



Afghanistan: Women's Rights Resources

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Afghanistan: Women's Rights Resources

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I. Filing a Complaint, Prosecution, and Withdrawal of Complaint

The Law on Elimination of Violence Against Women (EVAW Law)¹ is considered Afghanistan's most significant legislation concerning domestic violence. It contains the majority of the country's penal provisions regarding the protection of women from acts of violence. The procedure for filing a complaint under the EVAW Law is determined by article 7.

1. The victim of violence, by herself or her relatives, may complain in written [sic] to police, *Huqooq* Department, courts and other relevant authorities.
2. The institutions mentioned in paragraph (1) of this Article are obliged to register the received complaints and address them in accordance with the provisions of the law, and shall inform, in written [sic], the Ministry of Women Affairs.
3. The Ministry of Women Affairs shall, upon receiving written information or [a] direct complaint by the victim or her relatives, take and implement necessary measures in order to contact the victim.
4. Prosecutors' office and court are obliged to take [a] violence case as a priority and process it as expeditiously as possible.²

The United Nations Assistance Mission in Afghanistan (UNAMA) provides a summary of the complaint/prosecution process.

Within the existing legal framework, a survivor of violence against women has the right to approach the Department of Women's Affairs, the Department of *Huqooq*, the police or the prosecutor's office to register a complaint.

Under the EVAW Law, once the complaint is registered with the police, the police must refer the case to the relevant prosecutor's office for investigation. Once the prosecutor receives the case, based on a preliminary investigation and prosecutorial discretion, he or she should make a decision to prosecute under the EVAW Law, or the Penal Code, or both. If [a] decision is taken to prosecute, the case should be referred without delay for swift court adjudication. Unless the case involves one of the five serious offences under the EVAW Law, a complainant can stop the prosecution, trial or implementation of punishment at any stage by withdrawing her complaint.³

According to one law review article, article 7(4) of the EVAW Law "means that prosecutors and judges must prioritize cases of violence against women over all other proceedings. In addition,

¹ Law on Elimination of Violence Against Women (EVAW), <https://perma.cc/CC48-RSYE> (in English), <https://perma.cc/7HFP-MPLK> (in Dari).

² Id. art. 7.

³ United Nations Assistance Mission in Afghanistan (UNAMA), *Injustice and Impunity: Mediation of Criminal Offences of Violence Against Women* (May 2018), <https://perma.cc/W9AS-8TRB>.

the ERAW Law does not make any reference to informal dispute resolution processes or mediation. As such, the use of traditional mechanisms—such as *shuras* or *jirgas* [gatherings of elders]—to mediate such criminal cases is illegal.”⁴

Under article 39 of the ERAW Law, the victim may withdraw her complaint at any stage of the proceeding, even after conviction.

1. Proceeding of relevant cases and prosecution of the perpetrators of crimes set forth in Articles 22 - 39 of this law shall be conducted based on the complaint filed by the victim or her representative.
2. In circumstances mentioned in paragraph 1 of this article the victim may withdraw her case at any stage of prosecution (detection, investigation, trial or conviction) which results in the stoppage of proceeding and imposition of punishment.⁵

However, this rule does not apply to the five most serious crimes under the law, including sexual assault/violation, enforced prostitution, publicizing the identity of the victim, burning or using chemical substances, and forced self-immolation or suicide. “Due to the gravity of these five crimes, the perpetrators of these violent acts must be prosecuted and punished even if the complaint is subsequently withdrawn.”⁶ However, as noted above, in practice, mediation still plays a significant role.

Despite these legal proscriptions against using informal dispute resolution mechanisms in cases of violence against women, *shuras* and *jirgas* routinely mediate such criminal offenses. Based on the U.N.'s monitoring of 237 ERAW cases reported to the authorities across Afghanistan, 145 cases (61 percent) were resolved by mediators—in violation of the ERAW Law. The offenses mediated included murder, “honor killings,” and the five most serious ERAW offenses.⁷

Similar observations were made in a 2018 UNAMA report on the use of traditional and government-mandated mediation through ERAW institutions for even the most serious crimes under the ERAW Law:

UNAMA found that ERAW institutions and non-governmental organisations facilitated mediation proceedings, referred cases to traditional mediation mechanisms, observed mediation sessions, or knew about mediation taking place, in relation to “honour killings” and other offences stated in the ERAW Law. Such offences included the five serious offences set out in Articles 17 to 21 of the ERAW Law in respect of which the State must take action, irrespective of whether a complaint is filed or subsequently withdrawn. These are the crimes of rape, enforced prostitution, publicising the identity of a victim, burning or the use of chemical substances and forced self-immolation or suicide.

⁴ Mehdi J. Hakimi, *Elusive Justice: Reflections on the Tenth Anniversary of Afghanistan's Law on Elimination of Violence Against Women*, 18 NW. J. Hum. Rts. 52, 61 (2020), <https://perma.cc/7W44-6XN2>.

⁵ ERAW Law art. 39.

⁶ Hakimi, *supra* note 4, at 56.

⁷ *Id.* at 62.

UNAMA found that traditional dispute resolution mechanisms continued to pass decisions on cases involving allegations of criminal acts of violence against women, including murder, "honour killings" and the five serious offences - in all provinces of Afghanistan. UNAMA documented multiple incidents where survivors' families, ERAW Law institutions and non-Governmental Organisations referred cases to mediation by these informal mechanisms. As noted above, in many cases, ERAW Law institutions either coordinated or participated in the traditional mediation process. In relation to the crime of "honour killings" and murder of women,

UNAMA found that the police often failed to forward these cases, particularly "honour killings" cases to prosecutors. UNAMA notes that the failure of law enforcement authorities to take action in "honour killings" and murder cases of women and girls undermines efforts to promote the rights of women, erodes the rule of law, contributes to an expectation of impunity, discourages the reporting of these cases and increases citizens' perception of a corrupt and unreliable justice system in Afghanistan. . . .

There is no specific provision in Afghan law that permits or prescribes the mediation of criminal cases. Rather than seeing cases through to adjudication, the referral to mediation implies the State's abrogation of its primary responsibility as duty bearer under international law to ensure the effective prevention and protection of women from such crimes and to provide an effective response where they occur.⁸

Human Rights Watch made similar observations in a recent report.

Although mediation is often dangerous for women who are put at risk by being convinced to reconcile with their abuser, ERAW cases are commonly resolved through family mediation—often traditional informal councils, or jirgas. The ERAW law prohibits mediation in only five kinds of offenses against women: rape, forced sale of sex, publicizing the identity of a victim, burning or the use of chemical substances to cause harm, and forced self-immolation or suicide. For these offenses, even if the woman (or family member in the case of death) does not file a complaint, or tries to withdraw it, the state is obligated to prosecute. In all other cases, police and other officials can pressure the woman to have her case resolved through mediation. In violation of the law, ERAW officials have sometimes referred cases to mediation when it is prohibited. Particularly outside major cities, officials often refer women and their relatives to traditional councils to resolve cases, including violent crimes, thereby bypassing the justice system altogether. This kind of mediation often leads to outcomes that deny women protection and justice and reinforces impunity, even for the most serious crimes.⁹

Please note that violence against women can also be charged and prosecuted under the Penal Code, 2017,¹⁰ and the Criminal Procedure Code, 2014,¹¹ neither of which has been officially translated yet. Nor is an unofficial translation available to the public.

⁸ UNAMA, *supra* note 3, at 6-7.

⁹ Hum. Rts. Watch, *I Thought Our Life Might Get Better* (Aug. 5, 2021), <https://perma.cc/H2U7-YQJ7>.

¹⁰ Criminal Code of the Islamic Republic of Afghanistan, Issue No. 1260, May 15, 2017, <https://perma.cc/TSD9-P9MR> (in Dari and Pashto).

¹¹ Criminal Procedure Code, 2014, <https://perma.cc/2BDJ-EQ37> (in Dari and Pashto).

The following resources on combating violence against women in Afghanistan are listed in reverse chronological order:

- Human Rights Watch, *I Thought Our Life Might Get Better* (Aug. 5, 2021), <https://perma.cc/H2U7-YQJ7>.
- S. Qazi Zada, *Legislative, Institutional and Policy Reforms to Combat Violence Against Women in Afghanistan*, *Indian J. Int'l L.* 59, 257–83 (2021), <https://perma.cc/43V3-D5JZ>.
- Mehdi J. Hakimi, *Elusive Justice: Reflections on the Tenth Anniversary of Afghanistan's Law on Elimination of Violence Against Women*, 18 *NW. J. Hum. Rts.* 52 (2020), <https://perma.cc/7W44-6XN2>.
- UK Home Office, *Country Policy and Information Note – Afghanistan: Women Fearing Gender-Based Violence* (Mar. 2020), <https://perma.cc/6X86-6RJB>.
- UNAMA, *In Search of Justice for Crimes of Violence Against Women and Girls* (Dec. 2020), <https://perma.cc/TU6E-U4HD>.
- R Jewkes et al., *Violence Against Afghan Women by Husbands, Mothers-in-Law and Siblings-in-Law/Siblings: Risk Markers and Health Consequences in an Analysis of the Baseline of a Randomised Controlled Trial*, *PLoS* (2019), <https://doi.org/10.1371/journal.pone.0211361>.
- Afghanistan Public Policy Research Organization, *New Penal Code and ERAW Law: To Incorporate or Not to Incorporate?* (Jan. 2018), <https://perma.cc/B7BH-75H7>.
- UNAMA, *Injustice and Impunity: Mediation of Criminal Offences of Violence Against Women* (May 2018), <https://perma.cc/W9AS-8TRB>; see also other UNAMA reports on women's rights, <https://perma.cc/95YE-R3FN>.
- Torunn Wimpelmann, *Adultery, Rape, and Escaping the House: The Protection and Policing of Female Sexuality in Afghanistan* (Chr. Michelsen Inst. Working Paper WP 2017:9), <https://perma.cc/CP3G-L2TF>.
- Torunn Wimpelmann, “Good Women Have No Need for This Law”: *The Battles Over the Law on Elimination of Violence Against Women*, in *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* 51 (Oakland: U. Cal. Press 2017), <https://perma.cc/SW3B-MD46>.
- Torunn Wimpelmann, *Brokers of Justice: The Special Prosecution Unit for Crimes of Violence Against Women in Kabul*, in *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* 85 (Oakland: U. Cal. Press 2017), <https://perma.cc/98RZ-HD63>.
- Shafiqah Ahmadi, *Theory vs. Practice: Women's Rights and Gender Equity in Afghanistan*, 24 *Transnat'l L. & Contemp. Probs.* 313 (2015), <https://heinonline.org/HOL/P?h=hein.journals/tlcp24&i=331> (by subscription).
- Center for Gender & Refugee Studies, University of California Hastings College of the Law, *Breaking Barriers: Challenges to Implementing Laws on Violence Against Women in Afghanistan and Tajikistan with Special Consideration of Displaced Women* (Apr. 2016), <https://perma.cc/S9ME-MMCR>.
- Katarzyna Sadowa, *A Violence Against Women in Afghanistan after Taliban Occupation – Outline of the Issue*, 3 *Opolskie Studia Administracyjno-Prawne* 119-34 (2015), <https://www.ceeol.com/search/viewpdf?id=412455> (by subscription).

- Tim Luccaro & Erica Gaston, *Women's Access to Justice in Afghanistan*, United States Institute for Peace (USIP) (July 17, 2014), <https://perma.cc/7WCW-ZYNJ>.
- Anastasiya Hozyainova, USIP Special Report 347, *Sharia and Women's Rights in Afghanistan* (May 2014), <https://perma.cc/JB6K-G8BF>.
- Meredith B. English, *A Decade's Legacy: Dashed Hopes for Gender Equality and the Status of Afghan Women in Light of the Ensuing Drawdown*, 16 *The Scholar: St. Mary's L. Rev. Race & Soc. Just.* 805 (2014), <https://perma.cc/LMA8-4LRC>.
- Torunn Wimpelmann, *The Price of Protection: Gender, Violence and Power in Afghanistan* (Mar. 2013) (Ph.D. Thesis, University of London), <https://perma.cc/M7T7-GJBY>.
- Human Rights Watch, *"I Had to Run Away": The Imprisonment of Women and Girls for "Moral Crimes" in Afghanistan* (Mar. 2012), <https://perma.cc/VVV2-KWEX>.

II. Status of Women in Afghanistan's Family System

A. Women's Status in the Family

A 2001 country study of Afghanistan describes the family as the most important unit or institution in Afghan society. It is described as endogamous, patriarchal, patrilineal, and patrilocal.¹² These patriarchal structures are "rooted in a society constituted by different ethnic/tribal groups engaged in nomadic pastoralism, herding and farming, and settled agriculture and all organised along patrilineal lines."¹³

Afghanistan's patriarchal social system is characterized by "marked gender division of roles and responsibilities," where men are "given primacy in the public sphere and are responsible for providing for the family and upholding family honour through the protection of women's virtue." This enables "male family members to make key decisions on issues like education, careers and marriage but also grants them control over female behavior."¹⁴ The "unequal power relations between men and women" are "particularly visible through strict cultural codes of gender segregation and men's policing of women's mobility and sexuality." The custom of secluding women from the public sphere (*purdah*) and other prescribed gender norms impose strict control over women's mobility.¹⁵

The institution of *purdah* curtails women's mobility in the public domain and confines them to roles and responsibilities that can be carried out in the domestic sphere. They are only supposed to move about in the public domain with a male guardian. They therefore

¹² *Afghanistan: A Country Study, Family* (Peter R. Blood ed., GPO 2001), <https://perma.cc/J3A5-LNEE>.

¹³ Naila Kabeer et al., IDS Working Paper Series No. 387, *Afghan Values or Women's Rights?: Gendered Narratives About Continuity and Change in Urban Afghanistan 7-8* (2011), <https://perma.cc/AUH5-55TN>.

¹⁴ Carolin Fischer, *The (Changing) Role of Family Among Afghan Communities in Britain and Germany*, Paper Presented at Examining Migration Dynamics: Networks and Beyond Conference (Sept. 25, 2013), <https://perma.cc/RLL3-PLUN>.

¹⁵ Naila Kabeer & Ayesha Khan, *Cultural Values or Universal Rights? Women's Narratives of Compliance and Contestation in Urban Afghanistan*, 20(3) *Feminist Econ.* 4 (2014), <https://www.tandfonline.com/doi/full/10.1080/13545701.2014.926558>.

remain economically dependent on men for much of their lives. They are married off at an early age, generally within the extended kinship group, in exchange for bride-wealth and are expected to produce children as soon as possible.¹⁶

One 2013 report highlights the role religion and culture play in prescribing these gender roles.

Understanding the subordinate status of women in Afghan society requires practitioners to reckon with the continued centrality of religion and family in women's lives, and the historical weight of norms and traditions. Restrictions on women in the public sphere are often justified within the framework of religious teachings. Networks of religious leaders and mosques in Afghanistan play an important role in shaping public opinion, especially in the area of women's issues. The voice of religious leaders, therefore, is vital in raising awareness and acceptance of women's rights, as demonstrated when Afghan clerics issued a declaration which called on women to participate in the 2009 elections and on men to encourage women's participation. Some mosques have used Friday prayers as a medium for challenging and/or reinforcing women's traditional roles. Discriminatory gender norms have therefore emerged in part from uninformed interpretation of religious edicts, and are therefore embedded in an intertwining of religion with culture. . . . Prevailing conservative traditions, customary practices, and religious interpretation shape the Afghan cultural environment and function collectively to impede the realisation of women's rights.¹⁷

However, other experts also highlight the ethnic and regional variation in these roles and structures and the complex ways women navigate them.

Note that even in highly patriarchal contexts, women can find ways to navigate and resist oppressive power from within the spaces allowed by patriarchal gender systems. In Afghanistan, while women are undoubtedly resourceful in navigating the complex politics and creating spaces for agency and change within these conditions (Billaud 2015; Wimpelmann 2017), in contexts of poverty and gender inequalities, such opportunities are highly constrained. Afghan women continue to negotiate a range of expectations and limitations including demands for social change, respect for and adherence to tradition and potential backlash and reversal of rights (Brotsky 2011). Women's mobility, particularly in rural settings, is often highly constrained due to concerns about the policing of women's sexuality and maintaining the honour of the family, leading to purdah or the 'protection' and control of women through seclusion and veiling (Boesen 2004). Under the Mujahideen regime (1992-1996) and Taliban regime (1996-2001), women's mobility was tightly controlled (Ahmed-Gosh 2003), particularly under the latter, with the Taliban government introducing and enforcing a universal regulation that women were not permitted to leave their homes without a mahram (male relative) (Ahmed-Gosh 2003; Wimpelmann 2017). While post-Taliban this has tended to ease off, women, particularly in rural areas, are still often expected to be accompanied by a mahram when in public, partly to avoid verbal and physical intimidation, harassment or violence from unrelated men or other community members (AREU 2013; Ganesh 2013). If women have no boys and/or few male relatives, this limits their mobility outside of the home and community, limiting

¹⁶ Kabeer et al., supra note 13.

¹⁷ Afghanistan Rsch. & Evaluation Unit, *Women's Rights, Gender Equality, and Transition: Securing Gains, Moving Forward* 19 (Sept. 2013), <https://perma.cc/QG33-LBRH>.

their economic opportunities as well as their ability to socialise or access public services (Echavez 2012; Ganesh 2013).¹⁸

One paper notes, "while patriarchal relations in Afghanistan may share certain generic features, there are also considerable variations across the country"¹⁹ by class, ethnicity, and location.

Even the veiling of women has ethnic and regional variations. The all encompassing burqa, for instance, which was imposed by the Taliban as mandatory for any woman in the public domain, is mainly associated with female propriety among women in the Pashtun community, considered to be the most conservative of the different tribal groups. Women from some of the other ethnic groups may opt to cover themselves with large scarves or chadors (Abu-Lughod 2002). Women living in rural mountainous areas where entire settlements are made up of kin often exercise greater freedom of movement outside the home than women from lower-middle and poorer classes in urban households (Barakat and Wardell 2002).²⁰

The Afghan family system is also described as patrilineal "with inheritance and descent traced through the male line, leaving women with little property of their own. Women leave their natal home on marriage and assimilate, along with their children, into the husband's patrilineal group. Their position within marriage is bound up with their capacity to produce sons to carry on the family name and later in life they gain some authority as mothers-in-law."²¹

B. Resources on Women's Status in the Family

The following are resources on women's status in Afghanistan's family system, listed in reverse chronological order:

- Julienne Corboz et al., *Bacha Posh in Afghanistan: Factors Associated with Raising a Girl as a Boy*, 22(5) *Culture, Health & Sexuality* 585 (2020), <https://www.tandfonline.com/doi/full/10.1080/13691058.2019.1616113> (by subscription).
- Nina Evason, *Afghan Culture: Family*, *Cultural Atlas* (2019), <https://perma.cc/UH8U-HJLD>.
- Stefan Schütte, *Living with Patriarchy and Poverty: Women's Agency and the Spatialities of Gender Relations in Afghanistan*, 21(9) *Gender, Place & Culture*, 1176 (2014), <https://www.tandfonline.com/doi/pdf/10.1080/0966369X.2013.832661> (by subscription).
- Naila Kabeer & Ayesha Khan, *Cultural Values or Universal Rights? Women's Narratives of Compliance and Contestation in Urban Afghanistan*, 20(3) *Feminist Econ.* 4 (2014), <https://www.tandfonline.com/doi/full/10.1080/13545701.2014.926558> (by subscription).

¹⁸ Julienne Corboz et al., *Bacha Posh in Afghanistan: Factors Associated with Raising a Girl as a Boy*, 22(5) *Culture, Health & Sexuality* (2020), <https://www.tandfonline.com/doi/full/10.1080/13691058.2019.1616113> (by subscription).

¹⁹ Kabeer et al., *supra* note 13, at 8.

²⁰ *Id.*

²¹ Kabeer & Khan, *supra* note 15, at 4.

- Afghanistan Research and Evaluation Unit, *Women's Rights, Gender Equality, and Transition: Securing Gains, Moving Forward* 19 (Sept. 2013), <https://perma.cc/QG33-LBRH>.
- Naila Kabeer et al., IDS Working Paper Series No. 387, *Afghan Values or Women's Rights?: Gendered Narratives About Continuity and Change in Urban Afghanistan* 8 (Dec. 2011), <https://perma.cc/AUH5-55TN>.

III. Legal Status of Women and Children in Domestic Relationships

A. Constitutional Law

Chapter II of the 2004 Afghan Constitution sets out the fundamental rights and duties of citizens, which includes articles on the right to life, liberty, and human dignity.²² Article 22 stipulates, “[a]ny kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law.”²³ Article 54 states, “Family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.”²⁴

The Constitution declares that Afghanistan is an Islamic Republic, and Article 2 states, “The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.”²⁵ Under Article 131, “[i]n 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.”²⁶

B. Personal Status Law

In Afghanistan, marriage, divorce, custody, and guardianship issues among members of the Sunni population are regulated by both the Civil Code and uncodified *Shari'a* (Islamic law). The current Civil Code of Afghanistan came into force on January 5, 1977.²⁷ As noted in the previous section, according to the current Constitution of Afghanistan, which was adopted in 2004, if a specific rule cannot be found in codified law, then the rules of the Hanafi school of jurisprudence

²² Afghanistan's Constitution of 2004, <https://perma.cc/87N2-ELUQ> (unofficial English translation).

²³ Id. art. 22.

²⁴ Id. art. 54.

²⁵ Id. art. 2.

²⁶ Id. art. 131.

²⁷ Qanuni Madani [Civil Code] Kabul 1355 [1977] art. 10, <https://perma.cc/LE5E-GVGK> (unofficial English translation by the Afghan Legal Education Project).

apply.²⁸ This is reiterated in the Civil Code, which stipulates that, “[i]n cases [where] no provision of law exists, courts shall decide in accordance with general principles of Hanafi Jurisprudence of Islamic Sharia in order to secure justice in the best possible way.”²⁹

The Constitution also recognizes the application of Shi'i Islamic jurisprudence in cases where both parties are followers of Shia Islam.³⁰ In 2008, a Shi'i Personal Status Law was enacted for application to members of the Shi'i sect of Islam in Afghanistan.³¹

A 2014 USIP report has observed that “[o]n paper, women in Afghanistan enjoy significant rights” and notes that the Civil Code “provides rights for women to inherit or own property, sets the minimum age for marriage (Articles 70 and 71), and codifies a woman's right to choose her partner (Article 80) or to initiate marital separation.”³² However, the same report observes that, despite formal recognition, these rights might not be guaranteed in practice.

Many of the legal protections, however, have failed to translate into practice. Despite the ban on child marriage, the Afghan Ministry of Public Health estimates that 21 percent of all women were married by age fifteen and another 53 percent by age eighteen. Women still face barriers in accessing education, which hinders their access to public life. Despite the declared goal that women fill at least 30 percent of civil servant positions, women are routinely excluded from civil service hiring, or when hired are denied promotion. Female victims of sexual violence and trafficking are frequently persecuted and incarcerated for moral crimes, and their predators are only infrequently indicted or incarcerated. In other words, despite formal guarantees, the courts and society at large still act within the framework of conservative social norms that restrict women's rights in economic and political spheres. These restrictions include limitations on women's free movement as well as on rights to choose a spouse, divorce, and maintain child custody after a divorce. Lack of enforcement of women's economic rights—including women's rights to inheritance, land, and control over earned income—is widespread because women's economic independence is often not tolerated at the community level.³³

In addition, international human rights institutions and organizations have drawn attention to “discriminatory provisions” contained in the Civil Code and the Shi'i Personal Status Law. The concluding observations of the Committee on the Elimination of Discrimination Against Women

²⁸ Qanuni Assasi Afghanistan [Constitution of Afghanistan], Kabul 1382 [2004], art. 130, <https://perma.cc/7JBD-F5K3>.

²⁹ Civil Code art. 1(2).

³⁰ Constitution of Afghanistan art. 131.

³¹ Shiite Personal Status Code, Kabul 1388 [2009], art. 2, in USAID, *English Translation: Shiite Personal Status Law* (Apr. 2009), <https://perma.cc/RFC3-D4GB>. Note that Shi'i personal status rules are applicable to the minority Shi'i community in Afghanistan. If a specific provision cannot be found in the Shi'ite Personal Status Law, the matter is adjudicated according to the *fatwa* (opinion) of the Shi'ite *marja* (a person who has the authority to give jurisprudential opinions) in accordance with the rules of the Ja'fari school of jurisprudence of Shar'ia.

³² Anastasiya Hozyainova, USIP Special Report 347, *Sharia and Women's Rights in Afghanistan 2* (May 2014), <https://perma.cc/2SJW-VGWR>.

³³ *Id.* at 2.

(CEDAW) on the third periodic report of Afghanistan found such provisions with regard to “child marriage, divorce, polygamy, inheritance and the guardianship of children.”³⁴

Under article 70 of the Civil Code, the “[c]apacity to marry shall be complete when males attain 18 and females 16 years,” and article 71 states that a “Marriage contract of a girl who has not attained the age mentioned in Article (70) [16] of this Law may only be concluded by her competent father or competent court.” However, article 71(2) forbids marriage contracts involving minor girls under 15 years old.³⁵ Article 99 of the Shia Personal Status Law also allows underage marriage through a natural or authorized guardian or a court. Article 86 of the Civil Code and article 91 of the Shia Personal Status Law allow men to marry up to four wives at one time if certain conditions are met. The CEDAW committee has noted a number of other provisions as well.

(c)Articles 71 (1), 252, 256 and 268 of the Civil Code and article 45 of the Shia Personal Status Law, under which priority is given to the father with regard to the guardianship of children;

(d)Articles 135 to 145 of the Civil Code and articles 158 to 161 of the Shia Personal Status Law, under which the husband may, unilaterally and without giving grounds, repudiate his spouse, while the wife must resort to a judicial divorce, which is granted only on certain grounds for which she has the burden of proof;

(e)Articles 2007 and 2019 of the Civil Code and articles 219 and 222 of the Shia Personal Status Law, under which women do not have equal rights with men with regard to inheritance.³⁶

Scholars have pointed out other “contentious” provisions in the Shia Personal Status law, including provisions “compelling wives to sleep with their husbands every fourth night and to apply makeup on their husbands’ request, articles stating that women could not leave the house without their husbands’ permission and that obedience and sexual submission were obligatory in order to receive maintenance, and a number of articles permitting marriage with underage girls.”³⁷

Musawah, an international organization advocating for equality and justice in the Muslim family and family laws, states “[d]espite the equality guarantee under Article 22 of the Constitution, the Civil Code and the SPSL provide for a marital framework based on ‘reciprocal’ or ‘complementary’ rights (as opposed to ‘equal’ rights) between the two spouses, whereby in return for maintenance and protection from her husband, a wife is expected to obey him. Provisions in

³⁴ Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding Observations on the Third Periodic Report of Afghanistan* ¶ 11 (75th Session, Feb. 10–28, 2020), <https://perma.cc/P7YB-LRTU>.

³⁵ Civil Code art. 71(2).

³⁶ CEDAW, *supra* note 34, at ¶ 55.

³⁷ Torunn Wimpelmann, “Good Women Have No Need for This Law”: *The Battles Over the Law on Elimination of Violence Against Women, in The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* 51 (Oakland: U. Cal. Press 2017), <https://perma.cc/G6XP-DZLK>.

the family laws therefore discriminate against women as it is based on male authority and male guardianship.”³⁸

Please note that the EAW Law contains the following criminal provisions on the protection of women that relate to provisions of the Civil Code:

- Underage Marriage: Marriage to an underage woman “without considering Article 71” of the Civil Code, punishable by at least two years of imprisonment. (Art. 28.)
- Polygamy: Marriage to more than one woman “without the observing the provisions of Articles 86 and 89” of the Civil Code, punishable by “short term imprisonment of not less than 3 months.”(Art. 37.)
- Forced Marriage: Marriage without the woman’s consent, punishable by imprisonment for not less than two years. (Art. 26.)
- Prohibiting Right of Marriage: Prohibiting a woman from marrying or choosing her spouse, punishable by short-term imprisonment. (Art. 27.)

C. Customary Law

Customary law and tribal codes also play a significant role in certain regions. For example, women in Afghanistan may also be “disproportionally marginalized by customary law.”³⁹ Pashtunwali is a tribal code of conduct and customary law of the Pashtun community and regions of the country, which is based on dignity, shame, honor, revenge, and reparations. According to the Afghanistan Legal Education Project, “[c]ompared with Islamic law, Pashtunwali grants women with fewer rights regarding family, inheritance, and marriage. For example, only males may own property under Pashtunwali, but females may inherit property from male relatives under Islamic law. This means that a female might be deprived of her inheritance if the dispute is resolved under customary law, but would be entitled to it in the formal justice system.”⁴⁰

D. Resources on Legal Status of Women in Domestic Relationships

The following are resources on the legal status of women in domestic relationships, listed in reverse chronological order:

- Musawah, *Thematic Report on Article 16, Muslim Family Law and Muslim Women’s Rights in Afghanistan 3* (Feb. 2020), <https://perma.cc/2V5Y-ACTB>.
- CEDAW, *Concluding Observations on the Third Periodic Report of Afghanistan* ¶ 11 (75th session, 10–28 Feb. 2020), <https://perma.cc/P7YB-LRTU>.

³⁸ Musawah, *Thematic Report on Article 16, Muslim Family Law and Muslim Women’s Rights in Afghanistan 3* (Feb. 2020), <https://perma.cc/2V5Y-ACTB>.

³⁹ Afghanistan Legal Educ. Project, *An Introduction to the Laws of Afghanistan 52* (4th ed. 2017), <https://perma.cc/P8G5-JKQ2>.

⁴⁰ Id.

- Islamic Republic of Afghanistan, *Report of the Islamic Republic of Afghanistan on the Application of the Beijing Declaration and Platform for Action +25* (Sept. 2019), <https://perma.cc/V68P-QZWT>.
- Danny Singh, *The Management of Legal Pluralism and Human Rights in Decentralized Afghanistan*, 51(3) *J. Legal Pluralism & Unofficial L.* 350-80 (2019), <https://www.tandfonline.com/doi/pdf/10.1080/07329113.2019.1660079> (by subscription).
- Musawah, *Afghanistan: Overview of Muslim Family Laws & Practices* (updated May 31, 2017), <https://perma.cc/K6C6-RCQD>.
- Donna Lee Bowen et al., *State Fragility and Structural Gender Inequality in Family Law: An Empirical Investigation*, 4(4) *Laws* 654-72 (2015), <https://perma.cc/8QVU-QFYJ>.
- World Bank, *Gender Dynamics in Access to Justice in Afghanistan* (2014), <https://perma.cc/2N5M-DKSK>.
- Isaac Kfir, *Feminist Legal Theory as a Way to Explain the Lack of Progress of Women's Rights in Afghanistan: The Need for a State Strength Approach*, 21 *Wm. & Mary J. Women & L.* 87 (2014), <https://perma.cc/RH3N-LHG6>.
- Anastasiya Hozyainova, USIP Special Report 347, *Sharia and Women's Rights in Afghanistan* (May 2014), <https://perma.cc/2SJW-VGWR>.
- Canadian Women for Women in Afghanistan, *Family Law in Afghanistan*, <https://perma.cc/N388-PYXJ>; Canadian Women for Women in Afghanistan, *Women and the Rule of Law in Afghanistan*, <https://perma.cc/JEQ6-YXQU>.
- Shannon Daley, *Closing the Gap Between Law and Reality: Women's Constitutional Rights in Afghanistan*, 29 *Conn. J. Int'l L.* 329 (2013), <https://heinonline.org/HOL/P?h=hein.journals/conjil29&i=355> (by subscription).
- Kabeh Rastin-Tehrani & Nadjma Yassari, *Max Planck Manual on Family Law in Afghanistan* (amended 2d ed. July 2012), <https://perma.cc/7J43-9FPB>.
- Laura Belkner, *The Secular and Religious Legal Framework of Afghanistan as Compared to Western Notions of Equal Protection and Human Rights Treaties: Is Afghanistan's Legal Code Facially Consistent with Sex Equality*, 20 *Cardozo J. Int'l & Comp. L.* 501 (2012), <https://heinonline.org/HOL/P?h=hein.journals/cjic20&i=505>.
- Conor Foley, *A Guide to Property Law in Afghanistan* (Norwegian Refugee Council 2d ed. 2011), <https://perma.cc/H9CC-9TAZ>.
- Cheshmak Farhoumand-Sims et al., *A Woman's Place: Perspectives of Afghanistan's Evolving Legal Framework* (*Int'l Ctr. Hum. Rts. & Democratic Dev.* 2011), <https://perma.cc/G2WD-PP4L>.
- Elisa Scalise, *Women's Inheritance Rights to Land and Property in South Asia: A Study of Afghanistan, Bangladesh, India, Nepal, Pakistan, and Sri Lanka* (*Rural Dev. Inst.* Dec. 2009), <https://perma.cc/XV82-4YLJ>.
- M. H. Kamali, *References to Islam and Women in the Afghan Constitution*, 22(3) *Arab L.Q.* 270-306 (2008), <http://www.jstor.org/stable/27650624>.

- *Afghanistan: Children's Rights in UN Treaty Body Reports*, Child Rts. Int'l Network (Sept. 9, 2013), <https://perma.cc/NBC9-2FBU>.

IV. Programs for Victims of Domestic Abuse

Under the EAW Law, a domestic violence victim has a right to “access to shelter or other safe place(s),” “free access to emergency health services,” and an “advocate or legal aid provider.”⁴¹ The Ministry of Women Affairs is obligated to provide “protection for the victims of violence in protection centers (shelter), or if [a] protection center is not available, other safe places, as well as monitoring and evaluating them.”⁴² The Ministry of Justice is required to “assign a legal aid provider if requested by the victim of violence.”⁴³ The Ministry of Public Health must “promptly provide free and urgent treatment services to the victims of violence in the health centers and report accordingly to the Ministry of Women Affairs.”⁴⁴ According to Human Rights Watch, the government has “mandated several services for survivors of violence, including free health care, legal aid, and shelters.” Most shelters appear to be donor-funded and operate independently of the government. They “are not available in every province [and] face pressure from conservative politicians, including from within the government, as well as insecure and fluctuating funding due to their dependence on foreign aid.”⁴⁵

An authority on gender violence in Afghanistan has observed

The women's shelters operated through donor funding and donations from abroad. As they drew upon international networks and resources, they were, at least in part, constituted as transnational institutions. This enabled the shelters to act fairly autonomously of the Afghan government on many counts and to challenge or circumvent attempts by Afghan government officials to regulate, supervise, or co-opt them. However, the international leverage and resources that the shelters were able to mobilize could be sources of frustration, suspicion, and resentment. To many Afghan officials, and to the conservative media and politicians rallying against the shelters, the fact that the shelters were funded and supported by foreigners meant that the women residing in them were out of control in three ways: beyond family control and outside both government and national supervision. In other words, the shelters were regarded as a challenge to the institution of the family, to the government's authority over the foreign funded civil society, and finally to Afghanistan as a sovereign Islamic nation. Such anxieties formed the backdrop to the government's 2011 attempt to nationalize the shelters by placing them under government administration. . . . [T]he contestations over the shelters became enmeshed in broader issues of competing models of service provision, popular discontent with NGOs, and finally the U.S.-led war against the Taliban.⁴⁶

⁴¹ EAW Law art. 6.

⁴² *Id.* art. 8(3).

⁴³ *Id.* art. 12(4).

⁴⁴ *Id.* art. 14.

⁴⁵ *I Thought Our Life Might Get Better*, Hum. Rts. Watch (Aug. 5, 2021), <https://perma.cc/H2U7-YQJ7>.

⁴⁶ Torunn Wimpelmann, *With a Little Help from the War on Terror: The Women's Shelters, in The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* 108-09 (Oakland: U. Cal. Press 2017), <https://perma.cc/K2F6-78SH?type=image>.

Afghanistan: Women's Rights Resources

The following resources are listed in reverse chronological order:

- Amnesty International, *Afghanistan: Survivors of Gender-Based Violence Abandoned Following Taliban Takeover – New Research* (Dec. 6, 2021), <https://perma.cc/M6AX-WK9J>.
- Afghanistan Public Policy Research Organization, *Women's Shelters: A Preliminary Assessment* (Jan. 2018), <https://perma.cc/AUT4-NDJG>.
- Torunn Wimpelmann, *With a Little Help from the War on Terror: The Women's Shelters in The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* 51 (Oakland: U. Cal. Press 2017), <https://perma.cc/K2F6-78SH?type=image>.