

MARRIAGE RIGHTS OF AFGHAN WOMEN IN TRADITIONAL PRACTICES AND LEGISLATION PROTECTION

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Abstrak. *Hak Perkawinan Perempuan Afghan dalam Praktek Tradisi dan Perlindungan Hukum.* Tulisan ini bertujuan untuk mengkaji peranan hukum atas perlindungan yang sama terhadap perempuan di Afghanistan dan memberikan rekomendasi agar hak perkawinan mereka dilindungi oleh hukum sipil atau perdata. Meskipun hukum perdata atau sipil Afghanistan menyatakan adanya jaminan dan perlindungan terhadap hak-hak perkawinan bagi perempuan, namun hakikatnya mereka masih berisiko menerima perlakuan, adat, atau tradisi yang membahayakan jiwa mereka. Tulisan ini penting dalam mencari solusi masalah perempuan di Afghanistan sehingga mereka bisa mendapatkan hak-hak sebagaimana mestinya yang dilindungi oleh hukum.

Kata kunci: hak, perkawinan, adat, undang-undang sipil, *jirga*

Abstract. *Marriage Rights of Afghan Women in Traditional Practices and Legal Protection.* This paper aims to review the role of law for equal protection of women in Afghanistan and offers recommendations so that their marriage rights are protected by civil law. Although the civil law of Afghanistan mentions guarantees and protections of marriage rights of women, however, they are still at risk of being subjected to harmful treatment, customs, or traditions which are practiced in Afghanistan. Therefore, this paper is important in finding a solution to the problems of women in Afghanistan until they obtain duly protected rights by law.

Keywords: rights, marriage, customs, civil law, *jirga*

Introduction

Unfortunately, in Afghanistan today we can find harmful traditional practices of marriage which are inconsistent in Islamic law as well as in Afghanistan and international law that violates rights of women, especially in areas under the control of militants or in areas where the government is weak. The women are totally deprived of their rights. This article will discuss all forms of forced marriage. Forced marriage can encompass early (child) or adults who are pushed to marry against their willing because of the wish of their families or religious leaders, *baad* marriage, (retribution of a woman to settle a dispute) *badal* marriage (exchange marriage), and also coercion of widows to marry a relative of a deceased husband. Researches have found that 70 to 80 percent of Afghan women faced forced marriage.

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2007-2017 reported, early and force marriages are among the other factors contributing to higher dropout rate among girls. Majority of the provision under chapter 2 of the Constitution outlines the fundamental rights and duties of citizens, may also be interpreted in a way that would benefit women and girls oppressed by customary law. In addition to the aforementioned equality guarantees, article 23 (rights of life), article 24 (rights to liberty and human dignity), and article 29 (immunity from torture) have the potential to shield women from injurious customary practices (Constitution of Afghanistan 2004). Moreover, article 5 of Law on Elimination of Violence against Women (EVAW 2009) lists 22 forms of violation against women, they include violence against women: selling and buying women for the purpose of/or under pretext of marriage, prohibiting the choice of husband, marriage before the legal age, *baad* marriage (retribution of a woman to settle a dispute), forced marriage and marrying more than one wife without observing article 86 of the Civil Code. Those who instigate or arrange force marriages

are not punished and the practice continues to be widely accepted. Forced marriage contravenes CEDAW and the International Covenant on Civil and Political Rights as well as the new Afghan Constitution.¹

This customary marriages have been banned by the Constitution of Afghanistan, “traditions contrary to the principle of the sacred religion of Islam” (Constitution of Afghanistan 2004). It is critical to study the source of Islamic law on the status of women, highlight the discriminatory customs, and practices that have no basis in Islam and harmonize *syari’ah* and the provision of the convention. Access to justice is limited for Afghan women. Traditionally women are supposed to tolerate all kinds of suffering caused by discriminative attitudes and an inferior position. In a country, where according to Afghanistan Human Development Report 2007, more than 80% of dispute cases are referred to customary resolution mechanism which are male-oriented, women have less access to a fair judgment.

The Head of Afghanistan Independent Human Rights Commission (AIHRC), Sima Samar, said that the lack of government support is the only reason (TOLO news).²

Growing honor killings and violence against women in Afghanistan has created tensions among the rights organizations in Afghanistan. Women escaping from their homes is on account of growing honor killings and violence in Afghanistan. UNAMA HR reports and documents incidents of “honour” killings usually to women done by one of their relatives who believed that the victim had brought shame to the family. The perceived dishonor is often the women’s fight from a forced marriage or engagement to a questionable conduct with a man. Fawzia Koofi, a member of Afghan Parliamentarian and Women Activist, mentioned in her book titled *The Favored Daughter*:

In our society, especially in Badakhshan province, when the girls reach the age of 12, relatives and neighbors may start gossip about why she is not married yet. “Has someone asked her marriage?”, “Is any one ready to marry her?”, “She may not be a good girl, that is why no one wants to marry her”. If the family does not care about this gossip and lets the girl reach 16, the legal age for marriage, and allows her to marry someone of her choice at least her parents had agreed upon then she will be at least a part of a happy life. If the family is under financial pressure or listens to other’s gossip and marries their daughter before she’s 15, then this little girl who is

considered as poor girl since birth will become a mother herself. If she gives birth to a girl child then her little girl will hear the same words, “poor girl” since birth, and so it goes on to her daughter’s generation.”³

Many customary practices are observed in Afghanistan, which are wholly anti-*syari’ah*, and legislative.

Early Marriage (Child Marriage)

The definition of what is to be considered as early marriage varies according to each culture or society. In Afghanistan, early (child) marriages are to be defined as marriages which are celebrated when one of the spouses has not yet reached the minimum legal age set by the Afghanistan Civil Code. The Civil Code set the minimum legal age for marriage which is eighteen for male and sixteen for female. Although, the marriage of girls before the age of 16 or under limited circumstances at 15 is prohibited.

According to USAID, yet throughout Afghanistan child marriage have become even more numerous over the past 30 years. According to the Elimination of Violence against Woman 2009 law, “If a girl who has not reached he legal age of marriage, and is married without considering article 71 of Civil Code, the offender considering the circumstances shall be sentenced to mind term imprisonment not less than 2 years and the marriage contract shall be cancelled based on the request of the woman in according to the law”. The marriage of very young girls are commons across the region and among ethnic groups in Afghanistan. No official figure is available but the research shows that half of all Afghan girls are married before the age of 15 early marriage as one of the most serious harmful traditional practice in Afghanistan. According to *Hanafi* law, the age of marriage is generally achieved when reaching the age of puberty. Afghan human rights commission expressed its concern on underage girls’ marriage in the country.

However, the age of majority and minority is usually determined by legal presumption, but harmful traditional practice in northern part of Afghanistan, especially Balkh province, defines puberty by the physical change of child:

The hitting of girl with hat, this harmful traditional malpractice, a family member will hit the girl with hat. If she resists and does not fall, it means that she has reached the puberty age and is considered ready to get married. If she falls, this indicates that she is still a minor and

¹ Islamic Republic of Afghanistan Ministry of Justice Official Gazette, *Law on the Elimination of Violence against Woman*(EVAW) 2009, Issue 989.

²<http://tolonews.com/en/afghanistan/8726-samar-karzais-opposition-only-reason-major-rights-report-isnt-published>, accessed on 15th December 2012.

³ Fawzai Koofi, *The Favored Daughter*, (New York: Palgrave Macmillan, 2012), p. 45.

needs time to grow up.⁴

All the *syari'ah* schools have agreed that when the father or paternal grandfather has acted fraudulently or negligently as, for instance in case where the minor is married to a lunatic or contract is to the manifest disadvantage of the minor, the contract is voidable on the side of the minor upon reaching the puberty age⁵. That girl, who has been given in marriage in her childhood by her guardian, has the option of accepting or rejecting the marriage upon reaching the adulthood⁶.

The AIHRC's annual report indicates that running away, suicides, self-immolations, murder are amongst the negative consequences of early (child) marriage, and also early marriage has negative impact on their health and education. They won't be able to continue their education and often times they could get health problems related to giving birth at a very young age, which is one of the possible results is early death. Also, because of early pregnancy where the body of a girl is not yet fully ready to conceive and give birth, the result is they do not know how to take care of their baby properly. Aside from that there are cases that they are being abused by their husband and family. With the said issue, this will be a reason for their husband to marry another woman. In most Muslim countries, girls are expected to finish their education and reach at least the age of eighteen before marrying. In my opinion, the girls who are married at a younger age were more likely to suffer from domestic violence, health risks, and physical problems later in life thus has an impact in their education, girls were not able to complete their studies and could face unemployment problems later.

Badal Marriage

Badal (exchange) marriage is not acceptable according to Islamic law, because the wife has to receive dowry. The *Hadis*, narrated Ibn 'Umar, Allah's Messenger Saw. has forbidden *al-syighâr*, which means that one man says to another: "Marry me your daughter and I will marry you my daughter" or "Marry me your sister and I will marry you my sister".⁷ Such

⁴ Max Planck Institution Reports, *Family Structure and Family Law in Afghanistan*, (2005), p. 35.

⁵ Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and Judiciary*, (Leiden : E.J Brill Publishing, 1985), p. 67.

⁶ Asghar Ali Engineer, *The Rights of Women in Islam*, (UK: New Dawn Press Group, 2004), p. 75.

⁷ Al-Imâm Zayn al-Dîn Ahmad ibn 'Abd al-Lathîf al-Zubaydî, *Summarized Shabîh al-Bukhârî Arabic-English*, Translated by Muhammad Muhsin Khan, (Saudi Arabia: Darussalam, 1996), p. 80-85.

a marriage is forbidden in Afghanistan Civil Code (article 69) and is also forbidden by international law. Traditional customs in Afghanistan is built around ethnic allegiance such as *pashtunwali*, tradition, and rules are believed to have religious origins, and these vary in interpretation and practice from one region to another. Reported consequence of these marriages is that in-laws punish brides reciprocally in exchange for any reported mistreatment or punishment of their own daughter. For example, if one woman who was an exchange in marriage is beaten, the in-laws of other exchange woman may also beat her in retaliation. If one couple divorce, the other may as well. This practice is common among poor families who cannot afford the expenses associated with marriage arrangement.

The above practice, as well is denying a woman's right to freely enter into marriage vow based on her consent, and is also can a reason for promoting violence against women. For example, neighbor of mine, in Balkh province, exchanged their daughter and son even though, they were still minors, after a while their son died, in replacement they arranged their dead son's fiancé for their another son, who is just almost 12 year old and the girl was 14 years old last year (2012) and they got married. When I heard about them I was surprised, because the boy still cannot look after himself, how can he look after his wife and after a year perhaps they could have child how they look after their child? This kind of malpractice still continues across the country. As MPI reported, an 80 year old father forced her eight year old daughter to marry a 50 years old man. In exchange to that, the 80 year old man will marry the 14 years old daughter of a 50 year old man. Neither girl has reached her age of puberty. The head of Department of Women Affaires (DWA) Balkh was sent representative to talk to these men, but the men replied, "That is not your business". The following verse of the Qur'an emphasizes that parents should act in the best interests of their family which includes every individual. This requirement is not optional but compulsory. Allah Swt. said in holy Qur'an which means "O you who believe! Save yourselves and your families from a fire whose fuel is men and stone".(Q.s. al-Tahrîm [66]: 5).

Scholars interpret this verse as that if a girl is married based on any sort of personal benefits and against her will, it contradicts the tenets of *syari'ah* and may lead to an environment that can damage her spiritual life.

Baad Marriage

Baad is an exchange of women in a marriage arrangement, either to mend hostility or to pay a debt

or a bond between two families⁸. The practical way of carrying out this custom is that a girl or a woman is given for marriage to victim family by the aggressor family in order to settle the dispute or strife between two ethnic groups, clans, tribes, or even two families. For example, if a father or a brother commits murder or hurt someone, then a local tribal council is held to decide for a peaceful settlement of the dispute between the two families, a girl from the aggressor or murderer's family and one of the members of the victim's family will be married. This custom is called *baaddadan*. In the pre-Islamic period, when a person was killed by a person of the tribe, the victim's tribal for the sake of revenge must kill one of person to the murder tribe until they get their revenge. Similarly, the murders took place between two tribes. Islam, condemns such practice, Qur'an, clearly states, which means "O you believe! The law of equality is it prescribed to you in cases of murder: the free for the free the slave for the slave". (Q.s. al-Baqarah [2]: 178)

When a person killed another person the murder must be punished not the other member of family of murderer but this practice in Afghanistan is like the pre-Islamic period (time of ignorance). Still continuing, instead of killing the member of his family, his sister or daughter becomes the sacrifice.

The practice of *baaddadan* is part of a harmful customary process for solving bloody disputes such as murder committed by one member of a community against another member of the same or another community. In this case, *baad* is a part of collective punishment that is imposed upon an offender's family, in which they are required to give away one of their young women or girls in "marriage" to a man from the victim's family without the woman or girl's consent. Additionally, the member of the offender's family carry the burden of financial and other kinds of payment to the victim's family. Even though, it is viewed as a collective punishment imposed on the offender's family, that young woman or girl that must live within a group of people that lost one of its members at the hand of her brother or father. This practice often happened among *pushton* ethnics it is called (*pashtunwali*). All tribal *pashtuns* also *pashtunwali*, a social code which gave the tribal *jirga*. *Jirga* is a non-governmental institution, with various incarnation, such as village *jirga*, regional *jirga*, ethnic *jirga*. The consensus among historians, political scientist, and anthropologists is of the *jirga*

as a communal institution that deals with dispute settlement of conflict resolution and is limited to tribal communities.

On council, the right to make judgments on cases from a traditional pantheon of laws and punishments, especially when it comes to disputes of the ownership of land and giving of women for *baad* in murder cases. The line between *pashtunwali* and *syari'ah* law has always been blurred for the *pashtuns*, punishments were in fact drawn largely from *pashtunwali* rather than the *syari'ah*⁹. For instance, a person killed a nomad in Paktia province, the members of *jirga* went to the house of the victim and inquired whether the family members of the victim wanted to continue the enmity or if they preferred reconciliation with the family members of murder. They accepted the reconciliation and the members of the *jirga* went to the house of the murderer to find solution. The tradition has always been that a girl or two should be in exchange or money or a piece of land should be given to the family of victim in order to remove enmity.

Therefore, the sister of the murderer automatically appeared before the *jirga* without any hesitation and accepted a marriage into the family of the victim in order to finish the hostility between the families. Although, the Constitution of Afghanistan classifies article 26 mentioned that "Crime is a personal action. The prosecution, arrest, and detention of accused and the execution of penalty shall not affect another person".

This could lead to the outlawing of all forms of *baad*, which involves giving the sentence to women for the crimes committed by their male relatives. The interviewed Afghan men and women have expressed strong opposition to the practice. A girl married through *baad* is never respected by her new family as they associate her with her male relative who committed the crime and will accuse her equally of being a criminal. The girl is treated like a slave woman as a means of revenge. Although, it is illegal under Afghanistan law, according to the Criminal Law of Afghanistan: (1) A person who gives in marriage a girl who is eighteen years or older without her consent, shall be sentenced into short imprison. (2) If commitment of the crime specified under the above paragraph is for the purpose of *baaddadan*' (as a compensation for the wrongdoing), the offender shall be sentenced to the (medium imprisonment) not exceeding two years.

⁸ Benedicte Grima, *The Performance of Emotion among Paxtun Women, "The Misfortunes Which Have Befallen Me"*, (London: Oxford University Press, 2004), p. 34-36.

⁹ Ahmed Rashid, *Taliban The Story of the Afghan Warlords*, (London: Pan Macmillan Ltd, 2001), p. 54.

The second usage of *baaddadan* is a tribal method of pacifying a debts dispute, to pay his debt by the means of giving a girl in marriage to his creditor. Debt is a commitment from one party to pay in cash or in kind to the party with whom he borrowed that amount in cash or in kind. When the indebted person is not able to pay his debt within the agreed time limit, he is obliged to pay the outstanding amount upon condition that takes into account his economic capability. In many cases, parents pay their debts through their daughter by allowing their debtor to marry her. The most important thing is to give as *baad* their daughter for debt is due to poverty. ERAW law article 24 provides that “A person who sells a woman for purpose, or under the pretext of marriage, or purchases a woman or act as an intermediary in the process, the perpetrator shall, depending on the circumstance, be sentenced to the (long-terms) imprisonment not exceeding ten years”.

The Islamic teaching, Afghanistan and international law considers *baaddadan* as an un-Islamic practice that violates women’s rights, in *syar’ah*, the consent of woman entering into marriage is required. A legal representative must ask the woman three times and hear her consent three times before *nikāh* (permission to lawfully become husband and wife), but this informal justice system still continues in Afghanistan.

Compulsory Marriage of Widows

In pre-Islamic Arabia, widows suffered a great deal of injustice at the hands of their own families, their in-laws and society in general. When a husband died, his widow would be confined to a drab part of the home and made to wear her shabbiest cloths and refrain from using any perfume or incense for whole year. At the end of that period, she would be required to perform a series of degrading and meaningless rituals which included casting animal face into the air and riding an ass with all those worthless customs and alleviated the suffering, had to endure the humiliation and persecution of their families and were deprived of the opportunity to resume a happy and decent family life¹⁰. Harmful traditional practices not only curtail Afghan women’s rights before and during the marriage but also after their husband dies. Women’s low status in Afghanistan is reflected in the Qur’anic condemnation of various practices, especially the prohibition of levirate (forcing a widow to marry her husband’s brother, essentially rendering her a part of estate).

Forces marriage of widows stems in part from widows being considered the property of their in-laws, but is also often due to the desire to deny a widow her inheritance by marrying her relative and keeping any inheritance within the family. Even though the Qur’an clearly states the inheritance rights of women from her deceased husband, which means: “And for them a fourth of what you leave, if you have no children, but if you have children, then for them of what you leave an eighth after any bequest they may bequeath, or debt”. (Q.s. al-Nisá’ [4]: 12).

According to ERAW Law, article 34 mentioned that:

“If a person takes the inherited goods of a woman, or prevents her from acquiring it, he shall, depending on the circumstance, be sentenced to short imprisonment of not more than three months, and goods shall be vested to her”.

According to Kamali, the compulsory marriage of a widow to a member of her deceased husband’s family is a problem that still exist despite the legislative measure adopted in Afghanistan at the time of his research¹¹. The *pashtuns*, in particular seems to observe this practices, which is prohibited in the Qur’an (Q.s. al-Nisá’ [4]: 19) the custom is economically convenient in the sense that marriage of the widow to one’s brother does not normally require the payment of new *walwar* and no dowry which has to be paid either. This study also found that some of the harmful practices in Afghanistan is denying the widow’s inheritance. The Qur’an gives the inheritance right for widow. According to *syar’ah* law, the father of a woman has the right to approve her choice. This is to safeguard her welfare and interest. It does not replace the right of a woman herself to consent. No such right for the father exists when it comes to the marriage of a widow woman. According to the Criminal Law (Penal Code) of Afghanistan (1976), article 517: “A person who gives in marriage a widow, who is eighteen years or older, contrary to her will or consent shall be sentenced in view of the circumstance to short imprisonment”.

Furthermore, in pre-Islam there was no waiting period after her husband death. Some scholars argue that women are given great freedom to pursue immediate remarriage and great control over their sexuality and reproductive function.

However, it should also be noted that the lack of maintenance after she became a widow or a woman who did not immediately remarry might find herself in serve financial straits, especially if she happens to be

¹⁰ Sayyid Qutb, *In the Shade of the Qur’an*, translated by Adil Salahi & Ashur Shamis, (United Kingdom: The Islamic Foundation, 1999), p. 23.

¹¹ Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and Judiciary*, p. 78.

pregnant¹². Once the waiting period is over, (no one from her family nor from the family of her deceased husband) she is totally free to decide for herself within the established traditions and teaching of Islam. She is free to wear all the adornments permitted for Muslim woman, to receive marriage proposal, and to give her consent to marry any man within the traditions or customs, she only has God to please and fear for “God is aware of all that you do”¹³. Older widows usually do not remarry. It is customary in Afghanistan, especially in the countryside and among the uneducated, for a male family member, married or single, to marry his brother’s wife upon the latter’s death. This kind of emergency marriage is more common among the *pushtuns* ethnic in Afghanistan than other ethnic groups¹⁴. It is also a problem that the widows are facing in Afghanistan. They don’t have the rights of custody of their children. Consequently, woman may remain in unhappy marriage so as not to lose their children. In Afghanistan, many widow women feel obliged to marry their brother in law in order not to lose custody of their children. Years of war and high male mortality have brought the lack of custody rights for mothers to forefront of Afghan women’s concern. Interestingly, widows of the Iran-Iraq war (1980-1988) managed to successfully organize and pressure the Islamic Republic of Iran into changing the law to allow them to retain custody of their children even after they remarry.¹⁵

Closing Remarks

In conclusion, the entire data reveals that all the cases occurred in the latest year and shows the lower of rights of women is the marriage rights of Afghan women. This in general is more or less similar to during uncivilized period (*jāhiliyyah*) where women are the victims of men. This bad behavior towards women continuously is practiced in modern era. It is very sad to figure out young daughter becomes victims of father and young sister becomes victims of brother. Widows are not allowed to remarry in her choice and consent. Even thought, their rights are guaranteed under Islamic law and Afghanistan legislation. The people of Afghanistan claim that are Muslim, so they have to assert that the harmful traditional practices of marriage cannot be more important than Islamic law and legislation. The

decisions of the local *jirga* are highly influential to the society. Women on their assumption do property then they cannot do anything as they wish. Consequently, women in Afghanistan are deeply concerned about these harmful customs and traditions which also undermine the Islamic law and legislation.

The government, national and international organization should work together for awareness of the people base on Islamic law, civil law, and international law on matrimonial rights of women. The remedy this, justice and equality in Afghanistan can be put in to practice in six ways: (1) Amendments of the laws. (2) Interpretation of the laws. (3) Cultural activities such as awareness-raising. (4) Equal implementation of the law. (5) equal protection by the law. (6). Then government should provide the education facilities especially for women to be educated and aware of their matrimonial rights. □

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¹² John L. Esposito and Natana J. Delong-Bas, *Women in Muslim Family Law*, (New York: Syracuse University Press, 2001), p. 67.

¹³ Sayyid Qutb, *In the Shade of the Qur’an*, p. 90.

¹⁴ Ehsan M Entezar, *Afghanistan 101: Understanding Afghan Culture*, (USA: Library of Congress, 2008), p. 97.

¹⁵ Koninklijke Brill NV, *Encyclopedia of women and Islamic culture family, Law and Politics*, (T.t.t: Martinus Nijhoff Publisher, 2005), p. 132.