

CHAPTER 2

MARRIAGE STATUS OF WOMEN: CONFLICT BETWEEN LAWS AND TRADITIONAL PRACTICES IN AFGHANISTAN

2.1 Introduction

Reforms to further improve the status of the matrimonial rights involving women were undertaken during the reign of King Abdur Rahman Khan, who ascended the throne in 1880. He made a new law that requires registration of marriage, modified laws associated with unconsented girls' marriage before attaining the age of puberty, to either turn down or accept their marriages. Likewise, he created laws that allow a wife to sue her husband for divorce proceedings or maintenance for cases involving harshness or abuse.⁴⁵ He also attempted to challenge the custom of widows being remarried to the deceased husband's friends or closest kin.⁴⁶ Marriage is designed for the propagation of the human race as opposed to animals that mates indiscriminately. When Allah (s.w.t) wishes to honour mankind, He prescribes marriage to human as a bond between two people.

Islam considers marriage as a form of worship; thus a guideline in taking a life partner has to be laid down. Allah (s.w.t) created man and woman as companions. They were created to complement each other instead of competing with one another. Marriage is part of life. A happy marriage is between people that are pleased with each other.

⁴⁵ Kamala, Visweswaran. 2011. *Perspectives on Modern South Asia: A Reader in culture, History, and representation*. Blackwell: Publishing. Ltd. p.156.

⁴⁶ Ibid, p.157.

Hashim Kamali indicated that in Afghanistan, a man can acquire a wife by one of the following methods:

- a) Inheriting a widow;
- b) Having a bride in a return marriage; or
- c) Having a bride as a compensation for crime committed by relatives of the woman, or paying a bride price.⁴⁷

This study explains that the above methods are incompatible with *Shari'ah* the Afghan law, and the Universal Declaration of Human Rights. Importantly, Islam provides women with the right to choose men that suit them. However, patriarchal societies including Afghanistan do not allow girls to select their own husbands in spite of the fact that the Afghan Constitution elaborates on it. According to the Constitution:

“Freedom is the natural right of human beings. This right has no limitations except the liberty of others and public interest as defined by the law. The freedom and dignity of human beings are inviolable. The state shall respect and protect the freedom and dignity of human beings.”⁴⁸

2.2 The Concept of Marriage in Islam

The central function of marriage throughout Islam is well illustrated.⁴⁹ Islam considers marriage, which is an important safeguard for chastity to be incumbent on every Muslim man if he is physically and financially capable of it. It is interesting to note that in Islam, marriage is encouraged and is considered to be one of the Prophet's (s.a.w)

⁴⁷ Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and Judiciary*. p. 84.

⁴⁸ Art 24. Constitution of Afghanistan. 2004.

⁴⁹ John L. Esposito & Natana J. Delong-Bas. 2001. *Women in Muslim Family Law*. Second Edition. New York: Syracuse University Press. p.14.

sunnah. Indeed, marriage would be the rainbow between two hearts, sharing emotions such as feelings, adoration, sadness, happiness, real truth, faith, secrets, as well as respect, and the attainment of *jannah*. Hence Islam provides various rights to both men and women in marriage; nonetheless, many of these rights are not adequately discussed among Muslims, which results into the mistreatment of women. Allah (s.w.t) encourages marriage among His servants as the Qur'an declares:

“Marry those among you who are single or the virtuous once among your slave, male or female: if they are in poverty, Allah will give them means out of His grace: For Allah encompasseth all, and He knoweth all things.”⁵⁰

According to Abdullah Yusuf Ali's discourse:

“The subject sex ethics and manners brings us to the subject of marriage. “Single” here means any one not in bond of wedlock, whether unmarried or lawfully divorced, or widowed. If we can, we must marry in our own circle, but if we have not the means, there is no harm if we choose from a lower circle, provided our choice is determined by virtue. Poverty in the other party does not matter if there is virtue and love. A happily married man has the best wealth in a virtuous wife, and his very happiness makes him a better potential earner of wealth. A slave becomes free by married, Allah's mercy is for all; it is not confined to a class or grade of people.”⁵¹

Through marriage, Muslims are engaged in life-affirming activities. With more happiness, marriage can be a central point for growth and stability in the society. Allah (s.w.t) says to the effect:

⁵⁰ Al-Qur'an Al-Nur 24:32. (All Quranic translation in this writing are based on Abdullah Yusuf Ali. 1989. *The Holy Qur'an, Text, Translation and Commentary*. Maryland: Churi Walan, Kutub Khāna Ishayatul Islam).

⁵¹ Abdullah Yusuf Ali. 1989. *The Meaning and commentary of Holy Qur'an*. Delhi: Churi Walan, Kutub Khāna Ishayatul Islam. p. 874.

“And among His Signs is this, that He created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your (hearts): Verily in that are Signs for those who reflect.”⁵²

Besides, Abdullah Yusuf Ali says in the interpretation of the above mentioned verse:

“Unregenerate man is pugnacious in the male sex, but rest and tranquillity are located in the typical relations of parents dwelling together, as well as raising a household. A man’s chivalry towards opposite sex is usually natural and God-given. The friendship involving two men is quite distinct in quality and temper. There is special kind of love and tenderness between a man and a woman. So that as woman is the weaker vessel, that tenderness may from the certain aspect possibly be likened to mercy, the protecting kindness in which the strong should give way to or prioritize the weak”.⁵³

Moreover, the essence of marriage is hugely potential as it is recognized as a benefit and a blessing which creates a strong link between a woman and man from one side, and their families on the another side. Marriage also legitimizes the sexual relationship between men and women. As evident, not only sex out-of-wedlock is regarded as illegal religious wise, but also by traditions, as well as other social practices. Allah (s.w.t) says to the effect:

“Nor come evening to adultery for it is just a shameful (deed) as well as evil, opening the road (to other reviles)”.⁵⁴

Unlike the radical feminist perception, marriage in Islam is neither an imprisonment for girls that is forced upon them, nor enslavement that makes them subservient to men. Practically, the idea behind marriage is far from being hostile; rather it is a covenant of

⁵² Al-Qur’an. Al-Rum 30:21.

⁵³ Abdullah Yusuf Ali. 1989. p.1012.

⁵⁴ Al-Qur’an. Al-Isra 17:32.

belief, and a consent bond involving love and concern.⁵⁵ Within Afghanistan, according to the head of the Department of Women's Affairs in Kandahar, women usually want to marry in order to have a better life; since most of them are not working and believe that the marriage is the only option for better financial security and decent social life.⁵⁶

Apparently, Afghanistan has traditional and patriarchal cultures, which means that even educated women are still reliant on their husbands for maintenance. Men in cities acknowledge the fact that women can work, but they prefer good housewives and mothers. This mentality is also prevalent among educated Afghans. An example of this is a university lecturer from Ningarhar province, who prevented his school teacher wife from working. At the end of the Taliban reign, she was once again able to work; however, the husband took charge of her salary and did not leave anything for her or her child. Unlike the rural women, they are mostly homemakers whom prefer to stay at homes. Ali Rahnama suggested that the relationship between husband and wife must be one of mutual respect and consideration, which will give rise to promising generation who are confident, self-assertive, and un-intimidated by foreigners.⁵⁷

2.3 Marriage Law Procedure in Afghanistan

This research explains that the marriage methods in Afghanistan involve the following aspects:

⁵⁵ Zeenath Kausar. 2001. *Feminist Sexual Politics and Family Deconstruction: An Islamic Perspective*. Kuala Lumpur: IIUM Press. p.129.

⁵⁶ Max Planck Institute for Foreign private Law and Private International Law. 2005. *Family Structure and Family Law in Afghanistan: A Report of fact-finding Mission to Afghanistan*. p. 16.

⁵⁷ Ali Rahnama. 1995. *Pioneers of Islamic Revival*. Kuala Lumpur: S. Abdul Majeed Co. p. 56.

2.3.1 Engagement

Traditionally, engagement is one of the essential foremost pillars of marriage. Under the normal practices, friends and relatives of the suitor would assess and inquire about the women of their choices and present come out with a unique decision as to whether or not present a formal request for marriage. At this point, the man will then decide whether to accept or reject the terms being laid down to him. According to the Civil Code, engagement is a promise to wed, not a marriage.⁵⁸ The purpose of this preliminary proposal is for both parties to be aware of the marriage-related conditions prior to entering into an agreement with each other. This will help in addressing potential future problems that might arise, while also help in strengthening the relationship of the family. Patriarchal tradition deems women to be creatures that lack wisdom and judgment in making their own decisions the family of the girl usually not allow the suitor to see their daughter. In some cases, the couple will not see each other until marriage. This practice runs contrary to both Islamic law and the Civil Code. Islam allows a suitor to see the women and allows him to understand her attitude, valuations, and manners and also the woman is encouraged to see and get to know her husband-to-be prior to their marriage. Evidently, the Prophet Muhammad (s.a.w) had allowed couples who are getting to marry to see and talk to each other.⁵⁹ Abdulazim bin Badawi explains that Muhammad ibn Muslamah, a famous companion of the Prophet, quotes Prophet Muhammad (s.a.w)

⁵⁸ Art. 64. Afghanistan Civil Code.1977.

⁵⁹ Abdulazim bin Badawi. 2009. *A brief of Qur'an, Fiqh and Sunna*. (trans.) Abdullah Muhammadi. Tehran: Ehsan, p.369.

stating: “If a man wants to make a proposal to marry a woman, he is allowed to see her.”⁶⁰

Another companion of the Prophet (s.a.w), Mughiza bin Shuaiba, has claimed,

“I discussed with Prophet in regards of a woman to whom I needed to offer matrimony. Prophet stated, go and discover her, as it will eventually strengthen the sustainability of your relationship.”⁶¹

With regards to seeing each other, the customs that ought to be observed is as follows:

First, the man needs to prove that his intention is to have a spouse. If the intention is just for pleasure, then it is not permitted. Second, in the event of necessity, it is allowed to see the girl once or twice. Third, a person who has the intention to marry someone has the right to see her without informing the person in question or her family, as Prophet Muhammad (s.a.w) said:

“Whenever, the person who wants to be engaged to a woman, he can see her as well show her that his good intention is to be her husband, even though, she does not definitely know. This literature related that, Jabir ibn Abdullah claimed in the case of his wife: “I was concealing behind the wall to view her.”⁶²

In Afghanistan, the problem is that engagement is customarily regarded as a binding tie which must lead to marriage. Under the Afghanistan Civil Code, engagement is a non-binding promise to marriage; hence either of the parties is entitled to withdrawal if they wish to do so.⁶³ For broader understanding and clarity, the engaged parties are allowed to see each other for a valid reason as long as they will not quit or withdraw from the

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid, p. 370.

⁶³ Art. 64. Afghanistan Civil Code. 1977.

engagement. In Hanafīyy *Madhab*, it is recommended that they should see each other and all the Shari'ah jurists agree that visit must not be in a situation of quitting or withdrawing.⁶⁴

Indeed, the Afghan people regard their society as an Islamic society. Islam acknowledges the rights of the engaged parties to see one another before marriage. However, most of the people are profoundly attached to their cultural believes and practices which results in neglecting the Prophet's *sunnah*. Sometimes, they forbid their daughter's fiancée to get to know her during the engagement until the night of their marriage. Shaykh Muhammad Abu Zuhra says in this regard:

"Islam does not consider the extreme method of some petrified sanctimonious that prohibited the unrestrained seeing of girl in wooing, because in many instances some persons (usually women) see and not accept her, while the suitor wants the girl. Also *vice versa* in many occasions, it is possible that the women who have seen the girl adopted her and according to their characterization the suitor imagine the girl is qualified for him, but if he will see her later may not be acceptable, therefore it will cause spite and hatred between the spouses which threaten their future married life. However, if the man has seen the girl and accepted her; then he will never make such a destiny."⁶⁵

In Afghanistan, if it is known that a suitor is from a lower class, the family will usually react in a negative manner. The Qur'an recognises the rights of humans for being protected from defamation as well as sarcasm as Allah (s.w.t) says to the effect:

"Ye who believe! Let not some men among you laugh at others: it may be that the (latter) are better than the (former): Nor let some women laugh at

⁶⁴ Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and Judiciary*. p. 92.

⁶⁵ Muhammad Abu, Zuhra. 2006. *Tanzim al-islam al-mujtama*. Cairo: p69-70.

others it may be (latter) are better than the (former): Nor defame nor be sarcastic to each other”.⁶⁶

It is not a new concept for a woman to offer herself to a man; rather it dates back to the very first chapter of Islamic history. It was narrated by Abdullah bin Umar that said Umar: “I went to Uthman bin Affan and present Hafsa (for marriage) to him. He refused.” “I met Abu Bakr and said to him “if you wish, I will let you marry my daughter, he also refused,” and then the Prophet Muhammad (s.a.w) asked for her hand, and I gave him.⁶⁷ It is permissible for a woman to present herself to somebody for marriage. It was narrated by Thabit Al-Banani who said that:

“I was with Anas while his daughter present with him. Anas said, “A woman came to Allah’s Messenger (s.a.w), and presented herself to him, saying, ‘O Allah’s messenger, do you have any need for me (i.e. would you like to marry me)?’” there upon Anas’s daughter said, “what a shameless lady she was!” Anas said, “She was better than you; she had an admiration for Prophet (s.a.w) so she presented herself for marriage to him”.⁶⁸

Meanwhile, Article 23 (2) of International Covenant on Civil and Political Rights (ICCPR) has declared the rights of the people in their legal ages, in which their consents for marriage and settling down for family are required.⁶⁹

⁶⁶ Al-Qur’an Al-Hujurat 49:11.

⁶⁷ Muhammad ibn Ismail. Sahīh Al-Bukhāri. (trans.) Muhammad Muhsin Khan. 1984. *The translation of the meaning of Sahīh Al-Bukhāri, Arabic- English*, vol. VII. NO, 55. Delhi: Lahoti Fine Art press, Suilwalan. p. 39.

⁶⁸ Ibid, NO, 53. p. 38.

⁶⁹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification, and accession by General Assembly resolution, 2200 (XXI) of 16 December 1966, and entry into force on, 23 March 1976. Available, <http://www2.ohchr.org/english/law/ccpr.html>

2.3.2 Marriage Contract

Marriage contract typically takes place after the engagement ceremony in Afghanistan. Proper marriage requires the following terms:

- 1) Offer and acceptance should be done by the man and woman directly, or by their particular guardians.
- 2) The presence of two witnesses.
- 3) Non-existence of permanent or temporary legal prohibition causes between the man and the women.⁷⁰

Marriage is been defined by the Civil Code of Afghanistan:

“A contract which legalizes intercourse between man and woman with object to establish a family, and creates rights and obligations for both parties”.⁷¹

Marriage is a new contract unlike any contract in lifetime. You marry with regard to love, but your signature within the marriage certificate is about rights, duties, as well as property.⁷² Islamic law explains that, marriage is a new civil contract legalising sexual relations and procreation; relationship, reflecting the realistic bent of Islam, combines the character of both worship and social relations.⁷³ The Civil Code also offers the legal age of marriage, which is 18 for males and 16 for females;⁷⁴ which is similar to other Islamic nations around the world. For example, in Iran, the lawful age of marriage is 15 for males and 13 for

⁷⁰ Art. 77. Afghanistan Civil Code. 1977.

⁷¹ Ibid, Art. 60.

⁷² Donald J. Trump & Bill Zanker. 2007. *Think Big Make it Happen in Business and Life*. New York: HarperCollins Publishers. p. 31.

⁷³ John L. Esposito & Natana J. Delong-Bas. 2001. *Women in Muslim Family Law*. p. 15.

⁷⁴ Art. 70. Afghanistan Civil Code. 1977.

females;⁷⁵ in Pakistan 18 for male and 16 for female.⁷⁶ Likewise, in Malaysia, the minimum age for marriage is 18 for males and 16 for females, and the parents or the guardians must give their consents to the marriage for those minors.⁷⁷ Finally in Algeria, the age is 21 for males and 18 for females.⁷⁸

The doctrinal rule of equality states that marriage is regarded as a union by the law, when the social status of these persons is equal. This doctrine should be only considered if the status of the man is lower than woman, because women need to be supported by their husbands after being married. According to Hanafiyy *madhab*, family, religion, profession, freedom, good personality, and means define equality. However, a marriage that does not meet all of these criteria is not regarded as being void.⁷⁹

One important right that is being granted is the power for women to put conditions to their marriage contracts as acknowledged by the Hanbaliyy *Madhab*. The power renders to the women to make their decisions should not be contrary to the objectives of marriage. Rendering them this option could resolve many inequalities in areas such as polygamy and divorce.⁸⁰ This right is also stipulated in the Civil Code. Meanwhile, women can subject the marriage to a condition that if their spouses marry other women contrary to the provisions of Article (86) of the Civil Code, and they could be authorised to fill for divorce.

⁷⁵ Valentine, M, Moghadam. 2003. *Modernizing women: Gender and Social change in the Middle East*. USA: Lynne, Reinner Publisher. p.138.

⁷⁶ Pakistan: Govt urge to increase legal marriageable age for girls. 2011. Retrieved 24, Nov, 2012, from <http://Pakistan.childrightsdesk.com/?p=9085>.

⁷⁷ Legal Research Board. 2001. *Law Reform (Marriage and Divorce) Act 1976*, art 10. Kuala Lumpur, International law Book Service. p.6.

⁷⁸ International Foundation for Electoral Systems (IFES). 2011. *Handbook for Women's rights Advocates*. Printed in Afghanistan. p. 38.

⁷⁹ John L. Esposito & Natana J. Delong-Bas. 2001. *Women in Muslim Family Law*. p. 21.

⁸⁰ *Ibid*, P 22.

2.3.3 Consent of the Girl for Marriage

Since marriage is usually a social contract between a man and a woman, there is a need for consensus from the parties concerned. Basically, they must voluntarily agree to the supposed life-long contract which includes multiple responsibilities for each party.⁸¹ In the contemporary world, it is common to expect that a woman be asked for consent prior to marriage.⁸² However, in reality, this is not always the case. Despite the fact that arranged marriages is common in Afghan society, there are several Hadith where the Prophet (s.a.w) stated that the consent of a woman to a marriage have to be sought. Even silence in the face of the question of marriage can be taken as consent. It is the girl's right to decide on a marriage alongside her legal guardian, and the legal guardian cannot act unilaterally on this matter and dismiss her wishes.⁸³ Hamada Abdul-al-Ati, explains in his book:

“It was the Prophet (s.a.w) practice to tell the girl, in question from behind a curtain that so and so had proposed. If the girl kept silent, that was indicative of her approval of the marriage. But if she shook the curtain, it meant objection on her part, and the Prophet would disregard the proposal. The reason usually given for asking the girl's consent is that it would please her and cultivate congeniality between the parties”.⁸⁴

In essence, the parties will likely be compatible in their attitudes and pursuits if this crucial condition is widely practiced. Indeed, it will ensure a peaceful

⁸¹ Muhammad Ibrahim. n.d. *Al-Hufanāwī, Al-Zawāj*. Cairo: Maktabat al-Imān. P23.

⁸² Umar A. Osen. 2007. *The New Trend of Marital Rape in Family Law: A Legal Review under the Shari'ah*. International Family Law Conference. “*Family Law in the 21st Century: Challenges and the Way Forward*”. Kuala Lumpur : Crown Princess Hotel. p.167.

⁸³ Yusuf al-Qardawi. 1985. *The Lawful and The Prohibited in Islam (Al-Halāl wal Harām fil Islām)*. (trans) Kamal El-Helbawy. Kuala Lumpur: Islamic Book Trust. p. 176.

⁸⁴ Hammudah Abd al Ati. 1977. *The Family Structure in Islam*. Indaina: American Trust publication. p. 82.

relationship that may in turn build a healthy environment and develop the children in the correct sense.⁸⁵

In a traditional and a patriarchal society such as Afghanistan, there are few opportunities to meet and choose a life partner on one's own. Sadly, most fathers or guardians do not really take daughters' consents into account. It is a vintage practice that the fathers and brothers would often force their eldest daughters to get married to their choices whilst disregarding their consent to the marriage.

In Islam, marriage by definition is a voluntary union of a family and mutual consent is a prerequisite to any marriage. This mutual contractual agreement between a bride and a groom, whether the bride is a virgin, divorced, or even a widow gives both parties the opportunity to express their conditionality of the marriage setting. According to prophetic Hadith, the father or even a guardian cannot offer a virgin or matron within marriage. Narrated by Abu Huraira, The Prophet Muhammad (s.a.w) said:

“A matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission.”⁸⁶

This entails that the right of accepting the marriage is in the hands of the woman instead of the guardian. When the guardian (*wali*) accepts the marriage on the woman without knowing if the man is equal to her, this agreement will cease to exist, but it is

⁸⁵ Umar A. Osen. 2007. International Family Law Conference. “*Family Law in the 21st Century: Challenges and the Way Forward*”. Kuala Lumpur : Crown Princess Hotel.

⁸⁶ Muhammad ibn Ismail. *Sahīh Al-Bukhāri*. (trans.) Muhammad Muhsin Khan. 1984. The translation of the meaning of Sahīh Al-Bukhāri, Arabic- English, vol. VII. Chapter 42. p. 51.

ultimately the decision of the woman.⁸⁷ If a man gives his daughter in marriage in spite of her disagreement, the marriage will most likely be of ill-effect. Another well-known hadith that demonstrates the need for consent in most cases was narrated by Khansa bint Khida in which she says: "My father arranged marriage between me and his nephew, and I did not like this match, so I complained to the Messenger of Allah." He (s.a.w) said to me, "Accept what your father has arranged." I said, "I do not wish to accept what my father has arranged." He (s.a.w) said, "Then this marriage is invalid, go and marry whoever you wish." I said, "I have accepted what my father has arranged, but I wanted women to know that fathers have no right in their daughter's matter."⁸⁸

Meanwhile, the efforts for acquiring consents from couples have also been emphasised through national and international instruments. The Law on Elimination of Violence against Woman in Afghanistan (EVAW)⁸⁹ prohibits marriage without consent, as it states: "If a person prohibits a woman to marry, the offender considering the circumstances shall be convicted to the (short term) imprisonment."⁹⁰ The ICCPR also provides that: "No marriage shall be entered into without the free and full consent of the

⁸⁷ Zaleha Kamarddin. 2004. *Islamic Family Law: New Challenges in the 21st Century Volume II*. Malaysia: International Islamic University, p. 40.

⁸⁸ Muhammad ibn Ismail. *Sahih Al-Bukhari*. (trans.) Muhammad Muhsin Khan. 1984. The translation of the meaning of Sahih Al-Bukhari, Arabic- English, vol. VII. chapter 43. P 52.

⁸⁹ Islamic Republic of Afghanistan. 2009. *The Law on the Elimination of Violence against Woman, Official Gazette*. Issue NO 989.

This law has the following objectives:

1. Maintaining *Sharia* and legal rights and protecting that human dignity of women.
2. Protecting families and fighting against customs, traditions and practices causing violence against women and which are against Islamic *Sharia*.
3. Protecting and supporting women who are victims of, or at risk of violence.
4. Prevention of violence against women.
5. Maintain public awareness and training on violence against women.
6. Prosecuting perpetrators of violence against women.

This law has been enacted in accordance with Article 24 and 54 of Constitution of Afghanistan.

⁹⁰ Art. 27. The Law on the Elimination of Violence against Woman. 2009.

intending spouses.”⁹¹ In addition, the Universal Declaration of Human Rights (UDHR)⁹² refers to this right in its Article 16 (2): “Marriage shall be entered into only with the free and full consent of intending spouses.”⁹³

Force marriage has become a tragic situation among women in recent time. Women should not be forced into marital life and attaining their consents is necessary at the first stage of the marriage. According to the Constitution, when a minor has been married without her consent, she can ask for her marriage to be annulled upon reaching the age of maturity.⁹⁴

2.4 Detrimental Traditional Practices of Marriage in Afghanistan

Today in Afghanistan, we are still able to find detrimental traditional practices of marriage that are inconsistent with the Islamic law, Afghan legislations as well as international laws. This inconsistency totally violates the rights of women, specifically in areas under the control of militants or where the central government lacks influence. This study discusses all varieties of force marriages. Forced marriage could encompass children or adults who are pushed to get married against their will as to fulfil the desire of their families or religious leaders or commanders. Another detrimental marriage that is widely spread is the *baad* marriage “exchange of women in the marriage arrangement,

⁹¹ Art. 23(3). International Covenant on Civil and Political Rights.

⁹² The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948, was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. Available, <http://www.un.org/en/documents/udhr/history.shtml>

⁹³ Art 16(2). The Universal Declaration of Human Rights.1948. Available, <http://www.un.org/en/documents/udhr/index.shtml>.

⁹⁴ Elaheh Rostami-povey. 2007. *Afghan Women Identity and invasion*. London: Zed Books. p.22.

either to fix hostility or to pay a debt". Likewise, the *baadal* marriage "exchange marriage" and coercion of widows to marry relatives of their deceased husbands are kinds of detrimental marriage that are deeply rooted in Afghanistan. Various research have found that 70-80 per cent of Afghan women face the danger of force marriages.⁹⁵ Early marriages are one of many other factors leading to higher dropouts rates among girls.⁹⁶ Chapter two of the Constitution has outlined the education of rights and decent jobs access to all citizens without exception. In addition, the aforementioned equality is warranted by Article 23 "rights of life"; Article 24 "rights to freedom and human dignity"; as well as Article 29 "immunity from torture." Moreover, Article 5 of the EVAW has listed 22 items that shall be considered as violence against women. These items include selling and buying women under the pretext of marriage; prohibiting the selection of husbands; marriage prior to the legal age; *baad* marriage "retribution of a woman to work out a dispute"; forced marriage; and marrying more than one wife without referring to Article 86 of the Civil Code.

Ironically, one of the major concerns is that force marriages instigators and arrangers are always going unpunished, which the practice widely accepted in Afghanistan. Force marriages contravene the CEDAW, and the ICCPR, and the situation requires justice and equal rights in Afghanistan.

In this light, it is critical to review the source of Islamic law regarding the status of women, highlight the discriminatory practices that have no basis within Islam, and

⁹⁵ UNIFEM Afghanistan. 2008. *fact sheet: The situation of women in Afghanistan*. Retrieved 25, Nev,2012. From, <http://www.unifem.org/afghanistan/media/pubs/index.html>. p.3.

⁹⁶ Islamic Republic of Afghanistan, National Action Plan for the Women of Afghanistan. 2007-2017. P 8.

harmonise *Shari'ah* along with the provision of the Convention. Access to justice is limited for Afghan women. Traditionally, women tolerate a myriad of suffering caused through discriminative attitudes and substandard positions. It is a country where according to Afghan Human Progress Report 2007, more than 80% of cases that are referred to customary resolution mechanism are male-oriented, which considers women to have less common sense. The Head of Afghanistan Independent Human Rights Commission (AIHRC), Sima Samar mentioned that the insufficient government support might be one of the reasons.⁹⁷ Often, women are forced by such practices to remain as compensation due to wrongdoings of a male family member, or being passed onto another male relative for marriage. According to Deutsche Welle (DW) news report on 28th Nov 2012, a 15-year-old girl in Kunduz was beheaded after refusing to marry one of her relatives. The Police were quoted to be saying: "we have arrested two adult boys on suspicion of murdering a teenage girl." Sayed Sarwar Hussein, Kunduz's provincial authority's spokesman said: "This girl by the name of Gisa from the Khanabad district of Kunduz province was beheaded by her cousin on Wednesday." Furthermore, Kunduz province security officials said that the suspect wanted her to get married to him, but she refused.⁹⁸

Fawzia Koofi, an associate of Afghan Parliamentarian as well as Women Activist mentioned in her book "*The Favoured Daughter*" that:

⁹⁷ TOLO news. Retrieved 15. Dec, 2012, from <http://tolonews.com/en/afghanistan/8726-samar-karzais-opposition-only-reason-major-rights-report-isnt-published.S>

⁹⁸ n. a. 29, Nov, 2012. "After she rejected the suitor, was beheaded". Retrieved, 29, Nov, 2012. From, <http://www.dw.de>.

“when the girls reach the age of 12, relatives and neighbours may turn gossip about why she has not married yet. ‘Has somebody asked her marriage?’ ‘Is any ready to marry her?’ ‘She may not become a good girl, that is the reason why no one wants to marry her.’” If the family disregard these gossips until the girl is 16, which is the lawful age for marriage, and allows her to marry someone of her choice, she might actually end up happy. However, if the family bows to societal pressure and marry the aforementioned daughter prior to reaching the age of maturity, the cycle of underage and choiceless marriage continues.”⁹⁹

2.4.1 Child Marriage

Since child marriage was allowed in pre-modern Islamic law but became overruled by statutory regulations, this practice has been at the centre of many controversies. Child marriage and forced marriage are clearly deemed un-Islamic and equally against statutory law. The definition of what is regarded as child marriage varies from one culture to another. In Afghanistan, child marriages can be defined as marriages that are ratified when one of the spouses has not yet reached the minimum legal age defined by the Afghanistan Civil Code.¹⁰⁰ As previously indicated, the Afghan Civil Code has set the minimum legal age for marriage at eighteen for males and sixteen for females. The Code also prohibits the marriage of girls before the age of 16 or under restricted circumstances at age of 15 years.¹⁰¹

According to United States Agency for International Development (USAID), throughout Afghanistan, underage marriage has grown exponentially over the past three decades.¹⁰² According to ERAW regulations,

“If a girl who have not reached the lawful age of marriage, which is married without considering Article 71 of Afghanistan Civil Code¹⁰³, the

⁹⁹ Fawzia Koofi . 2012. *The Favored Daughter*. New York: Palgrave Macmillan. P. 15.

¹⁰⁰ Women and Children Legal Research Foundation (WCLRF). 2008. *Early Marriage in Afghanistan*.

¹⁰¹ Art 72. Afghanistan Civil Code 1977.

¹⁰² USAID. 2005. *Afghanistan Rule of Law Project*. P. 48.

offender considering the circumstances will be sentenced to imprisonment no less than 2 years and the marriage contract shall be cancelled in line with the request from the woman in based on the law.”¹⁰⁴

Yet, underage marriage is culturally common throughout in Afghanistan. Studies by the United Nation Assistance Mission in Afghanistan Human Rights (UNAMAHR) showed that half of all Afghan women are married before the age of 15. Child marriage is one of the most seriously detrimental traditional practices in Afghanistan.

Afghan human rights commission also expressed its concern about underage girls' marriage in Afghanistan. Latifa Sultani, head of women rights commission told Bokhdi Report Agency (BRA) that getting married when underage; psychologically and physically harm Afghan girls and their families. The commission expressed concern at a case where a 15-year-old high school student from Herat got engaged to a former opposition commander who was 50 years old without her consent.¹⁰⁵

According to Haji Abbas Hasanzadah, an Islamic scholar and a member of high council of Afghanistan “ulama”, that in Islam, satisfaction from both sides while conducting a marriage is a must. Sultani is concerned that the inequality of the couple’s age will harm the bride both mentally and physically, which will in turn be detrimental to the marriage.¹⁰⁶

¹⁰³ Section 1- Where the girl does not complete the age provide under Article 70 of Civil Code, (Marriage shall not be considered adequate until the male reach the age of 18 and the female the age of 16.), the marriage may be concluded only through her father or competent court. Section 2- The marriage of a minor girl whose age is less than 15 shall never be permissible.

¹⁰⁴ Art. 28. EAW law. 2009.

¹⁰⁵ Bokhdi News Agency. 2012. *Afghan Human Rights Commission Concern on underage girl (15) marriage with 49 years old man*. Retrieved 17 Nov, 2012. From, <http://www.bokhdinews.com/english/human-rights/6764-Afghan-Human-Rights-Commission-Concern-on-underage-girl-%2815%29-marriage-with-49-years-old-man>.

¹⁰⁶ Ibid.

Normally, the maturity age is generally determined by the law, but according to the practice in northern part of Afghanistan. Especially, the Balkh province, the puberty age is defined from the physical changes. This practice is known as *kolah zadan* “hitting with hats” in which, someone hits the young lady with a hat, if she resists and does not slide; it proves that she has already reached puberty and is ready to be married. But if the opposite happens, then she is still regarded as a minor, and thus needs time to grow.¹⁰⁷

All the *Shari'ah* schools have agreed that whenever the father or paternal grandfather has acted fraudulently and negligently in marrying off their daughter, the contract is voidable on the side of the minor upon reaching the puberty. She will then be presented with an option to either accept or reject the arrangement upon reaching maturity.¹⁰⁸

Meanwhile, running away, suicides, self-immolations, murder are amongst the negative consequences of child marriage. Child marriage has negative impact on health, and education. They will not be able to continue their educations and sometimes, they might get ill from giving birth at a very young age, which might be fatal. Pregnancy of young girls will negatively affect them as well, as physiologically.

Indeed, they simply cannot handle the stress of giving birth, and also coping with caring for a baby. They are also under constant barrage of abuse from their husbands and their families. The husbands might also use these issues as an excuse to find other wives. In most Muslim nations, girls are expected to be educated until at least the age of 18

¹⁰⁷ PIM, reports, 2005. *Family Structure and Family Law in Afghanistan*. p. 16-17.

¹⁰⁸ Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and Judiciary*. P. 107. Asghar Ali Engineer. 2004. *The Rights of Women in Islam*. UK: New Dawn Press Group. p. 131.

before being married.¹⁰⁹ Girls who are married at younger age almost will certainly suffer from physical and mental abuse, and will be deprived from education. Being deprived from an education will certainly limit her future employment abilities.

2.4.2 *Baadal* Marriage

Baadal (exchange) marriage is not acceptable according to Islamic law, because the wife does not receive any dower. It was narrated by Ibn 'Umar, that Allah's Messenger (s.a.w) has been forbidden *al-shigār* 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 without paying dower."¹¹⁰ Such unions are forbidden by the Civil Code¹¹¹ and are also forbidden by international laws. Traditional law in Afghanistan is created around ethnic allegiance. For instance, the *Pashtunwali* traditions and rules are thought to have religious origins but vary in terms of interpretations and practices from one region to another. Reported consequence of these marriages is that in-laws punish brides reciprocally in turn for any reported mistreatment or punishment of their own daughter. For instance, if one woman who has been exchanged in marriage can be beaten, the in-laws of the other exchange woman could also beat her in retaliation. When a couple divorce, the other might as well. This practice is popular among poor families who cannot pay the expenses associated with marriage arrangements. In this type of marriage the women are being traded like goods.

¹⁰⁹ Sally white. 2006. *Southeast Asia, Australia, and the Pacific*, in title *Encyclopedia of Women & Islamic Cultures: Family, Body, Sexuality and Health*. Volume III, (edit) Suad Joseph, Afsāna Na mābādī. Netherland: Kaninklijk Brill. p. 58.

¹¹⁰ Al-Imām Zain-ud-Din Ahmad bin Abdul-Lateef Az-Zubaidi. 1996. *Summarized Sahih Al-Bukhari Arabic-English*. (trans) Muhammad Muhsin Khan. Saudi Arabia: Darussalam. Chapter 9. No.1842.p 892.

¹¹¹ Art. 69. Afghanistan Civil Code. 1977.

The practice is also seen as a denial of woman's right to freely enter into marriage which can contribute to promoting physical violence against women. For instance, a family in Balkh province exchanged their daughters and sons despite their young ages as replacement for their deceased sons or daughters who were previously married.

It was also reported by Max Planck Institute (MPI) that an 80-year-old father forced his 7-year-old daughter to marry a 50-year-old man, and in return, the 80-year-old man will marry the daughter of the 50-year-old man. Neither woman has reached the age of puberty. The head department of woman affairs at Balkh province sent representatives to speak with these men, but they replied that "it was personal issues and no outside interference was required."¹¹²

Verses from the *Qurān* emphasises that parents should act with the best interests of their children at heart. This requirement is not optional but compulsory. Allah (s.w.t) says to the effect:

"O you who believe! Save yourselves and your families from a fire whose fuel is men and stone..."¹¹³

It is believed that if a girl is forcibly married based on personal benefits which contradict the tenets of *Shari'ah*, it will result in an environment that damages her spiritual life. In *Qurān* principle, it is unlawful to "forcibly inherit a woman"¹¹⁴ which implies the practice of *baadal* (exchange) marriage.

¹¹² Max Planck Institute for Foreign Private Law and Private International Law. 2005. *Family Structure and Family Law in Afghanistan: A Report of fact-finding Mission to Afghanistan*. p. 16.

¹¹³ Al-Qur'an. Al-Tahrim 66:5.

¹¹⁴ Al-Qur'an. Al-Nisa 4:18.

2.4.3 *Baad* Marriage

Baad is an exchange of women in an arranged marriage, either to mend hostility or to repay a debt or bond between two families.¹¹⁵ The practicality of this custom is that the girl or a woman is given for marriage to a victim's family through the aggressor family to settle disputes or conflict between two ethnic groups, clans, tribes, or even two families. For instance, if a father or perhaps a brother murders or hurts someone, then a nearby tribal council is held to come up with a peaceful settlement. A girl from the particular aggressor or murderer's family and one of the members of the victim's family is going to be married. This practice existed in the pre-Islamic era where, when a person was killed by a member of a tribe, the victim's tribe for the sake of revenge must kill one person from the tribe responsible until they manage to get their revenge. Islam condemns this kind of practice, and Allah (s.w.t) says to the effect:

“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.”¹¹⁶

The principle of *Baad* is part of the detrimental customary applied when solving bloody disputes. This practice is common among *Pashtun*'s, and it is part of *Pashtunwali*. All tribal *Pashtuns* refer to the tribal *jirga*¹¹⁷ or council in making judgements on cases from the traditional pantheon of legislation and punishments, especially in relation to disputes of the ownership of land and giving of women for *baad*, as well as murder. The line between *Pashtunwali* and *Shari'ah* law became blurred for the *Pashtuns*.

¹¹⁵ Benedicte Grima. 2004. *The Performance of Emotion among Paxtun Women*, “The Misfortunes Which Have Befallen Me”. Oxford: University press. P. 72.

¹¹⁶ Al-Qur'an. Al-Baqarah 2:178.

¹¹⁷ *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.

Punishments were in actuality drawn largely from *Pashtunwali* rather than the *Sharī'ah*.¹¹⁸

Based on the MPI-Report, a person had killed a nomad in Paktia province. The members of *jirga* went along to the house of the particular victim and inquired if the family members of the victim planned to continue the enmity, or if they preferred reconciliation instead. They chose reconciliation, and along with the members of the *jirga*, went along to the house of the murderer to agree upon a solution. The tradition is that a girl or two ought to be exchanged, or money or land should be directed at the family of victim, so as to remove enmity. Therefore, the sister of the particular murderer automatically appeared before the *jirga* without any hesitation and accepted marriage into the family of the victim in order to stop the hostility between the families.¹¹⁹

This can lead to outlawing varieties of *baad*, which involves punishing women for crimes committed by male relatives. Interviewed Afghan women and men have expressed strong opposition to the practice. A girl married through *baad* is never highly regarded by her new family, as they associated her with her male relative who committed the crime, and will continuously accuse her of being a criminal. As a result of this, the girl is treated as a servant as a way of revenge. This is illegal under Afghan legislations. According to the criminal law of Afghanistan:

- (1) A person who provides a girl for marriage who is eighteen years or older without her consent, shall be sentenced into short imprisonment, (2) If committing such of crime as specified under the above paragraph is for the

¹¹⁸ Ahmed Rashid. 2001. *Taliban The Story of the Afghan Warlords*. London: Pan Macmillan Ltd. P.112.

¹¹⁹ Max Planck Institute for Foreign private Law and Private International Law. 2005. *Family Structure and Family Law in Afghanistan: A Report of fact-finding Mission to Afghanistan*. p. 20.

purpose of '*Baad dadan*' (as a compensation for the wrongdoing), the offender shall be sentenced to imprisonment for a period not exceeding two years.¹²⁰

Another important incident in this regard was the case of Souriya, which was documented by the Human Rights Watch (HRW)¹²¹. In this case, Souriya, a 12 year old teen was forcibly married to someone not of her choice through the *Baad* practice. The cause of the marriage was that her family was indebted to that person and they could not afford to pay the debt on time. Eventually the teenage girl escaped away from her parent. According to Souriya, she was beaten up and abused by her husband. When she went to her father for help, she was told to be patient. After nine years with 3 children, her husband accused her of having an affair with one of his enemies; a man she had never seen until her day in court. She was charged with both "running away" and *zinā*. She told HRW, "My husband made this story up to hurt me and the man. He married another woman after two days once I was arrested." Souriya has been convicted and sentenced to five-and-half years in the penitentiary. The man with whom she was accused of running away with and committing *zinā* was sentenced to six-and a half years. Souriya told HRW that she has been pregnant when she has been arrested, and gave birth in prison, and the baby died three weeks later.¹²²

It is a fact that she is very much opposed to *Baad*. She understood that if a man and a woman fall in love; they should be allowed to marry instead of placing the blame on someone else. If she is still forced to marry as a form of *Baad*, then she believes that

¹²⁰ Afghanistan. 1976. *Criminal Law (Penal Code) - Official Gazette* NO. 347. Art. 517.

¹²¹ Human Rights Watch. 2012. "I had to Run Away" *The Imprisonment of Women and Girls for "Moral Crime" in Afghanistan*. USA. 10 Dec, 2012. From: www.hrw.org/sites/default/files/2012/03/28/i-had-run-away.PDF. p. 42.

¹²² Ibid.

there should be a prenuptial agreement, wherein it is stated that she would not be mistreated, and would be in decent place in order to protect her from abuses.¹²³

The researcher explores how girls in Afghanistan are taken and held like slaves through *baad*. *Baad* is most popular in areas where it can be dangerous for people to seek out government institutional supports; instead of going to the courts, they seek out *jirgas*, and assemblies of tribal elders that utilise tribal regulations, which allow women swapping. *Baad* is really a deeply rooted historical practice, and efforts to deal with the problem are constrained by many factors in countryside of Afghanistan. Drug smuggling is another contributing factor to this marriage type. As it known, Afghanistan is one of the havens of opium cultivation. Normally, drug smugglers would finance those families for growing and cultivating opium. But when disaster strikes such as government's mass sweeping and burning of those farms, the farm owners are left in dilemma and are obliged to reimburse money owed to those drug criminals. Failure to do so or any default in payment would open another window of illegal traffic of girls, who are only between 8 to 13 years to be used as manufacturing heroin, or immediately married them, or sold far away in Iran and Pakistan. The most important factor in practising *baad* is poverty, which induces the offenders to seek support poor opium farmers. Under the EVAW provisions, it is provided 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,

¹²³ Ibid.

there should be a prenuptial agreement, wherein it is stated that she would not be mistreated, and would be in decent place in order to protect her from abuses.¹²³

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“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,

¹²³ Ibid.

the perpetrator shall, depending on the circumstance, be sentenced to a long-terms¹²⁴ imprisonment not exceeding ten years.”¹²⁵

2.5 Compulsory Marriage of Widows

In pre-Islamic Arabia, widows suffered a lot of injustices at the hands of their own families, their in-laws, and societies in general. When a husband dies, his widow would be confined at home and made her wear the shabbiest clothes. At the end of their period, they would have to perform a series of degrading and meaningless rituals. These rituals include casting animal faeces into the air and riding an animal back, along with hundreds of other worthless customs, enduring humiliation and persecution of their families, and depriving them from the opportunity to resume any happy and decent family life.¹²⁶ Detrimental traditional practices do not only curtail Afghan women’s rights before marriages, but also after their husbands’ death. Women’s low status in Afghanistan can be deduced from within the Qur’anic condemnation of numerous practices, particularly the prohibition involving levirate, forcing a widow to marry her husband’s brother, essentially rendering her a component of the estate.

Meanwhile, coercive marriage of widows stems simply from the widows staying in the house of their in-laws. Additionally, it is often due to the desire to deny a widow her inheritance by marrying her off to a relative and keeping the inheritance within the family. The Qur’an stresses the inheritance rights of women from their deceased husbands in the following:

¹²⁴ Article, 100 (2). The duration of medium imprison is not less than five years and not more than fifteen years, Criminal Law (Penal Code) of Afghanistan. 1976.

¹²⁵ Art. 24. EVAW 2009.

¹²⁶ Sayyid Qutb. 1999. *In the Shade of the Qur’an*. (trans) Adil Salahi & Ashur Shamis. United Kingdom: the Islamic Foundation. p. 370.

“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.”¹²⁷

According to the EVAW:

“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”.¹²⁸

The compulsory marriage of a widow to a member of her deceased husband's family is a problem that stills exist despite the legislative measure adopted in Afghanistan. The practice of this custom is financially convenient despite its prohibition by the Qur'an and because marriage of the widow does not normally require the payment of fresh *walwar* (dower).

This study also identifies that many of the detrimental procedures in Afghanistan might be associated with denying the widow's monetary gift. The Qur'an provides that the father of a woman has the right to approve a woman's choices; this is done in order to ensure her wellbeing, and helps her give consent. There is no such provision for widows.

According to the Criminal Law (Penal Code) of Afghanistan:

“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”.¹²⁹

¹²⁷ Al-Qur'an. Al-Nisa 4:12.

¹²⁸ Art 34 EVAW law 2009.

¹²⁹ Art. 517. Criminal Law (Penal Code) of Afghanistan. 1976.

In the pre-Islamic period, there was no confinement period following a husband's death. Some argued that women were provided great freedom to immediately remarry, along with great handle over their sexuality and reproductive functions. However, it should also be noted that due to circumstances, a widow might lack maintenance if she does not immediately remarry, especially if she is pregnant from her deceased husband.¹³⁰ Once her confinement is over, she is free to decide her future for herself. She is free to dress in a manner permitted by Islam, be proposed into a marriage, and marry any man befitting her customs or tradition, the lady only has God to please, along with fear for: "God is aware of all you do".¹³¹

Widows usually do not remarry; it is a wide-spread customary in Afghanistan, especially within the countryside particularly among the uneducated ones. For any male household member, he is allowed to marry his brother's wife upon the brother's death. This form of emergency union is more common among *Pashtuns* in Afghanistan compared to other ethnic groups.¹³² It is a serious problem which widows are generally facing in Afghanistan in that, they are deprived of the rights involving the custody of their children. Therefore, a woman may continue to be in an unhappy marriage as a way of keeping her children.

In Afghanistan, many widows feel obliged to wed relatives of their husbands as a way to keep custody of their children. Years of conflict, along with the high male mortality rates, brought forth the custody problems to the forefront of Afghan women problem. Interestingly, widows of the Iran-Iraq war (1980-88) compelled the Islamic Republic to

¹³⁰ John L. Esposito & Natana J. Delong-Bas. 2001. *Women in Muslim Family Law*. p. 14.

¹³¹ Sayyid Qutb. 1999. *In the Shade of the Qur'an*. (trans) Adil Salahi & Ashur Shamis. p. 370.

¹³² Ehsan M Entezar. 2008. *Afghanistan 101: Understanding Afghan Culture*. USA: Library of Congress. p.119.

introduce laws involving custody, which would give them equal rights to keep their children even if they were getting remarried.¹³³

2.6 Marriage Dower (*Mahar*) in Afghanistan

Another matrimonial right granted to women under both Islamic law and Civil Code of Afghanistan is her dower¹³⁴. Dower is granted to a bride once the marriage contract is solemnised. Religiously, it is the right of the bride to receive a dower, and it can be in any form, such as monetary or in the form of goods. Allah (s.w.t) says to the effect:

“...give them their dower as prescribed; but if after a dower is prescribed you agree. There is no blame on you, and Allah is All-knowing All-Wise.”¹³⁵

As the women in marriage surrender their personae, so also the men (beside some part of his independence) at least some of his property according to his means. And this gives rise to the law of dower. A minimum dower is prescribed, but it is not necessary to stick to the minimum.¹³⁶ Dower is also regarded as a form of compensation that women are entitled to, as a woman will lose her source of income once married, and will be the responsibility of her husband. The dower is the exclusive right of a wife, and is not to be shared with anyone else. She also has the right to dispose it in any manner she chooses. The Civil Code of Afghanistan provides that:

¹³³ Koninklijke Brill NV. 2005. *Encyclopedia of women and Islamic culture family, Law and Politics*. The Netherland: Martinus Nijhoff Publisher . P 106.

¹³⁴ Art.99-101. Afghanistan Civil Code. 1977.

¹³⁵ Al-Quran. Al-Nisa 4:24 relationship created, the parties are recommended to act towards each other with the greatest confidence and liberality.

¹³⁶ Abdullah Yusuf Ali. 1989. *The Holy Qur'an, Text, Translation and Commentary*. India, Kutub Khana Ishayatul Islam, Delhi.

“Dower shall be considered the property of the wife. She can exercise any ownership power over her marriage-portion.”¹³⁷

There are two types of dower in Afghanistan, immediate (*mahar mu'ajal*) and deferred (*mahar mū'akhar*) dower. The immediate dower may include things like an amount of money, an apartment, a piece of land, or one more valuable product payable to the bride. If the immediate dower is placed, the proxy negotiates the precise amount or nature of the deferred dower, which is due sometime down the road. In practice, not many women request that their dower be paid upon marriage, but rather would usually defer the dower payment, with the exact amount agreed to be paid as mentioned in the marriage certificate.

The idea of dower inside a marriage contract is an important right in Islam to the wife. A marriage is not legal without a dower being agreed upon. This is reflected from hadith, in which the Prophet Muhammad (s.a.w) narrated:

“every marriage without dower is null and void.”¹³⁸

Islam has illustrated the idea of dower to be a compulsory part of marriage contract in the following ways:

- 1) To ensure that the compulsory giving of dower to wives was created in order to exercise the matrimonial rights of women.
- 2) To ensure that the dower which the husbands give to their wives, signifies the genuine and caring union between couples.

¹³⁷ Art. 110. Afghanistan Civil Code. 1977.

¹³⁸ Muhammad bin Ibrahim Al-Tuwaijiry. 2000. *The book of Nika*. Saudi: King Fahd National Library. P.16.

- 3) To ensure that husbands are aware that they are ready to assume family responsibilities such as managing their wives' affairs, expenditures, and protection from harm.

Generally, there are people in Afghanistan who do not understand the idea of dower and women's proper rights to dower. They believed that dower is a form of payment by men to get women. This case has been explained by Muhammad Ibrahim in *Al-Hufanāwī, Al-Zawāj*¹³⁹. In truth, dower is usually a dignity along with the rights that Islam provides for women. The Qur'an does not have any conception involving purchasing the wife through dower; instead, dower is regarded as a reward, and is a legitimate compensation that women can claim in all cases. The Qur'an, as a result, demands a bridal gift for any legal union, Allah (s.w.t) says to the effect:

“And give the women their dower voluntarily.”¹⁴⁰

The dower had been instituted with regard to marriage as a form of stable connection between the couple. Dower strengthens the bond between two people in matrimony, because doing so is an expression of commitment by the groom to the bride. It also acts as a deterrent to divorce, as in the event a groom pronounces breakup, he will then be obliged to pay the dower in full. In the event where a divorce occurs, the dower will assist a divorced wife financially.

¹³⁹ Muhammad Ibrahim. n.d. *Al-Hufanāwī, Al-Zawāj*. Cairo: Maktabat al-Imān. P.23. It is important to observe that some jurists hold the view that marriage is a worldly affair like buying and selling, and that is not a form of worship since disbelievers too get married. The basis of their argument lies in the fact that if it were a form of worship, it would not have been possible for any other community to observe it but Muslim Ummah alone. It is humbly submitted that marriage is a form of worship since it has been ordained by the Sole Legislator. An act of worship flows from a particular legislation and is linked with it. Marriage to the Muslims is an ordained act which is an act of worship like building of mosques and gathering therein to worship Allah. Disbelievers too build their religious houses and gather therein but the this act of there is not regarding as a form of worship because they did not act in accordance with divine laws regulating such matters.

¹⁴⁰ Al-Qur'an. Al-Nisa 4:31.

In Afghanistan, dower can be paid in the form of cash, property or home, or removable objects. The maximum quantity of dower that a husband has to pay to the wife is not defined legally; it depends upon the personal capacity on the husband. This verse indicates that it is lawful to give dower to the wife. This also shows that Islam respects the right of a wife by granting her dower. Almighty Allah (s.w.t) says to the effect:

“...even if you had given the latter, a whole treasure for dower, take not the least bit of it back.”¹⁴¹

Moreover, Islam has classified the easiest or minimum quantity of dower as a blessing or wisdom. Regarding the minimum dower, the Muslim jurists have different opinions: According to Hanafiyy *Madhab*, the minimum dower can be ten *Dīrhams*, or something that is worth ten *Dīrhams*.¹⁴² According to Mālikiyy *Madhab*, the minimum quantity of dower can be a quarter of legal platinum *Dirhām*, or about three silver *Dīrhams*, which prevents cheating. Marriage could not be executed with a dower a lot lesser than that, and for most, the quantity of dower is unlimited.¹⁴³ According to Shāfi‘iyy *Madhab*, there is not any minimum quantity of dower.¹⁴⁴ For Hanbaliyy *Madhab*, the volume of dower cannot be constrained, but lots of wealth usually translates to expectations of a large dower.¹⁴⁵ According to Islamic laws and Afghan Civil Code, there is no limit to a dower, because the whole idea is for the marriage to be a long-term contract that would ensure a

¹⁴¹ Al-Qur‘ān. Al-Nisa . 4:20.

¹⁴² Al-Imam ‘Alau’ddin Abu Bakr al-kasani. 1982. *Bada’I’ al-Sana’ Ifi Tartib al-Shara’I*, Vol.2. Beriut: Dar al-kitabal-Arabi. p. 275.

¹⁴³ Ahmad b.Muhammad al-Dirdir. 1992. *Aqrab al-Masalik Li Mazhab al-Imam Malik*. Dar al-Sudaniyyah Lil Kutub. p. 458.

¹⁴⁴ Abu Zakaria Muhyiddin al-Nawawi. N.d. *al-Majmu’ Syarh al-Muhzab*, Vol. 16. Beirut: Dar al-Fikri. P. 216.

¹⁴⁵ Al-allamat Abu Muhammad Ibnu Qudamah. N.d. *al-Mughni*,Juz. Riyadh, Ria’sah Idarat al-Buhuth al-Ilmiyyah. p. 680.

better life. The Prophet (s.a.w) stated that even an iron ring could be a dower¹⁴⁶. To have the lowest dower will serve to minimise the social problems being faced by Afghan contemporary society.

Moreover, Caliph Umar ibn al-kaittāb stated, “do not be excessive in the dowers of women. Whether, it is out of fearfulness of Allah (s.w.t) or nobility in this world, your Prophet (s.a.w) was more entitled to that. He did not give dower of his wives or daughters more than 12 uqiyyas, and that is 480 *dirhams*”¹⁴⁷ Additionally, he claimed “the excessive cost connected with dower with the women can cause men to experience enmity in direction of women within their heart”¹⁴⁸.

Contrary to popular belief, dower do not signify the expense of purchasing a woman, as is reflected in this Afghan phrase: *Da zar kharīdim ba sang mekoshim* (we ordered you using money as well as kill you with stone). This was a tradition of the *jāhilīat*, where they sell their daughter and the father will be presented with the dower, but in Afghanistan, this practice or thought is prevalent. The dower is paid to the legal guardian of the girl instead of the girl herself, which gives it a façade of a financial transaction instead of matrimony. According to Islamic rules, a wife is entitled to a dower, which would enable her to support herself if by some unfortunate turn of events; she ended up being a widow. Allah (s.w.t) says to the effect:

“And gives the women (on marriage) their dower as free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with good cheer.”¹⁴⁹

¹⁴⁶ Sahih Al-Bukhari Arabic-English.(trans) Muhammad Muhsin Khan. Darussalam, Saudi Arabia. Vol. 7. No.80.p 61.

¹⁴⁷ Muhammad Ibn Sa’d. 1995. *The Women of Madina*. (transt). Aisha Bewley. London: Ta-Ha Publisher Ltd., p.118.

¹⁴⁸ Ibid.

¹⁴⁹ Al-Qur’an. Al-Nisa 4:4.

A dower is the right of a wife, and should be given directly to her. However, in practice, it is not unusual for a bride's father to receive the dower instead. These expressions are employed in some parts of Afghanistan. In *Pashto* language, it is termed as *walwar*, in *Dari*, it is called *shirbaha*,¹⁵⁰ and in *Uzbaki*, it is called *qalin*.¹⁵¹ *Walwar*¹⁵² is widespread in the east as well as southeast, *shirbaha* within western as well as central Afghanistan, and *qalin* in the north as well as northwest. It is a commonly unsafe practice among a quite number of Afghan people, particularly in the farming areas where it is understood to be compensation for the family of the bride intended for nurturing and taking good care of the girl. Basically, the bride gets nothing from the dower.¹⁵³ Women are usually unaware of their rights and their entitlement to a dower.

It is believed that even intelligent and well-educated women are unaware of their dower and what the total amount was. For example, when the researcher conducted an interview with the head of Department of Women Affairs of Jewzijan province concerning the dower, she could not tell how much was her dower.¹⁵⁴ This scenario in the remote areas is more painful; since they are not even aware that they are entitled to a dower. The patriarchal nature of Afghanistan endow males are with more power than females, and in this case, the father of the bride negotiates the dower during the engagement. The couple themselves are uninvolved in the negotiation process.

¹⁵⁰ *Shirbaha* price and value of milk that the bride's mother fed her when she was an infant. This money generally goes to the bride's mother. It is not a religious practice like dower.

¹⁵¹ *Qalin* is the price of the girl. The amount of depend on tribe and families. It starts from 200,000 Afghanis (equivalent \$4000) to 500,000 Afghanis (\$10,000).

¹⁵² *Walwar* is similar to *qalin*.

¹⁵³ Sayid Sattar Langary. 2010. *Women from Afghanistan in Diaspora their Stories of Adversity, Freedom, and Success*. USA: Author House. p. 19.

¹⁵⁴ Fawzia Rasikh was interviewed via Skype at 4:00 pm Malaysia time to Afghanistan by the author. 15 July, 2012.

In Islam, it is unlawful for anyone to take the dower or part of it without the bride's consent,¹⁵⁵ while the Afghanistan Civil Code provides that "no one may compel the wife to dispose of her dower to the husband or anyone else."¹⁵⁶ The bride's family are compelled to seek high bride prices, as it is viewed as a status symbol. On the other hand, a bride who is to be given to her in-laws will think that she is being sold to the other family, and the expression: *Da zar kharidim ba sang mekoshim* (we ordered you using money as well as kill you with stone) will do little to alleviate this suspicion. One of the reasons for early marriage is high bride price; their parents receive the *walwar*, or *shirbaha* which induces them to seek cash as an exchange for their daughter.¹⁵⁷

Moreover, the excessive bride price causes the indecent people to switch their daughters in order to allow their sons to marry. This practice is un-Islamic. However, nowadays, the father of a bride obtains a large dower as it will help them support the family, and will also ensure that the future groom is capable of supporting his daughter. This is partly the reason why the numbers of unmarried women keep growing year after year. This needs to be addressed in the form of cultural awareness. But the government does not appear to have taken any concrete step. Sometimes, there are many cases where the fathers refuse the price of dower being offered hoping to get a higher price from a suitor, despite the fact that the daughter herself agrees to the suitor. In such event, she has little chance of protesting against her father's decision.¹⁵⁸

¹⁵⁵ Muhammad bin Ibrahim Al-Tuwaijiry. 2000. *The book of Nika*. P. 17.

¹⁵⁶ Art. 14. Afghanistan Civil Code. 1977.

¹⁵⁷ Women and Children Legal Research Foundation. 2008. *Early marriage in Afghanistan*. Kabul: Dehbori. p.13.

¹⁵⁸ An interview with Saiffudin Nabizada a lawyer in Balkh province, via Skype at 2:00 pm Malaysia time in Afghanistan . 18 October 2013.

2.7 Marriage Certificate

Marriage qualification is vital for the particular marriage to become legal. It can be legally recognised as a contract, through which both parties may make stipulation in certain limits. The written contract provides the name of the parties, their father's titles, the title of two witnesses, the volume of dower, which has been fixed, and other terms agreed between the husband and wife. For example, it curtails somehow a husband from separating and divorcing his wife. In the same case, this right may also be transferred to a wife to divorce her husband, as provided in the Afghan Civil Code. It also helps parties to set up conditions that will govern their marriages. One of the conditions is when husband gets married to another woman without his wife's knowledge, then she possesses all authority to file separation or divorce.¹⁵⁹

The Afghan Civil Code provides that:

“Marriage contract shall be registered in the official marriage deed by the respective office and shall be prepared in three copies. The original shall be kept with the respective office and the two copies shall be supplied to the concluding parties.”¹⁶⁰

In Afghanistan, the girls will be in a situation where they would have to withstand the arrangements made by parents in marriage certificates as ways being formulated to protect women's rights in terms of divorce as well as dower.

2.8 The Expense of Wedding Ceremony in Afghanistan

The *Sharī'ah* suggests *walimah* is a way to publicise and celebrate *nikāh*. The Hanafiyy and Hanbaliyy regard *walimah* as *mandūb* (recommendable), but the Shāfi'iyy,

¹⁵⁹ Afghan Constitution Art 86

¹⁶⁰ Art. 61. Afghanistan Civil Code, 1977.

regards it as *sunna muakkada* (strongly recommendable), whereas, the Mālikiyy regards *walimah* as *wājib* (obligatory).¹⁶¹ According to one *sunnah*, the Prophet (s.a.w) is reported to forbid marriage to be performed in secrecy.¹⁶² In one more Hadith narrated by Abu Hurayra, “a wedding feast attended only by the rich from which the poor is kept away is an evil occasion.”¹⁶³ During the Prophet’s (s.a.w) wedding feast to Safiyya, the *walimah* consisted of a dish of dates, curds and fat to which according to some traditions was added a meal of roasted barley.¹⁶⁴

Today in Afghanistan, Kabul is the centre of marriage, which is due to the fact that half of the country’s economy is focused there. According to research, one of many private regional Afghan TV channel, disclosed that the costs connected with marriage in Afghanistan and particularly in Kabul over the nine last months in 2012 amounted to 180 Million US Dollars¹⁶⁵ It was also reported that in the year 2012, about 16 thousand wedding functions took place in Kabul marriage ceremony halls, with the meal and beautification amounting to US Dollars 140,000. This high price tag has created unwelcomed effects on the Afghan society¹⁶⁶ There are some youth who are not able to marry, which lead them to commit an unlawful acts.

Despite the government’s effort in legislating marriage laws, it looks like it has failed to stop the increasing cost of marriage. Some families are forced to sell lands to pay for

¹⁶¹ Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A Study of the Constitution, Matrimonial Law and Judiciary* p.97.

¹⁶² Ibid.

¹⁶³ Muhammad ibn Ismail. *Sahih Al-Bukhari*. (trans.) Muhammad Muhsin Khan. 1984. The translation of the meaning of Sahih Al-Bukhari, Arabic- English. Vol. 7. No.84.p 63.

¹⁶⁴ Ibid. No.98.p 73.

¹⁶⁵ Khaibar Ahmadi. 20 November 2012. Kabul Afghanistan: Afghan TV Channel 1.

¹⁶⁶ Ibid.

the wedding feast. Mode, methods, traditions, as well as market intelligence will be the second element that impact contemporary society requirements and economic selections.

Afghanistan is one of the poorest countries in the world. There are 40 % of its populations are living in poverty. The rate of the unemployment is steadily increasing by the addition of tens of thousands of people annually.¹⁶⁷ Despite these dismal figures, families are forced to endure the expense of big events, even to the extent of taking out mortgages or borrowing money. The high price of getting married puts marriage off for a lot of youths, and results in the prevalence of moral decadence in the Afghan society.

Furthermore, the Afghan Parliament Health and Youth Committee (PHYC) have designed a scheme that minimises the marriage costs. The committee believe that and the high price connected with marriage prevents youths from getting married. PHYC chief, Naqibullah Fayeeq said, DW Airwaves that the cost of marriage is one of the reason connected with youth migration, as well as drug addiction of youngsters.¹⁶⁸ According to the researcher, some parts of this problem are an explanation for the inexistent connection with law. The common responsibility of the Parliament is to approve the particular regulations, which would simplify marriage by the youths.

2.9 Conclusion

The manner in which, women marriage rights are exercised under the Islamic law, the Afghan legislation and traditional practices in Afghanistan are completely different. This is because under the Afghan traditional practices, decisions regarding women's rights

¹⁶⁷ Ibid.

¹⁶⁸ Afzal Shah. 19 January 2013. Broadcast from Kabul Afghanistan. Kabul FM.

during marriage or divorce are primary based on customs and believes. As it is evident, the traditional Afghan customs and believes differ from one tribe to another, which makes those practices inconsistent and fill with vices and loopholes. Whilst under the Islamic law, decisions-makings regarding women's right premise on the divine texts of the Quran, *Sunnah* and jurisprudential analysis of the scholars. In addition, thus the existence of Afghanistan legislations on women marriage rights, the lack of proper implementation of these laws have made Afghan people to be widely relying on their traditional and customary practices. The conflict between the Afghan traditional practices on one hand and the other laws on the other hand has left huge impacts on the overall position of women and their basic rights in the Afghan society.

In this kind of patriarchal contemporary society, decisions tend to be largely made by men. Women do not have the freedom to pick their life partners. Arranged unions are generally advanced in this particular country depending on economic as well as political motives. In general this is more or less similar to the practice existed during *jāhiliyat* (uncivilized period), where women were the victims of men. This bad behaviour of men towards women has continuously been practiced in modern world. It is very sad to figure out young daughters are becoming victims of fathers and brothers to give them for forced marriage, respectively because of the murder they committed or for their own debt. Widows are not allowed to remarry men of their own choices, although their rights are guaranteed under Islamic law and Afghanistan legislation.

The decisions of the local *jirga* are highly influential and the problem with many men is that they claim women to be their properties. In areas horribly hit by poverty, girls are sold off sometimes in exchanged for meals. Women are treated as properties when the

marriage contract is signed and appeared that the woman cannot get married to another man. Dower payment is certainly compensation with the care as well as upbringing in the bride. A betrothed Afghan woman is controlled through the mother-in-law who makes such critical decisions on her behalf as to whether to attend activities or not. Consequently, women in Afghanistan are deeply concerned about these detrimental customs and traditions which also undermine the Islamic domestic laws.

