Registration, Court System, and Procedure in Afghan Family Law

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1 INTRODUCTION

This article focuses on the role of registration, the court system, and procedural regulations as methods of development and legal reform of family law in Afghanistan. It is based on two assumptions: (a) that reform of the substantive law, in this case the family law, is closely connected to reform of structure and procedure, and (b) that legal pluralism as a concept has to be taken into consideration when analysing the legal situation of Afghanistan.1

1.1 Reform in Islamic law

Different methods can be employed to reform Islamic law with regard to substantive law (1) and with regard to structure and procedure (2).

These are with regard to substantive law:

1. *Takhayyur* and *talifq*, the selection and combination of the legal rulings of different *madhhabs*. Both methods belong to the *ijmā’* (consensus) according to which the rulings and norms of all existing schools are acceptable;

2. Silence of the legislator;2

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1 This article is based on the results of the project “Afghan Family Law” of the Max-Planck Institute for Comparative and International Private Law in Hamburg. Members of the team are: N. Yassari (Hamburg), H. Kamali (Malaysia), N. Kamali (Kuwait), M. Lau (London), and I. Schneider (Goettingen). During this project a Fact-Finding Mission was carried out between December 2004 and March 2005, the results of which are documented in Sabooury, H. and Yassari, N., *Family Structures and Family Law in Afghanistan – A Report of the Fact-Finding Mission to Afghanistan January–March 2005*, 2005, see http://www.mpipriv-hh.mpg.de/deutsch/Forschung/LaufendeProjekte/Afghanistan/MPI-Report_Family.pdf (quoted as MPI-Report 2005). A conference in Kabul was held in June 2006, in which the results of this report were discussed with Afghan jurists, judges, representatives from politics and members of NGOs. I will refer to my notes made during this conference.

3. Use of *ijtihād* with a new and modern interpretation of the texts of Qur‘ān and *sunna* thereby ignoring the traditional consensus established in the schools of law and seeking solutions for legal problems which the Islamic countries have to deal with;

4. Use of other principles of law, e.g. *maṣlaḥa*.

With regard to structure and procedure:

5. Registration;
6. Non-hearing (‘*ādām *samā‘a*) of cases;
7. (New) definition of the court’s competence (*takhfīs al-qādā‘*);
8. Making obligatory certain procedural steps or institutions (e.g. mediation for divorce).

### 1.2 Legal pluralism

The role of registration and procedural regulations as well as the legislation, judiciary and legal practice concerning family law matters (and other laws) in Afghanistan cannot be comprehensively understood without recourse to the concept of legal pluralism. From a lawyer’s point of view, legal pluralism denotes the recognition by the state (the legislator) of the existence of a multiplicity of legal sources which constitute its legislation: international treaties, customary law, religious law.

The constitution of Afghanistan, enacted in 2004, contains relations to the UDHR and CEDAW (Art. 7) and thus to international law, as well as references to the Islam (Art. 3). Islamic law in itself is plural. In pre-modern Islam four (sunnī) schools and the shī‘ī (*īthnā‘asharī*) coexisted with differences in legal theory and material law. Afghanistan is largely a hanafī country, the Afghan civil code of 1977 (AfgCC) also contains, however, solutions of the mālikī law school.

Legal pluralism is not confined to the perspective of state enacted law. In sociological and anthropological studies, legal pluralism means a plurality of social fields, producers of norms which are in partial interaction with each other. This perspective entails the deprivation of the state of its capacity as the – sole – social actor (as opposed to its multiple constituents), and, consequently its consideration as the monopolist of legal production, be it directly or indirectly. Griffiths has developed this sociological theory of legal pluralism. He criticises any sort of theory which supports – explicitly or not – a centralised and hierarchic structure of the legal system with the state on top and reconstructs the legal system by taking into consideration various legal sources. This involves a refutation of the prescriptive approach commonly used by legal theoreticians. Furthermore, Sally F. Moore has developed...