

A brief Comparative Analysis of: UNCRC, Islam, Afghan legislations & Customary Practices

**Save the Children, Sweden – Norway
May, 2007
Kabul, Afghanistan**

**Project Manager: Bandana Shrestha
Written by: Nezamuddin Abdullah, Gender Consultant**

TABLE OF CONTENTS

Acknowledgment
Abbreviation and acronyms
Executive summary.....
Introduction -----

1. General Principles-----
1.1 Definition of the child -----
1.2 Non- discrimination-----
1.3 Best interest of the child -----
1.4 Right to life survival and development -----
1.5 Respect for views of the child-----

2. Civil Rights and Freedoms -----
2.1 Right to name -----
2.2 Right to nationality-----
2.3 Preservation of name and nationality-----
2.4 Freedom of expression -----
2.5 Freedom of religions, thought and conscience-----
2.6 The right to establishment of peaceful assemblies -----
2.7 The right to privacy-----
2.8 The right of children to protected from inhumanly tortures -----

3. Family environment and alternative care-----
3.1 Parental guidance and responsibility -----
3.2 Separation from parents -----
3.3 Recovery of maintenance and standard of living -----
3.4 Children deprived of family environment and adoption-----
3.5 Abuse and neglect and physical and physiological recovery -----

4. Basic health and welfare -----
4.1 Survival and development -----
4.2 Health care services-----

5. Education, leisure and cultural activities -----
5.1 Education-----
5.2 Leisure and recreation-----

6. Special protection measures-----
6.1 Sentencing of juveniles and prohibition of capital punishment -----
6.2 Physical and psychological recovery and social reintegration -----
6.3 Economic exploitation and forced child labor -----
5.4 Sexual exploitation and sexual abuse -----
5.5 Right of children of minorities to use their language and culture-----

7. Legislative gaps and recommendations-----

8. Conclusion -----
Bibliography-----

Acknowledgement

This initial research paper would not have been possible without the support of Mr. Leif Lahne and Mr. Fazel Jalil who encouraged this paper to find supporting evidence in order to improve the situation of girls in Afghanistan. Their expertise on the subject and their sharing of experiences and knowledge and foresight on the subject matter is extraordinary.

I would also like to thank: Mrs Bandana Shrestha for providing guiding comments and sharing valuable international expertise, Ms Zabiada Mohsani and Mr. Mohammad Hassian Hazim for providing their valuable suggestions and expertise on improving the paper.

I would also like to thank all colleagues in Save the Children Sweden – Norway office for their continual support and advice on taking this research forward.

Save the Children Sweden Norway
Kabul, Afghanistan

Abbreviations and Acronyms

CIRA	Constitution of Islamic Republic of Afghanistan
CCA	Civil Code of Afghanistan
PCA	Penal Code of Afghanistan
SC-SN	Save the Children Sweden- Norway
SCUK	Save the Children UK
AIHRC	Afghanistan Independent Human Rights Commission
UNCRC	United Nations Convention on the Rights of the Child
WCLRF	Women and Children Legal Research Foundation

Executive Summary

All the provisions and principles, except adoption and freedom of religion, set forth under the United Nation Convention of the Rights of Children (UNCRC) on civil rights and freedoms, family environment and alternative care, basic health and welfare, education, leisure, cultural activities and special protections measures in regard to children are in concurrence with the current enforced Afghan legislations and Islamic Law since adoption and freedom of religion are prohibited under Islamic Law and the current enforced Afghan legislations.

As a result, under the UNCRC, the current enforced Afghan legislations and Islamic Law children irrespective of their sex enjoy the right to have a name, acquire a nationality, freely express their opinions, have access to appropriate information, survive and develop, exercise their own culture, study in their native language, to be provided alimony and living standard consisting of nutrition, clothes and housing, to be taken care of medically, to be provided education, to rest and leisure, to be held criminally irresponsible and not to be sexually and economically exploited and .

However, customarily some of these provisions and principles are not being implemented at all or are being implemented discriminatorily between girls and boys. As a result of customs and traditions early marriages, forced marriages, deprivation of girls and women from education and work, giving the girls as “bad”¹, deprivation of girls and women from inheritance right, family violence against women and children especially, deprivation of widowers from remarriage, discrimination against women and girls based on their age and sex, seclusion and marginalization of girls and women from society, deprivation of the women and girls from participating in political matters and family decision making processes, giving in marriage the under age girls to old men (for instance the marriage of under age girl to 45- year- old man), exchange of girls with animals, opium and loan, receiving money vis-à-vis girls when they are given in marriage, forced child labor, sexual exploitation of boys are still being exercised.

The rationale behind the non-implementation of these principles beside others includes poverty, patriarchal society, illiteracy conservative, 23 years of conflict and 5 years of Taliban rule, exercise of customary practices contrary to Islam, inability of law enforcement agencies, lake of public awareness on gender equality and children rights, misinterpretation of Islamic Law by stakeholders and community. To make sure these principles are entirely implemented the followings recommendations are suggested:

Policy and law making:

¹ When a dispute, mostly fighting, arises between two families as a result of which a member of one family kills a member of another family, the killer family gives its daughter to member of the killed family. The purpose of this act which is known as “*bad*” is to stop and eliminate the enmity between these two families (For further information please refer to: WCLRF, 1383, Research Paper: *Bad* harmful calmative, Women and Children Legal Research Foundation, Kabul, p 14.

1. The customs and traditions contrary to Islam briefly mentioned above are being exercised whereas the constitution (article 54) places the responsibility on the government to eliminate the customs and traditions contrary to Islam as they relate to women and children. It is, therefore, strongly recommended to work with and encourage policy and law makers, particularly the Ministry of Justice and Parliament (Women and Children Affairs Commission) to incorporate these customary practices in their policies and find solutions for them.

Advocacy and lobbying:

1. As for as no or very little research has been conducted in regard to children and women rights, gender equality and non-discrimination in Afghanistan, conduct desk research under Islamic Law and Afghan legislations on children and women rights, gender equality, non- discrimination and gender participation in addition to fact finding qualitative and quantitative research which should be systematically documented and made widely available to all;
2. Translate the findings into local languages and widely disseminate the findings at all levels, including children, parents, community, tribal and religious leaders, law enforcement agencies dealing with children, primary and secondary teachers, and the judiciary;
3. Convene conferences and workshops on children and women rights, gender equality, non- discrimination, girl and women participation, elimination of customary practices contradicting Islam. Invite not only officers from like-minded organizations but also from relevant law enforcement agencies dealing with children, in particular, the staffs from the children correction and rehabilitation center and debate on rights of children to gender equality and non- discrimination and so forth and raise public awareness on the subject matter;
4. Launch public awareness activities, especially on child rights, gender equality, non- discrimination, elimination of customs and traditions contrary to Islam which should include parents, teachers, religious leaders and the community;
5. Network and build alliance with like-minded organizations working with children rights to advocate and raise public awareness on children rights and eliminate customary practices which are in contradiction with Islam;
6. Wide dissemination of Islamic Sharia relevant to children's rights translated into local languages and authenticated by prominent religious leaders. and
7. Compile and widely translate and disseminate a booklet of these hadiths at all level.

Media:

1. Use various forms of media by utilization provisions set forth under Islamic Law , UNCRC and Afghanistan legislations on children and women rights to raise public awareness on children rights, gender equality and non- discrimination; and
2. Work with and encourage all forms of media to invite the children and women right's expert and debate, especially on round tables on children and women rights to raise public awareness.

Capacity Building:

1. Build capacity of children, parents and community, tribal and other key religious leaders on gender equality, women rights and non- discrimination;
2. Train and build capacity of officers and staffs working in relevant law enforcement agencies dealing with children rights, particularly, officers from children correction and rehabilitation center; and
3. Provide professional and material support to law enforcement agencies dealing with children, in particular, to the children correction and rehabilitation center. For instance, professional doctors, medicines, professional teachers, teaching material, parks, sports play ground, sleeping places etc.

Education

1. Make sure that debate and study on children rights is not limited to law school and the relevant courts. Work with and encourage the relevant responsible body in Ministry of Education to include the children rights in school curricula with reference to Islamic Law and Afghanistan legislations; and
2. Introduce hadiths that talk about women and children and education etc to schools.

Introduction

Discrimination exists in every society whether developed or underdeveloped. Likewise, children face discrimination, but the type of discrimination and how they experience it differs according to the existing political, economic, social, legal, religious and cultural systems of different societies. In Afghanistan, discrimination, an all-pervasive violation of children's rights, is practiced openly as well as in subtle ways.

Discrimination is enacted by treating an individual or group of people in ways according to their status and background, where individuals and groups with more power treat those with less power unjustly. For example, discrimination by adults against children, or due to their biological differences, older children against younger children, one community against another or within groups themselves depending on the power structure within. Discrimination is a common phenomenon in all societies and is closely linked to power relations in society (ies) that determines the status of individuals / groups in the spectrum of society. Afghanistan is a patriarchal, religious and conservative country, where discrimination exists and persists against the girl child and hence, hampering gender equality and equity..

Social exclusion and lack of access to basic services and resources are common effects of discrimination. Research indicates that discrimination leads to poor self-esteem and confidence amongst children including poor psychosocial development. Discrimination may lower children's nutrition and access to health and education services. It can also be witnessed in lack of opportunities to participate in recreation and cultural gatherings. At its worst, discrimination can lead to child labour and child prostitution, to children leaving family structures and village, and to children's death through murder or suicide.

Children in virtually all societies have less power than adults and accordingly are more vulnerable to discrimination. Most girls and boys grow up with the awareness that, as children, their status is inferior to that of adults. Many children face additional forms of discrimination because of their:

- Gender
- Age
- Occupation or their parents occupation
- Religion and language of parents
- Disability or their parent(s) disability
- Health status i.e. HIV/AIDs status of the child or the parents
- Ethnicity and indigenous status
- Refugee or Internally displaced status

Country in context and is implication

23 years of war and devastation and five years under the Taliban authorities, has meant that Afghanistan has been left behind as one of the poorest countries in the world. Afghanistan has the second highest maternal mortality rate in the world. Even before the Taliban came to power, Afghanistan had high maternal and child mortality rates and a

very low literacy rate for women. But women participated economically, socially and politically in their societies.²

With the rise of Taliban's power, women and girls were systematically discriminated against and marginalized, and their basic human rights were violated. This resulted in the deteriorating economic and social conditions of women and girls in all areas of the country, in particular in areas under Taliban control. Women and girls continued to be severely restricted in their access to education, health care facilities and employment. During the Taliban's rule, only about 3 per cent of girls received some form of primary education. Poor health conditions and malnutrition made pregnancy and childbirth exceptionally dangerous for Afghan women.

Gender is a cross cutting theme which not only questions girls access to services but which can be detrimental to their survival. Furthermore, girls face multiple discriminations, for example, a girl with a disability is likely to face more problems than a boy in a similar situation.

In Afghanistan, gender continues to define a girls' identity and the opportunities to enjoy their childhood and ability to access their basic rights and services. Girls face more discrimination than boys witnessed by lack of access to adequate food, lack of education, forced or early marriages, limited or no access to health services, and many suffer from gender related violence. UNICEF's State of the World's Children states that Afghanistan is regressing on gender parity and maternal mortality rate, both indicators which affect women adversely.

Though there have since been over 3 million children who have returned to schools since, girls represent only 30 per cent.³ The total literacy rate stands at 36 per cent and female literacy rate standing at 21 per cent.⁴ 29 per cent of girls are going to school⁵ and 0.5 per cent of girls are enrolled in non-formal education schools run by NGOs. Despite these positive developments, girls' education continues to be a divisive issue for Afghan society. This is illustrated by continuing arson attacks on girls' schools in several provinces. These attacks were often preceded by written threats warning against girls attending school.

Another area of grave concern is early marriage and the impact it has on women and girls health issues. Though the legal age of marriage stands at 16 for girls and 18 for boys, 43 per cent of girls are married before the age of 16 years of age.⁶ Other areas of

² Women helped to draft the 1964 Constitution. In the 1970s, there were at least three women legislators in the Parliament. Up to the early 1990s, women were teachers, government workers and medical doctors. They worked as professors, lawyers, judges, journalists, writers and poets.

³ United Nations Commission on the Status of Women (CSW), *The situation of women and girls in Afghanistan: Report of the Secretary-General*, E/CN.6/2003/4.

⁴ UNICEF, 'South Asia Booklet on Child-relevant Socioeconomic Indicators', (compiled from: *The State of the World's Children 2006*, New York).

⁵ All information from ANHDP, 2005.

⁶ UNICEF, 'South Asia Booklet on Child-relevant Socioeconomic Indicators', (compiled from: *The State of the World's Children 2006*, New York).

gender based violence include domestic violence, kidnapping of young girls, rape, harassment and intimidation of girls in public areas. In impoverished rural areas, families have been reported to sell their daughters to escape desperate conditions or to settle bad blood between families.

It has been surmised, that the main obstacle in working towards achieving gender parity is due to in-grained traditional and cultural attitudes which view girls and women as male property without any identity of their own. This has been compounded by conservative and fundamentalist interpretation of religious texts heightened during the Taliban era which threaten girls' lives and dignity. As with other patriarchal and conservative societies, the notion of gender is viewed as a 'western' imposed concept and against the very notion of culture, tradition and religion.

Rational for the Study

Despite the many commendable programmes that have been undertaken by the Government of Afghanistan and civil society alike in promoting gender equality there has been little progress made so far. For example, early and forced marriages, lack of access to social services such as education and health care, domestic violence, and exploitation which all have negative effects on girls' development and violate their rights are still critical areas that need to be addressed.

There have been two strands of argument that: (a) it is religion which sanctions gender equality; and (b) that religiously, there is no gender inequality, but rather it is the cultural practices which discriminate between boys and girls. We have undertaken the second argument to portray, that religion itself does not pose a problem per se in promoting gender equality but rather, that it is the customary or cultural practices which sanction and promote gender inequality to such an extent, that many girls lose their lives while the perpetrators get away with complete immunity from any sort of punishment.

Ratification of UNCRC by Afghanistan

Afghanistan ratified the United Nation Convention on the Rights of Children in 1994. Therefore, Afghanistan is obligated to fulfill its obligations as stated in Article 2 paragraph 1 of the UNCRC:

State parties shall respect and ensure the rights set forth under the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, birth or other status.

This is further supported by the Constitution of the Government of Afghanistan, which obligates it to respect, protect, ensure and implement the provisions set forth under the UNCRC. Article 7 of the Constitution of Islamic Republic of Afghanistan states:

The state shall observe the Charter of the United Nations, international treaties, international conventions to which Afghanistan is a State Party, and the Universal Declaration of Human Rights...

Given the commitment of the Government of Afghanistan to respect, protect and implement the internationally accepted human rights principles and the applicability of UNCRC as an international human rights instrument in Afghanistan, Save the Children Sweden Norway has undertaken a mapping exercise of legal provisions and Islamic teachings to determine whether the two important sectors are in agreement in supporting gender equality. Based on information obtained from other Islamic countries, it is anticipated that there will be support and promotion for gender equality under Islamic teachings which can consequently be utilized to promote gender equality. The research will not only look at supporting evidence for gender equality from religious text but will also identify gaps in the legal provisions. This should assist Save the Children Sweden Norway's work in employing more effect strategies in addressing root causes of gender discrimination.

Methodology of paper

This very brief research paper has been conducted under the current Afghan legislations, especially the 2003 Constitution of Islamic Republic of Afghanistan, the 1976 Civil Code of Afghanistan, the 1976 Penal Code of Afghanistan, the Law on Nationality of Islamic Emirate of Afghanistan (Official Gazette # 792, 1421 lunar year [2000]). However, as for as these laws in Afghanistan have been derived from Islam this research paper has not only been conducted under Afghan legislations but also under Islam since when the written laws are silent in Afghanistan the courts have to make judgment based on Hanifi school of thought. Article 2 of the Civil Code states:

In case the laws are silent the courts shall make judgments in accordance with the basic principles of Hanifi school of thought to ensure the just in best manner.

Therefore, this research paper has been conducted very briefly under Afghan laws and Islamic law, particularly Hanifi School of thought.⁷

Layout of the Report

The research paper contains 9 chapters. The paper has attempted to briefly follow the thematic grouping of the UNCRC articles as suggested by the UNCRC Committee to State party reports for future reference. Hence the following structure includes:

Chapter 1: defines and explains the general principles set forth under the United Nation Convention on the Rights of Children.

⁷ There are four school of thought in Uunni Fiqh: Hanifi, Shafihia, Malikai and Hanbalia. Afghanistan has accepted Hanifi school of thought(Article 131 Constitution, Article 1 Penal Code and Article 2 Civil Code).

Chapter 2: analyzes the civil rights and freedom of children.

Chapter 3: looks at the family environment and alternative care for children,

Chapter 4: explores the basic health and welfare rights of children,

Chapter 5: examines the education, leisure and cultural rights of children, Chapter 6: presents the special protection measures for children.

Chapter 7: analyzes the legislation gaps and inconsistencies that exist between the UNCRC and the current Afghan legislations.

Chapter 8: provides recommendations to organizations dealing with women and children rights.

Chapter 9: provides a conclusion to the paper.

1. GENERAL PROVISIONS

1.1 Definition of the child (Article1, UNCRC)

The current Afghan legislations, including the Civil Code and the Penal Code, are silent on the definition of the child,⁸ however children have primarily been categorized into two categories: 1) minors; and 2) teenagers. The Penal Code defines minor as a child between the ages of seven and thirteen years of his or her age. Article 70 of the Penal Code of Afghanistan states:

Minor refers to a child between the ages of seven and thirteen.

Under the Penal Code of Afghanistan, minor child(ren) have been subdivided into two categories: 1) *gheer momayez*; and 2) *momayez*. The 1967 Civil Code of Afghanistan defines *gheer momayez* as a child between the ages of one to seven years of age. Article 40 of the Civil Code of Afghanistan states:

... Persons not attaining the age of seven years shall be deemed as gheer momayez.

Under the 1967 Penal Code of Afghanistan *momayez* refers to a child between seven to thirteen years of his or her age (Article 70). The 1967 Penal Code of Afghanistan defines teenager as child between thirteen to eighteen years of his or her age. Article 71 of the Penal Code of Afghanistan states:

Teenager refers to a child who has completed thirteen years of old and has not completed eighteen years of age.

Under the penal code the minors and teenagers do not hold criminal responsibility since the criminal responsibility age is 18 years old (for further information see special protection measures section).

Under the Civil Code the maturity age for marriage of girls is 16 and for boys is 18 years. Article 70 of the Civil Code provides:

Marriage shall not be considered adequate until the male completes the age of 18 and the female the age of 16.

Religious provision

⁸ . The new Bill titled “ The Law on Dealing with Violator and under Custody Children” which has recently been passed by parliament defines child as: “girls who have not completed the age of 17 and boys who have not completed the age of 18 years shall be recognized as child”.

Under Islamic Law child refers to a person whether girl or boy who has not met the maturity age.⁹ The highest maturity age under Hanifi school of thought is 18 for boys and 17 for girls¹⁰.

Under Islamic Law the children are divided into two categories: mamayez and gheer mamoyez.

Gheer momayez refers to a child who can not differentiate between bad and good things and momayez refers to a child who can partly differentiate between bad and good things.¹¹

The children unless attain the maturity age do not hold any criminal responsibility under Islamic Law. Prophet Mohammad says:

(رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ ، وَ عَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ وَ عَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ)^{١٢}.

(رواه احمد وابوداود والحاكم عن علي وعمر رضى الله عنهما)

“Three categories of persons do not hold accountability: sleeping person until s/he gets up, child until s/he gets his or her legal age and crazy until she/ he becomes healthy.

Under this hadith the children do not hold criminal responsibility until they attain the maturity age.

The marriage age for girl is when they attain their maturity age unless given in marriage by their father or grandfather under certain circumstances.¹³

1.2 Non-discrimination (Article 2, UNCRC)

The Constitution of Islamic Republic of Afghanistan (from here after referred to as the Constitution) and Islamic Law prohibits discrimination between men and women:

Legal provision

Under the Constitution, all Afghan nationals, irrespective of their sex and age, have full equal right before the law. Article 22 of the Constitution states:

⁹ Wazeeri, Majeed, Rights and obligation of child and guardian in Islam, Tehran, Ameer Kabeer publication, 1384/ 2005I, p 51.

¹⁰ Mogqhniyah, Mohammad Jowad, Personal Status, trans, Dr. Mostafa Jabari and Ameer Mosjadi Sarai, Tehran Qafqos publication, 1379/ 2005I, p 32

¹¹ Wazeeri, Majeed, Rights and obligation of child and guardian in Islam, p 53.

¹² Sunnan Abu Dawood.

¹³ For further information, please refer to: Mogqhniyah, Mohammad Jowad, Personal Status, p 31- Zoheli, Wahaba, Islamic Fiqh and its rationale, Pakistan, Kowata, volume 9, pp 6642-6682.

Any kind of discrimination and privilege between the citizens of Afghanistan shall be prohibited. The citizens of Afghanistan whether woman or man shall have equal rights and duties before the law

Under the provision set forth under this article there are two important things which need to be taken into account: a) discrimination and privilege between nationals of Afghanistan which also include women and girls is prohibited; and b) man and woman have full equal rights before the law. Thus, under the Constitution, no one has the right to discriminate against women and girls based on their sex since man and woman assume equal rights before the law.

Religious provision

Under Islamic law, men and women are recognized to be equal. Upon the authority of *Ahmad, Abu Dawood* and *Termazi* Prophet Mohammad say:

“Men and Women are equal.”¹⁴

Non- discrimination in practice

As stated above, under the Constitution and Islamic Law, discrimination between men and women is prohibited since both men and women assume equal rights before the law. However, under the Afghan customary practices, discrimination against women and girls continues to be persisting based on their sex. The women and girls, in reality, do not enjoy the same rights as men and boys.

The Afghan customary practices continues to seclude and marginalize girls, especially in rural areas such as restriction in their mobility, curtailment of any opportunities for education, development, employment, participation in the political process, family decision making process and self-protection and renders them almost completely dependent on male relatives.¹⁵

The standards of *Tarbia*(*learning good manners*) for girls are higher, more restrictive and usually linked to their sexuality and its control. The inability to express dissent or to protest in the event of violation of their rights negatively impacts their rights. When their views are neither encouraged nor expressed, their concerns are not likely to be taken into account in the efforts to formulate development policies, programmes and projects. Many girls are thus excluded from taking part in the activities, which might offer hope, motivation and future opportunities¹⁶

¹⁴ For further detail, please refer to: Zoheli, Wahaba, family fiqh in contemporary world, trans, Abdul Aziz Salemi(Iran: Tehran, 1382) pp 17- 27.

¹⁵ SCSN and SCUUK, 2005, Research Paper: A child Rights Based Situation Analysis, Save the Children - Sweden - Norway and Save the Children UK: Kabul, pp 52.

¹⁶ Ibid, pp 53.

Girls are usually confined to their homes; whereas boys have the liberty of going out as they are expected to assume the responsibility for the economic upkeep of the family. In this process, boys' right to participation is curtailed as they are under pressure to live up to the notions of masculinity, which they inculcate through the socialisation process. Their views often reflect expectations from them instead of their individual opinions, fears and concerns as they are expected to abide by the cultural and religious norms.¹⁷

1.3 Best interest of the child (Article 3, UNCRC)

The principle of best interest of the child, of both girl and boy, is reflected under the Constitution and Islamic Law:

Legal Provisions

Under the Constitution, the best interest of the child, of both girls and boys, is the ultimate responsibility and consideration of the government and the family. Article 54 of the Constitution states:

Family is a fundamental unit of society and shall be supported by the state. The state shall adopt necessary measures to ensure physical and psychological well being of family, in particular, of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam.

Religious Provisions

Islamic law pays particular consideration to the best interest of the children, of both girls and boys. Therefore, It has enacted particular provisions in regard to right to life, inheritance, breast feeding, rearing, child caring, living standard, education, leisure, guardianship, criminal irresponsibility and so forth of the children which are all briefly discussed in this research paper.

Best interest of the child in practice

Though under the Constitution and Islamic Law, the best interest of the women and children, especially of girls, is a primarily responsibility and consideration of the family and government, in reality, due to customary practices, the best interest of girls and women is denied.

As a result of customs and traditions, early marriages, forced marriages, deprivation of girls and women from education and work, giving the girls as “*bad*”, deprivation of girls

¹⁷ Ibid, pp 53- 53

from inheritance right, prohibited family violence against women and girls, deprivation of widowers from remarriage¹⁸ are seem to be happening.

Furthermore, discrimination against women and girls based on their age and sex, seclusion and marginalization of girls and women from society, deprivation of the women and girls from participating in political matters and family decision making, giving in marriage the under age girls to old men (for instance the marriage of under age girl to 45- year- old man), exchange of girls with animals, opium and loan, receiving money vis-à-vis girls when they are given in marriage are still being exercised¹⁹ which are all recognized to be against the principle of the best interest of the child.

1.4 Right to life (Article 6, UNCRC)

The children, both girls and boys, assume right to life and survival under the Constitution and Islamic Law:

Legal Provision

Under the Constitution all human beings, including children, irrespective of their sex enjoy full equal right to life and survival. Article 22 of the Constitution of Islamic Republic of Afghanistan states:

Life is a gift of God and a natural right of human beings. No one may be deprived of this right except by the provision of law.

Religious Provision

Under Islamic Law, both girls and boys, have the right to life. Prior to emergence of Islam, infanticide of especially of girls, was a common phenomenon. After evolvement of Islam, infanticide especially of girls was prohibited.²⁰ The Holy Quran states:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا²¹.

“Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin.”

¹⁸ This is happening in Afghanistan whereas prophet Mohammad (P.B.U.H) got married with numerous widows(Khadija, Hafasa, Ama Salama) and set examples in which he encourages widow remarriage(for further detail, please refer to: Qarzawi, Yousef, Contermporary Islamic Verdicts, trans, Dr Nahemi, Tehran, Ahsan printing press, 1382(2003) second edition, pp 670-674.

¹⁹ WCLRF, Report on Conference on Effects of Customary Practices on Afghan Women, Women and Children Legal Research Foundation: Kabul, PP 19- 27. Also: IHRCA, 2006, Evaluation of General Situation of Women in Afghanistan, pp 4- 5.

²⁰ IHRCA, 1382, Research Paper: Education of Children Rights, Independent Human Rights Commission of Afghanistan: Kabul, p9.

²¹ . Surat Alasra: verses 30- 31

The right to life in practice

Customarily, the children, of both girls and boys, assume the right to life. Under customary practices the children irrespective of their sex are neither killed nor denied the right to life.

1. 5 Respect for the views of the child (Article 12, UNCRC)

The Constitution and Islamic Law fully give due weight to the views of the children:

Legal Provision

Under the Constitution every person, including children, has the right to seek a defense lawyer to defend their right and have their views being given due weight. Article 31 of the Constitution states:

Every person upon arrest may seek an advocate to defend his/her rights or to defend his/her case for which he/she is accused under the law. The accused upon arrest has the right to be informed of the attributed accusation and to be summoned to the court within the limits determined by law. In criminal cases, the state shall appoint an advocate for a destitute. The confidentiality of oral, written or telephonic communications between an advocate and his/her accused client are immune from invasion...²²

Religious provision

Under Islamic Law too, the views of a child who is capable of forming his or her own views is given due weight. However, a child who is not capable of forming his or her own views can make his or her views heard and given weight to through his or her representative in legal and administrative proceedings.

Respect for views of the child in practice

The views of children particularly of girls in non- public spheres are not given due weight (for further detail see below section under freedom of expression) However, in the public spheres, particularly courts the children, of both girls and boys, do not have legal capacity

²² Article 22 paragraphs 1& 2 of the “ Bill on Dealing with Violator Children” which has not yet been signed by President of State fully entitles the children to hire defense lawyer, in case the need arises, hire a translator so that the child, his or her legal guardian, defense lawyer and translator attend in legal proceeding. Furthermore, article 33 paragraphs 1, 2 & 3 of the Bill on Dealing with Violator Children places the responsibility on judge to respect and give due weight to views of the child during proceedings. Article 42 paragraphs 1- 7 entitle the children to make appeals to appellate court.

to appear in court as plaintiff and defendant, but when they are involved in case, the authorized court summons the child and ask him/ her questions to find out whether he/ she has been used as means in committing the crime or not. When the child makes his/ her views the authorize court gives due weight to it.

2. CIVIL RIGHTS AND FREEDOM

2.1. Right to name (Article 7, UNCRC)

Under the Civil Code and Islamic Law, a child irrespective his/her sex assumes the right to have a name:

Legal provision

Article 38 of the 1976 Civil Code states:

Any person may choose a name in addition to his family name. The family name shall be transferred to the children...

Religious Provisions

Islamic Law also entitles children, regardless of their race, colour, sex, language, political or other opinion, national, ethnic or social origin, birth or other status to have a name. Furthermore, parents of a child, of both girl and boy, are also obliged to give the best and the most beautiful names to their children.²³

Upon the authority of *Tarmazi* Prophet Mohammad peace be upon him says

نُدْعُونَ يَوْمَ الْقِيَامَةِ بِأَسْمَائِكُمْ وَ أَسْمَاءِ آبَائِكُمْ فَأَحْسِنُوا أَسْمَائِكُمْ.²⁴

“Give decent names to your children, in resurrection day you will be called in your name and your fathers names.”

Right to name and identity in Practice

The legal and religious provisions set forth under the Civil Code and Islamic Law are not fully and broadly being applied. Although under Islamic Law and Afghan legislations every person including women and girls enjoys the right to have name and identity, names of women and girls indicating their identity is commonly and discriminatorily denied to be mentioned almost any where in the society because under the customary practices mentioning the names of girls and women is considered to be dishonoring to the family. Therefore, based on the same reason, women and girls are addressed through their husband and/ or a member of their family. For the same reason, in rural areas, people avoid calling girls by their names after they are sixteen or so since they consider this to be dishonoring to the family.

2.2. Right to nationality (Article7)

²³ Zoheli, Wahaba, family fiqh in contemporary world, pp 165- 167. Also: IHRCA, 1382, Research Paper: Education of Children Rights, Independent Human Rights Commission of Afghanistan, pp 23-24.

²⁴ Sunnan Tarmazi.

Legal provisions

The Law on Nationality of Islamic Emirate of Afghanistan (Official Gazette # 792, 1421 lunar year [2000]) subject to Islamic Law regulates the issues concerning acquisition and losing of nationality. Under the Law, all Afghan nationals, whether a girl or boy, woman or man enjoy full equal rights to acquire nationality. Article 2 paragraphs 1 & 2 states:

- 1. All nationals of Islamic Emirate of Afghanistan may have equal rights to acquire nationality;*
- 2. A person holding nationality of Islamic Emirate of Afghanistan in accordance with this law shall be known as Afghan.*

Under this Law, any child irrespective his/her race, colour, sex, language, political or other opinion, national, ethnic or social origin, birth or other status born by an Afghan national shall be recognized as an Afghan national. Article 9 paragraph 1 state:

A child born in or outside the territory of Islamic Emirate of Afghanistan by parents being nationals of Islamic Emirate of Afghanistan shall be recognized as national of Islamic Emirate of Afghanistan.

In addition, if an Afghan national gets married with a national of another country under certain circumstance the child irrespective of his/ her sex born by this marriage will be recognized as an Afghan national. Article 10 states:

- 1. Where one of the child's parents during his or her birth holds Afghan nationality and another does not, the child shall be recognized as national of Islamic Emirate of Afghanistan provided that:*
 - a) He or she is born in the territory of Islamic Emirate of Afghanistan;*
 - b) He or she is born outside the territory of Islamic Emirate of Afghanistan, but one or both of his or her parents reside permanently in the territory of Islamic Emirate of Afghanistan; and*
 - c) He or she is born outside the territory of Islamic Emirate of Afghanistan by parents living outside the territory of Islamic Emirate of Afghanistan, but they agree to establish Afghan nationality for the child.*

Moreover, whenever an Afghan gets married with a stateless person, their child will be recognized to be an Afghan national. Article 11 of the Law on Nationality states:

A child during birth of whom one of his or her parents hold Afghan nationality and another is stateless or his or her nationality is not known shall be considered to be national of Islamic Emirate of Afghanistan irrespective of whether the child is born in or outside the territory of Islamic Emirate of Afghanistan.

In addition to these provisions, a child found in the territory of Afghanistan and whose parents' nationality documents may be in question, are will still be recognized as an Afghan. Article 12 of Law on Nationality states:

A child found in the territory of Islamic Emirate shall be deemed an Afghan irrespective of his or her parents' valid document proving their nationality.

The right to have nationality in practice

In reality, as a result of customary practices the right to acquisition of nationality is not equally applied between men and women and girls and boys. Except for professional working women and girls going to schools, other girls and women do not have identification card (*tazkara*) to prove their nationality. The reason for this is the confinement of women and girls at home. While almost all men and boys have identification card to prove their nationality.

2.3 Preservation of identity (Article 8)

The Constitution subject to Islam protects the right of all nationals of Afghanistan regardless of their sex. Article 4 of the Constitution states:

... No member of the nation shall be deprived of his/her nationality of Afghanistan...

The Civil Code of Afghanistan respects and protects the right of all nationals of Afghanistan including men, women and girls to preserve their names and family names. Article 38 of the Civil Code states:

If a person adopts the family name of another and it causes a damage to the former, the injured, in addition to demanding the stoppage of offence it may also demand compensation from the offender for the damage incurred

Preservation of identity in practice

The practice is consistent with the law. Under the customary practices no one uses other's name or surnames. The right to preservation of nationality is also respected. The government does not deprive any one from his/ her citizenship it is why a lot of Afghans have double citizenships.

2.4 Freedom of expression (Article13, UNCRC) and access to appropriate information (Article 17, UNCRC)

The Constitution and Islamic Law allow every person irrespective of his/her sex to express his/ her opinion freely in written and oral form and have access to appropriate information:

Legal Provision

Under the Constitution, all persons, including women and girls enjoy the right to express their opinions freely. Article 34 states:

Freedom of expression is inviolable. Every Afghan has the right to express thoughts through speech, writing, or illustration or other means by observing the provisions of this Constitution. Every Afghan has the right to print or publish topics without prior submission to the state authorities in accordance with the law. Directives related to printing house, radio, television, press, and other mass media, shall be regulated by law.

Under this article all Afghans, including girls, assumes the right to express their opinions through speech, writing and illustration.

Religious provisions

Under Islamic Law freedom of expression is inviolable unless harming rights of others..The Moslems therefore can freely express their opinions.²⁵

The right to freedom of expression in practice

Generally, the right to freedom of expression is being exercised by all Afghans, however, specifically children's views on matters concerning them, are not heard and are actively or passively discriminated against. Afghan children fare poorly on all these accounts whether it is at the level of family, society and / or the state. Traditionally, opportunities for children and young people in Afghanistan to participate in decision-making process in the community as well as within the family is very rare. An individual's role and agency in the family and community affairs is determined by tradition and children are no exception. Since their early childhood, their identity is defined in terms of gender and they are prescribed with values and indirectly with future opportunities.²⁶

Children, especially girls, are made to learn early that as individuals they must conform to established norms of behaviour in accordance with their gender, clan, age and generation. *Tarbia* is the framework within which children's actions and deeds are viewed. It also regulates relationships inside and outside the family. It is of crucial

²⁵ For further information please see: Ghanoshe, Rashed, General Freedoms in Islamic Government, trans, Hosien Saberi(Iran: Tehran, 1381) pp 38- 39. Also: Zaidan, Abdul Kareem, rights of individual and government in Islam, trans, Nahmatullah Sherani(Kabul: Engineer Abib- ul- Rehman press, 1363{ 1984}), pp 88- 92.

²⁶ SCSN and SCUUK, 2005, A child Rights Based Situation Analysis, Save the Children – Sweden - Norway and Save the Children UK, p 51.

importance that the child has good *Tarbia*. On this rests the reputation of the child, the family and maybe the clan and any violation could bring disgrace and perhaps retribution.

Inability to express feelings and opinions depends essentially on the children's psychological make up and circumstances and can have many implications. They may accept what they are told either unquestioningly or grudgingly, protest silently or in few instances rebel openly. In the process, they miss out on the opportunities for learning, personality development and realization of their potential. *Tarbia* ensures quiet acceptance of the opinions and directives of the adults in most cases, and the same relationship and norms of behavior are passed on to the next generation. When they grow up and assume positions of authority in the social structure, they replicate the behaviour that they were subjected to.²⁷

Children especially girls do not participate as individuals and as a group in the decision-making processes in the family and community mainly because their individual identity is not recognized. And because their individual identity is not recognized, they do not receive opportunities for participation.²⁸

2. 5 Freedom of thought, conscience and religion (Article 14, UNCRC)

Under Islamic Law and Afghan legislations freedom of religion (apostasy) is prohibited.

Legal Provisions

The 1976 Penal Code of Afghanistan does not deal with apostasy and therefore infer the apostasy to Islamic Law. Article 1 of the 1976 Penal Code of Afghanistan states:

This law regulates the Tahzeeri crimes and penalties (disciplinary crimes and penalties). Those committing crimes of “Hodood”, “Qassase” and “Diat” shall be punished in accordance with the provisions of Islamic Law(the Hanifi Jurisprudence).

Under Islamic Law, apostasy comes under the category of Hodood crimes which is discussed below.

Religious Provisions

Under Islamic law freedom of religion (apostasy) is prohibited. In accordance with the consensus of Islamic jurisprudents any Moslem who changes his/ her religion shall be subjected to killing.²⁹ Prophet Mohammad (P.B.U.H) says:

²⁷ Ibid, p 51.

²⁸Ibid, p 51.

²⁹ For further details, please refer to: Zoheli, Wahaba, Islamic Fiqh and its rationale, Volume 7,pp5580- 5582.

رواه الجماعة إلا مسلم، ورواه ابن أبي شيبة و عبدالرزاق عن عكرمة عن ابن عباس

Any Moslem who changes his/ her religion shall be subjected to killing.

2.6 The right to establishment of peaceful assembly (Article 15, UNCRC)

Legal provisions

Under the Constitution all Afghans, including men and women and mature children assume the right to establish peaceful assemblies. Article 35 states:

The citizens of Afghanistan may have the right to form social organizations for the purpose of securing material or spiritual aims in accordance with the provisions of law.

The citizens of Afghanistan may have the right to form political parties in accordance with the provisions of law, provided that:

1. *The program and charter of the party are not contrary to the principles of sacred religion of Islam, and the provisions and values of this Constitution;*
2. *The organizational structure and financial sources of the party are made public;*
3. *The party does not have military or paramilitary aims and structures; and*
4. *Should have no affiliation to a foreign political party or sources.*

Formation and functioning of a party based on ethnicity, language, religious sect and region is not permissible.

A party set up in accordance with provisions of the law shall not be dissolved without lawful reasons and the decision of an authorized court.

The right of establishment of peacefully assembly in practice

In concurrence with the Constitution the right to establishment of peaceful assemblies and associations is being exercised by all Afghans including the women girls.

Though the Afghan women and girls have not yet established too many independent peaceful associations, except few, there are, however, a lot of women and girls working in various associations whose numbers differs from one place to another.³¹

³⁰ For further detail, please refer to: Ibid, volume 7, pp 5576- 5588.

³¹ IHRCA, 2006, Research Paper: Evaluation of General Situation of Women in Afghanistan, p 8.

2.7 Protection of privacy (Article 16, UNCRC)

Under the Constitution neither the government nor other persons have the right to interfere in other's privacy. Article 37 states:

Confidentiality and freedom of correspondence and communication whether in the form of letters or through telephone, telegraph and other means shall be immune from invasion. The state shall not have the right to inspect personal correspondence and communication unless authorized by the provisions of law.

Protection of privacy in practice

Consistent with the Constitution of Islamic Republic of Afghanistan the right of men, women and children not to be interfered in their privacy is being ensured broadly in Afghanistan.

2. 8 Right of children not to be tortured in an inhuman manner (Article 37, UNCRC)

As mentioned under the Constitution 1976 Penal Code of Afghanistan and the Islamic Law, inhuman and degrading punishment of children, both girls and boys, is strictly prohibited.

Legal Provision

Under the Constitution, no one has the right to punish or torture others, including children in a manner contrary to human dignity and honor. Article 29 states:

Torture of human beings is prohibited. No person even with the intention of discovering the truth can resort to torture or order the torture of another person who may be under prosecution, arrest, detention or convicted to be punished. Punishment contrary to human integrity is prohibited.

In addition to the Constitution, the Penal Code also prohibits degrading and inhuman punishment of human beings including children. Article 4 paragraph 2 of the Penal Code states:

Any punishment which is discordant to human dignity shall not be permitted.

Religious Provisions

Under Islamic Law not only degrading and inhuman punishment of children irrespective of their sex but also all type of punishment of children is prohibited. Prophet Mohammad (P.B.U.H) says:

((رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ ، وَ عَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ وَ عَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ)^{٣٢}.

(رواه احمد وابوداود والحاكم عن على وعمر رضى الله عنهما)

“Three categories of persons do not hold accountability: sleeping person until s/he gets up, child until s/he gets his or her legal age and crazy until s/he becomes healthy.”

Under this Hadith, children including boys and girls, are not criminally held responsible Therefore, no one has the right to punish them at all.

Inhuman torture of children in practice

As mentioned earlier, the family violence, forced marriage etc are continue to be happening which are all considered to be torture at the private spheres. However, at the public spheres the practice is consistent with the Constitution and Islamic Law. The children, of both girls and boys, are not subjected to inhuman and degrading tortures, however, in case they are in conflict with law, they may be quarantined in rehabilitation centers, a place where children who are in conflict with the laws are quarantined to learn good manners and behaviors.

³² Sunnan Abu Dawood.

3. FAMILY ENVIRONMENT AND ALTERNATIVE CARE

3.1 Parental Guidance (Article 5, UNCRC) and responsibility (Article 18, paragraphs 1 & 2, UNCRC)

The Civil Code of Afghanistan and Islamic Law places the responsibility on parents and alternatively on legal guardians(who are male/ female relative and president of state whose representative is judge) of the children irrespective of their sex to guide and take care of their children.

Legal provision

Under the 1976 Civil Code of Afghanistan parents, other primary care givers or legal guardians of children are obliged to guide and rear their children. Article 236 paragraph 1 states:

Child care shall be the right of persons set forth under the present law.

Under the Civil Code child care is the obligation of parents and legal guardians of the child, of both girls and boys. Among the parents and legal guardians the priority right has been given to mother if she desires so. Article 237 of the 1976 Civil Code states:

The mother shall have the priority right to the protection and care of the child during marriage and separation provided that she has the conditions require for child care.

The preconditions required for women to take the child under custody as stated in above article, are wisdom, maturity, honesty and capability. Thus, sane, minor, dishonest and incapable women such as blind etc are not qualified to parental guidance. Article 238 of the 1976 Civil Code states:

The woman who takes care of the child shall be wise, mature and honest so that there would be no fear of the loss of the child. She shall also have the ability to take care of the child

The women who have the priority right to take care of the child include : Mother, grandmother and great grandmother, father's mother, sister, half- sister (from the same father but different mother or vise versa), nephew, daughter of half sister, aunt(sister of mother), half-aunt (of the same mother and different father or vise versa), father's aunt(sister of the mother of the father), father's half aunt mothers aunt (sister of mother's father) and father's aunt (sister of father of father). Article 239 of the 1976 Civil Code states:

The women who shall have the right to custody of the child shall be in the following order:

1. *Mother, grand mother and great grand mother;*
2. *Father's mother;*
3. *Sister (from the same father and mother);*

4. *Half-sister(from the same mother but different father);*
5. *Half-sister(from the same father but different mother);*
6. *Nephew;*
7. *Daughter of half-sister(from the same mother but different father);*
8. *Daughter of half-sister(from the same father but different mother);*
9. *aunt (sister of mother)'*
10. *Half- aunt(of the same mother and different father);*
11. *Half-aunt(of the same father but different mothers);*
12. *Father's aunt(sister of the mother of the father);*
13. *Father's half aunt(of the same mother and different father);*
14. *Father's half aunt(of the same father and different mother);*
15. *Mother's aunt(sister of the father of mother); and*
16. *Father's aunt (sister of brother's of father).*

In case the women described above are not present or lack the qualifications set forth under article 237 of the Civil Code of Afghanistan, the right to child care shall be transferred to father, grandfather, great grand father of the child, brother, nephews and uncles (brother of father) of the child. Article 240 of the Civil Code of Afghanistan states:

Where the persons described in article (239) of this law are not present or lack the qualifications required for child care, the right to child care shall be transferred to the relatives of father of the child in order of inheritance they are entitled to.

However, in case where the persons described under article 239 and 240 of the Civil Code are absent or lack the qualification required for child care, the right to take the child under custody will be transferred to mother's father, half-brother's son (of the same mother but different father) or half- brother's son (of the same father but different mother), half uncle (of the same mother but different father) half- uncle(of the same father but different mother), uncle(brother of mother), half-uncle(of the same father but different mother) or half-uncle(from the same mother but different father). Article 241 of the Civil Code of Afghanistan states:

Where the persons described under articles (239) and (240) of this law are not present or lack the qualifications required for the child care, the child shall be given to the care of the closest relatives of the following persons in order of the degree of relationship:

1. *Mother's father;*
2. *Half-brother (of the same mother but different father);*
3. *Half- brother's son (of the same father but different mother);*
4. *Half uncle (brother of father, of the same mother but different father);*
5. *Half- uncle (brother of mother);*
6. *Half uncle (of the same father but different mother); and*
7. *Half uncle (of the same mother but different father).*

The cousin (daughters of uncle and aunt) in case the child is a boy and likewise the uncle's sons and aunt's sons in case the child is a girl shall not have the right to child care.

Religious Provision

Islamic Law also places the responsibility on parents and legal guardian who are male/female relatives and president of the child to guide and rear their child until the child attains the age of maturity.³³

Upon the authority of *Abn Maja* Prophet Mohammad (P.B.U.H) says:

*Respect your children and guide them in an appropriate manner.*³⁴

Parental guidance in practice

Though under the 1976 Civil Code and Islamic Law parents and legal guardians of the children, including girls and boys, are obliged to take care of their child(ren). In reality, parents and legal guardians do not fulfill their obligations since early and forced marriage of under aged girls, lack of provision of health services to children especially of girls, deprivation of children especially of girls from education, playing, decision making processes, lack of hearing of children voices, subjecting the children to forced child labor and so forth are rampantly happening in Afghanistan.

3.2 Separation from parents (Article 9, UNCRC)

Under the 1967 Civil Code of Afghanistan and Islamic Law, all children enjoy the right to live with their parents. However, in circumstances where separation or divorce takes place both parents have the right and obligation to take care of the child.

Legal Provision

Under the 1976 Civil Code, a child whether girl or boy assumes the right to live with his or her parents. However, in circumstance where separation and/ or divorce takes place, the child enjoys the right to live with one of his/her parents based on the decision made by authorized court (Articles 237- 241). Moreover, if mother and father of the child are all recognized as eligible for child caring, the competent court will apply the 'best interest of the child' and determine who to appoint for the child's caring. Article 242 of the Civil Code states:

Where more than one person has the care of the child, the court may select one of the two who is most in the interest of the child.

Religions provision

³³ Zoheli, Wahaba, family fiqh in contemporary world, pp 39- 54 and 177- 181.

³⁴ Sunnan Ibn Maja.

Under Islamic Law parents of a child, are obliged to take care of the child.³⁵ However, in circumstances where separation or divorce takes place, this act may not eliminate the parents or legal guardian's responsibility to take care of the child. Thus, the child depending on her/ his best interest may either live with one of his/her mother or father.³⁶

Separation from parents in practice

In actual situation, when divorce or separation takes place, the authorized court submits the child to mother if she desires so. If not, the court submits the child to father. In such circumstances, the child lives with one of his/ her parents to whom s/he has been submitted. Furthermore, the child can visit his/ her father or mother. In its decision, the authorized court is subject to the best interest of the child. For instance, if one of the parents of the child does not assume the capability to child caring, the authorized court subject to the best interest of the child submits the child to the one who assumes the capacity. In such circumstance, father and mother are obliged to accept decision of the court since the court implements its decision by force.

3.3 Maintenance for the child (Article 27, paragraph 4, UNCRC) and Standard of living (Article 27, paragraphs 1-3, UNCRC)

Under the Civil Code fathers and legal guardians of children are obliged to provide maintenance consisting of nutrition, housing, clothes and medical treatment to their children.

Legal Provisions

Under the Civil Code fathers of minor children irrespective of their sex are obliged to secure their children's maintenance until the children attain the age of maturity. Article 256 of the Civil Code states:

Father shall secure his minor son's alimony until the minor son acquires the power to work. The father shall also secure his minor daughter's alimony until she gets married.

In addition, in circumstances where a mature son can not work due to illness such as insanity, polio or due to study, his father shall also secure his maintenance. Article 257 of the Civil Code states:

The father shall be obliged to secure alimony of his poor mature son who is not able to work. The father shall also secure his poor mature daughter's alimony until she gets married.

³⁵ Zoheli, Wahaba, Islamic Fiqh and its rationale, volume 10, p 7296.

³⁶ Sabeq, Sayed, Fiqh-ul-Sunnah. Trans, Mahmmud Abdrahemi(Iran: Kordastan, 1371) pp1664- 1667.

However, where father of a child is poor and unable as a result of elderliness to work, the obligation to provide alimony for minor child will be transferred to the legal guardian: namely; male relative, female relative and the president of state whose representative is judge of the child. Article 259 of the Civil Code states:

Where father of a child is restituted and unable to work, the responsibility for providing alimony to the child shall be transferred to the legal guardian of the child.

Religious Provision

Islamic Law also places the responsibility on fathers to provide maintenance for their children.³⁷ The Holy Quran states:

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ³⁸

“The father shall bear the cost of their food and clothing on equitable terms”

Under this verse of Holy Quran fathers are obliged to secure maintenance for their children irrespective of their sex, however, where fathers as a result of illness or elderliness can not provide maintenance for their minor children, the legal guardians: namely male/ female relative and president of state of the children shall be obliged to provide maintenance for the children.³⁹

Maintenance in practice

In a broad sense the families within their capacities provide maintenance to their children of both girls and boys. However, some families do not provide maintenance to their children and subject them to forced child labor and begging which will be discussed in detail under forced child labor.

3.4 Adoption (Article 21, UNCRC)

Religious Provision

The Afghan laws are silent on adoption. However, under Islamic Law adoption is prohibited since adopted son or daughter deprives real sons or daughter of adopter from inheritance right. Deprivation of real sons and daughter of adopter from inheritance rights creates enmity between the adopted son or daughter and sons and daughters of adopter

³⁷ Zoheli, Wahaba, Islamic Fiqh and its rationale, Volume 10, pp 7415 - 7416.

³⁸ Sura, Albaqara, verses: 232- 233.

³⁹ . Ibid, pp 7415- 7416. Also: Abdul-ul-Rehman Jazayari, Fiqh in Four School of Thought, Volume 4, pp 453- 457.

and therefore deranges the family relationship among the family member⁴⁰ . The holy Quran states:

وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ (٤) ادْعُوهُمْ لِأَبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِنْ لَمْ تَعْلَمُوا آبَاءَهُمْ فِإِخْوَانُكُمْ فِي الدِّينِ وَمَوَالِيكُمْ⁴¹

Allah has not made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But God tells (you) the truth, and he shows the (right) way. Call them by (the names of) their fathers: that is juster in the sight of God. But if you do not know their father's (names, call them) your brothers in faith, or your maulas(friends).

Based on this verse of holy Quran, adoption and its legal consequences which was very common prior to Islam, was prohibited.⁴²

Adoption in practice

Subject to Islamic Law the Afghan judicial system does not officially recognize the system of adoption. There is, therefore, no substantive and procedural rules for adoption although adoptions seem to be occurring whose number is very difficult to estimate since no data is available in this regard.

3.5 Abuse and neglect (Article 19, UNCRC)

The Penal Code of Afghanistan and Islamic Law prohibits abuse and neglecting of children:

Legal provision

Under the Penal Code of Afghanistan neglecting and endangering the lives of children including boy and girl are prohibited. Article 358 paragraphs 1 & 2 states:

- 1. A person who himself or through someone else endangers the life of a person who has not completed age fifteen or due to health or mental or psychological state is incapable of protecting him or herself shall be sentenced to medium imprisonment of not more than three years or cash fine of more thirty six thousand Afghani;*
- 2. A person who leaves a child or feeble in an abandoned place shall be sentenced to medium imprisonment, even if the said is crime is committed by one of the parents or someone charged with the protection of the child.*

⁴⁰ Qarzawi, Yousef, Lawful and unlawful in Islam. Trans, Abu Baker Hassan Zada(Pakistan: Peshawer Katab Press, 1377) 5th edition, pp 275 – 276.

⁴¹ Surat, Alahzab, verses 4- 5

⁴² For further information on how adoption was prohibited in Islam, please refer to: Qarzawi, Yousef, Lawful and unlawful in Islam., pp 270-279.

Therefore, under this article where parents of a child endanger the life of the child or leaves the child in an abandoned place shall be sentenced to medium imprisonment. However, in case, the neglect endangers the life of the child or results in his/ her death, the neglecter will be sentenced to long imprisonment. Article 358 paragraphs 3 & 4 of the Penal Code of Afghanistan states:

3. If as a result of the crime set forth under paragraph 2 of this article the child or feeble becomes handicapped or dies, and the person committing it does not intend it, shall be sentenced to in accordance with the circumstances to the anticipated punishment of boating resulting in disability or death;

4. If a child or feeble is deliberately deprived of feeding or nursing required by his state and as a result of it his life is put in danger, the person committing it shall be sentenced to the punishment set forth under paragraph three of this article.

Religious provision

Under Islamic Law neglecting and killing the children irrespective of their sex, as stated above, is considered unfair and inappropriate.⁴³ The Holy Quran states:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا⁴⁴

“Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin.”

Child neglect and abuse in practice

Neglecting and abusing children whether girl or boy in a way set forth under the Penal Code is not seem to be happening in Afghanistan. Therefore, the practice is in concurrence with the Law.

⁴³ IHRCA, 1382, research paper: education of children rights, Independent Human Rights Commission of Afghanistan, p19.

⁴⁴ Surat, Alasra, verse 30- 31

4. BASIC HEALTH AND WELFARE

4.1 Survival and Development (Article 6, UNCRC)

Under the Constitution and Islamic Law all human beings including children have the right to life and development.

Legal Provision

Under the Constitution all human beings including children have the right to life and survival. Article 22 of the Constitution states:

Life is a gift of God and a natural right of human beings. No one shall be deprived of this right except by the provision of law.

Furthermore, article 54 of the Constitution states:

Family is a fundamental unit of society and is supported by the state. The state adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam.

Religious provisions

Under Islam, all children whether girl or boy as stated above have the right survival.⁴⁵

The right to development and survival in practice

Under the customary practices the chances of development of children, especially of girls is very risky. The girls have little or no access to services which prevents their physical and psychological development and survival.

The girls also do not have access to learning and education which plays significant roles in mental development. The early and forced marriages are another factors which prevent mental and psychological development of girls.

4.2 Health Care Services (Article 24, UNCRC)

The Constitution and Islamic Law entitle children to have access to health care services:

Legal provision

⁴⁵ UNICEF, April 1987, Child Care in Islam 1405(H) - 1985(A.D), UNICEF, MOGADISCIO, SOMALI, p 1923.

Under the Constitution the government is obliged to provide all Afghans including the children free preventive and medical health care services. Article 52 of the Constitution states:

The state shall be obliged to provide free means of preventive health care and medical treatment, and proper health facilities to all citizens of Afghanistan in accordance with the law. The state encourages and protects the establishment and expansion of private medical services and health centers in accordance with law...

Religious provision

Under Islamic Law parents of children, of both girl and boy, are obliged to provide their child with health care services and treatment.⁴⁶

Health care services in practice

Although, under the Constitution and Islamic Law, children irrespective of their sex assume the right to health care services. In reality, the high level of illiteracy and limited mobility restricts the access of Afghan women and girls to health care services. Their low status in the family can often result in a smaller share of family resources. Early marriage, frequent pregnancies, lack of decision making power within the family and the lack of nearby health facilities with female doctors denies women and the girls to have access to emergency obstetric services.

According to MICS 2003, nine out of ten women deliver their babies at home without any skilled assistance or ante-natal care; most deliveries (88.5 per cent) took place at home and were attended by untrained people (85.7 per cent). Even in urban areas, less than 40 per cent of the deliveries took place in a health facility or were attended by a trained person. Ante-natal consultations with trained medical personnel also reflect a similar trend.⁴⁷ The main reasons for these challenges are the customary practices, lack or non-existence of health clinics, economical problems, low status of women and girls in family and lack of access to family resources, illiteracy of women and girls⁴⁸

⁴⁶ Wahaba, Zoheli. family fiqh in contemporary world, pp 173-175.

⁴⁷ SCSN and SCUUK, 2005, A child Rights Based Situation Analysis, Save the Children – Sweden - Norway and Save the Children UK, pp 13- 14.

⁴⁸ IHRCA, 2006, Research Paper: Evaluation General Situation of Women in Afghanistan, p 8.

5: EDUCATION, LEISURE AND CULTURAL ACTIVITIES

5.1 Education (Article 28, UNCRC) and aims of education (Article 29, UNCRC)

The Constitution and Islamic Law entitle children irrespective of their sex to education:

Legal provisions

Under the Constitution all Afghan nationals including children, whether girl or boy, assume the right to free education. Article 43 of the Constitution states:

Education is the right of all citizens of Afghanistan, which shall be provided up to the level of the Bachelors (lisâns) free of charge by the state. The state shall be obliged to devise and implement effective programs for a balanced expansion of education all over Afghanistan, and to provide compulsory intermediate level education. The state shall also be required to provide the opportunity to teach native languages in the areas where they are spoken.

Under this article education is the right of all nationals of Afghanistan, including boys and girls from all socio-economic, religious, ethnic and cultural backgrounds and disabled.

Religions provisions

Under Islamic Law education is not only right but also an obligation. Islam dictates Moslems to seek knowledge and education whether male or female, boy or girl.

Prophet Mohammad (P.B.U.H) says:

طَلَبُ الْعِلْمِ فَرِيضَةٌ عَلَى كُلِّ مُسْلِمٍ⁴⁹
(رواه ابن ماجه)

“Seeking knowledge is incumbent on all Moslems.”

The word Moslem does not refer to male but also to female⁵⁰. Under Islamic Law education is not only the right and obligation of men and women but also the right of children, of both girls and boys. During the famous “Badr Invasion”, one of the wars took place during the Prophet’s life, Prophet Mohammad(P.B.U.H) commanded that each literate captive, taken in battle, would be released free if he taught ten Moslem children how to read and write.

The prophet said:

عَلِّمُوا أَوْلَادَكُمْ فَإِنَّهُمْ مَخْلُوقُونَ لِزَمَانٍ غَيْرِ زَمَانِكُمْ

⁴⁹ Sunnan Abn Maja.

⁵⁰ Faqi Rasool, Jamal Mohammad, Women in Islamic thought. Trans, Mahmood Abrahemi,(Iran: Tehran 1382)p191.

“Educate your children, for they are born for a time that is not yours.”

Therefore, under Islamic Law all children whether girl or boy are entitled to seek education.⁵¹

The right to education in practice

Although under the Constitution and Islamic Law, all children, irrespective of their sex enjoy the right to education, in reality, as a result of the customary practices this right is not implemented. Most children especially girls are deprived of education. In deed, one of the worst problems that exist under the Afghan customary practices is the denial and deprivation of girls from education which is carried out based on the decision of parents. Under the customary practices education of girls is recognized as violating the tribal principles and degrading the honor and dignity of family. The education of girls is denied for different reasons, however, the most important of which include early marriages, discrimination between boy and girl⁵², the family” honor” which is inextricably linked with the behavior of the female members - more invisible and immovable they are, the family is considered more honorable and precarious security situation in many parts of the country, and long distances to schools especially after the primary level,⁵³ constant war, poverty, threats from warlords, killing and threatening of school teachers and bad quality of schools.

5.2 Leisure and recreational (Article 31, UNCRC)

The children under the Constitution and Islamic Law are entitled to rest and play:

Legal Provisos

Under the Constitution the government is obliged to take measures to improve national and local sports. Article 52 states:

...The state in order to promote physical education and improve national and local sports shall adopt necessary measures.

The provision set forth under this article implicitly entitles the children to play sports and recreation and places the responsibility on the government to pave the way for the sports and recreation.

Religious provision

⁵¹ UNICEF, April 1987, Child Care in Islam 1405(H) - 1985(A.D), UNICEF, MOGADISCIO, SOMALI, p 53. Also: IHRCA, 1382, research paper: education of children rights, Independent Human Rights Commission of Afghanistan, pp 24-25.

⁵² . WCLR, Conference on Effects of Customary Practices on Women: Women and Children Legal Research Foundation, p 26.

⁵³ SCSN and SCUUK, 2005: Research Paper: A child Rights Based Situation Analysis, Save the Children – Sweden – Norway and Save the Children UK: Kabul, p 22.

Islamic Law entitles children to rest and play because toys and games bring happiness and enjoyment to the life of children. Toys are also a means of expanding the child's scope of knowledge. The Prophet Mohammad(P. B.U.H) says:

من دخل السوق وإشترى تحفة فحملها إلى عياله كان كحامل صدقة إلى قوم محاييح، وليبدأ بالأنات قبل الذكور.

If someone goes to the market and buys a toy and returns with it to his children, it is as if he had brought alms to a group of deprived and needy people, and he should start with the girls first.

These principles that Islamic Law advocates for indicate the right of children to rest and leisure, especially with emphasis to children .⁵⁴

Right of children to rest and play in practice

Under Constitution and Islam, children especially girls, have the right to play and rest. However, culturally the right of children especially of girls is mostly denied to play. The rationale for denial of this right among others includes the family “honor” and securities concerns. Under the customary practices the girls, particularly when attaining the age sixteen do not have the right to play. The more invisible they are the more honorable the family is. Lack of security and social immunity are another reasons which hinder children especially girls from playing. Furthermore, the girls have to look after siblings and housework at home which hinders them from playing.

⁵⁴ UNICEF, April 1987, Child Care in Islam 1405(H) - 1985(A.D), UNICEF, MOGADISCIO, SOMALI, pp 54-55. Also: IHRCA, 1382, research paper: education of children rights, Independent Human Rights Commission of Afghanistan, pp 21-23.

6: SPECIAL PROTECTION MEASURES

6.1 Sentencing of juvenile and prohibition of capital punishment (Article 37, UNCRC)

Under the 1976 Penal Code of Afghanistan and Islamic Law capital punishment of children are prohibited.

Legal provision

Under the Penal Code, girls and boys, who has not completed the age of 18 years, shall not be sentenced to capital punishment. Article 93 states:

A person who at the time of committing a crime has completed the age of eighteen but has not completed the age of twenty may not be sentenced to capital punishment. In this case, continued imprisonment shall be substituted for execution.

Religious provision

Under Islamic Law all children whether minors or teenagers are not held criminally responsible. Prophet Mohammad (P.B.U.H) says:

رُفِعَ الْقَلَمُ عَنْ ثَلَاثَ عَشْرَةَ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ ، وَ عَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ وَ عَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ^{٥٥}

(رواه أحمد و ابوداود و الحاكم عن علي و عمر رضي الله عنهما)

“Three persons do not hold accountability: sleeping person until he/she gets up, child until s/he gets his or her legal age and crazy until s/he becomes healthy.”

Under this hadith three categories of persons do not hold criminal responsibility: 1) a sleeping person as long as s/he is in sleep; 2) children whether girls or boys until they attain the maturity age; and 3) sane until s/he becomes healthy. Thus, in case a child whether girl or boy, sane and crazy commits a crime they shall not be held criminally responsible.

Sentencing of juveniles in practice

In practice, consistent with the Penal Code of Afghanistan the capital punishment of children is prohibited. Thus, the children are not sentenced to capital punishment.

⁵⁵ Sunnan Abu Dawood.

6. 2 Physical and psychological recovery and social reintegration (Article 39, UNCRC)

Physical and psychological recovery and social reintegration of a child whether girl or boy depends on whether the child is perpetrator or victim of crime, abuse and neglect. Thus, when a minor child whether girl or boy commits obscenity⁵⁶ the authorized court may reprimand him/her in the judicial session or order his surrender to one of his parents or legal guardians or order his quarantine in the correction and rehabilitation center. Article 74 of the Penal Code states:

If a minor child commits obscenity, the court instead of the punishments set forth under this law may reprimands him or her in the judiciary session or order his surrender to one of his parents or someone who has the right of guardianship over him/her or an honest person who undertakes his sound education and activity in the future, or order his quarantine in the Correction and Rehabilitation Center or charity organization and/or corrective schools which shall be established for this purpose by the government.

However, if a girl or boy who is between the age of 7 to 13 years of age commits a crime of misdemeanor⁵⁷, the authorized court may either surrenders him/her to his/her parents or legal guardian or quarantine him/her in the Correction and Rehabilitation Center. Article 75 states:

If the minor commits misdemeanor, the court may take one of the following measures:

- 1. His surrender to one of the persons set forth under article 74 of this law, provided that its duration is not more than three years and less than six months and that the person to whom he or she is surrendered should undertake, in writing, his future sound education;*
- 2. His quarantine in the Corrective and Rehabilitation or one of the Corrective Schools for a period of six months to three years.*

Nonetheless, where a child between the ages of 7 to 13 years of his or her age commits a crime of felony⁵⁸ whose punishment is death or continued imprisonment⁵⁹, the court instead of death or continued imprisonment may order to quarantine him or her in the Corrective and Rehabilitation Center. Article 76 states:

- 1. If the minor commits a felony whose punishment is death or continued imprisonment, the court may order his/her quarantine in the Corrective and*

⁵⁶ **Obscenity:** is a crime whose doer shall be sentenced to imprisonment of 24 hours to three months, or cash fine of up to three thousands Afghani (Article 26 of the 1976 Penal Code of Afghanistan).

⁵⁷ **Misdemeanor:** is a crime whose doer shall be sentenced to imprisonment of more than three months to five years, or cash fine of more than three thousand Afghani (Article 25 of the 1976 Penal Code).

⁵⁸ **Felony:** is a crime whose doer shall be sentenced to death or continued to long imprisonment (Article 23 of the 1976 Penal Code).

⁵⁹ Continued imprisonment is 16 to 20 years of imprisonment (article 99 of Penal Code of Afghanistan)

- Rehabilitation Center House or charity organizations or corrective schools provided that its duration is not more than five years;*
- 2. If the anticipated punishment for the crime of felony is long imprisonment, the period of quarantine may not be less than one and more than five years.*

These are in circumstances where the child is between the ages of 7 to 13 years of his or he age, however, in circumstances where a child is between the age of 13 to 18 (teenager) commits a crime of obscenity the authorized court may surrendered him/her to his/her legal guardian. Article 82 of the Penal Code states:

If a teenager commits obscenity, the court may sentence him/her to the punishment set forth under this law, or order his surrender to one of the parents or legal guardian or someone who has the right of guardianship over him/her or an honest person who undertakes his/her proper behavior in the future.

However, where a teenager commits a crime of misdemeanor, the authorized court may order his/her quarantine in the Corrective and Rehabilitation Center for less than five years. Article 83 of the Penal Code states:

If a teenager commits a crime of misdemeanor, the court may in his case, instead of the anticipated punishments for the said crime, take one of the measures set forth under article 76 of this law.

Where a teenager commits a crime of felony whose punishment is death or continued imprisonment, the court may order his/her quarantine in the Corrective and Rehabilitation Center for two to fifteen years. However, if the punishment of crime committed by teenager is long imprisonment⁶⁰, the maximum period of his/her quarantine in the Correction and Rehabilitation Center can not be less than one year and not more than the half of the maximum period of long imprisonment. However, if the maximum punishment of crime of felony is less than ten years the court can order his/her quarantine in the Corrective and Rehabilitation Center for less than one year or not more than half of the long imprisonment. Article 84 paragraphs 1, 2 & 3 of the Penal Code states:

- 1. If a teenager commits a crime of felony whose punishment is death or continued imprisonment, the court may order his/her quarantine in the Corrective House for a period not less than two and more than one years;*
- 2. If the anticipated punishment for the felony is long imprisonment, the maximum period of his quarantine in the Corrective House shall not be less than one year and its maximum not more than half of the maximum of long imprisonment;*
- 3. If the maximum punishment for the felony is less than ten years, the court may order his/her quarantine in the Correction House for a period of less than one year and more than half of the maximum of the anticipated punishment for that same felony.*

⁶⁰ . Long imprisonment is 5 to 15 years of imprisonment (Article 100 of the 1976 Penal Code).

If the child is victim of crime, abuse or neglect s/he may also be reintegrated to his her family. Article 356 of the Penal Code states:

A person who takes away or hides new-born baby from the persons who have legal rights over him her, or exchanges him or her with another infant, or untruthfully relates him her to someone else rather than his her mother shall be sentenced in the to medium imprisonment.

Article 357 paragraphs 1 & 2 of the Penal Code states:

- 1. A person who has been in charge of the child and after agreement or order of the court does not surrender the child to another person to whom the care of the child has been transferred shall be sentenced to short imprisonment or cash find of not three thousand Afghani and twelve thousand Afghani, even if the persons in charge is one of the parents or grand parents of the child;*
- 2. If one of the parents or grand parents takes back his minor child or grand child-himself or through someone else, from the person to whom the child's care has been delegated by court order, shall be sentenced to the punishment set forth under above paragraph, even if the act is committed without aversion or deceit.*

Physical and psychological recovery and social reintegration under Islamic Law

Islamic Law is silent on taking above measures, however, Islamic Law established the basic criterion of child criminal irresponsibility and the afore-mentioned measures have been established based on the criteria established by Islam.

Physical and psychological recovery and social reintegration in practice

The practice is in concurrence with the law. When a child commits obscenity the authorized court upon reprimand surrenders him/ her to his/her parents or legal guardians. If the child commits misdemeanor the court either quarantine him/her in correction and rehabilitation center or surrenders him to his/ her parents or legal guardians. However, if the child commits crime of felony the authorized court quarantine him/ her in correction and rehabilitation center.

6.3 Economic exploitation and forced child labor (Article 32, UNCRC)

The Constitution and Islamic Law prohibit the forced child labor:

Legal provisions

Under the Constitution forced child labor is forbidden. Article 49 states:

Children shall not be subjected to forced labor.

Religious provision

As mentioned earlier, under Islamic Law parents of a child whether girl or boy are obliged to secure alimony including nutrition, clothing, housing and medical treatment to their children irrespective of whether the children are boy or girl. Thus, under Islamic Law parents in no way can subject their children whether girl or boy to forced labor.

Economic exploitation of children in practice

Though under the Constitution and Islamic Law no one is allowed to subject a child whether girl or boy to forced labor which results in preventing the child's education and inflicting physical and/or mental disease on the child. However, in practice according to the Afghan Independent Human Rights Commission's reports most of children are involved in light, heavy and hazardous work preventing their education and inflicting physically and mentally diseases on them. A large number of children are involved in works in farming requiring great physical effort. The children have to bend down repeatedly and rise and carry heavy loads. They also have to take part in irrigation, canal cleansing encounter with the opium herbs which is threatening for their health. Though farming is an indispensable source of income for the family, it can result in intense physical and medical damages to the children and therefore the children have to suffer from backaches and skin diseases.⁶¹ In addition to child labor in farms, a large number of children are engaged in retailing works on the streets which can subject them to dangers because this category of children have to be out on the streets in different seasons from early morning to late at night. These children are vulnerable to exploitation and sexual abuse, drug addiction and criminal activities. Working on the streets can result in their failure to go to school or failure to get good grades in schools as a result of long working hours.⁶² Furthermore, a large number of children are involved in carpet-weaving which can result due to long hours, low level of light in sight weakness and get affected in respiratory diseases and failure to attend schools.⁶³

6.4 Sexual Exploitation of and sexual abuse (Article 34)

The Penal Code and Islamic Law prohibit sexual abuse and exploitation of children, of both boy and girl:

Legal provisions

⁶¹ . AIHRC, 2006, Research Paper: Situation of Child Labor in Afghanistan, AIHRC, Kabul, p 11.

⁶² . Ibid, pp 11 - 12.

⁶³ . Ibid, p12. Also: SCSN and SCUUK, 2005, Research Paper: A child Rights Based Situation Analysis, Save the Children – Sweden – Norway and Save the Children UK, p 22.

Before explaining sexual exploitation and abuse of children, it is imperative to mention that committing adultery, rape and homosexuality (lawat) are deemed as crimes under the Penal Code of Afghanistan (Article 427, paragraph 1). However, in circumstances where a person commits the crime of rape or lawat with a child whether girl or boy, the crime shall contain aggravating conditions⁶⁴ and shall have severe punishments. Therefore, whenever a person commits the crime of rape and lawat with a child or when the child is a third degree relative of the person, or when adulterer or homosexual is tutor, teacher, servant of the child or has influence over the child, or when adulterer rapes a virgin girl or boy, or when two or more rapists or homosexual assist each other and commit the crime of rape or homosexuality one after another, or when as a result of act of rape or homosexuality the child gets affected by genital disease or pregnancy, the crime shall contain aggravating conditions. Article 427 paragraph 2 of the Penal Code states:

1. Committing the crimes set forth under article 427 paragraph 1 of this law shall have aggravating conditions in the following circumstances:

- a. Where the person against whom the crime has been committed is not yet eighteen years of old;*
- b. Where the person against whom the crime has been committed is a third degree relative of adulterer or pederast;*
- c. Where the offender is a tutor, teacher, or servant of the person against whom the crime has been committed or has, one way or another, authority or influence over him/her;*
- d. Where the person against whom the crime has been committed is a married women;*
- e. Where virginity of the person against whom the crime has been committed has been deflowered due to adultery;*
- f. Where two or more persons have assisted each other in committing the crime or that the offenders have committed the act one after another;*
- g. Where the persons against whom the crime has been committed is affected by genital disease; and*
- h. Where the person against whom the crime has been committed becomes pregnant.*

⁶⁴ . When the motive of a crime is low and/or corrupt or when perpetrator of crime commits the crime in savage manner while realizing the weakness of the sense or inability of another, the crime shall have aggravating conditions. Article 148 of the Penal Code of Afghanistan states:

Without prejudice to the special conditions of aggravation of punishment set forth under this law, general aggravating conditions of crime are:

- 1) When the motive of crime is low and corrupt;
- 2) When the crime takes place in realization of weakness of the senses of the person against whom a felony is committed or his inability to defend him/herself;
- 3) When the crime is committed in savage manner or the person against whom the felony is committed has been disfigured;
- 4) When an official of public services takes advantage of his official prestige and influence and commits a crime;
- 5) When, making use of the state of economic crises, crime is committed.

In such circumstances, the Penal Code entitles the competent court to sentence the perpetrator to severe punishments. Article 49 of the Penal Code states:

Where an aggravating condition of crime is present in the crime rape or lawat, the court may sentence the criminal as follow:

- 1. To death penalty, in case where the anticipated punishment is continued imprisonment;*
- 2. To more than the maximum of punishment, in cases where the anticipated punishment are long imprisonment, medium or short imprisonment, provided that it does not exceed the double of maximum of principal punishment. In any case, the aggravating of long imprisonment can not exceed twenty years.*

Furthermore, in circumstances where the act of rape and/or homosexuality results in death of the child, the perpetrator will be sentenced to long imprisonment or death penalty. Article 428 of the Penal Code states:

Where committing the acts set forth under paragraph 1 article 427 of this law results in the death of the person against whom the crime has been committed, the offender in view of the circumstances shall be sentenced to long imprisonment or death penalty.

Under the Penal Code not only committing rape and homosexuality with a child whether boy or girl but also , instigating the children to delinquency, misbehavior and offence is also recognized as crime and therefore the perpetrator will be sentenced to medium imprisonment⁶⁵. Article 430 paragraphs 1 & 2 of the Penal Code states:

- 1. A person who instigates a male or female not eighteen years old to delinquency or acquire a profession pertaining to delinquency or assists another in this respect, shall be sentenced to medium imprisonment not less than three years;*
- 2. If the person committing the crime is one of the persons set forth under article 427 paragraphs 2 of this law, or the act has been performed for the purpose of acquiring benefits, the offender shall be sentenced to long imprisonment not exceeding ten years.*

Religious provision

Under Islamic Law homosexuality (lawat) and rape not only with children but also with adults is recognized as one of the most heinous crimes⁷⁷. In accordance with the consensus of Islamic Jurisprudents it is deemed unlawful and therefore no one is allowed to commit it.^{7v}

⁶⁵ . Medium imprisonment includes one to five years imprisonment (article 101 of Penal Code of Afghanistan).

⁶⁶ Sabeq, Sayed, Fiqh-ul-Sunnah, p 1176.

⁶⁷ Zoheli, Wahaba, Islamic Fiqh and its rationale, Volume 7, p5393.

The right children to be protected from sexual exploitation in practice

Although under Islamic Law and the 1976 Penal Code of Afghanistan sexual exploitation of children is prohibited. In reality, in Afghanistan, child sexual abuse is known to occur but is hidden because any discussion on matters of sexuality is taboo. There is strong reluctance in all sections of the society to acknowledge and to raise the topic. Some people accept the occurrence of child sexual abuse but often deny that it happens in ‘their’ family or community. Most information on child sexual abuse is being made available through the efforts of AIHRC and the media, is therefore anecdotal but may actually be higher or more rampant than thought to be.

The practice of men using young boys for sexual gratification is well known and talked about. Traditionally, “keeping” good-looking boys adds status and prestige to the man and contributes to his image (self or imposed) of virility. During the war, the commanders serving various warlords or even the Taliban at different levels used to pick up good-looking boys for sexual gratification albeit the practice of boys being made to entertain in parties was hidden. The child soldiers too were sexually abused. As peace returns, slowly and gradually, the incidents of kidnapping and sexual abuse of young boys are being reported with increased frequency by the AIHRC and the media and have been acknowledged by the authorities. The practice of boys being brought to parties for entertainment seems to have been revived. There are reports that it is taking place in some rural areas and in and around some cities. The situation is particularly serious because in many cases armed gunmen are involved and for every reported case, there are likely to be many more unreported cases.

In Afghanistan, people generally speak more openly about male sexual abuse. There is an overall sense that boys are more vulnerable to sexual abuse than girls. This belief is perhaps based on the fact that cases of male sexual abuse are more visible, often taking place in the public sphere, i.e., bus stops, hotels and parties. Many people believed that sexual abuse of girls was less frequent because they are in the “safety” of their homes. While it is difficult to ascertain the claim that girls are less vulnerable than boys to child sexual abuse, it can be stated that these cases are more likely to be hushed up.

The response for sexual abuse of girls differs radically from response to sexual abuse of boys. There is strong evidence to suggest that child sexual abuse is not seen to be violence perpetrated against a child, but primarily as an offence against the honour of the family. It is likely that the girls do not complain or are prohibited from complaining since it’s a matter of family honor.. If it is made public, then the family is likely to take action because high value is placed on the virginity of a girl and reflects upon the honour of the family. It could mean that the girl who has been abused could be married off to her perpetrator or the girl could be killed to regain the ‘honor’ of the family

However, the commodification of females results in the male members offering their girls in compensation for money, usually in cases where the family is unable to repay loans. Rural impoverishment and growth of the poppy economy are believed to have further

contributed to the marriage of underage girls and polygamy. However, this trend needs to be explored and investigated further.⁶⁸

6. 5 Right of children of minorities to use their own language and culture (Article30)

Under the Constitution of Islamic Republic of Afghanistan children of minorities including girl and boy enjoy the right to use their language and culture.

Legal provisions

Afghanistan is a multi-cultural and multi-lingual country. Thus, distinct languages and cultures are practiced here. However, under the Constitution, Dari and Pashto are official languages of the State. Article 16 of the Constitution states:

From among the languages of Pashtu, Dari, Uzbeki, Turkmani, Baluchi, Pashai, Nuristani, Pamiri and other languages spoken in the country, Pashtu and Dari are the official languages of the state...

Though Dari and Pashto are recognized as official languages of the state, in areas where majority of people speak one of the languages of Uzbeki, Turkmani, Baluchi, Pashai, Nuristani and Pamiri, the language spoken in that area is recognized as the third official language of the country. Article 16 of the Constitution further states:

... in areas where the majority of people speak one of the Uzbeki, Turkmani, Baluchi, Pashai, Nuristani and Pamiri languages, that language shall be recognized as third official language in addition to Pashto and Dari, the modality of its implementation shall be regulated by law...

Besides the spoken language, under the Constitution publications and mass media are also allowed to be practiced in all language spoken in the country. Article 16 of the Constitution states:

...The state adopts and implements effective plans for strengthening and developing all languages of Afghanistan. Publications and mass media are allowed in all languages spoken in the country...

The Constitution also places the responsibility on the government to provide the opportunity for minority to study their native language. Article 43 of the Constitution states:

...the state is also obliged to provide the opportunity to teach native languages in the areas where they are spoken.

⁶⁸ SCSN and SCUK, 2005, Research Paper: A child Rights Based Situation Analysis, Save the Children – Sweden – Norway and Save the Children UK., pp 45- 48.

The right of children of minorities to use their language and culture in practice

The right of children of minorities to use their language and culture is widely and efficiently respected and practiced in Afghanistan. The children of minorities freely practice their culture and speak their native language in the areas where the native language is spoken. They also speak in native language in the areas where that native language is not spoken. They not only speak, but also study in their native language. Material books have also been published in the minority's native languages. As a result, the children of minorities practice their culture, speak and study in their language. In addition to practicing culture, studying and speaking in their native language they also have Medias and publications in their language.

7. Legislative gaps and recommendations

As briefly stated above, all the provisions and principles, except adoption and freedom of religion set forth under the United Nation Convention on the Rights of Children have also been set forth under the Afghanistan legislations. Thus, there is no legislative gap(s) under the Afghanistan legislations.

However, in Afghanistan which is a post - conflict country the existence of laws is not a challenge. The real challenge is the existence of rule of law. Although under the current Afghan legislations children irrespective of their parent's or legal guardian's background, sex or place of birth or other status have access and enjoy all rights as outlined under the UNCRC, in reality some of these rights of children are not fully and extensively implemented.

As stated earlier, the main reasons behind the non-implementation of these principles beside others includes customs and tradition, poverty, patriarchal society, illiteracy conservative, two decades of wars, exercise of customary practices contrary to Islam, inability of law enforcement agencies, lake of public awareness on gender equality and children rights, misinterpretation of Islamic Law by stakeholders and the community.

To make sure these principles are entirely implemented the followings recommendations are, therefore, suggested:

Policy and law making:

1. The customs and traditions contrary to Islam briefly mentioned above are being exercised whereas the constitution (article 54) places the responsibility on the government to eliminate the customs and traditions contrary to Islam. It is, therefore, strongly recommended to work with and encourage policy and law makers, particularly the Ministry of Justice and Parliament(Women and Children Affairs Commission) to incorporate these customary practices in their policies and find solutions for them.

Advocacy and lobbying:

8. As for as no or very little research has been conducted in regard to children and women rights, gender equality and non-discrimination in Afghanistan, conduct desk research under Islamic Law and Afghan legislations on children and women rights, gender equality, non- discrimination and gender participation in addition to fact finding qualitative and quantitative research which should be systematically documented and made widely available to all;
9. Translate the findings into local languages and widely disseminate the findings at all levels, including children, parents, community, tribal and religious leaders, law enforcement agencies dealing with children, primary and secondary teachers, and the judiciary;
10. Convene conferences and workshops on children and women rights, gender equality, non- discrimination, girl and women participation, elimination of customary practices contradicting Islam. Invite not only officers from like-minded organizations but also from relevant law enforcement agencies dealing with children, in particular, the staffs from the children correction and rehabilitation center and debate on rights of children to gender equality and non- discrimination and so forth and raise public awareness on the subject matter;
11. Launch public awareness activities, especially on child rights, gender equality, non- discrimination, elimination of customs and traditions contrary to Islam which should include parents, teachers, religious leaders and the community;
12. Network and build alliance with like-minded organizations working with children rights to advocate and raise public awareness on children rights and eliminate customary practices which are in contradiction with Islam;
13. Wide dissemination of Islamic Sharia relevant to children's rights translated into local languages and authenticated by prominent religious leaders. and
14. Compile and widely translate and disseminate a booklet of these hadiths at all level.

Media:

3. Use various forms of media by utilization provisions set forth under Islamic Law , UNCRC and Afghanistan legislations on children and women rights to raise public awareness awareness on children rights, gender equality and non-discrimination; and
4. Work with and encourage all forms of media to invite the child and women right's expert and debate, especially on round tables on children and women rights to raise public awareness.

Capacity Building:

4. Build capacity of children, parents and community, tribal and other key religious leaders on gender equality, women rights and non- discrimination;

5. Train and build capacity of officers and staffs working in relevant law enforcement agencies dealing with children rights, particularly, officers from children correction and rehabilitation center; and
6. Provide professional and material support to law enforcement agencies dealing with children, in particular, to the children correction and rehabilitation center. For instance, professional doctors, medicines, professional teachers, teaching material, parks, sports play ground, sleeping places etc.

Education

3. Make sure that debate and study on children rights is not limited to law school and the relevant courts. Work with and encourage the relevant responsible body in Ministry of Education to include the children rights in school curricula with reference to Islamic Law and Afghanistan legislations; and
4. Introduce hadiths that talk about women and children and education etc to schools.

8. CONCLUSION

As the paper has reflected upon above, except for adoption and freedom to choose ones religions, there are no contradictions between the UNCRC and Islamic teachings. They are in concurrence with each other.. Almost all the provisions set forth under the Convention on the Rights of Children are consistent from one hand with the Afghan legislations and on the other hand with Islamic Law. Therefore, under the UNCRC, Islamic Law and Afghan legislations children without discrimination of any kind including gender and disability and other backgrounds or status enjoy the right to have all the rights as outlined under the UNCRC.

The UN Convention on the Rights of Children, Islamic Law and Afghan legislations place the responsibility on parents and legal guardians' of the child to guide and take care of the child. Furthermore, they all entitle children to live with their parents in family environment and in case separation and or divorce take place between the parents, the UNCRC, Afghan legislations and Islamic Law place the responsibility on both parents depending on the best interest of the child to take the child whether boy or girl under custody.

The UNCRC, Islamic Law and the Afghan legislations prohibit physical and psychological neglect of children whether girl or boy. Moreover, under the UNCRC, Islamic Law and Afghan legislations infanticide of children whether girl or boy is prohibited. Under the UNCRC, Islamic Law and current Afghan legislations children including girl and boy are entitled to enjoy the right to survival and development.

Under the UNCRC, Afghan legislations and Islamic Law, children including girl and boy are entitled to health care services. Therefore, the UNCRC, Islamic Law and Afghan legislations place the responsibility on government, parents and legal guardian's of the child to provide health care services and treatment to the children.

Under the UNCRC, Islamic Law and the Afghan legislations education is recognized as the right of all children including girl and boy.

The UNCRC and Islamic Law give special weight to leisure, recreation and rest of children and therefore entitle the children irrespective of their sex to play, leisure and rest.

Under the UNCRC, Islamic Law and Afghan legislations sentencing juveniles to capital punishments is prohibited. The UNCRC, Afghan legislation and Islamic Law prohibit economic and sexual exploitation, including the forced child labor, sale and trafficking of children.

Under the UNCRC parents of child and under Islamic Law and Afghan legislations father of child are obliged to secure maintenance consisting of nutrition, clothes, housing and living standard to their child whether girl or boy.

However, customarily some of these provisions and principles are not being implemented at all or are being implemented discriminatorily between girls and boys. As a result of customs and traditions early marriages, forced marriages, deprivation of girls and women from education and work, giving the girls as “ bad”, deprivation of girls from inheritance right, family violence against women and children, deprivation of widowers from remarriage, discrimination against women and girls based on their age and sex, seclusion and marginalization of girls and women from society, deprivation of the women and girls from participating in political matters and family decision making processes, giving in marriage the under age girls to old men (for instance the marriage of under age girl to 45- year- old man), exchange of girls with animals, opium and loan, receiving money vis-à-vis girls when they are given in marriage, forced child labor, sexual exploitation of boys, right to identity are not broadly and equally implemented.

Bibliography

1. Zoheli, Wahaba, Islamic Fiqh and its rationale, Pakistan, Kowata. Year(does not have year)?
2. Mohammad Ghazali, Women Issues Between Old and Contemporary Traditions, Trans. Majeed Ahmadi (Iran: Tehran, 1381[2002]).
3. Zoheli, Wahaba, Family Fiqh in Contemporary World. Trans, Abdul Aziz Salemi (Iran: Tehran, 1382[2003]).
4. Sabeq, Sayed, Fiqh-ul-Sunnah. Trans, Mahmmod Abdrahemi (Iran: Kordastan, 1371).
5. ¹ Mogqhniyah, Mohammad Jowad, Personal Status, trans, Dr. Mostafa Jabari and Ameer Mosjadi Sarai, Tehran Qafqos publication, 1379[2005].
6. Wazeeri, Majeed, Rights and obligation of child and guardian in Islam, Tehran, Ameer Kabeer publication, 1384[2005].
7. Abdul-ul-Rehman Jazayari, Fiqh in Four School of Thought, Pakistan.(does not have year)
8. Ghanoshe, Rashed, General Freedoms in Islamic Government, Trans. Hosien Saberi(Iran: Tehran, 1381[2002]).
9. Qarzawi, Yousef, Lawful and Unlawful in Islam. Trans, Abu Baker Hassan Zada(Pakistan: Peshawer Katab Press, 1377[1998]).
10. Zaidan, Abdul Kareem, Rights of Individual and Government in Islam, Trans, Nahmatullah Sherani(Kabul: Engineer Abib- ul- Rehman press, 1363[1984]).
11. Faqi Rasool, Jamal Mohammad, Women in Islamic thought. Trans, Mahmood Abrahemi (Iran: Tehran 1382).
12. SCSN and SCUK, 2005, *Research Paper: A child Rights Based Situation Analysis*, Save the Children - Sweden - Norway and Save the Children UK: Kabul.
13. WCLRF, 1383[2004]: (ARE YOU SURE THE DATES ARE CORRECT? IF THEY ARE IN AFGHAN YEAR, THAN PLEASE TRANSLATE AND PUT IN GREGARION YEAR) *Research Paper: Bad harmful calmative, Women and Children Legal Research Foundation*, Kabul.
14. WCLRF, 1384[2005]YEAR? *Report on Conference on Effects of Customary Practices on Afghan Women*, *Women and Children Legal Research Foundation*, Kabul.
15. IHRCA, 2006, *Research Paper: Evaluation of General Situation of Women in Afghanistan*. <http://www.aihrc.org.af/>
16. IHRCA, 2003, CHECK YEAR *Research Paper: Education of Children Rights*, Independent Human Rights Commission of Afghanistan: Kabul.
17. UNICEF, April 1987, *Child Care in Islam 1405(H) - 1985(A.D)*, UNICEF, Mogadiscio, Somali.
18. AIHRC, 2006, *Research Paper: Situation of Child Labor in Afghanistan*, AIHRC, Kabul..