

Family Law in Afghanistan

Marriage and Divorce Law

Family law, broadly speaking, is the law or regulation of familial relationships such as relations within the immediate family and/or extended family. Family law matters can be linked with the law of property (ownership) and criminal law (issues relating to abuse, among others). When family rights have not been legislated in law it can be difficult for women's rights within the family to be protected, or for women to access justice. Afghanistan has codified family law; however, it is poorly enforced.

Quick Facts: Marriage in Afghanistan

- 1 in 5 young women aged 15-19 years is currently married.
- 15% of women aged 15-49 years were married before the age of 15.
- 46% were married before the age of 18.
- Young women without education are more than 3 times as likely to be married before the age of 18 than are their counterparts who have secondary education or higher.
- 7% of women aged 15-49 years are in a polygamous marriage.
- 14% of women aged 20-24 are currently married to men who are older by ten years or more.
- 11% of young women aged 15-19 are married to men at least ten years their senior.
- Early childbearing among girls (under 18 years of age): 25%
- Contraceptive prevalence among women: 21%

Source: *Afghanistan Multiple Indicator Cluster Survey (AMICS) 2010/2011*, UNICEF

Family laws in Muslim societies are based on diverse sources of law, ranging from various interpretations of the Quran and Sunnah (teachings of the Prophet Muhammad), to colonial common law, the Napoleonic Code, and Soviet laws. Family law reform is also influenced by the diverse cultural, legal, judicial and political systems that can influence the interpretation and application of laws. Family law reform is often linked to constitutional law and criminal law, which at times can create tensions between the pursuit of gender equality and the right to religious freedom. The spread of international law seeking the protection and promotion of human rights has also provided a framework and motivation for reforming family law in Muslim societies so as to better protect women's rights. However, as many of these sources overlap or produce conflicting rules, Muslim women need access to law that is the most just to them.

The Nikah

In Islam, the *nikah* is a formal binding contract that is considered integral to the validity of a marriage. It outlines the specific rights and responsibilities of the bride and groom that both agree and sign to. It requires that two adult witnesses sign the contract as well. Once the terms are agreed and signed to, the marriage is declared publically. Islam does not consider the *nikah* a sacrament; it is revocable, which means divorce is permitted and can be initiated by either party. Therefore, the *nikah* can serve as an important tool for women to protect their rights and enforce what they are entitled to within the marriage, or in the event of the marriage's dissolution.

Source: *Mohammed Mazhar Hussaini, An-Nikah The Marriage*

Family Law Today in Afghanistan

For Sunni Muslims in Afghanistan, family law is governed by the Civil Code of 1976, which is drawn from the French civil code, and from Egyptian law, but with roots going back to the first marriage law in Afghanistan in the 1920s. The Sharia-inspired aspects of the law, like in Egypt, are governed by Hanafi jurisprudence, one of four schools of Sunni Islamic jurisprudence. The Afghan Family Law is generally considered to be progressive from a gender perspective in that it provides some important protections to women in child custody, inheritance and divorce rights. However, the 1976 law also has important weaknesses. For instance, there are different minimum ages for marriage for males and females, with 18 for males and 16 for females, in contravention of the Convention on the Rights of the Child, to which Afghanistan is a signatory, which specifies 18 as the minimum age for both sexes. There are insufficient provisions for the requirement of consent to marriage, there is language around the need for wives to be 'obedient' to husbands and to request permission from husbands for various acts, and unequal rights to divorce and inheritance between men and women. Given the Afghan Constitution's guarantee of gender equality, the current family law contravenes the new Constitution, in addition to international law that Afghanistan has ratified, notably, CEDAW.

For the Shia minority, (approximately 25% of the Afghan population), family law is governed in a separate code, known as the Shiite Personal Status Law (SPSL), which was drafted in response to Article 131 of the 2004 Constitution, which extended, for the first time, the right of Shias to have their own personal status

law that reflects Shia jurisprudential (*fiqh*) sources. The SPSL was drafted by a body called the Shia Mullahs Council, under the leadership of an Iran-trained cleric named Mohammad Asif Mohseni. The SPSL was quietly and quickly passed through parliament; however, when it came to light, the law was immediately problematic both for its content, which weakened women's rights rather than promoted them, as well as for the process by which the code was drafted and passed, which was without the participation of any women, with no transparency, and without following the required parliamentary procedures for a bill to be passed into law. According to a report published by the Afghan Research and Evaluation Unit (AREU), when the SPSL's content came to the attention of civil society groups, women activists and several progressive Shia institutions, they moved to win a delay in the parliament's vote on the bill. This allowed for alternative provisions to be drafted and proposed that would be less discriminatory towards women.

Quick Facts: Original Draft of the SPSL of 2009

- The SPSL required women to obey their husbands
- Women must ask for permission from their husbands to leave the house, including to work or to seek an education
- Women could not refuse sex to their husbands, a provision that earned the SPSL the nick name, "The Rape Law" in the media
- Made the minimum age of marriage for girls only 9-years-old
- Gave automatic preference to husbands in child custody

While the bulk of their recommendations were rejected by allies of Mohseni's in parliament according to MP respondents, civil society groups worked with allied MPs and succeeded in bringing changes to four articles. The changes included raising the marriage age to 16 for girls and 18 for boys, raising the age for paternal custody of boys to seven years (from two years) and girls to

nine (from seven) years, and bringing several conditions to the clause that wives must seek the permission of their husbands to leave the home. While much of the draft was left intact, these changes were significant and curtailed some of the more discriminatory elements of the law.

– Lauryn Oates, "A Closer Look: The Policy and Law-Making Process Behind the Shiite Personal Status Law" AREU (2009).

Running Away: A "Moral Crime"?

According to a Human Rights Watch report released in March 2012, up to 70% of approximately 700 female prisoners in Afghanistan have been imprisoned for running away, and nearly all were fleeing from forced marriage or domestic abuse. Recent reports show that these rates are rising. Some of the detained women have reportedly been forced to undergo vaginal exams by male police officers in order to determine virginity.

On September 16, 2012, the Minister of Justice and the Minister of Women's Affairs both strongly condemned these charges in a statement and acknowledged these girls and women as victims, rather than criminals. However, the President has yet to release the imprisoned girls and women charged with 'moral crimes,' nor has he taken the steps to prohibit future arrests or prosecutions. Commitments by senior government officials have also had little practical impact to date.

Women detained for 'moral crimes' face numerous challenges. Many have no place to go when they leave prison. For many, conditions in prison are preferable to the abuse they face at home. Women who are fleeing abuse may lose custody of their children if they divorce their husbands. Some women are at grave risk of 'honour killings' if they return home, while others face stigma upon returning to their communities.

Shelters are a critically important source of refuge; however, less than half of the country's 34 provinces have any shelters. Establishing and funding more shelters would be an important step towards giving women fleeing abuse alternatives to prison, as well as sensitizing and training police and law officials.

Source: Human Rights Watch (May 2013)

Lack of Rule of Law

Neither the 1976 family law for Sunnis nor the new SPSL for Shias are well enforced in Afghanistan, and women are

ill-informed of the rights they do have under both Afghan Law and international human rights law which Afghanistan is a signatory to. The consequences of this are a failure to protect women and girls from discrimination and abuses. Some of the most serious outcomes of this failure include the ongoing prevalence of child marriage (nearly half of Afghan women are married before the age of 18) which results in early childbearing and the many risks this entails for mother and child, or practices such as *ba'ad*, wherein girls are traded in order to settle disputes between families or clans. Women cannot easily obtain a divorce, even in cases of domestic abuse. According to Femin Ijtihad, 40% of women living in shelters are under 18 years of age, and most have sought refuge from abusive marriages. The Afghan Independent Human Rights Commission and the UN Mission in Afghanistan (UNAMA) document thousands of cases of domestic violence every year. Child custody practices often favour fathers over mothers. Women are routinely denied their rights to inheritance. Many women and girls run away to escape abuse or forced marriage, and many are treated as criminals rather than as victims in such cases. Self-immolation is frequently reported, a form of suicide women use as a last resort to escape forced marriages and/or violence at home.

There is thus an urgent need to better enforce Afghanistan's existing family law, in addition to embarking on legal reform with the aim of better protecting the rights of women. Improved enforcement requires proper training and monitoring of all duty-bearing institutions, in particular, the police when they are called in to respond to family law issues, as well the courts. Greater awareness is needed among both men and women alike of the rights that women are entitled to under family law. Because women's rights within their families determine to a great extent their rights and freedoms in the society at large, reforming and enforcing gender equitable family law must become a top priority for the Government of Afghanistan.

Percentage of women who were first married before age 15 and 18, by residence and age groups, Afghanistan, 2010-2011

Age	Urban				Rural				All			
	Percentage of women married before age 15	Number of women age 15-49	Percentage of women married before age 18	Number of women age 20-49	Percentage of women married before age 15	Number of women age 15-49	Percentage of women married before age 18	Number of women age 20-49	Percentage of women married before age 15	Number of women age 15-49	Percentage of women married before age 18	Number of women age 20-49
15-19	2.3	1,071	n/a	n/a	6.1	4,439	n/a	n/a	5.4	5,510	n/a	n/a
20-24	11.4	797	29.9	797	15.9	3,313	42.9	3,313	15.0	4,110	40.4	4,110
25-29	19.9	658	45.2	658	20.2	2,920	47.6	2,920	20.2	3,579	47.2	3,579
30-34	23.1	440	54.6	440	25.8	2,020	55.4	2,020	25.3	2,460	55.3	2,460
35-39	20.6	471	52.8	471	18.0	1,918	50.7	1,918	18.5	2,389	51.1	2,389
40-44	18.4	332	43.4	332	17.4	1,474	45.4	1,474	17.6	1,805	45.0	1,805
45-49	18.9	263	39.4	263	14.0	1,175	39.4	1,175	14.9	1,438	39.4	1,438
Total	13.8	4,031	43.0	2,960	15.5	17,259	47.1	12,820	15.2	21,290	46.3	15,780

Source: Afghanistan Multiple Indicator Cluster Survey 2010/11, CSO & UNICEF



A poster on the wall of a women's organization in Kabul warns against the dangers of child marriage.

Ulema's Declaration of 2012

In 2012, the Afghan Ulema Council, an unelected council of Muslim clergy, issued a non-binding edict proclaiming that “men are fundamental and women are secondary”. The edict further said that women are to avoid mingling with men in public during social activities that include education, bazaars, offices, and other aspects of life. Women should wear full Islamic hijab, respect polygamy, and comply with Sharia law on divorce. In addition, any teasing, harassing and beating women is prohibited only without a sharia-compliant reason, leaving room to suggest that domestic abuse is justifiable in certain situations. President Hamid Karzai, despite recently signing legislation to eliminate violence and discrimination against women, endorsed the edict that referred to women as second-class citizens.