides that the unborn child shall have those rights which are provided for by law.

The capacity of execution (*ahliyat-e adā'*), on the other hand, creates the ability to enter into legal transactions. Contrary to the capacity of obligation, it is not something everybody possesses. The capacity of execution is an inalienable right a person is entitled to upon reaching majority. However, a person of full age will be capable of execution only if they are of sound mind and have not been deprived of such rights due to any legal reason. Article 39 CC determines when a person reaches majority age. This article states:

“Majority begins upon attaining the age of 18 solar years. A person of full age has unlimited capacity of execution when entering into legal transactions, provided he/she is of sound mind.”<sup>54</sup>

With regard to capacity of execution, one should differentiate between full and limited capacity of execution and legal incapacity. Detailed explanations of this differentiation have been given earlier in Part 3 C II 2 b aa on the legal marriage age. To summarise, a child under 7 years of age is considered, in accordance with Article 40 CC, as undiscerning, i.e. legally incapable. A person who, due to mental deficiency or insanity, is undiscerning, regardless of their age, is also considered as legally incapable on the basis of Article 40 CC.

A child between 7 and 18 years of age has limited capacity of execution and is only partially entitled to enter into legal transactions. The validity of the legal transaction depends on whether the transaction is beneficial or detrimental to the child.

Dispositions made by a minor of sound mind are also allowed without the consent of the legal guardian if they are solely beneficial to the child (Article 541(1) CC). If the disposition is solely detrimental to the child, it is void, even if the guardian assented to it (Article 544(1) CC). The validity of dispositions which are both beneficial and detrimental to the child depends on the consent of the legal guardian (Article 544(2) CC).

Legally incapable persons and those of limited capacity of execution are subject to the provisions on legal, testamentary or court-appointed guardians and custody on the basis of the provisions of the Civil Code, which will be discussed in detail in the chapter on guardianship below.

The age of puberty is also mentioned in some parts of the Afghan Civil Code, but there is no legal regulation in Afghan law to determine when the child reaches the age of puberty. However, it can be concluded from the context of the legal regulations and the content of the provisions that puberty in the Civil Code mostly means majority.

### **3. Residence of the child**

In accordance Article 51(1) CC, residence is the place in which a person habitually resides, regardless of it being permanent or temporary. Moreover, Article 51(2) CC provides that a person can have more than one residence. According to Article 52 CC, the residence of a

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<sup>54</sup> The majority age is also 18 in Lebanon (Article 215 Lebanese Code of Obligations and Contracts of 1932), Syria (Article 46(2) Syrian CC of 1949), Iraq (Article 3 Iraqi Law on the Protection of the Minors of 1980), Jordan (Article 43(2) Jordanian CC of 1976), and in Morocco (Article 209 Moroccan Moudawana). In Egypt, the age of majority is 21 (Article 44(2) Egyptian CC of 1948), as well as in Libya (Article 44(2) Libyan CC of 1953), Kuwait (Article 96(2) Kuwaiti CC of 1980) and Tunisia (Article 153 Tunisian Law of Personal Status). In Algeria, the majority age is 19 (Article 40 Algerian CC).

person of limited capacity of execution, an incapacitated, missing or absent person is the residence of his/her legal guardian. Therefore, the residence of a child of limited capacity of execution is the same as the residence of his/her legal or court-appointed guardian or the person entitled to custody. The same applies to a legally incapable child.

However, a person of limited capacity of execution can have a special residence for legal transactions and dispositions if they are allowed to enter into commercial transactions (Article 52(2) CC). The permission to enter into commercial transactions can be granted to a person of limited capacity of execution by the court as soon as the person attains the age of 16 years. As such they can only after this date have a special residence.

#### **4. Maintenance obligation of the child**

Under Article 264 CC, a child who is wealthy and therefore financially capable, regardless of their sex and age, is obliged to provide maintenance to their indigent parents, grandparents and great-grandparents, regardless of their ability or disability to work. The affiliation to another religion of the book does not affect this obligation.

There are also some provisions in the law which regulate the maintenance obligation in respect of other relatives. Providing maintenance to an indigent person who is not able to work due to physical, mental or neurotic illness is an obligation of the financially capable relatives, including children, in proportion to their share of the inheritance (Article 265 CC). However, according to Article 266 CC, except for ascendants and descendants, the right to maintenance lapses in case of a difference in religion. It is noteworthy that maintaining a relative is obligatory from the date of assertion (Article 267 CC).

#### **5. Inheritance**

##### **a) General**

By proving descent, legal positions relevant with regard to inheritance will arise. Both the child and the parents can inherit from each other. However, the sex of a child affects their share of the inheritance. With regard to the parents, there is also a differentiation between father and mother.

As mentioned earlier, the law in Afghanistan divides the heirs into quranic heirs (*mīrāth be ʿarīq-e fard*) and residuaries (*mīrāth be ʿarīq-e ʿoṣūbat*).<sup>55</sup>

With some heirs, it depends on the family situation, i.e. the existence of certain other heirs, whether they are appointed as quranic heirs or residuaries. The mother, the father and the daughter, in accordance with Article 2004 CC, are quranic heirs, while under certain circumstances, the father and the daughter can be residuaries as well. The son, on the other hand, can only inherit as a residuary.

The residuaries are divided into three types:

1. Residuaries in their own right (*ʿaṣabe-ye be nafse*);
2. Residuaries through another (*ʿaṣabe-ye be sabab-e ghayr*);
3. Residuaries along with another (*ʿaṣabe-ye maʿa ghayr*).

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<sup>55</sup> See Part 3 D V “The inheritance rights of the surviving spouse” above for the relevant provisions relating to quranic and residuary heirs.

Residuaries in their own right are those male relatives whose relationship is not created through a female person (Article 2015 CC). Article 2016 CC determines who belongs to this group, which is divided into four classes. The heirs of the previous class always exclude those of the next class. Within the classes, the degree of relationship is the decisive factor (Article 1017 CC). The first group includes sons and son's sons, regardless of how far the line of descent extends, and the second includes the father and the true grandfather, regardless of how far the line of ascent extends. Therefore, a father can be both a quranic heir and a residuary, but the latter only if no male descendants of the deceased exist.

Residuaries through another are those female persons who need a relationship with another person in order to be related to the deceased or who have a share in the estate together with other residuaries (Article 2018 CC). The second group includes, among others, the case in which there are both sons and daughters who inherit together (Article 2019(1) CC). However, the son inherits twice as much as the daughter (Article 2019(2) CC).

A residuary along with another is a female person who needs a relationship with another female person in order to be related to the deceased, while this other person does not have a share in the estate as a residuary together with herself. This group includes full sisters and paternal half sisters as well as daughters and son's daughters (Article 2021 CC).

#### **b) Children's and parents' rights to inherit from each other**

In accordance with Article 2010 CC, the mother of the deceased person always inherits one-sixth of the estate as a quranic heir if the deceased leaves children or male descendants of his son, regardless of how far the line of descent extends. She inherits only one-sixth of the estate if the deceased leaves two or more brothers and sisters, regardless of whether they are full, paternal half or maternal half siblings. Otherwise, she inherits one-third of the estate. In case the father and the spouse of the deceased are still alive, she only receives her share after deduction of the spouse's share.

The father inherits one-sixth of the estate as a quranic heir, if the deceased person leaves one or more sons or male descendants of a son.

In case the deceased leaves only one daughter but no son, the daughter inherits one-half of the estate (Article 2008(1) CC). If there is more than one daughter and no sons, the daughters' share is two-third of the estate. If the deceased leaves both son/s and daughter/s, they inherit as residuaries through another. In this case, the son/s inherits twice as much as the daughter/s (Article 2019(2) CC).

Although their shares may vary depending on the existence of certain other heirs, the father, mother, son, daughter and spouse always have a share in the estate and cannot be excluded entirely.

### **IV. OBLIGATIONS OF THE PARENTS TO THE CHILD**

Descent creates obligations for the parents with respect to the child. These obligations include breastfeeding, maintenance and parental custody (care, guardianship of person and guardianship of property).

## **1. Breastfeeding**

### **a) Breastfeeding as an obligation of the mother**

In the first stage of life, a child needs to be fed with breast milk, which contains the essential nutrients for the child. The question in dispute is whether a mother who refuses to breastfeed her child can be compelled to do so. The schools of Islamic law differ in answering this question. According to the Hanafi school of law, a mother can be compelled to breastfeed her child in the following three cases:

1. If there is no other woman (wet nurse) available to breastfeed the child;
2. If neither the child nor the father are able to pay for a wet nurse;
3. If the child refuses to be breastfed by another woman.

If none of the cases mentioned above apply, the mother cannot be compelled to breastfeed the child herself. Thus, if she refuses to breastfeed her child or if she has died, it is the father's immediate duty to find a suitable wet nurse to breastfeed the child. If the mother suckles the infant herself, she will be entitled to a payment in proportion to their finances in her marriage life, which will be discussed below.

Under Article 235 CC, a woman who breastfeeds a child under the age of two will be considered as the child's milk-mother. The man with whom the woman has a sexual relationship due to which the milk is available is considered as the child's milk-father. Accordingly, the provisions of Article 84 CC are applicable here, on the basis of which a marriage impediment arises in case of milk kinship.<sup>56</sup>

### **b) Remuneration by the father for breastfeeding**

The remuneration for breastfeeding a child has to be paid, by the person who is obliged to provide maintenance for the child pursuant to Article 299 CC. This remuneration is paid in return for breastfeeding the child. Prior to anyone else, the father is obliged to provide maintenance for the child. Thus, he is obliged to pay for the breastfeeding of the child as well. If the father is without means or dead, the remuneration has to be paid by the person who is obliged to provide maintenance for the child. However, if the child themselves own property, the remuneration will be paid from their own money in all cases.

If the mother herself breastfeeds the child, she will not be entitled to remuneration as long as she is married to the husband or in the waiting period after a revocable repudiation (Article 230 CC). On the other hand, if the mother breastfeeds her child during the waiting period after an irrevocable repudiation of the marriage or after expiration of the revocation period, she will be entitled to remuneration in accordance with Article 231 CC. It is noteworthy that according to the provisions of Article 233 CC, if another woman offers to breastfeed the child for free or for a smaller remuneration than what the mother demands, the mother will not be entitled to any remuneration. Moreover, Article 232 CC provides that the mother will not be entitled to remuneration for breastfeeding for more than two years. All the schools of Islamic law share this view according to which the child should be breastfed until they are two years old if the mother wishes to complete the breastfeeding period.

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<sup>56</sup> See Part 3 C II 4 a dd "Impediment of milk kinship" above.

The amount of the remuneration for breastfeeding is determined in accordance with customary law. The current remuneration for wet nurses will serve as a rule. The remuneration which has been determined for the breastfeeding will remain due even upon the death of the father, but it will be paid, in accordance with Article 234 CC, from the estate of the deceased like other debts.

## **2. Obligation to pay child maintenance**

### **a) Obligation of the father to pay maintenance**

The maintenance for children is regulated under Article 256 CC. In accordance with this, maintenance for children in any form is an obligation of the father until a son is capable of working and until a daughter is married. However, a son's incapacity to take up an occupation, despite maturity age, can also be caused by physical or mental circumstances. Therefore, the father is not only obliged to provide maintenance to minor children but, in accordance with Article 257 CC, also to sons of full age who are without means and incapable to work as well as daughters of full age and without means, in any case, until they marry.

The expenses for maintaining a (minor) son or daughter who is working will be paid from their income provided it is sufficient. Otherwise, the rest of the expenses will have to be paid by the father further to Article 258 CC. Under this Article, if the children's income is more than what is necessary for their maintenance, the father will save the money until they reach majority age when the money will be returned to them.

### **b) Obligation of other relatives to pay maintenance**

If the father is incapable of paying maintenance for his children and unable to work, the person who is appointed as the legal guardian after the father will be obliged to provide for the maintenance of the children in accordance with Article 259 CC. Under Article 268 CC, after the father, the so called "true grandfather"<sup>57</sup> is considered as the guardian. If the father is without means but able to work, he will not be released from his maintenance obligation towards his children (Article 260 CC). In such a case, the guardian appointed after the father will be obliged to pay the child maintenance and can demand its repayment whenever the father is able to pay it.

According to Article 261 CC, a child who has neither father nor any property of their own, if there are relatives including ascendants in direct and collateral line, the maintenance should be paid as follows:

1. In case only the ascendants in direct line (grandparents) or the relatives in collateral line (uncles and aunts) are heirs to the child, the ascendants are obliged to pay for the maintenance whether they will effectively inherit from the child or not;
2. If the ascendants in direct line as well as the relatives in collateral line are joint heirs to the child, the maintenance will be paid by each of them in proportion to their shares of the inheritance.

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<sup>57</sup> A male ascendant in the male line, i.e. between whom and the child no female intervenes, e.g. a father's father, whereas a mother's father is a "false" grandfather.

### **c) Scope of the obligation to pay maintenance**

The maintenance obligation includes the expenses for accommodation, clothing, food, health care and all other necessary expenditures important for a child's growth and development.

In accordance with Article 262 CC, the father is not obliged to pay for the maintenance of his son's wife as well, unless he has previously agreed to it. In such a case, the father can demand the repayment of the maintenance when his son is able to pay it.

A couple can under Article 263 CC reach an agreement with regard to the amount of maintenance of their children. In case a lower sum than the required maintenance has been agreed upon, the father is obliged to pay the arrears of maintenance, and in case a higher sum than the required maintenance has been agreed upon, he is not obliged to pay the difference if it is significant.

### **3. Parental custody for minors**

Parental custody is a protective relationship serving the interests of the minor child and constitutes a right bound by obligations, which is valid with respect to everyone. The main focus is on parental responsibility and thus the obligatory aspect. In Islamic law, parental custody is divided into three categories:

1. Custody (*ḥeḍānat*) refers to the care for an infant in his/her early years of life when it needs to be looked after by a woman. This care is provided by the mother or by another woman assigned for this purpose;
2. Guardianship of person (*velāyat-e nafs*) or guardianship of education (*velāyat-e tarbiyat*) refers to the obligation of the legal guardian to provide for education, upbringing, development, health and security of the child. The father of the child as his/her legal guardian is appointed as the guardian of person prior to others;
3. Guardianship of property (*velāyat-e amvāl*) refers to the obligation of the legal guardian to administer the property of the child. Here, too, it is first of all the father as the legal guardian who is obliged to administer the property of the child.

#### **a) Custody (*ḥeḍānat*)**

##### ***aa) Definition***

The term custody (*ḥeḍānat*) is defined, in Article 236 CC, as the care and education of the child during a period in which they need such services. The necessary period of care and education of the child by a woman is regulated in detail by law. Under Article 249 CC, the period of custody ends when a boy reaches seven and a girl nine years of age. However, the court is authorised to extend the duration of custody under Article 250 CC, provided that the extended time does not exceed two years. Custody can be extremely important particularly in cases where the parents are separated.

### ***bb) Entitled persons***

In accordance with Article 236 CC, custody is classified as a right to be exercised by those people assigned under the provision of the Civil Code. All schools of Islamic law follow the belief that the mother should be considered for custody prior to anyone else, regardless of whether she is living with her husband or separated from him. This principle is laid down in Afghan law in Article 237 CC. According to this, the biological mother is primarily entitled to care and education of the child during the marriage or after its dissolution, provided she has the necessary aptitude for custody. This is determined in Article 238 CC, under which a mother who assumes custody for a child should be sane, of full age and reliable to ensure that the well-being of the child is not compromised and that she is capable of caring for the child and educating it.

Due to the mother's primary right to assume personal custody, if the woman dies or becomes incapable of looking after the child, her own relatives are given priority over her husband's relatives. Under Article 239 CC, the women entitled to custody are the following:

1. The mother, the maternal grandmother and the female ascendants in the maternal line;
2. The paternal grandmother;
3. The full sister (*khāhar-e a<sup>c</sup>yānī*);
4. The maternal half sister (*khāhar-e akhyāfī*);
5. The paternal half sister (*khāhar-e <sup>c</sup>allātī*);
6. The daughter of the full sister;
7. The daughter of the maternal half sister;
8. The daughter of the paternal half sister;
9. The full sister of the mother;
10. The maternal half sister of the mother;
11. The paternal half sister of the mother;
12. The full aunt of the father;
13. The maternal half aunt of the father (*khale-ye akhyāfī-ye pedar*);
14. The paternal half aunt of the father;
15. The mother's paternal aunt;
16. The father's paternal aunt.

If there are no women related to either the mother or the father available for custody, Article 240 CC provides that if those listed in Article 239 CC are not available or lack the necessary aptitude for custody, it will be transferred, according to the order of succession, as follows:

1. The father;
2. The paternal grandfather and the male ascendants in the paternal line;
3. The full brother;
4. The paternal half brother;
5. The sons of the full brother;
6. The sons of the paternal half brother;
7. The descendants of the full or paternal half brother;
8. The paternal uncle;
9. The son of the paternal uncle.

If the above people are not available either or lack the necessary aptitude for custody, Article 241 CC provides that the child will be given to his/her closest relative as follows:

1. The maternal grandfather;
2. The maternal half brother (*barādar-e akhyāfī*);
3. The son of the maternal half brother (*pessar-e barādar-e akhyāfī*);
4. The paternal half brother of the father (*kākā-ye akhyāfī*);
5. The full brother of the mother (*māmā-ye a<sup>c</sup>yānī*);
6. The paternal half brother of the mother (*māmā-ye <sup>c</sup>allātī*);
7. The maternal half brother of the mother (*māmā-ye akhyāfī*).

Since there must be a marriage impediment between the child and the person who assumes the custody of the child, the daughter of the paternal and maternal uncle as well as the daughter of the paternal and maternal aunt cannot assume custody of the child if it is a boy. Likewise, the son of the paternal and maternal uncle and the son of the paternal and maternal aunt cannot assume custody of the child if it is a girl (Article 241 CC).

Even if the mother is entitled to exercise custody of the child, she cannot take the child on a trip without the father's permission whilst she is married to him or in the waiting period (Article 252 CC). The same applies to the father who also, in accordance with Article 254, cannot take the child with him on a trip without the permission of the person entitled to custody. Similarly, any other person entitled to custody cannot take the child on a trip without the permission of the guardian under Article 253 CC.

In case more than one person is entitled to exercise custody, the court can choose the one it considers the most suitable in the child's best interests.

### ***cc) Loss of custody***

In some cases, the right to custody can be lost. This can be the case when the person entitled to custody is not qualified to exercise it. The requirements of Article 238 CC with regard to the woman's aptitude to exercise custody noted above are also applicable to any other person entitled to custody.

The law also contains a general principle in Article 251 CC that the court can give the child to the person who is the next on the list for custody. However, it has to be proven that it is not in the best interests of the child to be in the custody of that person, even if it is the father of the child.

As already mentioned, a marriage impediment has to exist between the child and the person entitled to custody. In addition to this, a woman who cares for the female child, regardless of whether it is the mother or another woman, will lose the right to custody according to Hanafi law if she marries or is married to a man between whom and the female child no marriage impediment exists. The same applies if the person entitled to custody is a man who is married to a woman between whom and the male child no marriage impediment exists. If the custody is exercised by a man, there is a consensus that there should be a woman, such as his wife, mother or grandmother, to supervise the child's affairs.

The man who cares for the child should belong to the same religious denomination as the child. If, for example, a non-Muslim child has two full brothers, one of whom is a Muslim and the other one is a non-Muslim, custody will be granted to the latter.

If the right to custody lapses for some reason, it will revive as soon as that reason ceases to exist (Article 243 CC).

***dd) Obligation for reimbursement of costs***

Besides the remuneration for breastfeeding and the maintenance obligation, the father is also obliged to reimburse the costs of custody (Article 244 CC). In case a child possesses any property of its own, the costs will be reimbursed from the child's own money, unless the father voluntarily pays it. Therefore, the father is obliged to reimburse all costs of custody to the person who assumes the custody. Remuneration of the person who cares for the child is part of these costs.

It should be noted that according to the Hanafi school of law the mother is not entitled to any reimbursement of the costs of custody whilst she is married to the father of the child or in the waiting period after a revocable repudiation. The reason is that the mother in both circumstances is entitled to maintenance from the child's father. This provision can be found in Article 245 CC. However, if the child's mother is in the waiting period after an irrevocable repudiation, or if she marries a man between whom and the child a marriage impediment exists, or if she is in the waiting period after a repudiation by the second husband, she is entitled to reimbursement of the costs of custody (Article 245(2) CC).

If the person who is obliged to reimburse the custody costs is without means and a relative between whom and the child a marriage impediment exists volunteers for custody, the person entitled to custody can choose to either assume custody free of charge himself or to leave it to the relative (Article 246 CC).

Where the person who is obliged to reimburse the custody costs is able to pay, but the child possesses property of their own, custody will be given to the mother in return for reimbursement of the customary costs, even if the costs are paid from the minor's own money (Article 247 CC).

**b) Guardianship of person (*velāyat-e tarbiyat* or *velāyat-e nafs*)**

***aa) Definition***

As mentioned above, guardianship of person is not specifically regulated in the Civil Code of Afghanistan. However, all schools of Islamic law agree that the father is obliged to provide for education, upbringing, development, health and security of the minor child. This care by the father is called guardianship of person. When the custody of the mother ends, the phase of guardianship of person by the legal guardian begins.<sup>58</sup>

***bb) Entitled persons***

The father's right to exercise guardianship of person is not laid down in Afghan law. This priority can be concluded from the Article 71(1) CC regarding guardianship in marriage of a girl aged between 15 and 16.

Moreover, in the section on the administration of property of a child of limited capacity of execution, the persons eligible for guardianship of property are listed. It is debatable whether these provisions can also be applied to the guardianship of person and whether the hierarchy

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<sup>58</sup> See Part 3 C II 2 c aa "Legal guardianship in marriage" above.

of the persons authorised to administer the property of a child of limited capacity of execution can be applied to a child's guardianship of person as well. However, as the law explicitly regulates the guardianship of property of a child of limited capacity of execution and is silent on the issue of guardianship of person, it seems more reasonable to speak of a legal loophole. In the absence of a legal provision, according to Article 1(2) CC the general principles of Hanafi law can be referred to as a means of interpretation, under which the father will be assigned as the guardian of person of a child with limited capacity of execution prior to anyone else. If the father is dead or unapt for guardianship of person, the question arises as to who else will be entitled to exercise guardianship of person in his place.

According to the general principles of Hanafi law, after the death of the father the guardianship of a person is transferred to his paternal grandfather. If the grandfather is dead as well, the guardianship of person will be granted to the next paternal male relative according to the legal order of succession. The hierarchy of those so-called agnatic heirs<sup>59</sup>, who, in accordance with the general principles of Hanafi law, are entitled to exercise the guardianship of person after the demise of the father and the paternal grandfather, has already been described in the section on the persons entitled to custody.<sup>60</sup> If there are no agnatic heirs suitable for guardianship of person, the guardianship will be transferred to those female relatives who are classed among the quranic heirs. These persons include the mother, followed by the paternal grandmother and finally the maternal grandmother. In case these people fail to be eligible for guardianship, it will be granted to the maternal grandfather. If the maternal grandfather is dead, the sister and her children and finally the paternal and maternal aunts and their children will be considered for the guardianship. With regard to those persons who do not have any legal guardian of person, Article 78 CC provides that the judge will be the legal guardian.

### ***cc) Duration of the guardianship of person***

If the age of the child exceeds the age relevant to the exercise of custody by the mother (9 for girls and 7 for boys, provided it has not been extended by the court), the father of the child or, in case of his absence, the paternal grandfather followed by those mentioned before, are entitled to take the child from the person who has been taking care of them.

Articles 39 to 42 CC regulate the termination of the guardianship of person. Under Article 42 CC, the guardianship of a person ends when the child reaches the age of majority. This article deals with the guardianship of legally incapable persons or those with limited capacity of execution. Full capacity of execution begins with the completion of 18 years of age under Article 39 CC, provided the person is sane.

### **c) Guardianship of property (*velāyat-e amvāl*)**

Guardianship of property is the administration of a child's property, which is one of the obligations of a guardian towards the child. The persons who can be assigned to administer the property of a child are the following:

1. The father as the legal guardian;

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<sup>59</sup> Male and female relatives in the male line, i.e. between whom and the deceased no female intervenes.

<sup>60</sup> See Part 4 A IV 3 a bb "Entitled persons" above.

2. A testamentary guardian appointed by the father;
3. The grandfather as the legal guardian if no testamentary guardian has been appointed by the father;
4. A court-appointed guardian.

## ***aa) Legal guardian***

### **(1) Preconditions and beginning of the guardianship**

The guardianship of property of a child with limited capacity of execution, as provided in Article 268(1) CC, belongs to the father, prior to anyone else, followed by the paternal grandfather, provided that no guardian has been appointed by the father in his will. Although this provision only mentions children with limited capacity of execution, this rule should be applied to children without legal capacity as well.<sup>61</sup> This can be concluded from Article 42 CC, according to which persons without legal capacity as well as persons with limited capacity of execution are subject to the provisions on legal (*velāyat*), testamentary (*vaṣāyat*) and court-appointed guardianship (*qavāmat*).

As such, the father and the paternal grandfather are considered as legal guardians of minors without legal capacity and those with limited capacity of execution. In accordance with Article 268(2) CC, the legal guardian cannot avoid the guardianship of property without the permission of a competent court.

In order to exercise the rights of guardianship, a legal guardian has to meet some preconditions. Article 269 CC provides that the legal guardian is entitled to exercise the rights of guardianship if they are of full capacity of execution concerning the exercise of rights with regard to their own property. Therefore, the legal guardian should be of full age, sane and honest.

If the father is known as a reliable person who has a good sense of business or nothing negative is known to suggest otherwise, he can administer the property of his ward as if it was his own property. If the father is reliable and no squanderer, but lacks business sense, he should only dispose of the child's property if it is advantageous for the child. On the other hand, if the father is known as an unreliable, prodigal person who has no sense of business either, he should not be authorised to administer the property of the child.<sup>62</sup>

### **(2) Administration of the property by the guardian**

Under Article 281 CC, the guardian is obliged to prepare a complete list of the ward's property within two months of the guardianship or the time the ward begins to own property and submit it to the relevant division of the competent court.

The legal guardian can make provisions regarding the administration and management of the ward's property in accordance with the provisions of the Civil Code under Article 270 CC.

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<sup>61</sup> Refer to Part 4 A III 2 "Legal capacity of the child (*ahliyat*)" above for further information on the differences in legal capacity.

<sup>62</sup> Nasir, 193, 194.

This power of disposal and administration of the child's property granted to the guardian is not unrestricted. The dispositions of the legal guardian should always be in the child's best interests. However, if an asset is given to a person with limited capacity of execution on condition that it should not be placed under the care of the legal guardian, Article 271 CC provides that it can be exempted as an exception from the property administration of the guardian.

In accordance with Article 282 CC, the guardian can use the ward's money to maintain themselves or someone else, provided there is legal basis for it.

There is a general rule recognised by the schools of Islamic law that nobody can conclude a contract on behalf of the person they represent with oneself or as the representative of a third party. An exception to this is made by the Hanafi school of law, according to which the father is entitled to sell the child's property to himself or his own property to the child, provided he is reliable and reasonable and has only his child's best interests in mind. This exceptional rule is laid down in Article 279 CC, under which the father can conclude a contract on behalf of his ward with himself or on behalf of a third party, unless it violates a legal provision.

### **(3) Limitations of the father's right of disposal as guardian**

In certain situations, the legal guardian needs the leave of the competent court to dispose of the ward's property. These situations are regulated in Articles 272 to 276 CC.

Article 272 CC provides that the legal guardian is not entitled to give away the ward's property without the permission of the competent court. In addition, he is not entitled to dispose of the ward's immovable property for his own, his wife's or his relatives' (up to the fourth degree) benefit (Article 273(1) CC). Moreover, in accordance with Article 273(2) CC, the guardian is not allowed to pledge the immovable property of his ward as a security for his own debts.

In accordance with Article 274 CC, the father cannot make dispositions regarding his ward's immovable property, commercial transaction, public and private property documents or securities whose value exceeds 20,000 Afghanis without permission of the competent court. The court will refuse to grant the power of disposal if the father's disposal of the ward's property would cause a loss or disadvantage of more than one-fifth of its value.

If a testator leaves property to a person with limited capacity of execution and directs that the legal guardian of this person should not be allowed to dispose of the property, under Article 275 CC the guardian cannot dispose of it without the court's permission and supervision.

Finally, Article 276 CC lists all other cases in which the guardian cannot dispose of his ward's property without the permission of the competent court:

1. Granting loans or taking loans;
2. Leasing/renting for a period exceeding the majority age of the ward;
3. Continuing a commercial transaction concerning the person with limited capacity of execution;
4. Accepting a gift or legacy which is tied to certain obligations.

### **(4) Limitations of the true grandfather's right of disposal as guardian**

The grandfather's power of disposal as a guardian is more limited than the one of the father. The Hanafi school of law considers the grandfather's power of disposal as equal to the power of the testamentary guardian. The same approach applies to the order of the persons appointed

to administer the property of the child. Article 280 CC determines the scope of a grandfather's power of disposal. The grandfather cannot dispose of the property of the person under his guardianship or make an arrangement to the child's disadvantage without permission of the competent court. He cannot refrain from or neglect taking security measures concerning the property either.

#### **(5) Liability for damages caused by the guardian**

Article 287 CC regulates the legal consequences of damages to a child's property under which the father is liable for damages to the property of his ward caused by his gross negligence. The grandfather's liability in such a case is equal to the one of the testamentary guardian.<sup>63</sup>

#### **(6) Permission for business activity of the ward**

Under certain conditions, minors are allowed to engage in commercial transactions on their own. To obtain this permission, some legal requirements need to be complied with. Firstly, the minor must be 16 years old. In this case, the legal guardian can with the permission of the competent court put a certain amount for business activity at the disposal of the child (Article 277(1) CC). The permission for business activity, whether conditional or unconditional, will not expire upon the death or dismissal of the legal guardian (Article 277(2)). The disposition of a minor thus authorised, who acts within the scope of the permission granted by the court with regard to his/her property, will be considered as equal to the one of a person of full age (Article 278 CC).

#### **(7) Termination of the guardianship**

Under Article 283 CC, when the ward reaches the age of 18, the guardianship will be terminated, unless the competent court orders its continuation due to legal incapacitation (*hajr*).<sup>64</sup>

The guardian or his heirs is obliged to return the property of the ward as soon as the latter reaches majority age under Article 288 CC. In case the asset has been disposed of, its objective current value has to be reimbursed. However, the guardianship can also be revoked, restricted or suspended prior to that time. If the ward's property is in danger of loss because the guardian abuses his power of disposal, the court can revoke his guardianship or restrict his authority (Article 284 CC). If the guardian is declared absent or is sentenced to more than one year of imprisonment, the competent court can order a suspension of the guardianship (Article 285 CC).

A person can be reappointed guardian by the competent court, provided that the reasons for the revocation, restriction or suspension no longer exist (Article 286 CC).

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<sup>63</sup> For the testamentary guardian, see Part 4 A IV 3 c bb) "Testamentary guardian" below.

<sup>64</sup> For more information on the conditions for legal incapacitation, see Part 4 B "Guardianship in case of legal incapacitation (*hajr*)".

## ***bb) Testamentary guardian***

### **(1) General**

Under Article 291(1) CC, a father can appoint a testamentary guardian for his child with limited capacity of execution or for an unborn child, when pregnancy is proven. In this provision, it is also determined that if a person has given an asset to the child with limited capacity of execution on condition that it should not be placed under the care of the legal guardian pursuant to Article 271 CC, the giver can appoint a guardian to administer the asset.

According to Article 291(2) CC, the appointment of a testamentary guardian is effected by means of a public or customary document which has been handwritten and signed by the father or the giver, or a document with certified signature or fingerprint of the issuer. However, the appointment of the testamentary guardian becomes valid when it is approved by the competent court (Article 296 CC). The appointment of a testamentary guardian can be revoked by the father or the giver at any time (Article 292 CC).

Moreover, the Civil Code clearly provides in Article 268(2) CC that the testamentary guardian cannot avoid taking care of the child's property without the permission of the competent court. Where the testamentary guardian accepts the appointment during the testator's lifetime, they cannot quit, unless they have reserved such a right before (Article 293 CC). A refusal of testamentary guardianship has to be expressed during the lifetime of the testator, who has to be informed of the decision (Article 294 CC). A person who, in accordance with Article 294 CC, has refused to assume guardianship cannot validly declare its acceptance after the death of the testator (Article 295 CC).

### **(2) Personal requirements of the testamentary guardian**

Under Article 289 CC, the testamentary guardian should be a righteous and qualified person of full capacity of execution and the same religion as the ward. Article 290 CC provides that the following persons cannot be appointed either as a testamentary or court-appointed guardian:

1. A person who has been convicted of an offense against public order or morality by final judgement;
2. A person who has a bad reputation or lacks a legitimate source of income;
3. A person who has been declared bankrupt by final judgement and has not been discharged;
4. A person who has already been dismissed before from legal or court-appointed guardianship by final judgement;
5. A person who has been excluded in writing from the right to assume guardianship by the father or the grandfather before their deaths;
6. A person who themselves have or whose ascendants, descendants or wife have a legal dispute or family conflict with the person of limited capacity of execution which could affect the well-being of that person.

### **(3) Rights and obligations of the testamentary guardian**

The testamentary guardian is generally endowed with less authority than the legal guardian. Article 304 CC provides that in the following cases the testamentary guardian cannot make dispositions with regard to the heir's property without the permission of the competent court:

1. Purchase and sale, barter, partnership, pledging, granting of loans and any other disposition which leads to a transfer of property or the constitution of a real right;
2. Assignment of a debt due to the person of limited capacity of execution or consent to the assignment of a debt due from the ward;
3. Ceding the property to a third party in order to realise profit and settle the respective accounts or taking up a loan for the account of the person with limited capacity of execution;
4. Renting/leasing agricultural land of the person with limited capacity of execution for more than three years and developed land for more than one year;
5. Renting/leasing immovable property of the person of limited capacity of execution for a period up to one year or longer after the ward has reached legal age;
6. Accepting or refusing a gift which is tied to certain conditions;
7. Paying maintenance to those whose maintenance is an obligation of the person with limited capacity of execution, unless it has been determined by a court's final judgement;
8. Settlements and arbitral awards;
9. Fulfilling liabilities of the estate and obligations of the person with limited capacity of execution, unless a court's final judgement has been issued;
10. Bringing an action, unless its postponement would cause a disadvantage or forfeiture of rights to the person with limited capacity of execution;
11. Waiving claims, or recognising those judgements of the court which can be appealed against by ordinary legal means, or withdrawing such an appeal after it has been lodged, and filing extraordinary appeals against a judgement;
12. Refraining from taking security measures or reducing such measures to the disadvantage of the person with limited capacity of execution;
13. Renting/leasing assets of the person with limited capacity of execution to the guardian himself, his wife or a relative up to the fourth degree or to someone who is represented by the testamentary guardian;
14. Paying for the marriage expenses of the person with limited capacity of execution;
15. Paying for the education expenses or such other expenses needed by the person with limited capacity of execution with regard to a certain occupation.

In accordance with the provisions of Article 305(1) CC, the testamentary guardian is obliged to deposit all cash income of the ward after deducting maintenance costs and all other expenses ordered by the court into a custody account with the court or an account with a bank designated by the court in the name of the ward. Similarly, the testamentary guardian should deposit all items, such as securities, jewelry, jewels and the like, if deemed necessary by the court (Article 305(2) CC). These acts must be performed within 15 days of receipt of the income and the aforementioned items. Moreover, the Article 305(3) CC provides that the testamentary guardian cannot reclaim the items deposited with the bank without the permission of the court. Likewise, the testamentary guardian is obliged under Article 307 CC to submit the annual statement of the account as well as the relevant vouchers to the court at

the end of the year. However, if the ward's capital does not exceed 10,000 Afghanis, the court can release the testamentary guardian from preparing and submitting annual accounts (Article 308 CC).

Under Article 306 CC, the testamentary guardian is obliged to inform the court of any legal action brought against the person with limited capacity of execution and the related measures and then comply with the court's orders.

#### **(4) Remuneration**

Pursuant to Article 310 CC, guardianship is exercised without remuneration. However, the court can at the request of the testamentary guardian exceptionally order the payment of remuneration or compensation for a particular activity. The payment of remuneration can be ordered only for future activities. The second sentence of this article provides that in no way can remuneration be paid for past activities.

#### **(5) Permission for the ward to administer the property**

It is possible for the court to permit a ward with limited capacity of execution to administer all or part of the property itself. Under Article 315 CC, the court at the request of the testamentary guardian can permit for all or part of the property under guardianship to be handed over to the person with limited capacity of execution in order to administer it themselves, provided that they have reached the age of 16. If the request is rejected, the testamentary guardian cannot file another application before one year has elapsed since the last final decision of the court.

Where a person with limited capacity of execution who has been allowed to administer the property themselves, they are obliged to submit the annual statement of net assets to the court under article 317 CC. The court will seek the opinion of the testamentary guardian in order to check the accounts. The court can also order that the annual net income of the ward who is allowed to administer the property be deposited into a custody account with the court or a bank (Article 317(2) CC). In such a case, the empowered ward cannot dispose of the money without the permission of the court. If the empowered ward undertakes the administration of the property against the provisions of Article 317 CC, or abuses their administrative authority, or if a continuation of the ward's power of disposal risks to cause loss, the court can at its own discretion or at the request of the public prosecutor or an entitled person revoke or restrict the permission, after having heard the ward's arguments.

#### **(6) Termination of the testamentary guardianship**

In accordance with Article 311 CC, the testamentary guardianship ends when:

1. The person with limited capacity of execution dies;
2. The person with limited capacity of execution reaches 18 years of age, unless the court has ordered its continuation beyond the age of 18 or the person is mentally deficient (*ma<sup>c</sup>tūh*) or insane (*majnūn*);
3. The guardianship is granted again to the legal guardian;
4. The activity for which a special guardian had been appointed is completed;
5. Upon dismissal of the testamentary guardian or acceptance of his resignation;
6. The guardian is deprived of his legal capacity, is absent or dead.

According to Article 312 CC, the testamentary guardian can be dismissed when one of the reasons preventing guardianship as laid down in Articles 289 and 290 CC arise. These reasons have been discussed in detail in the section above regarding the personal requirements of the testamentary guardian. Moreover, the testamentary guardian can be dismissed in case of negligent or improper administration of the property by the testamentary guardian, or if the ward's interests are at risk by not dismissing them. As provided in Article 313 CC, the testamentary guardian is obliged to hand over the property under their administration along with the accounts and all other relevant vouchers within thirty days after termination of the guardianship to their representative, or the person with limited capacity of execution themselves (if of legal age), or in case of the death of the ward to the heirs. After returning the property, the testamentary guardian should submit the accounts and the acknowledgement of receipt to the court.

If another person is appointed, the testamentary guardian is obliged to prepare the accounts of the ward's property and submit it to the court within thirty days (Article 309 CC). If the testamentary guardian dies, is incapacitated or declared absent, their heirs or representative are obliged to hand over the property and the accounts (Article 314 CC).

Under Article 316 CC, it is valid for the person with limited capacity of execution who has reached legal age to incur a liability or to be discharged from it to the benefit of the testamentary guardian if the testamentary guardian has already prepared and submitted the final accounts of the ward's property.

### ***cc) Court-appointed guardian***

#### **(1) General**

If there is no testamentary guardian for the person with limited capacity of execution or the unborn child, under Article 297 CC the court will appoint a guardian. The appointment remains valid even after the birth of the child, unless the court appoints a new guardian.

With regard to such a situation, the provisions of Article 268(1) CC are applicable. If no testamentary guardian has been appointed by the father, first the paternal male ascendants are obligated to exercise the guardianship of property of the child with limited capacity of execution. If no paternal male ascendant is alive to exercise guardianship, a guardian can be appointed by the court.

In accordance with Article 298(1) CC, the court can appoint more than one guardian for a person with limited capacity of execution if necessary. Where there are several guardians, they cannot dispose individually of the ward's property, unless such a disposition exclusively benefits the person with limited capacity of execution. If there is difference of opinion between the guardians, Article 298(2) CC provides that the order issued by the court should be followed.

The guardian, as provided in Article 302 CC, can appoint a representative in all cases in which he is entitled to exercise guardianship. The representative is dismissed upon the death of the guardian or the person under guardianship.

## **(2) Special and temporary guardian and guardian *ad litem***

In certain cases, the court can appoint a special or temporary guardian besides the legal or testamentary guardian. These cases are regulated in Articles 299 to 301 CC. Article 299 CC provides that the court can appoint a special guardian in the following cases:

1. If the interests of the person with limited capacity of execution are in conflict with the interests of the guardian, his wife, one of his ascendants or descendants or a person who is represented by the guardian;
2. If an asset is given to the person with limited capacity of execution on condition that it should not be placed under the care of the legal guardian;
3. If the guardianship requires specific qualities the permanent guardian lacks.

Under Article 300 CC, the court can appoint a temporary guardian in the following cases:

1. If the court has ordered the suspension of the property care by the legal guardian and the person with limited capacity of execution does not have another legal guardian;
2. If the guardianship has been suspended at the request of the guardian himself;
3. If temporary circumstances prevent the exercise of guardianship.

Moreover, the court can appoint a guardian *ad litem* under Article 301 CC to settle legal disputes concerning a person with limited capacity of execution, even if that person owns no property.

Article 303 CC provides that the obligations of the person appointed as guardian under Article 299 to 301 end when the purpose of the guardianship is fulfilled or the fixed period expires.

## **(3) Rights and obligations of the guardian, termination of the guardianship**

The provisions applicable to the testamentary guardian are applied to the obligations of the court-appointed guardians and the termination of the court-appointed guardianship. This is also true for provisions relating to remuneration, as well as the permission for the ward to administer the property. These provisions are laid down in the Articles 304 to 318 CC, which are outlined above.

## **d) Parental custody in other Islamic countries**

The differentiation between custody and guardianship has its basis in Islamic law and therefore other Islamic countries also differentiate between the two. However, not all legislators of Islamic countries follow this differentiation. In the Tunisian Law of Personal Status, custody is defined as the care of the child in terms of providing accommodation, food and upbringing. During the marriage, personal custody is the right of both parents (Article 57 Tunisian Law of Personal Status).

If the marriage is dissolved by the death of one of the spouses, the custody belongs to the surviving parent. If the marriage is dissolved during the lifetime of both spouses, the custody will be granted to one of the parents or to a third person. The judge will decide based on the best interests of the child. The Tunisian Law of Personal Status does not differentiate between the guardianship of person and the guardianship of property. The father is considered as the guardian of the child's property because he is the legal guardian of the minor child, both during the marriage and after its dissolution during the lifetime of the spouses. The law in Tunisia provides for the transfer of guardianship to the mother under certain conditions. It is

stated in Article 67 of the Tunisian Law of Personal Status that in case the legal guardian fails to fulfill his duty, abuses his authority or neglects his duty, is absent or of unknown residence or for any other reason causes harm to the child, the judge can delegate the powers of a guardian to the mother who holds custody.

In accordance with Article 235 of the Moroccan Moudawana, the legal guardian's obligations with regard to the management of a minor's personal affairs include ensuring that the child receives a religious orientation and training, as well as preparing the child for life. Moreover, the legal guardian is obliged to administer the minor child's property under the supervision of the court. Under Article 238 of the Moroccan Moudawana, the mother can assume the guardianship under the following conditions:

1. The mother has to be of legal age;
2. The father has to be deceased, absent or, due to any other reason, incapable of exercising guardianship.

According to this provision, if the father appoints a testamentary guardian, this guardian's rights will be limited to control of the mother in managing the affairs of the child and legal action against her where necessary.

In the United Arab Emirates, the courts have decided that the parents of a child can reach an agreement with regard to the guardianship of their child after a divorce and that they can grant it to the mother, even if she wants to marry another man after the divorce. However, some formal requirements have to be observed in this case. The best interests of the child are the only decisive factors and, therefore, the guardian does not necessarily have to be a male member of the family.

In Iraq, under Article 27 of the Law Number 78 of 1980 on the Protection of Minors the father is the legal guardian of the minor child followed by the court. The mother is given priority regarding personal custody and upbringing of the child under Article 57(1) of the Iraqi Law of Personal Status during the marriage and after its dissolution, unless it is detrimental to the child. Following amendments in 1987, Article 57(2) provides that the mother does not automatically forfeit the right to personal custody by a new marriage. In such a case, the court decides whether the custody should be granted to the mother or to the father. In making this decision, the court takes only the child's best interests into consideration. However, during this time, the father supervises the transactions, upbringing and education of the child until it is 10 years old. The court can extend the mother's custody until the child is 15 years old. Thereinafter, it is at the child's discretion to decide with whom of the parents they want to live (Article 57(4) and (5) Iraqi Law of Personal Status).

Unlike Iraqi law, the Syrian Law of Personal Status provides that if the mother marries a man between whom and the child no marriage impediment exists, she loses her right to custody, i.e. she can only marry a man who could not, theoretically, marry that child.<sup>65</sup> However, it should be emphasised that the mother does not forfeit her right to custody by working, as long as she cares sufficiently for the child.

Following an amendment made to the Law of Personal Status in 2003, the duration of custody has been extended in Syria. Article 146 of this law, provides that custody ends as soon as a

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<sup>65</sup> Article 155 of the Jordanian Law of Personal Status contains a similar provision.

boy reaches the age of 13 and a girl the age of 15. Similarly, the judge can give custody of the child to the mother, even after the end of the legal period of custody, provided that the legal guardian is not the father. If the child's custody is given to the mother, she is obliged to maintain the child as long as she capable of it (Article 147(1) and (2) Syrian Law of Personal Status). In the same way, the judge leaves the choice to the 15-year-old child, whether boy or girl, to remain with the mother until the boy reaches majority age and the girl marries. In this case, there is no remuneration for custody (Article 20 Legislative Decree No. 20).

In addition to this, the Syrian legislator clearly differentiates between the guardianship of person and the guardianship of property. In accordance with the provisions of Article 170 of the Syrian Law of Personal Status, the father and after him the true grandfather are obliged to exercise the guardianship of person and property of the minor. On the basis of this provision, the guardianship of person includes the authority of upbringing, medical care, education and guidance towards gainful employment, as well as consent to a marriage and all other things concerning the minor.

According to Article 170(4) of the Syrian Law of Personal Status, negligence of the guardian with regard to the child's education and upbringing leads to the loss of custody. This provision is also applicable to a woman having custody in case she fails to fulfill those obligations.

In accordance with Article 172 of the Syrian Law of Personal Status, the father, and in his absence the true grandfather, is prior to anyone else entitled to the guardianship of property of the minor, including preserving, administering and investing it profitably.

## **V. ADOPTION**

Adoption is the creation of a legal parent-child relationship between the adopter and the child regardless of a child's biological parentage. The adopted child is legally integrated into the family like a biological child born in marriage. Following the adoption, all family relationships with the family of origin are irrevocably terminated. Adoption has to be differentiated from acknowledgement of parentage. Acknowledgement of parentage refers to a situation in which somebody acknowledges a child whose father or mother is unknown as their own child. Adoption, on the other hand, is the acceptance of a child in the knowledge that this child is not one's own child.

The legal creation of a parent-child relationship through adoption is not recognised in Islamic law. This principle finds its expression in Article 228 CC according to which a person who is adopted will not be subjected to the effects of proven descent, such as the right to maintenance, care costs, right of succession, and impediment to inheritance due to affinity or regarding the repudiated woman (adoptive mother).

## **B. GUARDIANSHIP IN CASE OF LEGAL INCAPACITATION (*HAJR*)**

The law in Afghanistan recognises the administration of property by a guardian in cases in which a person is incapacitated by court order.

A person of legal age is declared legally incapacitated with regard to the administration of property due to insanity (*jonūn*), mental deficiency (*ma<sup>c</sup>tūhiyat*), prodigality or credulity (*sefāhat*) or neglectfulness (*gheflat*). This will remain in force until revoked by the court. Under Article 319(2) CC, the court appoints a guardian to administer the property of the incapacitated person. The word *bālegh* used in Article 319 refers to a person who has reached majority.

The expenses related to the guardianship of an incapacitated person have priority over all other expenses (Article 320 CC). Even though the court has declared a person incapacitated with regard to the administration of property due to imprudence or negligence, it can nevertheless allow that person to administer part of the property themselves (Article 321 (1) CC). In such a case, the provisions of Article 321(2) CC with regard to a person with limited capacity of execution who is permitted to manage his/her property are applicable.

In accordance with Article 322 CC, the provisions in Articles 289 and 290 CC are applicable to the guardian as well. Similarly, all other provisions concerning the testamentary and court-appointed guardian can also be applied to the guardian.

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