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State Responsibility for Eliminating  
Violence against Women With a  
Focus On Afghanistan

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## **FOREWORD**

I was born in Kabul during the civil war. By age four, I suddenly stopped attending kindergarten. My father later explained that it was unsafe to walk on the streets due to the falling missiles, shootings, kidnappings and other serious crimes. My mother was a teacher and she stopped working too, she told me that few days ago a missile fell on one of the bus she used to take to work. As we were living at the first floor of the building, I saw how my father replaced glass windows to the wooden for our safety. Every time we were hearing explosion the entire family had to run to a basement. We spent time in a basement in the hopes that we will stay alive during the bombarding. Meanwhile by chance, my father earned the opportunity to study Ph.D. in a neighboring country, so we benefited gratefully and left Afghanistan to settle in the Uzbekistan.

I grew up in Uzbekistan; well ahead, I understood how peace and safety could affect one's life and future. In Afghanistan, I could not have understood the meaning of peace because, at the time, the problems had come a normality and I had nothing not compare with since I didn't have such experience.

As an Afghan girl, I was very lucky to be allowed to go to school, and live a safe and happy life In Uzbekistan. However, I never left the thought about my female cousins and other girls who lived in a war and violence in Afghanistan. Later I learnt, that many of my female cousins were illiterate, some of them married at a very young age and already had children.

In one of the discussions with my father, he talked about women's rights and encouraged me to study law and advocate for women's rights, particularly for Afghan women. My father stories about Afghanistan's history, culture and women's status was very interesting and inspirational. The support and encouragement motivated me to achieve law degree and finally I chose to do my master's degree in order to analyze how international human right law promotes human rights on social, regional and domestic level. Furthermore, in this thesis I would like to expose a painful reality that Afghan women and girls face in daily life.

## **ABSTRACT**

Violence against women is a serious human rights violation and a major cause of reduced of life, distress, injury and death for female. According to World Health Organization, 1 in 3 women around the world experience physical or sexual violence, mostly by an intimate partner.

This study attempts to contribute to our understanding the problem of violence against women and State obligation with a focus on Afghanistan. Afghanistan is one of the most challenging countries in the world to be a woman. It is still a long way for becoming a stable country where women can enjoy equal rights and live in safety. Sexual, forced marriages, physical, rape and ‘honor killing’ crimes as a part of gender-based violence identifies direct violence against Afghan women and girls. The attitude viewing women as the property and honor of men in Afghan culture has put women and girls at the risk of violence. Moreover, discrimination and injustice against women for centuries in Afghan society has formed women’s identity as inferior citizen. This thesis challenges, the State responsibility, national law, religion and tradition and introduces them as direct, structural and cultural entities of violence.

## **ABBREVIATIONS**

AIHRC	Afghanistan Independent Human Rights Commission
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	International Covenant on Economic, Social, and Cultural Rights
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
LEVAW	Law on Elimination of Violence against Women
MoPH	Ministry of Public Health
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization

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## **1. Introduction**

The gender-based discrimination or discrimination against women are commonly known across various societies. However, we almost never hear about discrimination against men. This is because for thousands of years human rights conveyed the rights of men, and women, according to the philosophical belief, have been considered the second-class individuals. The philosophy established the foundations of patriarchy, which in one form or another reproduced in subsequent societies and cultures. She created the mechanisms that automatically reproduced the system of power, in which a man always performed at the top of the social pyramid of the patriarchal society, and he had the right to resort violence in order to preserve power and maintain his authority.

Violence against women has emerged as most important focus for both international and national community. In one way or another, in times of war and peace, under dictatorship or democracy, women's human rights have been violated daily and often systematically. Violation takes place in all communities, social classes and in all cultures, and the perpetrators usually go with impunity. Regardless of the alert and attention, violations of women's rights are permitted to continue in many countries, with existing national legislations on human rights of women. Thus, gender-based violence and inequalities between men and women is recognised as an obstacle to development, peace and equality.

This thesis limits its scope to violence against women with a focus on Afghanistan. Afghanistan is one of the many countries where violence against women persist systematically. As it suffered many wars, nevertheless according to reports the most criminal practice towards Afghan women was the Taliban regime.

Before the Taliban, Afghan women worked as doctors, teachers, nurses, physicians, pharmacist, journalist and held many other essential jobs in society. The Taliban restriction on women made impossible for women to represent their human rights interests. These restrictions caused poverty and economic deprivations among women, and the begging was the only option for survival. During the Taliban regime, violence including sexual, physical, extra-judicial executions, forced marriage and abduction were one of the gravest human right crimes happened in the

history of Afghan women.

Soon after the Taliban regime collapse, Afghan women, human rights activists and international community had a great hope and optimism concerning the improvement of women's situation. Women re-claimed many of the rights they lost, including new rights i.e. protection and remedies for violent crime. Nevertheless, the implementation of these rights has been slow and very complicated. According to UN Women: "An alarming 87.2 percent of Afghan women have experienced some form of physical, psychological, sexual, or economic violence perpetrated predominately by family members."<sup>1</sup> Recent reports, however, illustrates that levels of assaultive and lethal violence against women remain high, despite of improved awareness and Afghan legislation. Violence against women takes many forms, including suicide, physical, sexual, forced marriages, rape and honor killing etc. Women's rights violated by both State actors and non-State actors, such as police, judges, husbands, fathers, brothers, relatives and other members of community.

Herewith, it comes to mind: Why do not Afghan women enjoy their basic human rights and what types of obstacles they face in combatting violence? What is the government's role and responsibility in elimination of violence against women? Is Afghanistan responsible for not protecting women's rights under the international law?

These questions have been motivational to work on the chosen topic for thesis – *State Responsibility for eliminating violence against women with a focus on Afghanistan*.

Study limits its analysis on the recent status of women in Afghanistan and State responsibility. This thesis is structured into five chapters as follows:

The introductory established a general overview and aim of the research. The first part (2) of the thesis will analyses key international human rights instruments in order to determine the legal requirements, which can constitute a ground for promoting against violence and triggering State responsibility. This part will illustrate that treaties has a binding effect upon the States that have signed them and implicit obligation to protect women from violence as a part of their obligations.

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<sup>1</sup> Smith, Afghan Women 2014, supra note 9; Dominguez, supra note 2

Further, this part explores the normative framework of State responsibility. Establishing State responsibility to protect women's rights using the due diligence standard.

In addition, ascertaining due diligence obligation through the case studies. Subsequently proving that the State has a duty to protect women from violence, this part aims to answer the question of how the State can be held responsible for private actions resulting in women rights violations if it fails to take measures to prevent and respond to violations.

The subsequent part (3) will examine Afghan National Law with respect to women's rights. It will discuss in brief the history of Afghanistan and emergence of Islam, as it provides important insights into cultural and religious norms of the country. Moreover, it analyses relevant national Afghan legislations, including Constitutional and Criminal law with respect to women's status. In addition, this part will define women's status in Islam and discuss issues of equality, liberty and justice, in order to give some concreteness. The State and non-State justice system explained, and proved that non-State justice system fails to protect women's right during the dispute and treats women unequally.

The next part (4) explore the different forms of violence against women. It argues that background of violence against women in Afghanistan regarded as social-cultural problem and persisted in social relationship. Further, the cultural and structural violence explained in detail, and it is important to avoid stereotyping a particular culture by talking a stigmatized topic like violence against women from cultural perception. In this part, explained the different forms of violence practiced particularly in Afghan custom e.g. *bad*, *badal*, *jahez* and '*honor killing*'. The meaning of losing honor for a men and the consequences for women in that regard is analyzed. Reports from different sources and victim stories are illustrated.

Finally, the last part (5) discussing the different strategies for change. In this part, the study argues that role of the government is vital and responsible for improving the national legislation and justice system to protect women and girls from violence and discrimination. The cultural norms that are main obstacle for girls to attain the school should be breakdown and transformed. As Afghanistan is a Muslim country, the religious leaders have a significant role and responsibility

to convey the correct interpretation of the Islamic sources on the women's rights to the community.

### **1.1 Aim and methodology**

This thesis is based on literature studies conducted at the library of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The study is the result of an extensive literature survey on issues of violence against women, and Afghanistan in particular, including an analysis of relevant academic lectures, NGO reports, government publications, United Nations reports, Special Rapporteur's reports. There is plenty of literature on women in Islam and Muslim societies, Islamic Law and International Human Rights Law, International Law Sources on Women's Rights.

Although a significant body of work has already been produced on the topic of violence against women and the issues has been discussed from different approaches with interesting conclusions, this thesis surpasses the current scope of academic thinking on this type of violence focused on Afghan context. This thesis attempt to introduce another aspect into the academic debate. It is grounded in the belief that State is responsible for violation against women for both State and non-State point of view, perpetrators enjoy impunity and use culture and religion as their justification. This thesis has both descriptive and an analytical part.

## **2. Violence against Women in International Human rights System and State Responsibility**

### 2.1 Women's International Human rights Law Source

The attempt for gender equality started at the time of foundation of the UN in 1945. From the earliest stages, it gave women important rights although few were aware of that fact. However, the UN proclaimed to reaffirm faith in “equal rights of men and women” believe in “fundamental human rights” and in “the dignity and worth of each individual”. Prior to that there had been no other international document proclaiming equality of all individual and specifically main focus belonging to one of the sexes, as a basis for discrimination.

The basis of the international human rights system consists of international treaties such as Agreements, Covenants, Declarations and Conventions. These international legal acts have an obligatory character for states which have ratified or acceded to them. Multilateral treaties between larger countries will often involve both compromise in the drafting process and flexibility as to the ability of the countries to select among the treaty provisions which will be applicable. Therefore, treaties often contain provisions allowing countries to make ‘reservations’ upon signature or ratification. Consequently, States may enter multilateral treaties subject to reservations that limit their legal effect and obligations under these treaties, and will not be bound to the relevant provision from which it has reserved its agreement.<sup>2</sup>

In this context, the Article 19 of Vienna Convention provides some ground rules regarding reservations: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in case not falling under sub/paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.<sup>3</sup>

Therefore, treaties are the strongest and most binding type as they represent consensual agreements between the countries that sign them. On the basis of

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<sup>2</sup> Buck, Trevor: ‘ International Child Law’. Great Britain by Cavendish Publisher 2005 p. 40-41

<sup>3</sup> Ibid.

contrast, the UN human rights system distinguishes between character-based bodies, such as the Commission on Human Rights and the Sub-commission on the promotion and protection and of Human rights, concerning the treaty based bodies that ascending under the specific international instrument, for instance Committee on the Elimination of Discrimination Against Women is the one set up for CEDAW.<sup>4</sup>

Consequently, the key foundational documents on women human rights are the UN Charter and International Bill of rights: the UDHR; the ICCPR; the ICESCR and CEDAW. At that point, it became clear that women's human rights will be a central question in the future work.<sup>5</sup>

### *2.1.1 The United Nations Charter and The United Nations Human Rights ("UN" "UDHR")*

The Charter establishing the United Nations entered into force on October 24, 1945. The UN Charter is the first in the history of international relations multilateral document that laid the foundations of the global cooperation between States in promoting and encouraging respect for human rights and freedoms. Its many provisions can be regarded as revolutionary at the period when law and culture subordinated women in every country around the world. Article 1 (3) of the UN Charter states that one of the goals of the UN is "to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and promoting and respecting human rights and fundamental freedoms of all persons, regardless of race, gender, nationality and religion ". Member states agreed "to joint and separate action in cooperation with the Organization" to achieve those purposes.<sup>6</sup>

However, in spite of the abstractness of the statutory provisions relating to human rights, it should be noted the importance of the Charter in the creation of a legal framework for the implementation of exact subject of regulation: a) basic human rights, b) the dignity and worth of the human person, and c) the fight against discrimination (equality of rights between men and women, nations large and small). The Charter also created constituent UN bodies empowered to work

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<sup>4</sup> *ibid*

<sup>5</sup> Susan Deller Ross "Women's Human Rights", *The International and Comparative Law casebook*, 2008. p. 55.

<sup>6</sup> *Universal Declaration of Human Rights* (UDHR), 10 December 1948, [www.unhcr.org/refworld/docid/3ae6b3712c.html](http://www.unhcr.org/refworld/docid/3ae6b3712c.html), visited on 12 April 2019.

toward these goals. One of the relevant bodies for their impact on women's rights is the Economic and Social Council. To conclude, Article 8 states "[t]he United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."<sup>7</sup>

In 1948, The Universal Declaration of Human Rights (UDHR) adopted by the UN general Assembly. The document has received wide acceptance, though it was not originally binding on member states. The reason behind is that this document has outline of foundational human rights principles which has been recognized as a binding expression of customary law and authoritative interpretation of the UN Charter itself. The Article 1 of the UDHR states that "[a]ll human beings are born free and equal in dignity and rights." and moreover, Article 3 states, "Everyone has the right to life, liberty and security of person".<sup>8</sup> Although UN did not specially mention violence against women, it remains relevant because it refers to dignity as the foundation of human rights. Consequently, violence against women can constitute violence on the human dignity of women. Therefore, States that are parties to different instrument have an implicit obligation to protect women from violence as part of their duties. However, this document is not binding on member states.<sup>9</sup>

In conclusion, the UN and other international organizations adopt not only the Conventions, but also the Declarations. The differences between these types of international documents are significant and fundamental. The fact is that the Declarations, even those adopted at the session of the UN General Assembly, are not binding on the states that voted for it. A declaration is not an international "law", but a declaration of intent by states. In contrast to the Declarations, the Convention after its ratification by one or another state acquires an obligatory character for it, and failure to comply with the norms established by the Convention may entail the claim of international responsibility measures to it.

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<sup>7</sup> Ibid. p.56

<sup>8</sup> *Universal Declaration of Human Rights* (UDHR), 10 December 1948, [unhcr.org/refworld/docid/3ae6b3712c.html](http://unhcr.org/refworld/docid/3ae6b3712c.html), visited on 12 april 2019.

<sup>9</sup> I. Boerefijn, 'Domestic Violence Against Women in International Human Rights Law' in I. Westendorp, Ria Wolleswinkel (eds), *Violence in the Domestic Sphere* (Intersentia, Antwerpen, 2005), p. 35.

### 2.1.2 *Convention on the Elimination of Violence Against Women* ("CEDAW")

A new stage in the protection of the collective rights of women associated with adoption of the Convention on the Elimination of All forms of Discrimination against Women in 18 December 1979, became one of the significant achievements of the United Nations Decade for Women (1976-85).<sup>10</sup> Committee, the expert body established by the Convention to monitor its implementation, initiated its work in 1982. The Convention has many State Parties signed and has been open for signature only since 1980. Even with broad support for its objectives, both the Convention and Committee have attracted far less attention than the other human rights treaties and their committees among those active in the field of international human rights.<sup>11</sup> At the same time, it is a treaty in relation to which many states, upon ratification, have a considerable number of very substantial reservations. Nearly 40 States have made a total of roughly 105 reservations and declarations to the Convention. Some of these reservations, although they retain the general thrust of the obligations under the Convention, are aimed at allowing States to maintain discriminatory practices and legislation in certain areas (e.g. questions of the nationality of children born in marriage, the equal right of the spouses to divorce, freedom of choice of employment and profession, and use of property, etc.).<sup>12</sup> Many reservations based on the conflict between the norms of the Convention and Sharia law. For instance, Article 2 of the Convention contains a general statement of the “obligations of states parties, requiring them to pursue without delay a policy of non-discrimination’s using all appropriate means.” However, for instance Bangladesh has made following reservations: “The Government of Bangladesh does not consider as binding upon itself the provision of Article 2 and [other article] as they conflict with Saria law based on Holy Quran and Sunnah”. States such as Egypt, Iraq, and Libya have also made similar broad reservations.<sup>13</sup>

According to the UN Commission on CEDAW, reservations reduce the

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<sup>10</sup> On the U.N Decade for Women generally and the importance of the Convention in the context of the activities of the Decade, see A. Fraser *The U.N Decade for Women: Documents and Dialogue* (1987); Elder, *The Rights of Women: Their Status in International Law*, 25 *Crime & Soc. Just* 1, 23-32 (1986).

<sup>11</sup> Gender issues and human rights Volume 1, Ed, Dianne Otto p. 414, 2013 “The Yale Journal of the International Law”; Volume 14, Nr 1, Winter 1989.

<sup>12</sup> Ibid.

<sup>13</sup> Anne F. Bayefsky “General Approaches to the Domestic Application of Women’s International Human Rights Law”. *Handbook Human Rights of Women: National and international Perspectives*. Ed. Rebecca J. Cook 1994, p.352.



effectiveness of the treaty, create obstacles for the Commission to assess progress in implementing its provisions, limit the Commission's mandate and negatively affects the entire human rights regime.<sup>14</sup>

CEDAW has restricted capacity to promote implementation of the Convention. Additionally, the Committee has no quasi-judicial powers allowing to pronounce a State Party in violation of the Convention and to order a proper remedy. At the same time it may offer general recommendations to individual States, or to the State Parties generally, as appropriate approach to pursue the Convention's goals, its major means for exerting pressure on states to comply with their obligations lies in its public review of individual country reports.<sup>15</sup> Under Article 21 of CEDAW, the CEDAW Committee "may make suggestions and general recommendations based on the examination of reports and information received from the states parties." In other words, the general recommendations are authoritative statements that can be used to clarify states' report obligations (e.g. requiring information on a specific issue must be included in reports), or to suggest approaches to implementing treaty provisions. They can also be written as interpretations and updates of the human rights treaty, clarifying the meaning of specific provisions or highlighting thematic issues. General recommendations are not treaties and do not need ratification by states parties. They are not legally binding; however, they are considered as authoritative statements on the content of legal duties assumed by states parties.<sup>16</sup> Further, the CEDAW does not contain any provision directly prohibiting violence against women in general. The CEDAW Committee's general recommendations provide some of the substantive work on defining Violence against Women and outlining state obligations to end it. Some of the General Recommendations that are relevant in the context of violence against women are mentioned hereafter:

- The Recommendation No.12 of the Committee specifies that States should include in their reports information on violence and on measures introduced

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<sup>14</sup> Ibid.

<sup>15</sup> Gender Issues and Human Rights Volume 1, Ed, Dianne Otto p. 418, 2013 "*The Yale Journal of the International Law*"; Volume 14, Nr 1, Winter 1989.

<sup>16</sup> Committee on the elimination of all forms of discrimination against women, CEDAW/C/1995/1. IMPLEMENTATION OF ARTICLE 21 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

to deal with it.<sup>17</sup>

- Article 4 (c) of CEDAW includes the due diligence standard for violence against women.

- Recommendation No.19 addresses violence against women and gives a nonexhaustive list of human rights involved in the context of gender-based violence. Moreover, the Committee noted in General Comment No. 19 that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”<sup>18</sup>

- Article 2 of CEDAW is focused on the role of law, legislation and legal institutions in securing women’s right to non-discrimination, both formally (de jure) and in practice (de facto). General Recommendation No. 28 (GR 28) highlights and supports the significance of this Article in the broader context of gender equality, recognising it as “the very essence of the Convention” and “crucial to its full implementation”. Moreover, GR 28 focuses on state obligations under Article 2, calling for the condemnation of all forms of discrimination against women and adoption state policies to eliminating it. As part eliminating violence against women, GR 28 calls attention to each state’s due diligence obligation to prevent, investigate, prosecute and punish acts of gender-based violence. Additionally, states are required to:

*- Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor’s acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. (para.*

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<sup>17</sup> CEDAW General Recommendation No.12, *supra* note 20, U.N. Doc.

<sup>18</sup> CEDAW General Recommendation No.19, *supra* note 51, para. 7. U.N. Doc. A/47/38 (1992).

13)

- *Provide appropriate remedies and reparations to women whose rights have been violated under CEDAW. (para. 32)*
- *Ensure women have access to affordable and timely remedies when their rights have been violated, including the provisioning of legal and assistance where necessary. (para. 34)*
- *Initiate criminal proceedings and prosecute perpetrators who have violated women's human rights, such as in cases of domestic violence and violence against women at-large. (para. 34)<sup>19</sup>*

An additional impetus to this process can be given approval by the General Assembly on October 6, 1999, of the Optional Protocol and the Convention on the Elimination of All Forms of Discrimination against Women, which permits individual women and women's non-governmental associations to file individual complaints of violation of the Convention. After ratification and entry into force of the Optional Protocol, such complaints can be sent to the UN Commission on the Elimination of Discrimination against Women by individuals, groups of individuals or organizations that have suffered damage or in some form affected by the violation of the rights provided for in the Convention.

The Afghan Government signed the Convention on the Elimination of Discrimination against Women on 14 August 1980, but, because of severe conflicts in the country, the Convention was only ratified in 2003.

### *2.1.3 International Covenant on Civil and Political Rights ("ICCPR)*

The International Covenant on Civil and Political Rights ICCPR entered into force on 23 March 1976, was adopted by the UN General Assembly on 16 December 1966. The ICCPR has binding effect upon the signatory states. Human Rights Committee ("HRC") is an independent expert body appointed to monitor

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<sup>19</sup> CEDAW General recommendation No. 28, General 16 December 2010,

states parties' implementation of the ICCPR and its Optional Protocols. The ICCPR has two Optional Protocols. The First Optional Protocol to the ICCPR (1966) establishes an individual complaints procedure for bringing alleged violations of the Covenant by state-parties before the treaty body HRC. Whereas, the Second Optional Protocol (1991) commits state-parties to the abolition of the death penalty.

The ICCPR provides legal framework to protect and preserve the most basic civil and political rights such as equality, due process, right to life, freedom of religion and the right to equality. Consequently, most of the rights included in ICCPR dealing with the violence against women, for instance Article 6 “right to life”, Article 7 “right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, Article 23: right to marry with free and full consent; equality in marriage.<sup>20</sup>

Worth to mention, that ICCPR issues General Comments and provide State Parties with detailed guidance on the meaning of the treaty articles, recommendations for further action, and guideline for preparing state reports. The reporting mechanism obliges State Parties to file periodic reports with the monitoring body describing the “measures that “they have adopted for, with the ‘progress made’ in the attempt to achieve covenant rights.

The Committee through its General Comments has addressed gender-based violence in relation to several ICCPR's provisions and state responsibility to eliminate it. For instance, in General Comment No.31 para.9 “States parties must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, relation against witnesses, violence against women, including domestic violence”. The problem of domestic violence has brought a new perspective regarding States' obligations with respect of acts of torture and cruel, inhuman or degrading treatment committed by private parties, such as husbands, partners and parents.<sup>21</sup>

General Comment No.28 in para.5 states: “Inequality in the enjoyment of rights by women throughout the world I deeply embedded in tradition, history and

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<sup>20</sup> Women's Human Rights, The International and Comparative Law Casebook; “ *The Interrelationship of the ICCPR and the ICESCR; and the Human Rights Committee's Evolving Equal Protection Doctrine*” Susan Deller Ross 2008, p.91 <sup>21</sup> Ibid. p. 91-92.

<sup>21</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Engel, cop. 2005), p. 184.

culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. State parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenants rights."<sup>22</sup>

#### *2.1.4 International Covenant on economic, social and Cultural rights ("ICESCR")*

The ICESCR and its ESC Committee monitors state compliance with the treaty through a reporting process, and its issues General Comments that provide States Parties with recommendations and guidelines for state reports. The ICESCR has the same reporting mechanism as ICCPR as described below. Meanwhile both Committees have become concerned about women's rights situation; the reports and observations continually speak to these issues. The treaties differ from each other , The ICESCR provides the legal framework to protect and preserve the basic economic, social and cultural rights, and requires States Parties to provide assistance enabling everyone to have access to employment opportunities, social security insurance, family protection, adequate food and housing, good health, education and social protection. This in contrast to ICCPR, the ICESCR in Article 2 (1) requires a State Party "to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.....". Accordingly, ratifying States cannot immediately provide such assistance because of the enormous expense. On the other hand, ICESCR requires the immediate provision of equality rights. Thus, Article 2(2) provides that States Parties "guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind [such] as.....sex..." Similarly, Article 3 of the treaty requires that the "States Parties to the present Covenant undertake to ensure the

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<sup>22</sup> UN, ICCPR: General Comments No.28 Equality of rights between men and women (article 3): 29/03/2000. CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments)

equal right of men and women to the enjoyment of all [either ‘civil and political’ or ‘economic, social, and cultural’] rights set forth in the present Covenant.”<sup>23</sup>

In its General Comments, the Committee has tackled gender-based violence in relation to provisions in ICESCR and state responsibility to eliminate it. According to General Reporting ICESCR Guidelines, states are required to report on specific aspects of gender-based violence: “ To indicate: a) Whether there is legislation in the State party that specifically criminalizes acts of domestic violence, in particular violence against women and children, including marital rape and sexual abuse of women and children and the number of registered cases, as well as the sanctions imposed on perpetrators; b) Whether there is a national action plan to combat domestic violence, and the measures in place to support and rehabilitate victims; and c) Public awareness-raising measures and training for law enforcement officials and other involved professionals on the criminal nature of acts of domestic violence.” Consequently, State parties are required to take appropriate measures to ensure that individuals under their jurisdiction are not subjected to any form of illtreatment.<sup>22</sup>

Afghanistan was among the first countries to accede to both treaties in 1983 without reservations.

### *2.1.5 Convention Against Torture ("CAT")Violnce aginast women as a form of torture.*

In recent years, one may assume that torture and other inhuman or degrading treatment and punishment were relevant matters of the past century, but unfortunately this is not the case. In our so called progressive society, the torture of people and people exposed to severe punishment and degrading treatment still occurs. The definition of torture is quite complex due to its various interpretation over the years. In the thirteen century, the Roman lawyer Azo gave this definition: “Torture is the inquiry after truth by means of torment”.<sup>24</sup>

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<sup>23</sup> Women’s Human Rights, The International and Comparative Law Casebook; “ *The Interrelationship of the ICCPR and the ICESCR; and the Human Rights Committee’s Evolving Equal Protection Doctrine*” Susan Deller Ross 2008. p.92 <sup>22</sup> Committee on ECS; Guidelines on treaty-specific documents to be submitted by States Parties under Article 16 and 17 of the ICESCR. United Nations, General comment 16, para 40. 27 E/C.12/2008/2 24 March 2009.

<sup>24</sup> Edward Peters, Torture, Basil Blackwell inc. 432 Park Avenue South Suite 1503, New York , USA, 1985 p.2-3 <sup>24</sup> Ibid.

Article 1 of the Declaration against torture adopted by the General Assembly of the UN on 9 December 1975 reads thus: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Lastly, there is a more imposing definition by another twentieth-century legal historian, John Heath: "By torture I mean the infliction of physically founded suffering or the threat immediately to inflict it, where such infliction or threat is intended to elicit, or such infliction is incidental to mean adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civil, or ecclesiastical interest."<sup>2</sup>

The first definition applied to torture as a legal incident was by Roman lawyer, the second is the most diplomatic definition, and the third is intended to apply to the historical circumstances. However, it is likely that people using term in past century may find these definitions too narrow. However, the description of torture simply is mental and physical pain intentionally subjected upon a human being by any other human being.

The definitions of torture and ill-treatment in the Convention against Torture were created when the dominant understanding of torture was the harm caused to prisoners in state detention; such prisoners were and are predominantly men. Torture was then narrowly defined to account for their situation.

Currently torture of women is one of the human rights violation that causes the greatest concern in every society. Torture of women constitutes a fundamental violation of human rights and is explicitly prohibited in all circumstances by a number of international human rights law treaties. Despite the fact it is prohibited by law, it continues to be used in most states around the world. Thus, rooted discrimination based on gender encompasses nearly every society and is reflected in each society's laws. The gender has a significant impact on the form of torture or other ill-treatment. When women and girls are subjected to torture or other illtreatment, the circumstances in which it occurs, the consequences, and the

availability of legal, medical and social remedies comes into question.

Genderspecific torture is directed disproportionately or primarily against women. Men can also be targets of sexual torture but in smaller numbers. However, the definition of torture in the CAT specifically includes discrimination as a purpose that characterizes ill-treatment from torture. Gender discrimination, can therefore under certain conditions, fulfill the criteria for torture.<sup>25</sup>

Feminist advocates recognized that the intention, purpose and level of pain and suffering inflicted by non-State actors (particularly in cases of rape and domestic violence) on women is very similar to torture in detention. Rhonda Copelon said that “When stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence.”<sup>26</sup> Further Rhonda Copelon establishes in her article ‘Gender Violence as Torture: The Contribution of CAT General Comment No. 2’, the similarities between domestic violence and torture. Copelon explains that each of the four basic elements of torture, as defined in Article 1 of CAT, is present in violence against women.<sup>27</sup> A concise description of Copelon’s analysis can be made as follows:

- First element: *severe physical and/or mental pain and suffering*. Rape, domestic violence, female genital mutilation and trafficking all these forms of violence are very similar to common methods of torture: for instance beating, biting, spitting, punching, stabbing, strangling, burning or attempted burning. The psychological consequence is often related with the physical pain: the feeling of humiliation, debilitation and fear caused by the physical cruelties.<sup>28</sup>

- Second element: *intentional infliction*: “To constitute torture, pain must be intentionally inflicted against the will of the victim.” The intent required is general: that the person willingly and independently performing conduct that made severe pain or suffering objectively foreseeable, thereby demonstrates the

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<sup>25</sup> Amnesty International, 2001; Madrigal- Borloz, 2017; Mendez, 2016; Redress & Amnesty International, 2011; Sáez, 2016

<sup>26</sup> Copelon, Rhonda (1994), ‘Recognizing the Egregious in the Everyday: Domestic Violence as Torture’, Handbook Columbia Human Rights Law Review 291-367.

<sup>27</sup> Copelon, Rhonda (2008), ‘Gender Violence as Torture: The Contribution of CAT General Comment No. 2’ City University of New York Law Review p. 247

<https://academicworks.cuny.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1193&context=clr> visited on 34 March 2019

<sup>28</sup> Ibid



difference between torture and accident.<sup>29</sup> For instant in the case of Prosecutor v. Kunarac, the court stated that “it is irrelevant to the definition of torture that an accused rapist defends on the ground that he did not intend to rape, but only intended, for example, to obtain sexual gratification”, as was argued by one of the accused in present case. Perpetrators may argue that they lost control and acted spontaneously, however this is not legally recognized excuse, because the perpetrators acts with the purpose exercising control and often plans attack.<sup>30</sup>

- Third element: *acts inflicted for specified purposes*. Many scholars argue that the element of “specific purposes does not really require subjective but rather considerations of goals and consequences of the violence objectively.” Accordingly, the use of torture as a abusive power is a violation of basic human rights without regarding to the type of purpose.<sup>31</sup> Moreover, The General Comment’s No.2 explains the importance on the derogability of torture, as well as its reference to the *jus cogens* status of torture under customary international law.<sup>32</sup> With regard to gender, the General Comment adds to this list of impermissible claims “any religious or traditional justification that would violate this absolute prohibition.”<sup>33</sup> Thus, it enlightens the extent of non-derogability while it addresses the most common justifications applied to gender violence and abuse.

- Fourth element: *some degree of official or quasi-official involvement, whether active or passive*.<sup>34</sup> Copelon argues that the concept of “consent or acquiescence” are broad enough to embrace the failure of governments to redress violence against women. This signified a compromise between those who wanted to include purely private torture and those who felt that the State has to be the responsible party. Further, The General Comment N.2 effectively contend with the private-public distinction, where it is admitting that States have both negative and

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<sup>29</sup> Copelon, *supra* note 14, p. 325.

<sup>30</sup> Copelon, Rhonda (2008), ‘Gender Violence as Torture: The Contribution of CAT General Comment No. 2’ City University of New York Law Review p. 247

<sup>31</sup> Copelon, *supra* note 14, p. 325.

<sup>32</sup> General Comment No. 2, *supra* note 2, ¶ 1.

<sup>33</sup> *Ibid.*

<sup>34</sup> Copelon, *supra* note 14, p. 308., p 355.

affirmative obligations to prevent torture and ill-treatment.<sup>35</sup>

Azadeh Chalabi argues in her article “that the words ‘ensure’, ‘provide’, ‘protect’, ‘take measure’ and ‘take steps’, used normally for a positive obligation, are stated 8, 7, 1, 8, and 1 times in the CAT only. Articles 2 and 16 of the Convention require each State Party to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.”

Even more, this also exists in the preamble of the optional protocol to the CAT.

Thus, this Optional Protocol recalls that the effective prevention of torture necessitates education and a combination of various legislative, administrative, judicial and other measures.<sup>36</sup>

In conclusion, In 2016 Special Rapporteur on torture Juan Méndez in his report dealing with gender perspectives expressed that “States are responsible for the acts of private actors when States fail to exercise due diligence to prevent, stop or sanction them, or to provide reparations to victims.”<sup>37</sup>

Afghanistan became signatory party to the Convention against torture on 4, February, 1985 and ratified the Convention on 1 April 1987.

### *2.1.6 Convention on the Rights of the Child ("CRC")*

The Convention on the rights of child adopted by General Assembly in 1989, is a legally binding international instrument that combines variety of human rights – such as civil, cultural, political and social.<sup>38</sup> It was reaffirmed by world leaders that children, because of their vulnerability required the special protection of a particular convention and have distinctive human rights that should be recognized. Thus, the CRC is the first, comprehensive, right-based international treaty created to protect and enhance the position of child.

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<sup>35</sup> See generally General Comment No. 2, supra note 2.

<sup>36</sup> Chalabi, Azadeh: ‘The nature and scope of states’ obligation to adopt a national human rights action plan’ Faculty of Laws, University College London, UK Published online: 08 May 2014.

<sup>37</sup> UN Doc. (A/HRC/31/57)

<sup>38</sup> UNICEF, CRC and CEDAW ‘Making the Connection between women’s rights and children’s rights’ Facilitator’s guide. UN Children’s Fund 3 United Nations Plaza New York, NY 11117 United Nations Children’s Fund 3 United Nations Plaza New

Definition of a child in Article 1 of CAT states: “..a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.” Further, the Conventions enshrines four core principles: non-discrimination (including by sex) , the best interest of the child, the right to life, survival and development, the views of the child.<sup>39</sup>

The CRC is monitored by the Committee on the Rights of the Child and the reporting procedures requires that states submit reports, later the Committee examines country reports and then responds with its ‘concluding observations’. Further, the Committee also reviews additional reports from states which have ratified the two Optional Protocols to the CRC: the Optional Protocol on the sale of children, child prostitution and child pornography, and the Optional Protocol on involvement of children in armed conflict. The CRC Committee cannot receive individual complaints. It also issues General Comments, where the Committee has addressed gender-based violence in relation to specific provisions in the CRC and state responsibility to eliminate it.

In its GC No.13 ‘The right of the child to freedom from all forms of violence’ states that: “*. States parties should ensure that policies and measures take into account the different risks facing girls and boys in respect of various forms of violence in various settings. States should address all forms of gender discrimination as part of a comprehensive violence-prevention strategy. This includes addressing gender-based stereotypes, power imbalances, inequalities and discrimination which support and perpetuate the use of violence and coercion in the home, in school and educational settings, in communities, in the workplace, in institutions and in society more broadly. Men and boys must be actively encouraged as strategic partners and allies, and along with women and girls, must be provided with opportunities to increase their respect for one another and their understanding of how to stop gender discrimination and its violent manifestations.*”<sup>40</sup>

Essential in the context of child law is the hierarchy of sources of *jus cogen*, there are rules in international law that should be regarded as fundamental. It

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<sup>39</sup> Davel, CJ ‘Children’s rights in a transitional society’ Protea book house 1999, p.129-140. *UN International Convention on the rights of child. Articles:2,3,6 and 12*

<sup>40</sup> UN Committee on the Rights of the Child (CRC), General comment no. 13 (2011);The Rights of the child to freedom from all forms of violence, 18 april 2011, CRC/C/GC/13 <https://www.refworld.org/docid/4e6da4922.html> visited 21 March 2019

means that there are some obligations that each State has towards the international community *as a whole*, for instance, prohibition of torture, genocide, outlawing aggression and protection from slavery. In this context, Article 53 of Vienna Convention provides ‘a treaty will be nullified if it conflicts with peremptory norm of general international law. The rule known as *jus cogens*, such a peremptory norms cannot be derogated from and possess binding nature on all nations. Accordingly, there are noteworthy arguments that can be made that certain provisions of CRC can be considered as including norms of the character justifying the requirements of *jus cogens*. For instance, Van Bueren, argues “that the sexual and economic exploitation of children is comparable to slavery and should therefore be recognized as a ‘peremptory norm of general international law’ capable of prevailing conflicting treaty provision and binding nations that have not ratified the treaties that provide protection against such exploitation of children.”<sup>41</sup>

In conclusion, Committee in its General Comment No.13 emphasizes child rights into human rights due diligence and States obligations and the responsibilities of family, and other actors, states further that “*References to ‘States parties’ relate to the obligations of States parties to assume their responsibilities towards children not only at the national level, but also at the provincial and municipal levels. These special obligations are due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations. Regardless of whether violence takes place, States parties have a positive and active obligation to support and assist parents and other caregivers to secure, within their abilities and financial capacities and with respect for the evolving capacities of the child, the living conditions necessary for the child’s optimal development (arts. 18 and 27). States parties, furthermore, shall ensure that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence*

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<sup>41</sup> Buck, Trevor: International Child Law. Great britian Cavendish Publisher 2005, p. 27

*and in the justice systems are addressing the needs and respecting the rights of children.”*<sup>42</sup>

Subsequently, the research shows that even of the existing of international norms and treaties, many children around the world become victims of different human rights violations. This type of infringements is contradicted to the very basic human rights, because children are vulnerably and completely under the control of adults. However, the Convention defines common standards, legal and moral norms that promote a policy of protecting children’s human rights.

Afghanistan ratified the CRC on March 28, 1994, which contains many provisions affecting women, the organization of the family and girl, children. However, in so doing it ade a general reservation to the effect that “the Government of the Republic of Afghanistan reserve the right to express, upon ratifying the Convention, reservations on all provisions of the Convention that are incompatible with the laws of Islamic Sharia and the local legislation in effect.”<sup>43</sup>

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<sup>42</sup> UN Committee on the Rights of the Child (CRC), General comment no. 13 (2011);The Rights of the child to freedom from all forms of violence, 18 april 2011, CRC/C/GC/13

<https://www.refworld.org/docid/4e6da4922.html> visited 21

March 2019

<sup>43</sup> UN Treaty Body Databas

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN) visited 21 March 2019

## 2.2 State Responsibility for Violations against Women

Generally, State Responsibility in international law plays an important role for ensuring the stability of the national and international community. State Responsibility occurs in the existence of certain established considerations on which State liability can arise. For instance, in municipal law a State may sometimes enjoy freedom from legal responsibility. Yet, in international law a State can be responsible for its conduct in violation of its international obligations.<sup>44</sup> Such responsibility attributes, to a State, the feature of its position as an international person.<sup>45</sup> However, State responsibility is established on acts or omissions committed by State actors or by non-State actors whose actions are prior to the State.<sup>46</sup> Yet, there is an exception to this rule; a States may be held accountable for their failure to exercise due diligence to prevent and respond to certain acts or omissions of non-State actors.<sup>47</sup> In the seventeenth century, a Dutch jurist Hugo Grotius clearly formulated in his work the principles that could be seen as a predecessor to contemporary conceptions of State responsibility. Grotius used in his terminology the expression *patientia*, which mean the “toleration”. The principle of *patientia* would hold a ruler or a community accountable where there is a knowledge of a crime committed by a his or her citizens or official, and authority as such failing to prevent illegal acts when in a circumstances illegal acts can and should be reasonable foreseeable, preventable and actually detected.<sup>48</sup> In the early twentieth century, Oppenheim advanced two different theories concerning the State responsibility, the original and vicarious responsibility of a State. The so called “original” responsibility is born by a State when the acts are directly ascribable to it, for instance certain acts of its government, official or its private actors performed at the government’s dispositions or with its authorization. While “vicarious” liability, on the other hand, take place out of certain internationally offensive acts of private individuals,

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<sup>44</sup> Draft Articles on State Responsibility, pt I, Art 3 and Commentary, YBILC (1973), ii, p. 179.

<sup>45</sup> Draft Articles on State Responsibility, pt I, Art 2 and Commentary, YBILC (1973), ii, p. 176.

<sup>46</sup> See the draft articles on responsibility of States for internationally wrongful acts, general commentary, Yearbook of the International Law Commission, 2001, vol. II (Part Two) and corrigendum, para. 77.

<sup>47</sup> Amos Hershey, *The essentials of international public law* (New York, 1st edn, Macmillan 1918) 162. <sup>50</sup> Hugo Grotius, *De Jure Belli Ac Pacis* (1922).

<sup>48</sup> Hugo Grotius, *De Jure Belli Ac Pacis* (1922).

regardless of whether they are nationals, aliens or officials acting without authorization in the state's territory.<sup>49</sup>

The essential differences between original and vicarious State responsibility, is that former involves a State being in direct infringement of legal obligations binding on it, which can be serious matter, while the latter the State's responsibility demands for it to take certain preventative measures against injurious conduct complained of, accordingly requires the State to secure that and if necessary punish offender. For this reason these preventative obligations of the State in cases of "vicarious" responsibility are themselves obligations for the violation of which by a State refusing to take required remedial or preventative measures, in consequence the State bears direct responsibility.

Eventually, drawing attention to above-mentioned useful distinction, it should be noted that State's responsibility for act of a private person is not vicarious responsibility *stricto sensu*. In international law the State is not legally responsible for the acts itself, but for its own failure to comply with obligations binding upon it in relation to the acts of the private actors. The State's responsibility for unauthorized actions of its officials is, however, considered a vicarious responsibility.<sup>50</sup>

Lastly, States may not invoke the provisions of its national law as justification for international delict. States can be internationally responsible for not exercising the considerable power in policy-making in the sphere of law enforcement and for the breach of international obligation or in other words violation of the right and freedoms of individuals.

### *2.2.1 The State's positive obligation to protect women's human rights*

Every human being is inherently a right holder who should enjoy universal human rights. By becoming a party to the different human rights treaties, or as a matter of customary international law a State acquires obligations. In accordance

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<sup>49</sup> Oppenheim's International Law, 9<sup>th</sup> Edition, Volume I, Longman Group UK Limited and Mrs Tomkosko Hudson, 1992, pp. 500-501 <sup>44</sup> Ibid, p 502

<sup>50</sup> Ibid, p 502

to the International law all States, including Afghanistan, have specific and clear responsibilities to take measures to combat violence against women committed by representatives of both the State and non-State actors. Worth to mention, that different rights may point to different types of State duties, thus it depends on the nature of the right and on the problems that it was meant to overcome or to prevent.

The basic dual distinction is between negative and positive obligations. It is clear that States must not only impose “negative” duties, for instance to refrain from interfering with a right e.g. ‘do not arbitrarily detain a person or torture’, but also State should take certain measures to ensure rights. To illustrate, States must not only arbitrarily take the right to life but also must consider its positive obligation and take appropriate measures to protect the right to life against apparent risk within their territory.<sup>51</sup> This dual obligation is expressed well in Article 2 of International Covenant on Civil and Political Rights, according to which each State party ‘undertakes to *respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’. This encloses ‘legislative, judicial, administrative, educative and other appropriate measures [taken] in order to fulfil [a State’s] obligations’.<sup>52</sup> The provisions of the ICCPR advocate that this duty has two parts. The first is the duty to protect and take preventative measures against occurrences of violations of human rights, irrespectively of whether they are committed by State or non-State actors. The second is the duty to inhibit violation and to take remedial measures when the violations take place. Furthermore, it is within the States responsibility to exercise ‘due diligence’, this is to take all measures which can reasonably be taken in the circumstances in order to ensure the rights which granted.

In *M.C. v. Bulgaria* a fourteen-year-old girl claimed that two men had raped her. The prosecution did not proceed due to lack of finding of force or physical resistance on the applicant’s body. Applicant claimed that the outcome of the criminal investigation composed a lack of effective protection, investigation and punishment by Bulgarian State. The European Court of Human Rights criticized the State for its failure to investigate, punish and prosecute rapists and enact

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<sup>51</sup> Ilias Bantekas and Lutz Oette, *International Human rights law and practice*, Cambridge university press , 2013 pp. 76, 321322

<sup>52</sup> HRCtee, General Comment 31, para . 7.



criminal legislation in rape cases, and also emphasised on the use of force rather than consent in defining the crime of rape. Therefore, the court found that the State failed to exercise its due diligence obligation under article 3 of European Convention on Human rights. This case clearly highlights that States should take different series of measures, such as criminalizing certain forms of rape, reconsider ineffective frameworks of investigations in rape cases and changing legislation in order to provide effective protection.<sup>53</sup> Further, The Court concluded that States have positive obligations enshrined in Article 3 (freedom from torture, inhuman or degrading treatment) and Article 8 (right to privacy), in order to take appropriate criminal provisions effectively punishing rape and also put them into practice through effective legislation and prosecution. Consequently, The Court found that the investigation carried out by the Bulgarian authorities, and the approach of the investigator and the prosecutor in this case (which focused on the lack of evidence of resistance on the part of the applicant) did not meet the State's obligations under the development and effective use of criminal law system that would ensure punishment in respect of any form of violence and sexual assault.<sup>54</sup>

Different treaties may also specify measures, such as reviews or enactment of legislation, provide effective remedies and other similar steps, which States have to take in order to fulfil their obligations.<sup>55</sup>

Subsequently, it can be concluded that even though human rights conventions rarely talk of duties, the duty of States to protect individual or groups from violations of their human rights by State or non-State actors is however well recognized in international law. This duty amongst other obliges States to take a series of preventive measures, i.e. the establishment of national and regulator monitoring systems directed at preventing occurrences of human rights violations and the enactment of national legislation.

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<sup>53</sup> See for example *M.C. v Bulgaria*, (2005) 40 EHRR 20, paras. 109/87, and *Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008 (16 July 2010), paras. 8.1-8.10. <sup>48</sup> *Ibid*, paras. 170-190

<sup>54</sup> *Ibid*, paras 170-190.

<sup>55</sup> see for example articles 4(1), 5, 10, 11, 13 and 14 Convention Against Torture.

### 2.2.2 Introducing the Due Diligence Standard

The State obligation to protect its individual from discrimination is a fundamental principle of international anti-discrimination law. It is commonly recognised that the manifestations of discrimination on the private sphere, such as in the relationship between individuals, groups and non-State actors are the serious cause for concerns. International anti-discrimination law imposes an obligation on States to effectively combat discrimination and protect people from its effects in the private sphere. However, non-State entities are required not to refrain from discrimination, and also to ensure respect for the principles of equality and nondiscrimination in practice.

In accordance to the “due diligence standard” States are responsible for the failure to comply with its international obligations in cases where the existence of discriminatory offenses committed by State or non-State actors. States are required to exercise “due diligence” in the prevention of discrimination and minimize the consequences of discrimination.

The due diligence standard provides assistant for the rights holders to hold State responsible, by providing an assessment outline for ascertaining what establishes effective fulfilment of a State’s obligations.

Concerning non-State actors, it has been argued that: “*International human rights law requires a State to take measures – such as by legislation and administrative practices – to control, regulate, investigate and prosecute actions by non-State actors that violate the human rights of those within the territory of that State. These actions by non-State actors do not have to be attributed to the State, rather this responsibility is part of the State’s obligation to exercise due diligence to protect the rights of all persons in a State’s territory.*”<sup>56</sup>

To conclude, the standard of due diligence imposes a responsibility on the State to take necessary measures to prevent, protect and provide remedies for acts of violence committed whether by State agents or private parties. Thus, due diligence standard is extended State responsibility to all acts of violation wherever they occur whether in the public or private sphere, and whoever commits violence State agents or private parties.<sup>57</sup>

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<sup>56</sup> Robert McCorquodale and Penelope Simons, “Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law”, *Modern Law Review*, vol. 70, No. 4 (2007), p. 618

<sup>57</sup>OHCHR, *15 Years of the United Nations Special Rapporteur on Violence Against Women: its Causes and Consequences*, p. 25,

### 2.2.3 Establishment of the due diligence in IACHR: Case study *Velasques Rodrigues v. Honduras*

The Inter-American Court of Human Rights was the first human rights body to hold that the American Convention on Human Rights requires States to exercise due diligence. The landmark case, *Velasques Rodrigues v Honduras*, was received by the Inter-American Commission of Human Rights and raised the issue of whether a State is responsible for every violation of human rights that occurs in the private sphere. Rodriguez was a Honduran student who was arrested without warrant by national security of Honduras. Police and security forces constantly denied knowledge of his location and fate. Honduras was one of the places with widespread or systematic practice of enforced disappearance, thus there was every reason to believe that Mr. Rodriguez was no longer alive. In this case, it was not confirmed whether security forces or police were involved in his disappearance.<sup>58</sup> However, the Court found that disappearance of Mr. Velasquez was carried out by agents who acted under cover of public authority, even though it has not been confirmed. Accordingly, the court held “... *[A]ny violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention*”.<sup>59</sup>

Further the Court held that the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfil the duties provided under Article 1(1) of the Convention, which obligated it to guarantee Mr. Velaquez the free and full exercise of human rights. The duty to act in good faith reasonable discretion was derived by the Court on the basis of Article 1(1) of

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<sup>58</sup> Velásquez Rodríguez v. Honduras, 29.7.1988, Int.-Am. Ct. H.R., Ser. C, No.4 (1988), para. 147-148.

<sup>59</sup> Ibid.

the American Convention on Human rights, to which the Contracting Convention undertook to respect the rights and freedoms set forth in the Convention, and to ensure their implementation.<sup>60</sup> Therefore, the Court concluded that States are obliged to regulate and set up governmental framework so that they were able to ensure the enjoyment of human rights.<sup>61</sup> In particular, the governmental structure should ensure the prevention, investigation and punishment of human rights violations, and provide the maximum possible compensation for damages. According to the Court the adoption of legislative measures alone are not enough.<sup>62</sup> In addition, the public authorities should carry their active actions to ensure effective implementation of the Convention. In the present case, the failure to take the necessary measures for the investigation and prosecution was therefore in violation of the duty to act in good faith.<sup>63</sup>

#### *2.2.4 Establishment of the Due diligence in ECtHR : Case Study Opuz v. Trukey – protection of women against gender based violence*

Presently, there are numerous case practices in international protection of human rights, which provides the obligation of States to protect the right to life and physical integrity against violations by a private actor. The European Court of Human rights follow the similar approach. This principle is important not only when the involvement of public authorities cannot be established. It applies even when an individual without assistance from the State threatens or violates the fundamental human rights of another individual, and the public authority does not react (such as in

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<sup>60</sup> Article 1 (1) of American Convention on Human Rights provides: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

<sup>61</sup> *Velásquez Rodríguez v. Honduras*, 29.7.1988, Int.-Am. Ct. H.R., Ser. C, No.4 (1988), para. 166

<sup>62</sup> *Ibid.* para. 167, “The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation - it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights”.

<sup>63</sup> On this basis, the Court held responsible Honduras for not taking appropriate measures to ensure the right to life, personal liberty and to be treated with dignity. (And also she failed to exercise due diligence to prevent attacks on a person’s life, physical integrity or liberty on its territory and punish perpetrators). See *ibid* para. 194.

cases of domestic violence in which the victims' request for protection, contrary the police does not interfere to provide support and protection). An example of this is the decision of the ECtHR in *Opuz vs. Turkey* case, which drew a lot of public attention since it concerned the issues of domestic violence against women and its consequences about the State responsibility.

Nahid Opuzen is a Turkish women who filed a complaint in ECtHR, claiming that the Turkish authorities had failed to provide sufficient protection to her and her mother from an attack by her former husband, which led to the death of her mother and to the ill-treatment of her. The applicant was subjected for several years to continuous and extreme acts of violence committed by her husband. During the years of abuse, the applicant filed several complaints with Turkish authorities<sup>64</sup> Medical reports indicated several times that the injuries of the applicant were life threatening.<sup>65</sup> The violence ended up when the perpetrator murdered the applicant's mother by shooting her.<sup>66</sup>

The national court convicted the husband of Nahid Opuzen as the perpetrator for murder and sentenced him to life imprisonment. Nevertheless, later on the court reduced his sentence from 15 years to 10 months imprisonment and a fine, stating that the deceased had provoked the assault.

The claim addressed to the ECtHR was based on the failure of the State to take the required measures against the applicant's husband on the ground of the violation of the right to life (Article 2), the right to be free from torture, inhuman and degrading treatment (Article 3), the right to an effective remedy (Article 13) and the right to be free from discrimination on the ground of gender (Article 14) of ECHR.

The Court concluded, "The violence suffered by the applicant and her mother can be seen as gender-based violence, which is a form of discrimination against women." The applicant was able to demonstrate that women in Turkey mainly suffered domestic violence, and that discriminatory judicial passivity of the State created conducive atmosphere for domestic violence. Moreover, the national criminal law does not contain provisions that properly would prevent such phenomena.

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<sup>64</sup> Case of *Opuz v. Turkey*, ECtHR Application no. [33401/02](#), Judgement Strasbourg 09/09/2009. Paras 7-52, 14-47

<sup>65</sup> *ibid.* para. 133

<sup>66</sup> *ibid.* para 54

According to the report by Amnesty International the “[s]tatistical information about the extent of violence against women in Turkey is limited and unreliable. Nonetheless, it appears that a culture of domestic violence has placed women in double jeopardy, both as victims of violence and because they are denied effective access to justice. Women from vulnerable groups, such as those from low income families or who are fleeing conflict or natural disasters, are particularly at risk. In this connection, it was found that crimes against women in south-east Turkey have gone largely unpunished”.<sup>67</sup> The Court, therefore, considered the response by Turkish authorities to be manifestly inadequate and found that Turkey violated the rights to life, to be free from torture and the prohibition against gender discrimination. For the first time, the domestic violence became a form of genderbased discrimination prohibited by the European Convention of Human Rights. Moreover, the Court recognizes that domestic violence is not a “private family matter” but it is in the public interest to ensure State protection from it.

As an illustration, in the *Osman v. UK* case, the ECtHR decided that the State can be held responsible if it is established that: “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.<sup>68</sup> In other words, the State is under the positive obligation to take the necessary measures to prevent serious human rights violations and to investigate, prosecute and punish perpetrators.<sup>69</sup> In the same way it has been established in the *M. C. v. Bulgaria case*, that the State’s positive obligation occurs whether the violation is perpetrated by State agents or non-State actors.<sup>70</sup>

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<sup>67</sup> *ibid.* para 99, Amnesty International’s 2004 report entitled “Turkey women confronting family violence”.

<sup>68</sup> *Osman v. UK* case, 28 October 1998, ECHR, No. 23452/94, para.

116, [cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=osman&sessionid=23959473&skin=hudoc-en](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=osman&sessionid=23959473&skin=hudoc-en), visited on 12 April 2019

<sup>69</sup> Interights, *Opuz v. Turkey* Brief, 21 June 2007, para.8

<sup>70</sup> *M.C. v. Bulgaria* case, 4 December 2003, No. 39272/98, para. 151, [www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/fight\\_against\\_sexual\\_exploitation\\_of\\_children/1\\_pces/CASE%20OF%20MC%20v.%20BULGARIA.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_sexual_exploitation_of_children/1_pces/CASE%20OF%20MC%20v.%20BULGARIA.pdf), visited on 12 April 2019

### 2.2.5 The position of CEDAW Committee Regarding the application of the due diligence standard

Article 2 of The Convention on the Elimination of All Forms of Discrimination against Women refers to the obligation of States to carry out by all proper means and without delay a policy of eliminating discrimination against women. Yet, it does not exist any specific provisions related or referring to a State's responsibility to act with due diligence in elimination of violence against women. However, Article 4 (c) of the Declaration on the Elimination of Violence against Women, for example, provides the States urge to “*(e)exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons*”.<sup>71</sup> Additionally, in General Comment 19, CEDAW emphasized State responsibility for private acts arises “*if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.*”<sup>72</sup>

In 2006, to the Commission on Human Rights of the United Nations Economic and Social Council, Yakin Ertürk the special rapporteur on violence against women published a report and stressed that there is a rule of customary international law that “obliges States to prevent and respond to acts of violence against women with due diligence”. According to Yakin Ertuk, the concept of due diligence provides a criterion to determine whether a State comply with obligation in combating violence against women. He also stresses the lack of clarity that remains regarding its scope and content. He Stated as follow: “*The application of the due diligence standard, to date, has tended to be limited to responding to violence against women when it occurs and in this context it has concentrated on legislative reform, access to justice and the provision of services. There has been relatively little work done on the more general obligation of prevention, including the duty to transform patriarchal gender structures and values that perpetuate and entrench violence against women. On the other hand, the exclusively State-centric*

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<sup>71</sup> The Beijing Declaration and Platform for Action adopted by the Beijing Fourth World Conference on Women reaffirmed this principle: Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, UN GAOR, Annex I, UN Doc A/CONF.177/20/Rev.1 (1995).

<sup>72</sup> CEDAW General Recommendation 19 (n 144) 19. “Also stressed was the need to move away from a public/private dichotomy in viewing violence against women By categorising some forms of violence against women as a “private” matter it has a normalising effect, and State intervention is perceived differently than if it were a “public” incident of violence”. See Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (n 25) 18.

*nature of the due diligence obligation has failed to take into account the changing power dynamics and the challenges these pose for State authority as well as the new questions they raise about accountability.”<sup>73</sup>*

In other words, State responsibility could arise only for those acts or omission where involvement of public authorities would be proved. The ongoing shift in due diligence obligation from restrictive State-centric approach, where mainly involving active State conduct, to a broader interpretation of the obligation including wide categories of non-State actors, such as private actors, is a recent advance in human rights law.

## **2.3 The Content of the due diligence standard**

### *2.3.1 Prevention*

Regarding the fulfilment of the prevention obligation many States discharges there due diligence obligations of prevention violence against women through the adoption of specific legislation. Even if the implementation of the law creates greatest challenging, the mere existence of laws establishes the key element to fight against the violence and create an atmosphere where such violence is not tolerated and accepted.

Adopting the specific legislative provisions are not only the solutions in the problematic areas of gender-based violence. The focus should be on the preventative measures aiming to combat cultural or traditional ideologies used to justify the diverse types of violence. For example, most States are conducting broadbased public education campaign on violence against women, using different posters, magazine advertisements, websites and television and radio commercials. Thus, many States have developed training and awareness-raising programs established in different professional groups such as the police and the judiciary. These groups should be provided appropriate trainings in order to deal with the cases of violence against women in a proper manner.

The public awareness through education and information should not only focus on unacceptability of gender based violence but also on the elimination of cultural

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<sup>73</sup> THE DUE DILIGENCE STANDARD AS A TOOL FOR THE ELIMINATION OF VIOLENCE AGAINST WOMEN “Report of the Special Rapporteur on violence against women, its causes and consequences”, Yakin Ertürk, Economic and Social Council, E/CN.4/2006/61 20 January 2006, para. 15



patterns that propagate discrimination which results in the idea that the female sex is inferior. Sex stereotypes should be eliminated, and the taboos and silence around violence should be broken through different means.<sup>74</sup>

On the other hand, there are some States that adopted legislation for the purposes of prevention and punishing violence against women, however, it was drafted or applied in ways that further violated the rights of women. For instance, Ukrainian legislation on domestic violence includes provisions that allow a woman to be arrested if she provokes violence through “victim behaviour”.<sup>75</sup>

### *2.3.2 Protection*

States are under the obligation to act with due diligence in order to protect women from different forms of violence. Citizens’ rights or women’s rights encompass the scope of the individual relationship with the State in which she/he expects not only to guard their rights against unlawful interference, but also requires the active assistance of the State in their implementation. When it comes to human rights, use of the phrases “everyone has the right” or “everyone is guaranteed” puts emphasize on the recognition of the certain rights and freedoms for any person in the territory of that particular State.

Constitutional rights and freedoms are the main element of the constitutional relationship, which connects the State and inhabitants. To establish the relationship between the States and its inhabitants it is important to obtain protection of their rights, accordingly the state has duty to provide this protection. Fundamental rights and freedoms are not only recognized by the States, but those rights should also be protected. Implementation constitutional rights expresses the affirmation of the State as a democratic State.

Individual rights and freedoms are related directly with a person, neither linked with membership of citizenship and nor derived from it. Individual rights and freedoms are inalienable and belong to human from birth. These right and freedoms that are necessary to ensure the protection of life, liberty, dignity and other right related to a human personal, private life. Individual rights include: the right to life, the right to liberty and security, privacy, housing, freedom of thought and

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<sup>74</sup> Ibid. 56. Para 87.

<sup>75</sup> UNIFEM, “Not a minute more: Ending violence against women”, New York, 2003,p. 43.

speech and to judicial protection of their rights to legal protection, procedural safeguard in the case of prosecutions and etc.

However, the action of many States in constitutional, administrative, criminal and procedural law is aimed primary at the establishing liability, and punishment of those responsible and does not extend to the suppression, protection and prevention work with the potential odd-enders. The State has no right to interfere in the private sphere up to the fact of violence, and focus mainly on the punitive function of the law and does not provide security and protective services to women. For example, State could be held responsible for an absence or inadequate provision of services such as shelters, which indicate that women often have no other choice, but to continue living with their abusers.<sup>76</sup>

Yartik Erkin underlined in his report that the main gaps in the enforcement of protective obligations include a lack of adequate enforcement by police and the judiciary of civil remedies, and criminal sanctions for violence against women. He also criticizes States for focusing on the protection that has too frequently been put on the short-term emergency assistance rather than on providing victim of violence with the means to avoid future harm. He suggested “*States are required to develop appropriate legislative frameworks, policing systems and judicial procedures to provide adequate protection for all women, including a safe and conducive environment for women to report acts of violence against them and measures such as restraining or expulsion orders and victim protection procedures.*”<sup>77</sup>

### 2.3.3 Punishment

The cases of violence against women must be investigated and appropriately punished with due diligence. In other words, States possess an obligation to adopt or modify legislation discriminatory provisions or ensure that violent acts are met with appropriate punishments. So, the development of specific policing practices and procedures in relation to the investigation and prosecution of violence against women cases can be seen in many jurisdictions. For instance, in Poland, the police

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<sup>76</sup> Special Reporture Yarkin Ertuk: “Many of these protection failures were evident in the testimonies I received during my recent mission to the Russian Federation (E/CN.4/2006/61/Add.2)” “Report of the Special Rapporteur on violence against women, its causes and consequences”, Yakin Ertürk, Economic and Social Council, E/CN.4/2006/61 20 January 2006

<sup>77</sup> Ibid.

are obliged to provide legal information to victims of domestic violence and actively encourage them to enforce their right to be free from violence.<sup>78</sup> However, there are many examples of States failing in their duty to appropriately investigate and punish perpetrators of violence against women.

In the case of Afghanistan, for instance invoking of international norms within local context or ordinary local law, whether substantive or procedural to punish perpetrators of gender-based violence may bring rapid troubling outcomes. Simply because of local justice involves a merging of Islamic and customary law that responds to and reflects endemic cultures of war. In majority of communities of Afghanistan, customary law is reproduced among certain local constituencies as legitimate local law. In other words, punishment and reparation it imposes on systematic human rights abusers themselves constitutes human rights abuses, specifically against women. For instance, conveyance of women as a property between different clans represents a preferred form of reparation under customary law, and a form of pursuing justice.<sup>79</sup> More, a State report submitted by Afghanistan to CEDAW underlines a certain laws of Afghanistan that have strict penal orders to punish the perpetrators of crimes against women in order to provide more support to women. For instance, LEVAW has increased the punishment of the rape to 20 years of imprisonment. If the victim dies, the offender will be sentenced to death.<sup>80</sup>

#### 2.3.4 *Reparation*

The State Rapporteur's report on due diligence underlines the importance of compensation to victims of gender-based violence, Stated as follow: *"The obligation to provide adequate reparations involves ensuring the rights of women to access both criminal and civil remedies as well as the establishment of effective*

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<sup>78</sup> Ibid.

<sup>79</sup> Mark A. Drumbl "Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan". *Colombia Journal of Transnational Law*, p 352

<sup>80</sup> Consideration of reports submitted by Afghanistan under article 18 of the CEDAW /C/AFG/1-2, para. 77 "LEVAW came to force according to a legislative decree issued in 2009 and is cited in the courts regularly. Besides giving a definition of violence against women, LEVAW has explicitly stated the indicators of violence. LEVAW also prohibits discrimination against women and has obligated different governmental organizations to use specific and effective measures towards eliminating discrimination against women. LEVAW has increased penalties for perpetrators of violence against women and has projected establishment of the High Commission on Elimination of Violence against Women." CEDAW /C/AFG/1-2, para. 26

*protection and support services for women survivors of violence. Compensation for acts of violence against women may involve the award of financial damages for any physical and psychological injuries suffered, for loss of employment and educational opportunities, for loss of social benefits, for harm to reputation and dignity as well as any legal, medical or social costs incurred as a consequence of the violence. States are also required to ensure that women victims of violence have access to appropriate rehabilitation and support services. The notion of reparation may also include an element of restorative justice.* However, he is mentioning the very little information regarding the State's obligation to provide adequate reparation for acts of violence against women and this aspect of due diligence remains grossly underdeveloped.<sup>81</sup>

To conclude, many States already have problems and difficulties in fulfilling the major obligations, so the compensation duty appears to be a little irrelevant in practice.

As a final point, the due diligence standard involves positive steps on the part of the State to prevent the violations, control and regulate private actors, investigate and, where applicable, prosecute and punish incidences of violations, and provide effective remedies to victims. Therefore, the State is responsible for private actions resulting in human rights violations if it fails to take reasonable or serious measures to prevent violations or respond to them.

## **2.4 Implementation – problem of implementing existing legislations**

The value of the international protection of human rights continues to increase. Simultaneously increases the complexity of the subject and problem solving. This facts is emphasized in the Annual Report of the UN Secretary General for 1974 Waldheim Kurt Stated as follows “No activity is more important for the future and even more difficult agreed with the complex reality of our world than the protection and promotion of human rights”, where there is still “gap between aspiration and achievement”.<sup>82</sup> When it comes to gender equality, all international legal norms provide essential prerequisites for achieving the gender

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<sup>81</sup> Special Reporture “Report of the Special Rapporteur on violence against women, its causes and consequences”, Yakin Ertürk , Economic and Social Council, E/CN.4/2006/61 20 January 2006

<sup>82</sup> Waldheim Kurt, Introduction to the Report of the Secretary-General on the Work of the Organization. U. N., 1974, p. 18.

equality. Many countries have made significant progress in their legislations. However, until now, not only maintained, but even there is increase of the gap between law and reality. Therefore, today the main problem in this area is the implementation of existing legislations, whether at international or national level to protect human rights of women.

Two aspects can be distinguished in the implementation of the rights of women. On the one hand, a lot of discussions are ongoing concerning the human rights of women between a various commissions and different governments around the world, but on the other hand; the discrimination is often increased. Actually, such activity is only the appearance of women's rights and are often undertaken to divert the working masses from the struggle for equality.

Upon becoming party to a specific treaty a State carry out itself a series of obligations in the domestic law in order to effectively comply with treaty requirements. Accordingly, implementation can be understood as the extent of a State's compliance with its obligations.<sup>83</sup> In order to complete legislation it is extremely important to address violence against women. International law constitutes a very essential role to inform and lead the national law of many States.<sup>84</sup> Legislation plays an important role and possesses the ability to send a message to the entire society that violence against women is a serious crime that cannot be tolerated.<sup>85</sup> However, while the legislation is a necessary element in combating gender-based violence, and effective implementation becomes crucial to resolve the problematic area. Therefore, it is important to give effect to treaty rights by binding all branches of the State, requiring the State to take legislative, administrative, judicial measures in order to improving and adopting human rights-based method in policy making.<sup>86</sup>

The international standards on the rights of women should be implemented into the State's law since the challenging matters concerning women cover almost all the aspect of the society. It addresses public relations, where morality, customs and traditions have a particularly strong influence, and deeply affecting the entire

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<sup>83</sup> Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press, 2013, p. 78-79

<sup>84</sup> M. L. Mcconnell, 'Violence Against Women: Beyond The Limits Of The Law' 21 *Brooklyn Journal of International Law*, p. 903.

<sup>85</sup> Coomaraswamy and Kois, *supra* note 190, p.189.

<sup>86</sup> *Ibid.* 64 *Opuz v. Turkey*

process of legal regulation. It is known how difficult this relationship is in developing countries. Thus, it seems clear that enacting legislation is not the only solution to prevent violence against women. The Committee on CEDAW urges and demands that State parties should “*take appropriate measures...to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women.*”<sup>87</sup> This view has been reinforced in several key reports of the United Nations, in his recent address the United Nation Secretary General said: “*Violence stems from social attitudes that belittle women and girls. It is tolerated through indifference, ignorance and fear of speaking out. And it thrives where families and communities pressure women to suffer in silence*”.<sup>88</sup>

As for the case of Afghanistan, the government’s effort is seriously lacking in this respect. The national legislation possesses major difficulties regarding the functioning and coordination of responsible institutions. For example, the afghan constitution underlines equal rights and duties for men and women before the law. However, women still face many difficulties, for instance, in regards to the right to education and attend the schools. Many girls and women were burned down and poisoned on the way to school, and threatened to stay at home. Violence against women continues to occur.<sup>89</sup>

### **3. Afghan National Law with respect to Women’s Human Rights**

#### **3.1 History of Afghanistan**

The state of Afghanistan is commonly known to have been founded in 1748 by Amir Ahmed Shah Durrani.<sup>90</sup>

Afghanistan is a landlocked country in southwest Asia, and borders Pakistan, Iran, Turkmenistan, Tajikistan, China, India and Uzbekistan. Long

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<sup>87</sup> Discrimination against Women: The Convention and the Committee, 25 June 1993 Article 2 (f)

<sup>88</sup> Secretary-General, Ban Ki-moon remarks at official commemoration of International Day for the Elimination of Violence against Women New York, 28 November 2012, <http://www.un.org/sg/Statements/index.asp?nid=6466> visited on 12 april 2019

<sup>89</sup> Afghan Schoolgirls Poisoned, AFP via Bloomberg, Apr. 30, 2004.

<sup>90</sup> G.J. Lawless et al “A Very Brief History of Afghanistan”, A Hermeneutic Analysis of Military Operations in Afghanistan, DOI 10.1057/978-1-137-60012-7\_2 , 2017. Ch.2 p.5

since, Afghanistan was admirable for its location on the east-west trade routes, especially the ‘Silk Route’ to China.<sup>91</sup> Therefore, Afghans geographical environment has had lasting effect on his customs, character and its people. Afghanistan by being a crossroad of Asia had more invasions in history than any other nation in the world. The Aryans, after making Afghanistan their home for centuries, then Achaemenians, Greeks, Parthians, Scythians, Yueh-chis, Turks, Arabs and Mongols, among other races which held control of parts of the country periodically and left their enduring influence upon it. Some of these races forced to migrate to the other neighbored countries, and some kept apart and retained most of their original characteristics, while others merged into the general population. However, despite the mixed origin and apparent diversity in race, language and sect, the principals of religion and cultural heritage, Afghans hold their long-established authority over the majority of the population.<sup>92</sup>

Afghanistan is composed of many different ethnic groups, each of which has their own culture. The principal races and tribes that make up the populations of the country are: the Pashtuns, they derived from Indo-European stock and establish the great majority. Further, Tajiks are Aryan origin, the rest are Mongoloid Hazaras, the Uzbeks, the Turkmens and the Kirghiz groups. Other small minorities include Arabs, Baluchis and Sikhs.<sup>92</sup>

William Maley explained in his article that: “Afghanistan’s current difficulties are in large measure the product of a troubled history and a troubled geographical location”, therefore Afghanistan has been the victims of its history and geography. According to selected reports, Afghanistan was perhaps the most peaceful country in the Asian continent for the five decades or so before the communist coup. In the three decades since the communist coup of 1978 and the Soviet invasion of 1979, the country has been exposed to the impact of ideological and political forces. The Soviet invasion made the country a battlefield during the Cold War.

After the Soviet Union withdrawal, the Afghanistan’s Government faced new challenges and this time between the regional actors (*mujahedeen and tribal groups*). These groups established the beginning of a  *Jihad (an Islamic holy war)*,

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<sup>91</sup> Mohammed Ali, “The Afghans” 3d Edition Kabul 1969, Kabul University, The Punjab Educational Press, Lahore Pakistan: p. 19 <sup>92</sup> Ibid.

<sup>92</sup> Ibid. 6

and the latest Taliban's regime in 2001. Taliban's and their leader Mullah Omar studied in the *madrassa* (Islamic school) located in Peshawar, Pakistan. This type of *madrassas* later moved to Kandahar with a claim to stop the war and atrocities between warlords in Afghanistan. In 1996, Taliban seized Kabul and rapidly imposed severe fundamental Islamic system on women.<sup>93</sup>

Many years of war made Afghanistan one of the most dangerous countries in the world. The severe wars had a horrifying impact on women and children particularly, as in all 'war-torn societies' women and girls suffer disproportionately. However, Taliban's regime had one of the most severe treatment on women, and oppressed women between 1996 until 2001. Women had no rights to education and work, forced to wear the *burqa* outside, and they could go only out of their homes with necessity and male family member accompany them. During this period women were essentially invisible in public life, barred from going to school or working, women suffered from abduction, abuse, torture, rape and slaughter.<sup>94</sup>

### **3.2 Islam in Afghanistan**

Islam arrived in Afghanistan in the eighth century during the expansion of the Islamic empire. Various leaders have legitimized their rule based on protection of Islam and personal piety. The ninth and tenth centuries witnessed the rise of numerous local Islamic empires.<sup>95</sup>

The Mongolians invasion under the leadership of Genghis Khan was wilder than all the previous invaders. They struck terror wherever they wanted and left the country with death and destruction. Such was the condition of the country when the Muslim Arabs came later, and they had much better chance of success. Hereafter Islam gradually made its way through the country. Muslim Arabs brought Islam and their culture, which assimilated with the local and had a strong

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<sup>93</sup> Institute for the study on war: 'Pakistan and Afghanistan.' <http://www.understandingwar.org/pakistan-and-afghanistan> visited on 19 May 2019

<sup>94</sup> Mayer, Ann Elizabeth; 'Islam and Human rights-Tradition and politics', University of Pennsylvania, Westview Press, Fifth edition 2013 p. 126

<sup>95</sup> Mohammed Ali, "The Afghans" 3d Edition Kabul 1969, Kabul University, The Punjab Educational Press, Lahore Pakistan: p. 14 <sup>97</sup> Ibid. 14-15 <sup>98</sup> Ibid.



impact on the social, economic and cultural development of Afghanistan. In tenth century soon after Arabs invaded the Turks under the leadership of Sultan Mahmud. Sultan Mahmud is later known for creating the largest Ghaznavid Empire in the region, including Iran, southern Central Asia and northwestern India.<sup>96</sup>

The religion of Islam did not achieve success immediately in Afghanistan; the war lasted almost three hundred years from the time of emergence of a new religion. Since then Islam is a dominant factor of Afghan life.

Islam is the official state religion of Afghanistan, although the constitution gives the adherents of religions other than Islam and provides for equality. The Afghan population is predominantly Muslims, and vast majority about eighty-five present population such as Uzbek, Turkmen, Baluchi, Pashai, Nuristani, as well as most of the Pashtuns, profess Sunnism of the Hanafi *madhab* (*religious law school*). Nearly fifteen present of the population such as Persians, Hazaras, partly Tajiks and Pashtuns practice Shiism subscribe to the Jafari School.<sup>97</sup>

### 3.2.1 What is Islam and Sharia?

An important phase in the history of humanity turn out to be the multitude of beliefs that emerged particular world religions such as Buddhism, Christianity and Islam. Islam is one of the three world religions, having its adherents in many countries of the world, thus Muslims constitute the overwhelming majority of the population of many countries in Asia and Africa.

Islam is an ideological system with significant influence on international politics. The term "Islam" comes from the Arabic verb *Asalama*, which literally means peace, and peace is the fundamental religious idea of Islam.<sup>98</sup> Accordingly, the term Islam in Islamic religion is used in combination with two meanings: surrender to Almighty *Allah* (*Subhanahu wa t'ala, hereafter s.w.t.*, translated into English as "may he be glorified") as a sole God (an inner action) and profession of Islam, this is to say devotion to message of the last Prophet Mohammad, peace be upon him, hereafter (p.b.u.h.). Islam is a way to achieve peace at personal level by

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<sup>96</sup> Ibid. p.14-15

<sup>97</sup> Ibid.

<sup>98</sup> Khadij Elmadmad: "Womens Rights under Islam": 'The human rights of women: International Instruments and African Experince'. Ed. Gerd Oberleiter, World University Service, Austria, 2002. P. 244 <sup>100</sup> Ibid.

submission to Allah (s.w.t.), and is a religion (*din*) and way of life (*dunia*). A person practicing Islam called a Muslim. Accordingly, Islam regulates the relations between individuals and Allah (s.w.t.), and the relations between Muslims and their political leaders.<sup>99</sup>

Islam does not claim the role of the new religion brought by Prophet Mohammad (p.b.u.h.) to Arabia Peninsula in 7<sup>th</sup> century, rather declares as a new expression in its final form of a true religion of Almighty Allah (s.w.t.), which was originally revealed to Adam (p.b.u.h.) (a first Prophet) and then to subsequent Prophets.<sup>100</sup>

The will of Allah (s.w.t.), to which Muslims must submit, is known through the sacred scriptures, the Holy Qur'an and the foundational source *Hadith*, in which the traditions and statements of the *Sunna* of the Prophet Mohammad (p.b.u.h.), eg. his deeds, decisions, and are documented. *Sunna* would hence have normative consequences for the Muslim community. The Qur'an scriptures revealed to Prophet Mohammad (p.b.u.h) from Allah (s.w.t.) through the archangel Gabriel, he bore the responsibility for conveying Allah's (s.w.t.) message to his people. Accordingly, both the Quran and *Hadith* inhabit definite position of authority with in Islamic law.<sup>101</sup>

### 3.2.2 Islamic Law Shari'a

'Sharia' or Islamic law is the foundation of Islamic rules, a collection of religious rules derived from the original sources of Qur'an and *Hadith*. Sharia law undertakes teachings and a code of living for Muslims to lead every aspect of their lives, it can concern relationships with their families, society and nation, or prayer and fasting. Subsequently, Sharia law regulates public life, i.e. interactions between individuals, which categorized into three domains: Islamic political governance of the state, the Islamic legal system, and economic system.<sup>102</sup>

Sharia law emerged after the death of Prophet Mohammad (p.b.u.h.), muslim jurists or legal interpreters known as *fuqaha*<sup>103</sup> claimed authority to study

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Mohahammad Mazher Idriss and Tahir Abbas Ch.7. "Does Quran condone domestic violence": 'Honour, Violence, Women and Islam', Ed. Tahir Abbas 2011 p. 97

<sup>102</sup> Ibid.

<sup>103</sup> Ibid. p.108

Sharia and determine its legal rule. The legal rulings called *fiqh* and represent the legal doctrine of Islamic law. The tradition of *fiqh* tackles issues that cover, however not limited thereof: Rules of ritual practice (e.g. Prayer, fast, purification); Contract law (e.g. formation, breach, liability); Tort Law (e.g. categories of injuries, liability, and damage rules); Court administration (witness testimony, evidence, pleading); Criminal law (e.g. crime, evidentiary requirement, sanctions).<sup>104</sup>

It is important to underline that the process of *fiqh* doctrines in Islam on entire areas of law took many centuries to develop. During this practice, the systematic process of legal commentaries analysis and interpretations of law caused the dispute and competing ‘interpretive communities’ of the law or so called *mudhab* ‘schools of law’. As a result, it currently exist four Sunni legal school and three Shi’a schools. The Sunni schools are the Hanafi, Maliki, Shafi’I and Hanbali. The Shia schools are as follows; Ja’fari (mostly in Iran), Isma’ili’s, and Zaydis. It is important to stress the difference between Sunni and Shia Muslims, the both groups are of the Islamic faith and the largest denominations of it. The dispute and conflicting beliefs between these two groups begun after the death of Prophet Muhammad p.b.u.h.. The Sunnis believe that the Prophet had no rightful heir and that a religious leader ought to be elected through a vote among the community, at which point they chose Abu Bakr as his successor. The Shiites believe that the successor must be direct somebody from the Prophet Mohammad (p.b.u.h) family, so they revere his cousin and son-in-law Ali ibn Abu Talib as the second most honoured person after Muhammad (p.b.u.h.). Sunnis and Shiites have same general principles of the Islamic religion, laws and rituals, but minor difference in prayer. Accordingly, this division relates mostly to political Islam.<sup>105</sup>

Therefore, it is particularly important, if one wants to define a rule of Islamic law, one will start with *fiqh* treaties of one or another school of law, rather than with the Quran or *Hadith*.

Islamic law distinguishes from the common law in some important matters. In the Islamic juridical system, there are no lawyers, nor is there a jury. Thus far, there are three legal institutions in Islamic legal history: the offices of the *qadi*

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<sup>104</sup> Anver m Emon, Ch. 2 ‘*Sharia and the Modern State*’: “Islamic Law and International Human Rights Law”;Oxford, United Kingdom 2012. P. 58.

<sup>105</sup> Ibid.

judge, *mufti* knowledgeable jurist, and *muhtasib* 'market inspector'. Firstly, the qadi is a judicial officer appointed by the ruling authority to enforce judgments of law. Secondly, a mufti is identified as the most knowledgeable jurist in a region and provide non-binding determinations for questions of law posed on him, in the form of *fatwa*. 'Fatwa' is the traditional name for a Sharia legal judgement or legal opinion. Thirdly, the institution muhtasib is managing and observing the marketplace, and ensuring the social order in accordance with religious guidelines.<sup>106</sup>

### 3.3 The Status of Women in Islam

Muslim women represent approximately half of the international Muslim world and they live in different situations around the earth. It is important to distinguish between bachelorette, married, divorced and widowed while dealing with women in Islam. Theoretically, women's status according to Islam should be the same all over the Muslim world. However, in practice, the different schools of opinion provide various opinions in relation to women's rights. Consequently, it is the different Islamic schools and the division of opinions that provide various Quranic stipulations and contrasting views concerning the status of Muslim women.

To understand the Islamic rules on women, one should learn the situation of women in pre-Islamic Arabia and even some other places. The situation of Women in pre-Islamic Arabia was objectively more oppressive, than in other societies from Greece to India. In the pre-Islamic era, known as *jahiliya* period, women were victims of culturally approved discrimination, dehumanization and social deprivation. During the *jahilyiya* period, which is interpreted as the period of ignorance, women were placed in the same market as slaves and they could not choose their husbands. This form of marriage was by capture, women were captured and forcibly married. Moreover, even the right to life of newly born female children depended on her father's will not to bury her alive. The practice of female infanticide was a common custom among the Arabs during the *jahiliya* period. Women in Arabian society had no right to inheritance and involvement in

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<sup>106</sup> Ibid. p. 61-62

the political life.<sup>107</sup>

Prophet Muhammad p.b.u.p and Islam brought many innovations and rights for women, and its social reforms that put an end to horrible criminal practices. Thus, Islam has a universal mission, which is not directed only towards Arab women. Additional, Etim Okon writes in his article ‘Islam has done much to enhance the status of women more than any other world religion.’ Islam has its own concern with human rights, it recognizes human and civil rights of women. Islam emphasizes the need to respect human beings’ dignity for both men and women, besides it criticizes cruel conduct against a woman by a man. Very often, Islam refers to the three fundamental international human rights: equality, liberty and justice.<sup>108</sup>

### *3.3.1 Equality*

Some Muslim scholars have excessive views on the rights of women; they believe that the basic principles of Sharia in determining the status of women lies in her equality to men. In relation to this point Abdalati states: ‘...but that equality and sameness are two different ideas, man and woman are not identical but they are created equals.’ He argues that the Quran has not given the man a dominant status over woman, and never in the history of Islam has any Muslim doubted the human status of woman. Abdalati suggested, that “Quran does not have pejorative description, or stereotype for woman and that in Islam, woman is not the product of the devil, or the seed of evil. Unlike other popular beliefs, Islam does not blame Eve alone for the first sin. The Quran makes it very clear that both Adam and Eve were tempted, that they both sinned; that God’s pardon was granted to both after their repentance, and that God addressed them jointly.”<sup>109</sup> Consequently, Islam does not acknowledge the opinion that the creation of women was afterthought, rather recognizes the legitimate status of woman as man’s equal partner in the procreation of humankind, as mentioned in the Quran: “O mankind! Verily we have created you from a single (pair) of a male and a female, and made you into nations, tribes that you may know each other.

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<sup>107</sup> Abdalati, Hammudah : ‘Islam in Focus’. American Trust Publications 1975 p. 184-185.

<sup>108</sup> Khadij Elmadmad: “*Womens Rights under Islam*”: ‘The human rights of women: International Instruments and African Experience’. Ed. Gerd Oberleiter, World University Service, Austria, 2002. P. 244

<sup>109</sup> Abdalati, Hammudah : ‘Islam in Focus’. American Trust Publications 1975 p. 184-185.

The noblest of you in Allah's sight is the most righteous of you. Allah is wise and Allah knows".<sup>110</sup>

Equality of man and women covers all aspects of human attempt in Islam, thus women are equal to man in seeking knowledge, she is entitled to freedom of speech, choice and association. Hereby, Abdalati states "Islam grants woman equal rights to contract, to enterprise, to earn and possess independently. Her life, her property, her honour are sacred as those of man. If she commits any offense, her penalty is not less or more than a man's in a similar case".<sup>111</sup> Accordingly, special attention should be given to the fact, that women or men receives retribution from Allah (s.w.t.) absolutely equally according to her/his deeds, Allah (s.w.t.) says in this respect: "Whoever does righteousness, whether male or female, while he is a believer - We will surely cause him to live a good life, and We will surely give them their reward [in the Hereafter] according to the best of what they used to do. There are degrees for all according to their deeds. So, that Allah may duly requite them for their word. They shall not be wronged."<sup>112</sup> Furthermore, in Islam and according to Quran, equality is guaranteed between women and women before their children, therefore children should obey, respect and show kindness to both of parents. In Islam, motherhood has a divine privilege and status of honour and admiration. Thus, Prophet Muhammad p.b.u.h said, "Paradise is under the feet of mother", and he spoke of a superior rank of mother over fathers.<sup>113</sup> Abdalati expatiates more on the privileges that Islam has bestowed on woman. "As a wife she is entitled to demand of her prospective husband a suitable dowry that will be her own. She is entitled to complete provision and total maintenance by the husband. She does not have to work or share with her husband the family expenses".<sup>114</sup>

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<sup>110</sup> The Holy Qur-an Text, Translation and Commentary by Abdullah Yusuf Ali Volume 2, Copyright by Khalil Al-Rawaf 1946, Verse (49:13)

<sup>111</sup> Khadij Elmadmad: "Womens Rights under Islam": 'The human rights of women: International Instruments and African Experience'. Ed. Gerd Oberleiter, World University Service, Austria, 2002. Pp.150 <sup>114</sup> The Holy Quran Surah An-Nahl Verse 16:97, Surat Al-Ahqaf. Verse 19.

<sup>112</sup> The Holy Quran Surah An-Nahl Verse 16:97, Surat Al-Ahqaf. Verse 19.

<sup>113</sup> Mautana Muhammad Yunus Palanpun: "Scattered Pearls" Volume 3, Karachi Pakistan, 2013. Pp26.

<sup>114</sup> Abdalati, Hammudah : 'Islam in Focus'. American Trust Publications 1975 p. 184-185. <sup>116</sup> See Huyam Khwwam, women's Righst in Arab National Law, p.148.

### 3.3.2 Liberty

Slavery for both men and women is abounded in Islam according to different verses in the Quran, even more it has called for freedom of all human beings.

Marriage in Arabic term is *al-Nikah*, which means 'unity', thus it is an agreement between two parties: the bride and the bridegroom, normally entered by a legal contract that requires voluntary and mutual consent of both parties. The aim of the marriage is for the couple to live together in a sexual relationship and form of permanent bond of mutual loyalty and dignity. In Islam woman is not be obliged to marry against her will, but if such happens, she may ask for divorce.<sup>115</sup>

Etem Okon writes in his article that: "Marriage in Islam is not a sacrament, but a legal contract for life. Women granted full rights under Islamic law to negotiate and insist on favorable terms. A Muslim woman has the right to determine, collect and keep her dowry (*mahr*), as a source of personal pride and comfort. Couples expected to work hard to achieve unity and consensus. Marriage is not a servant-master relationship. The wife is neither a house attendant, nor a tenant to be expelled on flimsy excuses, which are rooted in human failure and shortcomings. The foregoing represents objective and universal expectations on marriage that transcends particularistic views of any religion and culture".<sup>116</sup>

Quran states : "They (your wives) are a garment for you, just as you are a garment for them"<sup>117</sup>, thus A. R. I. Doi comments on the metaphor which describes husband and wife as a 'garment' one to another, and says: "The word garment also emphasizes the fact of their interdependence in life, the one being incomplete without the other... mutual upholding of each other's reputation and credit, mutual respect of one another's secrets, mutual affection, and mutual consolation in misfortunes."<sup>118</sup>

Polygamy is a greatest sources of criticism to Islam, in order to understand plural marriage relationship in Islam one need to learn what the Holy Quran says, "If ye fear that ye cannot do justice with the orphans, then marry as it pleases you, two, three or four women: and if ye fear that ye cannot be equitable, then only one, or that

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<sup>115</sup> See Huyam Khwwam, women's Righst in Arab National Law, p.148.

<sup>116</sup> Etem E. Okon: 'The Status of Woman in Islam' OSR Journal Of Humanities And Social Science (IOSRJHSS) Volume 10, Issue 2 (Mar. - Apr. 2013), p.24 ; e-ISSN: 2279-0837, p-ISSN: 2279-0845. www.Iosrjournals.Org

<sup>117</sup> The Holy Qur-an Text, Translation and Commentary by Abdullah Yusuf Ali Volume 2, Copyright by Khalil Al-Rawaf 1946, Verse 2:187

<sup>118</sup> Doi, A.R. I. (1981).The Cardinal Principles of Islam. Zaria: HudaHuda. ﷻ

your right hand possess (i.e. female slaves). That will be more suitable to prevent you from doing injustice”.<sup>119</sup> The interpretation of this verse is that men can marry a maximum of four wives, if they have enough resources to provide for each equality. Thus, according to Kenneth Cragg: “The verse is considered as a virtual prohibition because of the conditionality of fairness and equality of treatment, which is ideally unattainable”. So, then what is equality of treatment in that verse? Equality may be interpreted to mean fairness and equity to all the wives and children.<sup>120</sup>

Some Islamic countries modified their marriage laws, therefore polygamy marriages are considered illegal in many Muslim countries.

In conclusion, liberty of women in Islam is considered as conditional in some cases as they are not entitled to totally freedom and thus in particular situations their liberty is limited. For instance, abortion, changing religion after having accepted Islam, marrying a non-Muslim man or sexual relations out of marriage are considered to be anti-Islamic actions.

### 3.3.3 Justice

According to Islam justice is a very important aspect. Injustice, dictatorship and tyranny for all human being, regardless of their sex is not tolerated. The Quranic verse 279 Chapter of Cow, Allah (s.w.t.) commands be aware not to wrong anyone. Even more, many of Allah’s name in Islam mean justice (al-Haq, al-Adl).<sup>121</sup>

In Islam, gender, justice and equality partly endorsed and based on some of the instructions of the Quran and the *Hadith* of the Prophet: “And men are a degree above them (women)”.<sup>122</sup> This particular verse corroborated by Surah “Men are the protectors and maintainers of women because God has given the one more strength than the others”.<sup>123</sup> The common interpretation of surah is that man is a step higher than the woman is, and that man is the protector of woman. It also connotes physical superiority of man over woman. Islam has allowed man to be in charge of woman.

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<sup>119</sup> The Holy Qur-an Text, Translation and Commentary by Abdullah Yusuf Ali Volume 2, Copyright by Khalil Al-Rawaf 1946, Sureh Noha Verse 4:3

<sup>120</sup> Etim E. Okon Ph.D: ‘The Status of Woman in Islam’. IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 10, Issue 2 (Mar. -Apr. 2013), PP 21-27e-ISSN: 2279-0837, p-ISSN: 2279-0845.www.Iosrjournals.Org

<sup>121</sup> The Holy Qur-an Text, Translation and Commentary by Abdullah Yusuf Ali Volume 2, Copyright by Khalil Al-Rawaf 1946

<sup>122</sup> Ibid. Sura 2:228

<sup>123</sup> Ibid. surah 4:34



This is a situation, where Nijole Benokraitis has described as “masculine paternalism and condescending chivalry which refers to superficially courteous behavior that is protective and paternalistic, but treats women as subordinates”.<sup>124</sup>

Consequently, Muslim apologists have claimed that there is no component of subjugation in the two verses, but that since Quran has given man the duty to care for woman, these verses only applied within the family. Islam calls for the respect of women and kindness towards them. As translated in verse in the Quran by Yusuf Ali: “And among His Signs is this, that He created for you mates from among yourselves, that ye may Dwell in tranquility with them, and He has put love and mercy between your (hearts): Verily, in that are indeed signs for a people who reflect.”<sup>125</sup> Yusuf Ali comments on this verse as further: “...There is a special kind of love and tenderness between them (men and women). And as women is the weaker vessel that tenderness may from a certain aspect be linked to mercy, the protecting kindness which the strong should give to the weak.”<sup>126</sup> However, these are some clear rights granted to women in Islam, but unfortunately, it does not provide an organized code of women’s rights.

### **3.4 Islam and Violence against Women**

Like the majority of women in the world, Muslim women face violence in different forms both in Islamic and non-Islamic countries. It is very important to analyze what Islamic view is in relation to violence against women, and whether such would be permitted with the reference to the primary sources of Islamic law. In addition, one should explore the issues of whether Islam does condone domestic violence?

One of the most often cited Quranic verse is from the Sureh An-Nisa, is the only Quranic verse that appears to deal with ‘disciplining’ Muslim women. Thus, the verse in its English translation from Arabic permits a form of martial ‘discipline’ by the husbands and translated as follows: “Men are the protectors and maintainers of women, because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them). Thus,

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<sup>124</sup> Etim E. Okon Ph.D: ‘The Status of Woman in Islam’. IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 10, Issue 2 (Mar. -Apr. 2013), PP 21-27e-ISSN: 2279-0837, p-ISSN: 2279-0845.

<sup>125</sup> Ibid. Surah Rum verse 30-21.

<sup>126</sup> Ibid, see Commentry No.3526 p. 1056

righteous women are obedient and guard the rights of men in their absence under Allah's protection. As to the women on whose part you see ill/conduct (i.e. disobedience, rebellion), admonish them (first), (next) and remain apart from them in beds, (and last ) and *beat them (lightly, if it is useful)*, but if they return to obedience, seek not against them means do not seek ways to harm them. Surely, Allah is Ever Most High, Most Great.”<sup>127</sup>

What meant by ‘disobedience’? The famous theologian Ali ad-Din stressed, “The disobedience of a woman relates to a) her becoming abhorrent towards her husband; b) when she absolves herself from her responsibility towards him, c) when she displays extreme arrogance against him.”<sup>128</sup> Further, ‘Obedience’ is necessary only in those issues which Islamic law has allowed for a husband a reasonable and *halal* (lawful) and does not violate the right of a wife; consequently, this is not something that a husband can enforce from his own desires. If a husband commands a wife to do something that is conflicting to the teaching of the Quran and Sunnah, a wife has full right to protest against his wishes.

Furthermore, the verse in Quran commands and requires husbands to act as the ‘maintainers’ and ‘guardian’ of their wives, if those responsibilities not met by husband the verse does not apply, because he had failed in his duties. However, many Muslim men abuse their positions of responsibility and supposed Quranic authority, thus they beat their spouses culturally manipulate these verses to control and oppress them.

Probably the most debated aspect of this verse relates to the physical punishment of women. If other aspect with the verse fail to have effect, according to this verse Muslim husbands permitted to use “light force”. According to Tahir Abbas: ‘In English the Arabic word, *‘Ibridubhunna’* use of *‘light force’* may be summarized a ‘gentle smack’, there are however many interpretations of this term, and it’s often arise misunderstandings. This is because these interpretations appear to permit violence upon Muslim women, which the authors are a very uncomfortable with.”<sup>129</sup> Moreover, it is very important to understand that that

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<sup>127</sup> Mohahammad Mazher Idriss and Tahir Abbas “*Does Quran condone domestic violence*”: ‘Honour, Violence, Women and Islam’, Routledge , 2011 p.97

<sup>128</sup> Ibid. p. 99

<sup>129</sup> Ibid. 102

linguistics is a central science in Quranic hermeneutics. The Arabic linguistic is a very different to English one and is more complicated to construct. Thus, many scholars translated the word *Idribu* as ‘strike, hit, beat, chastity’, where as another scholar, for instance Ahmed Ali translated it as ‘to forsake, to avoid, or to leave’. In English words above are different and have diverse accent, therefore it is affecting women with prejudice.<sup>130</sup>

Though the Quran restore such light chastisement lawful, many classic scholars of Islam recommend that one should abstain from practicing such actions because it could lead to other unwanted consequences Thus, Imam Fakhr Razi has stressed that Muslim men should: ‘Know that those who strike are not better than those who refrain.’<sup>131</sup>

Accordingly, many scholars believe that such physical violence should be completely abounded. Tahir Abbas states, “There is no authority in the Quran for the type of regular and frequent acts of violence that some Muslim women experience within their homes at the hand f abusive husbands. The action of many Muslim husbands are also contradictory, such men do not exercise the level of control that is expected of them, as demonstrated in current verse.”<sup>132</sup> Additional, the Prophet Muhammad p.b.u.h. obliged Muslim men to treat their wives with the greatest respect and that this is linked to *Iman* (faith in religion), and stated as follows: ‘The most perfect believer is one who is the best in courtesy and amiable manners, and the best among you people is one who is most kind and courteous to his wife...the best among you is the one who treats his family best’.<sup>133</sup> So, accordingly Muslims men expected to follow Sunnah of Prophet Muhammad p.b.u.h if they wish to be considered as a true believers of the faith. Thus, if a Muslim man practice violence against women, it means he contradicts to *Hadith* of the Prophet who constantly advised the believers ‘not to beat women’, even more physical assaults contradicts the teachings and instructions of the Prophet in relation to controlling one’s anger. Anger is a central part of the inner spiritual duties of a believer, thus Islamic law expects believers never to act upon anger as this can lead to other form of sinning.

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<sup>130</sup> *ibid.* p.102

<sup>131</sup> *Ibid.* 203

<sup>132</sup> *Ibid.* p.104

<sup>133</sup> *Ibid.* p.107

Certainly, In Islam wife beating is not permitted and it is evident both, from the Quran and the *Hadith* aspect, and Prophet Muhammad p.b.u.h. opinion that had great and expansive respect for women.

### 3.5 Constitution of Afghanistan

Afghanistan's official law is the formal legal system established under the Constitution.

For the past one hundred years, different Afghan male leaders have publicly admitted the necessity for reform on the status of Afghan women. For instance, Amir Abdur Rahman introduced a numerous of laws in attempt to support customary social practices with the prescription of Islam at the end of 19<sup>th</sup> century. For this, he used the principles of the Quran, and prohibited child marriages, forced marriages, exorbitant bride price, and ruled that women could obtain divorce.<sup>134</sup>

The Afghan Constitutions from 1923 stated that “*onwards guaranteed equal rights for men and women.*”<sup>135</sup> Moreover, women were automatically empowered by the 1964 Constitution, which guaranteed all Afghans “dignity, compulsory education and freedom to work.” Article 27 of the 1977 Constitution stated: “*The entire people of Afghanistan, women and men, without discrimination have equal rights and obligations before law.*”<sup>136</sup>

In 1959, new policies called for enlarging roles of women regarding removal of the veil voluntary, education and career opportunities, and it put an end to the beliefs that women should remain in their homes. Further, in 1964 Afghanistan recognized the right of women to vote. Between 1923-1980s, the contribution of women to the society had a positive progress to modern development in Afghanistan. Over following years, increasing number of educated women worked in the areas of government, parliamentarians' diplomats, in industry, business, as entertainers, as hairdressers, in the army and police. These forms of transformations, such as employments in public areas and

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<sup>134</sup> Mohammad Hashem Kamali: 'References to Islam and Women in the Afghan Constitution' Arab Law Quarterly 22 (2008) 270-306

<sup>135</sup> THE CONSTITUTION OF AFGHANISTAN APRIL 9, 192

<sup>136</sup> Mariam A. Nawabi: "Women's Rights in the new Constitution of Afghanistan."

<http://constitutionnet.org/sites/default/files/E13WomensRightsShort%20VersionNawabi.pdf> visited on 13 April 2019

education for girls became more and more acceptable in society, thus, it considerably changed the attitude towards the role of women in Afghan society. The feminist movement supported that the crucial point of social changes in the country would provide revolutionary changes in women's status. On the other hand, conservatives groups considered the feminist movement and women liberation as a serious threat against the patriarchal system, which sustained conservative power. This situation has continued up to present time. Rights for women is the core conflict between fundamentalists and intellectual groups in Afghanistan. In 2004, after the collapse of Taliban regime the Loya Jirga, a form of tribal elders approved and passed a new Afghan Constitution, which included 64 women among 500 delegates. For the first time, they heard the voice of an Afghan young girl, Malalai Joya, who broke the silence and raised her voice against the warlord and criminals with in parliament. Furthermore, the Afghan government established the Ministry of Women's Affairs (MoWA) and the Afghanistan Independent Human Rights Commission (AIHRC) to fulfil the constitution's commitment to women's rights.<sup>137</sup>

The new Afghan Constitution requires the state to comply with international human right standard and values. The Constitution encompasses several Islamic provisions reflecting the views of Islamic as well as human rights groups. Further, the constitutional provisions dealing with the rights of women organized into three categories: *neutral, protective and discriminatory*. Neutral provisions are applicable to all citizens and do not make distinction between sexes, yet they may be interpreted in a way that is more beneficial towards women than men, considering the social situation of the country. Protective provisions called "women-specific" and it intentionally drafted to protect women's rights. Discriminatory provisions are those, which are either explicitly discriminatory or neutral, and could be against women's rights.

To illustrate, the neutral rights contained in Article 43 and 44 of the constitution, states: 'Education is the right of all citizens of Afghanistan, which shall be offered up to the B.A.': "The state shall devise and implement effective programs to create and foster balanced education for women".<sup>138</sup> According to

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<sup>137</sup> Masuda Sultan: 'From rhetoric to Reality: Afghan Women on the Agends for Peace'; Women Waging Peace Policy Commission February 2005

<sup>138</sup> Islamic Republic of Afghanistan The Constitution of Afghanistan (Ratified) January 26, 2004 Article 43 and 43.

different reports, while women have a constitutional right to receive an education, yet many women and girls face difficulties in attending's schools. Violence against women continues to occur; many schools for girls burnt down, in another setting three school girls were poisoned in Khost, some girls are the victims of acid attacks on the face. Their only crime was attending the school. Many women and girls in rural areas do not attend the school out of fear, thus in many remote areas there is no sign of a school.<sup>139</sup> Articles 48 and 49 of the Constitution also grants everyone the right to work and to free choice of profession and prohibits forced labor.

Regarding protective provisions, the Constitution recognizes in Article 54 that the family is the “fundamental unit” of the society, and guarantees its protection, specifically the physical and spiritual interests of mother and child. Moreover, the latter Article of the constitution claims for abolition of all unIslamic traditions.<sup>140</sup> Application of these two requirements may improve women status who are treated unfairly because of social taboos, and which are presumably based on the teaching of Islam. For instance, these can include the preference of a boy over a girl child, dowry, child marriages and honour killing. The last discriminatory provision of Constitution that are *prima facie* or neutral but by implication manifestly discriminatory towards women in social context. Herby, Article 31 (3) states that the state shall provide legal aid and counsel to the destitute in criminal cases: ‘in criminal cases, the state shall appoint an advocate for a destitute’. However, considering the social and cultural norms of the society, it is discriminatory towards women, large number of women coming into conflict with law especially when it comes in the context of family law or laws relating to personal status. Because, these areas are not covered by the Constitution.<sup>141</sup>

Further, Article 130 of the Constitution provides: “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.” Similarly, Article 131

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<sup>139</sup> Afghan Girls, Scarred by Acid, Defy Terror, Embracing School, <https://www.nytimes.com/2009/01/14/world/asia/14kandahar.html>

<sup>140</sup> Niaz A. Shah: “The Constitution of Afghanistan and womens Rights” *Feminist Legal Studies* (2005) 13:239–258 DOI .1007/s10691-005-7543-7 <https://link.springer.com/content/pdf/10.1007/s10691-005-7543-7.pdf> visited on 15 April

<sup>141</sup> Ibid footnote138.

mentions the Shia Muslims “Courts shall apply Shi’a school of law in case dealing with personal matters involving the followers of Shia sect....in accordance with the provisions of law.”<sup>142</sup>

Despite Afghanistan’s poor human rights record, Afghanistan has signed and ratified all above-mentioned human rights instruments. For instance, in the context of women’s rights, it signed CEDAW in 1980 and ratified it in 2003 without reservations. These improvements are very positive in terms of the State’s achievement to enact its obligation to legislate law which is compatible to international standard. However, these improvements also offers major challenges. Afghanistan’s legal system consists of a mixed between Islamic law and of State enacted legislation. The controversial relationship between Islam and human rights illustrated in Afghan Constitution. During its drafting-process the central problem to resolve was the respective roles of human rights and Islam.<sup>129</sup> For instance, in the Afghan constitution, the preamble opens with statements that establish Islam and UDHR as pillars of the new system. The first line states of the constitution state that it is written ‘with firm faith in God Almighty and relying on His mercy, and Believing in the sacred religion of Islam’, four lines below, it states: “Observing the United Nation Charter and respecting the Universal Declaration. In addition to referring to the UDHR, Article 3 of the Constitution provides that “no law shall contravene the beliefs and principles of the sacred religion of Islam.”<sup>143</sup> Consequently, this provision establishes Islam as the norm of legality, but leaves this norm undefined, since there are no objective manner to determine what category like Islamic “beliefs and principles” means. in this context, Islam and human rights are left uncertain. Due to this vagueness and the priority problem the door has been left the door open for fundamentalists to discriminate and use conservative interpretations of Islam at odds with human rights.

However, many provisions of new Constitutions involve women’s rights. For instance, Article 22 of the Afghan Constitution bans discrimination based on gender, and is a significant achievement for women’s rights advocates in the country. The implementation of a new Constitution manifested a new state of

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<sup>142</sup> Said Mahmoudi ‘The Shari’a in the New Afghan Constitution: Contradiction or Compliment?, [http://www.zaerv.de/64\\_2004/64\\_2004\\_4\\_a\\_867\\_880.pdf](http://www.zaerv.de/64_2004/64_2004_4_a_867_880.pdf) visited on 21 April 2019

<sup>143</sup> Susan Deller Ross, ‘Women’s Human Rights’ The international Comparative Law Casebook: University of Pennsylvania, Philadelphia 2008 p. 50

modification for the country's legal system.<sup>144</sup> Lastly, the relation between Sharia law and guaranteed rights in the Afghan Constitution remains controversial, particularly in the areas of family law, penal law and human-rights law in general. The Afghan Constitution strongly supportive of human rights and women's rights, but they seem too vague, outdated, and do not provide sufficient clarification regarding women's status and rights.

### 3.6 Criminal Law of Afghanistan

The domestic legal system of Afghanistan largely destroyed by wars, however following the collapse of the Taliban's regime; the Bonn Agreement of 2001 authorized formation of the Afghanistan Judicial Commission, and were tasked to "*rebuild the [Afghan] domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.*" The Afghanistan National Development Strategy of 2008, was one of the several strategies to guide the process, these strategies had a complex task of rebuilding Afghanistan's rule of law and institutions. During this process the key objectives that were to be accomplished by 2010 included competition of the basic legal framework, such as (civil, criminal and commercial law) and establishment of fully functional legal system.<sup>145</sup>

Codified law in Afghanistan, adopted from its pre-conflict past, the Afghans Civil Code adopted from 1977, Penal Code 1976, and Criminal Procedure Code 1965, are still in use. The codes are however too vague, outdated, and do not have sufficient clarification regarding women's rights. Nevertheless, these documents cannot defend and protect afghan women from violence and particularly sexual

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<sup>144</sup> Anne Elizabeth Mayer: 'Islam and Human rights: Tradition and politics' 5<sup>th</sup> Edition, University of Pennsylvania 2013. Pp.96

<sup>145</sup> Dr Ali Wardak: A Decade and a Half of Rebuilding Afghanistan's Justice System: An Overview, Van Vollenhoven Institute, p. 10  
<https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituutvoormetajuridica/afghanistansjusticesystem-vs-2016.10.04.pdf> visited on 24 April 2019



violence. Afghan law and its judicial system work as structural violence against women. For instance, domestic violence does not clearly classify as a crime in the Afghan Penal code. Domestic violence may constitute beating and laceration under Articles 407 and 408. Even more, to prosecute domestic violence cases depends on a factor whether the violence was a response to a woman's disobedience.<sup>146</sup>

In order to understand the justice system of Afghanistan, it is very important to highlight two justice institution, formal and informal. The first system, based on positive law and Islamic Sharia, they function through legal codes and state institutions, such as courts, prosecutors, police, the prison service and the bar of law. Thus, in this context, the judicial branch includes a Supreme Court (*Stara mahkama*)<sup>147</sup>, the Attorney General's Office (*Loy saranwali*), the Ministry of Justice (*Wezarate-e-adelia*) the Appeals Courts, Primary Courts and Special, the police (*Sarandoi*), and the prison service.<sup>148</sup>

In 2003, the first 50 female judges were appointed. However, there has been little increase in the number of female judges since then. Opposition to women in this role remains high among male judiciary.

Further, the concept of 'informal justice' has been described differently and in different contexts of social-legal literature, therefore it is lacking a general understanding among the scholars over a formal definition of the phrase.<sup>149</sup> The most important informal or non-state institutions in Afghanistan are *jirga* and *shura*. The specific form of a *jirga* and *shura* are determined by the nature of dispute at hand, by a *rishsaifidan* (local elders and leaders) who refer to traditional customary laws in order to reach a settlement that is valid to disputants and to the community.

*Jirga* is an ancient institution, a tribal assembly. In ancient times, *jirga* used to be the institution that could maintain peace and order during the governmental

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<sup>146</sup> Rashida Manjoo, Human Rights Council<sup>[17]</sup> Twenty-ninth session: 'Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to Afghanistan' A/HRC/29/27/Add.3, 12 May 2015, para. 13

<sup>147</sup> Omar Sial 'Islamic Republic of Afghanistan Legal System and Research' <http://www.nyulawglobal.org/globalex/Afghanistan1.html>

<sup>148</sup> A.S. Sirat: 'The Modern Legal system of Afghanistan'; *The American Journal of Comparative Law* Vol. 132, No. 4 (Autumn, 1968), pp. 563-569

<sup>149</sup> Ibid.

ceased to function. It had to perform three-fold duties of policy, magistracy and justice, and in cases of national emergency it could mobilize a force to defend the village.<sup>150</sup>

*Jirga* and *shura* address issues ranging from minor bodily harm and agricultural land boundaries to serious and sometimes violent conflicts concerning communal lands and murder. According to research and national survey, the *jirga* and *shura* are more accessible, more efficient (in terms of time and money) and perceived as less corrupt in delivering justice and consequently more trusted among Afghans compared to formal state courts.<sup>139</sup> However, the same survey illustrates that male elders dominate gathering of informal justice system, and women are excluded from membership, participation and decision-making processes of this system. This situation has not only serious consequences for gender equality within these local institutions of dispute settlement, but also severe consequences for the actual delivery of justice to women at a local level. For instance, in many settlements made by *jirgas* and *shuras* may include *baad*—the practice of offering a woman into marriage as a means of dispute settlement without her consent.<sup>151</sup> Accordingly, these types of practices violate Afghan state laws, Sharias, and fundamental human rights.

This form of exclusion of women from participation in *jirgas* and *shuras* are not inherent characteristics of this informal state justice, but rather characteristics of Afghan patriarchal society.

According to a recent field study: “Women’s access to these [community-based dispute resolution] processes and participation in them is constrained and at times decisions are made which do not uphold women’s human rights. However, this is not an outcome of community-based dispute resolution or customary law itself, but is instead a consequence of prevailing gender roles and relations in Afghanistan more widely.”<sup>152</sup>

Certainly, women’s rights are widely violated in Afghan society, and the formal justice institutions appear not better than informal justice institutions.

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<sup>150</sup> Mohammad Ali, “The Afghans” Kabul, Punjab Educational Press Pakistan, 1969 3d edition, p.53 <sup>139</sup> Dr. Ali Wardak, “STATE AND NON-STATE JUSTICE SYSTEMS IN AFGHANISTAN: THE NEED FOR SYNERGY”: University of South Wales, 10 October 2011, p.1314-1319 <https://www.researchgate.net/publication/265268168> visited on 27 April

<sup>151</sup> *ibid*, p.1314-1319

<sup>152</sup> COMMUNITY-BASED DISPUTE RESOLUTION PROCESSES, *supra* note 36, at 4.

Notably, women's access to the formal justice system is severely limited, there is approximately three percent of the judges and less than once percent of police personal are women.<sup>153</sup>

Women rights activists are aware of these defections gaps in criminal law. Therefore, Ministry of Women's Affairs enacted the law on the Elimination of Violence against Women (EVAW). The EVAW law provides protection for women against violence as well as forced marriages, under-age marriages and polygamous relationships. While there are still some controversial instances, this law has provided much clarification regarding gender-based violence and sexual violence. Further, this law has a more specific and clear definition of sexual violence and bans rape, forced prostitution, forced marriages, child marriage and *baad*.<sup>154</sup> Such practice is similar to many other societies that are experiencing war or recently entered into a state of post war, since these type of rule of law is very weak. According to reports, the EVAW is not officially recognized and no Afghans court uses it in dealing with violence against women.<sup>155</sup> EVAW was discussed in 2013 in the Afghan parliament session, however the conservative parliamentary members disagreed with some articles of this law, and they found it contrary to Sharia Law. For instance, the article 23 of the law says: "if a person beats a women which does not result in damages and injury, the offender in view of the circumstances shall be sentenced to the short term imprisonment not more than one month." Thus, some members of the parliament claim, "this part is against Sharia law, because if beating does not damage and inure the women there is no punishment for that in Islam". Furthermore, Article 27 condemns any personal act that "prohibits a woman from marrying", Article 26 prohibits "forced marriage" and 37 condemns polygamy; all these articles were disproved by the Afghan parliament, finding this law conflicting with Islam. Therefore, here religion used to legitimize direct violence and so is a form of cultural violence.<sup>156</sup>

According to UNAMA: "The landmark law on the Elimination of Violence

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<sup>153</sup> AFGHANISTAN HUMAN DEVELOPMENT REPORT, supra note 9 at 71. at 83.

<sup>154</sup> UNAMA: Injustice and Impunity Mediation of Criminal Offences of Violence against Women Kabul, May

<sup>155</sup> Harassment of Women in Afghanistan: A hidden phenomenon addressed in too many laws, <https://www.afghanistan-analysts.org/harassment-of-women-in-afghanistan-a-hiddenphenomenonaddressedintoo-many-laws/>

<sup>156</sup>Ibid.

against Women was a huge achievement for all Afghans,” said the United Nations High Commissioner for Human Rights, Navi Pillay. “But implementation has been slow and uneven, with police still reluctant to enforce the legal prohibition against violence and harmful practices, and prosecutors and courts slow to enforce the legal protections in the law. Afghan authorities need to do much more to build on the gains made so far in protecting women and girls from violence.”<sup>157</sup> Even more, EVAW law recognizes 22 acts of violence against women but the list is not complete. For instance, “honour killing” is not recognized as a specific crime and enumerated under the EVAW law as a form of violence against women. In addition, Afghan Penal Code recognize honour killing as the offence of murder and a perpetrator receives a lighter sentence.<sup>158</sup> Police and courts are ignoring the crimes against women in the family, as it is considered a private matter. Consequently, there is no facility to criminalize violence in private scopes in the criminal code of Afghanistan.

In conclusion, complete legislations constitute the first effort in addressing violence against women, because it has the capacity to send a message to the society in general by emphasizing that gender-violence in any form is a serious crime that cannot be tolerated. Noteworthy, the legislation alone will not eliminate violence against women and gender-based discrimination, but should have an effective implementation. In the case of Afghanistan, the national legislation is very weak and complicated and there are many obstacles regarding the functioning and the coordination of responsible within the institutions.

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<sup>157</sup> UNAMA ‘Mixed results on Implementation of the EVAW law over past years’ 8 Dec. 2013

<sup>158</sup> Honour killings are not clearly defined in Afghan law. Article 398 of the Afghan Penal Code states: “A person defending his honour, who sees his spouse or another of his close relations, in the act of committing adultery or being in the same bed with another and immediately injures or kills one or both of them shall be

## **4. Forms of Violence against women in Afghanistan**

### **4.1 Background**

Violence against women is often recognized as 'gender-based' violence because it partly stems from women's subordinate status in society and is one of the most widespread types of human rights violations. It takes variety of forms, from domestic abuse and rape to child marriages, and honour killings. This is a universal problem appearing in most cultures and social groups. The cruelty and pervasiveness of violence against women differs to the basis of the socio-cultural relations and structures in any society. Unfortunately, in many countries, this action is tolerated and ignored under different names such as culture and religion.

Afghanistan is known as the land with a lengthy historical background of violence against women, it is a concern of several ages that violence has been in the focus of social problems in Afghanistan. In the post-Taliban period, the violence started to be regarded as a socio-cultural issue and a violation of human-moral values and women's human rights. Violence against women has pervasive sociocultural background in Afghanistan, and it is thus, not possible to identify the beginning of violence against women. As society changed, violence has taken different forms, but has persisted in social relationships, despite the fact that violence is not an acceptable and condemned by legal and moral norms. Women experience violence in different forms, depending, among other factors, on their age and social position.

### **4.2 Cultural and Structural violence**

A British anthropologist Tyler stated that: “Culture is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society”<sup>159</sup> and according to another author Matsumoto culture is, ‘... the set of attitudes, values, beliefs, and behaviours shared by a group of people, but different for each individual, communicated from one generation to the next.’<sup>160</sup> The concept of “culture” explains things by showing how they make sense as part of a coherent way of life.

Cultural attitudes towards gender-based violence differs significantly across societies. As it is the case with other cultural norms, since they emerge as response to different local conditions. Lisa Aronson writes in her article: “First, we must avoid stereotyping. Only rare forms of violence are inflicted against every women in a culture, and there are few forms of violence against women that belong exclusively to any particular culture. Instead, most of forms of violence against women are familiar and hardly raise an eyebrow: that is, the everyday slapping, beating, and sexual assault of female’s fall ages around the world that have largely become commonplace and unremarkable’.<sup>161</sup> Thus, violence against women is general and a global phenomenon, while its manifestations are shaped by the values and circumstances of particular cultures, so it does not look the same across cultures. It will be very difficult to avoid bearing in mind culture, one can commit an error by assuming that everyone is “the same”, that means applying unquestionably all women certain ideas that have been degenerated by and for those from the dominant cultural groups. Nevertheless, talking a stigmatized topic like violence against women from cultural perception feels dangerous, because discussing any particular kind of violence against women within a particular culture can result to overgeneralization and stereotypes.<sup>162</sup>

Moreover, by proposing different suggestions for prevention or improving violence against women can effect in varying cultural contexts, and by this means risking to advocate models for contexts where they will not fit.

In conclusion, Aronson suggests that: ‘by discussing a form of violence against women that appears in given culture, we risk “essentialising” the culture. In other words, we risk underestimating differences among people in that culture and

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<sup>159</sup> Tyler (British anthropologist) 1870: 1; cited by Avruch 1998: 6

<sup>160</sup> Matsumoto 1996: 16

<sup>161</sup> Fontes, L.A and McCloskey, K.A. 2011. Cultural issues in Violence against Women. In C.M rentezetti, J.L. Edleson and R.K Bergen (Eds). Sourcebook on Violence against Women (2<sup>nd</sup>Edition) pp.152. Thousand Oaks, CA:Sage.

<sup>162</sup> Ibid.

supporting racist discourses that construct members of minority cultural groups, or non-Western nations, as a homogenous “other”.<sup>163</sup>

The concept of ‘structural violence’ was introduced by Johan Galtung in 1969, he refers to a form of violence wherein some social structure or social institution may harm people by preventing them from meeting their basic needs; according to Galtung, rather than conveying a physical image, structural violence is an “avoidable impairment of fundamental human needs.”<sup>164</sup> Thus, this new term brought attention to the degree of damage and harm it may cause to the lives of people, especially when structural inequalities are harmful for women because of the intersection of gender with existing circumstances such as inadequate education, poor health, and care.

Furthermore, the lack of data on violence against women and on the prevalence of the public/private divide leads to relative reversibility of structural violence. This is one of the reasons, where researchers give attention more on public, political violence rather than violence that occurs in the private sphere, where it is more common.<sup>165</sup>

In the context of Afghanistan, there are many human rights researchers who face many obstacles in gathering the data for their reports, the reasons vary it can be lack of security and inaccessibility of certain insecure areas of the country. Another type of problem is the dominance of old and long-standing customary practices which make it difficult to talk to women and girls who have experienced violence. Moreover, the vast majority of victims do not come forward and seek help from the authorities. Accordingly, violence against women in Afghanistan has taken the form of serious awareness which has taken its toll on physical, psychological, sexual, and economic life of the female. These types of violence women have to face throughout her entire life, be it from her parents, her husband, and other relatives. Structural violence impacts all aspects of women’s lives, their health, safety and society, in other words they are denied of their fundamental rights.<sup>166</sup>

Concluding, Johan Galtung has rightly remarked “when one husband beats his wife,

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<sup>163</sup> Ibid.

<sup>164</sup> Johan Galtung in “Violence, Peace and Peace Studies,” 1969, Violence, Peace, and Peace Journal of Peace Research, Vol.

<sup>165</sup> Dr. Parul Sinha, Department of Obstetrics and Gynecology, Sarfarazganj, Era's Lucknow Medical College, Hardoi Road, Lucknow - 226 003, Uttar Pradesh, India. “Structural Violence on Women: An Impediment to Women Empowerment”

<sup>166</sup> Violence against women In Afghanistan Factors, root causes and situation A Research Report Afghanistan independent Human Rights Commission

there is a clear case of personal violence, but when one million husbands keep one million wives in ignorance there is structural violence.”<sup>167</sup>

### **4.3 Most VAW cases are physical violence**

Violence against women can take various forms. Physical abuse is one of the most common forms of a violence against women in Afghanistan. It can take place mostly in the home by intimate partner, in laws, brother, father or others. It can be punching, hitting with objects, pulling hair, pushing, locking in the house, forced pregnancy and abortion, forced prostitution, not feeding, keeping from sleeping etc.

### **4.4 Consequences of Losing Honour or ‘Honour’ killing**

Gender violence encompasses “Honour” based violence, “crimes of honour”, “crimes related to honour conflict”, “crimes of tradition”, and “cultural-based violence”, “honour killing” these terms are typically used to refer to situation where violence results in a woman’s death.

Honour killings is one form of extreme violence perpetrated on women by men. Afghanistan is one of the countries where the incident of honour killing are among the highest in the present-day world. In honour cultures, aggression is an acceptable reaction to insults and threats to honour. In this regard, it is very important to understand the concept of honour killing, according to Lang “honour killing is most commonly a premeditated murder of a girl or a women, committed by her brother, father, or a combination of male agnates in the name of resorting the family’s social reputation”.<sup>168</sup> Thus, an honour killing is a murder committed against a woman for actual or perceived immoral behavior deemed to be in breach of a household or community’s honour.

Honour killings are severe, but logical, conclusion to efforts to maintain a family’s honour by means of woman’s or a girl chastity, more over it is more

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<sup>167</sup> Johan Galtung in “Violence, Peace and Peace Studies,” 1969, Violence, Peace, and Peace

Journal of Peace Research, Vol. 6, No. 3 (1969), pp. 171

<sup>168</sup> Amir H. Jafari “Honour Killing: Dilemma, Ritual, Understanding” Oxford University Press 2008, pp.18-19



collectivist societies that killings by male relatives of the women to restore family honour take place.<sup>169</sup> For instance, infidelity in marriage is not a matter between husband and wife, rather relates and reflects on the honour of the entire family. Additionally, in some cases the tribal council or the *Jirga*, as the extended family, decides that women should be killed and sends out men to undertake the task.<sup>170</sup> The category of honour killings covers a broad range of murderous acts against women for supposed affronts to a family's honour, such as wedding without parents' consent, adultery i.g. sex outside of marriage, most commonly for intimate relations with a man.

Moreover, women are murdered by family members when they are victims of rape, the victimization is considered a disgrace to the woman's family because the woman was not married to the rapist. Other reasons for honour killings can take place when women refuses to enter into forced marriage, or falls in love with someone who is unacceptable to the family, seeks a divorce, or simply when trying to escape marital violence. In some cases, the mere perception is that a woman has behaved disobediently, thus shaming her father, brother or male cousins, and therefore afflicted to lose her life.

*Namus or Ghairat* (Honour) as a tribal notion, one of Islamic scholars Husain suggests there is no place in Islam for killing in the name of *ghairat*. Instead he ties it to a "deficient tribal mode of life" and states further: "The whole concept of *ghairat* is based on a tribal, pre-Islamic worldview in which women is considered as chattel with no mind or will of her own. Islam came as a liberating force conferring rights on women that were unheard of in those days. Unfortunately, in the more retrograde parts of the Muslim world, these rights have been snatched away in the name of honour that has been accorded a false stamp of custom."<sup>171</sup>

Shahid another Islamic scholar, also connects the notion of *ghairat* with tribal and feudal traditions and not with Islamic injunctions. Additionally he equates "*ghairat* with lack of education, an epitome of the perspectival world: We live in one of the most traditional, conservative societies in the world...religious

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<sup>169</sup> Fontes, L.A and McCloskey, K.A. 2011. Cultural issues in Violence against Women. In C.M rentezetti, J.L. Edleson and R.K Bergen (Eds). Sourcebook on Violence against Women (2<sup>nd</sup>Edition) pp.152. Thousand Oaks, CA:Sage.

<sup>170</sup> Ibid.

<sup>171</sup> Amir H. Jafari "Honour Killing: Dilemma, Ritual, Understanding" Oxford University Press 2008, pp.67-68

fundamentalism is very strong in the country...men tend to develop an unhealthy sense of *ghairat*-especially in backward areas and among uneducated sections of society.”<sup>172</sup> Nevertheless, muslim perpetrators of honour killings often claim that they were following the tenets of Islam, but Sharia forbids physical harm to women.<sup>173</sup>

Furthermore, at a very young age, afghan girls are taught about *namus*, *iz'zat* (respect) and *Sharam* (Shame). Young girls are told and reminded repeatedly with these words. They are instructed and admonished to be obedient to males and not to take any actions that might be considered against the principles of the family and society.

According to Government reports, murder of women represents the second most prevalent form of violence against women in Afghanistan. UNAMA documented “280 cases of murder and “honour killings” of women from January 2016 to December 2017. Thus, 50 cases ended in a conviction of the perpetrator and subsequent prison sentences, representing 18 per cent of documented cases. UNAMA therefore found that the vast majority of murder and “honour killings” of women resulted in impunity for the perpetrator”.<sup>174</sup>

UNAMA found that “enforcement authorities did not take sufficient action in these cases- including in relation to the apprehension of suspects, in breach of their due-diligence obligations to investigate, prosecute and punish those responsible for the crime of murder. The police only forwarded one third of the documented cases over the two-year period to prosecutors. Notwithstanding the alarming levels of impunity documented for those cases which are registered, UNAMA notes that “honour killings” are under-reported in Afghanistan. In relation to deficiencies in apprehending perpetrators, UNAMA emphasises that Article 209 of the Criminal Procedure Code, which allows trials to be held in absentia, must be utilised in murder and “honour killing” cases where the

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<sup>172</sup> Shahis, A. T. ‘Victims of honour’, The Weekly Review, Dawn. Karachi (12 April 1999)

<sup>173</sup> As discussed in Lang (2000), the Quran (4:15-46) says, ‘Those of your women who commit abomination seek against them the testimony of four of your number, and , should they swear, detain the women in their quarters until death release them, or until God appoints a procedure for their case (lahunna).’ See John Burton for a discussing of the punishment for sexually illicit behavior and the bases of the sanctions in the Quran and other source of Islamic law. Burton traces the debates-origins, positions, and interpretations- of the ‘stoning issue’ (1990:pp.123-164) and argues that no direct penal code comes from the Quranic references. In the Quran (24:2) it calls [sic] for stoning adulterers and for one hundred strokes and a years of banishment for non-adulterer fornicators (1990:127). He points out that the flogging punishment and some references to stoning refers to both male and female.

<sup>174</sup> United Nations Assistance Mission in Afghanistan United Nations Office of the High Commissioner for Human Rights May 2018 Kabul, Afghanis “Injustice and Impunity Mediation of Criminal Offences of Violence against Women”

apprehension of perpetrators is not possible. The article allows the holding of a trial in absentia for misdemeanour and felony crimes following a specific procedure.”<sup>175</sup>

UNAMA states that “Murder and “honour killings” of women are acts of extreme violence and constitute a serious violation of human rights. Any act of violence against women perpetrated in the private or public sphere, whether by State or non-State actors, invokes the obligation of the State to prevent, investigate, punish and provide compensation for all acts of violence. The resolution of such cases by mediation must never occur; and cases must be prosecuted under the applicable general murder articles in order to end impunity.”<sup>176</sup>

#### 4.5 Sexual violence

Sexual abuse is another form of violence experienced by women and girls in Afghanistan. According to a nationwide research in 2008, Global Rights Afghanistan indicated that 87.2 percent of Afghan women and girls are faced with at least one form of sexual, physical, economical, psychological abuse. However, no such term ‘sexual violence’ can be found in the national criminal or civil legislation in Afghanistan. Even rape in its general terms is not defined in the legislative context of Afghanistan. The national Penal Code links rape with adultery *zina*<sup>177</sup> and even children who have been victims of rape were subjected to prosecution and were sent to jail or the Children’s Reform Centers, as prisoners. Moreover, rape victims are charged with *zina* and are further re-victimized as some of them are forced to get married to their rapists or imprisoned for “moral crimes”.<sup>178</sup> Furthermore, rape and ‘run away’ victims are forced to undergo virginity test. It is equally concerned at the increase of so-called honour killings and at the discriminatory provision in the Penal Code which allows presenting the defense of honour as a mitigating circumstance for perpetrators of such crimes.<sup>179</sup> However, Special Reporters on violence against women Rashida Manjoo highlights the issues of ‘run-away’ in the rapport: “Women and girls also run away from home as a

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<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Zina Adultery is sexual intercourse between a married woman and another married man. Its called Zinna in Islamic Law and upon testimony of 4 authentic witnesses (men) the adulterer and adulteress are subject to lashes and stoning based on the Sharia law and the judgement of the Qaazi (religious judge)

<sup>178</sup> Human Right Watch : ‘Afghanistan: Surge in Women Jailed for ‘Moral Crimes’ Prosecute Abusers

<sup>179</sup> Ibid.

response to harmful practices, including physical, psychological or sexual abuse, or being forced into marriage, to avoid death at the hands of their relatives. Running away is neither a crime under Afghan law, as there is no provision in the Penal Code that addresses the issue; nor is it a crime under sharia law. However, the authorities sometimes charge women and girls who run away, with the “intention” to commit sexual intercourse outside of marriage (*zina*) or attempted *zina*, which is considered to be a crime against God’s commands under sharia law. They can also be charged for the crime of *zina* under article 427(1) of the Afghan Penal Code.”<sup>180</sup>

Such a crisis is also displaying of the lack of access to justice means for women and girls in Afghanistan. Civil and family disputes are considered private and are not reported to the formal courts, however the traditional dispute resolution mechanisms or the *Jirga*’s decide for such cases.<sup>181</sup>

*A women who was abused sexual tells her story: “My father in-law and mother in-law beat me and pushed me to work on the farm. My husband did not like me; he always told me that I am not beautiful. My older brother in-law has a wife but he always sexually abused me, and then told me to not talk about it to anyone. When I told to my husband, he beat me and accused me of lying. I came to my father’s house and talked about all these abuses, but my father and brother told me to save their honour”.*<sup>182</sup>

However, the 2011 UNAMA report talks about forced marriage, under-aged marriage, exchange marriage, baad, and honour killing, but these issues are looked at from a traditional and cultural perspective and not as sexual violence. A total of 4,505 cases of violence against women were registered by the joint database of the Ministry of Women’s Affairs, Ministry of Interior and the Attorney General’s Office from March 2012 to March 2015 in 32 provinces. During the first half of 2015, the Afghanistan Independent Human Rights Commission registered 4,154 cases of violence against women, including 1,249

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<sup>180</sup> Rashuida Manjoo: ‘Report of the Special Rapporteur on violence against women, its causes and consequences. Mission to Afghanistan.’ A/HRC/29/27/Add.3, 12 May 20 15. Para.16

<sup>181</sup> United Nations Assistance Mission in Afghanistan United Nations Office of the High Commissioner for Human Rights May 2018 Kabul, Afghanistan “Injustice and Impunity Mediation of Criminal Offences of Violence against Women”.

<sup>182</sup> Interview with G. S., safe house in Kabul, June 9th, 2013.

cases of physical violence, 976 cases of psychological violence, 862 cases of economic violence, 262 cases of sexual violence, and 805 cases of other types of violence.<sup>183</sup>

#### **4.6 Forced Marriage**

According to the AIHRC, 60- 80 percent of marriages in Afghanistan are concluded without the consent or against the will of one of the spouses.<sup>184</sup>

In Afghanistan, most marriages are arranged by the families of the marrying couple, rather than as a result of a relationship initiated by the man and the women themselves. Although the man and woman often do not know each other before becoming husband and wife, their union may become happy and pleasant. Sadly, this is not always the case often arranged marriages turn violent, mostly because the marriage was obtained without the consent of one or both parties. For instance, in many cases a poor family may be forced to marry off a daughter to settle debts, conflicts or simply escape the poverty.

Article 70 of the Civil Code of Afghanistan states: “Marriage shall not be considered adequate until the male the age of 18 and the female the age of 16.” (Republic of Afghanistan (5 January 1977). Civil Law of the Republic of Afghanistan (Civil Code)) See also Article 71 which states: (1) Where the girl does not complete the age provided under Article 70 of this law, the marriage may be concluded only through her father or the competent court. (2) The marriage of a minor girl whose age is less than 15 shall never be permissible. The Social Institutions and Gender Index report published by the OECD Development Centre, in a section title “Discriminatory family code”, states: “The Civil Code sets the minimum legal age of marriage at 16 for girls and 18 for boys, allowing for the marriage of a girl aged between 15 and 16 provided that there is consent from either the child’s father or the competent court. The Civil Code has prohibited the marriage of a child younger than 15 in all circumstances. Under Sharia law, there is no minimum age for marriage. However, it is generally held that a person may be ready to enter into marriage at the transition into puberty.

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<sup>183</sup> Rashida Manjoo ‘Report of Special Rapporteur on violence against women, its causes and consequences’, UN Human Rights Council, Twentyninth session, A/HRC/29/27/Add.3. 1 2 May2015

<sup>184</sup> UNIFEM 01 December 2009, Media Centre , Global Rights 2008

Marriage without the consent of both parties (forced marriage) is not valid under Sharia law and the Afghan Penal Code. These hold that marriage should be entered into with total commitment and full knowledge of what it involves. Pertaining to widows and women younger than 18 years of age, the Penal Code imposes a prison sentence for leading a woman into marriage against her will or without her consent. Despite these provisions, coerced early marriage persists.”<sup>185</sup>

A manual published by the Max Planck Institute of Germany, states: “Current reports and surveys with regard to the marriage registration in Afghanistan indicate that in most parts of the country marriages are neither certified nor registered, and only 5 percent of all marriages in Afghanistan have been registered. In spite of the existing regulations, registration authorities which could function systematically have not yet been created in Afghanistan. The lack of registration is partly explained by the fact that non-registration does not affect the validity of the marriage: a marriage is considered religiously valid without registration.”<sup>186</sup> Further, this manual states: “According to observations reported by national and international organizations, forced marriages do take place in Afghanistan. These are marriages of under-age children, married by their parents or other persons, as well as marriages of adults, mostly women, against their free will and consent.”<sup>187</sup>

Case study: A woman who was forced by her parents to get married with her cousin says: *“Three years ago I was forced by my parents to get married with my cousin who was a soldier in the National Army. One month later different types of violence started and every day I was beaten without any reason. Under different accusations, such as talking with my father or other scant reasons he beat me. He repeatedly threatened me to death by knife and weapon. Out of fear and panic to be killed, I aborted my child three times. Now I want to divorce, but I have no one to help me. Many times a Jirga intervened to settle our problems, but my husband does not abide by his promise and again continues to beat me. The Jirga forced me to go to my husband’s house, but he does not abide by his promise and beats*

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<sup>185</sup> Social Institutions and Gender Index (24 July 2015) Country Profiles: Afghanistan, p.2

<sup>186</sup> (Max Planck Institute (July 2012) Max Planck Manual on Family Law in Afghanistan, p.52)

<sup>187</sup> Ibid. p.32

*me repeatedly. For this reason I do not believe in the decision made by the Jirga.*”<sup>188</sup>

#### 4.6.1 Exchange of girls *badal*

The culture of *badal* marriage (women and girls exchanged as brides between families) remains intact in several parts of the country, fueling family violence and leading to divorce.<sup>189</sup> The primitive practice involves the marriage of a brothersister pair from two households. In some cases, it involves uncle-niece pairs, or cousin pairs. This form of marriage generally involves blood relatives. Nevertheless, in some cases, *badal* can be practiced in order to settle the dispute. In many cases, the justification for this custom has been supposed as an environment with generally low and uncertain incomes, weak or uncertain legal institutions. It is widely viewed as the most effective means available to the poor. However, violence against or ill-treatment of one woman married through an exchange marriage is met by violence against or ill-treatment of the other exchanged wife, and as a consequence a cruel, self-perpetuating cycle of abuse directed at the two women continues.<sup>190</sup>

Case study: Zaranj resident Khan Mohammad told Pajhwok Afghan News: *“Thirty years back, he engaged his sister to Najmuddin and, in exchange, married his sister due to the poverty of both families that could not afford dowries. Things had been going well for a few years, her mother-in-law started subjecting his sister to violence. As a result, Mohammad’s mother incited her son to mount pressure on his wife, sister of Najmuddin.....If my sister would have no new suites, shoes, etc., I could not purchase her any. When my wife would mistakenly put more salt in food, I had to be angry with her, so much so that my mother forced me to marry a second girl.”* After his second marriage, his brother-in-law

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<sup>188</sup> Afghanistan Independent Human Rights Commission (AIHRC) ‘Summary of the findings report on Violence Against

<sup>189</sup> *Badal* a marriage conducted by exchanging two girls for each other

<sup>190</sup> Deborah J. Smith, Afghanistan Research and Evaluation Unit Issues Paper Series: ‘Decisions, Desires and

Diversity:Marriage Practices in Afghanistan.” 2009. P.41, <https://www.refworld.org/pdfid/4992cc722.pdf>

also tied the knot with another and divorced his sister, who had three daughters and a son. "Although my mother tried to coerce me into divorcing my wife, I continued to love her. So I didn't bow to my mother's dictates. Then I was forced to marry for a third time."<sup>191</sup>

Religious scholars argue and call *badal* an undesirable practice. For the reason that if one woman gets into distress with her family, another woman who married in exchange may also face violence as a form of revenge.

Maulvi Attaullah Fikri, the Nimroz appellate court judge, believes "any human being born free should not be exchanged for another person. He insists marriage should take place with the mutual consent of two people." He opposes the *badal* custom for linking the fates of four people.<sup>192</sup>

#### 4.6.2 Giving on *bad*

*Baad* is one of the most abusive customary practices in Afghanistan, where girls or women are given to an aggrieved family to "compensate" for a crime, a punishment usually decided by a local *Jirga*. The *jirga* often orders the assailant's family to pay a "blood price," by forcing a female relative to marry a member of the victim's family. *Jirga* participants interviewed by Human Rights Watch presented *baad* as a more "restorative" form of justice than revenge killings or seizure of property. One Herat-based *jirga* member said, "Instead of killing the brother [in revenge] it was much better to give this girl as *baad*. She was also killed in a way but if they killed the brother then the enmity between the two tribes would continue for centuries."<sup>193</sup>

"There's a law against giving Afghan women away to pay for the crimes of their families but it still happens," said Aruna Kashyap, women's rights researcher at Human Rights Watch. "The government should punish those who treat women like family property."<sup>194</sup>

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<sup>191</sup> <https://www.pajhwok.com/en/2015/12/05/nimroz-badal-marriages-continue-spawn-family-violence>

<sup>192</sup> Ibid.

<sup>193</sup> Human Rights Watch: Afghanistan: 'Stop Women Being Given as Compensation' 8 March 2011, available at: <https://www.refworld.org/docid/4d79e53f2.html> [accessed 26 April 2019]

<sup>194</sup> Ibid.



Moreover. “According to Islamic law, a man and woman should agree on a marriage for it to be valid. However, tradition be likely to take priority in Afghanistan. Parents regularly decide upon their daughters' future without asking them for an opinion. Men, on the other hand, are generally able to reject their family's choice of bride and can even choose their own bride sometimes.”<sup>195</sup> A report from the Institute for War and Peace Reporting states: “Campaigners against the *bad* practice, which often leads to a miserable life of abuse for the woman, say their work has been given a major boost in recent months. The issue became a national talking point last year when 27-year-old Khan Wali Adil took the unprecedented step of setting up a protest tent in front of the Wolesi Jirga, the lower house of the Afghan parliament. Originally from Paktia province, the teacher had refused to take part in a forced marriage himself and said that he had been ostracised as a result. ‘I do not want women and girls to live in slavery and become the victims of the dishonest demands of others,’ he told IWPR. Adil explained how, after his elder brother was murdered in a land dispute, the killer’s family offered their eldest daughter in marriage as a way to end the dispute between them. However, Adil refused to agree to the union.”<sup>196</sup>

#### 4.6.3 Dowry (*Jahez*) Bride price

The cost of an Afghan wedding depends on a wide variety factors, including number of guests, the ceremony site, jewelry, dresses, food, the décor etc. The wedding party is an important part and biggest events of life for a man and girl. Nevertheless, afghan weddings are enormously expensive affairs with excessive costs. While the Qur’an states that weddings should be conducted within the financial means of the family, it is not the usual custom in Afghanistan. Many Afghan men marry almost older in life, saving for years to be able to afford the engagement and wedding requirements. Many afghans believes the more money spent on their daughter’s wedding, the more valuable their daughters are regarded. Usually couples have limited role in the wedding and bride price negotiations and have to accept what their families decide.<sup>197</sup>

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<sup>195</sup> (Deutsche Welle (18 April 2013) Afghan women escape marriage through suicide, “Tradition takes priority”,

<sup>196</sup> (Institute for War & Peace Reporting (17 January 2017) Hope for Afghan Women Traded to End Feuds)

<sup>197</sup> Fazal Muzhary: ‘The Bride Price> The Afghan tradition of paying for wives’. 25 October 2016.

<https://www.afghanistan-analysts.org/the-bride-price-the-afghan-tradition-of-paying-for-wives/>

So what is bride price? It is a payment that the father of the bride receives from the groom. Thus, the bride price can be a serious burden on grooms and their families, but it is also essential source of income for the families of brides, especially a poorer ones and those who have not a son. Bride price is recognized as *walwar* in Pashto-speaking areas and *toyana* and *sherbaha* in dari-speaking regions. It is a disputed Afghan tradition with no foundation in Islamic law and does not appear in the new draft marriage law. It is also not to be confused with the dowry (*mahr*) which is decided upon *nikah*<sup>198</sup> ceremony and should be given to the bride in case her husband divorces her or dies.<sup>199</sup>

Very often parents marry off their child girls at 15 and 16 age, according to articles 70 and 71 of Penal Code a girl may marry at the age of 15. It is reported that 17, 3 percent of girls aged 15 to 19 are married. The 2010-2011 Afghanistan Multi Indicator Cluster Survey found that 15.2 per cent of surveyed women were married before the age of 15 and 46.4 per cent before 18.<sup>200</sup> Accordingly, girl child marriages is perceived as an asset exchangeable for money due to the practice of the bride price, thus exposing to violence, including rape, force to stop education and into premature parenthood.<sup>201</sup>

The Afghan marriage law came into force in 1977 and articles 56 to 267 focus on family issues. However, the civil law is silent on bride price. The 2015 draft marriage law approved by the parliament appears to return to previous attempts to explicitly abolish bride price, but requires the payment of *mahr* according to Islamic law. The law also regulates other wedding expenses.<sup>202</sup>

Three ethnic Turkmen women told UNAMA HR: “they were exchanged in marriage by their families at very young ages. They described accepting the arrangement, having been told it was in their families’ best interest. They reported that they suffered physical and mental abuse at the hands of their in-laws for not

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<sup>198</sup> *Nikah*- a form of marriage which has been sanctioned by Islam, where a man asks another for the hand of the leatters ward or daughter and then marries her by giving her dower. Khan Noor Ephroz: “Women and Law”, Rawat Publication, New Delhi 2003, see p.26

<sup>199</sup> Fazal Muzhary: ‘The Bride Price> The Afghan tradition of paying for wives’. 25 October 2016. <https://www.afghanistan-analysts.org/the-bride-price-the-afghan-tradition-of-paying-for-wives/>

<sup>200</sup> See United Nations Population Fund, “Afghanistan State of the Youth Report 2014”,p.9

<sup>201</sup> Rashuida Manjoo: ‘Report of the Special Rappporteur on violnce against women, its causes and consequences. Mission to Afghanistan.’ A/HRC/29/27/Add.3, 12 May 20 15. p.9

<sup>202</sup> Ibid.

bringing sufficient gifts by way of dowry”.<sup>203</sup> Consequently, many Afghan women and girls suffer violence due to this practice.

Case study on child marriage: Local authorities of Badghis province have reported that *“a man in this province had killed his 9-year-old wife. Naqibullah Amini, the governor spokesman, said that the girl was named Samia and belonged to the Qadis district and had died as a result of domestic violence. According to him, Samia had been married to Sharafuddin two years back, when she was just seven, in return for 1,000,000 Afghanis. Sharafuddin is 35-years-old now.”*<sup>204</sup>

#### 4.7 Polygamy

There are various reasons for polygamy in the Afghan community. Thus, one of the most common reasons found for men to have more than one wife was because they had been obliged to marry the widow of a male (brother) family member. In this case the women has usually lost her husband as a result of war or a different circumstances. Another reason, to take another wife can be that the first wife had issues with fertility.<sup>205</sup>

Thus, with regard to the practice of polygamy Article 86 of the Civil Code of Afghanistan states: “Polygamy can take place after the following conditions are fulfilled: 1 – When there is no fear of injustice between the wives; 2 – When the person has financial sufficiency to sustain the wives. That is, when he can provide food, clothes, suitable house, and medical treatment; 3 – When there is legal expediency, that is when the first wife is childless or when she suffers from diseases which are hard to be treated.”<sup>206</sup>

A report from the Afghanistan Research and Evaluation Unit states: “About seven percent of women aged 15-49 years were in a polygamous marriage with its incidence being twice as high among women with no education (8 percent) than among the women who have secondary education or higher (4 percent). About 2 percent of women aged 15-19 years were in a polygamous marriage, while the

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<sup>203</sup> Assistance Mission in Afghanistan (UNAMA) (9 December 2010) Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan, p.15)

<sup>204</sup> <http://www.rawa.org/temp/runews/2018/07/30/man-kills-his-9-year-old-wife-in-afghanprovince.html#ixzz5mezEHAM7>

<sup>205</sup> Afghanistan Research and Evaluation Unit (AREU) (November 2013) Women’s Economic Empowerment in

Afghanistan, 2002-2012: Information Mapping and Situation Analysis, p.17

<sup>206</sup> Republic of Afghanistan (5 January 1977) Civil Law of the Republic of Afghanistan (Civil Code))

figure was 11 percent for women aged 40-49 years.”<sup>207</sup> These women were more at risk of physical violence from their spouse and particularly the combined spousal and mother-in-law and sibling-in-law/sibling physical violence.

#### 4.8 Suicide: Self-immolation

Many afghan women are committing suicide as a way to die and escape the violence. The trauma of physical, sexual and psychological abuse has selfdestructive consequences on women. Women and girls who are the victims of violence have significantly higher levels of anxiety, depression, sorrow, and psychosomatic symptoms.

Self-inflicted burn or self-immolation is a common, dramatic and most violent suicidal method practiced by victims of violence in Afghanistan. A report from WHO in 2014 states: “Deputy Minister of Health Care Services for the MoPH Dr Najia Tariq noted that since the beginning of the year, 4466 cases of selfpoisoning and 707 cases of self-immolation have been registered in central hospitals. 4136 cases of self-immolation from 30 provinces have been reported, including 166 confirmed suicides.” According to research: “Reliable data on suicide in Afghanistan is scarce. A large proportion of Afghans suffer from mental health problems such as depression, a major risk factor for suicide. Gender-based violence, substance abuse, trauma and stress relating to conflict, as well as displacement, poverty and continued insecurity around the country also increase the risk of suicide. Moreover, girls between the ages of 16–19 are more prone to committing selfimmolation, burning themselves to death. Nearly 80 percent of women who commit self-immolation are married. The most common reason for self-immolation is forced or child marriage.”<sup>208</sup>

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<sup>207</sup> Afghanistan Research and Evaluation Unit (AREU) (November 2013) Women’s Economic Empowerment in Afghanistan, 2002-2012: Information Mapping and Situation Analysis, p.13

<sup>208</sup> World Health Organization: ‘WHO and partners call for efforts to strengthen suicide prevention in Afghanistan’. Kabul 10 September 2014.

<http://www.emro.who.int/afg/afghanistan-news/world-suicide-prevention-day-2014.html> visited on 1 May

#### 4.9 Preventing from social activities (education included) as an economical violence

Education is considered a fundamental basis of social work in the community, and access to it is a right of every human being, particularly women. According to a famous scientist and doctor from the Islamic world, Abu Ali Sina Balkhi, 2019 “education means planning the community's activity for the health of the family and the growth of the children in a society throughout life and after death.”<sup>209</sup>

Halima Askari the first woman head of the Provincial Council in Afghanistan's Wardak province states in an interview: “We are living in a maledominated society where women are denied opportunities simple because they are women. There is a perception that women should not go out, not go out to work, not go to school. But we are encouraging women to do all of these things.”<sup>210</sup> Cultural norms are one of the social challenges that impede girls from education, due to social conditions and costumes prevailing in the community's where they are living. Accordingly, many girls and women are prevented from social activities such as work and education by their families, intimate partners or armed conflicts. This is rooted in the society's gender-based discrimination, social norms and gender stereotypes that perpetuate such violence. Further, gender stereotypes, poverty, forced and child marriages are the main obstacles that leads to denial of the right to education and other social activities.

Culturally, Afghan families give priority to the boy-child's prospects and therefore disfavoring the girl child despite the fact that both children are given right to equal social, economic and political opportunities like education and leadership by law.

Moreover, another reason to the leads girl's exclusion from education is sexual harassment on their way to school, including abduction (abduction is similar to acid attacks). These forms of crimes cause afghan families to keep their daughters at home, because sexual harassment can have destructive consequences for a girls “reputation and personality in their communities”, thus banning from school is seen as a protection of ‘family honour’.

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<sup>209</sup> Humaira Haqmal, Ch.6 “The State os Women's Education in Afhanistan.” 2012. pp.116 <sup>214</sup> UN Women, Asia and The Pacific: Halima Askari ‘Our victory is our unity’. 12 November 2018.

<http://asiapacific.unwomen.org/en/news-and-events/stories/2018/11/in-the-words-of-halima-askari> visited on 1 may 2019

<sup>210</sup> UN Women, Asia and The Pacific: Halima Askari ‘Our victory is our unity’. 12 November 2018. <http://asiapacific.unwomen.org/en/news-and-events/stories/2018/11/in-the-words-of-halima-askari>

In April 2017, a Ministry of Education official told Human Rights Watch that 9.3 million children were enrolled in schools, of which 39 percent were girls.

According to statistics, even in the most optimistic means, the number of Afghan girls who go to schools has never been higher than fifty percent. According to UNICEF's estimates, in January 2016, 40 percent of school children in Afghanistan did not go to school. The UNICEF adds that from 2010-2011, 66 percent of Afghan girls at secondary school age, younger than 12 to 15, did not go to schools in comparison with 40 percent of boys of this age.<sup>211</sup>

The Canadian Panel on Violence against Women, 1993 stated, "Women will not be free from violence until there is equality, and equality cannot be achieved until the violence and threat of violence are eliminated from women's lives."<sup>212</sup>

Conclusively, cultural barriers are one of the main obstacles to the growth and spread of girl's education in Afghanistan.<sup>213</sup>

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<sup>211</sup> Ibid.

<sup>212</sup> [https://www.ecoi.net/en/file/local/1419339/1788\\_1512564165\\_afgh.pdf](https://www.ecoi.net/en/file/local/1419339/1788_1512564165_afgh.pdf)

<sup>213</sup> Hamidullah bamik: 'Afghanistan's Cultural Norms and Girls education; Access and Challenges' December 2018  
[https://www.researchgate.net/publication/329377137\\_Afghanistan's\\_Cultural\\_Norms\\_and\\_Girls'\\_Education\\_Access\\_and\\_Challenges](https://www.researchgate.net/publication/329377137_Afghanistan's_Cultural_Norms_and_Girls'_Education_Access_and_Challenges)

## 5 Strategies for change

### 5.1 Role of government

International instruments have set out Afghanistan Government's obligations to prevent and respond to violence against women. Afghanistan enacted special legislation and focused on violence against women, but the outcomes are not sufficient. Because national prevention and response mechanisms are very weak.

#### 5.1.1 Law and Justice System

The Afghan legal system is complex, due to the relationship between constitutional, Islamic and customary law is complicated. Consequently, women have layered identity with certain rights and obligations, thus, she is a subject to different sets of rules; the gap between *de jure* and *de facto* rights depends on multiple set of norms from constitutional law, to Islamic and customary law. However, even where formal law and religion provides a certain rights to women, its denial by precipitous force of custom constantly prevails. For instance, the right to enter into marriage of free will, right to education, mobility, employment, access and control over her property, right to inheritance etc.

Afghan legislation has disunited legislation, with many breaches and unregulated parts of law. Röder calls "the legal landscape 'a patchwork' of various norms. While the nation may be a unified state in a strict sense, the law is in practice a fragmented *mélange* of secular, customary, and religious law variously applied according to local acceptance of central legislation and modified by shifting conditions of governmental authority. Legal pluralism is the hallmark of legal reality in Afghanistan."<sup>214</sup> Furthermore, Nadjma Yassari states that: "The limited practical value of Afghanistan's statutory laws has to be attributed to the decline and demise of central political authority in Afghanistan as a result of the

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<sup>214</sup> Röder, T. (2009), 'Kollisionen zwischen Sharī'a, Gesetz und Stammestradition in Afghanistan', in M. Kötter & G.F. Schuppert (ed.), *Normative Pluralität Ordnen*, 257-30. Baden-Baden: Nomos Verlag.

civil war, but also to the lack of training of legal professionals and the inability to adapt statutory

law to Afghanistan's particular circumstances.”<sup>215</sup>

It is important to emphasize/highlight that it is not the implications of Sharia law in Afghanistan, that precludes appliance and implementation of international legal and human rights standards. It is rather the lack of a functional legal system, entrenched on the rules of law to create a competent, capable system which in practice will guarantee, socially and political awareness and effective enforcement of laws. Whereas the Government is dedicated to carry out its obligations, enforced not only by Afghanistan’s national laws but also by the country’s international responsibilities, the ultimate challenge to action is the lack of security and the weak peace balance in the country.<sup>216</sup>

A functional legal system in Afghanistan, would entail unification of certain aspects of Islamic and customary law, within the limits imposed by human rights considerations. In this context, Nadjma Yassari argues in her article, that “[i]t is impossible to reject the existing body of tribal laws in its entirety, as this will damage the legal reform process; but at the same time, discriminatory practices, especially those against women, must be abolished. This, in turn, means bringing about a gradual change of popular attitudes on part of the population at large concerning the application of those rules that infringe upon basic human as well as basic Islamic rights. This is the *conditio sine qua non* for change.”<sup>217</sup> It means, that the enforcing system will not be prosperous in Afghanistan as long as customs such as honor killings, forced and child marriages, *bad*, *badal*, physical and sexual violence are not seen as a crimes or disgraceful acts against the human dignity of a woman,.

The Special Rapporteur Manjoo Rashida in the latest report from 2015 on violence against women in Afghanistan recommends that the Government:

- (a) Strengthen the practice of participatory democracy, especially through

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<sup>215</sup> Nadjma Yassari, Mohammad Hamid Saboory: ‘Sharia and national law in Afghanistan.’ 2010. <https://www.juragentium.org/topics/islam/en/yassari.htm> <sup>220</sup> Ibid.

<sup>216</sup> *ibid.*

<sup>217</sup> *Ibid.*



- more effective consultation processes in the law-making sphere;
- (b) Prioritize the clear codification of family law and the criminal law concerning gender-specific offences to ensure compliance with article 22 of the Constitution, which expressly provides that men and women have equal rights and duties before the law;
  - (c) Ensure that legislation clearly specifies the obligation to register all marriages and divorces;
  - (d) Ensure that the criminal law establishes criminal liability for all parties involved in the organization of child and forced marriages; Repeal Article 398 of the Penal Code to ensure that perpetrators of honor killings are not granted legal concessions; and reform the law pertaining to moral crimes to ensure that it incorporates policies and directives that have been issued.
  - (e) Revise the Criminal Procedure Code and prohibit degrading practices, including virginity testing, as a source of evidence in criminal investigations;
  - (f) Ensure that there is accountability in cases of self-immolation, including through effective forensic and other investigations
  - (g) The processing of a case by *jirgas* or *shuras* not preclude such cases from being brought before the formal justice system. Gender based violence cases that have a criminal component be refer to the formal justice system to ensure accountability.<sup>218</sup>

In research carried between 2017 and 2018, Human Rights Watch discovered that Afghan women who seek justice after facing violence remains challenged. For instance, “UNAMA documented several instances where ERAW institutions cooperated with mediators in traditional dispute resolution mechanisms to force survivors into accepting mediation and its decisions.”<sup>219</sup> “Accordingly, authorities

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<sup>218</sup> Rashuida Manjoo: ‘Report of the Special Rapporteur on violence against women, its causes and consequences. Mission to Afghanistan.’ A/HRC/29/27/Add.3, 12 May 20 15. p. 19

<sup>219</sup> United Nations Assistance Mission in Afghanistan United Nations Office of the High Commissioner for Human Rights May 2018 Kabul, Afghanistan “Injustice and Impunity Mediation of Criminal Offences of Violence against Women”

repeatedly failed to exercise due-diligence to investigate and prosecute in cases involving violence against women. Mediation of criminal offences against women as traditional dispute resolution mechanism is unlawful and amount to a human rights violation on the part of the State.”<sup>220</sup>

Hereby, UNAMA offers recommendation to the Government:

- Promptly investigate and prosecute cases of violence against women, including “honor killings”. ERAW institution’s must refer criminal offences of violence against women to the criminal justice system and not to traditional dispute resolution mechanisms;
- ERAW institutions must never mediate or refer to mediation cases of violence against women, including murder and “honor killings” and the crimes set out in Articles 17-22 of the ERAW Law, except for civil disputes resulting from such offences.<sup>221</sup> However, legal framework as ERAW, provides hope for many Afghan women and hope for future development. If legislators explicitly recognize women’s fundamental right in in this context, it will make an impact on members of society. Afghan society should understand that gender equality and equity is a right, and not a privilege.

## 5.2 Education and Social-Cultural Norms

Cultural barriers are seen as one of the main obstacles to growth and spread of girl’s and women’s social activities and education in Afghanistan. Bamik therefore argues in his article that: ‘one of the most important ways of development and transformation in each society is to challenge and ignore the norms that for various reasons are no longer responsive and meaningful for a group or stratum.

Without breaking the norms of the old, the divine, the one-sided, the unequal and the incompatible with the style and the modern conditions of life in the contemporary world, the society is dying and ruining. The key to the dynamism and transformation of a society and culture is based on the critical and challenging approach toward the value systems and norms of that society. This process starts

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<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

with the breakdown of the norm and ends with the transformation of values.”<sup>222</sup> Accordingly, educating society can play a significant role in the transformation of cultural norms and strict cultural values. In the meantime, the majority of victims of these harsh cultural norms are Afghan girls, educating them can be one of the best and most effective ways to eliminate discrimination and gender inequalities. When girls achieve and increase education, skills, and the competence required in the particular society, they can confront and combat with the political, economic, social, gender, and educational bias in the particular community.

Bamik suggest that: ‘The Afghan Ministry of Education as a responsible entity in providing education should pay close attention to the education and training of girls and women and provide special programs in this regard. These actions require that certain mechanisms should be created by the Ministry of Education and other relevant entities for fighting with the predominant rigid cultural norms that impede girls from gaining education. In addition to government responsible entities, educating girls is one of the best investments that families and communities themselves can make it happen because educated girls, for example, marry later, will have healthier children, earn more money that they invest back into their families and communities, and play more active roles in leading their communities and families.’<sup>223</sup>

### 5.3 Role of religious leaders

Religious leaders play crucial and unique role in the response to and elimination of violence against women, by carrying the responsibility to protect and nurture the spiritual welfare of the community as a whole and its individual members. However, there are several terms used in Islam in describing “leader”, among them are *imam*, *khalifah*, *syaikh*, *ulema* and *mullah* in Afghan community.<sup>224</sup> Accordingly, in Afghanistan practices two primary religious actors as religious leaders: the local *mullah* and high-level religious scholars the *ulema*.

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<sup>222</sup> Hamidullah Bamik: ‘Afghanistan’s Cultural Norms and Girls education; Access and Challenges’ December 2018  
[https://www.researchgate.net/publication/329377137\\_Afghanistan's\\_Cultural\\_Norms\\_and\\_Girls'\\_Education\\_Access\\_and\\_Challenges](https://www.researchgate.net/publication/329377137_Afghanistan's_Cultural_Norms_and_Girls'_Education_Access_and_Challenges) <sup>206</sup>Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Khairulnizam Mat Karim: ‘Role of Religious Leader in Interfaith Dialogue towards Conflict Resolution: An Islamic Perspective’. International Journal of Education and Research Vol. 2 No. 6 June 2014

A *mullah* is one who has gone through schooling and considered learned in scripture and sacred law. The term *mullah* is used on a local level and referring to mosques leaders and teacher. Religious leader's *mullahs* have a key role in educating Muslim community on the basic principles of women's rights in Islam. Because, most children and adults in Afghanistan attending non-formal Islamic education in specific setting, usually in the mosque. *Mullahs* use written texts such as *Quran* and the *Hadiths* and other kind of written literature. Besides of teaching, the *mullah's* duties also include to guide the villages in Islamic matters for men as well as for women.<sup>225</sup> *Mullah* leads the daily prayers and offer Islamic lecture each week on different matters, and takes care of life-and-death ceremonies.

It has been a positive initiative from the Asian Foundations Women's Right's team to protect and promote women's rights, where it launched two-year project called "Advancing Human Rights and Women Rights within an Islamic Frameworks across South Asia," which worked specifically with religious leader's *mullahs*. The Asian Foundations expresses: "In a traditional society like Afghanistan where Islam shapes culture, traditions, and customs, there is no better way to raise a sensitive topic such as women's rights than through community-level religious leaders themselves. In the fall of 2011, our partners began hosting workshops in Afghanistan where some 450 Imams from five provinces were given information and tools to protect, teach, and promote/preach about women's rights in Islam."<sup>226</sup>

Furthermore, the Afghan *ulema* has the higher religious clergy by acting as the interpreters and upholders of the scriptural tradition and the law. The *ulema* Council of Afghanistan is a body for religious guidance and it concerns with questions of theology, Islamic law. The *ulema* play a vital role in the society, as they are religious specialists with the authority to convey the correct interpretation of the *Quran* and the *Hadith*. It is important to note that Ulema Council has no

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<sup>225</sup> Pia Karlsson & Amir Mansory: 'Islamic and Modern Education in Afghanistan -Conflictual or Complementary?; Institute of International Education, Stockholm University. P 10

<sup>226</sup> Palwasha Kakar: "Religious Leaders and Women's Rights in Afghanistan". June 6, 2012

implementing mandate or capacity in relation to social and developmental activities.

Zia Moblaghi claims that: “In a society, where violence against women is prevalent and many women face heartbreaking physical tortures such as cutting nose, ear and fingers, such an interpretation would definitely not help to end violence against women. *Ulema* should preach on those verses of Quran that stress love and affection and equal rights among men and women in the family and society.”<sup>227</sup> Thus, statements of *ulema* concerning women’s issues that contradicts to Afghan Constitution should not be acceptable, since Afghan Constitutions guarantees the right of women, and defines a framework where women can engage in political, cultural and economic activities.

However, if the various statements made by the *ulema* regarding women’s rights that can appear to completely contradict with Constitution and Islam, may have negative impact on the community in general as people would reject the rule of law or Islamic education due to that widespread illiteracy, poverty and high unemployment. *Ulema* can be powerful tool to spread the message of gender equality and the need to empower women.

Hamid suggest in his article, that *ulema* in Afghanistan requires not only education focused at understanding Islamic law and human rights but also mechanisms that ensure their independence from state’s political and financial control.<sup>228</sup>

Fawzia Kofi suggest: “You can see in all Islamic countries, the work environment of men and women are similar. We should learn from the Islamic and regional countries. Afghan Government should implement Afghan Constitution, state laws and international conventions.”<sup>233</sup>

## 6.4 Media

Media in Afghanistan made one of the most significant changes in reducing various forms of violence against women and combating injustices. Journalist

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<sup>227</sup> UNAMA: “Points of view in Afghanistan on Ulema Council's statement on women” 19 March 2012

<https://unama.unmissions.org/points-view-afghanistan-ulema-councils-statement-women> visited on 19 May 2019

<sup>228</sup> Hamid M. Khan: ‘Islamic Law, Customary Law, and Afghan Informal Justice. United States Institute of peace, Special Report 363, March 2015 <sup>233</sup>Ibid.

Mehdi Sami addressed the role of media in raising awareness on women's rights. He said, "The violence against women stems from high rate of illiteracy in Afghanistan and called on the *Ulema* to play their part in raising awareness. We have laws but not the mentality to implement them. We should not behave with human rights and women's right as a project but rather take it as our core responsibilities."<sup>229</sup>

## 6.5 Women's shelters

Safe house for women fleeing various forms of abuse exist in a number of Afghan provinces. Women shelters in Afghanistan supports victims of violence to improve their health, education, security and dignity. However, many shelters are under attack by family members or other individuals because of their conservative views on women's shelters. Nongovernmental organizations' groups operate about 40 shelters, legal aid offices, halfway houses for women. Nearly all such work and sites depend on donations from international groups and have succeeded counter to the patriarchal culture.<sup>230</sup>

## 6.6 Support from International community

The Special Rapporteur Rashida Manjoo recommends, "The international community, including the United Nations and the donor community, continue to support the Government of Afghanistan in fulfilling its duty to promote and protect the rights of women in Afghanistan. In particular, the Special Rapporteur recommends that the international community:

(a) Advocate for the inclusion of women and women's rights issues on the agenda of peace negotiations and set the promotion of women's right as a target for the provision of further funding;

(b) Review the actual amount of funding that is currently being given directly to the Government of Afghanistan and to local non-governmental Organizations, to enable a more precise picture of who is benefiting from aid. There is a need to address perceptions of large amounts of funding to foreign consultants and United Nations agencies, which are sometimes seen as wasteful

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<sup>229</sup> UNAMA: "New documentary and round-tables highlight the violence faced by Afghan women". 25 November 2012

<sup>230</sup> Shelters Have Saved Countless Afghan Women. So Why Are They Afraid?

<https://www.nytimes.com/2018/03/17/world/asia/afghanistan-womens-shelters.html> visited on 19 May 2019

and leading to a lack of capacity building and sustainability of local authorities and service providers;

(c) Assist in the review of protection mechanisms, including shelters, in order to find sustainable long-term housing alternatives for women in need of protection. Emphasis should be placed on the empowerment of women and girls through education, skills development and job creation.”<sup>231</sup>

## **Conclusion**

The intention with this thesis was to contribute academic understanding of genderbased violence in Afghanistan by examining the State responsibility for eliminating violence under international law, history, post-war status of the country, plural legal system, culture and religion.

Culture, misinterpreted religion and weak legislative norms remains a very strong force, and especially are shown to often affect efforts targeting the elimination of violence. These practices violates women’s rights that guaranteed in the national constitution as well as the regional and international human rights instruments.

The solution for the Government of Afghanistan is to do all within their powers to eliminate harmful violence. Firstly, it must demonstrate greater due-diligence in cases that involves allegations of criminal acts of violence against women. In other words, the states may also be held responsible for failing to take due diligence to ensure that violations do not occur, by taking appropriate action by preventing, protecting and punishing.

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<sup>231</sup> Rashuida Manjoo: ‘Report of the Special Rapporteur on violnce against women, its causes and consequences. Mission to Afghanistan.’ A/HRC/29/27/Add.3, 12 May 20 15. p. 21

While national level policies and laws are important for legal protection of women, focus should be also on abolishing the mediations at informal level because it removes cases from judicial inquiry, and treats both parties unequally and reduces offender's accountability.

In this regard, according to report of Dr. Martin Lau: "The main source for any legal reform has to be Afghanistan itself. Experience has shown that the wholesale import of foreign laws hardly ever succeeds in improving human rights standards or the rule of law. The impetus for change and reform thus has to come from within. The Judicial Commission and the Human Rights Commission already provide institutional mechanisms for initiating legal reform. The implementation of these reforms depends as much on the existence of institutional capacity as it does on political will and power."<sup>232</sup>

Subsequently, the government, religious leaders and scholars, NGOs, academe, media and other sectors, as a responsible entity should undertake effort to promote change of attitude, values, beliefs and behaviors that have criminal and destructive impact towards women. These include the following : 1) engaging in promoting peoples understanding of women's rights and strength efforts to mainstream gender; 2) to identify the staff and officials whose positions are crucial in promoting women's status (e.g. judges, prosecutors, polices, etc.), and ensure that they are provided with adequate human rights and gender trainings in order that they mainstream gender in their respective areas of responsibility; 3) support the community in promoting and protecting girl's rights to education and increasing the enrolment and retention rate of girls in primary and secondary schools; 4) focus on the promotion of women's leadership, capacity building and strengthening participation in law making on equal terms with men; 5) improve women's access to health services; 6) governments work to criminalize and prosecute traditional practices harmful to women's emotional, physical, social, and economic wellbeing, and reduce occurrence of such activities, including early and forced marriages; 7) Improve knowledge and awareness of Islamic and human rights, specifically rights of women and girls, for people mediating disputes within informal mechanisms, 8) combat the corruption in the public and

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<sup>232</sup> Dr. Martin Lau "Afghanistan's Legal System and its Compatibility with International Human Rights Standards", International Commission of Jurists, Germany



private sectors, civil society, and citizen sector. All survivors of violence should be able to get the support they need to move on from the impact of abuse.

In shortly strategies for combating violence against women includes: legal measures; social cultural, economic and political measures; measures including education, training and awareness building, and the requirement that states made adequate provisions for these services in their budgets.

Subsequently, various governmental institutions of Afghanistan have undertaken major awareness programs to apprise common people about the rights of women within the national legislation. The awareness rising programs have aimed at various stages, from raising awareness of women to raising awareness of religious leader and different tribal leaders. Moreover, the message is being given in the communities through mosques. In this regard, in Afghan society public statements made by government leaders, religious scholars have a positive and significant impact.<sup>233</sup> These types of programs or campaigns are the most effective tools in terms of fighting customs and tradition that justify violations of women's rights.

Consequently, Afghanistan has still a long way to go for women to be able to live in a safe environment and enjoy equal rights to men. The violence that Afghan women and girls suffer stem from the culture in Afghan society where the rule of law in no longer reliable. This is the result of the contradiction between the religious interpretation, the national constitution and the international obligations. Moreover, the lack of protection and trust to institutions provides discrimination against women in the judicial institutions, which ultimately, has created the common view of women as inferior citizens in the Afghan society.

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<sup>233</sup> Palwasha L. Kakar: "Engaging Afghan Religious Leaders for Women's Rights", June 18 2014, <http://www.usip.org/publications/engaging-afghan-religious-leaders-women-s-rights> visited on 12 April 2019

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