



Reforming the Afghan Family Law¹

Family law is a specialized area of *civil law* dealing with family related issues, including divorce, inheritance, and adoption. A *Family Code* has existed in Afghanistan since the beginning of the 20th century. Based on Sunni jurisprudence, it was last reformed in the first chapter of the Afghan *Civil Code* in 1977.

Since its establishment as an Islamic republic in 2004, Afghanistan requires that its *family law* respect the rights and responsibilities of men and women as described in, or *Shariah*. It must also respect Afghanistan's national and International human rights commitments, including its constitutional provisions recognizing the equality of women and men, as well as its accession (without reservations) to the UN's *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW).

Rights & Democracy's involvement in Afghanistan has been to support the reform of Afghanistan's *family law* through the creation of the Family Law Drafting Committee comprised of Afghan experts and hosted by the Ministry of Women's Affairs. The partnership with the Ministry of Women's Affairs is based upon an agreement with this Ministry, inline with Official Gazette number 787, stating that only governmental authorities can suggest a draft law.

The process to prepare the draft law took more than two years and involved researching Shariah-based arguments to reform the law, analyzing experiences from other Muslim countries, and drawing comparisons with other Afghan laws affecting family matters. More specifically, the work concentrated around the following articles: redefinition of family as a lawful, enabling and equitable unit; marriage; custody of children; mutual relationship; polygamy; divorce; benefit and interest of children.

The committee finalized the first draft of the reformed *family law* in September 2009. A series of consultations with Afghan civil society, members of parliament, regional experts and lawyers will be undertaken in 2009 and 2010, before a final draft is submitted by the Ministry of Women's Affairs to the department of legislation of the Ministry of Justice in March 2010.

¹ Rights & Democracy (International Centre for Human Rights and Democratic Development), is a non-partisan organization 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. This document has been prepared by Zia Moballegh, Senior Officer for Family Law (amoballegh@dd-rd.af) and by Alexandra Gilbert, Project Coordinator for Afghanistan (agilbert@dd-rd.ca).

The Family Law Drafting Committee

The Family Law Drafting Committee was established in January 2008. Coordinated by Rights & Democracy, the committee is comprised of 18 Afghan experts and was created to review the existing Afghan *family law* and to draft gender-sensitive recommendations and amendments in-line with Afghanistan's human rights commitments, Quranic interpretations, compilations of *Hadith*² and based on the experiences of other Muslim countries. In order to foster a sense of ownership among Afghan stakeholders, the Family Law Drafting Committee has also taken into consideration feedback from Afghan lawyers based outside Kabul. The committee has held 40 meetings to review the Afghan *family law* and other documents.

In the latter half of 2008, the Family Law Drafting Committee prepared and proposed recommendations for the draft *Shiite Personal Status Law*, in order to ensure that this law would be in-line with Afghanistan's Constitution and its international human rights commitments. The amendments prepared by the committee were supported by Afghan civil society organizations and eventually presented to Afghanistan's President and the Minister of Justice. More than half of the committee's recommendations were included in the revised *Shiite personal Status Law*, which was gazetted on 27 July 2009.

The Family Law Drafting Committee also drafted a law concerning 'Guardians and Wards' which is the first law in this area in Afghanistan. It will be on the Afghan Parliament's agenda in 2010.

The members of the Family Law Drafting Committee are:

Rights & Democracy: Zia Moballegh, Senior Officer, Family Law; Monisa Bahram, Family Law Assistant.

Ministry of Justice: Mr. Ahmadullah Sediqi - Member of Criminal Law Department; Mr. Kabir Jaji – Member of Civil Law Department.

Supreme Court: Mr. Mohammad Sediq Muslim - Head of Religious Decrees Department (*Dar-ul Eftah*); Ms. Rahima Rezaie - Head of Family Court; Ms. Homa Alizoi - Head of Juvenile Court.

Ministry of Women's Affairs: Ms. Fouzia Amini - Director, Legal Department; Ms. Shakila Afzalyar – Deputy, Legal Department; Ms. Fakhria Hashimi – Manager, Legal Department; Mr. Mohammad Alem Amini – Advisor; Ms. Somaya Khalili – Legal Advisor.

Kabul University: Mr. Niaz Mohammad Hussainkhail – Lecturer, Sharia law Faculty; Ms. Shahla Farid – Lecturer, Law Faculty / AWN.

AIHRC: Ms. Soraya Sobhrang – Commissioner; Ms. Hangama Anwari – Commissioner; Mr. Ali Riza Rohani – Advisor.

Medica Mondiale: Ms. Nabila Nayebkhail – Defence Lawyer.

Afghanistan Independent Bar Association: Gulghotay Afzalyar- Member/ Lawyer.

² Hadith are a collection of narrations from the Islamic Prophet Mohammad which are regarded by traditional schools of jurisprudence as important tools for interpreting the Quran and as a source of legislation. Hadith are revered by Muslims as a source of religious law and moral guidance. These works are referred to in matters of Islamic law and history to this day.

Normative and Institutional Framework

Afghanistan is bound by several international human rights obligations that affect *family law*. In 2003, Afghanistan was the first Muslim country to ratify the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) without reservations. Article 16 of CEDAW binds state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. Other relevant international human rights law provisions binding upon Afghanistan include article 16 of the Universal Declaration on Human Rights; article 23 of the International Covenant on Civil and Political Rights; and article 10 of the International Covenant on Economic, Social and Cultural Rights. These provisions in particular crystallize the principle of free consent to marriage, and that of equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

Afghanistan's Constitution and national development policies also affect Afghanistan's *family law*. Afghanistan adopted a new constitution in 2004, according to which all existing laws would have to be reviewed. Article 54 of the Constitution of Afghanistan provides that "family is the fundamental pillar of society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam." Article 22 of the Constitution further states that: "Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law".

The Afghanistan National Development Strategy (ANDS) aims to strengthen democratic practice and institutions, human rights and the rule of law, through the "development, ratification and enforcement of legislation that is consistent with Afghanistan's international obligations". The National Action Plan for Women of Afghanistan (NAPWA) also highlights the importance of reforming the legal and judicial systems to protect the rights of women guaranteed by the Constitution as well as within international conventions and standards.