



MAX PLANCK INSTITUTE
FOR FOREIGN PRIVATE LAW AND PRIVATE INTERNATIONAL LAW

Family Structures and Family Law in Afghanistan

A Report of the Fact-Finding Mission to Afghanistan
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A. The Fact-Finding Mission to Afghanistan

This research was conducted by the Max Planck Institute for Foreign Private Law and Private International Law, Hamburg (MPI). The aim of the mission was to provide basic information about family structures and family law as practised in Afghanistan.

Over 200 interviews were conducted, in particular with employees of national, international, and nongovernmental organisations. As this was the first field research in the ongoing project on family law in Afghanistan at the MPI, this research had an experimental aspect. The fact-finding mission consisted of two male Afghan jurists who were conducting such field research for the first time. Very often the pattern of the pre-formulated questionnaire prepared in Hamburg had to be abandoned and ventures into unforeseen fields became necessary.

The mission visited the nine main provinces – Kabul, Kandahar, Herat, Balkh, Badakhshan, Bamiyan, Ningarhar, Kunduz, and Paktia – from January to March 2005. The interviewees were judges, prosecutors, law lecturers of the faculties of law and Shari^ca, employees of state institutions, members of various international organisations and NGOs, members of local *jirgas* and councils, and local residents. 60 % of the interviewees were male and 40 % were female Afghans, ranging in age from 20 to 70 and coming from all social strata. Most of the interviews were conducted at the working places of the interviewees. Very few interviews took place at the homes of local residents. Most of the women interviewed were working for state institutions, especially the local branches of the Afghan Independent Human Rights Committee (AIHRC) and the regional branches of the Department of Women's Affairs of the Ministry of Justice. Conducting interviews with women who weren't working, i.e. housewives, posed a big difficulty. The interviews with housewives happened purely by chance, while visiting the local branch of AIHRC or the local Department of Women's Affairs (see below). Sometimes women were alone during the interview, sometimes accompanied by other women. Some women were especially outspoken when the interview was done together with a male. The women wanted to seize the opportunity to tell the men how they felt about male domination. They insisted that men did not observe the rights of women and always tried to impose their will on female family members. However, it also happened that women didn't feel comfortable with the presence of a male colleague.

AIHRC is an independent, fully Afghan governmental organisation. Since 2002, branches have been established in the provinces of Afghanistan. The employees of AIHRC are all Afghan nationals living and working in Afghanistan. Some of them are graduates of the faculties of law and Shari^ca.

Most employees, especially in remote provinces like Badakhshan, are high school graduates with experience in government offices. AIHRC is an organisation which evaluates human rights conditions but has no executive powers. They hear, register, reconcile, or try to reconcile parties involved in all kinds of disputes. They cooperate with courts and other legal institutions such as the Department of Women's Affairs and other local human rights institutions to settle cases before they are referred to the courts. People turn to the AIHRC in all kind of complaints, including property disputes as well as family disputes such as divorce, cases of forced marriages, child marriages, rape, disputes between husband and wife and other family members, and other related family law cases.

The Department of Women's Affairs of the Ministry of Justice deals with every kind of family matter and is similar to AIHRC. Like AIHRC, they are only authorised to provide legal guidance and instructions to people in family matters. In most provinces, the employees of these departments are without legal education and have little knowledge of legal and/or Islamic matters; however, since they are familiar with the problems of Afghan society, they try to provide people with advice.

Contrary to what the mission expected, most people openly shared their experiences and thoughts. 90 % of the interviewees welcomed the mission. It was easy to communicate with the people in urban areas. They cooperated freely, while people in rural areas were more hesitant to talk about issues related to family matters, especially the issue of remarriage of widowed women, domestic violence in particular against women, equality of gender, and the right to education for women. In Badakhshan, for example, the chief of police refused to speak with the mission, even after being informed about the project in detail.

Most interviewees hailed the mission and acknowledged the necessity to conduct more research on family law matters. However, according to one deputy of the Ministry of Justice, since the beginning of the reform process of the legal and judicial sector, no particular institution has emerged to cooperate with the Ministry of Justice or the Supreme Court or other legal institution to follow a reformative path for the development of family law and related issues.

B. Findings of the Mission

I. The court system

According to the Bonn Agreement, the existing statutes and acts in Afghanistan shall be applicable until new laws are enacted. The court system is codified in the code of civil procedure of 1976 and the law on the jurisdiction and organisation of the courts of 1967. According to these statutes, the court system is based on a three-tier system consisting of the primary court, high courts, and a Supreme Court. These courts are entrusted to deal with all legal disputes: primary courts (*maḥkama ebtidaya*), high courts (*maḥkama morafia*), and the Supreme Court (*stera maḥkama or tamyīz*).

Today primary courts exist in every district of Afghanistan; these courts are also called district courts. There are high courts in the centre of every province, also called provincial courts. And finally, in January 2005, an Interim Supreme Court was established in Kabul.

According to the Afghan code of civil procedure, a branch for family matters, i.e. a specific family court, should be established in every district court. However, these courts have not yet been established. The only specialised family court in Afghanistan is the family court in Kabul. In the provinces, the civil branches of the district courts and the high courts deal with family law cases.

The specific family court at the Supreme Court in Kabul operates in the following manner (according to the interviewed judges from the Supreme Court):

- (1) Registration of all complaints to the court in the registration book (*daftar endrāḡ*)
- (2) General evaluation meeting of the judges in order to classify the registered complaints
- (3) Court procedure to resolve the dispute
- (4) Court judgment
- (5) Appeal to the provincial high court within one month after the issuance of the district court verdict
- (6) Appeal to the Supreme Court within two months after the provincial high court has issued its judgment.

II. Informal dispute resolution mechanism

1. *Jirgas*

In practice, however, the courts are not the first mechanism to deal with a legal case. This is done by the local assemblies, the *jirga* or *shura*. The expressions *jirga* and *shura* denote the same mechanism: *jirga* is Pashto, *shura* Dari. People favour addressing the local *jirga* as the first step for the investigation and settlement of legal disputes. So in practice the majority of disputes in their basic stages are referred to the local *jirgas*. Even when a case is referred to the court, the court refers the case back to the *jirga* in order to find an informal solution first. So basically the *jirga* is the first place where legal problems are discussed in the form of mediation (*wasātat*). The preference to address a local *jirga* is especially clear in family law matters and where one party is a woman. Addressing an official institution can cause serious harm to the prestige of both parties. Going to court is considered a shameful act for women.

Example 1:

A man was absent for seven years. His wife wanted to get a divorce from him. Her parents-in-law were not behaving properly towards her. Therefore, she complained to the Department of Women's Affairs and asked for help. But the parents tried to prevent her from doing so: they told her that their son was still alive and warned the legal officials not to intervene in this case. This is very common in most parts of Afghanistan, especially if a husband is absent and if he doesn't have any brothers. The parents will do everything to prevent their daughter-in-law from suing for divorce.

Furthermore, it was reported that abuses perpetrated by family members against family members – including rape, mistreatment, house imprisonment, and even murder – don't even reach a *jirga*. Rather they get buried within the house boundaries. Very rarely do such sensitive matters reach the *jirga* and/or the courts. Confusion about these institutions and their authority is prevalent among the population.

a) Permanent *jirga*

These *jirgas* have existed for centuries, mostly in the east and southeast areas of Afghanistan. They consist of a specific number of well-known individuals who have distinguished themselves by their ability to make decisions. The members of a *jirga* are volunteers and must be wise, virtuous, honest, knowledgeable of social issues, and well respected. They don't receive any money from the government or from any party of a dispute. They gather when a dispute needs to be resolved. Women and children are not allowed as members of these *jirgas*; they are considered "disturbing factors".

b) Ad-hoc *jirga*

Ad-hoc *jirgas* exist mostly in the north, northwest, and central areas of Afghanistan. The members are not specified. They are also volunteers but it is

not necessary for them to have special characteristics. In a family law matter related to family, divorce, murder, separation, domestic violence, remarriage of a widow, etc., they would be members of the families of the two parties, co-villagers, or individuals of that district and the elders ("the white beards", Dari: *mū-e safīdān* or *riš-e safīdān*). In sensitive issues, only very close family members will be allowed as members of the *jirga*. This can even lead to the exclusion of the religious figures of the community. Family members are considered third persons, or non-allied arbitrators. The family members are of both families. If it is a family case, women may participate (although not as decision-making members). In other cases there are usually no women. None of the all gatherings reported to the mission included women. The assembly will try to convince the parties to reach a peaceful solution. In the Afghan context and taking into account the social problems of the Afghan community, these gatherings can be described as reasonably fair because the purpose of these gatherings is to reconcile both sides. If an agreement cannot be reached, the members of the *jirga* will refer the case to the official courts. The court might also try to appoint arbitrators without any court ruling in order to reach an agreement between the parties. If these efforts fail, the court must deal with the case.

2. *Special structures*

In Herat a special structure has developed: The courts have authorised special institutions to conduct legal activities and issue verdicts on family law matters. One instance of such an institution is the Women's Council of Herat. It consists of seven members: two judges from the provincial high court of Herat, a lawyer, a prosecutor, a physician, a university lecturer, and a psychologist. This council was authorised by the provincial high court of Herat with an official mission (a so-called official licence) to issue oral and written judgments on family law matters. When asked to show its licence, the Council members refused. So far the Council has issued judgments on divorce and a number of arbitration verdicts. They meet every Wednesday afternoon and review the complaints. They invite the parties and provide them with legal advice. If this mediation fails, the case will be dealt with according to the provisions of the law. According to the head of the Women's Council of Herat, this Council acts as a branch of the family court and provides advice in particular to women seeking help. According to one Deputy Chief Justice of the Supreme Court, the Supreme Court is unaware of this institution. When asked about this matter, the Deputy Chief Justice expressed his concern and said that the Supreme Court would disapprove of such an institution.

III. Sources of law

1. *Uncodified Islamic law versus statutory law*

When asked about sources of Afghan law, the judges of the high courts and members of the local *jirgas* pointed to traditional/customary law (also called *orf* and *anana*), examples of which include the *pashtunwali* as practised in the Pashtu areas, and Islamic law, in particular *ḥanafī* law, as almost 80% of the population are followers of the *ḥanafī* school.

However, there are also statutory laws. The most important code in civil and family matters is the civil code of 1977 (hereafter: AfgCC). Most of the family law regulations of the civil code are based on the *ḥanafī madhhab*, but there are also rules borrowed from other schools of law such as the *malikī* jurisprudence. According to the deputy of the head of the high court of the province of Badakhshan, in practice uncodified classical *ḥanafī* law is considered the main source of law, superior to any statutory law. In practice, the judges thus bypass statutory law and apply their interpretation of the *ḥanafī* rules, as far as they know them, thus putting aside all improvements that had been incorporated into the code as compared to the classical *ḥanafī* rules. This affects especially the rules on divorce borrowed from the *malikī* law and incorporated into the AfgCC that give women more reasons to apply for divorce than the *ḥanafī madhhab*.

Example 2:

According to the head of the provincial court of Kunduz, there is no such thing as a "divorce" for women (there is not even a proper expression for it). Women only have the right to "separation". Men have the right to divorce even if they don't have any reason.

It can thus be generally said that Afghan judges apply the law they know. According to the head of the provincial court of Kunduz, since most judges assigned by the Supreme Court are graduates of the religious schools (*madrasas*), they lack knowledge of statutory law and prefer to apply Islamic law, in particular *ḥanafī* law referring to *fiqhi* books of *ḥanafī* scholars.

The ignorance of statutory law is more prominent in the provinces of Badakhshan, Kunduz, Bamiyan, Paktia, Kandahar, and Ningarhar. Courts are often understaffed and not properly equipped. Although copies of the main codes have been distributed across the country (especially in Badakhshan, Bamiyan, Kunduz, and Paktia by various NGOs) and are present in most courts, the assumption prevails that Islamic law is more important than state-enacted law. This is particularly true for the district courts. According to the heads of the provincial high courts of the nine provinces visited, the provincial high courts apply statutory law. But even there the judges willing to apply statutory law are confronted with many questions: Which statute applies in a particular

case? What is the relation between the various acts? Which supersedes which? Which statute is to be given priority over another?

In this context, it becomes evident that judges are not properly prepared for their duty. Since the establishment of the transitional government, only a small number of judges, prosecutors, and lawyers have benefited from the short-term legal training programs offered by the international community. However, though training was provided, no real changes have been seen on the provincial level as regards handling cases and applying statutory laws. There is still a strong uncertainty among legal actors as to which laws apply. All the efforts so far have been concentrated on a small number of legal experts, but the impact of these projects have not involved the system as a whole. Furthermore, in the past three years, most of the projects have been focused in Kabul and a few provinces, while the majority of the provinces where the problems are located have been left aside.

2. Customary law

Besides uncodified *ḥanaḥī* law, customary law is also applied in family matters. Traditional/customary law as applied in the last centuries has remained uncodified and unwritten. It consists of accepted practices and values publicly respected and obeyed by the people. Customary law impacts the social relations in criminal matters. For example, the Pashtunwali applied in the Pashtun area applies in particular criminal cases such as murder, adultery, kidnapping of a woman, running away, property, debts, torture, succession of property, and theft. The Pashtunwali is also applied in property disputes and family matters, especially on issues related to gender and the role and duties of women. There are also other customary laws beside the Pashtunwali, but in the Pashtun areas the regulations are stricter and more rigidly applied.

The interviewees made it clear that those who refuse the application of customary law will be condemned by their families and have no real choice to refuse its application.

Example 3:

A person killed a nomad in Paktia province. The members of the *jirga* went to the house of the victim and inquired whether the family members of the victim wanted to continue the enmity or if they preferred reconciliation with the family members of the murderer. They accepted the reconciliation and the members of the *jirga* went to the house of the murderer to find a solution. The tradition has always been that a girl or two should be exchanged, or money or a piece of land should be given to the family of the victim in order to remove enmity. Therefore, the sister of the murderer automatically appeared before the *jirga* without any hesitation and accepted a marriage into the family of the victim in order to finish the hostility between the families. This tradition is called *badd*.

3. *Knowledge of the people on the sources of law*

The level of legal knowledge of the population ranges from very low to non-existent: Most people know that a constitution has been enacted, but the content is ignored as is its significance. It can be estimated that 90% of the population have only a very vague idea of what the concept of law implies or what the sources of law are.

Example 4:

A woman's husband was absent for four years. After four years she decided to marry another person without even going to a court or asking for a divorce. When she was asked by the judges why she got married and violated the principles of Islam, she had a very brief and simple answer: "I didn't know that it was important to get divorced before getting married for the second time." (Interview with the head of the Department of Women's Affairs of Kunduz)

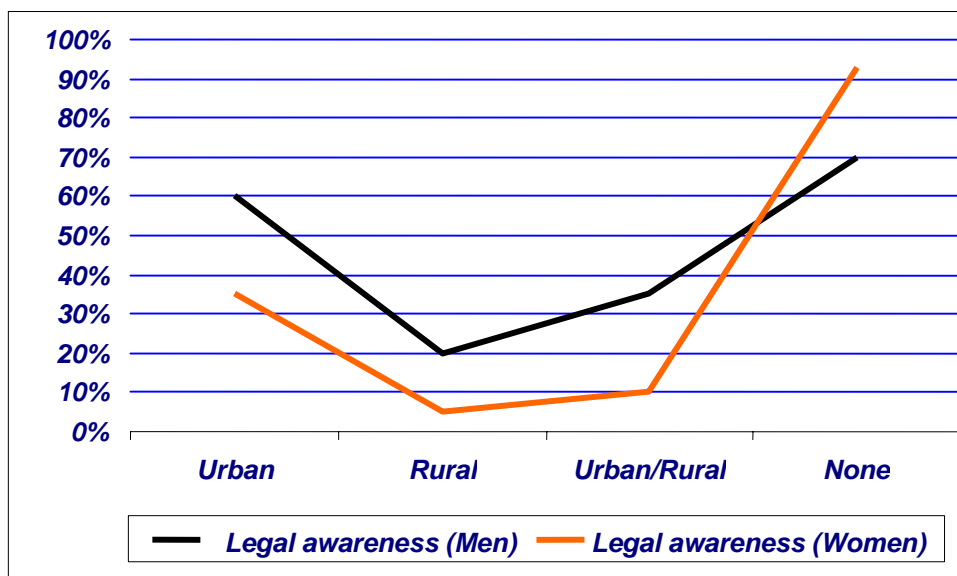
Example 5:

A married woman married another person without getting a divorce. The case was forwarded to the court and the woman was asked why she married another person while still married to someone else. She replied, "Since my husband was old and I wasn't happy with him I married this other person."

Common persons have also little knowledge of Islamic law and most of them think that customary law complies with the *Sharī'a*. In reality, most regulations of customary law contradict both Islamic law and Afghan statutory law. Most people don't see this contradiction because the members of the *jirga* very often include the religious figures of the village, the mullahs. Even when the decisions of the *jirgas* are not in accordance with Islamic law, the participation of religious figures in the decision-making of the *jirga* makes people believe that the decision complies with Islamic law.

When asked about their rights and duties in a marriage, most interviewees lacked knowledge. Based on their answers, the following statistics can be drawn.

Figure 1: Basic knowledge among male and female Afghan interviewees about their rights and obligations in family matters



IV. Marriage and related issues

1. Arranging marriage (*khāstgarī*)

a) General pattern of *khāstgarī*

In Afghanistan, a man and a woman rarely meet before their wedding. Dating before marriage (*mulāqāt*) is considered indecorous and can cause serious problems for the couple, especially in tribal and rural areas where women are considered personal property of the men and part of their honour. The seclusion of women and segregation of gender prevent any contact between eligible men and women before marriage. Although to a much lesser extent, this mentality also exists among the urbanised community. However, there are some exceptions in some upper-class urbanised families where the girl and the boy are allowed to meet before any kind of agreement is reached.

The parents are the main negotiators in arranging marriages. When the time is ripe to marry their children, as a first option they search for a suitable candidate girl within the families of their closest relatives, then the secondary relatives and neighbours, and finally other unrelated families. In some urban families, the son will make available a name or an address for his parents. This may also happen in rural families but to a lesser extent. The female family members of the prospective groom first open the negotiations with the female family members of the bride. If they come to an agreement, the family of the

prospective bride will specify a date and ask the male family members of the prospective groom to come and meet the rest of the bride's family. If certain points are still open, further negotiations take place. These will stop immediately whenever the family of the prospective bride does not show any interest. This process is called *khāstgarī*.

b) Negotiations during *khāstgarī*

There are two major issues especially discussed during the marriage negotiations: the amount of dower (*mahr*) and the amount of the bride price (*walwar*).

(1) Dower (*mahr*)

The right to a dower is derived from Islamic law and enshrined in the AfgCC. However, women often don't know about their right to *mahr* and its importance. When asked, even educated women holding official governmental positions didn't know whether they had a dower and how much it was. The heads of the Department of Women's Affairs, for example, confirmed that they themselves didn't know how much their dowers were. The situation in rural areas is even worse, since they don't even know that they have a right to dower.

Women undervalue the *mahr* because they understand it as financial aid **after** divorce. Emphasising *mahr* would mean that divorce is an option for them. To insist on the *mahr* during the marriage negotiations is considered wrong and diminishes the social prestige of a woman. When *mahr* negotiations take place, each party nominates a proxy to represent him. The couple itself does not negotiate the dower; their proxies bargain over the amount of the dower.

There are two kinds of dowers, immediate (*mahr mo'aḡal*) and deferred (*mahr mowaḡal*) dower. The immediate *mahr* is briefly mentioned because all the gifts, jewellery, clothes, and other expenses given during the engagement period are considered to be part of the immediate *mahr*. If such gifts and offerings did not take place, the immediate *mahr* may consist of an amount of money, an apartment, a piece of land, a car, or another valuable item payable to the bride. Once the amount of the immediate dower is set, the proxy negotiates the specific deferred dower that will be due at some point in the future. This can be divorce, but it can also be another time in the future. Normally no woman asks for her dower during marriage. After the parties have reached an agreement on the immediate and deferred dower, the details of the agreement will be included on the marriage certificate.

(2) Bride price (*walwar*)

In the past twenty years, one of the main issues during the *khāstgarī* negotiation is the issue of *walwar*, also called *toyana*, *qalin*, or *shir baha*, expressions used in different parts of Afghanistan. *Walwar* is widespread in the east and

southeast, *toyana* in central Afghanistan, *qalin* in the north and northwest, and *shir-baha* in western areas of Afghanistan. *Walwar* is understood as a compensation for the family of the bride for having nursed the girl. The amount of *walwar* is not fixed and may vary according to the economic background of the bride's family. In some cases, for example where the prospective spouses are relatives or there are close relations between the families or where the parents of the bride are less traditional, the economic condition of the groom's family will also be considered.

Generally, the following pattern can be seen: If the bride's family is rich, they will not ask for extra money; in educated families, the *walwar* also does not seem to be an issue. If the bride's family is poor, *walwar* will be the single most important issue during the negotiations. The *walwar* has become an important income for the bride's family. The practice of *walwar* is very strong in rural areas where education is lacking and people are illiterate and poor.

Example 6:

The father of a girl was opposed to the engagement of his daughter even though the girl and the boy agreed to it. The father of the girl wanted to get more money as *walwar*, while the prospective groom was poor. The boy invited family members, relatives, and elders of his village to the house of the father of the girl to negotiate and have the father agree to a reasonable *walwar*. Finally, it was agreed that the boy should comply with the father's demand, which was overwhelmingly high. After a couple of months the boy insisted on getting married, but he still could not come up with the *walwar* the father had asked for and he could not afford to provide for the extra money expected by the father and the marriage expenses. The father invited the same persons present at the first gathering and asked the boy whether he could comply with the condition as agreed upon then. The young man responded in the negative. The father declared his intention to nullify the agreement with the boy. As there was no one to guarantee the payment of the *walwar* to the father, the people present consented to the father's proposal and the engagement was nullified.

The amount of *walwar* can be as high as imaginable. According to members of the *jirga* of Gardiz, the center of Paktia province, *walwar* can start from 95,000 Afghani (= US\$ 2,000) and reach 2,000,000 Afghani (= US\$ 40,000). The *walwar* will be higher when the man is already married and wants to conclude a second, third, or fourth marriage. According to a member of the Gardiz *jirga*, in one of the districts of Paktia a man paid the amount of 4,000,000 Afghani (= US\$ 80,000) for his third marriage. The amount can radically increase for a fourth marriage. The amount of the *walwar* will also vary according to the specific characteristics of the girl, such as virginity, beauty, education, and family standing. According to the AIHRC Kandahar Regional office, in some rural areas when *walwar* is not asked for or taken by the bride's family, the bride will not be as respected as girls in this family whose parents have been paid a *walwar*.

2. Engagement (*nāmzadī*)

The invitation of the family of the prospective groom to come to the house of the bride's family is considered a sign of approval. After the meeting of the families, the courtship is considered complete and will be blessed by presenting some sweets to the family of the prospective groom. The courtship will be followed by a ceremony which can vary in size depending on the wishes of the bride's family. During that ceremony, the couple will exchange rings. This is called the engagement (*nāmzadī*).

In the whole process from the negotiations to the agreement, the parents are the dominating key players. Generally, the families rarely respect the will of a girl. Only in some urbanised families will the parents respect the wish of a girl against their own wishes. In most cases, however, even in urbanised families in places like Kabul, parents impose their will on their children by forcing them to marry regardless of what their children want. The head of the Department of Women's Affairs of Kandahar explained that most people defend the rule that parents choose spouses for their children. It is generally justified by the claim that minors and young children are not able to decide for their own best interests. This way of thinking is commonplace and has convinced the youth to submit to their parents' will, especially among the young, illiterate rural residents of the country. In the urban areas and bigger cities, young, educated Afghans have greater liberty to approve or disapprove of the decision of their parents regarding their marriage or to express their willingness toward such a decision.

Example 7:

The parents-in-law of a widowed woman with five children wanted her to marry her brother-in-law. The woman had known her brother-in-law since he was a child and felt more like a sister or parent for him, so neither of them agreed to the marriage, but still the parents-in-law insisted that they should marry. A council of elders was invited by the parents and their relatives to intervene. The council decided that they should not marry and deemed their marriage contrary to the Islamic *Sharī'a* because the woman had grown up with the boy like her son.

Nāmzadī always happens before marriage. It is difficult to specify a fixed duration of *nāmzadī*. There are some exceptional cases where a couple gets married immediately after the conclusion of *nāmzadī*. Normally, however, marriage does not take place immediately after the conclusion of the engagement. Generally, marriage is concluded within six months or one year after *nāmzadī*. However, it can take several months and sometimes years before the families decide to actually marry the couple. The most important reason for this delay is the financial burden of marriage: marriage requires a lot of money and expenses which in most cases overwhelm the groom's family (or himself).

According to Art. 64 AfgCC, *nāmzadī* is a promise to marry, not marriage itself. Although *nāmzadī* does not create marital bonds, in practice the dissolution of an engagement rarely occurs.

Example 8:

In the Barak district of Badakhshan, a married man had an affair with a girl. After a couple of months the girl wanted to marry the man. As sexual relations before marriage are prohibited, the family of the girl forwarded the case to the courts. As there were no objections from either side, the man married the girl. After 40 days of marriage, armed men entered the house and took the girl with them to an unknown place. The husband of the girl went to the AIHRC office and asked for help. AIHRC sent a mission to the district in order to find out what had happened. It was discovered that the girl had been already engaged to another boy by her parents. An engagement ceremony had taken place in secret. No one knew about the engagement. The father of the girl, however, had received money (*walwar*) from both men, the first fiancé of his daughter and the husband. Finally, a council was convened that included relatives of all parties. They decided that the girl should stay with her husband and the first secret engagement would be dissolved. The relatives of all three families agreed that the husband should reimburse the fiancé and return the money that he had given to the father of the girl.

Example 9:

A man engaged his stepsister to a widowed man who also had children without seeking her approval. After the engagement was concluded, the girl complained to the Women's Affairs Office and warned everyone that she would commit suicide if the engagement was not dissolved. The Department of Women's Affairs of Kunduz province sent a mission to the district of Ali Abad, and they invited the same audience that was present during the engagement ceremony. The mission convinced the representatives of both parties of the inadvisability of the marriage, and finally the engagement was dissolved.

There must be a very strong reason for the annulment of an engagement; otherwise the man's honour and custom will keep the couple together. If an engagement is nullified, the girl carries the stigma, not the boy. From a traditional social perspective, the girl will be considered a divorcee. She will not be seen as she was before her engagement; she will now be without any assurance of her future and without the esteem that she held prior to her first engagement. On the other hand, the damage caused by the annulment of the *nāmzadī* will not inflict any serious damage on the male party, besides some minor difficulties whenever he wants to enter into another engagement contract. For example, if an engagement contract is nullified, the gifts bought for the girl, and any money that was paid as *walwar*, have to be returned to the man. If the gifts are damaged or lost or used, they won't be returned. While from a social point of view the man can easily get engaged again with a new *walwar* as if he had never been engaged before, it is very difficult for the girl to get engaged for a second time. People believe that if she had had good morals or ethics, her first fiancé would not have dissolved the engagement. The real reason for the annulment of the engagement will not be taken into account.

3. Marriage (*nikāh*)

Marriage is considered a benefit and a blessing. It creates not only a very strong link between a man and a woman, but also between the families of the two. Marriage legitimises the sexual relationship between men and women. Sexual relationship outside wedlock is considered illegal not only by religion but also by tradition and social pressures. According to the head of the Department of Women's Affairs in Kandahar, women usually want to marry to have a better life. Since most of them don't work (only a very small number have employment in government offices), they believe that marriage is the only option to have financial security and an opportunity to live with less stress from their family. Traditionally they have depended and still depend on their husbands who have to provide for their maintenance. Men in urban areas acknowledge the fact that an educated woman could work; but they also want her to be a good housewife and to take care of the children. This mentality also exists among educated Afghans.

Example 10:

A lecturer of the engineering faculty of Ningarhar province didn't allow his wife, who was a schoolteacher, to teach. After the collapse of the Taliban regime she received permission from her husband to teach in the school. At the end of every month the man took her salary, leaving nothing for her.

In rural areas, the place of even educated women (if any) is at home as a housewife and caretaker of the children. Women hardly have a say in their marital life. Almost 70% of the Afghan men interviewed and 80-85% of the women interviewed were unaware of women's rights accorded under Islamic law. Some men knew the rights of women but did not observe them. Allowing women more liberties or granting them their marital rights according to Islam makes men feel weak. They live under the impression that they would lose their authority within their family. This causes serious problems for Afghan women and Afghan society at large. The women are deprived of their basic rights and of education and suffer many social and personal restrictions in their daily life, such as house detention and abuse.

a) Marriage age / child marriage / forced marriage

According to *hanafi* law, the age of marriage is generally achieved with the reaching of the age of puberty. According to tradition and actual practice, the puberty age is defined by the physical changes of the child. There are traditional ways of determining the age of puberty. In the northern provinces of Afghanistan there is a tradition called *kolāh zadan*, i.e. the hitting of girls with hats, as reported by the heads of the AIHRC Balkh regional office, the Department of Women's Rights Protection, and the Department of Women's Affairs of Balkh province. According to this tradition, a family member will hit the girl with a hat. If she resists and doesn't fall, she is to have reached the

puberty age and is considered ready to get married. If she falls, this indicates that she is still a minor and needs time to grow. This method of determining the marriage age is practised in almost all nine provinces visited (especially in Mazar-e Sharif and the northern provinces) with some regional variations.

According to Art. 70 AfgCC, the age of marriage is 16 for a girl and 18 for a boy. In practice, none of these limits are really observed by families. In the rural areas of Bamiyan, Badakhshan, Kandahar, Kunduz, and Ningarhar, the actual marriage age of minor girls can be as low as eight years. Even though minor girls are the more evident victims of child marriages, minor boys can also be victims of these traditions and be forced to marry at an unsuitable age. As reported, sexual relations are taken up immediately after the wedding without consideration of the girl having reached the age of puberty. There were no reports that the parents of the minor child set any conditions that sexual relations should not take place or that the married minor should stay with her parents until the girl reaches the age of puberty.

Minor marriages are mostly the consequence of old traditions that are not legally recognised and contradict Islamic principles. They emanate in particular from the following traditions:

- the practice of *badal* (exchange of girls between two families)

Example 11:

An 80-year-old father married his eight-year-old daughter to a man aged 50. In exchange, the father married the 14-year-old girl of that man. Neither girl had reached her age of puberty. The Department of Women's Affairs sent representatives to talk to the men, but the men replied by saying "that is not your business." (As reported by the head of the Department of Women's Affairs of Balkh)

- marriage promise of an unborn girl to an unborn boy, or engagement during childhood

Example 12:

An eight-year-old girl was promised to a newborn boy. After the boy turned ten, the families requested that the ten-year-old boy marry the 18-year-old girl. Even though both the boy and girl and some other family members voiced their opposition to this marriage, they were married. When the girl addressed the court to file a suit for separation, the judge, after viewed the case, told the girl: "Go to your house and live with your husband and respect your life without making any further complaints about your husband."

- forced marriages

Example 13:

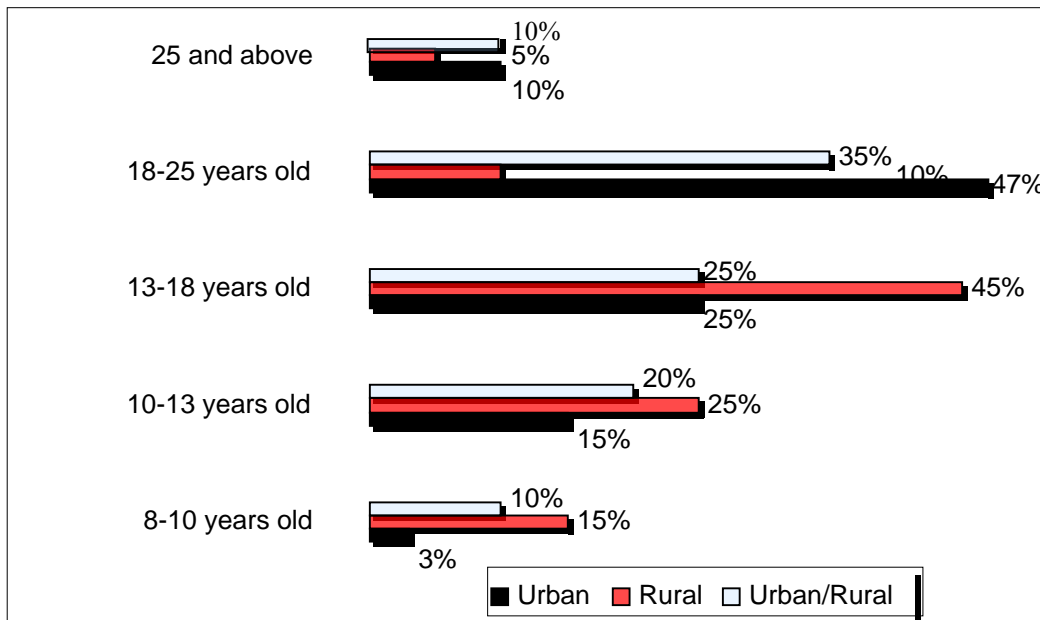
A 13-year-old girl was married by her uncle to an 80-year-old man. Her uncle habitually mistreated her before she was married to the old man. The uncle got a lot of money from the old man. However, the old man mistreated her as well. Finally she was severely injured and is now paralysed and under medical treatment.

- *badd* (girls given into marriage for compensation for a crime: the girls get married to members of the family of the victim to end and prevent future enmity between the families); see example 3.
- marriages in order to get the bride price, the *walwar*; this has been practiced in recent years even in cities like Kabul.
- sheer ignorance of the age limits under Islamic and statutory law.

It is primarily weak economic conditions that encourage families to marry their minor girls. This tendency has grown with the growing influences of warlords, who can pay great amounts of money to the parents of the girl. In these cases, the parents will agree even if their girls are still minors.

Although the effects of child marriages on the children are disastrous (maternal mortality and repeated pregnancy and childbirth before they have reached physical maturity, which often produces serious physical trauma, psychological disturbance, and sometimes lifelong physical and emotional damage), the general attitude towards child marriage is to consider it (a) necessary (evil) and acceptable. Only in urban areas is child marriage not always considered a good thing. As reported by the European Union Special Representative, a council of Muslim scholars recently issued a decree authorising child marriages and declaring it Islamic.

Figure 2: Based on the information of the interviewees, the following average marriage ages for girls could be deduced.



According to *ḥanafī* law, a child married while a minor has the right to have the marriage annulled (*fasekh*) when she or he reaches the age of marriage maturity. In most cases the minor does not know about this right and it rarely happens that a minor when reaching the age of maturity succeeds in having her/his marriage cancelled. That person will be stopped either by her own family, by her in-laws, or finally by the courts. The reason is that divorce is considered wrong, and a girl or woman who asks for divorce will lose her social standing. This is why society and the courts try to avoid the issue.

b) The marriage proceedings

(1) *The wedding*

In urban areas, marriage ceremonies take place in private houses or in private wedding halls. In rural areas all marriages take place in private houses. Normally the marriage, *nikāh*, is celebrated by a religious scholar. People attach great importance to the presence of a mullah, but any other person who is familiar with the ceremony of marriage can wed the parties, even if he is not a religious person. In cases where the permission of the parents is lacking, the couple can refer to the civil courts to substitute the permission and get married. This rarely happens. If a couple wants to marry without the consent of their parents, they will be caught before they can reach the courts. Sometimes the families have them imprisoned by the police.

Example 14:

A boy fell in love with a girl and they had sexual intercourse. The parents of the girl informed the police and the boy was imprisoned for two months. After two months he was released without any court procedure but by the intervention of local and influential people. He married the girl and the case was never pursued again by police or prosecutor or courts.

(2) *The marriage certificate (nikāh-nāmah)*

From the communist era until 1992, every marriage had to be written in an official marriage certificate available in every district. The marriage certificate was an official certificate distributed by the Supreme Court. For a marriage, three copies of the marriage certificate were produced. One was left with the religious man who concluded the marriage, one was sent to the Supreme Court (its branch in the district) where the marriage contract would be registered in the registration book, and the third copy was given to the couple. Every *nikāh-nāmah* had a number. The first page contained the insignia of the Supreme Court. The certificate of marriage had to be signed by all participants: the bride, the groom, the witnesses, and the mullah who wed the couple.

In the past 20 years, however, most marriages have not been registered in the Supreme Court. Due to the disruption of the administrative structure in Afghanistan, these rules are not observed today. Today the *nikāh-nāmah*

consists of a simple piece of paper without an official insignia. It is a white piece of paper on which the mullah writes the names of the bride and the groom, their proxies, and the witnesses. The proxies and the witnesses must sign the paper. The mullah then recites verses from the Koran and concludes the *nikāh*. He gives the handwritten paper to the groom. In case an issue arises requiring them to prove that they are married, the copy of the marriage contract will be the only proof and must be presented to the requesting authority.

Under Islamic law and the AfgCC, the *nikāh-nāmah*, the contract of marriage can include stipulations such as the transfer of divorce rights from the husband to the wife. However, this possibility is hardly known. Interviews conducted with women of different social strata ranging from highly educated urban women to illiterate rural women revealed that not even in a single case had women demanded the delegation of divorce rights in case of serious threat or grave misbehaviour.

The Deputy Chief Justice of the Supreme Court of Afghanistan explained that Afghan women lack knowledge about their religious and legal rights. The abnormality of the social conditions, the lack of education, and the strict traditional structures have deepened their financial dependencies on their husbands and have significantly contributed to their desolate situation.

V. Polygamy

Generally the social and public reaction toward polygamy is condemnatory. It is considered to have negative social consequences. For most ordinary people, however, polygamy does not seem to be an issue; their attitude is rather indifferent. Since divorce is seen as a bad thing, the social prestige of a divorcee is very, very low, and for the majority of women, living alone is not an option. That is why women would rather be a second or third wife than a divorcee.

According to Islamic law and the AfgCC, polygamy is a legal institution whereby a man can marry up to four wives simultaneously. However, the conditions set for multiple marriages, such as the equal treatment of all wives, are not observed in practice by the bride's parents or the polygamous husband. A court permission for the conclusion of a second, third, or fourth marriage is not required either under classical *ḥanafī* law or the AfgCC.

The unequal treatment of spouses gives rise to many family troubles such as abuse, home detention, and prevention of living in the house of the husband, problems with child custody and inheritance leading sometimes to suicide. Usually the most recent wife will be preferred to the first, second or third wife.

Example 15:

A wife was mistreated and abused by the other wife of her husband. She complained to the court. The judge asked her to come to his house to talk about her case in detail. She refused to go to his house. The next day the judge warned the woman that her case would not be dealt with if she was not cooperative. She went to the Department of Women's Affairs of Kunduz province. They asked the husband and the second wife to come and discuss the matter. The department provided them with information of how to live together in peace. With this kind of mediation the parties were appeased.

Example 16:

A 17-year-old girl was married to a 79-year-old man. The man had another wife and children. The girl was always mistreated by her husband. She decided to separate from him. In this case, the court granted her a divorce from her old husband. The girl in this case was lucky to have a judge who understood her situation and despite the social problems of being a divorcee granted her the divorce. In places where warlords are influential and courts/judges depend on them, justice is less likely to be granted.

There is a contrast between the urban and the rural population. In urban areas, polygamy is hardly practised. It is considered an unnecessary institution. Exceptionally, particularly in issues revolving around succession, polygamy does also occur in urban areas. According to interviews conducted with the head of the AIHRC Paktia regional office, UNAMA Badakhshan province, AIHRC Kandahar regional office, Nigin Publication, and UN Habitat Bamiyan, people have made their own classifications in four categories as follows:

1. Polygamy amongst rich, educated Afghans

In this social stratum, the issue of taking a second wife arises mostly for three reasons:

- (1) When the couple has no male heir. In this case, the parents of the husband often pressure their son to enter into a second or third marriage to produce a male heir. The parents argue that polygamy is necessary because the first wife is unable to give birth to a male child. The perception seems to be that it is the wife's "fault" if no male child is born and a new wife opens the perspective of giving birth to a son.
- (2) Another reason is the competition between close relatives, especially brothers. Social prestige favours polygamy among this category of people not just in remote parts of the country but also in urban areas.
- (3) If the wife suffers from a disease which is difficult to treat.

2. Polygamy amongst educated Afghans

Polygamy rarely happens in this category. Amongst the interviewees, the educated persons explained that for them marriage was an emotional, religious, and consciously binding contract. Therefore, plurality of marriage only takes place where it can't be refused or avoided: for example, as tradition dictates, the lack of male heirs is a reason for a multiple marriage because a male child is considered very important. This is due in particular to the son's role as the supporter of his

elderly parents or as a successor in the business of the family. This is an essential element, since the family will not relinquish this authority to any outsider.

3. Polygamy amongst illiterate, rich Afghans

Polygamy usually takes place among this category of people, be they rural or urban. According to the interviewees, the number of multiple marriages has increased in the past 15 years amongst this category of people. The new generation has strong political affiliations to warlords and smugglers, providing these people with illegal capital and giving them the means to support several wives. Given that these individuals are ignorant and illiterate, polygamy is practised without observing the limitations set for it under Islamic law and statutory law. Most of the polygamy cases were among this category of people.

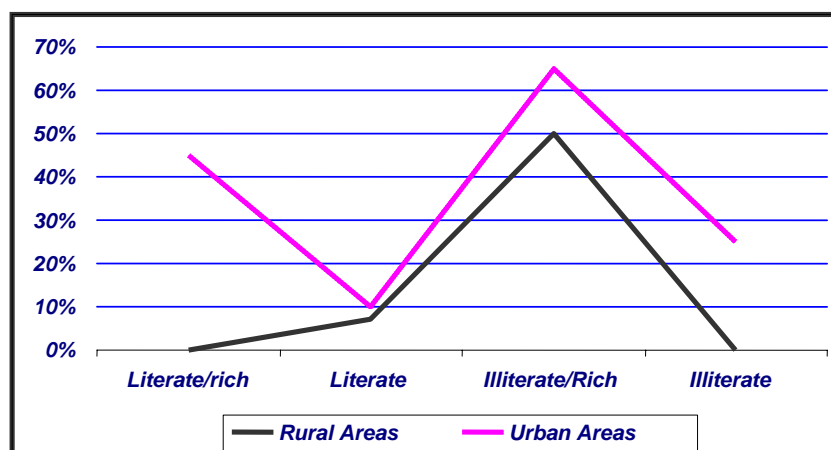
Example 17:

A commander in the province of Kunduz had three wives. He married a schoolgirl aged 13. Even though the bride's family did not agree to the marriage, the girl herself was in favour of it. The man was rich and she thought that she would live without financial problems. After the marriage the commander told her that she was not allowed to have children. He said: "I married you only to enjoy sexual intercourse with you, which my other wives after giving birth to children can't give me."

4. Polygamy amongst illiterate, poor Afghans

Polygamy rarely happens among illiterate, poor people. The main reason preventing polygamy is their weak financial condition. The desire for multiple marriages is very strong amongst these people, since being (financially) able to have another wife would represent social and material prestige.

Figure 3: Occurrence of multiple marriages among the four categories (based on the interviews)



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Max Planck Institute, Hamburg April 2005