

AFGHANISTAN

SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW (UPR) OF THE HUMAN RIGHTS COUNCIL (HRC)

Fifth session of the UPR Working Group (4-15 May 2009)

RIGHTS & DEMOCRACY

(The International Center for Human Rights and Democratic Development)

Contact:

Ms. Alexandra Gilbert

Coordinator, Women's Rights in Afghanistan

agilbert@dd-rd.ca, +1-514-283-6073, ext. 290

KEYWORDS: Women's Rights, Family Law, Afghanistan

EXECUTIVE SUMMARY: In this submission, Rights & Democracy provides information on the situation of women's rights in Afghanistan. This submission covers Afghanistan's normative and institutional framework with respect to family law, and its international commitments through CEDAW and human rights law. This submission highlights the cooperation of the State with civil society via a project managed by Rights & Democracy through its office in Kabul to reduce the gap between Afghanistan's Constitution and its international obligations. The project includes the work of the Drafting Committee of the Ministry of Women's Affairs (MoWA) on the reform of family law. The main challenges to the implementation and efficiency of this project are: the coexistence of formal state apparatus and laws with traditional practices and customs; the lack of infrastructures, and the lack of respect for the rule of law. Specific challenges include: forced marriage; *walwar*; *baad*; child marriage; domestic abuse; women's difficult access to justice, and; opposition to family law reform both within the society and in Parliament. In this context, Rights & Democracy makes the following recommendations in order to overcome these challenges: 1) amending family law to comply with Afghanistan's commitments under CEDAW and international human rights law; 2) putting in place the infrastructure needed to fully implement the Constitution, laws, strategies, policies and programs with justice and equality; and 3) conducting national awareness-raising campaigns about women's rights in Islam.

A. METHODOLOGY/CONSULTATION

This submission is based on original information collected in Afghanistan in the context of the project "*A Measure of Equality for Afghan Women: Rights in Practice*", which is a four-year project managed by Rights & Democracy and funded by the Canadian International Development Agency (CIDA). The project involves Afghan parliamentarians, legislators, attorneys, religious authorities, media and civil society organizations. This submission was prepared by Rights & Democracy, in close consultation with its Kabul-based Afghan staff and local partners on the ground.

B. NORMATIVE AND INSTITUTIONAL FRAMEWORK OF THE COUNTRY UNDER REVIEW

Family law / law on marriage

1. Family law, as a codified statute, has existed in Afghanistan since the 1920s through an ordinance concerning marriage (*nezaamnameh Nekah*). In 1961, principles concerning marriage (*usulnaameh-e-Ezdewaadj*) took effect. The document stipulated that 15 years old was marriageable age and made it illegal to exchange girls in reparation for a crime. In 1971, a new marriage law was promulgated.¹ Consent to marriage and registration of marriage, including the contractual authority of women to divorce (*tafwiz-e-talaq*), were the main progressive provisions, even though there were no provisions concerning polygamy.
2. In 1977, the civil code (*qanuon-e madani*) “introduced only minor reform on child marriage, polygamy and divorce which, however, fell short of an adequate response to the demand for more effective measures.”² This law, has many shortcomings: different marriageable ages (16 for girls and 18 for boys), lacks explicit provisions related to mutual consent to marriage, unequal powers for the termination of marriage, absence of provisions concerning children’s interests and rights, and discriminatory articles on inheritance.
3. In 2003, Afghanistan was the first Muslim country to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *without any reservations*. In addition to Art. 16 of CEDAW, relevant international human rights law provisions binding upon Afghanistan also include Art. 16 of the Universal Declaration on Human Rights as a reflection of customary international law, Art. 23 of the International Covenant on Civil and Political Rights (ICCPR), and Art. 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). These provisions in particular crystallize the principle of free consent to marriage, and that of equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.
4. Subsequently to ratifying CEDAW, Afghanistan adopted a new constitution in 2004, according to which all existing laws have to be reviewed. Article 54 of the Constitution of Afghanistan provides that “[f]amily 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.”

¹ Published in Official Gazette #190, August 8.

² Kamily, Hashem (2005). *Islam and Sharia in the Afghanistan Constitution 2004*: with special reference to personal law, a paper of *The Sharia in the Constitution of Afghanistan, Iran and Egypt- Implications for Private Law*, Max-Planck-Institute, Mohr Siebeck, Germany.

5. The Bonn Agreement of 2001 and the Afghanistan Compact of 2006 also emphasized the importance of reforming laws and express concerns about the involvement of women and gender equality.
6. It is in this context that Rights & Democracy has launched its project in 2007, with the objective to bring existing Afghan family law into compliance with Afghanistan's Constitution and its international obligations under international human rights law.

C. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

Challenges to the implementation and efficiency of the normative and institutional framework:

Formal state apparatus and traditional practices

7. Implementing reforms and laws remains a major challenge in Afghanistan. Since the fall of the Taliban in 2001, two parallel structures have emerged. One is the formal state apparatus, with ministries, institutions and representatives at the different regional levels, which are supported by a legal system based on Islamic law. The second structure is a complex system of alliances, traditional practices and customs, divided along tribal lines or allegiances to warlords, which use local councils known as *shura* or *jirga* as mediators or decision-makers to resolve disputes. In this context, new institutions established to apply uniform conflict-resolution mechanisms in matters concerning human rights are struggling to gain recognition and legitimacy from communities.

Lack of infrastructure and rule of law

8. Afghanistan is in transition at the moment, and it might take decades to have proper infrastructures put in place. Nevertheless, enforcement of existing family law based on equality is possible. Since the Constitution and many other national and international documents recognize equality and justice, laws should be adapted in compliance with these documents.

D. COOPERATION OF THE STATE WITH CIVIL SOCIETY

Rights & Democracy's project:

Bringing family law in line with the Constitution and international obligations

9. In 2007, the International Centre for Human Rights and Democratic Development (Rights & Democracy) launched "*A Measure of Equality for Afghan Women: Rights in Practice*," which is a four-year project funded by the Canadian International Development Agency (CIDA). The project supports Afghan parliamentarians, legislators, attorneys, religious authorities, media and civil society organizations in their efforts to bring Afghanistan's family law in line with the country's constitution, best practices in other Muslim countries and Afghanistan's obligations under international human rights treaties.

Drafting Committee on reform of family law

10. On April 7, 2008, the Ministry of Women's Affairs (MoWA) and Rights & Democracy entered into an agreement, and a drafting committee mandated to review existing family law was subsequently created. Various consultations have been held with Afghan stakeholders, including community members, to ensure a sense of ownership with respect to the ongoing reform. In addition, Rights & Democracy has convened many consultation sessions to have participants share their perceptions of the main issues related to family law reform. The committee will complete a first draft of the family code in the first half of 2009. MoWA will then table the code in Parliament.

E. ACHIEVEMENTS, CHALLENGES AND CONSTRAINTS

Forced marriage, *walwar*, *baad*, child marriage and domestic abuse

11. Numerous practices inconsistent with women's rights are widespread in the country. The most challenging issues include forced marriages, *walwar* (a practice whereby the groom pays compensation to the bride's family for expenses incurred in caring for the bride from birth to marriage), the practice of *baad* (literally, "blood money," whereby a woman is given away by her family as compensation for a crime committed by one of its members to the family of the victim), child marriages, and domestic abuse. According to the Independent Afghan Human Rights Commission, the profound despair of women forced to live under these conditions led, in 2007, to nearly 180 cases of self-immolation in the south and west of the country alone, in addition to more than 200 cases of suicide and as many attempts to flee in the same territories.

Women's access to justice

12. Women seeking justice through the official system are also facing problems. There is still persistent prejudice against women who choose to consult lawyers rather than resort to traditional customs. In some regions, security remains an aggravating factor that prevents women from joining the very institutions established to assist them. Access to justice is limited for Afghan women. According to Afghanistan Human Development Report (2007), more than 80% of dispute cases are referred to customary resolution mechanisms, which are dominated by men. According to a 2005 Amnesty International report, "there is widespread recognition amongst women contacted ... that such community systems perpetrate grave abuses of women's human rights."³
13. Judges also have a biased attitude toward women seeking justice through the formal justice system. For example, despite civil code provisions on marriage dissolution initiated by the wife and divorce due to violence, judges have refused to resolve cases in the favour of women. Women seeking assistance at police stations and prosecutors' offices also face similar problems.

³ Bennett, Jennifer (2007), *Scratching the Surface: Democracy, Tradition, Gender*, Henrich Boll Foundation, Lahore, Pakistan.

Opposition to family law reform within society

14. A number of conservative groups are hostile to family law reform. Many conservative Islamists in Afghanistan argue that equality-based family law is part and parcel of feminist beliefs, deemed to be anti-Islamic. The reformed law is therefore considered to go against the principles of Islam. In addition, opponents of reform are misusing the concept of feminism as a basis to reject changes. They argue that women's rights activists are influenced by Western laws, including human rights instruments. However, a better understanding of *Hadith* as being compatible with Islamic principles and human rights law and standards can have a positive impact on such notions.

Achievements

15. Despite these challenges, some achievements were made:

- First, a model marriage contract was recently accepted by Afghanistan's Supreme Court and is currently being disseminated within the country as widely as possible.
- Second, there is currently a substantive and substantial ongoing dialogue within Afghanistan's civil society on women's family law rights which promises to be conducive to changes compliant with women's rights.
- Third, an active civil society on family law and women's rights has emerged in Afghanistan and already shows signs of sustainability.

RECOMMENDATIONS

16. Afghanistan is in transition. The constitution, laws, strategies, policies and programs are all new, and the infrastructures needed to fully implement them are not yet in place. Nevertheless, justice and equality for women in Afghanistan can be achieved by:

Recommendation 1: Amending family law to comply with Afghanistan's commitments under CEDAW and international human rights law.

Recommendation 2: Putting in place the infrastructures needed to fully implement the Constitution, laws, strategies, policies and programs with justice and equality.

Recommendation 3: Conducting national awareness-raising campaigns about women's rights in Islam.