

Women's Rights and the New Constitution of Afghanistan

Niaz A. Shah Kakakhel *

INTRODUCTION

The war-wracked country, Afghanistan, got its new constitution on January 4, 2004 after concerted efforts of national and international actors, specifically technical and financial support from United Nations.⁽¹⁾ The UN Secretary General called it a 'historic achievement'⁽²⁾ and US ambassador to Afghanistan named it as 'one of the most enlightened constitutions in the Islamic world'.⁽³⁾ The constitution consists of a preamble, twelve chapters and one hundred and sixty two articles. The purpose of this paper is to map out what protections are provided in the constitution for women's human rights and whether any provisions may be discriminatory may undermine

* The author is doctoral student at the Institute of Governance, Public Policy & Social Research, Queen's University Belfast, UK.

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Niaz A. Shah Kakakhel (PhD II Year) Institute of Governance, Public Policy & Social Research Queen's University Belfast, BT7 1JP, UK Email: niaz.mian@qub.ac.uk
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their basic rights. The paper also touches on potentially conflicting areas between constitutional commitments to Islam and international human rights instruments, specifically the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (Women's Convention),⁽⁴⁾ which Afghanistan ratified in March 2003. The paper concludes with a set of suggestions for revamping certain provisions of the constitution to better protect women's rights and to avoid potential collision between domestic law and the Women's Convention principles.

The constitutional provisions dealing with the rights of women could be generally grouped into three categories: neutral, protective and discriminatory. Neutral provisions are those which do not make distinction between the sexes and are applicable to all citizens, though they may be construed in way that is more beneficial towards women (protective construction) than men bearing in mind the social milieu of Afghanistan. Protective provisions are intentionally designed to protect women's rights and may be called 'women specific'. Discriminatory provisions are those which are either expressly discriminatory or *prima facie* neutral but by implications or construction could go against women's rights and may possibly undermine the effect of the protective provisions. Some article may fit into more than one category and the grouping should therefore not be regarded as rigid.

NEUTRAL PROVISIONS

All the neutral provisions are listed in the chapter on fundamental rights and duties of the citizens. Of great significance is article 6 under which the state undertakes to 'protect human rights'. This could be employed in two ways: firstly, reminding the state of its constitutional obligation in cases of human rights violations and secondly, influencing interpretation of other article by emphasizing the intention of the framers of the constitution to implement general human rights standards. Article 7 makes further a constitutional commitment to observe the international standards contained in the human rights instruments which Afghanistan has ratified thus bringing domestic

human rights violations under the umbrella of the international human rights protection regime. The constitution also guarantees the right to life,⁽⁵⁾ the right to liberty and human dignity⁽⁶⁾. Article 29 guarantees immunity from torture. The most important neutral provision which may be open to protective construction is article 27 (3) stating that no one should be punished except under the lawful decision of a court of law. This could prove to be a strong constitutional shield in the cases of honor killings as well as domestic violence where commonly the perpetrators resort to taking law into their own hands. The right to acquire property and its protection provided in the constitution could also help women more than men because many women are either deprived of property rights or not recognized as active (beneficial) owners of property belonging to them in government records.⁽⁷⁾ Education is the right of every Afghan and state is obliged to provide free education up to secondary level to all citizens, says the constitution.⁽⁸⁾ This should help women's education particularly in a society where male education is generally preferred over female and in cases where parents/families cannot afford to send all their children to school particularly. Free education should end this financially constrained educational discrimination against women. The right to property together with free education could go a long way in achieving economic independence for women. The constitution gives everyone the right to work and free choice of profession and prohibits forced labour. In many cases women are forced into forced labour in Afghanistan and this provision could be used as guard against such practices. Article 48 guarantees for paid holidays and working hours, which could be relied on by women who are at the advance stage of pregnancy and or on maternity leave. This article would be helpful for protecting women working in private sectors where, commonly, holidays and maternity leave are not paid at all or paid partially.

PROTECTIVE PROVISIONS

This group of articles begins with the provision prohibiting any kind of discrimination (including discrimination on the basis of sex).⁽⁹⁾ It also

specifies that men and women have equal rights and duties under the law using phrase the 'men and women' instead of citizens. This reflects the emphasis of the framers of the constitution on the equal rights and duties of men and women as individuals. The chairperson of CEDAW, Feride Acer, said 'this is a significant victory for women and girls in Afghanistan'.⁽¹⁰⁾ The constitution also protects the immunity of home from invasion.⁽¹¹⁾ This seems to be neutral safeguard applicable both to men and women but in fact it is protective since home is the place of woman, the mother, wife and sister in Afghan society and its immunity amounts to respecting women's right to privacy and property. Realizing great gap between the literacy rate of men and women, the framers of the constitution made special provision obliging state to make elaborate programmes for promoting and balancing education of women.⁽¹²⁾

The constitution guarantees special assistance to elderly people, orphans and 'women without maintainer/guardian' in society.⁽¹³⁾ This provision has significant implications for the rights of women in Afghanistan. Firstly, it would be used to protect the current large number of 'women without maintainers/guardian' and orphan girls arising from the heavy toll in war. Secondly, it could be construed to cover cases like *Shah Bano*⁽¹⁴⁾ in India. In this case the Supreme Court ordered a Muslim husband to pay maintenance to his elderly divorced wife beyond the four months waiting period of *Iddat*⁽¹⁵⁾ because of her specific circumstance, as she had no one to support her. The Supreme Court passed the order on the basis of section 125 of the Indian Criminal Procedure Code, 1973, which states that a husband should provide to his wife maintenance if she is 'unable to maintain herself'. The judgment raised so much anger among the Muslim population that the government hurriedly passed a new law, *Muslim Women (Protection of Rights on Divorce) Act*, 1986 to console Muslims nullifying the effect of judgment. The chief reason for Muslim resentment was that the judgment was handed in by non-Muslims judges based on secular law. In the case of Afghanistan, the constitution states that Islam is the state religion⁽¹⁶⁾ and no law shall be made against the injunctions of Islam.⁽¹⁷⁾ This signifies that providing assistance in any form to needy women under constitution is

Islamic and would be welcomed, unlike *Shah Bano* case, by the society. This provision could be used as valid living example, crossing the borders of Afghanistan, in Muslim countries like Pakistan and others where no such provision exist filling the legal vacuum.

The constitution recognizes the family as ‘fundamental unit’ of society and guarantees its protection, particularly the physical and spiritual well being of ‘mother and child’.⁽¹⁸⁾ The constitution also stands for the abolition of all un-Islamic traditions.⁽¹⁹⁾ Implementing these two provisions could improve the position of women who are treated less favorably because of certain social taboos, which are presumably (and erroneously) based on teachings of Islam. Extreme example would be honor killing. The constitution makes special provision that at least two female delegates may be elected to *Wolesi Jirga* (The Council of People)⁽²⁰⁾ from each province in the house of 220 to 250.⁽²¹⁾ (The number of the provinces remained uncertain but presently seems 32). This means that one quarter of women is the basic minimum representation in the Council of People which is not sufficient but a great step forward in women’s political participation in a country where women are not allowed to leave their homes.

DISCRIMINATORY PROVISIONS

There are some articles, which are, prima facie, neutral but inherently or by implications glaringly discriminatory towards women when viewed in the social context of Afghanistan. Article 31 (3), states that the state shall provide legal aid/counsel to the destitute in criminal cases. This is a sound step benefiting every citizen. However, if looked at in the social and cultural milieu of Afghanistan, it is impliedly discriminatory towards women because the large number of women that come in conflict with law are mainly in family cases and these cases are omitted by the constitution. The discrimination becomes more poignant when it comes to the fact that many women live below the poverty level in Afghanistan and financial constraints deter them from initiating litigation for their rights.

The constitution gives every one the right to elect and be elected⁽²²⁾ but

also lays down certain preconditions for election to certain elective bodies, e.g., National Assembly. For instance, article 72(2) makes higher education necessary for member for National Assembly, the highest deliberative and decision making body. This is discriminatory because most of the women would not meet the criterion of 'higher education' and the framers of the constitution were well aware of women's current extremely low literacy rate in the country. Provincial and District councils elect the members of the *Majlis-e-Mashorano Jirga* (The Council of Elders) and the President is empowered to appoint one third of the members from technocrats and experts from various fields of life and within this 50 per cent should be women.⁽²³⁾ This is protective in the sense that it would encourage women to come forward, as many would be reluctant to go for election campaigning and political smearing etc. However, this is not a satisfactory quota for women, not even equal to one quarter of the Council of People. The Constitution has not reserved any seats for women in the Provincial and District Councils as well. In Pakistan (neighbouring Islamic country sharing many cultural values) women can be elected in general election but specific number of seats are reserved for them in the Parliament as well as Provincial Assemblies. Keeping in view the social and political environment, the government of Pakistan also made special provisions for the inclusion of women in local government at district level.⁽²⁴⁾ Not reserving seats for women in the Provincial Councils is serious constitutional omission.

THE CONSTITUTION AND HUMAN RIGHTS

The constitution reflects the views of both Islamic and human rights groups. It is an eclectic compromise embodying many aspects, which could be easily associated with advocates of human rights while injecting several Islamic provisions. The constitution makes frequent references to the 'protection of human rights' and to the Universal Declaration of Human Rights, 1948 (UDHR) and Charter of the United Nations (Charter). This is why it is called an 'unflinchingly democratic and pro-human rights' constitution.⁽²⁵⁾ The preamble of the constitution declares respect for UDHR and the Charter⁽²⁶⁾

and reaffirms faith, *inter alia*, in the ‘protection of human rights’.⁽²⁷⁾ In article 6, the state undertakes, *inter alia*, to set up society based on justice, human dignity and protection of human rights. Apart from the preamble, article 7 also makes a commitment to observe the Charter, UDHR and international treaties and conventions that Afghanistan has signed or ratified. The constitution also supports the creating of domestic machinery for the protection of human rights declaring that an independent human rights commission should be set up. This would receive complaints of human rights breaches and provide assistance to the aggrieved persons in seeking remedies according to law.⁽²⁸⁾ Prof. Madhvi Sunder maintains that ‘under the new Afghan constitution, the independent human rights commission will be able to enforce CEDAW among other “international conventions Afghanistan has signed”’.⁽²⁹⁾ I would not concur with this view for the reason that it is not adjudicating body rather it is advising and assisting body as the plain wording of the constitution indicates. Equal representation for women on the commission could turn it into an effective forum for helping the cause of women’s human rights.

All these provisions are very encouraging and would help and expedite the promotion of human rights culture in Afghanistan. It is also heartening to know that Afghanistan has ratified Women’s Convention in 2003 without reservations in contrast to several Muslim countries. This becomes significantly interesting when the constitution declares Afghanistan as an Islamic Republic⁽³⁰⁾ and Islam as state religion.⁽³¹⁾ The constitution also prohibits the enactment of any law repugnant to injunctions of Islam and values of the constitution.⁽³²⁾ The constitution has also bared amendment to the provisions dealing with the adherence to the fundamentals of Islam.⁽³³⁾ The Supreme Court is empowered to review, on the request of government or courts, any law or international convention or treaty whether or not it comply with the constitution.⁽³⁴⁾ This signifies that no law should be made which is against Islamic law and no law, certainly, should be construed in way, which goes against the grain of Islamic law, and Supreme Court is the final arbiter in such cases.

Human rights groups have expressed their reservations and concerns

about introduction of this provision of the constitution. IRIN, quoting Rubin, reported that:

Another debatable question was the newly introduced notion of the judicial review of legislation and acts of the government. That has never existed in Afghanistan before, and I think people do not necessarily appreciate the dangers it poses...He added that the idea might sound progressive, but it had risks. If a group of unelected people decides whether anything that the government does is consistent with the basic principles of Islam, *which no one has defined*, that gives them tremendous amount of power and it is very tempting to use it in political ways.⁽³⁵⁾

Feminist Majority Foundation aired similar apprehension:

‘Concern among women's rights and human rights advocates remains over language in the Constitution that states that "in Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam." This language and another article leaving matters where there is no provision in the constitution or law to adjudication by religious laws may leave individual rights, human rights, and women's rights vulnerable to extremist interpretations of Islam.’⁽³⁶⁾

Reviewing the provisions of human rights treaties (including Women’s Convention) whether or not it comply with constitution are fraught with problems when it comes to implementation of Women’s Convention. There are many areas of Sharia law,⁽³⁷⁾ which in their current form clash with the principles of Women’s Convention.⁽³⁸⁾ One such problematic area is family law, divorce, polygamy and inheritance. In family law of Islam, man has the unilateral and extra judicial power to divorce his wife whereas woman has either to return her dower to buy release or to go through the ordeals of litigation to get the marriage dissolved. *Sharia* law allows polygamy contingent upon certain conditions.⁽³⁹⁾ The Koran said: ‘...marry women of your choice, two or three or four’ (4:3).⁽⁴⁰⁾ Regarding inheritance, the Koran declares: ‘to the male the equivalent of the portion of two females’. This is

clearly in conflict with the principles of article 16 (1) of the Women's Convention, which envisages equal rights for men and women in family sphere. Under the current Islamic law of evidence woman's testimony is not admissible in cases where *Hadd*⁽⁴¹⁾ punishment is applicable. This rule is based on the narrow interpretation of (and in isolation from other related verses) the Koranic verse which says when dealing with one another; take the evidence of two men or one man and two women (2:228). This conflicts with article 15 of Women's Convention, which accords 'to women equality with men before the law'.

The real test for the constitutional commitments to human rights standards and adherence to fundamentals of Islam, two apparent conflicting sets of laws, has to be waited and seen when it comes to implementation of Women's Convention. It is also yet to be seen how Afghanistan will fulfil its international obligations, incorporating doctrine of equality in national constitution and other legislation under article 2 (a) of Women's Convention.⁽⁴²⁾ If Afghanistan succeeds in reconciling both sets of laws, it could pave the way for Muslim states to withdraw their reservations making Women's Convention an effective tool for protection of their rights in domestic courts.

REVAMPING WOMEN'S RIGHTS PROVISIONS

For ending discrimination and better protection of women's rights, certain amendments may be made in the constitution and in some cases special legislation may be required. To hear women's voices, they should be given proper representation in all the elective bodies: especially Provincial and District Councils where the constitution is silent. The seats in the National Assembly should be increased. Governors/Chief Ministers should be empowered to induct female expert and technocrats into Provincial Councils on the presidential style under article 84 allowing for inducting women in the Council of Elders. Women should be included in important decision making bodies like central and provincial cabinets. Article 73 empowers the President to appoint Ministers to the central cabinet from within or outside

National Assembly, which could be used as gateway for women's induction into central cabinet. Similar provision should be inserted in the constitution giving to provincial Governors/Chief Ministers to appoint women to provincial cabinet from within and outside Provincial Councils. Women participation should also be ensured at grassroots level, District Councils through special laws.

The constitutional stipulation of providing legal assistance to destitute citizens involved in criminal cases should be expanded to include family cases as well. The constitution forbids discrimination of any kind and stipulates equal treatment of men and women before law but does not have separate equality clause like article 25 in the constitution of Pakistan, which has history of protecting women's rights in several significant cases.⁽⁴³⁾ Special express equality clause forbidding discrimination on the basis of sex may be inserted into the constitution. To avoid potential conflict between Islamic law and international human rights law in general and Women's Convention in particular, the government of Afghanistan should set up an independent commission comprising experts on Islamic and human rights law to make suggestions and work out plans how to reconcile Islamic law with human rights standards and norms. ❖

NOTES:

1. See <http://www.constitution-afg.com/un.html>. Web site visited in Feb. 2004.
2. <http://www.un.org/apps/news/storyAr.asp?NewsID=9363&Cr=Afghanistan&Cr1=>. Web site visited March 14, 2004.
3. *New York Times*, editorial, 6 January 2006.
4. Some writers use CEDAW both for Women's Convention and the Committee set up thereunder. In this paper CEDAW is used for the Committee, not the Convention.
5. Article 23.
6. Article 24.
7. Article 40.
8. Article 43.
9. Article 22.
10. <http://www.peacewomen.org/resources/Afghanistan/CEDAWAcar.html> Web site visited March 14, 2004.
11. Article 38.
12. Article 44.
13. Article 53.
14. ARI 1985 SC 945.
15. *Iddat* is a term of Islamic law meaning the waiting period of four months after the dissolution of marriage. During this period a woman cannot marry and husband is obliged to provide her maintenance but not beyond that. After this period she is allowed to remarry any man she wishes.
16. Article 2.
17. Article 3.
18. Article 54.
19. *Ibid.*
20. The National Assembly of Afghanistan consists of two houses: *Wolesi Jirga* (The Council of People) and *Masherano Jirga* (The Council of Elders).

21. Article 83.

22. Article 33.

23. Article 84.

24. See, *NWFP Local Government Ordinance 2001*, Pakistan.

25. Prof. Madhavi Sunder, 'The New Constitution of Afghanistan: Will it respect women's human rights? Will its mixture of Religion and Democracy work?' in *Find Law's Legal Commentary* http://writ.news.findlaw.com/commentary/20040115_sunder.html Web site visited March 14, 2004.

26. Preamble paragraph 5.

27. *Ibid.* Paragraph 8.

28. Article 58.

29. http://writ.news.findlaw.com/commentary/20040115_sunder.html web site visited March 14, 2004.

30. Article 1.

31. Article 2.

32. Article 3.

33. Article 149.

34. Article 121.

35. http://www.irinnews.org/S_report.asp?ReportID=34455&SelectRegion=Central_Asia web site visited March 14, 2004. Emphasis added.

36. <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=8231> web site visited March 14, 2004.

37. *Sharia* law is the outcome of evolutionary processes, that is the interpretation of the Koran and the *Sunnah* of the Prophet Muhammad (what he did, said or approved by silence) over the ages informed by different political, economic, social and cultural factors.

38. The followers of Islam are divided into two main schools: Shia and Sunni and so are their laws. Sunni law is further subdivided into four schools: Hanafi, Hambli, Malaki, and Sahfi. Hanafi School is followed in Afghanistan (article, 130) and the examples are from Hanafi jurisprudence. Other schools also hold the same view.

39. The conditions are that if one is not able to do justice to an orphan, and then marry up to four women but if one fears unequal treatment among wives then only one.

40. Yousaf Ali, '*The Meaning of the Holy Koran*' (Amana Corporation, Brentwood, Maryland, USA). p. 184.

41. *Hadd* is an Islamic punishment, which is fixed by either the Koran or the *Sunnah* of the Prophet Muhammad and the court/judge has no discretion. This is in contrast to *tazir*

where judge is allowed to award punishment according to merits of each case.

42. My thesis is that current *Sharia* law, practiced in Muslim states; dealing with women's rights is not compatible with international human rights standards. However, the dynamism and spirit of Islamic law allows for reformulation of *Sharia* law (through juristic practice of *Ijtihad*, independent individual reasoning) and certain reformation would make them compatible/reconcile with most of the international standards.

43. See, PLD 1990 SC 295, PLD 1993 SC 341, 1999 MLD 1250 and PLD 1990 SC 1.