

Afghanistan

1. Discrimination in the family

Shari'a law, regional customary laws, traditional ethnic rules and state law form family law in Afghanistan (Planck, 2012). Although statutory law prevails, where there are no provisions of law nor any ruling found in Shari'a law, common customs may be observed, as long as they do not contradict provision of law or principles of justice (Civil Code, 1977). In practice, customary law is largely observed in family matters (Planck, 2012). A new Afghan Constitution was adopted in 2004, stipulating former statutory laws, including the 1977 Civil Code, are valid until new legislations have been adopted, provided they are not contrary to the new constitution (Planck, 2012).

a) Overarching legal framework for marriage

Marriage in Afghanistan is often seen as a contract between two families where offers of marriage and acceptance may be conducted by the guardian or agent (Civil Code, 1977. Art 77). However, for marriage to be legal, consent from both parties is required (Law on Elimination of Violence against Women, 2009). The Penal Code (Section 517) states that a prison sentence can be given to a person who gives a widow, or a girl over 18, contrary to her will or consent away in marriage, and if marriage is for the purpose of 'Bud dadan' (compensation for wrongdoing) that prison sentence will be 'medium', not exceeding two years (Penal Code, 1976). Similarly, if the girl is below legal age of marriage and has not given consent, the Law on Elimination of Violence against Women states the offender shall be imprisoned for no more than two years, and the marriage will be void (Law on Violence Against Women, 2009).

Although consent is required by law, traditions and customs dictate that this is rarely respected; in most cases marriage is decided upon by the girl's parents or close relatives, and in many cases, particularly in rural areas, the two to marry will not see each other before the marriage ceremony (CEDAW, 2011).

The registration of marriage and divorce in the courts is on a voluntary basis, making forced and early marriages easily conducted (CEDAW, 2011). A lack of accurate statistics and data prevails on marriage, and the lack of registration has serious implications on women's rights, such as dowry, alimony, child fosterage and remarriage, and even renting of hotel rooms (CEDAW, 2011).

Forced marriage of widows occurs, in part due to widows being considered the property of her in-laws, but also to keep inheritance in the family by forcing a marriage within the family (CEDAW, 2011). Often, if remarriage within the same family does not occur, the widow risks losing her children, as guardianship lies with the father.

b) Early marriage

Women are legally able to marry at 16 years, and men 18 years; however, women can be married off younger with the consent of her father or a court. Marriage under 15 years is not permissible by law (Civil Code, 1977. Art 71).

Although child marriage is illegal in Afghanistan, the practice is widespread, in large due to cultural practices such as exchange marriages, bride price, engagement before birth, and giving girls in baad (to solve communal dispute) (Girls not Brides, 2017). Poverty, strong patriarchal values and low access of education are drivers (Girls not Brides, 2017).

In April 2017, a National Action Plan to Eliminate Early and Child Marriage was launched by the Ministry of Women's Affairs and the Ministry of Information and Culture in partnership with UNFPA (Girls not Brides, 2017). The National Action Plan revolves around two approaches; the prevention and ending of child marriage, and the implementation of services and laws for those affected by child marriage.

c) Household responsibilities

There are no provisions regarding women's right to be recognised as head of household. Traditionally men (father, brother, or son) head the household, bearing larger responsibility towards other family members, including being the predominant decision makers. Women traditionally are responsible for the house and up-bringing of children (CEDAW, 2011).

Law dictates that women must obey their husbands (Women, Business and Law, 2017), stated implicitly due to the fact that under the Civil Law (Art 122), she would not be entitled to alimony if she leaves her residence without the permission of her husband, or does not fulfil her marital duties (Civil Code, 1977).

Parental rights are broken down into two stages: custody and guardianship. Women are awarded custody for their children until they reach the age of nine for girls and seven for boys, when the father become the legal guardian, or grandfather in the second instance, provided the father has not appointed an executor (Civil Code, 1977. Art 249). During the custodial period if the mother should die or become incapacitated than the responsibility passes to her relatives. Guardianship is so defined as legally being responsible for education, upbringing, development, health and security of the child (UNAMA, 2012).

d) Divorce

Men hold the right and authority regarding divorce in Afghanistan (Civil Law, 1977. Art 135), and can declare a divorce without giving reason. Women can only divorce their husbands if he agrees, or for specific reasons; such as long absences; if he causes suffering to her; if he cannot bear children; has a mental illness or cannot pay her living (CEDAW Shadow Report, 2012). Divorces are granted by family court, but as marriage registration is rare, divorce can be hard to achieve as they must first prove they are married, and prove the divorce is justified (CEDAW Shadow Report, 2012). *Khol'* divorce is another form, where the marriage is terminated after the women pays the monetary price her husband asks, however, the husband can accept the proposal or not. Women in Afghanistan are

largely poor and financially dependent, meaning *Khol'* divorce is rare (CEDAW, 2011). Shia women face similar restrictions under the Shia Personal Status Law, 2009.

e) Inheritance

Inheritance in Afghanistan depends on the status of religious, statutory or customary laws, which are often overlapping. The Civil Code articles 1993 to 2051 outlay set rules for inheritance shares, where girls and widows have rights of inheritance, depending on number of daughters and sons in the family, and the number of descendants of the deceased wife or husband (Civil Code, 1977). Sharia Law stipulates that daughters inherit half that of a son (Educational & Training Center for Poor Women & Girls of Afghanistan, n.d.).

Although legal provisions grant women the right to inherit, few do in practice, due to lack of awareness of rights, lack of law enforcement, and precedence of customary and tribal law. Fear of disownment from her family, risk of discrimination from male tribal councils, 'tradition' of awarding their inheritance to their brothers, and poverty causing the view that land must stay with the men to keep in the family (as daughters are married off, potentially to other tribes which would award that tribe greater influence and control) are all factors preventing women from their legal inheritance rights (Canadian Women for Women in Afghanistan, N.D.)

More

Polygamy is accepted in Islamic law and the Civil Code, where a man can marry up to four wives simultaneously (Planck, 2005). However, the conditions set for multiple marriages are not often observed in practice, such as equal treatment of the wives (Planck, 2005).

2. Restricted Physical integrity

a) Violence against women

In 2009, the End Violence Against Women Law (EVAW) was enacted, which criminalises 22 acts of violence against women. These acts include sexual assault; forced prostitution; recording the identity of the victim and publishing it in a way that damages her personality; burning, using chemicals or other dangerous substances; forcing one to burn herself or to commit suicide or using poison or other dangerous substances; causing injury or disability; beating; selling and buying women for the purpose of or on the pretext of marriage; forced marriage; prohibiting from the right of marriage or right to choose spouse; underage marriage; abusing, humiliation, intimidation; harassment/persecution; forced isolation; forced addiction; deprivation of inheritance; prohibiting access to personal property; prohibition from the right to education, work and access to health services; forced labour; marrying more than one wife without observing Article 86 of Civil Code; and denial of relationship (EVAW, 2009).

Violence also includes psychological violence, as the law is defined as acts which "cause damage to the personality, body, property, and spirit of a woman" (EVAW, 2009). The EVAW outlines punishments for each of the 22 provisions, with varying penalties from six months' imprisonment to

the death penalty. Victims' rights include prosecution of the abuser, shelter in a safe shelter, legal and medical aid (EVAW, 2009).

b) Domestic violence

Domestic violence is not specifically criminalised, however, the EVAW provides stronger punishments for those who commit violence against women, and forbids physical, sexual, emotional, and psychological abuse, including the right to have a violence free home (Stop Violence Against Women, 2011). As of 2011 there were 14 independent shelters for women in Afghanistan, providing shelter, education and legal assistance (Stop Violence Against Women, 2011). Low levels of awareness and lack of implementation across the country prevail.

In addition, the Civil Code provides limited rights as a wife can petition the court for a separation order if she has received harm from intercourse with the husband, which 'makes the continuation of intercourse between them impossible' (Stop Violence Against Women, 2011).

Violence against women is common occurrence and a daily occurrence for many Afghan women (OHCHR, 2009). Years of war and insecurity have spread the culture of violence, and the mental and physical violence experienced by many have contributed to violence in the family (CEDAW, 2011). Women in southern and eastern provinces are more subjected to violence, and in border areas the proliferation of armed disputes and Taliban presence mean a lack of health, education and legal services meaning victims of domestic violence lack access to support and legal services (CEDAW, 2011). Forced and underage marriage, and extreme poverty correlate to higher rates of domestic violence (OHCHR, 2009), and vast illiteracy mean that there is a lack of awareness on the rights of men and women (CEDAW, 2011).

Low levels of reporting, lack of victim protection and sympathy toward perpetrators mean that police response to domestic violence is limited, even with some judicial mechanisms unaware that rape is a criminal offense (Department of State, 2016). Family bribery, tribal pressure or other interference contribute to poor legal redress (Department of State, 2016). Honour killings are not appropriately prosecuted, particularly as there is a societal acceptance of the practice, meaning most cases are not reported and therefore do not reach prosecutors (Department of State, 2016). Even when they are reported honour killings receive a lower sentence often, for example, the Penal Code, Article 398 provides a lesser sentence for a man who injures or kills a spouse or close relatives when catching them committing adultery or in bed with another (Penal Code, 1976).

c) Rape

The EVAW criminalised rape, under the term sexual assault, and is punishable with 7 – 15 years' imprisonment under Article 426 of the Penal Code (1976), and, should the rape result in death, the death sentence is applied (EVAW, 2009). If the assaulted is underage, then the maximum continued imprisonment term is applied (EVAW, 2009). Further penalties are incurred if the perpetrator is a close relative, a teacher, servant or doctor or in a position of power (EVAW, 2009), or for aggravated forms of rape, such as the rape of a virgin, if the perpetrator has genital disease, if the rape results in pregnancy, if the woman assaulted is married or in the case of gang rape (Penal Code, 1976).

The perpetrator can be required to pay an amount of money to the victim, equivalent to dowry (EVAW, 2009). If there is a ‘violation of chastity of a woman... that does not result in adultery (such as sexual touching)’, the punishment is up to seven years imprisonment (EVAW, 2009).

No specific law addressing marital rape could be located, and it is not explicitly mentioned in the Penal Code of 1976 (OHCHR, 2009) nor the EVAW, 2009. The Shi’a Personal Status law obligates women to obey her husband in sexual matters, including in the frequency of sexual intercourse (UHCHR, 2009).

The Penal Code defines sex outside of marriage as zina, a criminal act with imprisonment of 5 – 15 years (Penal Code, 1976). Women can be prevented from reporting rape, for fear that they will be accused of Zina and punished themselves, including imprisonment (UHCHR, 2009). Informal addresses are sought, including arranged marriage between the aggressor and the victim to avoid ‘shame’, as well as monitory compensation, or ‘baad’, being paid from the perpetrators family to the victims. In some extreme cases, both parties in zina are killed to remove the shame from both families, or the aggressor’s family give girls to the victim’s family to ‘compensate’.

The National Action Plan 1325 (2015) addresses the need for protection from all types of violence, the increased awareness of legal redress and the need to conduct an assessment of the existing laws in Afghanistan. It specifically aims at the establishment of health and psychological support for survivors of sexual violence, safe shelters in all provisional capitals of Afghanistan, a protection system to protect the survivor and their family, and a mechanism in court to oversee violence against women cases in court. No specific budget has been assigned by the NAP 1325, instead requiring the steering committee to encourage national and international donors to commit to fund. The EVAW additionally requires that victims of sexual violence have access to free emergency health services, and access to a legal aid provider (EVAW, 2009).

d) Sexual harassment

Sexual harassment is criminalised under the Elimination of Violence Against Women Law (2009), where Article 3 defines “using words or committing acts by any means, which causes damage to the personality, body and psyche of a woman” as harassment – although what ‘words’ and ‘acts’ constitute are not defined (Qaane, 2017). Harassment is criminalised, with no less than three months imprisonment, or no less than six months if the offender has abused their authority or position (EVAW, 2009).

In November 2016, the Anti-Harassment of Women and Children Law was passed by parliament, but has yet to be approved by the president. Article 3 of the law defines harassment as “physical contact, illegitimate request, verbal and non-verbal harassment and any other acts that caused psychological, physical damage and humiliated a woman or a child” (Qaane, 2017). The law further defines harassment as “Hostile action or physical contact with women; publication of posters, pictures, audio and video clips that are against ethics; verbal or non-verbal abuse or illegitimate demands; intimidating or abusing a woman by threatening a demotion, transfer, termination, withholding of promotion, or withholding of a positive evaluation” (Qaane, 2017). However, the law also defines physical harassment as “touching the body of a woman who is not mahram” (women

which men cannot marry under Islamic Law, i.e. sister, daughter, or his own wife, etc.), meaning that abuse from close family members or husbands is excluded from the definition of physical abuse, providing a loophole for domestic violence (Qaane, 2017). Sexual harassment is wide spread and, although praising this legislation as a step in the right direction, NGOs question the impact it will have.

e) Female genital mutilation

There is no evidence that female genital mutilation is widely practiced in Afghanistan.

f) Abortion

Abortion is a criminal offense, except if it is to save the life of the mother, under the Criminal Code of 1976 and the Penal Code of 1976 determines fine or imprisonment for those who perform it. This punishment is increased for a medical practitioner, and a woman can be imprisoned or fined should she consent to, or induce, her own abortion (UN, 2017).

3. Restricted Access to productive and financial resources

a) Secure access to land and assets

Land and property laws fall under the 2004 Constitution, the Civil Code and land laws (Akbar, Pirzad, 2011), with the Constitution granting equal property rights to all citizens. It allows every Afghan citizen to own or acquire and use property within the law (Constitution, 2004). The Civil Code takes precedence over religious and customary laws, and discusses specific rights regarding property rights, sale, ownership, inheritance and disputes, and recognises a woman's right to own and sell property without interference from male family members (Akbar, Pirzad, 2011). However, the Civil Code is only relevant for Sunni Muslims, as it is based upon the Hanafi sect of Islam. For Shia Muslims, the Shia Personal Status Law is applied.

Under the Civil Code, women can inherit land and property, however, daughters are only entitled to half that of a son, and widows receive one-eighth of the property if they have children; one-fourth if they do not, with divorced women receiving nothing (WCLRF, 2011).

Marriage is another opportunity for women to gain property ownership, when the women is provided 'mehr', or dowry, in money or property (Akbar, Pirzad, 2011). Mehr is an essential right of women in Islam, and is mentioned in the Quran, and is to enable the women with property without restrictions, and as such is written into the Civil Code (articles 110 and 114). Mehr is hard to enforce in reality, largely due to a lack of awareness of their rights to Mehr, or do not claim as belief that men are the main income source. Upon divorce or death of the husband a lack of marriage registry, and social stigma of taking family issues to court (Harakat) mean that women find it hard to claim her rights; without official marriage papers it can prove impossible to prove the terms of marriage, and her right to property.

Legally, under the Civil Code, women are therefore allowed to administer marital property if they are the owner. Similarly, although no formal barriers are written into Islamic jurisprudence regarding property rights, statutory and customary practices often deprive women of their rights (NRC, 2014).

Women often waive their legal right to avoid stigmatisation, ostracism, violence or similar, are unaware of their legal rights, and even when they pursue their legal rights, the justice system often suffers from discriminatory practices, prohibition of women's active participation and a lack of trained professionals (NRC, 2014).

No public measures, laws or action plans were located to protect women's land or property rights, to increase women's literacy rates to better understand their rights, nor to ensure participation in cooperatives, or committees.

b) Secure access to formal financial resources

By law, women and men enjoy the same rights to open a bank account and obtain credit (Commercial Law, Article 4), and legally women do not need their husband or guardian's permission or signature. As many women do not own property, however, they are unable to access credit, as they do not have collateral to borrow against. Patriarchal customs that restrict women from accessing ID cards, such as needing permission from their husbands to leave their house, also restrict women, and many require permission from their husbands or family for loans or to open bank accounts (WCLRF, 2011). Customary beliefs in the notion of family businesses result in the idea that men are the primary users of loans, with women simply the route in which it is acquired, resulting in women handing their money to husbands or sons (WCLRF, 2011).

No government efforts to promote gender sensitive measures to expand women's access to formal financial institutions could be located.

c) Workplace rights

Afghanistan has ratified both the ILO convention number 100 on Equal Remuneration Convention (1951), and number 111 on Discrimination (Employment and Occupation) (1958). All forms of discrimination are prohibited under the Labour Law (2008, Article 9), including recruitment, entitlements, field, speciality or field. The Labour Law does not require equal remuneration for equal work, and no bodies, laws or regulations could be located which are responsible for the monitoring and enforcement of gender equality in employment in Afghanistan.

Women (and minor persons) are not permitted to be employed in work which is 'physically arduous', harmful to health or carried out underground (Labour Law, 2008, Article 120). Similarly, women and minor persons are not permitted to work night hours (Labour Law, 2008, Article 121).

Women are entitled to 90 days of paid maternity leave, increasing to an additional 15 days with abnormal delivery or the delivery of more than one baby, on presentation of a certificate issued by the hospital (Labour Law, 2008, Article 54). The law does not protect the women's employment security, nor does it ban asking about a women's pregnancy or child bearing intentions during the interview process. Paternity or parental leave is not recognised by Afghan law.

Legally, women do not require their husband or guardian's permission to choose a profession or work, or to register a business. However women do face significant obstacles in accessing the labour market, due to illiteracy, negative attitudes towards working women, and cultural traditions including women requiring permission from their husbands to leave the house (CEDAW, 2011). It is

common for women to be prevented from the workplace, with reports that women have received death threats or even been killed for working, however, no convictions have been made for such violations (CEDAW Shadow Report, 2012).

4. Restricted Civil liberties

a) Citizenship rights

The Constitution of Afghanistan bans any kind of discrimination and distinction between the citizens of Afghanistan. Under the 2000 Law on Citizenship of the Islamic Emirate of Afghanistan, women (married or unmarried), share the same rights as men to acquire, retain, change, or confer to their spouse their nationality. Both men and women can pass their nationality to their children: if, at the time of birth, if one of the parents holds citizenship to the Islamic Emirate of Afghanistan (IEA) and the other parents holds citizenship of another country, citizenship is passed to the baby if either the baby is born in the IEA, the baby is born outside the IEA but one parent permanently resides in the IEA, or if both the baby and the parents reside outside the territory than the parents must mutually select the citizenship of the IEA for the baby (Law on Citizenship, 2000).

Births are registered according to the Afghanistan Civil Registration Law Article 31, where parents or the child's legal guardian are obliged to register the child within six months after birth (MOI, 2017). The required information for registration is the name, date of birth, birthplace and gender (MOI, 2017). No provisions were located to provide increased access to the registration of births in rural areas, nor to allow delayed or late registration for unregistered adults or children.

It is mandatory for men to apply for an Identity Card (Tazkera) and optional for women. When submitting the application, two recent photographs must also be submitted of one close relative on the father's side of the family, or for married women, with the husbands Tazkera or one of his male relatives (UNHCR, 2005). Women need their legal guardian (father) or husband's permission to get a passport (Law on Passports, 1939).

b) Voting

Afghani men and women over the age of 18 can vote in elections, so long as they have a voting card and are not prohibited by law (Election Law, 2016). Article 5 of the Election Law prohibits direct or indirect imposition of any kind of restrictions based on ethnicity, sex, language, employment etc. However, poor security and issues such as family involvement, lack of knowledge, illiteracy, economic problems paying for transportation to voting place, and a lack of female police in local areas prevent women from attaining their right to vote (CEDAW Report, 2011).

To attempt to encourage female voters the Independent Election Commission built separate voting cabinets for men and women and provided female facilitators. Awareness programmes emphasizing the importance of women's participation were broadcast via the media (CEDAW Report, 2011).

c) Political voice

The 2004 Constitution provides seats in both houses of parliament for women and minorities, requiring at least 68 female delegates in the 'Wolesi Jirga' the lower house of the assembly (Article

68), and in the upper house 'Meshrano Jirga' one third of the seats are to be appointed by the President, 50% of which must be women (Constitution, 2004). Overall, over 35% of the parliament and 30% of the provincial council are designated to women, however, significant barriers stop women from participating in political life, including needing permission from male relative to leave the house, insecurity and patriarchal traditions that women should not be participating in the workforce (CEDAW Shadow Report, 2012). Women in political positions receive threats, such as Sima Joyenda, one of Afghanistan's only two female governors, who was removed from her post after she received numerous death threats (Human Rights Watch, 2016).

d) Access to justice

Sharia law states that women's testimonies are worth half that of a man, meaning that women's testimony does not carry equal weight in court (Women, Business and Law, 2017). No legislations could be located which protect women from violence in political or public life, or which address the harassment of human rights defenders.

No laws could be located regarding women's capacity to be sued or sue in the same manner as a man, however as the Constitution recognises women as fully legal entities it implies that women should, legally, have the right to sue or be sued.

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