



Legislative, institutional and policy reforms to combat violence against women in Afghanistan

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Abstract Since the fall of Taliban regime in 2001, the government of Afghanistan, in a bid to promote human rights and specifically women’s rights, made several legislative and institutional advances. These included the establishment of the Afghanistan Independent Human Rights Commission (AIHRC) as a national human rights institution, Ministry of Women’s Affairs, Departments of Women’s Affairs and Gender, Human Rights Units in various ministries and the passing of the Law on Elimination of Violence against Women (EVAW Law) through a Presidential Decree in 2009. Afghanistan is a signatory to several international human rights instruments, including the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). International treaties and Conventions to which Afghanistan is a signatory forbid all types of discrimination against girls and women and oblige Afghanistan to eliminate all types of discrimination, violence and other possible detrimental practices against women. This paper aims to critically analyse the international obligations of Afghanistan concerning violence against women and the necessary legal and institutional amendments for providing better protection for such victims. This paper has pursued a reformist agenda to eliminate violence against women, which is largely caused by weaknesses in Afghanistan’s legal, institutional and policy frameworks regarding women. The existing legal environment in Afghanistan comprises three incoherent sources of law—State legal code, customary practices and Islamic *sharia* law. Adopting and implementing the recommendations are likely to contribute significantly to the emancipation of women in Afghanistan. Thus, as part of the reformist

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agenda adopted by this paper, violence against women warrants urgent legal, institutional and policy reforms.

Keywords Violence against Women · International Law · Due Diligence Standard · State Obligation · Legislative · Institutional and Policy Reforms · Afghanistan

1 Introduction

Since the fall of Taliban regime in 2001, the government of Afghanistan, in a bid to promote human rights and specifically women's rights, made several legislative and institutional advances. These included the establishment of the Afghanistan Independent Human Rights Commission (AIHRC) as a national human rights institution, Ministry of Women's Affairs, Departments of Women's Affairs and Gender, Human Rights Units in various ministries and the passing of the Law on Elimination of Violence against Women (EVAW Law) through a Presidential Decree in 2009.¹

These national legislative and institutional plans have proved to be ineffective in addressing the issue of violence against women (VAW) in Afghanistan. According to World Health Organisation (WHO), 'almost 90% of women in Afghanistan have experienced at least one form of domestic violence, 17% have experienced sexual violence and 52% have experienced physical violence'.² The high prevalence of VAW in Afghanistan can attributed to legal and institutional challenges and ambiguities created by the State and is deeply rooted in Afghanistan's weak, confusing and contradictory regulatory frameworks towards women.

The high incidence of VAW in Afghanistan demonstrates the inadequacy of the measures taken by the Afghan government. This is reinforced by the observations and recommendations made by the Committee on Elimination of Violence against Women (CEDAW Committee) following the 2013 Afghanistan's second periodic report. The Committee urged Afghanistan 'to establish measures, as a priority, to effectively combat impunity and comply with its due diligence

¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, on Her Mission to Afghanistan (4–12 November 2014)*, UN Doc A/HRC/29/27/Add.3 (12 May 2015) 10.

² World Health Organization, *Addressing Violence against Women in Afghanistan: The Health System Response* (World Health Organization, 2015) 1.

obligation to prevent, investigate, prosecute and punish violence perpetrated against women by State and non-State actors'.³

The pervasiveness of VAW in Afghanistan can also be attributed to the judicial attitude towards VAW cases. Women victim of violence lack access to justice and majority of the VAW cases are either resolved through mediation or informal dispute resolution mechanisms such as *jirga*⁴ and *shura*⁵. Due to the absence of exact data, it is challenging to determine the percentage of VAW cases that are resolved by these informal institutions. Nevertheless, it is purported that 80 per cent of disputes are resolved through *jirga* in Afghanistan.⁶ CEDAW Committee expressed serious concerns over the handling of VAW cases by these informal institutions⁷, calling it discriminatory as it weakens the enforcement of the current legislations concerning VAW. This was followed by recommending Afghanistan to define the correlation between formal and informal dispute resolution mechanisms and ensuring that the latter conform to all the national laws including EAW, and preventing such informal institutions to handle serious human rights abuses.⁸

While there is an increase in reporting of VAW cases in Afghanistan which is attributed to women's better understanding of their rights, numerous cases of VAW remain unregistered and convictions are a rarity. The formal justice system remains unsupportive of women's rights and is dysfunctional in handling of VAW cases. Moreover, EAW continues to be sporadically executed due to its ambiguous status and judicial attitude towards this law.⁹ Women have also no access to key

³ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined initial and second periodic reports of Afghanistan*, CEDAW/C/AFG/CO/1-2 (13 July 2013) para. 23 (a).

⁴ For more information about *jirga*, see Ali Wardak, *Jirga-A Traditional Mechanism of Conflict Resolution in Afghanistan* (UK: University of Glamorgan, 2003); Rai Singh, 'Emergency Loya Jirga Shapes Afghanistan's Future' (2002) 58(2) *India Quarterly* 173; Farid Maiwandi, 'An Introduction into the History and Institution of Afghan Traditional Loya Jirga' [2002] *Online Center for Aghan Studies*, www.afghan_politics.org; Hassan M Yousufzai and Ali Gohar, *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding [Ie Peace-Building] and More-* (Sang-e-Meel Publications, 2012).

⁵ For more information about *shura*, see Ahmad Al-Raysuni, *Al-Shura: The Qur'anic Principle of Consultation* (International Institute of Islamic Thought (IIIT), 2013) 1; Ahmad S Moussalli, 'Hasan Al-Turabi's Islamist Discourse on Democracy and Shura' (1994) 30(1) *Middle Eastern Studies* 52; Mishal Fahm Al-Sulami, *The West and Islam: Western Liberal Democracy versus the System of Shura* (Routledge, 2004).

⁶ H Saboory and N Yassari, 'Family Structures and Family Law in Afghanistan—A Report of the Fact-Finding Mission to Afghanistan January-March 2005' (Hamburg, 2005).

⁷ CEDAW Committee (n 3) para. 23 (a).

⁸ *Ibid* para. 14-15(c).

⁹ Louise Arbour, 'Fighting For Women's Rights in Afghanistan', *International Crisis Group* (2013) <<https://www.crisisgroup.org/asia/south-asia/afghanistan/fighting-women-s-rights-afghanistan>>.

leadership roles and decision-making processes, specifically those that affect women's rights.¹⁰

Afghanistan has a long history of civil war and devastation; hence, academic writings on topics related to Afghanistan, especially for controversial and complex topics such as the elimination of VAW are limited. This pervasive culture has continued unabated in the absence of formidable State interventions, strict law enforcement and institutional reforms, which constitute the subject matter of this article. The lack of research and scholarly writings also illustrates the limited attention that has been given to this area. The existing literature on VAW is mainly limited to reports provided by international organisations in Afghanistan.

This article aims to fill the gap in the existing literature by addressing Afghanistan's responsibility to eliminate VAW and evaluate the contradictory legal, institutional and policy frameworks that have contributed to the rise of VAW. This research also contributes to exposing the root causes of the women's inferiority in Afghan society, which has received sporadic scholarly attention. Hence, there is a dire need to address the factors that have given rise to VAW in Afghanistan and the necessary legal and institutional amendments for providing better protection for women against violence. As part of the reformist agenda adopted by this paper, VAW warrants urgent legal, institutional and policy reforms.

2 Afghanistan's international obligations concerning violence against women

Under international law, it is a long established international principle that State responsibility is invoked when a State fails to act with due diligence in response to or prevention of acts or omissions of non-State actors.¹¹ These principles were articulated in the 17th century by Grotius, who held rulers responsible for crimes that could have been prevented by the State.¹² Moreover, in the early 20th century, Oppenheim advanced the theory of vicarious State liability, which holds a State responsible for an individual's conduct if it fails to

¹⁰ Sima Samar, 'Feminism, Peace, and Afghanistan' (2019) 72(2) *Journal of International Affairs* 145.

¹¹ Amos Shartle Hershey, *The Essentials of International Public Law* (Macmillan, 1915) 161–162.

¹² Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres: In Quibus Jus Naturae & Gentium, Item Juris Publici Praecipua Explicantur* (ex officina Wetsteniana, 1720).

renounce or condemn it.¹³ Triepel argued that a State should be held responsible for its failure to act with due diligence, when required.¹⁴

VAW is widely recognised in the literature as a fundamental human rights violation.¹⁵ Despite acknowledging the challenges, increasing international recognition of VAW has created opportunities for its elimination.¹⁶ The scope of domestic violence is not just limited to physical and sexual abuse, but also encompasses economic and emotional aspects.¹⁷ Thus, as an urgent human rights issue, VAW is currently at the forefront of international development and demands both national and international action.¹⁸

Special rapporteurs on VAW have repeatedly addressed the topic of State responsibility. In 2006, Special Rapporteur Ertürk recommended concrete actions constituting 'reasonable steps' towards the prevention and protection of women from violence, the punishment of perpetrators and the compensation of victims.¹⁹ Additionally, in preparation for her thematic report, Special Rapporteur Manjoo provided guidelines on the issue of due diligence standards for VAW.²⁰

¹³ L Oppenheim, *International Law*, 1912' vol. I, 189.

¹⁴ Heinrich Triepel, *Droit International et Droit Interne*, vol 2 (A I, 1920).

¹⁵ United Nations General Assembly (UNGA), *Accelerating Progress towards the Millennium Development Goals: Options for Sustained and Inclusive Growth and Issues for Advancing the United Nations Development Agenda beyond 2015*, 67th sess, UN Doc A/67/257 (6 August 2012); Julie Stone Peters and Andrea Wolper, *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, 2018); Emma Fulu et al, *Why Do Some Men Use Violence Against Women and How Can We Prevent It?: Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (UNDP, UNFPA, UN Women and UNV Bangkok, September 2013); Elisabeth Friedman, 'Women's Human Rights: The Emergence of a Movement' in *Women's Rights, Human Rights* (Routledge, 2018) 18; Diana J Arango et al, 'Interventions to Prevent or Reduce Violence against Women and Girls: A Systematic Review of Reviews' [2014] *World Bank, Washington, DC* <<https://openknowledge.worldbank.org/handle/10986/21035>>.

¹⁶ Claudia García-Moreno et al, 'Addressing Violence against Women: A Call to Action' (2015) 385(9978) *The Lancet* 1685.

¹⁷ Cigdem Kaya, 'State Responsibility Regarding Domestic Violence against Women with a Focus on Turkey' (Master Thesis, Lund University, 2009).

¹⁸ Gita Sen and Avanti Mukherjee, 'No Empowerment without Rights, No Rights without Politics: Gender-Equality, MDGs and the Post-2015 Development Agenda' (2014) 15(2–3) *Journal of Human Development and Capabilities* 188; Andrea Cornwall and Althea-Maria Rivas, 'From "Gender Equality and Women's Empowerment" to Global Justice: Reclaiming a Transformative Agenda for Gender and Development' (2015) 36(2) *Third World Quarterly* 396; Shahra Razavi, 'The 2030 Agenda: Challenges of Implementation to Attain Gender Equality and Women's Rights' (2016) 24(1) *Gender & Development* 25; Zoe Pflaeger Young, 'Gender and Development' in *Handbook on Gender in World Politics* (Edward Elgar Publishing, 2016); Elaine Unterhalter and Amy North, 'Girls' Schooling, Gender Equity, and the Global Education and Development Agenda: Conceptual Disconnections, Political Struggles, and the Difficulties of Practice' (2011) *Feminist Formations* 1.

¹⁹ Yakın Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women. Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN Doc E/CN.61 (26 January 2006).

²⁰ Rashida Manjoo, *Summary Paper: The Due Diligence Standard for Violence against Women* (Web Page, 2011)

<<http://www2.ohchr.org/english/issues/women/rapporteur/docs/SummaryPaperDueDiligence.doc>>.

Due diligence serves as a tool in determining to what extent States have met or failed to fulfil their international obligations to combat VAW.²¹ Bourke-Martignoni believes that the due diligence standard lack precisions and is not considered the most effective standard by which to combat gender-based violence.²² However, Boerefijn and Naezer argue that the existence of the due diligence principle has been helpful in assessing the extent of State responsibility.²³ Abi-Mershed is of the same view, arguing that it has been proven that due diligence is crucial in delineating the circumstances under which a State may be obligated to prevent or respond to acts or omissions by private actors.²⁴

Afghanistan is party to several international human rights instruments.²⁵ International treaties and Conventions to which Afghanistan is a signatory forbid all types of discrimination against girls and women. Pursuant to its treaty obligation, Afghanistan is obliged to guarantee that women obtain legal protection and are not discriminated against under the law. Article 7 of the *Constitution of Afghanistan* acknowledges the duty to adhere to international treaty obligations.²⁶

Afghanistan has ratified the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)²⁷ without reservation, becoming the first Muslim country to ratify this *Convention* without any reservations. This is considered a major step for Afghan women. Hence,

²¹ Yahn Ertürk, 'The Due Diligence Standard: What Does It Entail for Womens Rights?' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill Nijhoff, 2009) 25.

²² Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill, 2008) 47. It is asserted that international obligations have already laid down what States need to do in combating and eliminating violence, which are clear and precise.

²³ Elizabeth Boerefijn and Eva Naezer, 'Emerging Human Rights Obligations for Non-State Actors' in *Due Diligence and Its Application to Protect Women from Violence* (Brill Nijhoff, 2009) 91.

²⁴ Elizabeth AH Abi-Mershed, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System' in *Due Diligence and Its Application to Protect Women from Violence* (Brill Nijhoff, 2009) 127.

²⁵ Including the *International Covenant on Civil and Political Rights* (ICCPR) (Afghanistan ratified on 24 January 1983 without any reservations); *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (Afghanistan ratified on 24 January 1983 with reservations to Article 26); *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (Afghanistan signed on 14 August 1980 and ratified on 5 March 2003); *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) (Afghanistan signed on 4 February 1985 January and ratified on 1 April 1987 with reservations to Article 20 and 30); and *Convention on the Rights of the Child and its Optional Protocols on the Sale of Children, Child Prostitution, and Child Pornography and Involvement of Children in Armed Conflict* (Afghanistan ratified on 27 April 1994). Office of the United Nations High Commissioner for Human Rights, *Ratification Status for Afghanistan* (Web Page, 2019) <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN>.

²⁶ *Qanun Asasi Afghanistan* [The Constitution of Afghanistan] art 7.

²⁷ *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 (entered into force 3 September 1981).

by ratifying CEDAW, Afghanistan has committed itself to meeting the *Convention's* objectives. This includes incorporating in its legal system the principles of equality between men and women, eliminating and replacing all discriminatory laws, forming public institutions and tribunals to protect women against discrimination and abolishing all discriminatory acts against women by 'persons, organizations, and enterprises'.²⁸ This resulted in drafting of the 2004 *Afghanistan Constitution* that relatively protect women's rights.²⁹

Moreover, Articles 2(c), 3, 5(a) and 15 of CEDAW refer to access to justice. Article 5(a) requires the removal of social norms that delay women's ability to assert their rights. Articles 15–17 provide obligations to ensure women's equality under the law, stop all forms of discrimination against women based on socioeconomic status or education and ensure equality of women's rights in family life. Moreover, the *Convention* states that the marriage of a child renders the marriage null.³⁰

Article 2 of CEDAW is vital since it provides the proper guidelines and measures to abolish discrimination against women. It includes:

- a) Embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- b) Adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- c) Establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- d) Refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- e) Take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

²⁸ Cheshmak Farhoumand-Sims, 'CEDAW and Afghanistan' (2009) 11(1) *Journal of International Women's Studies* 136, 142.

²⁹ Michael Schoiswohl, 'The New Afghanistan Constitution and International Law: A Love-Hate Affair' (2006) 4 *Int'l J. Const. L.* 664.

³⁰ CEDAW (n 27) art 16 (2).

- f) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- g) Repeal all national penal provisions which constitute discrimination against women.³¹

Furthermore, according to Articles 9, 10 and 14 of *International Covenant on Civil and Political Rights* (ICCPR), Afghanistan's international legal obligations include the right of all humans to a just trial and equal treatment under the law.³² Fair treatment is a fundamental principle of international law and should be interpreted as legal protection for defendants as well as for survivors and victims under the justice system. Thus, women should be treated with respect and given protection before, during and after the legal process.

Besides, as a signatory to *International Covenant on Economic, Social and Cultural Rights* (ICESCR), it obliges the government of Afghanistan to prohibit discrimination based on sex (art 2), and warrants that all rights are enjoyed by men and women equally.³³

Additionally, State responsibility might be invoked under human rights law once the measures taken by a State in preventing or addressing the crime of VAW is not reasonable and/or adequate. This is achieved through incorporating the concept of due diligence under human rights law³⁴ that constitutes a 'yardstick' to determine the adequacy or reasonability of States' measures to fight VAW.³⁵ Two fundamental developments solidified due diligence standard: The adoption of 1993 *Declaration on the Elimination of Violence Against Women* (DEVAW) by the United Nations General Assembly (UNGA) and the nomination of a Special Rapporteur on VAW.³⁶ DEVAW in Article 4(c) urges the States to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW,

³¹ Ibid art 2.

³² *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) arts 9, 10, and 14.

³³ *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entered into force 3 January 1976), arts 7 and 3.

³⁴ Ertürk (n 21) 13.

³⁵ Bourke-Martignoni (n 22) 47.

³⁶ Amy J Sennett, 'Lenahan (Gonzalez) v. United States of America: Defining Due Diligence' (2012) 53 *Harv. Int'l LJ* 537, 543.

whether those acts are perpetrated by the State or by private persons'.³⁷

Hence, through the due diligence norms, States including Afghanistan are required to provide access to justice and address the immediate needs of violence victims. This includes providing health care and support services. Similarly, it must be ensured that no further harms occur. This can materialise through the establishment of proper legislative frameworks, judicial systems and policing systems that offers a safe environment for female victims. Moreover, States must ensure that shelters and physical and psychological health services are accessible to violence victims.³⁸

Despite these obligations, the rise in VAW in Afghanistan and the State's inaction concerning such violence at all stages—prevention, investigation, prosecution and compensation—is manifest. The CEDAW Committee³⁹, the Committee against Torture⁴⁰, United Nations Assistance Mission to Afghanistan (UNAMA)⁴¹ and the Special Rapporteur⁴² following her field visit to Afghanistan have all acknowledged the normalisation of VAW and the seriousness of the situation of Afghan women and have urged Afghanistan to comply with due diligence standards.

3 Violence against women in Afghanistan

In the United Nations Development Programme (UNDP) 2018 Gender Inequality Index, Afghanistan globally was among the lowest ranking countries (168 out of 189).⁴³ VAW is prevalent, in which the number of

³⁷ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), art 4 (c) <www.unhcr.org/refworld/docid/3b00f25d2c.html>.

³⁸ UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 29th sess, UN Doc A/HRC/29/27/Add.3 (12 May 2015) 82.

³⁹ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined initial and second periodic reports of Afghanistan*, CEDAW/C/AFG/CO/1-2 (13 July 2013) para. 23 (a).

⁴⁰ Committee against Torture, *Concluding Observations on the Second Periodic Report of Afghanistan*, CAT/C/AFG/CO/2 (12 June 2017) para. 35 and 36; Committee against Torture, 'Consideration of reports submitted by States parties under article 19 of the Convention (continued), Second periodic report of Afghanistan', (27 April 2017) para. 44.

⁴¹ United Nations Assistance Mission in Afghanistan (UNAMA) and United Nations Office of the High Commissioner for Human Rights (OHCHR), *Injustice and Impunity Mediation of Criminal Offences of Violence against Women* (Report, May 2018)

<https://unama.unmissions.org/sites/default/files/unama_ohchr_evaw_report_2018_injustice_and_impunity_29_may_2018.pdf>.

⁴² Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 1) 7–8.

⁴³ United Nations Development Programme, *Human Development Reports* (Report, 2018) <<http://hdr.undp.org/en/composite/GII>>.

girls attending schools is less than half that of Afghan boys. Amnesty International stated that gender-based violence against women and girls continue by both State and non-State actors.⁴⁴

The rise in VAW is particularly evident in locations controlled by the Taliban. Annually, the AIHRC reports thousands of cases of VAW in Afghanistan, including killings, acid attacks and beatings. Cases of VAW continue to be vastly under-reported, largely because of stigmatisation, traditional practices and fear of retribution and punishment for victims.⁴⁵

To date, Afghanistan's regulatory, institutional and policy frameworks have failed to eliminate or even reduce VAW. Constitutional contradictions and ambiguities have created confusion regarding where the *Constitution* stands on the issue of combating VAW. Access to justice for women and girls, whether this be through formal or informal dispute resolution mechanisms, is a cause of deep concern in Afghanistan. Inaccessibility to the formal justice system along with corruption, lack of support and untrustworthiness with respect to women's rights is worrying. In addition to these issues, societal pressures to deal privately with VAW results in victims being forced to choose informal justice systems such as *jirgas* and *shura* to resolve disputes. These methods are criticised for failing to uphold women's rights or provide fair trials and non-discrimination by investigators.⁴⁶ In addition, after reviewing 237 cases of VAW (including violence against girls), UN researchers concluded that authorities frequently directed victims away or pressured them to consent to mediation. These means, which are utilised even when women and girls are the victims of crimes such as forced prostitution, acid attacks and rape, are in direct contravention of EVAW law.⁴⁷

From its initial stages, the EVAW law has been vehemently opposed by conservative parliamentarians. Hence, to circumvent parliamentary procedure, the EVAW law was adopted by a Presidential Decree,

⁴⁴ Amnesty International, *Afghanistan 2017/2018* (Report, 2018) <<https://www.amnesty.org/en/countries/asia-and-the-pacific/afghanistan/report-afghanistan/>>.

⁴⁵ Ibid.

⁴⁶ Office of the United Nations High Commissioner for Human Rights, *Statement by the Special Rapporteur on Violence against Women Finalizes Country Mission to Afghanistan and Calls for Sustainable Measures to Address the Causes and Consequences of Violence against Women, Including at the Individual, Institutional and Structural Level* (Report, 2014) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15284&LangID=E>>.

⁴⁷ Heather Barr, *Afghan Government Ignoring Violence Against Women* (Web Page, May 2018) Human Rights Watch <<https://www.hrw.org/news/2018/05/30/afghan-government-ignoring-violence-against-women>>.

violating Article 79 of the *Constitution of Afghanistan*.⁴⁸ In May 2013, the Afghan Parliament declined approval of the law, which has been abandoned ever since.

The UN Assistance Mission in Afghanistan (UNAMA)⁴⁹ acknowledges that the implementation of national legislation aimed at eradicating VAW remains a challenge. Access to justice for women is restricted, and women continue to face discrimination before the law. Meanwhile, the continued inability of State officials to perform due diligence in investigating, prosecuting and punishing perpetrators or provide compensation to survivors is attributed to the current high rates of impunity and normalisation of VAW in Afghan society.⁵⁰

Moreover, when considering the issues embedded in Afghan society, including insecurity, violence, religious fundamentalism and corruption, the effect of customary law is often neglected. Three principal legal references exist in Afghanistan—*sharia*⁵¹, constitutional law and customary law.⁵² However, legal pluralism is absent, and *sharia* and customary laws often prevail because of the special positions they hold in Afghan society.⁵³ Additionally, customary laws are different to Islamic *sharia* law, leading to clashes. There are substantial misunderstandings among the *ulama* about the interpretation of Islamic laws specifically pertaining to women's rights.⁵⁴

In light of the aforementioned matters, this paper aims to demonstrate that the Afghan government has sanctioned the surge in VAW

⁴⁸ Article 79 of *The Afghanistan Constitution* states 'During the recess of the House of Representatives, the Government shall, in case of an immediate need, issue legislative decrees, except in matters related to budget and financial affairs. Legislative decrees, after endorsement by the President, shall acquire the force of law. **Legislative decrees shall be presented to the National Assembly within thirty days of convening its first session, and if rejected by the National Assembly, they become void**'.

⁴⁹ United Nations Assistance Mission in Afghanistan (UNAMA) is a 'political mission that provides political good offices in Afghanistan; works with and supports the government; supports the process of peace and reconciliation; monitors and promotes human rights and the protection of civilians in armed conflict; promotes good governance; and encourages regional cooperation'. UNAMA, 'Mandate' <<https://unama.unmissions.org/mandate>>.

⁵⁰ United Nations Assistance Mission in Afghanistan (UNAMA) (n 41).

⁵¹ Sharia literally means path. Generally see Jasser Auda, *Maqasid Al-Shariah: A Beginner's Guide* (International Institute of Islamic Thought (IIIT), 2008) vol 14; Toni Johnson and Lauren Vriens, 'Islam: Governing under sharia' (2014) 25 *Council on Foreign Relations*; John L Esposito and Natana J DeLong-Bas, *Shariah: What Everyone Needs to Know* (Oxford University Press, 2018).

⁵² Carol Mann, 'Afghanistan The Law's the Problem in Afghanistan', *The Guardian* (27 December 2009) <<https://www.theguardian.com/commentisfree/2009/dec/26/afghanistan-women-customary-law>>.

⁵³ Robert W Hefner, *Shari'a Politics: Islamic Law and Society in the Modern World* (Indiana University Press, 2011); Asta Olesen, *Islam & Politics Afghanistan N* (Routledge, 2013); Nadjma Yassari and Mohammad Hamid Saboori, 'sharia and National Law in Afghanistan' [2010] *sharia Incorporated* 273; Esther Meininghaus, 'Legal Pluralism in Afghanistan' (ZEF Working Paper Series, No. 72, December 2007).

⁵⁴ United States Institute of Peace, *Rule of Law in Afghanistan* (Web Page, 2016) <<https://www.usip.org/programs/rule-law-afghanistan-0>>.

cases by failing to adopt effective, sufficient and clear legal, institutional and policy frameworks. Hence, this paper adopts a reformist agenda in providing workable reforms and recommendations to decrease and eventually eliminate VAW in Afghanistan.

4 Harmony and compatibility of existing laws: civil, *sharia* and customary

Afghanistan's existing legal environment consists of three sources of law, namely the State legal code, customary practices and Islamic law (*sharia*).⁵⁵ Nevertheless, complications have emerged because of the coexistence of both formal and informal traditional systems for the administration of justice in Afghanistan. *Jirga* and *shura* are the primary institutions spearheading the traditional justice system.⁵⁶ Moreover, weaknesses in and the untrustworthiness of the formal justice system have resulted in many victims resorting to informal dispute resolutions mechanisms.⁵⁷

Afghanistan's legal reforms have resulted in the creation of separate legal elites such as statutory law experts trained in law schools in Afghanistan and experts in Islamic law trained in *madrassas* and *sharia* schools. This has also resulted in a dual court system in which one court deals with *sharia* law and the other with statutory law. Currently, the judiciary and courts are dominated by *sharia* graduates and their loyalists.⁵⁸

The judicial system has been unfavourable towards Afghan women, who are often caught between constitutional rights and cultural

⁵⁵ Ali Wardak, 'Building a Post-War Justice System in Afghanistan' (2004) 41(4) *Crime, Law and Social Change* 319.

⁵⁶ The past decades of Soviet Union invasion and civil war devastated the formal justice system in Afghanistan. As the result, more citizens depend on the informal justice system to resolve their cases. Tanja Chopra and Deborah Isser, 'Women's Access to Justice, Legal Pluralism and Fragile States' in Peter Albrecht et al (eds), *Perspectives on involving non-state and customary actors in justice and security reform* (International Development Law Organization, 2011) 23-38; Ali Wardak, 'State and Non-State Justice Systems in Afghanistan: The Need for Synergy' (2010) 32 *U. Pa. J. Int'l L.* 1305; Noah Coburn and John Dempsey, 'Informal Dispute Resolution in Afghanistan' (United States Institute of Peace, 2010); Torunn Wimpelmann, 'Nexuses of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage' (2013) 32(3) *Central Asian Survey* 406; Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2007).

⁵⁷ Sudhindra Sharma and Pawan Kumar Sen, 'Afghanistan's Justice System' [2009] *San Francisco: The Asia Foundation*.

⁵⁸ Deniz Kandiyoti, 'Old Dilemmas or New Challenges? The Politics of Gender and Reconstruction in Afghanistan' (2007) 38(2) *Development and Change* 169, 182.

constraints and religious and secular laws.⁵⁹ Although Islamic law has been accepted by the public in Afghanistan, customary practices at times take different turns from Islamic law. A substantial lack of understanding and arrangement between Afghan religious leaders about the interpretation of Islamic law in various legal matters has been noted. These include (but are not restricted to) criminal law and procedure, the rights of women, the compulsory effect of rights listed under international law and the broader body of basic rights.⁶⁰

Sharia-trained judges tend to heavily rely on the classical interpretation of Islamic law, leading to the adoption of views that restrict women's rights and often normalise VAW. Training judges under a unified training system and equipping them with adequate knowledge of Afghanistan's national and international obligations, specifically concerning women's rights, is critical. The legal code, customary practices and Islamic laws in relation to women must be harmonised to meet Afghanistan's international treaty obligations. Presently, the absence of harmony between laws in Afghanistan is mainly attributable to constitutional ambiguities, contradictions and the presence of constitutional crises. These are discussed below.

5 Necessary constitutional amendments

Islam has always held a special position in the Afghan society and the system of governances. The role of Islam has been embedded in all Afghanistan constitutions in different eras: monarchical/secularist, communist's era, *Mujahideen* and the Taliban and even the present government. Therefore, it is impractical to rule Afghanistan without relying on the Islamic principles.⁶¹

The role of Islam in constitutional democracies have been subject to debates among both Islamic and western scholars.⁶² Ehteshami asserts that neither *Quran* nor Prophetic tradition (*Sunnah/Hadith*) has established a specific form of governance or a 'definite pattern' that

⁵⁹ Asia Foundation, *A Survey of the Afghan People: Afghanistan in 2018* (Report, 2018) 166 <https://asiafoundation.org/wp-content/uploads/2018/12/2018_Afghan-Survey_fullReport-12.4.18.pdf>.

⁶⁰ United States Institute of Peace, *Rule of Law in Afghanistan* (Web Page, 2016) <<https://www.usip.org/programs/rule-law-afghanistan-0>>.

⁶¹ Niaz A Shah, 'The Constitution of Afghanistan and Women's Rights' (2005) 13(2) *Feminist Legal Studies* 239, 242–243.

⁶² Mohammad Hashim Kamali, 'Constitutionalism and Democracy: An Islamic Perspective' (2010) 2(1) *Islam and Civilisational Renewal (ICR)*; Patricia Martinez, 'Islam, Constitutional Democracy, and the Islamic State in Malaysia' [2004] *Civil Society in Southeast Asia* 27; Jean L Cohen and Cécile Laborde, *Religion, Secularism, and Constitutional Democracy* (Columbia University Press, 2015); Voll Esposito, John L Esposito and John Obert Voll, *Islam and Democracy* (Oxford University Press on Demand, 1996); John L Esposito and James P Piscatori, 'Democratization and Islam' (1991) 45(3) *Middle East Journal* 427.

needs to be conformed to and are subject to interpretations.⁶³ Rashid Moten claims that there are no contradictions between Islam and democracy and if we follow the proper practice of consensus, collective debate, Muslims teachings, transparency and accountability, a democratic rule that is based on Islamic teaching will be produced.⁶⁴

Afghanistan is not immune from such debates i.e. the role of Islam, democracy and international obligations. In Afghanistan, Islamic law is the supreme law of the land. Afghanistan is acknowledged as an Islamic Republic (art 1) and Islam is the State religion (art 2). Article 3 of the *Constitution* states that 'No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan'.⁶⁵ It is further specified by Article 149 that the provisions of this *Constitution* relating to Islam may not be amended.

The *Constitution of Afghanistan* fails to draw a line between liberal and Islamic teachings. Its contradictory preamble states that the *Constitution* aims to lead the nation with the principles of the rule of law, democracy and Islam, but fails to indicate how these can be merged in the context of Afghanistan. The *Constitution* declares that Afghanistan needs to 'observe the *United Nations Charter*, interstate agreements, as well as international treaties to which Afghanistan has joined, and the *Universal Declaration of Human Rights*'.⁶⁶ However, Article 3 of the *Constitution* states that 'No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan'.⁶⁷

While one article requires that no law shall be contrary to the principles of Islam, another requires the State to comply with its international human rights obligations. Many principles in human rights instruments are 'deemed' contrary to Islamic principles.⁶⁸ For instance,

⁶³ Anoushiravan Ehteshami, 'Islam, Muslim Politics and Democracy' (2004) 11(4) *Democratization* 90, 92.

⁶⁴ A Rashid Moten, 'Democratic and Shura-Based Systems: A Comparative Analysis' (1997) 3 *Encounters-Leicester* 3.

⁶⁵ *Ibid* art 3.

⁶⁶ *Qanun Asasi Afghanistan* (n 26) art 7.

⁶⁷ *Ibid* art 3.

⁶⁸ Anita M Weiss, 'Interpreting Islam and Women's Rights: Implementing CEDAW in Pakistan' (2003) 18(3) *International Sociology* 581, 584. See also Liv Tønnessen, 'Feminist Interlegalities and Gender Justice in Sudan: The Debate on CEDAW and Islam' (2011) 6(1) *Religion & Human Rights* 25; Michele Brandt and Jeffrey A Kaplan, 'The Tension between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia' (1995) 12(1) *Journal of Law and Religion* 105. Many Muslim countries made reservations to Articles 2, 16, 9 of CEDAW stating these Articles' contradictions with Islamic law. For instance, Article 2(f) is deemed to be in contradiction with Islamic Law of inheritance. Moreover, Article 15(2), which provides that 'State parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals' is deemed contradictory to the *sharia* definition of testimony, capacity, and the right to conclude contracts. Moreover, Article 16's contentious issues are: 1) Equal Right to Marry and Choose a Spouse; 2. Equal Rights and Obligations of Spouses during the Marriage; 3) Equal Right for the Dissolution of Marriage; 4) Equal Rights for Custody and Guardianship of Children; 5) Same Rights for the Ownership and Acquisition of the Property. In addition, Article 9 represents equal citizenship rights.

several Muslim countries such as Morocco, Egypt, and Bangladesh (among others) have made reservations to CEDAW, citing incompatibility of some of its provisions with Islamic law.⁶⁹ This comes with the Afghanistan's ratification of CEDAW without any reservations. Among other human rights instruments, Article 18 of UDHR not only promotes freedom of religion, but also freedom from religion. Additionally, Article 18(2) of the ICCPR states that 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice'.⁷⁰

Therefore, the language of Article 3 of the *Afghanistan's Constitution* raises serious questions. For example, what school of thought should be followed when deciding that no laws should go against the 'beliefs and tenets of the sacred religion of Islam', and which organ decides as such?⁷¹ This legal pluralism is inadequately addressed with respect to Afghanistan's complex political, cultural and religious dynamics, which is evident in the State's efforts to reconcile secular and Islamic laws. The discord between Islam's role and Afghanistan's international obligations existed even at the time of drafting the *Constitution*, resulting in a *Constitution* with full of ambiguities.⁷²

Another important provision in Afghanistan's *Constitution* that should be revisited is Article 130(2) in which *Hanafi* jurisprudence is referred to 'when there is no provision in the *Constitution* or other laws regarding the ruling of a pending case'.⁷³ Theoretically, when a presiding judge must decide between Islamic law and international obligations, the decision is dependent on the judge's stance. Given that the majority of

⁶⁹ Geraldine A Del Prado, 'United Nations and the Promotion and Protection of the Rights of Women: How Well Has the Organization Fulfilled Its Responsibility' (1995) 2 *Wm. & Mary J. Women & L.* 51, 70.

⁷⁰ The crime of apostasy constitutes a *hudud* crime, under the *Hanafi* interpretation of Islamic law (stipulated by Article 130 of *The Afghanistan of Constitution*), as applied in Afghanistan which is a class of crime that imposes fixed punishments. Death penalty is prescribed by the prevailing *Hanafi* jurisprudence for the crime of apostasy. The prosecution and/or punishment can be avoided if he/she recants. Mandana Knust Rassekh Afshar, 'Case of an Afghan Apostate-The Right to a Fair Trial between Islamic Law and Human Rights in the Afghan Constitution' (2006) 10 *Max Planck YBUNL* 591. It is emphasised by the modernist authors that there is no general statement in the *Qur'an* concerning the differences in men and women's roles. However there are some verses that connotes women subordination, but even these verses are interpreted by modernist authors in such a manner that reject the notion of superiority, mainly as regards to the rights and obligations of spouses during marriage. Maysa Bydoon, 'Reservations on the "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)" Based on Islam and Its Practical Application in Jordan: Legal Perspectives' (2011) 25(1) *Arab Law Quarterly* 51.

⁷¹ Shamshad Pasarlay, 'Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory' (PhD Thesis, University of Washington, 2016) 268–269.

⁷² International Crisis Group (ICG), *Reforming Afghanistan's Broken Judiciary* (Asia Report N°195, November 2010).

⁷³ *Qanun Asasi Afghanistan* (n 26) art 130 para 2.

judges in Afghanistan are *sharia*-trained, it is not surprising that the conservative view reinforced by Article 130(2) prevails.⁷⁴

Two important cases on apostasy and blasphemy, which both resulted in the imposition of the death penalty, illustrate the contradiction between Articles 3 and 7 of the *Constitution*. Abdul Rahman was sentenced to death for renouncing Islam and becoming a Christian,⁷⁵ while Sayed Prawiz Kambakhsh's was sentenced to death for making blasphemous remarks.⁷⁶ These sentences were in apparent violation of Afghanistan's obligations under international law, specifically under Article 18 of UDHR and Article 18(2) of the ICCPR.

Therefore, there is the need for constitutional amendments as to where Afghanistan stands in terms of its international women's human rights obligations. Articles 3 and 7 are contradictory and the EVAW law is perceived differently by judges and practitioners, resulting in weak, confusing and unconstitutional legal frameworks for women in Afghanistan. This contradiction is further reinforced by the inclusion of Article 130, allowing judges to rely on the *Hanafi* school of thought when there are lacunae in the law. In the *Hanafi* school of thought, there can be diverse opinions on a single matter, allowing judges to impose stricter punishments depending on their stance on women's rights and VAW.

This problem is further exacerbated by the presence of the constitutional interpretation crisis in Afghanistan. Article 121 of the *Constitution* gives the constitutional interpretation authority to the Supreme Court.⁷⁷ Conversely, Article 157 established the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), creating a constitutional interpretation crisis between the Commission and the Supreme Court.⁷⁸ This has resulted in clashes between the two organs, both claiming that they have constitutional mandates to interpret the *Constitution*. The Commission lacks structure, its authorities are vague and the selection and qualifications of its members are left entirely to the Executive. Therefore, unless and until these constitutional ambiguities and interpretation crises are sufficiently

⁷⁴ International Crisis Group (n 72).

⁷⁵ Afshar (n 70).

⁷⁶ Decision of the Kabul Appeals Court on the Case Concerning Insult to the Holy Religion of Islam and the Holy Prophet (SAW), Decision No. 580 (2007).

⁷⁷ *Qanun Asasi Afghanistan* (n 26) art 121.

⁷⁸ *Ibid* art 157.

addressed, it is unrealistic to expect any improvements in women's rights issues with respect to VAW in Afghanistan.

Finally, despite Article 22 in the *Constitution*, which states that 'Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden',⁷⁹ the explicit prohibition of discrimination based on sex is absent. It is recommended that a provision for the prohibition of discrimination based on sex be included in the *Constitution* and relevant legislation in line with Articles 1 and 2 of CEDAW.

6 Reforms to the law on the elimination of violence against women (EVAW Law)

In 2009, the *Law on the Elimination of Violence Against Women* (EVAW Law) in Afghanistan was issued through a Presidential Decree while the parliament was in recess.⁸⁰ This law addresses and criminalises domestic violence, child and forced marriages, and many other abuses against women. In order to attain parliamentary approval, EVAW was brought before the parliament in 2013 and was vehemently opposed and rejected by the parliament, mainly due its contradiction with Islamic law and particularly Article 3 of the *Constitution*. Its status and the enforcement remains unclear⁸¹ and the law has been in 'limbo' since then.⁸² While the promulgation of EVAW was a momentous achievement in 2009, the tenth anniversary of this law is not a cause for celebration, but of concern.⁸³ As Afghanistan was recently revising its 1976 *Penal Code*, there were attempts to incorporate EVAW into the new revised 2018 *Penal Code* in a bid to strengthen its status; however, these attempts were failed, causing further concerns.⁸⁴

Afghanistan's failure to enact the EVAW law since 2009 has had catastrophic consequences on female victims of violence, demonstrating the fragility and unreliability of this law. EVAW has been unverified,

⁷⁹ Ibid art 22.

⁸⁰ It doing so, it was intended to prevent this law to be subjected to parliamentary approval as there were fear of its rejection by the conservative parliamentarians.

⁸¹ Human Rights Watch, *Afghanistan: Ending Child Marriage and Domestic Violence* (Report, 2013) <https://www.hrw.org/sites/default/files/related_material/Afghanistan_brochure_0913_09032013.pdf>.

⁸² Human Rights Watch, *Afghanistan: Country Summary* (Report, 2018) <https://www.hrw.org/sites/default/files/afghanistan_0.pdf>.

⁸³ Mehdi J Hakimi, 'Elusive Justice: Reflections on the Tenth Anniversary of Afghanistan's Law on Elimination of Violence against Women' (2020) 18 *Nw. UJ Int'l Hum. Rts.* 52, 53.

⁸⁴ Arne Strand, Kaja Christine Andersen Borchgrevink and Kristian Berg Harpviken, *Afghanistan: A Political Economy Analysis* (NUPI, CMI and PRIO Report, December 2017).

and its implementation is sporadically executed. Many judges and legal practitioners consider this law unconstitutional as it contradicts Article 79 of the *Constitution*.

As a result, access to justice for Afghan women is limited and they receive unequal treatment before the law. State officials have constantly failed to exercise due-diligence to investigate, prosecute and punish VAW perpetrators, and offer reparations to violence victims.⁸⁵ UNAMA in cases monitored between 2016 and 2017 found that there is a ‘de facto impunity’ for honour killings and murder of Afghan women mainly caused by judicial attitude towards resolving the VAW cases through mediation.⁸⁶

The Special Rapporteur’s report also reveals that women are frequently discouraged and afraid of authorities and as such are discouraged to file complaints. The report continues that ‘even when they file complaints, they are encouraged to withdraw the case. Prosecutors often use one of the objectives of the EVAW, defined under its Article 2 as the preservation of the family unit, to mediate cases out of the formal court system’.⁸⁷

Apart from the need to enact the EVAW law through a proper parliamentary process, there are also several provisions within EVAW that need amendments. According to Article 39 of the EVAW law, complaints made by victims can lead to proceedings against and prosecution of perpetrators of violence.⁸⁸ However, the law states that a victim can withdraw a case anytime, including at the detection, investigation, trial or conviction stages, ending the proceedings and imposition of punishment.⁸⁹ This is of concern because, regardless of the severity of the crime and the injuries inflicted on female victims, the law allows for the acquittal of perpetrators. It is also recommended to expand State authorities’ obligations to investigate and prosecute all 22 EVAW crimes, regardless of any associated civil complaint or proceedings.

In addition, there is the need for an effective monitoring mechanism of EVAW implementation in Afghanistan. It is crucial to ensure that implementation and progress records of EVAW are tracked and

⁸⁵ United Nations Assistance Mission in Afghanistan (UNAMA) and United Nations Office of the High Commissioner for Human Rights (OHCHR) (n 41) 6.

⁸⁶ *Ibid* 21.

⁸⁷ The UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 29th sess, UN Doc A/HRC/29/27/Add.3 (12 May 2015).

⁸⁸ *Law on Elimination of Violence against Women (EVAW) 2009* art 39.

⁸⁹ Mainly the compliant withdrawal takes place pursuant to societal persecutors pressures.

measured, and the collection of data is consistent with the extent of EVAW implementation. Through such processes, stakeholders and relevant organisations that advocate for women's rights can propose reforms where needed.⁹⁰

7 Afghanistan's *penal code* review

The most contentious aspect of the 2018 revised *Penal Code* is the non-incorporation of the EVAW law, which continues to be executed as a special and separate law. Few of the EVAW law's provisions have been included in the revised *Penal Code*, but not in its entirety.⁹¹ This is of concern because the EVAW law is merely based on a Presidential Decree and is widely considered unconstitutional by legal practitioners and judges.

In addition, there are also other concerns regarding the 2018 revised *Penal Code* that can normalise the crime of VAW against women. The virginity of unmarried women remains an important part of Afghan society⁹² and is considered a matter of family honour. Afghan girls and women at certain circumstances are forced to undergo the practice of 'virginity test'.⁹³ With the recent revision of Afghanistan's *Penal Code*, there were optimisms that such issue is going to be addressed. However, the new revised *Penal Code* has not fully addressed this practice and women can still be subjected to virginity tests either by consent or court order. Even stipulating consent criteria does not provide any sort of protection because the majority of women are constrained by a strict patriarchal system.⁹⁴

The allegation of sexual intercourse by unmarried girls can result in a court order for a virginity test. Women have also undergone virginity tests for unjustifiable reasons. Many have questioned the medical accuracy of the gynaecological exams that determine virginity. Under

⁹⁰ Canadian Women for Women in Afghanistan, *Afghanistan's EVAW Law* (Web Page, 2014) <https://www.cw4wafghan.ca/sites/default/files/attachments/pages/cw4wafghan-afghansevawlaw_0.pdf>.

⁹¹ Afghanistan Public Policy Research Organization, *New Penal Code and EVAW Law: To Incorporate or Not to Incorporate?* (Research Report, July 2018) 18.

⁹² Marjan Nahavandi Muzhgan Yarmohammad, 'A New Afghan Law Preserves "Virginity Tests" for Women Afghan Women Oppose Procedure as "Torture"', *United States Institute of Peace* (2018) <<https://www.usip.org/publications/2018/07/new-afghan-law-preserves-virginity-tests-women>>.

⁹³ Those that do not meet this social norm can possibly be subjected to moral crimes and even honor killings.

⁹⁴ United States Institute of Peace, *A New Afghan Law Preserves 'Virginity Tests' for Women Afghan Women Oppose Procedure as 'Torture'* (Web Page, July 2018) <<https://www.usip.org/publications/2018/07/new-afghan-law-preserves-virginity-tests-women>>.

international law, these tests are considered degrading, cruel and inhumane.⁹⁵ This is despite the recommendation made by the Special Rapporteur in 2014 to ‘revise the *Criminal Procedure Code* and prohibit degrading practices, including virginity testing, as a source of evidence in criminal investigations’.⁹⁶

It was hoped that the new *Penal Code* would bring significant developments and transformation to Afghan society. However, excluding the chapter that criminalises VAW has led to serious concerns because it means that the strongest criminal code does not provide protection for VAW. There is a need for technical amendments to the *Penal Code* to ensure that the ERAW law is applicable. Moreover, the practice of virginity testing, which is legitimised by the *Penal Code*, must be removed and dismissed. Thus, there is a need to revisit the *Penal Code* and remove the elements that undermine women’s dignity.

8 Required institutional reforms

Ministry of Women’s Affairs (MoWA) reports that women make up 22 per cent of government employees, but that only 9 per cent are in decision-making positions. Women account for 1.3 per cent of employees in the security sector and 18 per cent of those in the health sector.⁹⁷ Moreover, non-government organisations in Afghanistan are moving further away from implementing gender projects under the guise of incorporating gender issues into new or existing programs.⁹⁸

Women’s leadership in Afghanistan mainly focuses on a top-down approach, which places women in political positions of authority without any emphasis on the leadership skills needed for such challenging positions. Such strategies have led to the isolation of these women rather than giving them any power in mobilising people with common interests. Despite bottom-up efforts being made, they have failed because they have only involved individual leaders and

⁹⁵ Human Rights Watch, *Afghanistan: Surge in Women Jailed for “Moral Crimes”* (Report, 2013) 2 <<https://www.hrw.org/news/2013/05/21/afghanistan-surge-women-jailed-moral-crimes>>.

⁹⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 1) 19.

⁹⁷ UNAMA, *Participation of Women in Various Afghan Institutions* (Web Page, 2013) <<https://unama.unmissions.org/participation-women-various-afghan-institutions>>.

⁹⁸ Sofya Shahab, ‘Women’s Rights in Afghanistan: One Step Forward, Two Steps Back?’, *The Guardian* (27 November 2013) <<https://www.theguardian.com/global-development-professionals-network/2013/nov/26/womens-rights-afghanistan-gender-mainstreaming>>.

organisations rather than creating a broader social conversation that could bring lasting social change.⁹⁹

The top-down approach assumes that leadership is equated with sanctions. An anthropologist who conducted ethnographic research in 2012 similarly concluded that MoWA used a top-down modernisation model.¹⁰⁰ The symbolic value of MoWA's existence has had one effect—keeping the women's agenda alive in domestic politics. The establishment of this ministry has had little to do with women's agendas and is simply considered a step to appease the international community. The 'appointment of MoWA's senior management has largely been driven by interests of major financial players'.¹⁰¹ Therefore, such appointments lack merit and fail to meet the basic foundational top-down assumptions in promoting women's leadership.

Therefore, the focus on women's leadership must be coupled with female leaders who are trained and ready to meet the sophistication and sensitivity of gender-based issues in Afghanistan. Greater priority must be given to the issue of VAW in Afghanistan, and critical leadership is necessary. When there is political will, there will be greater resource allocation and assistance by the State.

For the legal protection of women, the inclusion of women as stakeholders in policymaking at the national level is crucial. It is also important to increase women's participation in political, social and economic settings. Violence is more prevalent in families and societies with high rates of poverty,¹⁰² and a scarcity of resources leads to gender-based discrimination, deprivation and the belief that boys are more valuable than girls.

Lastly, the independence of the AIHRC must be strengthened in line with the Paris Principles, which relate to the status of national institutions in promoting and protecting human rights.¹⁰³ A clear and fair nomination and selection process in and sufficient budgetary

⁹⁹ Aarya Nijat and Jennifer Murtazashvili, *Women's Leadership Roles in Afghanistan* (US Institute of Peace, 2015) 5.

¹⁰⁰ Julie Billaud, 'The Making of Modern Afghanistan: Reconstruction, Transnational Governance and Gender Politics in the New Islamic Republic' (2012) 7(1) *Anthropology of the Middle East* 18, 8.

¹⁰¹ Nijat and Murtazashvili (n 99) 6.

¹⁰² Afghan Women's Network, *Gender-based Violence in Afghanistan* (Report, 2009) <https://www.aidsdatahub.org/sites/default/files/documents/Gender_based_Violence_in_Afghanistan.pdf>.

¹⁰³ *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 (20 December 1993). Article one States 'A national institution shall be vested with competence to promote and protect human rights. Article two adds that 'A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence'.

resources must be ensured to enable the Commission to achieve its mandate.¹⁰⁴

9 The importance of improving socioeconomic conditions for Afghan women

Many Afghan women and girls, especially those in the rural areas, have high level of illiteracy and face inequality, underdevelopment, and lack of employment and educational opportunities. Women choose not to leave abusive situations because of the challenges associated with it. These include the deprivation of inheritance, difficulties in obtaining divorce, fear of losing custody of their children and the inability to return to their communities and homes.¹⁰⁵

The importance of improving the socioeconomic situation of women to eliminate VAW is recognised in the 1990 *Resolutions and Decisions of the Economic and Social Council*.¹⁰⁶ Low socioeconomic status is considered a contributing factor to domestic violence. Identifying such factors is critical for combating domestic violence to ensure the appropriate allocation of resources and the necessary interventions. Hence, domestic violence cannot be addressed without considering the socioeconomic status of women.¹⁰⁷ The lack of economic independence accentuates women's vulnerability. It is easier for economically independent victims of domestic violence to resolve issues independently or leave abusive relationships. However, subordinate women with no resources face the opposite situation.¹⁰⁸

¹⁰⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR) (n 1) 18.

¹⁰⁵ United Nations Assistance Mission in Afghanistan (UNAMA) and United Nations Office of the High Commissioner for Human Rights (OHCHR) (n 41).

¹⁰⁶ *Resolutions and Decisions of the Economic and Social Council*, GA Res E/1990/90, Organizational Session for 1990 New York, (17 January and 6-9 February 1990) <https://digitallibrary.un.org/record/196840/files/e-1990-90-e.pdf>. In paragraph 23 of this resolution, it is asserted that, 'The recognition that violence against women in the family and society is pervasive and cuts across lines of income, class and culture must be matched by urgent and effective steps to eliminate its incidence. Violence against women derives from their unequal status in society'.

¹⁰⁷ Disa K V Lubker, 'Socioeconomic Status and Domestic Violence' (2004) 3(1) *International Journal of Global Health and Health Disparities* 85.

¹⁰⁸ Cigdem Kaya, 'State Responsibility Regarding Domestic Violence Against Women with a Focus on Turkey' (Master Thesis, Lund University, 2009), 41. See also Krista M Chronister, 'Contextualizing Women Domestic Violence Survivors' Economic and Emotional Dependencies' (2007) 62(7) *American Psychologist*; Sascha Griffing et al, 'Domestic Violence Survivors' Self-Identified Reasons for Returning to Abusive Relationships' (2002) 17(3) *Journal of Interpersonal Violence* 306; Eric Y Tenkorang et al, 'Factors Influencing Domestic and Marital Violence against Women in Ghana' (2013) 28(8) *Journal of Family Violence* 771; Bharati Basu and Felix Famoye, 'Domestic Violence against Women, and Their Economic Dependence: A Count Data Analysis' (2004) 16(4) *Review of Political Economy* 457; Richard M Tolman and Daniel Rosen, 'Domestic

Afghan women have limited participation in and influence on the economy. Despite improvements, the market is mainly dominated by men. Women account for only 19 per cent of the labour force and only 11 per cent of non-agricultural jobs. The rate of female labour participation is 18.5 per cent in comparison to 80 per cent for men, and UN Women estimates that women own only 5 per cent of businesses in Afghanistan.¹⁰⁹

As expressed by the UN resolution¹¹⁰, VAW in Afghanistan is expected to continue unless the State takes the initiatives to improve the socioeconomic status of women. The current injustices against women in Afghanistan are mainly attributed to their low socioeconomic status (among others).

10 Women's involvement in peace talks

Similar to 2014 presidential election in Afghanistan, September 2019 election was also tainted with irregularities. The 2019 election result was challenged by Abdullah Abdullah who served as the Chief Executive Officer since 2014 election due to the sharing power agreement that was reached between him and President Ghani, mediated by the United States (US). After many months of political uncertainties, Abdullah and President Ghani have reached a new sharing power agreement, helping the peace process to continue. Based on the agreement reached, Abdullah will be the chairman of the High Council for National Reconciliation (HCNR), mandated to spearhead the peace negotiations with the Taliban.¹¹¹

As the Afghanistan peace process progresses, the challenges of COVID-19 has made this process and its impacts uncertain. Following two years of negotiations between the US and Taliban, in 29 February 2020, the 'Agreement for Bringing Peace to Afghanistan' was signed in Doha. Four topic are covered by the agreement: 'the withdrawal of US troops; counter-terrorism cooperation between the US and the Taliban; a reduction in violence that can lead to a ceasefire; and the initiation of the

Violence in the Lives of Women Receiving Welfare: Mental Health, Substance Dependence, and Economic Well-Being' (2001) 7(2) *Violence against women* 141; Koustuv Dalal, 'Does Economic Empowerment Protect Women from Intimate Partner Violence?' (2011) 3(1) *Journal of injury and violence research* 35; Corinne H Rocca et al, 'Challenging Assumptions about Women's Empowerment: Social and Economic Resources and Domestic Violence among Young Married Women in Urban South India' (2008) 38(2) *International journal of epidemiology* 577.

¹⁰⁹ Strand, Borchgrevink and Harpviken (n 84) 19.

¹¹⁰ *Resolutions and Decisions of the Economic and Social Council* (n 106).

¹¹¹ Shereena Qazi, 'Taliban Talks in Sight as Afghan Political Rivals End Feud', *Aljazeera* (2020) <<https://www.aljazeera.com/news/2020/05/afghan-rivals-leadership-feud-boost-peace-process-200517172632386.html>>.

intra-Afghan negotiations'.¹¹² This agreement has also facilitated the intra-Afghan talks between the government of Afghanistan and the other political fractions with the Taliban that were excluded in the earlier negotiations.¹¹³

The recent peace negotiations have raised many concerns. The US and its allies invaded Afghanistan to overthrow the extremist and fanatical Taliban regime and support a democratically elected government.¹¹⁴ Taliban ruled Afghanistan from 1996 until 2001 and they demonstrated the most notorious human rights abuses against women, such as denying them of access to education, health care, freedom of movement and publicly punishing them by lashing and even stoning.¹¹⁵

As the peace talks with this group progresses, there are fears that the last two decades hard-earned achievements regarding women rights are going to be compromised. Afghanistan government has failed to include women in peace negotiations. Quotas to ensure the presence of women are merely symbolic and appointments lack merit. Generally, the road to peace has failed to include women at all. Women's interests are ignored and have been compromised. For instance, the peace agreement reached between Afghanistan and the militant Gulbuddin Hekmatyar, giving him and his militia amnesty in 2016, did not touch on women's rights and their futures.¹¹⁶ Afghan women activists have strongly opposed such moves.¹¹⁷

In the Moscow talks, the Taliban demanded a revision of the *Constitution of Afghanistan* and the recent US–Taliban peace negotiations are considered hasty and alarming.¹¹⁸ Individuals such as Cheryl Benard, whose article was published after the Americans and the Taliban had

¹¹² Said Sabir Ibrahim, 'Next Steps for the Afghan Peace Process', *Center on International Cooperation* (2020) <<https://cic.nyu.edu/publications/next-steps-afghan-peace-process>>.

¹¹³ Ibid.

¹¹⁴ Susan Hutchinson, *Why Women Are Vital to a Peace Agreement in Afghanistan* (Web Page, 2018) SBS <<https://www.sbs.com.au/news/dateline/why-women-are-vital-to-a-peace-agreement-in-afghanistan>>.

¹¹⁵ Heather Barr, 'A Crucial Moment for Women's Rights in Afghanistan', *Human Rights Watch* (2020) <<https://www.hrw.org/news/2020/03/05/crucial-moment-womens-rights-afghanistan>>.

¹¹⁶ Strand, Borchgrevink and Harpviken (n 84) 31.

¹¹⁷ Afghan Women's Network, *Afghan Women Call for Fair and Lasting Peace, and Lasting Peace Requires the Full, Equal and Meaningful Participation of Women* (Web Page, 2019) <http://awn-af.net/index.php/cms/press_detail/1497/12>. It was declared by the Afghan Women's Network 'Afghan Women call for fair and lasting peace, and lasting peace requires the full, equal and meaningful participation of women. We, Afghan women welcome the any steps headed for bringing peace in Afghanistan. However, sustainable peace requires the equal participation of the Afghan people, both men and women'.

¹¹⁸ Mariam Safi and Muqaddesa Yourish, 'What Is Wrong With Afghanistan's Peace Process' *New York Times*, 20 February 2019 <<https://www.nytimes.com/2019/02/20/opinion/afghanistan-peace-talks.html>>.

agreed in principle to a peace framework, have underestimated the devastating influence of the Taliban on Afghan women.¹¹⁹

Women exclusion in the peace process is despite the 2018 Security Council's resolution that called on Afghanistan to facilitate 'the effective and meaningful participation of women and women's rights groups' in the peace process.¹²⁰ This problem was also highlighted in the 2013 CEDAW Committee report on Afghanistan. The Committee recommended that women's participation in the peace process must be ensured.¹²¹ Therefore, the recent peace process talks have created an atmosphere of fear and uncertainty for the future of Afghan women and girls. It is vital that that the current intra-Afghan negotiations with Taliban include the interests of various stakeholders, particularly women, who represent the most vulnerable members of Afghan society.

11 Conclusion

This paper has pursued a reformist agenda to eliminate VAW, which is largely caused by weaknesses in Afghanistan's legal frameworks regarding women. The existing legal environment in Afghanistan comprises three incoherent sources of law—State legal code, customary practices and Islamic *sharia* law.

The lack of harmony and compatibility of these laws has served as a barrier to providing better protection for women. The judicial system has been unsupportive of Afghan women, who are often caught between constitutional rights and cultural constraints and religious and secular laws. This problem has emanated from constitutional contradictions and ambiguities. The *Constitution of Afghanistan* has failed to draw a line between liberal and Islamic teachings or, alternatively, to complement them to support each other. The contradictions between Islam's role and international obligations existed when the *Constitution* was drafted, but remain unaddressed.

¹¹⁹ In her recent Article, she stated, 'I believe that Afghan feminists, once they put their minds to it, will find that their path is actually quite clear. First, they need to recognize that the Taliban is not their only—and perhaps not their worst—problem.' Cheryl Benard, 'Afghan Women Are In Charge of Their Own Fate' *The National Interest* (February 27, 2019) <<https://nationalinterest.org/feature/afghan-women-are-charge-their-own-fate-45777>>.

¹²⁰ SC Res 2405, UN Doc S/RES/2405 (8 March 2018) para. 10.

¹²¹ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined initial and second periodic reports of Afghanistan*, CEDAW/C/AFG/CO/1-2 (13 July 2013) para. 8.

Hence, in addressing these challenges, this paper proposed the necessary constitutional amendments to provide better protection to Afghan women and violence victims. This paper also examined the ambiguities contained in other Afghanistan legal instruments that deal with VAW, including ERAW and 2018 revised *Penal Code* and consequently provided the needed reforms. This paper also illustrated in order to combat VAW, there is also a need for institutional and policy reforms, improvement of socioeconomic conditions for Afghan women, and their active involvements in the peace process.

This paper also purports, in order to forward women's rights agendas and combat VAW in Afghanistan, it is vital to embrace feminist scholarships that are consistent with Islam, Islamic values and the social settings of Afghanistan. As Islam holds a special position in the Afghan society, it must be ensured that women's empowerment approaches are based on Islam rather than Western approaches. This implies that *sharia*-based approaches are an effective means of combating VAW. Many female activists have reported that the likelihood of people accepting women's rights is higher when the Islamic law approach is used.¹²²

There is also a need to engage many stakeholders in the dialogue to end VAW. These stakeholders include, but are not limited to, men, traditionalists and *ulama*. Involving *ulama* in the dialogue is essential because of their substantial influence in society. Many *ulama* in Afghanistan heavily rely on strict and classical scholars' interpretations of women's rights. Some classical scholars approve of the beating of women, considering it a man's right. However, the majority of contemporary scholars reject such a view.¹²³ It is vital that views that disapprove of and criminalise VAW are disseminated throughout Afghan society via various platforms and forums such as mosques, universities, television programmes, awareness campaigns and conferences.

In addition, it is also recommended that Afghanistan should ratify *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (OP-CEDAW) to provide better protection mechanisms for Afghan women. Afghanistan's current regulatory and institutional frameworks have proven ineffective in protecting victims of violence. By ratifying OP-CEDAW, victims of violence can bring their individual complaints before the CEDAW Committee,

¹²² United States Institute of Peace, *sharia and Women's Rights in Afghanistan* (Special Report 347, May 2014) 1.

¹²³ Sharifa Alkhateeb, 'Ending Domestic Violence in Muslim Families' (1999) 1(4) *Journal of religion & abuse* 49.

following the exhaustion of local remedies. This is in line with the 2015 UN Security Council resolution, which urged ratification of OP-CEDAW by States that had not yet done so.¹²⁴ Once the individual complaints can be brought before the CEDAW Committee, it will result in better access to justice for VAW victims and a greater accountability of Afghan government before the CEDAW Committee, the international community and the donors.

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¹²⁴ SC Res 2242, UN Doc S/RES/2242 (13 October 2015). It stated, 'Reaffirming the obligations of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto and urging States that have not yet done so to consider ratifying or acceding to it'.