Max Planck Institute Afghan Family Law Workshop Report

Martin Haars*

1 INTRODUCTION

Following the international community’s pledge to strengthen the judicial reconstruction efforts of Afghanistan’s current government, a number of conferences, seminars and workshops are regularly being organised by various institutions and governmental and non-governmental organisations. Very often the activities only take place in the capital city of Kabul, due to its comparative advantages in infrastructure, security and possible attendance of experts in their respective field of interest.

The process of (re)constructing the system of the administration of justice in Afghanistan is multi-faceted with regard to actors, target groups, objectives, fields of law and methodology. Seminars on selected family law-related issues like women’s rights, domestic violence or childcare have been organised; foreign state organisations and the Afghan Ministry of Justice have been implementing training for judges, lawyers and administrative officers on aspects of constitutional law and procedural law (both in administrative and civil law), and research activities are being conducted by scholars in institutions of higher education in and outside Afghanistan. However, most of the activities are not coordinated and one gets the feeling that most actors work independently, each following their own programmes.

While the general framework of Islamic hanafi law, which is the predominant school of law in Afghanistan and Afghanistan’s codified civil law, has been studied reasonably well, the legal situation on the ground in Afghanistan is hard to assess. There is not yet a comprehensive strategy for analysing Afghan family law in theory and practice. In order to compile first-hand information on family law in Afghanistan, the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany (hereafter MPI) conducted a three-day workshop on family law in Afghanistan in Kabul, from 10-12 June, 2006 with funding from the German Federal Foreign Office. The workshop was conceived as a platform for discussions between the legal experts of the

* Martin Haars is at the Max Planck Institute of Comparative and Private International Law, Hamburg, Germany.
MPI-Team and the Afghan legal community in order to identify the main problems and possible solutions in the field of family law, with the intention of devising in early 2007 a textbook on Afghan family law for Afghanistan’s university faculties of law and shari'a.

Originally seminars were planned in Kabul, Herat and Mazar-e Sharif. However, because of the unstable security situation in early June 2006, it was decided to leave out the provinces until the atmosphere had cooled down. Therefore the provincial actors were invited to come to Kabul and for the talks to be carried out in the capital.

The MPI-team consisted of Afghan and international legal experts of both traditional Islamic family law and/or contemporary Middle Eastern legal systems: Dr. Nadjma Yassari and Hamid Saboory from the MPI, Professor Mohammad Hashim Kamali (Kuala Lumpur, Malaysia), Professor Irene Schneider (Göttingen, Germany), Dr. Martin Lau (School of Oriental and African Studies, London, U.K.), and Dr. Najibullah Kamali (Encyclopaedia of Islamic Law, Kuwait). The Afghan participants came from the provinces of Kabul, Nangarhar and Balkh. There were representatives of the Ministry of Justice, the Afghanistan Independent Human Rights Commission, the Supreme Court, the Kabul Court of Appeals, the Family and the Juvenile Court in Kabul, some members of the current Loya Jirga, lecturers and professors from the universities of Kabul, Balkh and Nangarhar, as well as non-governmental organisations such as the Afghan Women’s Council, the Afghan lawyer’s associations, and the International Legal Foundation. Some other non-Afghan guests came from the United Nations Organisation, the Italian Justice Office of the Italian Embassy in Kabul, the U.S. Embassy, and the German Embassy.

More than 50 persons attended the workshop and debated on a wide range of matters of Afghan family law such as engagement, conclusion of marriages, marriage-related rights and duties, registration of personal status, and divorce. Other topics like maintenance of children or family law-related inheritance issues had to be left out, in order to give the participants more time for detailed discussion of the core themes. The discussions were mostly very lively and covered the Islamic foundations of family law and general concepts of human relations as well as modern factors influencing marriages in Afghanistan. In the following, some of the points of discussions will be outlined in brief.

2 DEBATED ISSUES OF AFGHAN FAMILY LAW

The workshop was structured in three sections beginning with solicitation and engagement, going on to the requirements for a valid marriage including forced marriages, child marriages, clauses in marriage contracts, and finishing with the registration of matters of personal status and polygamy and divorce. All topics were introduced by brief presentations from members of the MPI-team summarising the legal situation in Afghanistan according to the Afghan civil code of 1977 (hereafter CC). They were mirrored and contrasted with matters of Islamic jurisprudence, codifications of family law in other Islamic countries like Jordan, Morocco or Iran, and reports on legal pluralism in Afghanistan.