

## CHAPTER 3

### POLYGAMY AND DIVORCE PRACTICES IN AFGHANISTAN

#### 3.1 Introduction

Polygyny<sup>169</sup> and divorce are the common and basic issues in the legal framework of Islamic countries, including Afghanistan, which are related to the family law and particularly the matrimonial rights. These concerns are addressed in the Qur'an, Hadith, and the Civil Code of Afghanistan. The people in Afghanistan are adherents to the Hanafiyy *Madhab*, and therefore, courts in Afghanistan adhere to Hanafiyy *Madhab* in their legal frameworks and judgements.

For this reason, the Hanafiyy *Madhab* was practiced until the Civil Code came into effect in 1977. Meanwhile, several parliamentary Acts were passed. However, none of them address the issue of polygamy or even bothered to mention it. The Afghan Civil Code intends to draw a clear demarcation between polygamy and divorce to ensure that injustice is not perpetrated in the form of extramarital manners. This makes the review of polygamy and divorce imperative, as both involve the most basic unit of a society, which is family.

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<sup>169</sup> Webster's *New world Dictionary* define polygyny as a practice of having two or more wives at the same time; whereas, polygamy is defined as the practice of having two or more wives or husband at the same time many books used polygamy. This research used polygamy as having two or more wives at the same time.

This chapter reviews the concept of polygamy and divorce in the Islamic perspective, and then, followed by a discussion of the Civil Code of Afghanistan, and an assessment of the phenomenon involving polygamy. It also discusses the women right to sue for divorce in accordance with Islamic laws and the Civil Code of Afghanistan. Additionally, the negative consequences of this practice with regards to women, children, and society in the context of Civil Code and Islamic law are also discussed.

### 3.2 The Rules and Conditions of Polygamy under Islamic law

Prior to the advent of Islam, polygamy was a common practice. Biologically speaking, when the population is scarce, polygamy is a great way to ensure the survival of a species. By the advent of Islam, the world is well populated, and the Qur'an set out in defining the practice of polygamy. Polygamy was originally intended to honour the wives and children of fallen warriors in the path of Islam. This is best demonstrated by the marriage of the Prophet (s.a.w), where all of his wives, with the exception of Aisha, were widows. The Qur'an permits the practice of polygamy, under strict conditions. Allah (s.w.t) says to the effect:

“If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable to prevent you from doing injustice”.<sup>170</sup>

The Qur'an emphasises the message of *adl* (justice), where it does not simply mean equal rights of treatment on lodging, clothing, and other domestic requirements, but also equal distribution of love, adoration, and care. Seeing as to how it is impossible to be

<sup>170</sup> Al-Qur'an. Al-Nisa. 4:3.

perfectly fair, the Qur’anic injunction is in some ways a prohibition to the practice. The Qur’an is also clear on the fact that monogamy is perfectly attainable and preferred in a societal context. This is in accordance with the verse “...this is better to prevent you from doing injustice”<sup>171</sup> actually means that failure to adhere to the commandments in this verse will bring about severe punishment from Allah (s.w.t). It is a misconception that Islam allows its followers to marry four wives at the same time. Islam categorically prescribes certain conditions according to which, a man could marry more than one wife.<sup>172</sup> Despite the fact that polygamy is permissible in Islam, it would be useful to examine the conditions that are attached to this practice.

A man can be married to multiple wives as long as he possesses perfection and wisdom enough for him to be impartial to all of his wives. The interpretation of the clause; “...marry women of your choice...”<sup>173</sup> signifies that the spousal life is not going to be delightful until they adhere to the following few simple conditions of polygamy:

1. The provision of the financial solvency, along with sufficient wealth, should be secured for decent living for the families. A wife is not permitted to have multiple husbands, and will therefore be vulnerable if her polygamous husband is not financially supporting her and her offspring.
2. The man must also be able to satisfy all of his wives equally, and not show favouritism to any of his wives. Prophet Muhammad (s.a.w), has mentioned

<sup>171</sup> Ibid.

<sup>172</sup> Jamil Farooqui. 2007. “The Status of Women in Islam: A Sociological Perspective”. *International Conference on the Status of Muslim Women in Contemporary Societies: Realities and Prospects*. Kuala Lumpur. International Institute for Muslim Unity and International Islamic University Malaysia. Vol.7. August. p. 249-250.

<sup>173</sup> Al-Qur’an. Al-Nisa. 4:3.

“Whoever has two wives and leans unduly to one of them will come on the day of judgment with half of his body leaning.”<sup>174</sup>

It compels men who are in a polygamous marriage to divide their times equally with all their wives, and also share the same levels of affection with them.

3. The man must be wise and rational. He must also be fair in even trivial matters such as food, clothing, and treatment of all his wives. A man is required to keep this level of commitment even if he is ill. This is being clarified by the actions of Prophet Muhammad (s.a.w) as testified by his wife Aishah:

“Allah’s messenger would visit all of his wives when he was sick and would ask them where he shall be tomorrow”.<sup>175</sup>

When it became challenging for the Prophet (s.a.w) to relocate, he asked for their permission to be with Aisha. It was related that:

“when Allah’s Messenger was ill, he called all his wives together and said, “verily, I am no longer able to visit all of you, so, if you do not mind that I remain with Aishah, please allow me to do so.”<sup>176</sup>

This shows that if a husband wants to spend more time with one wife, the other wives need to give their consent.

Polygamy is often a complicated aspect of marriage issue in Islamic countries where communal welfare supersedes individual ones (women). Throughout Afghanistan, polygamy is normally viewed as being a right of a man, but its practice makes it highly undesirable, and the call to be abolished. Nowadays, women organisations often attempt

<sup>174</sup> Abu Dawud. *Sunan Abi Dawud*. n.d. Vol.2. No 2128. p.572.

<sup>175</sup> 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, 144. p, 107.

<sup>176</sup> Abu Dawud. *Sunan Abi Dawud*. Vol.2. No 2132. p.573.

to hide it for its existence. This approach is flawed and instead of hiding it, they should attempt to synchronise it with the current lifestyle and see how it can help Afghan society.<sup>177</sup>

The best example of those who practiced polygamy was the Prophet Muhammad (s.a.w), at the beginning he married only one wife Khadijah, and after her death, he married widows and took their children in as his own, and raised them under his care. These children were either war orphans or were in desperate need of parental attention. That is why the Prophet (s.a.w) married these widows because it proves that one of the reasons permitting polygamy is the need of parental care for orphans, as stipulated in the Qur'an. The Prophet (s.a.w) also said:

“A woman maybe married for four reasons: for her property (wealth), her rank (lineage), her beauty and her religion. However, you should marry the one who is religious and you be satisfied”.<sup>178</sup>

However, it is believed that the reasons for men taking second wives in Afghanistan have much to do with beauty and wealth; spirituality is seldom a deciding factor. The aforementioned conditions are actually almost impossible to fulfil in Afghanistan, as the women themselves do not seem aware of their own rights.

### 3.3 Elements of Polygamy under the Afghanistan Law

Polygamy and its particular condition are vividly described in holy Qur'an, Hadith, and Civil Code of Afghanistan in many situations. But in Afghanistan, women are risking

<sup>177</sup> Abu Ameenah Bilal Philips & Jameelah Jones. 2005. *Polygamy in Islam*. Saudi Arabia: International Islamic Publishing House. p. 85.

<sup>178</sup> Abu Dawud. *Sunan Abi Dawud*. Vol.2. No 5445.

their lives by simply entering into polygamous marriages. As mentioned over and over again, consent does not seem to be of concern in Afghanistan. It was also mentioned that marriage requires the consent of the woman in question, and in polygamy, a husband who is taking a second, third, or fourth wife will require the consent of the preceding wives. The next section analyses three factors; the first one is for men intending to practice polygamy, while the second involves woman consent in allowing husband to marry, and the third one woman being married to a married man.

### 3.3.1 Elements related to Man's Polygamous Practices in Afghanistan

In Afghanistan warlords are particularly fearful, and this fear had caused some families to give their daughters to these warlords. Ironically, most of these warlords are married more than four times despite the prohibition of that in Islam. In order to get away from this prohibition, a warlord would divorce one of his wives and wed another that catches his fancy. This is exemplified in the case of a commander in Bamyan province, where upon spotting a local girl, ordered his soldiers to kill her husband, and forcibly married her. He covered all his current wives into giving him consent, and the family of the girl were also forced to consent to the marriage. Power along with duress plays a tremendous role in oppressing families to accept polygamous marriages.<sup>179</sup> This occurs through the followings:

- Lack of rule of law. In places where rule of law is scarce, the most powerful local chieftain is the law, and they will usually act in a manner they prefer.

<sup>179</sup> This case has been personally witnessed by the author when he was studying in a university in Afghanistan.

- Factor of tribal influence. There are many tribes within the Afghan societies, and each tribe has a lord. These lords use their positions to force families to hand over daughters to them or whomever they choose for marriage.
- Wealth and strong economy can make men marry several times. Most of the men that have married for the second occasion cited the reason of being financially established. For illustration, Adullah Shafiq from Herat province explained, "I am thankful to God that I have wealth and can afford everything involving my wives and children daily expenses."<sup>180</sup>

Determined by what is mentioned above, and according to Article 86 of the Civil Code of Afghanistan, it can be inferred that mere strong economic feature without other conditions being fulfilled is not sufficient to justify polygamy. A man should be compelled to provide a valid reason for taking a second wife. The unsuitable traditions are profoundly involved in a number of marriages. The custom itself can be directly considered as one of the elements of polygamy. As an example, if parents selected an illiterate bride for their educated son, the son still has to abide by the wishes of his parents simply because of obedience. It is considered that this may no longer be the case in the nearby future, where men would yearn for wives of the same education level. This is also prevalent in certain tribal customs, where Afghan men take second wives to fulfil tribal obligations. Reports are rife with cases where men compete along tribal lines, which have affected lives of individuals. These competitions involve men being compelled to take

<sup>180</sup> Abdullah Shafiq. Shopkeeper of Herat province Afghanistan, (interviewed via Skype from Malaysia). 20 March 2013.

second wives simply because someone from another tribe has done so. Some might even attempt to go further, by taking third or fourth wives.

On this issue, the researcher had conducted interviews in order to explain this better, based on the opinions of men who are married more than one wife. A person from Balkh province explained, "My partner was unwell, so I married another woman, my step-brother imitated me and married a second wife as well. When I saw him getting married for that second occasion, I got married for the third occasion."<sup>181</sup> Single Afghan women are terrified by this competitive behaviour and they are hoping that they will be rescued from this fate before it befalls on them. Generally speaking, men who took second wives regretted their decision as they face numerous problems. This is due to the fact that such marriages are vulnerable and are wrought with traditions and customs. A person from Jewzijan province explained, "I loved a woman and got engaged to her. My brother died while doing so, and I was coerced by my father and elders to marry the widow of my brother. I should say, that my personal sister-in-law is apparently 15 years older than I am. I had absolutely no way but to marry her."<sup>182</sup>

It is ascertain that failure of a wife to reproduce can be a reason for a husband to take a second wife. In some extreme cases, a husband might also kill a wife for not being able to bear a son. For example, a woman in north-eastern Afghanistan was arrested for allegedly intending to strangle her 22 years old daughter-in-law for becoming pregnant with baby girl. The husband is suspected to be involved as well, but fled before he could be arrested. The son was a soldier in a local militia, and is currently enjoying an unlimited

<sup>181</sup> Interviewed via Skype at 5:00 p.m. Malaysia time to Afghanistan by the author. 10 October 2013.

<sup>182</sup> Ibid. Interviewed on 25 October 2013.

political support. Militia groups enjoy political patronage, and are perpetrators who commit abuses, robberies, and extortion. Local villagers claimed that he frequently abused his wife. This case occurred in Kunduz province. The new born girl was fortunately unharmed; Kunduz police chief, Sufi Habib, told the BBC that:

“The mother gave birth to a third girl two months ago. The husband and mother-in-law strangled her for giving birth to a third daughter.”

The Director of Kunduz Women's affairs, Nadira Gya said "it has been a ferocious crime dedicated against an innocent woman". Local and tribal elders from the district condemned this killing, saying it turned out a work of ignorance, and as a crime against Islam, humanity, and women's right. They also called for immediate punishment.<sup>183</sup>

Unfortunately, the birth of a boy is a cause of celebration in Afghanistan, while a girl is seen as a burden. Some wives in Afghanistan were abused due to their failure of bearing sons. In a traditional Afghan home, not having a son is an extreme burden. There is a saying: “*dar khanai k pesar na basha o khana tarik ast*” which connotes that a “family with no son is actually home without light”. This proverb outlines the worth of a son to a family and therefore in such a case the family would usually opt for a second wife who may be capable of delivering them a son.

These are tragic signs of gender discrimination that is widened in Afghan society, regardless of urban or rural communities. This discrimination is ingrained into the society's mind set, and is present in almost all phases of life. Women in Afghan society are being abused from day one in their families' houses to the house of their in-laws. Due

<sup>183</sup> Bilal Sarwary. 30 Jan 2012 . “*Afghan woman is killed 'for giving birth to a girl'*”. Accessed 13, March 2013. <http://www.bbc.co.uk/news/world-asia-16787534>.

to the lack of medical understanding, men tend to put women's barren status on the wives and not the husbands. An interviewed with Doctor Jamila Saighani, she explained about the reasons that determine as to whether a woman is to give birth to a baby girl or boy:

“Humans are made up of 23 pairs of chromosomes, these chromosomes are vital or even somatic, and with one of them being the sexual chromosome. The sexual chromosomes in men are termed XY, while for women, its XX. If a mother contributes an X chromosome and the father contributes an X chromosome as well, the child will be female, and if one of the parents contributes a Y chromosome, the child will be a male. This simple explanation goes to show that it is not completely the fault of the wives if they could not bear a son.”<sup>184</sup>

All of the elements being discussed in this context are contradictory to both Islamic jurisprudence and Afghan Civil Code. The Civil Code permits childless men to take second wives, but even then, certain terms and conditions needs to be fulfilled prior to doing so.

Predominantly, childlessness is another deciding element for men to be married for the second time. A man is permitted to take a second wife if the first is barren.<sup>185</sup> This is recognised in the Afghan Civil Code, where it authorises men who are with barren wives to take second ones, when the first wives are childless or when suffering from diseases which are hard to be treated.<sup>186</sup>

The question that comes from this is how the barrenness is to be determined. Due to the shortage of medical facilities and the doubt of a patriarchal society, the benefit of the

<sup>184</sup> Jamila Shaighani. Experts Doctor of Obstetric of woman. (Skype interviewed by author from Malaysia). 25 March 2013.

<sup>185</sup> Donald Newton Wilber. 1962. *Afghanistan: Its People, Its Society, Its Culture*. New Jersey : HARF Press, Princeton,. Volume, 11. P 92.

<sup>186</sup> Art 86. Afghanistan Civil Code. 1977.

doubt frequently edging the husband; there are no prenuptial medical check-ups required in Afghanistan, and the marriage certificate does not require any sort of medical certificate to be provided. It is also not a requirement where medical doctors are scarce. Women afflicted with diseases that cause barrenness face particular challenges, as their husbands can exploit their illness to marry for the second times. There are some husbands in spite of getting financial help from the state to treat their wives; they will use these monies to get marry elsewhere.

This is nearly a common practice, with all Afghan men being interviewed admitted to doing this, despite the fact that their wives illnesses are perfectly curable. It should also be pointed out that 30 per cent of women lost their lives because of this. This serves to highlight the lack of attention that women receive when they suffer from minor treatable diseases.<sup>187</sup> Another inhumane local practice seen nowadays throughout the Afghan society is referred to as a crook marriage. Statements from witnesses in Kabul said that a man after a few years of childless marriage would normally negotiate with his first wife to marry for the second time, and when the second wife delivered a baby, the man divorced her and kept the child with himself.<sup>188</sup> It is a kind of persecute that women in Afghanistan are undergoing.

### 3.3.2 Women getting married with a Married Man

The Afghan women play a specific role in arranging the marriage. The Civil Code of Afghanistan considers the contentment of couple to be one of the basic conditions for the

<sup>187</sup> Women and Children Legal Research Foundation. 2006. *Research Report Polygamy in Afghanistan*. p. u.

<sup>188</sup> Personal observation of Prof. Dr. Sayed Sikander Shah Haneef, lecturer at Kulliyah of IRK, IIUM, Malaysia, interviewed on 11<sup>th</sup> November 2012.

arrangement of marriage. For the proper contract of marriage the observance of the following terms are required:

- 1- Offer and acceptance should be affected correctly by the parties to the contract or by their guardians;
- 2- Presence of two witnesses; and
- 3- Non-existence of permanent or temporary legal prohibition between the man and the woman.<sup>189</sup>

If one of the couple shows unwillingness, the marriage is considered void. However, the reality is that despite these codes and laws are in place, however in practice, many forms of forbidden marriages are still being practiced in Afghanistan. Some of the situations compelling women to give consent to second wife are discussed below:

1. The consent of a woman was simply not asked for; in other words, forced marriage, such as *baad* (retribution of a woman for a murder, to restore peace), marriage in childhood, *baaddal* (exchanging of daughters), and marriage of widows to her husband's family members, as already discussed in Chapter Two.
2. Where women consent to marrying a married man due to desperation. Studies have highlighted the fact that the most significant element behind polygamy in Afghanistan is the lack of centralisation of the family. Other elements, for instance economic difficulties, and conventional practices make women vulnerable instead of independent. Also, girls do not possess economic independence in many parts of Afghanistan.

<sup>189</sup> Art 77. Afghanistan Civil Code. 1977.

Meanwhile, many girls are seen as burdens by their relatives, and also have to deal with massive limitations on the account of the lack of association with parents. Consequently, they are forced to marry a married man. This is due to the lack of presence of the parents. There are other sorts of situations that force women to marry in this situation. Lack of mother cause problems such as misbehaviour of having a step-mother, lack of attention from the father, as well as deprivation from the father's favour, cause girls to want to marry a married man, especially when only the mother is still alive, as this will help them both financially as well.

The absence of parents in a single parent household has negative impacts on child development in Afghanistan, especially, in education, custody, and health. The EVAW considers the following acts as violence against women: battery and laceration,<sup>190</sup> harassment or persecution,<sup>191</sup> prohibiting access to education,<sup>192</sup> and marrying more wives without the observance of article 86 of Civil Code.<sup>193</sup> This is substantiated by Article 35 of the EVAW which says:

“If a person who prohibits a woman from the right of education, work and exercising her other rights as provide by law, considering the circumstance the offender shall be convicted to short term imprisonment not more than 6 month.”<sup>194</sup>

Unawareness of a suitors' marital status is certainly a point of contention. As it is required by law in Afghanistan that, a woman must be made aware of the suitors' status

<sup>190</sup> Art 5 (7). EVAW law. 2009.

<sup>191</sup> Ibid. Article 14.

<sup>192</sup> Ibid. Article 19.

<sup>193</sup> Ibid. Article 20.

<sup>194</sup> Ibid Article 35.

as a married man prior to entering into a marriage contract with him, but in practice, it is not always the case. The Afghan Civil Code states that:

“During a marriage, when a person conceals his previous marital status from the newly wed-wife, and does not secure the clear consent and agreement of his wife, in the case where she contends to not continue living with the husband, she can demand divorce from the court in accordance with the provision of article 183 of this Civil Code.”<sup>195</sup>

For the polygamous marriage, the Civil Code states that:

“A person who marries with more than one wife without the observation of the provision of Article 86<sup>196</sup> and 89<sup>197</sup> of the Civil Code, he shall be sentenced to short term imprisonment of not less than 3 months.”<sup>198</sup>

Practically, the findings indicate that the percentage of men marrying without informing their second wives about their current marriage status is about 35 per cent.<sup>199</sup> This percentage is still increasing instead of decreasing because the economic problems play a powerful role in persuading women to marry a wealthy married man. Low financial stance forces poor people families to offer their very young daughters for marriage to a married man with the implicit promise of ensuring the daughter's financial welfare. Also, women who consent to marry some of rich men, normally hope that by sacrificing their lives, they could alleviate the suffering of their immediate families.

<sup>195</sup> Art. 89. Afghanistan Civil Code. 1977.

<sup>196</sup> When the first wife is childless or when suffering from diseases which are hard to be treated.

<sup>197</sup> During a marriage, when a person conceals his previous marital status from the newly wed-wife, and does not secure the clear consent and agreement of his wife, in the case where she contends not to continue living with the husband, she can demand divorce from the court.

<sup>198</sup> Art. 38. EVAW law. 2009.

<sup>199</sup> Women and Children Legal Research Foundation. 2006. *Research Report Polygamy in Afghanistan*. Kabul Afghanistan. p. hh.

Here are a few cases associated with women who consented to marry a married-man due to economic considerations. A lady from Parwan province was interviewed and she said:

“our father did not have money to solve our financial problems. We could only have meal one time a day and would stay hungry the rest of the day. Therefore, I married a rich married man, who promised to assist my father.”<sup>200</sup>

Another woman from Ghazni province was interviewed and she quoted:

“My father was old and I was the only younger girl in my family. I was compelled to marry a rich married-man; since I wanted to help my father.”<sup>201</sup>

A lady from Herat also said:

"After the death of my husband, I had three children. All of them young and only one of them used to go to school. I could not send him to school because I did not have money. At the time, I never wanted him to remain uneducated. I was worried about their future and no one to assist me. I had to marry a married-man who pledged to pay for my children's expenses.”<sup>202</sup>

The threat of divorce is additionally on the list of elements that will attract the particular consent of wives. Wives are compelled to permit their spouse to marry a second wife in order to avoid their husbands from divorcing them.

### 3.3.3 Women's Silence on the Husband's second Marriage

The research indicates that most women do not consent for their husbands to take second or several wives. In other words, the husband, without having the consent of their

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid

wives, decides to marry a second, third, and fourth girl. This issue is specifically being addressed under Article 87 Civil Code of Afghanistan, as it notes:

“A woman, whose husband has married contrary to the provisions of Article 86 of this Civil Code, can demand divorce from the court in accordance with the provisions of Article 183 of Civil Code on the grounds of separation caused by damage or loss.”

The awareness of the wife regarding the husband’s second marriage is one of the preconditions of polygamy. However, in practice, the wives remained quiet due to the following reasons:

1. Majority of women in Afghanistan are not aware of their simple rights with regards to the one mentioned under the Civil Code; as they are deprived of basic education.
2. A number of women are familiar with their protection under the law, but on the account of weak judicial system, and other bureaucratic obstacles within the courts, they chose not to pursue any matter.
3. Due to stresses endured from the ruling community, contacting the particular court is regarded as a shame and a disgrace, particularly for women, and due to this, women usually do not contact the courts in order to vindicate their rights.
4. Fear of their spouses and their in-laws, and fear of being dishonoured are also contributing factors as well.

This study indicates some other significant reasons that add to the silence of women in terms of the second marriage of their husband to be as:

- i. Anxiety about divorce. Since divorce is generally deemed a cultural disgrace, the loved ones and family members on each side are likely to accept polygamy to be a last resort as an alternative to seeing the particular marriage dissolve.
- ii. Anxiety about the future of their children custody. They are afraid that they would not be given their children custody in case of divorce.
- iii. Financial instability. Because women mostly rely on their husbands to cover their expenses, but if they are being divorced, they risk losing all financial supports that are expected to be given by the husbands.

Meanwhile, the unprecedented needs and standards of living make impartiality amongst several wives and children very hard to keep. Conditions associated with life changes as a result of various stages of all time. While the basic principle of Islam is usually kept, they need to interpret it within the light of new socio-economic problems is noticeable. Islam helped polygamy for the protection of women and their substance. Yet polygamy within this country is practiced, especially among the elites in such fashion of being detrimental to the rights and interests of women.

What the researcher finds about conditions related to polygamy revolves around justice, which is regarded as one of the major problems. It is impossible to find a man who has been able to behave accordingly in respecting the rights of his wives. For example, the Civil Code provides that if a person has more than one wife, he cannot force

them against their consent to reside in a single residence.<sup>203</sup> Yet, it is hard to find a man in Afghanistan who has more than one wife and provide them separate residence.

### 3.4 Divorce in Islam

Divorce is often termed as *talāq*, which means “repudiation.” The term *talāq* is an Arabic word originating from the root word *tāliqa*, meaning to release someone from an obligation. The word implies that a spouse is discharged from its spousal duties, either through legal or repudiation means.<sup>204</sup>

Women are mentioned frequently in the Qur’an, mostly in a respectful and positive manner. It mentions that women should be treated with kindness and equity, unless they have been guilty of open lewdness. The Qur’an also says that man and woman are created to live as wives and husbands in love, harmony and peace. Muslim women must be treated properly within the relationship, and are afforded many rights. If the husband mistreats her, she has the right to seek redress. She is not trapped in an oppressed relationship as a result of the religion; but, it is the culture and traditions that bind her.

#### 3.4.1 Forms of Divorce in Islam

Under the Islamic law, there are various categories of divorce which are:

1. *Talāq al-Sunnah*. This is a type of divorce that is in consonance with the Prophet’s teachings. Basically, *Talāq al-Sunnah*, is usually further split into two categories:

<sup>203</sup> Art, 116. Afghanistan Civil code, 1977.

<sup>204</sup> John L. Esposito and Natana J. Delong-Bas. (2001). *Women in Muslim Family Law*. p.28.

i. *Talāq al-Ahsān*: would be an appropriate and classical type of divorce, this contains a single pronouncement of divorce made after a period of menstruation followed by abstinence from sexual activity for the time scale of *'aiddah*.<sup>205</sup>

Allah (s.w.t) says to the effect: “Their husbands have the right in the meantime to take them back, should they seek reconciliation”.<sup>206</sup>

The *ahsān* divorce is most approved form because of the kind and fair treatment given to the wife. Her period of suspense is not prolonged, and because there has been only one pronouncement of divorce, there is no prohibition against remarriage of the parties. In addition, if the husband or wife dies during the period of *'aiddah*, the partner still inherits from each other.<sup>207</sup>

ii. *Talāq al-Ahsān*: it is also an approved form of divorce, although to a lesser degree than *ahsān*, because it follows the releasing, but not the spirit of the Prophet’s injunction.<sup>208</sup> It consists of three pronouncements made during successive period among menstruation, and no intercourse taking place during any three periods of menstruation.<sup>209</sup> The third pronouncement is irrevocable to prevent the practice from divorcing a wife and then taking her back several times in order to induce her to purchase her freedom by relinquishing her dower, or making some other financial sacrifices.<sup>210</sup>

Allah (s.w.t) says to the effect:

<sup>205</sup> Mohammed Imad Ali. 2004. *Tribal divorce: A Critical Analysis*, in, *Islamic Family Law: New challenges in the 21<sup>st</sup> Century*, (ed), Zaleha Kamaruddin. Vol 2. Kuala Lumpur: International Islamic university. p. 134.

<sup>206</sup> Al-Qur'an. Al-Baqarah. 2:228.

<sup>207</sup> John L. Esposito and Natana J. Delong-Bas. (2001). *Women in Muslim Family Law*. P.30.

<sup>208</sup> Ibid. p.30.

<sup>209</sup> Mohammed Imad Ali. 2004. *Tribal divorce: A Critical Analysis*. p.134.

<sup>210</sup> John L. Esposito and Natana J. Delong-Bas. (2001). *Women in Muslim Family Law*. p.31.

“A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you (men), to take back anything of what you have given them.”<sup>211</sup>

Moreover, Abdullah Yusuf Ali has interpreted the aforementioned verse:

“Whereby a divorce regarding mutual incompatibility would be allowed; there may be a danger, which the parties may possibly commit and then repent, and again wish to separate. To avoid such capricious steps, a limit will be prescribed. Two divorces (with any reconciliation between) are allowed. Next, they must decide to either dissolve the particular union for good, or otherwise ”hold collectively on equitable terms” and come to term with each other. If ultimately deciding to separate, both parties should do so amicably, and in accordance to what is laid out in this scenario. Such rules include the fact that a man, under no circumstances is allowed to request for the return of marital or conjugal gifts given to the wife in the course of the marriage, unless it is explicitly agreed to by the wife. This is mostly due to the fact that these gifts can be used to support the wife economically during the waiting period after her divorce.”<sup>212</sup>

The Civil Code of Afghanistan confirms this particular practice by simply enacting that each and every *talāq* will be revocable:

“In general, divorce is *raj'ie* (return-divorce) and in the following it is *ba'in* (distinct-divorce).<sup>213</sup>

- 1- Third divorce.<sup>214</sup>
- 2- Divorce granted prior to copulation.
- 3- Divorce given against.<sup>215</sup>
- 4- Divorce recognized as distinct divorce in this law.

2. *Talāq al-Bid'ah*. This type of divorce does not follow the Prophet's teaching.

Meanwhile, the *Talāq al-Bid'ah*, could be further categorized into a pair of categories:

<sup>211</sup> Al-Qur'an. Al-Baqarah. 2:229.

<sup>212</sup> Abdullah Yusuf Ali. 1989. *The Holy Qur'an, Text, Translation and commentary*. India, Kutub Khana Isha'yatul Islam. p. 92.

<sup>213</sup> Art ,146. Afghanistan Civil Code 1977.

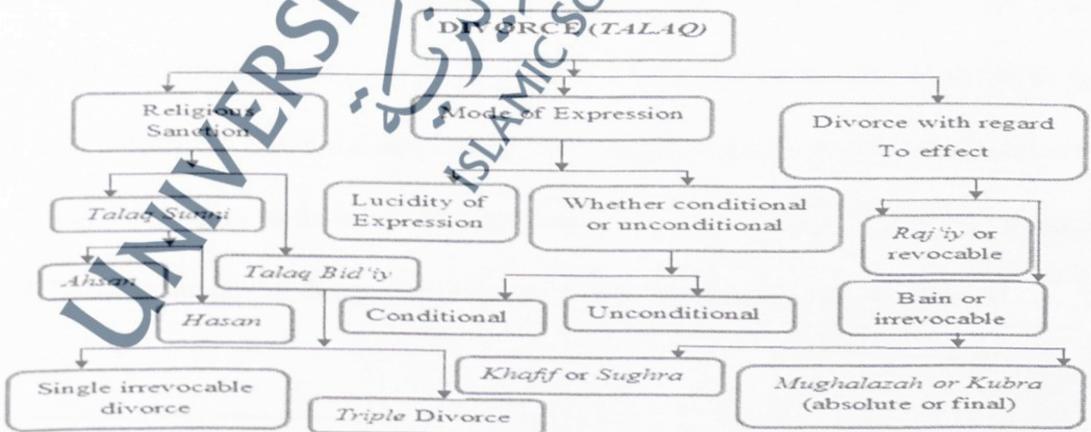
<sup>214</sup> The third divorce, that is a divorce following two separate pronouncements made in two clean periods.

<sup>215</sup> The wives who cannot bear staying home with their husbands are provided with the right to free themselves from their marriages by returning dower and gifts given to them by their spouses, it is also called *Khul'a*.

- i. Single irrevocable divorce proceedings.
- ii. Triple Divorce.

Unlike the two approved types of divorce, the two disapproved types (*Talāq al-bid'ah*,) do not allow for the opportunity to reconsider any possible capricious, as well as hastily made decision. Nonetheless, the way of divorce is often conducted by the people of Afghanistan, and is not going to reflect the particular Islamic law and Afghanistan Civil Code, as they are hasty divorce proceedings. The aforementioned divorces are valid, but disapproved, as well as considered sinful within Islam. In contrast, the Civil Code approved this practice by abolishing triple *talāq* altogether and enacting that every *talāq*; regardless of the words or numbers, which may be used therewith, shall effect a single (but revocable) *talāq* only.<sup>216</sup> The diagram below presents each form of divorce obtainable in Islamic law. This will be divided into three types: first are kinds of divorce; second would be the mode of expression; and the third the issue of these divorces:

DIAGRAM 3.1: FORMS OF DIVORCES UNDER ISLAMIC LAW<sup>217</sup>



<sup>216</sup> Art.145. Afghanistan Civil code 1977.

<sup>217</sup> Ahmad K.N. 1978. *Muslim Law of Divorce*. New Delhi: Kitab Bhavan. p.62.

### 3.4.2 The Wisdom of Divorce in Islam

When a marriage is deemed incompatible or inharmonious, the first thing that comes to the couple's mind is divorce. Divorce should not be the first step in a failed marriage, but might be inevitable if both parties feel that they cannot live as a unit under one roof anymore. Islam recognizes this need, and will not attempt to force an ailing marriage if both parties are unwilling to do so; then Islam secures its smoothness and fairness.<sup>218</sup> Allah (s.w.t) says to the effect:

“...and as for those women on whose part you fear stubbornness, (first) admonish them; then refuse to share their beds; and (finally) beat them (lightly). Then if they return to obedience, do not seek for away against them; indeed, Allah is Most High, Great. And if you fear breach between the two of them, appoint an arbiter from his family and arbiter from her family. If they desire to set things a right, Allah will bring about reconciliation between them; indeed Allah is Most Knowing, Most Aware.”<sup>219</sup>

As explained previously, a pair of marriage is often a strong bond by using which Allah (s.w.t) joins a man and a woman. While they are singles at the early stage of their lives, they are termed as couples after marriage. Marriage makes them a pair, and thus the sorrow and joy of the one are equally the sorrow and joy of the other. Allah (s.w.t) describes this connection in graceful language: “...they (wives) are your garments so you are their garments.”<sup>220</sup> On the other hand, Islam discourages divorce, but it also allows it as a way for couples to dissolve their unbearably broken marriages. The Prophet (s.a.w) said, “Among the lawful things that is the most detestable to Allah, is divorce.”<sup>221</sup>

<sup>218</sup> Fathi Osman. 1997. *Concept of the Quran: A Topic Reading*. Kuala Lumpur: ABIM, p.818.

<sup>219</sup> Al-Qur'an. Al-Nisa. 4:34-35.

<sup>220</sup> Al-Qur'an. Al-Baqarah. 2:187.

<sup>221</sup> Abu Dawud, *Sunan Abi Dawud*, Kitab al-Talaq, vol, 5. p. 586.

### 3.4.3 Rights of Wife to Obtain Divorce under the Civil Code of Afghanistan

Marriage is designed to be a good harmony associated with love, closeness, mutual treatment, and companionship. The moment these goals fail, Islam provides vast avenues for wives to separate from their husbands. There are many grounds under which women can ask for separation. According to Afghan Civil Code, “divorce is the dissolution of the conjugal relationship between husband and wife that may occur at the present or future by explicit or implicit statement. Divorce can be considered by a husband or a competent court through request of wife.”<sup>222</sup> Based on second paragraph of Article 135 of the Civil Code, women cannot simply abandon parity relationship, but she has to recourse to the court, and the court will take action if they find that the woman’s demand for divorce is legal. Furthermore, Afghanistan Civil Code provides three primary avenues where a wife may acquire a divorce:

1. *khul'a* (repudiation from the wife).
2. *Fasakh* (judicial dissolution of marriage).
3. *Tafriq* (separation due to a defect).

In addition, the Civil Code of Afghanistan addresses these concerns by noting that:

“In case her husband marries one more women without her consent she could possibly get her divorce proceedings.”<sup>223</sup>

This condition would probably be valid if it is a written decrees in marital life deed. Women’s decision regarding marital life and divorce proceedings remains circumscribed by simply custom as well as discrimination.

<sup>222</sup> Art,135. Afghanistan Civil Code, 1977.

<sup>223</sup> Ibid. Art, 88.

### 3.4.3.1 *Khul'a* (repudiation by the wife)

The wives who cannot bear staying home with their husbands are provided with the right to free themselves from their marriages by returning dower and gifts given to them by their spouses.<sup>224</sup> Based on traditional *Fīqhah*, *khul'a* allows a woman to begin a divorce from the mutual consent with her husband, or possibly a judicial decree. Nonetheless, differing interpretations associated with *khul'a* exist across the Islamic jurisprudence on the compensation, consent of the husband, role of the court, and the Civil Code of Afghanistan. Allah (s.w.t) says to the effect:

“...and if you (the judges) fear that the two may not be able to keep the limits ordained by Allah, there is no blame on either of them if she redeems herself (from the marriage tie by returning all or part of the *mahr*”).<sup>225</sup>

As outlined by Abdullah Yusuf Ali, in such exceptional situations, it will be permissible to provide some substantial considerations to the husband, but the need for this should be subject to the ruling of the court. The renowned story of *khul'a* was the story of Jamilah, the wife of Thabit ibn Qays.<sup>226</sup> As Narrated by Ibn Abbas, the spouse of Thabit ibn Qais came to the Prophet (s.a.w) said,

" O Allah's Apostle! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner if I remain with him." On that Allah's Apostle said to her, "Will you give back the garden which your husband has given you as *mahr*?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once."<sup>227</sup>

<sup>224</sup> Yusuf al-Qaradawi. 2001. *The Lawful and The Prohibited in Islam*.p. 218.

<sup>225</sup> Al-Qur'an. Al-Baqarah. 2:229.

<sup>226</sup> Julie, Macfarlane. 2012. *Islamic Divorce in North America: A Shari'a Path in a Secular Society*. Oxford: Oxford University Press. p.34.

<sup>227</sup> 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, 197. p.150.

Most Islamic jurisprudence agrees that a husband is not entitled to more than the initial level of dower (*mahar*) that was provided to the wife. However, some interpretations suggest that the spouse is entitled to a better compensation, while other interpretations suggest that the husband is not entitled to any compensation.<sup>228</sup> Theoretically, *khul'a* demands that the dower (*mahar*) be returned, along with any marriage gifts. The Muslim jurists consider this law to be applicable if the husband is not at fault. Men occasionally prefer to pressure their wives to help demand *khul'a* instead of pronouncing *talāq*, so as to they could easily demand back the return of the *mahar*.

Another circumstance that frequently arises within *khul'a* is when the husband will request an unreasonable fiscal compensation. This can effectively limit her seeking *khul'a*, because they have no ways to financially support her by losing her *mahar* and other wedding “gifts.”<sup>229</sup> In regard to the consent of the husband, four *Madhab* agree that husband's agreement is often a basic treatment and essential to the allowing of divorce proceedings, unless in extenuating situations. While this can be a prevailing interpretation, other interpretations suggest that the husband does not have to consent in the event where the divorce are valid, such as *darar* (cruelty), impotence (if undisclosed to the bride at the time of marriage), as his unwillingness to consent to the divorce. In addition, if any husband cannot provide the wife with basic spousal obligations, like

<sup>228</sup> Asghar Ali, Engineer. 1992. *The Rights of Women in Islam*. New York: St. Martin's Press. p.137-8.

<sup>229</sup> Macfarlane. 2012. *Islamic Divorce in North America: A Shari'a Path in a Secular Society*. p.195-6.

shelter as well as maintenance, a wife may be granted *khul'a*.<sup>230</sup> Moreover, if a woman is underage, then consent have to be given by the guardian.<sup>231</sup>

The role of courts varies according to the jurisprudence, depending on the type of *talāq* (husband's repudiation of the marriage) and judicial annulment. If the husband refuses to grant a divorce, then the wife can approach a mediator, such as an *imam*. The only person who is able to grant *khul'a* regardless the husband's consent is the *Sharī'ah* court judge. When the case for *khul'a* has taken place, a decision is granted to the spouse and the annulment is effective. The judicial annulment of *khul'a* is known as *fasakh*, which typically occurs in the event of the husband refusal to consent to the wife's request of divorce.<sup>232</sup>

Prior to the introduction of the Civil Code, Afghanistan has been governed by Hanafiyy *Madhab*. The particulars of the wife will be of significance within Hanafiyy *Madhab*, due to the fact that under this particular *Madhab*, *khul'a* can easily be obtained without the husband's consent. Under Mālikiyy *Madhab*, the right of the wife to "*khul'a*" is flexible and the husband's consent is not a precondition.<sup>233</sup> The Civil Code of Afghanistan has adopted the Mālikiyy *Madhab* with regards to *khul'a*, it provides that:

1. Deposit (*khul'a*) underneath the Civil Code would be the dissolution of the marriage contract in return of the property that the wife may offer to

<sup>230</sup> Engineer. 1992. *The Rights of Women in Islam*. p.137-8.

<sup>231</sup> Jamal J. Ahmad, Nasir. 2009. *The Status of Women under Islamic Law and Modern Islamic Legislation*. Netherlands: Brill. p.131.

<sup>232</sup> Judith E, Tucker. 2008. *Women, Family, and Gender in Islamic Law*. Cambridge: Cambridge University Press. p.97-99.

<sup>233</sup> Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and the Judiciary*, p.170.

the husband. 2. Deposal shall take place either by explicit or by other implied words, which may impart the meaning of *khul'a*.<sup>234</sup>

A house will also be accepted as an alternative to deposal (*khul'a*), along with some sort of agreement regarding the children. It should also be pointed out that in *khul'a*, maintenance is still part of the deal, unless explicitly stated otherwise.<sup>235</sup>

#### 3.4.3.2 *Tafriq* (separation due to a defect)

In the Hanafiyy *Madhab*, a wife is only entitled to a judicial annulment (*fassakh*) with her marital life if her spouse is incompetent in consummating the marriage, or he went missing, or turns at 90 years old. Moreover, the Mālikiyy *Madhab* entitles a wife to a judicial dissolution on the grounds of a husband's critical illness, his failure to take care of her, violence, or desertion.<sup>236</sup> These are precisely factors that are also recognised under the Afghan Civil Code. On top of that, in order for this to take place, a husband has to be absent for a total period of 4 years from home, or in some cases, being sentenced to prison for more than 10 years.

- i. For *tafriq* (separation due to a defect) based on incurable illness: The Afghan Civil Code declares:

“The wife can demand separation when the husband is a victim of an incurable illness, or illness which requires long time to cure and when the wife intercourse with him turns out to be completely detrimental”.<sup>237</sup>

In the event, if the defect (illness) is such that recovery would be impossible, the court shall have a verdict on the separation of the couple without delay. If the diseased is

<sup>234</sup> Art. 156. Afghanistan Civil Code, 1977.

<sup>235</sup> Ibid, 1977. Art. 158, 169, 198.

<sup>236</sup> Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and the Judiciary*. p. 160.

<sup>237</sup> Art. 176. Afghanistan Civil code, 1977.

recoverable, yet it would take long time to treat it, the court shall postpone the demand for separation for a period of not more than one year.<sup>238</sup>

In the case of *Muhammad Roozi v. Razia*,<sup>239</sup> the plaintiff Razia who was married to Roozi, filed for separation. While concealing his illness from his wife, it became apparent that Roozi was suffering from an incurable illness “not acquiring sexual ability” and this was confirmed based on medical tests. However, the defendant did not accept the court’s decision, and claimed that the judge neglected to take into account Article 114.<sup>240</sup> On the appeal, the court ruled in favour of the plaintiff and held the previous ruling that separation was necessary because the marriage appears to be detrimental.<sup>241</sup>

ii. For *tafriq* (separation due to a defect) based on harm (*darar*): If the wife alleges that the cohabitation with her husband is injurious to her in such a way that would make it impossible to continue their marriage relationship, she may request the court for a divorce.<sup>242</sup> The subsequent articles entitle the wife to a divorce within injurious situations that she can prove, or based on her insistence that it is true. In the event where the alleged harm is shown and reconciliation between spouses appears impossible, the court is to order an irrevocable divorce, effective immediately, in the form of a single *talāq*.<sup>243</sup>

<sup>238</sup> Ibid, art, 179.

<sup>239</sup> Decision No. 14/64. 1/7/1390 (2010), Cassation Court for Personal status of civil division of appeal, Kabul province (translated by the writer from written record of Dari).

<sup>240</sup> If the defect of the husband is not removed within one year, the court shall by taking into account the provision of Article 179 of Civil Code order separation between the husband and wife.

<sup>241</sup> NO 14/64, 27/4/1390 (2010)

<sup>242</sup> Art. 183. Afghanistan Civil Code, 1977.

<sup>243</sup> Ibid, Art, 184.

In the case of *Gul Ahmad v. Sabirah*<sup>244</sup>; Sabirah filed for a divorce because of her husband mistreating behaviours towards her and the horrendous suffering she endured. The court ruled to separate Gul Ahmad and Sabirah on the basis of causing harm (*darar*).<sup>245</sup>

Meanwhile, where the wife's allegation of detrimental treatment cannot be proven but she insists that this was the case, the court is to appoint two arbitrators to try to reconcile between the spouses.<sup>246</sup> The arbitrators will submit their decision to the court, which will then be adopted to form the basis of the court's conclusion. The Civil Code provides the closing alternative that:

“When the arbitrators do not succeed to effect reconciliation, or when the cause of discord is attributable to the husband or to both sides, or is not clearly ascertainable, the court shall decree a divorce. The other clause of this article basically supplies *khul'a* divorce decree is issued ordering the return by the wife, the part or the whole of dower to the husband”.<sup>247</sup>

This provision explains that causeless abuse and regular physical attack are good grounds for divorce proceedings. The majority view instead permits the wife to complain to the courts so the husband could be punished.<sup>248</sup> The Mālikiyy *Madhab* has adopted a new perspective, which is that the wife may compel the judge to penalise the spouse, or alternatively, the court can order divorce proceedings.<sup>249</sup>

<sup>244</sup> Decision No. 18/78. 8/1/1390 (2010), Cassation Court for Personal status of civil division of appeal, Balkh province (translated by the writer from written record of Dari).

<sup>245</sup> *Gul Ahmad v. Sabirah*, Personal Rank Court associated with Balkh province determined at patent No 18/78, 9/8/1389 (2009),

<sup>246</sup> Art. 185. Afghanistan Civil Code, 1977.

<sup>247</sup> *Ibid*, Art. 186.

<sup>248</sup> An interview with Muhammad Arif Hanif, member of judge committee of Balk province's Court, via Skype at 3:00pm Malaysian time in Afghanistan. 20 December 2014.

<sup>249</sup> *Ibid*.

iii. For *tafriq* (separation due to non-payment of maintenance), where the husband refuses to pay the maintenance when he apparently owns no property or his inability to pay the maintenance cannot be proven, the wife can demand separation.<sup>250</sup> Where the husband proves his ability to pay the maintenance, the court shall give him a suitable time, not more than three months, to pay the maintenance. But if he is still unable to pay the maintenance, the court shall order separation between the spouses.<sup>251</sup> Divorce for failure to provide maintenance is a divorce which is revocable; the husband can therefore resume the marital relationship during the period of *idda* provided that he proves his ability to support her.<sup>252</sup> Abn Qayyim al-Jawziya explained that if the husband had deceived the woman by showing himself before the marriage to be affluent and then is proven to be the opposite, then the wife can file for divorce based on the grounds of incapability of supporting her.<sup>253</sup>

iv. For *tafriq* (separation due to absence), the Civil Code provided that if the husband becomes absent without any reasonable excuse for a period of three years or more, and in case the wife suffers a loss as a result of his absence, she can demand separation from the court even though her husband may own such property from which the wife can provide her maintenance.<sup>254</sup>

In the event of his absence, the court after hearing the demand for separation will announce in writing, to the absent husband, and will fix a time so that during which, the husband must return to his family's house or ask his wife to come to his residence. Where

<sup>250</sup> Art. 191. Afghanistan Civil Code, 1977.

<sup>251</sup> Ibid, Art, 192.

<sup>252</sup> Ibid, Art. 193.

<sup>253</sup> Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and the Judiciary*. p. 187.

<sup>254</sup> Art. 194. Afghanistan Civil Code, 1977

the absent husband continues with his absence without any reasonable excuse in spite of the court announcement, or where the announcement would be impossible to reach the husband, the court, in such case, will order for separation between the couple. Moreover, if it happened to be that the husband is imprisoned for ten years or more, the wife can apply for a judicial divorce after expiry of five years regardless of whether he is able to maintain or not.<sup>255</sup>

A typical case which illustrates this problem is evident in *Public Prosecution v. Fatima*.<sup>256</sup> The plaintiff was living in Pakistan before she got married to the defendant, Syed Hakim. After their marriage, they lived together along with their three children. However after couple of years of being missing, the plaintiff filed for separation.<sup>257</sup> Eventually, the Herat Court sentenced the couple to separation based on the absence of the husband with the patent, No, 17/380, 24/1/1390, (2010). However, the public prosecutor refused to accept the verdict and appealed at the Court of Appeal. His justification was that “the defendant went abroad to work and return back home with some money so as to get goods and live together with his wife as well as children”<sup>258</sup> However, the Court of Appeal rejected the prosecutor’s points and upheld the early court ruling and called for separation due to the defendant’s long absence.<sup>259</sup>

According to Hanafiyy and Shāfi’yy *Madhahib* a lengthy absence of the husband, despite being injurious to the wife, does not entitle her to a judicial divorce proceedings;

<sup>255</sup> Ibid, Art. 196.

<sup>256</sup> *Public Prosecution v. Fatima* Case, Decision No. 17/380, 24/1/1390 (2010), Cassation Court for Personal status of civil division of appeal, Herat province (translated by the writer from written record of Dari).

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

she will be obligated to remain patient. Yet, as outlined by *Mālikiyy Madhab*, in the event where the wife suffers harm from her husband's absence, she is allowed seek judicial divorce proceedings. The amount of absence after which the spouse may get a divorce for, is three years in a row, or certain amount of years as per some *Mālikiyy* jurists. According to some *Mālikiyy* jurists, the mere absence of the husband despite having an acceptable excuse produces a valid cause for the initiation of divorce proceedings. For example, when he is serving a protracted sentence of imprisonment, she may get a divorce. The *Hanbaliyy Madhab* is comparable to that of *Mālikiyy* in this sense with the exception of the fact that if husband has a reasonable excuse for his absence, the wife may not seek a divorce.<sup>260</sup>

However, jurists have different views regarding husband disappearance, according to *Hanaffiyy Madhab*, the wife is not permitted to enter another *nikāh* until ninety years have elapsed since the birthday of her missing husband, or seventy years according to some other opinions. But according to the *Mālikiyy*, if no news of the husband's whereabouts is heard after four years, the wife is allowed to remarry. The Afghanis Civil Code has adopted the *Mālikiyy*'s perspectives, which entitles the wife to a divorce after her husband is missing for the period of four years.<sup>261</sup>

### 3.5 Problems to Obtain Divorce in Afghanistan

In Afghanistan, women within an unsatisfactory marital life generally will not initiate *talāq*, whether or not they are usually mistreated, literally abused, compelled to endure

<sup>260</sup> Muhammad Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and the Judiciary*. p.187.

<sup>261</sup> Art. 194. Afghanistan Civil Code, 1977

frequent actual and verbal neglect. Women would have little to gain no matter what the reason is, because their families would most likely not welcome them back and individuals would look down upon women as divorcees, regardless of all circumstances. This type of stigma may well affect their chances of getting remarried. If a woman desires a divorce, she must come before a judge, who will then decide whether or not she may be granted one.<sup>262</sup> The legal system additionally creates hurdles for women to accomplish this, because it needs women to provide men witnesses that can testify to the purported abuse.

Additionally, women are being financially supported by their spouses, and would have difficulties in proving their claims of abuses or mistreatments. They would also encounter difficulties in seeking divorce at courts, and would be encouraged to remain with their spouses, unless they formally files their divorce papers with the court. In some cases, judges might ask for a bribe to see their cases through. This is best illustrated by Dewa, where she told the BBC that whenever she went to court in Jalalabad city, the judge, named Zahorudin, agreed to visit her family to assist with the case. However, once there, he demanded money instead. As a radio journalist, Dewa, who was no stranger to recording devices, and as soon as the judge made clear his intentions, she stated recording the whole conversation.<sup>263</sup> The BBC Afghan Service obtained a copy of that conversation, and confirmed its authenticity. In it, the 65-year-old judge could be heard getting 20, 000 Afghanis (\$390; £240) for himself, and also another 100, 000 Afghanis (\$1, 960; £1, 215)

<sup>262</sup> J. Milivojevic. 2012. *Countries Around the World Afghanistan*. UK: Copstone Goloble library limited. p.24.

<sup>263</sup> Emal Pasarly. 12 Dec. 2012 "Afghan judge Zahorudin recorded on tape 'seeking bribe'". <http://www.bbc.co.uk/news/world-asia-20150996>. accessed 13/12/2012.

for the judge presiding over the divorce case. When Dewa refused to pay, he was heard making another offer for him to rule in her favour by marrying him; “I will pay thousands [Afghanis] available for you and handle you within gold from a toes for your forehead”. Dewa took the particular tape to the Supreme Court in Kabul, but until now, no actions have been taken against the judge. The divorce case itself remained unresolved.<sup>264</sup>

As an alternative to be protected from the authorities, women similar to her would run away to avoid the danger of becoming prosecuted on the basis of fleeing an abusive husband. However, Afghan society is more sympathetic if the relationship did not work due to a husband’s inability to perform sexually, or his infidelity. But women, who cannot bear regular physical and verbal abuses by their husbands, find it more difficult or impossible to search for legal separation and divorce, and may entertain thoughts of suicide or absconding as a means to end their suffering.<sup>265</sup>

Moreover, when a woman attempt to run away or go back to her family’s home where she can feel safe, it might not always turn out well for her, and in some cases, proves to be fatal. Some wives simply disappear, and never to be seen or heard from again. Women who seek refuge at their families’ homes face dilemmas, on one hand; they hope that their families would take them in. However, Afghan customs dictate that married women belong to their husbands, and by running away from husbands represent great shame to their families. More often, the families will compel them to return to their husbands and implore them to be patient. In some extreme cases, their families themselves might kill them in order to erase the shame they have brought upon them.

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<sup>264</sup> Ibid

<sup>265</sup> Hafizullah Emadi. 2005. *Culture and Custom of Afghanistan*. USA: Greenwood press. p.180.

The profoundly shocking practice of ladies being the subject of all forms of violence publicly or privately must end. Specialists across Afghanistan need to ensure that perpetrators connected with violence against women are delivered to justice. Violence against women is still endemic in Afghanistan and those responsible quite rarely confront justice. Not only do women face violence as a result of family associates for reasons of protecting the so-called “honour”, but also often women confront human rights abuses resulting from verdicts released by traditional, informal rights systems. These systems should be reformed, and also the police ought to prevent this kind of acts from being carried out.

Furthermore, women in Afghanistan cannot make decisions to leave marriages, and hence would have to endure beatings and physical injuries. They virtually have no one to turn to, and it is a sad fact that most women in jail in Afghanistan nowadays, are there because they attempted to escape from their abusive husbands. The Afghanistan Supreme Court orders the prosecution of women who flee because of violence and torture of their families because of force marriage. Senior government officials confirmed that it is not a crime, yet those views were never made into policy. The HRW made a request to the president to free all women in jail who were there because they fled their abusive homes. There are also cases where the husband married a wife from a different region, and after consummating the marriage, he returns to his home province, and neglects his newly married wife, which means that she is lock up and is not allowed to marry until she is divorced.

There are also some challenges on divorce under the Afghan Civil Code, which makes it difficult for women to seek divorce. According to the Civil Code, a marriage can be dissolved in four ways: *talāq* (repudiation by the husband),<sup>266</sup> *khul'a* (repudiation by the wife),<sup>267</sup> *Fasakh* (judicial dissolution of marriage),<sup>268</sup> *Tafrīq* (separation due to a defect).<sup>269</sup> Critiques point out that there are major loopholes containing these rules, which often obviate its execution in contemporary society. Some of the weaknesses of the law are, because the law states that spouses may be separated from each other either orally or on paper. And if incapable of any of these means, divorce may be effective by using signs to indicate the meaning of separation and divorce. Commonly, it may be the wife who is pleading that her estranged husband has divorced her, but still will not abide with the aftermath procedure of his *talāq*. The burden of proof will then be on the wife as she will need to provide proof to her claims.

In instances where husbands maintain separation and divorce, they are required to pronounce *talāq* every time.<sup>270</sup> The husband has liberty to effect divorce without registration.<sup>271</sup> Considering these types of difficulties, the question that arises is why the Civil Code for that matter, did not make the registration of *talāq* strictly obligatory because the husband has violated some forms of legal rules.

The three wars have devastated Afghanistan in a way that women's ability to obtain divorce has been severely compromised. Although, it would be possible to find means to

<sup>266</sup> Art. 135. Afghanistan Civil Code, 1977.

<sup>267</sup> Ibid, Art, 156.

<sup>268</sup> Ibid, Art, 132.

<sup>269</sup> Ibid, Art, 176.

<sup>270</sup> For more details see Hashim Kamali. 1985. *Law in Afghanistan: A study of the Constitution, Matrimonial Law and the Judiciary*. p. 174.

<sup>271</sup> Ibid, p. 177.

divorce, actually being divorced is regarded as *taboo* in Afghanistan, as nobody will respect her right after being divorced.<sup>272</sup> However, women are terrified of losing their children in the event of divorce, where they are only granted temporary custody if the children are still infants, and might lose that custody once they reach puberty. So, women may tolerate virtually any physical harm or any type of threat because they do not want to be separated from their children. Because of this, many women avoid separation or divorces in Afghanistan.

### 3.6 The Custody and Welfare of the Children after Divorce in Afghanistan

Since the guidelines of the Qur'an require that when couples decide to separate, it should be conducted as amicably as possible; if there are children as result of the marriage, the parents must continue to cooperate in the interest of the children.

Allah (s.w.t) says to the effect:

“The mothers shall give such to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be Treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear Allah and know that Allah sees well what ye do.”<sup>273</sup>

<sup>272</sup> Natasha Thomsen. 2007. *Global Issues: Women's Rights*. New York: Infobase Publishing. p.114.

<sup>273</sup> Al-Quran. Al-Baqarah, 2:233.

Islam explains that the parents have obligations to raise their children and secure their growth in various aspects; physically, intellectually, spiritually, and morally.<sup>274</sup> In fact, the *Sharī'ah* insists that the father must pay for a nanny or domestic help to cater his children where such services are needed. Allah (s.w.t) says to the effect:

“For him (father) who desires to complete the term. But he shall bear the cost of feeding and closing on equitable terms, no soul shall have a burden laid on it greater than it can bear.”<sup>275</sup>

The Afghan Civil Code makes it the duty of the father to provide maintenance for his children: “...the father shall provide maintenance to the minor son until he acquires the power to work and to the minor daughter until she gets married.”<sup>276</sup>

Also, the mother has the obligation to breastfeed the child since she has bond marriage with her husband. Allah (s.w.t) says to the effect: “The mother shall be entitled to fostering the infant as long as she is in the bond of marriage with her husband or in the return-divorce period.”<sup>277</sup>

Once there is a divorce, the issue of custody of children will arise. Under the Islamic law, custody is regarded as part of children's right. They need someone to look after them, so mother is the best person to do that. The special bond between a mother and her child is mainly the result of the natural connection during pregnancy. It is a sound reason to assign the primary role of custody to the mother. The Prophet (s.a.w) declared that the

<sup>274</sup> Fathi Osman. 1997. *Concept of the Quran: A Topic Reading*. p. 833.

<sup>275</sup> Al-Quran. Al-Baqarah, 2:233.

<sup>276</sup> Art 256. Afghanistan Civil Code. 1977.

<sup>277</sup> Ibid, art 230.

mother has the better right to take the custody of child. Amr Ibn Shuib narrated the hadith a woman came to the Prophet (s.a.w) and said:

“O Messenger of Allah, my womb was a resting place for this child, and my breast was a drinking place for him, and my lap was a soothing place, but his father divorced me and wishes to snatch him away from me.” The Messenger of Allah said, “You have got better right to take him till you marry someone else.”<sup>278</sup>

The Civil Code of Afghanistan has provided that:

“woman, shall have the right to care of the child, are in the following order: 1. Mother, grandmother, 2. Father’s mother, 3. Sister....”<sup>279</sup> Moreover, the Civil Code states: “The child custody, care, and protection during a period childhood are the roles of the woman.”<sup>280</sup>

The above hadith and Article indicate that mother is the best person to have the custody right over the child until she or he attains the age of maturity. The Civil Code of Afghanistan declared that.

“The custody period of a male child shall be ended when he attains the age of seven, and the female child shall be ended when she attains the age of nine.”<sup>281</sup>

But once the child becomes matured, she/he has the right to choose her/his own custodian provided that the decision was not under influence and coercion.<sup>282</sup> This issue is further clarified in the hadith, which was narrated by Abu Hurairah that a woman came to the Prophet Muhammad (s.a.w) and said:

“O Messenger of Allah, my husband wishes to go away with my son while he does need some of my services.” Then the Prophet (s.a.w) said to the

<sup>278</sup> Abu Dawud, Sunan Dawud, Vol. II, *Kitab al-Talaq*, p.616.

<sup>279</sup> Art 239. Afghanistan Civil Code. 1977.

<sup>280</sup> Ibid, Art 236.

<sup>281</sup> Ibid, Art 249.

<sup>282</sup> Zaleha Kamarddin. 2004. *Islamic Family Law: New Challenges in the 21th Century*. p. 100.

boy: “This is your father and this is your mother. Take the hand of either of them whom you like.” Afterwards, the boy caught the hand of his mother and she went away with him.<sup>283</sup>

However, the Civil Code of Afghanistan is silent on the issue of child’s decision to choose his/her own custodian after reaching maturity. The Civil Codes only gives the right to the court when the child is above five years. It provides that:

“Where the wife is separated from her husband at which, the age of the child is more than five years, then the court may give the child to the one of spouses whom is more in the interest of the child.”<sup>284</sup>

As a result, custody rights are allocated to the parent who can understand the needs of the child more and better than anyone else. However, it is difficult to imagine the child as being without a mother. Therefore, transferring child custody over to the mother until reaching certain age is crucial for the child’s development. Considering the circumstances, most of the times, the laws are not implemented in Afghanistan, and women are denied the rights that were given to them by the Qur’an and Civil Code.

### 3.7 The Maintenance Right of the Woman after Divorce

A woman in Islam has financial and non-financial rights. Her financial rights refer to maintenance that is obligated on husband. Under the Islamic law as well as Afghan legal system, the husband has the duty to maintain his wife while they are in marriage bond, and the first three months after her divorce, or if the wife is pregnant until the baby is born. Allah (s.w.t) says to the effect:

<sup>283</sup> Sayid Saqib, 1990. *Fiqh Sunnah*, Vol. 8, (trans) Mahyuddin Syaf. Kualm Lumpur: Victoria Agency. p. 177.

<sup>284</sup> Art 248. Afghanistan Civil Code. 1977.

“The husband shall be bearing the cost of their food and clothing on equitable terms.”<sup>285</sup>

This verse prescribes that it is the husband who bears maintenance of the wife and children since she is in his wedlock. Also, the hadith that was narrated by Jabir bin Abdullah mentioned that the Prophet (s.a.w) said:

“Fear Allah regarding women. Verily you married them with trust of Allah and made their private parts lawful with the word of Allah. You have got rights over them that they entertain nobody to your bed, which you dislike. If they do this, give them beating without causing injury. They have got right over you in respect of their food and clothing according to means agreed.”<sup>286</sup>

Based on above hadith, when the wife surrenders herself to the husband, she has right to get her husband’ support and it is the responsibility of the husband to pay maintenance to his wife. The Civil Code of Afghanistan has given this right under a condition as noted:

“With the conclusion of a true and binding marriage it becomes necessary for husband to give maintenance to his wife even though she might live in the residence of her relatives. If the wife refuse without any reason to reside in the residence of the husband, the husband shall not be liable to give the maintenance.”<sup>287</sup>

In addition to that, the following verse prescribes the obligation for the husband to maintain his wife while she is in the divorce period (*‘iddah*):

“Let the women live in the same style as you live, according to your means. Annoy them not so as to restrict them.”<sup>288</sup>

<sup>285</sup> Al-Qur’an. Al-Baqarah, 2:233.

<sup>286</sup> Muhammad ibn Ismail. *Sahīh Al-Bukhāri*. (trans.) Muhammad Muhsin Khan. 1984. The translation of the meaning of Sahīh Al-Bukhāri, Arabic- English, vol. VII .p 212.

<sup>287</sup> Art 117. Afghanistan Civil Code. 1977.

<sup>288</sup> Al-Qur’an. Al-Talaq, 65:6.

The above verse clarifies that Islam treats the married women as full respectful persons in every sense of the term, and it is obligatory not only in the married state, but also during the *'iddah* or she must be provided on the same scale as she once received in her marriage time. According to Civil Code of Afghanistan, the divorcee is entitled to maintenance from the date of divorce to the end of her *'iddah*.<sup>289</sup> Any claim of the divorcee for maintenance for more than one year from the date of the divorce shall not be heard.<sup>290</sup>

Unfortunately in Afghanistan, husbands do not merely deprive their divorcee wives of maintenance, also they physically abuse them. The lack of implementing the laws as well as the inadequate educational awareness in Afghanistan, especially among the women, have kept them away from demanding their rights and deprived them from asking their maintenance rights, which are designed by the law.

### 3.8 Conclusion

Polygamy is considered as part of the societal necessities. Islam applies specific conditions and places limits on those attempting to practice it. However, regretfully, in Afghanistan, the men circumvent the limits and abuse women vis-a-vis separation and divorce. Before Islam, polygamy existed with virtually no conditions. However, with the advent of Islam, it limited the number of wives a person can marry up to four.

<sup>289</sup> Art 126. Afghanistan Civil Code. 1977.

<sup>290</sup> Ibid, Art 127.

In the domestic context, the Civil Code of Afghanistan has not properly addressed this problem. Family Courts are not in operation everywhere in the country to follow up with this kind of cases, and almost all of the family conditions are handled in ordinary courts.

Majority of Afghani people in recent time regard polygamy as incompatible with the current economic situation. Most of the polygamists are usually illiterate, but are financially secure, and with influential roles. It is clear that most men are involved in polygamy because of tribal competitive events, limited number of sons and women exploitation. Women remained silent when their husbands take new wives because they fear divorce, their futures, children's welfare, and violent life. In the event of a divorce, women are not granted custody of their children.

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