Family law in Afghanistan: past experiences and future landscape

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“Family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.” – Afghanistan Constitution 2004, Article 54

A. Introduction and the current situation of family law reform in Afghanistan

The International Center for Human Rights and Democratic Development (Rights & Democracy) started “the Measure of Equality for Afghan Women: Rights in Practice,” a four-year program, in 2007. The project focuses specifically on four main initiatives that support Afghan parliamentarians, legislators, jurists, religious authorities and civil society organizations working on the progressive reform of family law to bring it in line with Afghanistan’s Constitution, best practices in other Muslim countries, and Afghanistan’s obligations under international human rights treaties. Consequently, on April 7, 2008, an agreement was signed between the Ministry of Women’s Affairs and Rights and Democracy, and a drafting committee has been established accordingly.

The committee consists of representatives of the Supreme Court, the Ministry of Justice, Family Court, the Ministry of Women’s Affairs and a few civil society activists. The main tasks of the committee are to review the provisions of the Civil Code on family from a gender-equality perspective and recommend amendments or new articles in the framework of a separate, specific family code. However, the committee has also reviewed, commented on and suggested new articles for the “Bill of Shi’ite Personal Status Law,” and has drafted a “Law Concerning Guardians and Wards.”

Just as the other components of the Rights & Democracy program bring the community’s perspectives on reform of family law to the attention of the committee, many lobby and networking meetings with MPs and civil society prepare the Parliament for the bill. The annual workshops with the international experts present the experiences of the other Muslim countries to the committee and other pro-reform activists. The committee will finalize the first draft of the Family Code by mid-2009, and within six months, consultations with the other stakeholders (civil society and MPs) will take place. The Code will be submitted to the relevant authority of the state by the Ministry of Women’s Affairs.

B. Change is needed

Family law, as a codified statute, came into effect in the 1920s by the Nezaamnameh Nekah ("the Ordinance Concerning Marriage"). Then in 1961, the Usulnaameh-e-Ezdewaadj ("the Principles Concerning Marriage") took effect, which specified 15 as the marriageable age and illegalized the practice of the exchange of girls. Afterward, the new marriage law was promulgated in the official gazette, number 190, on August 8, 1971. Consensus to marriage and registration of marriage along with some provisions on divorce, including tafwiz-e-talaq (the contractual access of women to divorce) are the main progressive provisions of this five-chapter, 40-article law. However, it had no provisions on polygamy. The 1977 Civil Code
(qanuon-e madani) combined the family law with other civil provisions. “The Civil Code of 1977 introduced only minor reforms on child marriage, polygamy and divorce which, however, fell short of an adequate response to the demand for more effective measures.”¹ (Kamali: 2005) Therefore, this law, which is already implemented, has many shortcomings, including: different marriageable ages (16 for girls and 18 for boys), a lack of explicit provisions on consent to marriage, tamkin (obedience) of the wife, unequal authority in termination of marriage, ignorance of children’s interests and rights, discriminatory articles on inheritance and limitations to women’s constitutional rights through requiring them to seek permission from their husbands to practice such rights.

The activists and lawyers are considering many reasons for the changes, including the following:

- Because laws regulate the relationships, and relationships are based on needs, and needs differ through time, the laws should also address these needs. Many women’s issues relating to family, such as education, work, leaving the house (travelling) and constitutional rights, along with social realities, such as a transitional society and a lack of implementation mechanisms for practicing and gaining rights, are new and they must be put into practice through concerned laws.
- Conformity of other laws with the Constitution, as mentioned, is another reason. The 2004 Constitution is among the most recent laws of Afghanistan, and as it is superior to others, family law and other laws should be revised accordingly. In fact, Afghanistan National Development Strategy requires the state to adapt all civil, commercial and criminal laws to the Constitution and the human rights treaties to which Afghanistan is a signatory. They argue that while the Constitution provides equal rights for men and women, the Civil Code provisions on “tamkeen” (obedience) and “Noshouz” (disobedience) limit women’s access to these rights. This example shows how the Civil Code violates or limits constitutional rights.
- Afghanistan signed CEDAW in 2003 without any reservation. CEDAW and other human rights instruments to which Afghanistan is a signatory require the state to bring domestic laws into compliance with these international laws.
- The 2003 Bon Agreement and the 2006 London Compact are the two main agreements that have established the new post-Taliban administration and underlined the main strategic goals of Afghanistan. Both agreements emphasize gender equality and law reforms.
- New interpretations and understandings of Quranic and Islamic laws require the state to codify them.
- Laws in Muslim countries differ from each other; however, all of them are based on Shari’a. This fact shows that law changes according to social needs, and it is changeable. For example, domestic violence causes quite a few female suicides every year. Therefore, as the imbalance of power between men and women in the family feeds violence against women, the concerned laws should be amended in a way that can end the impunity of the perpetrators.

C. Equality and justice

Equality and justice are the cornerstones of development in a war-ravaged country, and they are necessary. The social and human development of Afghanistan requires the participation of all individuals. To put the Millennium Development Goals, the Afghanistan National Development Strategy, the Strategy of Justice Sector, and the National Plan of Action for Women of Afghanistan into practice, Afghanistan should guarantee equitable laws and the same rights for all citizens. For instance, the Strategy of Justice Sector envisions a 30% quota for female employees, but in practice, due to social norms that hinder women's education, achieving this goal is a challenge.

Articles 43, 44 and 54 of the Afghan Constitution emphasize “balanced education for women [and] elimination of illiteracy,” stating that “to expand balanced education as well as to provide mandatory intermediate education throughout Afghanistan, the state shall design and implement effective programs and prepare the ground for teaching mother tongues in areas where they are spoken.” It also provides that “family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.” In addition to these articles, many others that guarantee certain rights for women, such as those related to constitutional rights, Parliament, state, and the judiciary system, all require the reform of current family law. Some articles of the law are interpretations of certain discriminatory customs. The state should reform them, as this is the most important step toward removing such customs.

While Afghanistan is in a transition period at the moment and it might take decades before the infrastructures are in place, enforcement of an equitable law is possible. As mentioned, the Constitution and many other national and international documents require equality and justice. As a result, there is no other choice but to adapt the laws to conform to these documents.

Justice and equality in Afghanistan can be put into practice in three ways: amendments of the laws, interpretation of the laws, and cultural activities such as awareness-raising. Many activists argue that laws should be written in such a way as to allow the judges to interpret them in a more equitable and just manner. At the moment, judges are not sensitive to gender issues. Awareness-raising is therefore vital, as it can help those targeted by the laws to enjoy their rights and enforcers to make informed and sensitive judgments.

Although, as mentioned, justice and equality are necessary, in a conservative country like Afghanistan, many other needs are also necessary to support the reform of laws. Religious justifications to win over extremists and religious leaders can facilitate the process of reform. Understanding and distinguishing true Islam from its contextual and historical picture, building skills using a Shari‘a interpretation and monitoring resources are the most important needs in promoting a gender-sensitized version of family law in Afghanistan.

Many Islamists in Afghanistan argue that equality-based family law is part of the implementation of feminist beliefs, and since feminism is labelled an anti-Islamic movement, the reformed laws will be against the provisions of Islam. Although the opponents of reform are misusing feminism to reject changes, reading the Qur’an and understanding Hadith and the compatibility of Islamic principles and human rights standards can remove some of these

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2 The Constitution of Afghanistan, official gazette number 818, January 28, 2004
hindrances. Meanwhile, fundraising, campaigning, lobbying and networking skills are the prerequisites for having a fruitful dialogue.

D. Arguments against reform

Reform is not welcomed by many conservative groups. Many different arguments and justifications are used to reject reform or present it with different obstacles. Most of the contrasting views are based on Shari’a. In this view, even scientific findings, such as increased child and mother birth mortality due to child marriage, are rejected as they are in contradiction with the nass (the text of Hadith). The Quranic verse: “…the command is for none but Allah…” (12:40) and other traditional texts argue that all human made laws have no value and only divine laws must be followed. Moreover, it is argued that women’s rights activists have no proper replacements besides western laws, including human rights instruments.

As mentioned, sometimes these groups accept some amendments as a maslahah (expedient), but they argue that experience shows that many expedients can end in corruption. They argue that ajratul messl (compensation of housework), uncontrolled amount of mehr and the contractual right of wives to their husband’s property encouraged Iranian women to abuse such rights by forcing their husbands to divorce them and gaining the men’s property. Therefore, the reform should take place in a controlled way.

The stereotyped roles of women as a mother and wife and social roles based on Shari’a are the other common reasons used by Islamist figures. They believe in the divine division of roles and emphasize that these are sacred roles for women.

A group of conservative MPs and official figures admit that there is a need for amendments, but argue that because there is no guarantee for the implementation of laws, they will have no real effect on women’s lives. Linking the family code with full implementation of the rule of law, they propose that amendments to family law be postponed until the proper time.

Moreover, another group of MPs reject the issue of family law revision. They argue that the current Parliament is in control of the Islamic extremists and that they might change the current provisions and introduce a more restrictive law instead. Therefore, it is much better not to put the family law on the agenda at the moment.

It is also argued that due to other important commitments of the state and issues such as security, broad-based accessibility and implementation of law, revision and amendments are not a priority right now.

Fear of the collapse of families is also mentioned by mullahs as a reason why they do not want to codify what Shari’a considers as rights for women. For example, divorce due to harm has been expanded in the laws of many Muslim countries, but in Afghanistan, many mullahs still reject this, arguing that such a right may increase the number of divorces and ultimately speed up the collapse of families in Afghanistan. Therefore, despite the fact that according to Shari’a, women have certain rights, they are opposed to the codification of such rights.

Discriminative interpretation or even misattribution of the Constitution are other methods opponents are using. They believe that Article 3 guides other constitutional provisions, including those of fundamental rights. Consequently, the by-laws can restrict the
constitutional rights of women based on Shari’a. However, Article 7 of the Constitution provides that “the United Nations charter, interstate agreements as well as international treaties that Afghanistan has joined and the Universal Human Rights Declaration shall be respected.” This includes CEDAW. Many Islamist figures, including most of the MPs, argue that Article 3 has a paramount role in the Islamization of all laws. As a result, CEDAW is filtered through an Islamic perspective, despite the fact that Afghanistan is a signatory with no reservation.

F. Implementation

Implementation of family law is tied into customs. As a result, women’s access to justice, the equal implementation of law and equal protection by law have not been practiced properly in Afghanistan.

Access to justice is limited for Afghan women. Traditionally women are supposed to tolerate all kinds of suffering caused by discriminative attitudes and an inferior position. In a country where, according to Afghanistan Human Development Report 2007, more than 80% of dispute cases are referred to customary resolution mechanisms, which are male-oriented, women have much less access to a fair judgment. In many cases, women have been ordered by such customary mechanisms to be exchanged in compensation for their male relatives’ criminal acts. “There is widespread recognition amongst women contacted by Amnesty International (2005 report) that such community systems perpetrate grave abuses of women’s human rights.” In such a circumstance, many hopeless women prefer to commit suicide. Since March 2008, there have been one hundred cases of self-immolation in south-western Afghanistan alone. Self-immolation by a woman who had petitioned for divorce and was awaiting the verdict in a provincial court when she set fire to herself in protest against the institutions shows to what extent official systems, including the statutory system, challenge women’s access to justice. Although “to set oneself on fire is to prove that what one is saying is of the utmost importance,” what their motivation is and who or what the subject of their protest is has never been heard by the authority. Therefore, despite the increase in female self-immolation since 2001, the government has taken no concrete measures to address this fierce violation of women’s rights, to which the only solution seems to be to commit suicide.

The above mentioned case also shows how the judges’ biased attitudes towards women’s cases turn the justice system into anti-woman machinery. Despite the Civil Code provisions on Khol (dissolution of marriage initiated by wife) and divorce due to zarar (harm), the judges refused to resolve the case in favour of the woman who set herself on fire to escape a lifetime torture. Women are facing the same problem in police stations and prosecutors’ offices. As a result, all justice sectors do not implement the constitutional provisions on equal access to justice properly.

Misusing Shari’a to justify domestic violations is also common in Afghanistan. Many of the customary practices, such as forced marriage, child marriage and challenging the women’s

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4 http://www.guardian.co.uk/commentisfree/2008/sep/09/afghanistan.gender?gusrc=rss&feed=worldnews
5 ibid
6 For more details refer to: Medica Mondiale, (2007). Dying to Be Heard: research on self immolation in Afghanistan, Kabul
choice in marriage are justified by *Shari’a*. Article 77 of the Civil Code also accepts such practices, providing that “for the proper contract of a marriage the observance of the following terms are required: offer and acceptance should be effected by the parties to the contract or by their guardians or deputies.” As a result, forced marriage and child marriage of girls by their fathers or grandfathers are considered legal. Based on such understanding of law the judges insisted that a 14 years girl who has been sold two times for $2000 and then to another man for $5000, should marry the man who paid the money, despite the fact when this person wanted to forcibly have sexual intercourse, she went into a coma. The girl has been in juvenile centre for three months before hearing. (UNICEF: 2008)\(^7\) This shows in such situation, how easily vulnerable female victims can be marked as a perpetrator.

Even though the Civil Code provides women with the right to *Khol*, or judicial divorce due to harm or husband’s impotency, women’s petitions, particularly in the provinces, have been rejected. Usually, the access of women to *khol* is subject to the approval of the husband, but the Civil Code does not explicitly state this. Article 161 provides that either of the spouses may return from *khol* prior to the acceptance of the other. While the husband has a full and unquestionable authority to divorce his wife, it is clear that *khol* as a balance in the rights to dissolve the marriage contract has been legalized in *Shari’a*. However, as mentioned, the courts subject it to acceptance by the husband, and in a conservative society such as Afghanistan, almost no woman can practice this right.

In many instances, women are considered as legal minors in the Civil Code. Men are the heads of the family and women should obey them. Men can decide on the marriage of girls, even for those who are legally mature. Marriage implies an agreement by the woman to give up many of her rights. Consequently, she cannot enjoy education, work, or social, cultural and political activities, except with the permission of her husband.

Current laws discourage empowerment by limiting women’s access to education, work and other fundamental rights.

### G. Conclusion

Afghanistan is in a transition period. The Constitution as well as other laws, strategies, policies and programs are all new and necessary infrastructures are not yet in place. As a result, family law is not fully enforced and the gap is filled with the customary practices. While most of the practices are gender-blinded or discriminatory, as the National Justice Sector Strategy states, “the Government’s vision for justice is of an Islamic society in which an impartial, fair and accessible justice system delivers safety and security for life, religion, property, family and reputation; with respect for liberty, equality before the law and access to justice for all.” The state should improve the institutional capacity to maintain equality and justice in a sustainable way.

Both customs and the official system, including the law, violate the rights of women, and law reform is necessary. Gender equality, as provided in the Constitution, and justice are the core values guiding the amendments and drafting of a new family law for Afghanistan. Family law that encourages women to practice their constitutional rights can facilitate the implementation of national development strategies and plans. Therefore, when embodied in

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family law, legal equality speeds up the realization of developmental goals and commitments of the country under MDGs.

The task of reviewing current family law in light of the Constitution, international human rights instruments, recent progression in the interpretation of Shari’a, current research and needs of the time can pave the way to achieving protection of women’s rights and a sound family. The roles of civil society and the state in undertaking such a task are very important, and international efforts such as Musawah reinforce their endeavors.