CODE ON THE SEPARATION OF SPOUSES

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CODE ON THE SEPARATION OF SPOUSES

The edict of the respected Commander of the Faithful – may Allah protect him – regarding the implementation of the Code

Number: 18

Date: 4/8/1447 AH [24 January 2026]

First article:

Hereby, I ratify the Code on the separation of spouses, consisting of one preface, two chapters, 12 sections and 31 articles.

Second article

This edict is to be implemented from the day of its ratification. The aforementioned code should be published, along with its full text, in the Official Gazette.

Peace be upon you and the mercy of Allah and His blessing!

The Commander of the Faithful, Sheikh al-Quran and Hadith, Mawlawi Hibatullah Akhundzada.

In the name of Allah, the Beneficent, the Merciful

Praise be to Allah, Lord of the Worlds. Blessings and peace be upon the foremost of the Messengers, and upon all his family and companions.

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CODE ON THE SEPARATION OF SPOUSES

The Book

The Code on the Separation of Spouses consists of one preface, two chapters, 12 sections and 31 articles.

Preface

The preface consists of articles, one dealing with the meaning of principles and laws and the other dealing with terminology.

The Meaning of Principles and Laws

First article

The principles and laws referred to in this Code are those principles and laws which have been approved and ratified by the Exalted Commander of the Faithful, Sheikh of Quran and Hadith, Mawlawi Hibatullah Akhundzada – may Allah protect him.

Terminology

Second article

In this Code, the following terms are used to render the meanings given below:

1. Separation *[firqat]*: The ending of the married relationship between a man and his wife.
2. Dissolution of marriage *[tafrīq]:* The dissolution of a marriage between a man and his wife [with the involvement of a judge].[1]

[1] One can glean from the footnotes inserted under terms 1 and 2 ('separation' and 'dissolution of marriage') that the first – *firqat* – involves the separation of a man and wife, with no involvement of the judge *(qazi)*, while the second – *tafrīq* – involves a judge.

3. Prerogative of puberty *[khiyar-e bulūgh]:* The right of a minor – a boy, or a girl (whether she is a virgin or has been married previously)[2] – to annul a marriage into which one of them has entered, once they reach puberty, so long as the said marriage has come about when he or she was a minor and was arranged by a relative other than a father or grandfather.
4. Absent without trace *[mafqūd]:* That absent person whose whereabouts, life and death are unknown and his household have made an effort to trace him without being able to find any news or sign of him.[3]
5. Absentee of whom there is trace *[ghair mafqūd ghaʾib]:* That absent person who has travelled far from his home village, but his whereabouts are known. Even so, he has been gone a long time and has left his wife alone at home. He does not return home, nor does he take his wife with him. He does not even attend to her necessities and does not send any money home. Neither does he divorce her, all of which is a cause of great difficulty for his wife.
6. Separation with compensation *[khulʾa]:* Taking money in exchange for relinquishing the marital bond, by pronouncing the word khulʾa.
7. Stubborn *[mutaʾanat]:* A husband who, even though he is able to do so, does not give his wife household expenses, or fulfil her marital rights.[4]
8. Invoking curses *[liʾan]:* Testimonies confirmed by oaths, accompanied by a curse and wrath, which, with respect to the husband, stand in place of the punishment for false accusation of fornication *[hadd al-qazaf],* and with respect to the wife, stand in place of the punishment for fornication.[5]

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[2] The phrase in brackets, "whether she is a virgin or married previously" raises some questions. It is difficult to imagine that a girl could have been married twice, while still pre-pubescent, and horrific to imagine that the first marriage might have been consummated, transforming her status from virgin *[bakirah]* to married *[thayyibah].*

[3] The Code references *Kanz al-Daqaʾiq*, a concise and comprehensive manual of Hanafi Islamic law authored by Imam Abuʾl Barakat ʿAbd Allāh ibn Ahmad al-Nasafī (d 1310 CE), with annotation of al-Shalbi, published by al-Matbaʾah al-Kubra al-Amīriyah, Cairo, in this case vol III, p310.

[4] A footnote in the Code defines the related noun, *al-taʾannut* (the act of being stubborn – while mutaʾanat refers to the person who is stubborn). It gives three definitions, all amounting to much the same thing. The simplest of the three would seem to be that of al-Anbari in *Lisan al-Arab* (The Arabic Language, vol II, p61, Dar Sadir, Beirut): "The word originally means severity. When Arabs say someone is severe (*yataʾanatu*) with another, they generally mean that he requires them to do something which would be very difficult to accomplish." Article 2.7, then, concerns itself with husbands who are unreasonably stubborn – *al-mutaʾanat* – meaning someone who practices such behaviour.

[5] The definition of liʾan given in the footnotes of the Code quotes the book of Hanafi jurisprudence *Kanz al-Daqāʾiq* [see FN 3] and reads exactly the same – in Arabic – as the definition given in article 7.2 in the text of the Code, in both Dari and Pashto.

One can gain a clearer picture of what liʾan looks like in real life by studying related texts in the Quran (Surah al-Nūr, 24:6-10), which give context and texture. Far from referring to some random invocation

9. Likening one's wife to a prohibited female relative *[zihar]:* This is when a sane, adult, Muslim husband likens the whole body of his wife – or some of her body parts from which the whole body may be understood or a commonly referred-to part – to a body part of those women who are permanently prohibited to him, where looking at that body part would be unlawful for him.[6]
10. Compatibility *[kafa'at]:* This means the equality or suitability of the husband with the wife in lineage and status, ancestry, religion, age and other such attributes.

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of curses, li'an takes place when a man accuses his wife, or a wife her husband, of having illicit relations with someone else, and the partner denies this. In such a case, when neither can produce a witness, they should swear an oath four times that they are telling the truth, and a fifth time that the curse of God should descend upon them if they are lying. There are several cases of li'an being overseen by the Holy Prophet recorded in Hadith (see *Mishkat al-Masabih*, trans James Robson, Sheikh Muhammad Ashraf, Lahore, vol I, pp702-707). The entire chapter of Mishkat on marriage – along with translation – in which invoking curses comprises the 15th chapter, can be viewed here.

[6] Again, the definition of *zihar* given in the text of the Code does not give a clear picture of what it might actually look like in real life. The related verses of the Holy Quran (Surah al-Ahzab, 33:4-5, and Surah al-Mujadilah, 58:1-4) are much clearer and give more context. From those original sources, one can establish the conciseness and relative clarity of the definition mentioned in and on the authority of *Kanz al-Daqā'iq*: "It is to draw a direct likeness between the woman to whom one is married with another whom one is not allowed to marry," for instance a mother, sister or aunt (father or mother's sister) [see FN 3].

CHAPTER ONE
GROUNDS FOR JUDICIAL SEPARATION

This chapter consists of twelve sections:

1. Judicial separation due to lack of compatibility;
2. Judicial separation due to the prerogative of puberty;
3. Judicial separation due to wet-nursing;
4. Judicial separation due to the prohibition on blood-relationships;
5. Judicial separation due to the husband being missing;
6. Judicial separation due to khul'a and absence;
7. Judicial separation due to obstinacy and wrongful conduct;
8. Judicial separation due to the existence of a defect in the husband;
9. Judicial separation due to apostasy;
10. Judicial separation due to turning away from Islam;
11. Judicial separation due to difference of religion; and
12. Judicial separation due to li'an or zihar

SECTION ONE
Judicial Separation Due to Incompatibility

Lack of Compatibility
Article 3

Where a woman has a guardian and she marries a non-compatible person without the guardian's permission, her marriage is not valid.[7]

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[7] Footnote number 14 of the Code states that the same repercussion, ie the invalidation of the marriage, applies in the case of gross inadequacy of a mahr. However, the footnote says:

Clearly this applies in the case of a grown-up person who marries herself off without the permission of her guardian. Such a bond is valid according to the apparent meaning of accounts of jurists [zahir al-rawayah], with the guardian retaining the right to annul the marriage. But the preferred position of jurists now is that the union is not valid.

It is worth noting that the word 'now' in this case refers to the time of the compilation of the quoted source, *Radd al-Muhtār 'ala al-Durr al-Mukhtār [Guiding the Baffled to The Exquisite Pearl]*, a work of Hanafi

Right to Annul a Marriage in the Case of Incompatibility
Article 4

If the guardian of a woman, with her permission, marries her to a person with whom her compatibility is unknown, and the woman or the guardian made compatibility a condition at the time of the marriage and it later becomes known that the person is not compatible, then in this case the guardian and the woman have the right to annul the marriage. However, this separation shall take place by order of the court.[8]

SECTION TWO
Judicial Separation Due to the Prerogative of Puberty

Prerogative of Puberty
Article 5

If some relative, other than the father or paternal grandfather, contracts the marriage of a minor boy or minor girl – whether the minor girl is a virgin *[bakirah]* or previously married *[thayyibah]* – [9] to a compatible person and for an appropriate mahr, the contract is valid. However, when the said minor boy or minor girl reaches puberty, he or she has the option to annul the marriage contract. This annulment shall take place by order of the court.[10]

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jurisprudence compiled in the 18th-century by the Hanafi scholar Ibn Abidīn vol III, p906 (published by H M Saeed, Karachi), itself an authoritative commentary on a 17th-century work, Imam Muhammad Ala-ud-Din Haskafi's *Al-Durr al-Mukhtar Sharh Tanwir al-Absar (A Precious Pearl in Explanation of the Enlightening of the Eyes)*.

[8] Footnote number 15 of the Code cites the 12th-century Hanafi manual of fiqh, *Bada'i' as-Sana'i' fi Tartib ash-Shara'i'* (Marvellous Artistry in the Arrangement of Sharia Regulations) by 'Ala' al-Din al-Kasani, vol vi, p183, Dar al-Kutub al-Ilmiya, Beirut Maktaba Uthmaniya, Quetta, seconded in *Radd al-Muhtār* [see FN 7]. The footnote states:

The reason that only a court can decide this case is that the separation is being effected without a divorce [talaq], the separation not being of the husband's making. So it cannot be called divorce, since divorce is the prerogative of the husband. It is therefore an annulment of the marriage, which is a matter only a qazi or judge can decide.

[9] The Code references *Kanz al-Daqa'iq*, by Imam Abu'l Barakat ʿAbd Allāh ibn Ahmad al-Nasafī, with annotation of al-Shalbi, [see footnote 3].

[10] For the reason why a court of law has to be involved in this case, see footnote 8.

Marriage of a Minor Boy or Minor Girl to a Non-Compatible Person, or with Gross Unfairness in the Mahr[11]

Article 6

If one of the relatives, other than the father or paternal grandfather, contracts the marriage of a minor boy or minor girl to a non-compatible person, or with gross unfairness in the mahr, the marriage is not valid.

Lapse and Non-Lapse of the Puberty Prerogative

Article 7

The Puberty Prerogative of a virgin girl lapses by her silence.

The Puberty Prerogative of a boy and of a previously married girl does not lapse by silence.

However, it lapses by the expression of consent, whether made expressly or by implication.

Misuse of Discretion by the Father or Paternal Grandfather

Article 8

1. If the father or paternal grandfather has married off a daughter or granddaughter, who is a minor, and has not treated her with compassion and the said father or paternal grandfather is not known for misusing their power *[su'i ikhtiyar],* then in this case, the daughter or granddaughter, upon reaching puberty, has the option to apply to the court for the annulment of the marriage contract.
2. If the father or paternal grandfather is known for misusing their power because of immorality or insanity and has married his daughter or granddaughter to a non-compatible person, or has caused gross unfairness in her mahr, her marriage is not valid.[12]

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[11] *Mahr* is the Islamically prescribed gift given to a bride by the groom (often, in Afghanistan, it is a pledge, and not actually handed over). Mahr is distinct from another payment commonly made in Afghanistan – the bride price (*walwar* in Pashto and *toyana* and *sherbaha* in Dari) – which is given by the groom's family to the bride's. The former – mahr – is sanctioned in Islam. The latter – walwar or toyana – is not. The matter is further complicated by another payment that is made – not in cash but in kind. This consists of the household items – typically bedding for the new couple, kitchen pans and crockery – that accompany the bride to her in-laws' home *(jahez)*.

[12] A clear example of gross unfairness in the mahr and of marrying a daughter or granddaughter to a non-compatible person would be for a father or grandfather to marry a girl to a man much older than her and/or for a huge bride-price from which he – not the bride – benefits. Such a practice is widespread – normal even – across huge swathes of Afghanistan. Successive governments have been unwilling, or unable to put an end to this practice.

The Code is a slight improvement on such customary practice in that it gives a legal option to a girl to reject her marriage, even though her circumstances would mitigate against such an action: the time in

3. Misusing power is established when the father or paternal grandfather is reckless and lacks sound judgment, or where, before the said marriage contract, he had contracted the marriage of another daughter or granddaughter in a manner in which her welfare was not observed.

Proof of the Puberty Prerogative
Article 9

1. Witnesses are required to prove the Puberty Prerogative, that is, when a virgin girl reaches puberty, she shall call two male witnesses, or one male witness and two female witnesses, at the time of puberty, and shall say that she has annulled the marriage contracted for her with such-and-such person. If, at the time of puberty, there is no one available whom she can call as a witness, then she shall state verbally that she has annulled her marriage. But when she later has access to witnesses, she shall call witnesses and say to them: "I have now reached puberty and have annulled my marriage." This annulment shall take place by order of the court.
2. If one of the relatives, other than the father or paternal grandfather, married off a minor virgin girl, and after her puberty, a dispute arises with the husband, and the girl says, "I reached puberty yesterday and chose separation," and the husband denies her statement, then in this case, if the girl has no witnesses, the statement of the husband is accepted with his oath.
3. If the wife says before the judge, "I have now reached puberty and have annulled the marriage," then in this case, she is believed and there is no need for witnesses or an oath.
4. If the wife says, "When I reached puberty, I annulled the marriage," then in this case, the wife shall present witnesses to prove the annulment. If she has no witnesses, the husband shall take an oath.
5. If one of the relatives, other than the father or paternal grandfather, married off a minor virgin girl, but the girl was unaware of her marriage before reaching puberty, then when she learns of her marriage after reaching puberty, she retains the prerogative of puberty, even if a long time has passed after puberty.

Condition for Annulment of Marriage through the Puberty Prerogative
Article 10

For the annulment of a marriage contract on the basis of the prerogative of puberty, a judge's ruling is required.

Without a judge's ruling, the marriage cannot be annulled.

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which she has to voice her rejection is short, she would have to get to a court to do so and she would still be young and either already living with her in-laws or still in the home of the father or grandfather who has contracted the marriage. The Code does also provide a small opportunity for human rights organisations, civil society, community and religious leaders, broadcasters and journalists to back up this law – or work to improve it.

SECTION THREE
Judicial Separation Due to 'Fosterage'[13]

Breastfeeding
Article 11

1. If a woman – a foster-mother *[marsi'ya]* – informs the spouses that they are related through breastfeeding – for example, that you are milk-brother and milk-sister, or milk-aunt and milk-nephew, or another similarly prohibited relationship – then if both the husband and wife confirm her statement, or if the husband confirms it, while the wife denies it, the wife becomes prohibited to the husband.
2. However, if the wife confirms it and the husband denies it, the marriage remains in force. In that case, the wife shall require the husband to swear an oath that she is not his milk-sister or his milk-aunt. If the husband refuses to take the oath, the judge shall order a judicial separation.[14]
3. If two just men, or one just man and two just women, testify that this woman is the husband's milk sister, milk maternal aunt, milk paternal aunt, milk mother, milk grandmother or milk niece through breastfeeding, then the two of them become prohibited to one another and the judge shall order a judicial separation.
4. The testimony of witnesses regarding breastfeeding is not dependent upon a claim by the woman concerned.[15] Rather, even without a claim or request by the woman, the witnesses may give their testimony.
5. If witnesses, in the presence of a woman, lawfully testify that, for example, her husband is her milk brother, and the husband denies it, and after giving their testimony, the witnesses die or disappear, then it is not permissible for the woman

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[13] 'Fosterage' and 'foster-mother' are the standard ways of translating the practice of a woman breastfeeding another woman's child. In Islam, it carries the same ban on marriage as the equivalent blood relation. Verse 24 of Surah al-Nisa in the Quran (4:24) lists the blood relations that a man is not permitted to marry, along with your "foster-mothers, who wet-nursed you, and your sisters from wet-nursing." As explained in a hadith transmitted by Bukhari, "what is unlawful by reason of consanguinity is unlawful by reason of fosterage." *(Mishkat al-Masabih,* translated by James Robson, Sheikh Muhammad Ashraf, Lahore, vol I, p672, see FN 5).

[14] Footnote 28 of the Code quotes *Al-Fatawa al-Sirajiya,* (p209), a book of judicial verdicts published in Quetta, Pakistan, to explain that, if the couple has consummated the marriage, the husband "will have to pay [his wife] a standard mahr *[mahr al-mithl]."* (The 'standard mahr' is based on the mahr usually given to women of similar status at the time of the marriage contract.)

[15] This would seem to be a reference to the foster-mother, since, in this article, she is the one who initiated the claim. This interpretation is reinforced by the reference at the beginning of the article to "a woman – a foster-mother *[marsi'ya]."* In the next article, the foster-mother is referred to only as "a woman." So it would appear that the woman who has made the claim is indeed the foster-mother and not the wife.

to continue living with her husband. Rather, she should free herself from him by whatever means possible.

Husband and Wife Breastfed by the Same Woman
Article 12

1. If a woman says, "I have breastfed this husband and this wife," the following situations and rulings apply:
   i. If both spouses confirm her statement and the marriage has not been consummated, the marriage is invalidated and the woman is not entitled to a mahr.
   ii. If both spouses confirm her statement and consummation has taken place, the marriage is dissolved and the woman is entitled to a standard mahr *[mahr al-mithal].*
   iii. If both spouses deny the wet nurse's statement, but the woman who reported the breastfeeding relationship is known for her upright nature *[ādila],* the marriage is not automatically dissolved. Rather, the husband has the option either to continue the marriage or to separate from his wife, although separation is preferable. If the husband chooses separation and consummation has not taken place, it is preferable for the husband to give half of the mahr to the wife and it is preferable for the wife not to take anything. If consummation has taken place, it is preferable for the husband to give the mahr, maintenance and housing in full and it is preferable for the wife to take the lesser of the proper mahr or the specified mahr and to waive maintenance and housing.[16]

SECTION FOUR
Judicial Separation on the Grounds of Prohibition [of marriage] because of Consanguinity

Prohibition by Consanguinity
Article 13

1. If a man or a woman commits, or has committed fornication with the ascendants or descendants *[usūl or furū']* of their spouse, or performs with them acts that, according to Hanafi jurisprudence, give rise to prohibition [of marriage] because of consanguinity, this shall occasion the judicial separation of the spouses.[17]

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[16] The Code footnotes *Radd al-Muhtar* [see FN 7], vol II, p234.

[17] The Code's footnote 33 details the kind of acts that might give rise to such a judicial separation in the eyes of Hanafi jurisprudence:

This includes touching and looking with desire, there being no difference between an act that is intentional, or accidental, or done by accident, or that one is forced to commit, even if a husband awakens and intends

2. The definition of consanguinity, and other rulings and issues relating to the prohibition by consanguinity, shall be regulated in the relevant procedure *[tarz al-amal].*

Ruling on Touching of a Woman by the Husband's Ascendants or Descendants
Article 14

If a wife alleges that one of her husband's ascendants or descendants has touched or kissed her with sexual desire, the judge shall ask the husband whether he admits or denies the allegation. If the husband accepts the allegation, the judge shall order the separation of the spouses. If the husband denies the allegation, the judge shall require the wife to produce witnesses. If she produces witnesses in accordance with the requirements of sharia and proves her claim, the judge shall order their separation. If the wife fails to produce the required witnesses, the judge shall require the husband to swear an oath. If the husband refuses to make an oath, the judge shall order their separation. If the husband makes an oath, the judge shall dismiss the claim.[18]

SECTION FIVE
Judicial separation Due to the Husband Being Missing

Husband Being Missing
Article 15

1. If the missing person is among those missing in war or is considered highly likely to be dead and there are indications proving his death, or such a long period has

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to make love to his wife, but instead squeezes his daughter lustfully, in a manner that arouses desire, thinking she was her mother, then this will entail his wife being forbidden to him forever.

[18] Footnote number 34 of the Code refers to Mawlana Ashraf Ali Thanvi (1886-1943) and his *Al-Hīlat al-Najiza li'l-Hālīlat al-Ājiza* (An Effective Solution for a Helpless Wife) which, like another of Thanvi's magnum opuses, the book of jurisprudence, *Behishti Zewar* (The Jewellery of Paradise) is written entirely from a woman's perspective. His aim in *al-Hilalat al-Najiza*, in what was then British-ruled India, ie a culture similar to that of Afghanistan, was to try to wrest a better deal for women by empowering them to separate from unfit, incompatible, absent or abusive husbands. This is reflected in the quotation cited in the footnote to the Code:

The judge will dismiss the case [referred to in article 14 of the Code]. *He will not order the dissolution of the marriage, nor will he uphold it. However, the woman should not continue cohabiting with her husband. She will be able to extract herself from the marriage through the mechanism of khul'a – divorce instigated by the wife. If she decides against khul'a, still she will not expose herself to his advances. If she is certain that her husband has strayed beyond the bounds of propriety in this case, or she is pretty certain of this, then the two are not allowed to live together.*

For full details, refer to *Al-Hīlat al-Nājiza,* pp87-91, Karachi.

elapsed that the judge's prevailing opinion is that he has died, then in accordance with an edict issued by the Exalted Commander of the Faithful – may Allah protect him – on 10.4.1441 AH [8 December 2019], the judge concerned shall issue a ruling on the death of the absent person.[19] He may then direct [the man's] wife to pass the specified time *[iddat]* on the demise of a husband.[20] Furthermore, he should order that once she has passed the stipulated period, then the widow of the missing person may marry someone else.[21]

2. If the missing person is not among those who disappeared in war or is not considered highly likely to be dead, then the wife of the missing person shall, in accordance with Hanafi jurisprudence, wait for such a period that the death of the missing person becomes certain and the people of his generation – his contemporaries – have all died.

Stages with regard to the Separation of a Missing Person and His Wife Article 16

1. In the matter of judicial separation between a missing person and his wife, the following stages must be observed as a matter of precaution:
2. If the wife of the missing person wishes to end the marriage and marry another person, she must submit a petition to the court and prove her marriage and her husband's missing status through witnesses.
3. After the wife of the missing person submits her petition, the judge is required, taking into account the situations set out in article 15 of this Code, to conduct a full investigation concerning the said missing person.
4. In the cases mentioned above, a three-level judicial review is required.[22]
5. If the judgment issued in the cases above is upheld by the Supreme Court, the Chief Justice of the Supreme Court shall, following that affirmation, submit the judgment to His Excellency, the Commander of the Faithful – may Allah protect him – for approval.

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[19] The relevant edict is referred to as Edict 43, vol 5. Read it in full in Decrees, Orders And Instructions Of His Excellency, Amir Al-Mu'minin as published in the Official Gazette on 22 May 2023, AAN's unofficial translation, p24. The Hijri year referred to in the Code is in accordance with the Islamic lunar calendar, not the solar Hijri calendar commonly used in Afghanistan.

[20] It is noticeable that the relevant Quranic verse stipulating the period that should elapse before a woman marries again is not referred to in the Code. It is in Surah al-Baqarah, 2:234, "Those amongst you who die, leaving widows, the widows should constrain themselves for four months and ten days."

[21] Surah al-Baqarah, 2:235, stipulates that a new marriage contract should not be concluded until the prescribed waiting period has been completed: "Do not commit to the bond of marriage until the waiting period expires."

[22] The three-level judicial review referred to would seem to consist of the court where the petition was lodged, the appeals court and the Supreme Court.

6. The aforementioned judgment shall enter into force only after it has been approved by His Excellency the Commander of the Faithful – may Allah protect him.

Completion of the Stipulated Widow's Waiting Period after Death
Article 17

1. After the ruling mentioned in article 15, and after completion of the stages set out in article 16 of this Code, the wife of the missing person is required to complete the widow's waiting period of death – four months and ten days – fully, in accordance with the rulings of Hanafi jurisprudence.[23]
2. After completing the waiting period mentioned in paragraph 1 of this article, the wife of the said missing person may marry another person.

SECTION SIX
Judicial Separation Due to Khul'a and Absence

Wife Persuading the Husband to Accept Khul'a
Article 18

1. A woman may, with the consent of her husband, separate herself from him by way of khul'a.[24]
2. Khul'a, in return for whatever amount of property the spouses mutually agree upon, is valid. However, taking compensation for khul'a in excess of the stipulated mahr, in cases where the wife is not recalcitrant, is not appropriate.[25]

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[23] More important than jurisprudence is the verse of the Quran, Surah al-Baqarah, 2:234 – see footnote 23 above.

[24] The relevant Quranic verse with respect to khul'a – separation on the instigation of the wife, in which she is not compensated by the husband – which, again, neither the Code nor its footnotes cite, is in Surah al-Baqarah, 2:229:

Divorce may be pronounced twice and then a woman must be retained honourably or released with kindness. It is not lawful for you to take away anything of what you have given your wives, unless both fear that they would not be able to observe the bounds set by Allah. In such a case it shall be no sin for either of them if the woman opts to give something for her release. These are the bounds set by Allah; do not transgress them. Those who transgress the bounds of Allah are wrongdoers.

[25] With regard to recalcitrance – *nushūz* – it is usually associated with women being disobedient or recalcitrant towards their husband, as in this article. However, it can also refer to a man being recalcitrant towards his wife, as in Surah al-Nisā (4:128), "If a woman fears ill-treatment *(nushūz)* or indifference on the part of her husband, it shall be no offence for her to seek a reconciliation, for reconciliation is best. But people are prone to selfish greed. If you do good and fear Him, surely Allah is aware of what you do." This verse signifies a stage – also instigated by the wife – prior to her actual seeking separation (khul'a), where peace-making and reconciliation are given priority.

3. A divorce which takes place due to khul'a is a binding, irrevocable divorce [*talaq ba'in*].[26]

Rulings Concerning the Husband's Refusal to Accept Khul'a and Divorce Article 19

1. If a woman requests judicial separation from the judge on account of her husband's absence – in cases when he is not legally considered missing – or because he does not provide maintenance, the judge must not order separation.[27]
2. The maintenance and housing rights of the wife of an absent husband – who is not legally classified as a missing person – together with the other rules and matters relating to such cases, shall be governed by the relevant implementing procedure.[28]

Return of the Missing Husband after Judicial Separation by the Judge Article 20

1. If, after a decree of judicial separation, the missing person returns, and his wife has married another man, separation shall take place between the second husband and the said woman, and the woman belongs to the first husband. However, the judge shall give the first husband the choice either to keep the woman as his wife, or divorce her, or, if both parties agree, to conclude a khul'a with her.[29]

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[26] This means that, should the couple wish to be reconciled, they may do so, but it would require a new *nikah* (marriage).

[27] Footnote 43 of the Code adds – on the authority of the annotation in *Radd al-Muhtar*, vol III, p590 [see FN 7] – that:

… no separation should be enacted between the husband and wife based on his inability to fulfil her rights in any of the three types [unspecified], nor on his failure to fulfil them if he were absent, even if he were wealthy. Al-Shafi'i permitted [separation] based on the husband's insolvency and [also] if his absence is harmful to her. However, if a Hanafi judged in this way, it would not be enforced.

[28] No footnote is given, nor is it explained in the text of the Code, what the relevant implementing procedure in this case is.

[29] Footnote 44 in the Code cites ostensibly differing statements of two of Sunni Islam's first caliphs, Ali ibn Abi Talib and Umar ibn al-Khattab. The Code cites a Hanafi jurist by the name of 'Ibrahim' as giving preference to Ali ibn Abi Talib's statement, that the woman should return to her first husband and separate from her second husband. However, she should keep her mahr, seeing that her second marriage has been consummated. Her first husband should not approach her until she has completed the waiting period that is incumbent due to her separation from the second husband.

The Code does not say what Umar said, but elsewhere, his words are reported and are included here as they help explain the contents of the next article in the Code:

It has been established that she is married and a woman married to another man is not among those who are lawful [for marriage], but rather falls into the category of those who are forbidden to all other men, as mentioned in the Quran (4:24). Thus, how could it be sound to leave her with the second man? Furthermore, if the first man were to claim the mahr – even though the marriage contract was concluded between the

2. If the first husband referred to in paragraph 1 of this article wishes to retain the woman as his wife, he shall not have marital relations with her until the completion of her waiting period.[30] If the first husband does not wish to retain her, he shall divorce her. The woman shall then observe the prescribed waiting period,[31] and after the completion of that waiting period, she may conclude a new marriage contract with the second husband, in other words, the person whom she had previously married.[32]
3. All other rules and matters relating to a missing husband and an absent husband who is not legally classified as missing shall be regulated by the relevant implementing procedure.[33]

Ruling on the Mahr of the Wife of a Missing Husband Who Is Found after She Has Married Another Person

Article 21

If, after the missing husband is found, his wife is returned to him, the woman shall be entitled to a mahr from the second husband only if consummation or a valid seclusion has occurred between them.[34]

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woman and the second man – how could the payment of the mahr to the first man be justified? The mahr is the acknowledgement of her marital intimacy, and as such, it is her property rather than her husband's – much like the mahr of a woman who has engaged in intercourse under a mistaken belief of legality. We therefore conclude that she is legally the wife of the first man; yet, he may not have sexual relations with her because she is currently observing the waiting period resulting from her union with the other – analogous to the case of a woman who has engaged in intercourse under a mistaken belief of legality.

Footnote 44 of the Code says this was cited by the 11th-century Hanafi jurist, Imam Abu Bakr al-Sarakhsi, *al-Mabsūt li'l-Sarakhsi*, vol 11, p37, Dar al-Maarifa, Beirut.

[30] In other words, the waiting period related to her separation from the second husband.

[31] This is the waiting period related to her separation from her first husband.

[32] A footnote below this article (FN 46) indicates that it is taken from the Pashto version of a collection of fatwas of Darul Uloom, Deoband, India, Ghaznavi Kutub Khana, Karachi, vol 10, p201.

33 Again, there is no clarification of what the relevant implementing procedure might be.

[34] According to a fatwa of the Binori Town madrasa in Karachi, while consummation refers to the occurrence of sexual intercourse between the spouses, valid seclusion refers to the spouses being together – following a valid marriage contract – in a private, secure place where they are able to engage in sexual intercourse, free from any physical, legal or natural impediments, even if intercourse does not actually occur.

SECTION SEVEN
Judicial Separation on the Grounds of the Husband's Obstinacy *[muta'anat wali],* or Khul'a or Divorce from an Unjust Husband

Article 22

1. A wife may petition a court if her husband oppresses her, fails to fulfil her rights, or hostility exists between the spouses.
2. Upon the wife's petition under paragraph 1, where marital discord *[shiqaq]* is established, the court shall proceed as follows:
   i. It shall appoint two arbitrators from among the families of the spouses and send them to the parties for the purpose of reconciliation and for determining which party is the wrongdoer and which is the wronged party.
   ii. Prevent the oppression committed by the person identified by the arbitrators as the wrongdoer.
   iii. Grant the right to the wronged party in accordance with the rules of Hanafi jurisprudence.
   iv. Compel the obstinate or oppressive husband to cease his oppression and obstinacy, or to grant a divorce.

SECTION EIGHT
Judicial Separation Due to the Existence of a Defect in the Husband

Existence of a Defect in the Husband
Article 23

1. If one of the following defects exists in the husband, the wife may seek judicial separation:
   i. *Jabb* (his penis has been severed);
   ii. *Inīn* (his penis is incapable of erection);
   iii. *Khusa* (castration/being a eunuch, or absence of erectile capacity).
2. In the case of jabb (where the husband's sexual organ has been severed), the judge shall immediately order separation. In the case of impotence or castration, the judge shall grant the husband one year for treatment. If he does not recover and the wife requests a separation, the judge shall order a separation between the spouses.
3. Insanity, vitiligo *[bars,* ie the loss of pigment on parts of his skin] and leprosy are defects that do not give rise to separation between spouses.

4. If the husband develops the defect of jabb, impotence, or castration after sexual intercourse has taken place, the wife may not seek judicial separation on that basis.[35]

SECTION NINE
Judicial Separation on Grounds of Apostasy

Apostasy of One of the Spouses
Article 24

If one of the spouses – God forbid – becomes an apostate, separation occurs between the husband and wife. There is no need for a judge's ruling.[36]

Informing the Court of Apostasy
Article 25

If one of the spouses becomes an apostate, the wife or husband who has remained Muslim is required to inform the court about the matter. In this case, after investigation, the judge shall record the matter in a legal document *[wathiqa].*

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[35] Three footnotes (FN 51, 52 and 53), which the translator summarises here, explain the various conditions referred to in the text of the Code, and the basis for the slightly different judgements in the various cases. The footnotes quote the most famous and standard book of Hanafi jurisprudence by the 12th-century scholar, Burhan al-Din al-Marghinani, *al-Hedaya fi Sharh Bidayat al-Mubtadi,* Chapter on Impotence and Other Such Matters, vol II, p273, published by Maktaba Rashidiya, Quetta, which says the judge will give a husband one year's respite in cases of impotency. If he is able to resume sexual relations with his wife during this time, all well and good; otherwise, the judge will order his separation from her, if she demands this.

The case of a castrated man – one whose testicles have been removed – is the same as that of an impotent man when he is incapable of an erection, since there remains hope of him becoming capable of sexual intercourse. In that case, the wife does not have any option of separation.

As for one whose penis and testicles have been severed, separation will be ordered in his case – if the wife demands it – since there is nothing gained by any respite being granted. The Code quotes the 17th-century *Majma' al-Anhar fī Sharhi Maltaqa al-Abhar* (The Conjunction of Streams), vol I, p463, Maktaba al-Haramayn al-Sharifayn, Quetta).

[36] The reason given in footnote 54 of the Code for apostasy triggering automatic separation is that apostasy is akin to death, since it leads to death (the punishment for apostasy being death – Translator's note), and a dead person is not a legal entity for marriage. A distinction is drawn here between separation due to a refusal to embrace Islam *[al-ibā],* which occurs only through judicial decree, and separation due to apostasy *[al-ridda],* which is established by the act of apostasy itself, the act of apostasy establishing incompatibility, occasioning the instant annulment of the marriage. The Code cites *Bada'i' al-Sana'i* [see FN 8], vol II, pp620-1, seconded in *Al-Radd al-Muhtar*, [see FN 7], vol II, p392.

SECTION TEN
Judicial Separation on Grounds of Turning Away From Islam

Turning Away of One of the Spouses from Islam
Article 26

1. If, in a Muslim country *[Dar al-Islam],* the couple are from among the *Ahl al-Kitab* (People of the Book)[37] and the husband accepts Islam, then in this case, separation does not occur between them.[38]
2. If the spouses are among the People of the Book and reside in a Muslim country, and the wife embraces Islam, her conversion in itself does not result in judicial separation between them. Rather, the husband shall be invited to embrace Islam. If he accepts Islam, their marriage shall remain in force. If he refuses, the judge shall decree a judicial separation.[39]
3. If, in a Muslim country, one of the spouses embraces Islam and both spouses are Zoroastrians *[majūsiyan]* or polytheists, the mere conversion of one spouse does not itself result in judicial separation between them. Rather, the spouse who has not embraced Islam shall first be invited to accept Islam. If he or she accepts Islam, then their marriage remains intact. If not, then a judge will order a separation.
4. If a couple live in a non-Muslim country *[Dār al-Harb]* and one of them embraces Islam, the marriage is not immediately dissolved.[40] Rather, the dissolution of the

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[37] People of the Book refers to adherents of other religions whom Muslims regard as having received divine revelation, generally in the form of scripture, chiefly to pre-Islamic Abrahamic religions, typically Jews, Christians and Sabians.

[38] Footnote 55 of the Code cites *Bada'i al-Sana'i* [see FN 8] vol 6, p184, although a clearer explanation for a Muslim man being allowed to marry a woman from the People of the Book comes in Surah al-Māida, 5:5: "Chaste believing women and chaste women of the people who were given the Book before you, are lawful to you, provided that you give them their mahr, and marry them, neither committing fornication, nor taking them as mistresses."

[39] The jurisprudence in the case of the continued validity of the marriage of a woman from the People of the Book who becomes Muslim is more complicated than in the case of a man who accepts Islam. Here, the explanation given in footnote number 56 of the Code is straightforward:

According to us [those following the Hanafi school of thought], the woman's acceptance of Islam does not in itself occasion separation. First of all, her husband should be urged to accept Islam also. If he does so, the marriage remains valid. If he refuses, then a judge will order their separation, since it is not permissible for a Muslim woman to be subject to marriage with a non-Muslim. (Bada'i' al-Sana'i [see FN 8], vol 6, p184).

Translator's note: There is no explicit Quran verse saying that a Muslim woman is not allowed to be married to one of the People of the Book, but the consensus among Muslim scholars that this is not allowed is based on the Surah above, which only explicitly mentions Muslim men.

[40] The location in which a person resides has traditionally been known either as Dar al-Islam – literally the land of Islam – or Dar al-Harb – literally the land of war. I have translated these terms as a Muslim country and non-Muslim country.

marriage shall be suspended until the completion of three menstrual periods of the wife. If the wife does not menstruate, the dissolution shall be suspended for three months. If, during that period, the other spouse also embraces Islam, the marriage shall remain in force. If the prescribed period expires and the other spouse has not embraced Islam, the marriage shall terminate automatically.[41]

SECTION ELEVEN
Judicial Separation on Grounds of Disparity of Residence

Disparity of Residence of a Couple
Article 27

1. If one of the spouses comes to a Muslim country having either embraced Islam or acquired the status of a non-Muslim in a Muslim state *[dhammi],* while the other spouse remains in a non-Muslim country in a state of unbelief, the marriage shall be dissolved.[42]
2. If one of the spouses enters a Muslim country as a person granted temporary safe-conduct *[mustaman]*, while the other spouse remains in a non-Muslim country in a state of unbelief, the marriage shall not be dissolved.[43]

SECTION TWELVE
Judicial Separation Due to Mutual Imprecation *[li'an]* and *zihar*[44]

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[41] Footnote 58 of the Code gives almost exactly the same text as that in the Code itself – citing *Bada'i' al-Sana'i,* [see FN 8], vol 6, p190. Readers may be wondering why a distinction is drawn here between a Muslim country and a non-Muslim country. The reason is that it is presumed that there would be no Muslim courts to annul the marriage in a non-Muslim country. Hence the introduction of a time period, prior to the marriage being dissolved.

[42] The footnotes to the Code give the reason for this as due to their difference of [the two spouses'] abodes *(ikhtilaf-e darayn)*, one living in Dar al-Islam and the other in an abode that is associated with disbelief, Dar al-Harb.

[43] This is due to the fact that the person entering Muslim territory has received asylum, whatever their religion.

[44] For understanding the meaning of li'an and zihar, it is best to look at the verses of the Quran in which both acts are mentioned. I have tried to express the meaning of the words, given in the Quranic verses, in the translation. Li'an is when a husband and wife invoke curses on each other, when one has accused the other of adultery. The verses are as follows:

One who accuses his wife and has no witnesses except himself shall swear four times by Allah that his charge is true, and the fifth time, that Allah's curse may be upon him if he is telling a lie. The wife shall receive no punishment, if she bears witness four times in the name of Allah that her husband has lied and a fifth time that Allah's wrath will be upon her if he is telling the truth. Where would you be, but of Allah's grace and His mercy upon you, and Allah is the Acceptor of Repentance, the Wise One. (Al-Nūr, 24:6-10).

Ruling on *li'an*
Article 28

If mutual imprecation *[li'an]* occurs between the wife and husband, the judge shall issue a ruling of separation.[45]

Ruling on *zihar*
Article 29

If a person likens his wife to his mother, prohibition [of sexual relations] arises between the couple until expiation is given. Once expiation is given, the prohibition shall be lifted. If the husband neither performs the prescribed expiation *[kaffarah]* nor divorces his wife and the wife demands the resumption of marital relations, the judge shall compel the husband to perform the expiation. If the husband neither performs the expiation nor divorces her, the judge shall compel him to perform the expiation by imprisonment and corporal punishment, or to divorce his wife. However, until the husband performs the expiation, sexual relations between the spouses are not permissible.[46]

Similarly, the verses on zihar – literally likening their wives to the backs of their mothers – make clear what zihar amounts to, and the expiation involved:

Those who separate themselves from their wives by pronouncing, "To me you are like my mother's back," must concede that [their wives] are not their mothers; none are their mothers except those who gave birth to them – surely they utter an evil word and a lie. Allah is Pardoning, Forgiving. Those who put away their wives by equating them with their mothers, and then wish to go back on what they have said, must set free a slave before the couple may touch one another again. This is what you are exhorted to do. Allah is fully aware of what you do, and anyone who does not have the means must fast for two consecutive months before they touch each other, and whosoever is not able to do that must feed sixty needy people. That is to affirm your faith in Allah and His messenger. These are the limits set by Allah. Those who deny the truth shall have a painful punishment" (Surah Al-Mujādilah, 58:2-4).

[45] Footnote 61 of the Code says that all three of the most important imams in Hanafi jurisprudence – Abu Hanifah himself, Abu Yusuf and Mohammad – agree that:

It entails the obligation of separation for as long as the state of mutual imprecation persists – rather than the separation occurring automatically by virtue of the mutual imprecation itself, without a ruling by the judge. Consequently, the husband retains the right to divorce, to swear off her [zihar], or to swear an oath of abstinence [īla], and the rights of inheritance between the spouses remain in effect prior to the actual separation.

[46] A footnote in the Code explains that this amounts to a prohibition on normal sexual relations between the couple until such time as the expiation is given. The marriage itself remains intact. *Translator's note:* It is in Hadith that the person who has done zihar should seek forgiveness from Allah and not return to his wife until he has undertaken the required expiation. The Code likens this to the period when a woman has her period: sexual relations are not allowed at this time, but the marriage remains in place. It quotes *Majma' l-Anhar* [see FN 35], vol I, p448.

CHAPTER TWO
DRAFTING OF PROCEDURES

Miscellaneous Provisions
Article 30

The Supreme Court of the Islamic Emirate of Afghanistan may, for the purpose of better implementing the provisions of this Code, issue implementing procedures *[tarz-e amalha].*

Enforcement and Publication
Article 31

This Code shall enter into force from the date of endorsement and shall be published in the Official Gazette. All other regulations and laws that have not been approved, adopted, or promulgated by His Excellency the Commander of the Faithful (may Allah preserve him), or that are inconsistent with the provisions of this Code, are hereby repealed.

Code on the Separation of Spouses

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Translated for AAN by John Butt
Edited by Kate Clark and Roxanna Shapour
Design and layout by Žolt Kovač