

WOMEN’S RIGHTS IN THE NEW CONSTITUTION OF AFGHANISTAN¹

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I. INTRODUCTION

A written constitution represents the preeminent legal document in a society, a social contract that defines the relationships between individuals and the state. It is the starting point, not ending point, for the enumeration of individual rights and liberties. The approach of the Constitutional Commission, the body responsible for drafting a proposed constitution for the Islamic State of Afghanistan, in re-establishing the legal rights of women will institute not only future legal precedent in Afghanistan, but will set forth the values and ideals of its society. How these values and ideals are then interpreted will affect the implementation and application of laws and regulations derived from the constitution.

The issue of women's rights should not be addressed in isolation, but as part of the need for legal protection of human rights and protection from unfair discrimination for all of Afghanistan's citizens. Although women's rights have been violated throughout the past twenty-three years of conflict, such violations run counter to Islamic and Afghan law. Gender equality and equity, an element of human rights, is supported by Islamic law and philosophy, one of whose purposes is the attainment of justice, fairness, and dignity for all human beings. Gender equality and equity are also supported by Afghan legal precedent, evident in the 1964 Constitution and subsequent constitutions, as well as the ratification by Afghanistan of several international treaties.³

II. CURRENT CRISIS

When identifying the needs of Afghan women, it is crucial to see them as part of society, rather than a marginalized group, because viewing them in isolation de-emphasizes the idea of equality and ignores the fact that women's rights are part of human rights. This perspective begins with understanding the statistics that face Afghan society as a whole, and realizing that women effect, and can be affected by, changes in these demographics.

A. Post-Conflict Afghan Society

It is estimated that after 23 years of conflict, approximately 1.5 million men, women, and children have lost their lives.⁴ Afghanistan poses the world's largest single refugee case load ever, with an estimated 6.2 million refugees living outside of the country, eighty percent of them women and children.⁵ The country also faces the highest number of internally displaced persons in the world, currently estimated at 1.1-1.5 million.⁶ There are approximately one million

³ See § V *infra*.

⁴ See M. Sakhawat Hussain, *War on Terror: Afghan Situation Still Volatile*, THE INDEPENDENT (Sept. 20, 2002).

⁵ See United Nations High Commissioner for Refugees statistics as of April 2002, *available at* www.unhcr.ch.

⁶ See *Id.*

landmine victims and “Afghanistan is the most mine and unexploded ordinance-affected country in the world.”⁷

B. Challenges Facing Afghan Women

Afghanistan has been ranked at the bottom of the United Nations gender development index.⁸ The estimates for literacy rates of Afghan women range from 11-21%.⁹ It is estimated that only 3% of girls are enrolled in primary schools.¹⁰ Due to years of war and conflict, a large population of widows exists and over 500,000 Afghan women are heads of households.¹¹ The life expectancy of Afghan women who live in Afghanistan or in neighboring refugee camps is only 45 years, while for men it is only 47 years.¹² Afghanistan is one of the few countries where the life expectancy of men is longer than women’s – this in a country that has seen armed conflict for close to a quarter of a century.¹³

C. Relationship of Women’s Rights to Children

Because women are child-bearers, they are greatly affected by what happens to their children, both before and after birth. One woman dies of pregnancy-related complications every thirty minutes in Afghanistan.¹⁴ About seventy-five percent (75%) of Afghan women lack access to

⁷ See *Afghanistan: Preliminary Needs Assessment for Recovery and Reconstruction*, United Nations Development Programme (Jan. 2002) available at www.undp.org.

⁸ See Angela White, *Afghan Women Stripped of Basic Human Rights*, MIDDLE TENNESSEE STATE UNIVERSITY NEWSPAPER, March 2001.

⁹ See *New Voices: Afghan Women Emerge from Taliban Repression*, ATLANTA J. & CONST. A1 (October 9, 2002) (estimates 2001 rate as 11%); CIA WORLD FACTBOOK 2002 (Jan. 1, 2002) (estimates 1999 rate as 21%); *Background Note: Afghanistan*, U.S. Department of State (June 2002) (estimates 1999 rate as 15%).

¹⁰ See Homira Nassery and Carol Le Duc, *Afghanistan Recovery and Reconstruction Preliminary Needs Assessment*, WORLD BANK AND UNDP PAPER ON GENDER, at www.inweb18.worldbank.org/sar/sa/nsf/afghanistan (2002).

¹¹ See *Afghanistan: Preliminary Needs Assessment for Recovery and Reconstruction*, United Nations Development Programme (Jan. 2002) available at www.undp.org.

¹² See *Background Note: Afghanistan*, U.S. Department of State (June 2002) (estimates female life expectancy for 2000 as 45.1 and male life expectancy as 46.62); CIA WORLD FACTBOOK 2002 (estimates female life expectancy for 2000 as 45.85 and male life expectancy as 47.32) available at <http://www.state.gov/r/pa/ei/bgn/5380.htm>.

¹³ See Hillary Mayell, *Change Slow for Afghan Women*, NATIONAL GEOGRAPHIC NEWS, March 12, 2002.

¹⁴ See, *Health in Afghanistan Situation Analysis*, World Health Organization available at www.who.int/disasters/repo/7543.doc (March 2002).

essential maternal care due to the absence of health facilities.¹⁵ Afghanistan has one of the highest maternal mortality rates at 1,700 deaths per 100,000 live births.¹⁶

After birth, the statistics for raising children are equally grim. One quarter of all children dies before reaching the age of five.¹⁷ Fifty percent of Afghan children suffer from chronic malnutrition.¹⁸ Thirty percent (30%) of Afghan children are orphans.¹⁹ The lack of education, health facilities, and basic needs for children leads to great emotional and psychological trauma among Afghan mothers.

In making policies and laws aimed at attaining and maintaining Afghan women's rights, it is important to understand the impacts it will have upon the development of children. When women have equal opportunities for education, employment, and health care, it will not only improve their own lives, but will likely have positive impacts on their families. For example, an educated woman is more likely to have the tools necessary to educate her children. A woman with economic resources is more likely to be able to afford health care for her children.

Protecting the legal rights of Afghan women will thus have positive impacts on Afghan children.

D. Importance of Women's Rights to the Development of Afghanistan

Providing for gender equality and equity within Afghan's legal system not only has positive benefits for Afghan women and children, but also benefits the development of the country. Economic growth occurs most rapidly in countries with low disparities between women and men in health, education, employment, and property rights.²⁰

Because Afghan women outnumber men by six to four, it has been recognized that Afghan women's full participation in all aspects of life in Afghanistan is critical to the nation's future and development.²¹ Women's participation in political life precipitates high levels of

¹⁵ See *Id.*

¹⁶ See *Afghanistan Recovery: Some Basic Facts*, United Nations Development Programme, available at www.undp.org/afghanistan/basicfacts.htm (last visited October 17, 2002).

¹⁷ See *Afghanistan: Preliminary Needs Assessment for Recovery and Reconstruction*, United Nations Development Program (Jan. 2002) available at www.undp.org.

¹⁸ Kevin Coughlin, *Kids' Fund for Afghans Falls Short- Charity's Future Uncertain, But Teachers and Students Praise \$10.3 Million Raised in U.S.*, THE STAR LEDGER 015 (Sept. 17, 2002).

¹⁹ See *Id.*

²⁰ See Nassery and Le Duc, *supra* note 10.

²¹ See *Transition within Tradition: Restoring Women's Participation in Afghanistan*, Paper produced at Transition within Tradition Conference, Harvard University, Women and Public Policy Program, December 7-9, 2001.

transparency, social responsiveness and democratization while minimizing corruption.²² If there is no protection in both the provisions and process of Afghan law against unfair discrimination based on characteristics such as sex, a large segment of society will be disadvantaged, hurting the potential development of Afghanistan as a whole.

It is important to recognize that socioeconomic development, given dire statistics in Afghanistan, cannot move forward if the legal framework does not support equality in and before the law for all of Afghanistan's citizens. Ensuring that Afghan women can participate equally in the political life in Afghanistan, have equal opportunities for education and employment, equal access to health care, and other rights, must not only emanate from the laws and legal institutions through a "top down" approach, but also through social and development programs through a "bottom up" approach. This two-tiered approach will assist in the greater attainment of rights for Afghan women, not through words alone, but through the realization of these rights in the socioeconomic and political life of the nation.

III. HISTORICAL PERSPECTIVE OF WOMEN'S LEGAL RIGHTS IN AFGHANISTAN

Throughout Afghanistan's history, women's legal rights have reflected internal and external tensions. Various political groups have used the issue of women's rights to criticize other groups and to rally support for their ideologies. The issue of women's rights in Afghanistan has also been linked to attempts by foreign nations to interfere in Afghan politics.

A. Internal Legitimacy for Women's Rights

History in Afghanistan has taught that when foreign intervention or influences are seen as the catalyst for reform in women's rights, rather than allowing the reforms to grow from within, the changes are not long-lasting. Conservatives and traditionalists inevitably use the issue of women's rights to link the ruling government with foreign interests or to accuse the government of running counter to Afghan culture or tribal customs. These accusations are then used to build popular support against the government and its reforms. In many cases, these foreign interests have been successful in hampering developments in women's rights.

In the process of drafting the new Constitution of Afghanistan, the issue of women's rights will likely remain a controversial issue, either openly or discretely, and will again be a symbol for what direction the nation should take. If the issue of women's rights is regarded solely as an agenda to appease pro-Western influences, conservative groups are likely to use the issue to build popular support against the government that brings about such changes. This pressure will be based not upon legitimate concerns of complying with Islamic law or philosophy, which was one of the first systems of governance that gave women legal rights, but will be based upon attempts to discredit the new government in order to gain more support and power.

²² See Nassery and Le Duc, *supra* note 10.

B. Early Reforms

Reforms in the area of women's rights began in Afghanistan in the 1880s, when Amir Abdur Rahman Khan ascended the throne. Amir Abdur Khan changed some of the customary laws by abolishing leviratic marriages,²³ raising the age of marriage, and giving women divorce rights under specific circumstances.

The next king, Amir Habibullah Khan, ruled from 1901-1919 and continued the previous king's reform agenda, by putting a ceiling on the extravagant expenses during marriages and abandoning the veil for his wives, who were publicly seen in western clothes.

In the 1920s, King Amanullah Khan introduced the most liberalizing reforms of the time in the area of women's rights. He allowed his wife, Queen Soraya, to take an active role in civil society and governance in an era when women were absent from the Afghan political scene. Queen Soraya openly challenged the traditionalists in a public address at a gathering of women in the 7th Independence Anniversary in 1926. She stated, "Do not think, however, that our nation needs only men to serve it? Women should also take their part as women did in the early years of Islam."²⁴

King Amanullah's sweeping reforms were a part of broader efforts to modernize Afghanistan. The government quickly brought about reforms with regards to women's rights at a time when socioeconomic and cultural institutions were unprepared and conservatives who sought to keep control of the status quo looked upon these institutions with disfavor. When King Amanullah raised the age of marriage for women to 18 and for men to 21 and abolished polygamy, tribal leaders opposed the reforms and eventually forced the King to reverse some of his policies. It would not be until the 1950s that reform of women's rights would progress as they did during this period.

C. Beginning of Modern Reforms

During the 1950s, social and economic changes led to reforms in women's rights. "A need was perceived for women to be economically active to help Afghanistan achieve its targeted development goals."²⁵ In 1959, members of the royal family appeared unveiled in public and the government encouraged women to abandon the veil; the government also curtailed marriage expenses and encouraged women to participate in the economy. It was during this time that Afghanistan became one of the first states to sign the Convention on the Political Participation of Women, giving Afghan women equal rights as men to run, hold, and be elected for public office. This was before women in Switzerland had the right to vote.

²³ Leviratic marriages occur when a woman's family forces her to marry her brother-in-law after her husband's death.

²⁴ LOUIS DUPREE, *AFGHANISTAN* 46 (1973).

²⁵ Dr. Human Ahmed Ghosh, *Feminist Perspective: September 11th and Afghan Women*, 2 LEMAR-AFTAAB, Issues 2&3 (2001).

The Constitution of 1964, promulgated under the leadership of Mohammed Zahir Shah, contained a broad “equality clause,” which provided the people of Afghanistan with equal rights and obligations before the law. Significantly, the Constitution was interpreted in the 1960’s and early 1970’s as providing gender equality and it was during this time that women in urban areas advanced in politics, education, medicine, law, and other fields.

D. Communist Influence

During the early 1970s, Afghanistan began to experience a socialist reform agenda. The Soviet Union continued to strengthen its economic aid, assisted in training the Afghan army, and offered scholarships to young Afghans to study at Soviet universities. This influence was later exerted in the area of women’s rights. Although the laws and legal system during the communist regimes provided more explicit protection for women’s rights, these regimes violated other individual rights and liberties and was harshly opposed by most Afghans. Thus, many Afghans perceive reforms in women’s legal rights as part of a communist agenda, even though such reforms had been indigenous to Afghanistan and had begun fifty years earlier.

IV. ISLAMIC SUPPORT FOR GENDER EQUALITY AND EQUITY

Human rights were embodied in the Qu’ran six centuries before the Magna Carta and nearly fourteen hundred years earlier than the UN instruments.²⁶ “They are rights for everyone, Muslim and non-Muslim - even for unbelievers - thus the concept of justice is universal.”²⁷

In most cases, reactions to reforms in women’s legal rights have arisen not out of contradictions with Islamic philosophy, but as attempts to guard ancient tribal laws and customs. As one scholar has stated, “[t]ribal laws and sanctions have taken precedence over Islamic laws in deciding gender roles in the region.”²⁸ Thus, many customs and laws that are thought to be based upon Islam are actually based upon tribal laws. In analyzing women’s rights in Afghanistan, it is important to address shar’ia and to understand the various interpretations that exist on different issues.

Because Afghanistan is a nation that has adopted Islam as its religion, the shar’ia is important in understanding all aspects of social, economic, and cultural life. With regards to the rights of women, Islam provides clear guidance that men and women are equals before Allah:

O mankind! Be conscious of your Sustainer, who has created you out of one living entity (nafs), and out of it created its mate, and out of the two spread abroad a

²⁶ See Haleem, Mohamed Abdel. *Human Rights in Islam and the United Nations Instruments* at 436. Printed in Cotran, Eugene and Sherif, Omar Adel Omar, eds. *THE RULE OF LAW AND ISLAM*, 435-453 (1999).

²⁷ See Id.

²⁸ Ghosh, *supra* note 11.

multitude of men and women. And remain conscious of God, in whose name you demand your rights from one another, and of these ties of kinship. Verily, God is ever watchful over you! (4:1)

Never will I suffer to be lost
The work of any of you,
Be he male or female:
Ye are members, one of another.
[Surah 3: Al-'Imran: 195]

If any do deeds
of righteousness, --
be they male or female --
And have faith,
They will enter Heaven,
And not the least injustice
Will be done to them.
[Surah 4: An-Nisa':124]

For Muslim men and women, --
For believing men and women,
For devout men and women,
For true men and women,
For men and women who are
Patient and constant, for men
And women who humble themselves,
For men and women who give
In Charity, for men and women
Who fast (and deny themselves),
For men and women who
Engage much in God's praise, --
For them God prepared
Forgiveness and great reward.
[Surah 23:Al-Mu'minum:35]

O mankind, We have created you
male and female, and appointed you
races and tribes, that you may know
one another. Surely, the noblest among
you in the sight of God is the most god
fearing of you.
[Surah 18: Hujurat: 13]

And believers, the men and women,
are leaders, one of the other, they bid to

honour, and forbid dishonour; they
perform the prayer, and pay the alms,
and they obey God and his Messenger.
[Surah Towbah: 73]

Whoever does an atom's weight of
good, whether male or female, and
is a believer, all such shall enter into
Paradise.
[Surah 40:40]

Spiritual equality, responsibility, and accountability for both men and women is a well-developed theme in the Qur'an. Providing gender equity within the legal framework would thus not conflict with that principle, but would instead uphold the dictates of Islam itself.

It is a clear teaching of the Qur'an that man and woman are equal in the sight of God, and the Qur'an uses both feminine and masculine terms and imagery to describe the creation of humanity from a single source.²⁹ Jurisprudence contrary to these principles has often been the result of a misunderstanding or misapplication of the Qur'anic text resulting from cultural distortions or patriarchal bias.³⁰ As an Islamic scholar stated, "[t]extual injunctions on gender equity and the prophetic model are sometimes disregarded by some if not most Muslims individually and collectively. Revision of practices (not divine injunctions) is needed. What needs to be reexamined are fallible human interpretations and practices."³¹

V. INTERNATIONAL TREATIES

Afghanistan has ratified several key treaties relating to individual rights and liberties. The Bonn Agreement provides that the legal framework shall include existing laws and regulations, to the extent they are not inconsistent with the Bonn Agreement or with international legal obligations to which Afghanistan is a party.³²

Simply stated, Afghanistan's treaty obligations supercede existing domestic laws and regulations. In relation to women's legal rights, this hierarchy is significant because provisions protecting women's rights in these international treaties cannot be superceded by domestic laws.

²⁹ Riffat Hassan, *Members, One of Another: Gender Equality and Justice in Islam*, at <http://www.religiousconsultation.org/hassan.htm>.

³⁰ Azizah Al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 JOURNAL OF LAW AND RELIGION 37, 40 (2000-2001).

³¹ Jamal Badawi, *Gender Equity in Islam*, at <http://www.iad.org/books/GEI.html>.

³² *See Id.*

A. Convention on the Political Rights of Women of 1953

Afghanistan was one of the first nations to ratify the Convention on the Political Rights of Women of 1953, which provides that women shall have all the political rights that are afforded to men, including the right to vote in all elections as well the right to run for, and to hold public office.³³

B. International Bill of Human Rights

Afghanistan has also ratified various international treaties regarding individual rights, including many that expressly provide for gender equality and equity. Afghanistan is a party to the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. Both of these covenants provide that the enumerated rights shall be granted equally without regard to sex, religion, or race. These two treaties provide rights in broad areas and because Afghanistan has ratified these agreements, they provide Afghan women equal legal rights as to men in those areas.

C. Labor Agreements

Afghanistan is a member of the International Labour Organization and ratified the Convention Concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951, which provides that men and women must earn equal pay for equal work.

Moreover, Afghanistan ratified the Convention Concerning Discrimination in Respect of Employment and Occupation of 1958, which provides that parties agree to undertake programs to stem all discrimination (both race and sex-based) with respect to employment.

D. Binding Obligations

The Qu'ran provides that Muslims must be faithful to any treaties and contracts they enter into.³⁴ As stated earlier, because these are international treaties to which Afghanistan is a party, they are binding obligations and supercede domestic laws. Even if express language is not utilized in the new Constitution regarding gender discrimination, binding international obligations outlaw such unlawful discrimination.

The Judiciary and Constitutional Commissions must assess these treaty obligations as a part of their review of Afghan laws. The Ministry of Justice should ensure these obligations are honored in carrying out the administration of justice. Otherwise, adding additional protections in the Constitution will have little significance or effect if the government does not implement current binding laws.

³³ See The Convention on the Political Rights of Women, 193 U.N.T.S. 135, *entered into force* 7 July 1954.

³⁴ Qu'ran 2:177; 5:1.

Thus, current Afghan law provides protection against unlawful sex-based discrimination. Providing gender equality in and before Afghan law in the new constitution would thus not be alien to Afghan history or culture.

VI. GENDER EQUALITY AND EQUITY IN CONSTITUTIONS OF OTHER COUNTRIES

A. Constitutions of Muslim Countries

The Constitutions of many countries with large Muslim populations provide for equal rights of all its citizens. These nations, among others, include Syria,³⁵ Algeria,³⁶ Tunisia,³⁷ Morocco,³⁸ Oman,³⁹ Bangladesh,⁴⁰ Tajikistan,⁴¹ Uzbekistan,⁴² Turkmenistan,⁴³ Pakistan,⁴⁴ and Lebanon.⁴⁵

There are various approaches to addressing gender equality and equity in the constitutions of various Muslim countries:

1. *Specific provisions stating that men and women have equal rights*

- “All citizens are equal before the law. No discrimination shall prevail because of bind, race, sex, opinion or any other personal or social condition or circumstance.”⁴⁶

“The aim of the institutions is to ensure equality of rights and duties of all citizens, men and women, by removing the obstacles which hinder the progress of human

³⁵ See, CONST. SYR., Arts. 25-27 and 45.

³⁶ See, CONST. ALG., Arts. 29, 31, and 32.

³⁷ See, CONST. TUNIS., Arts. 6, 20, and 21.

³⁸ See, CONST. MOROCCO, Arts. 5, 8, and 13.

³⁹ See, CONST. OMAN, Art. 17.

⁴⁰ See, CONST. BANGL., Art. 28(2).

⁴¹ See, CONST. TAJ., Preamble, Arts. 5, 14, 17, 27, 33, and 42.

⁴² See, CONST. UZB., Preamble, Arts. 13, 18, 43, 44, and 46.

⁴³ See, CONST. TURKM., Preamble, Arts. 17, 18, 25.

⁴⁴ See, CONST. OF PAK., Art. 4 and 25.

⁴⁵ See, CONST. LEB., Art. 7.

⁴⁶ See, CONST. OF ALG., Art. 29.

beings and impede the effective participation of all in the political, economic, social and cultural life.”⁴⁷

“The fundamental human and citizen's rights and liberties are guaranteed. They are a common heritage of all Algerians, men and women, whose duty is to transmit it from generation to another in order to preserve it and keep it inviolable.”⁴⁸

- “All persons are equal before the law and the courts. The government guarantees the rights and freedoms of every person regardless of ethnicity, race, sex, language, faith, political beliefs, education, or social or property status. Men and women have equal rights.”⁴⁹
- “All citizens of the Republic of Uzbekistan have the same rights and freedom and are equal before the law regardless of differences in gender, race, nationality, language, religious, social origin, beliefs, and personal or social position. Privileges may be established only by law and must be in accord with the principles of social justice.”⁵⁰

“Women and men have equal rights.”⁵¹

- “Turkmenistan guarantees the equality of the rights and freedoms of its citizens and, likewise, the equality of citizens before the law regardless of nationality, ethnic origin, property holdings, official status, place of residence, language, religious preference, political convictions, or political party membership.”⁵²

“Men and women in Turkmenistan have equal civil rights. A violation of equal rights based on gender will entail legal liability.”⁵³

“The exercise of rights and freedoms should not violate the rights and freedoms of other people, moral demands, social order, or harm national security.”⁵⁴

⁴⁷ See, CONST. OF ALG., Art. 31.

⁴⁸ See, CONST. OF ALG., Art. 32.

⁴⁹ See, CONST. TAJ., Art. 17.

⁵⁰ See, CONST. UZB., Art. 18.

⁵¹ See, CONST. UZB., Art. 46.

⁵² See, CONST. TURKM., Art. 17.

⁵³ See, CONST. TURKM., Art. 18.

⁵⁴ See, CONST. TURKM., Art. 19.

- “(1)The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. (2) Women shall have equal rights with men in all spheres of the State and of public life. (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution. (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.”⁵⁵

2. *Clauses that prohibit gender discrimination, as well as discrimination based on race, language, and religion and other characteristics*

- “All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed.”⁵⁶
 - “All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.”⁵⁷
 - “All citizens are equal before the Law, and they are equal in public rights and duties. There shall be no discrimination between them on grounds of gender, origin, colour, language, religion, sect, domicile or social status.”⁵⁸
- “Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable.”⁵⁹
- “All citizens are equal before the law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex alone.”⁶⁰

⁵⁵ See, CONST. BANGL., Art. 28.

⁵⁶ See, CONST. OF EGYPT, Art. 40.

⁵⁷ See, CONST. OF TURK., Art. 10.

⁵⁸ See, CONST. OMAN, Art. 17.

⁵⁹ See, CONST. OF TURK., Art. 12.

⁶⁰ See, CONST. OF PAK., Art. 25(1) and (2).

3. *General equality clauses that do not expressly specify gender or other characteristics, but that can be interpreted to apply equally to all citizens*

- “The State shall guarantee equality of opportunity to all Egyptians.”⁶¹
- “(1) Freedom is a sacred right. The state protects the personal freedom of the citizens and safeguards their dignity and security.
(2) The supremacy of law is a fundamental principle in the society and the state.
(3) The citizens are equal before the law in their rights and duties.
(4) The state insures the principle of equal opportunities for citizens.”⁶²

“Every citizen has the right to participate in the political, economic, social, and cultural life. The law regulates this participation.”⁶³

- “Citizens are equal in all rights and duties.”⁶⁴
- “The state shall guarantee equal opportunities for all citizens in the fields of political, economic, social and cultural activities and shall enact the necessary laws for the realization thereof.”⁶⁵
- “Every citizen has the right to participate in the political, economic, social and cultural life of the country.”⁶⁶

4. *Clauses that provide additional protection for women*

- “The State shall guarantee coordination between woman’s duties towards her family and her work in the society, considering her equal to man in the political, social, cultural and economic spheres without detriment to the rules of Islamic jurisprudence.”⁶⁷
- “The state guarantees women all opportunities enabling them to fully and effectively participate in the political, social, cultural, and economic life. The state removes the

⁶¹ See, CONST. OF EGYPT, Art. 8.

⁶² See, CONST. SYR., Art. 25.

⁶³ See, CONST. SYR., Art. 26.

⁶⁴ See CONST. OF YEMEN, Art. 40.

⁶⁵ See CONST. OF YEMEN, Art. 24.

⁶⁶ See CONST. OF YEMEN, Art. 41.

⁶⁷ See CONST. OF EGYPT, Art. 11.

restrictions that prevent women's development and participation in building the socialist Arab society.”⁶⁸

- “Nothing in this Article [25] shall prevent the State from making any special provision for the protection of women and children.”⁶⁹
- “Motherhood and childhood are protected by the state.”⁷⁰

5. *Universal application of clauses within a constitution*

In addition to the approaches described above, it is important to recognize that the constitutions of most Muslim countries utilize universal terms such as “person” and “individual,” when providing enumerated rights. This guarantees that these rights apply equally to all citizens or individuals residing in that state, and thus cannot be limited based upon sex or other characteristics.

Therefore, there is precedent across the Muslim world to provide expressly for the equal rights of all citizens, regardless of sex, in the constitutional framework. Promoting and protecting gender equity in the Constitution of Afghanistan is a principle based not only on fundamental human rights and Qu’ranic jurisprudence, but supported by the practices of many Muslim nations spanning different continents, political systems, social customs, and economic realities.

B. **Constitutions of Non-Muslim Countries**

Although not every nation includes gender equity rights in its constitution, these rights may be included later as part of the legal system through statutes, codes, or common law. In such situations, however, it will likely take longer to include these rights in the legal system in a piecemeal fashion. For example, although the United States constitution applies broadly to grant certain inalienable rights to all human beings within its borders, laws in the U.S. did not originally provide equal treatment to both sexes. It was not until almost 150 years after the U.S. constitution was adopted that women in the U.S. were guaranteed the right to vote. Women were also discriminated against in employment, wages, and other realms until specific statutes, such as Title VII, were enacted or judicial decisions prohibited such discrimination.

Constitutional support in the U.S. for federal legislation that prohibits unfair discrimination based upon sex, or other characteristics, has been largely based upon *process* protections provided for in the U.S. Constitution, such as the right to “due process of the law.” Perhaps if express and clear support for women’s rights had been provided for in the U.S. constitution, it would not have taken over a hundred years for women to attain such basic guarantees.

⁶⁸ See, CONST. SYR., Art. 45.

⁶⁹ See, CONST. OF PAK., Art. 25(3).

⁷⁰ See, CONST. UZB., Art. 65.

1. *Recent Post-Conflict Experiences*

Nations that expressly include equal rights laws in their constitutions due to changes in governance, such as South Africa, provide the framework to more quickly protect those individuals in its population who had previously suffered discrimination. Chapter 2 of the South African Constitution, entitled “Bill of Rights,” provides in Article 9 “Equality” that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The equality protections of the South African constitution are comprehensive because they not only address equality before the law, but establish the principles of equal protection and benefit of the law, provides for the full and equal enjoyment of all rights and freedoms, allows for remedial measures to be taken to address unfair discrimination, and most importantly, prohibits not only *state action* that discriminates based on certain characteristics, but *private action* as well.

Recently, East Timor adopted a constitution, which took effect on its independence on May, 20, 2002, that distinctly provides for equality of all individuals and a principle of non-discrimination based upon gender, race, ethnicity, and other characteristics:

- “1. All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties. 2. No one shall be discriminated against on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition.”⁷¹

“Women and men shall have the same rights and duties in all areas of family life and political, economic, social, cultural.”⁷²

⁷¹ See, CONST. OF EAST TIMOR, Sect. 16.

⁷² See, CONST. OF EAST TIMOR, Sect. 17.

These two recent examples of post-conflict and governance changes support the formulation of a constitution with clear and explicit terms. Although it takes time to change social norms, changes in the law, coupled with enforcement of those laws, help to realize progress more quickly as it provides specific legal precedent that must be followed.

VII. EQUAL RIGHTS IN AFGHAN CONSTITUTIONS

A. Constitution of 1964

The Preamble of the 1964 Constitution states, among other reasons, that the Constitution was framed,

“TO achieve *justice and equality*”

“TO organize the functions of the State and its branches to *ensure liberty and welfare of the individual* and the maintenance of the general order”

“TO form, ultimately, a prosperous and *progressive society* based on social co-operation and preservation of *human dignity*”

(emphasis added).

In addition to the Preamble, several articles of the Constitution of 1964 support gender equality. Article 25 of the Constitution of 1964 states,

“[t]he people of Afghanistan, without *any* discrimination or preference, have equal rights and obligations before the law”⁷³ (emphasis added).

Article 26 of the Constitution provides broad support for individual rights and liberties and makes no distinction in any of its provisions based upon sex. Words such as “human being,” “no one,” “person,” “every Afghan,” are used, supporting the fact that these provisions are universal and cannot be limited based upon sex or other characteristics. Examples of provisions in Article 26 that support gender equity and equality include:

“Liberty is the natural right of the *human being*.”

“The liberty and dignity of the *human being* are inviolable and inalienable. The State has the duty to respect and protect the liberty and dignity of the *individual*.”

(emphasis added).

Article 34 of the Constitution states,

⁷³ CONST. OF AFG. OF 1964, Art. 25.

“[e]ducation is the right of *every Afghan* . . .” (emphasis added)

Article 37 of the Constitution states,

“Work is the right and precept of *every Afghan* who has the capability to do it.” (emphasis added).

Although the 1964 Constitution has been widely cited as guaranteeing equal rights for women, its provisions did not expressly do so. The use of the word “people,” however, was interpreted as including women and thus has been utilized as the basis of equal rights for Afghan women. After the adoption of the 1964 Constitution, women participated in the country’s legislative body, in the civil service, and in a variety of occupations.

This demonstrates the importance of interpretation and application of clauses within a constitution. When society and government protect individual rights and liberties, broad clauses may be sufficient to protect these rights. However, when there have been human rights violations and the social and economic conditions in a country are not conducive to interpreting and applying these rights universally, more specific language to protect individual rights and liberties are needed in the constitution and in the laws.

B. Constitution of 1976

The Constitution of 1976, enacted after Daoud Khan took power, states in Article 27,

“[a]ll the people of Afghanistan, both women and men, without discrimination and privilege, have equal rights and obligations before the law.”⁷⁴

In 1977, women made up 15% of Afghanistan’s legislature, a number that has not been reached by many Western legislative bodies.

C. Constitution of 1987

The Constitution of 1987, enacted during communist party rule, went further and states in Article 28:

Citizens of the Republic of Afghanistan, both men and women, have equal rights and duties before the law, irrespective of their national, racial, linguistic, tribal, educational and social status, religious creed, political conviction, occupation, wealth, and residence. Designation of any illegal privilege or discrimination against rights and duties of citizens are forbidden.⁷⁵

Article 33 states:

⁷⁴ CONST. OF AFG. OF 1976, Art. 27.

⁷⁵ CONST. OF AFG. OF 1987, Art. 28.

“The citizenship of the Republic of Afghanistan is equal and uniform to all citizens.”

D. Constitution of 1990

Articles 28 and 33 of the Constitution of 1987 were unchanged in the Constitution of 1990.⁷⁶ In the early 1990s, women made up 70% of the teachers, 50% of government workers, 50% of university students, and 40% of physicians.

E. New Constitution of Afghanistan

Thus, there is support for the principles of equality and nondiscrimination in past constitutions of Afghanistan. The Bonn Agreement provides that the legal framework for the Transitional Administration shall include the Constitution of 1964, to the extent that its provisions are not inconsistent with those contained in the Bonn Agreement and with the exception of the provisions related to the monarchy.⁷⁷ It is open to interpretation whether the Bonn Agreement required the Constitutional Drafting Commission to utilize the 1964 Constitution as the starting point in drafting a new constitution for Afghanistan.

In any case, there is strong support in the 1964 Constitution, as well as later constitutions, that the protection of equality before the law and nondiscrimination have been very important to the Afghan nation.

VIII. RECOMMENDATIONS FOR NEW CONSTITUTION OF AFGHANISTAN

A. Rationale

Due to the violation of women’s basic rights as human beings and full and equal participants in the social, economic, and legal systems in Afghanistan during the past years, it is essential that law makers consider promoting and preserving those rights in the new political, legal, and social framework of Afghanistan. The people of Afghanistan, especially women and girls, have been denied their basic human rights including the right to live in peace, the right to liberty, the right to be educated, the right to work, the right to move about freely, the right to freedom of expression, among other rights.

In order to draft legislation or implementing regulations pertaining to the rights of women in Afghan society, it is imperative that the focus first begin at the constitutional level. Since the constitution provides the framework for the basic rights of individuals and their relationship with other individuals and the state, the protection of gender equity must emanate from that framework. The existence of potential conflicts between women’s rights and social and customary pressures should not extinguish or diminish existence or application of these rights.

⁷⁶ Article 28 was re-numbered as Article 38.

⁷⁷ See Agreement on Provisional Arrangements in Afghanistan, Article II (1), at www.uno.de/frieden/afghanistan/talks/agreement.htm (2001).

The legal system must give women the mechanisms and tools to protect their rights, even if social norms do not.

B. Recommendations for Approach and Language of New Constitution

- 1. All provisions should be clearly drafted so that no provision can be interpreted as applying to only one sex.*

It is essential to the protection and promotion of equal rights that the future Constitution of Afghanistan provide for the equal rights of all its citizens, regardless of sex, and be clearly drafted so that none of its provisions can be interpreted as applying to only one sex.⁷⁸

Words such as “people,” “person,” “individual,” “human being,” etc. should be used to make it clear that a particular provision applies to all persons, regardless of sex or other characteristics and should be pervasive throughout the Constitution.

- 2. The word “Afghan” should be defined so that discrimination based upon certain characteristics is prohibited.*

The new Constitution should state in its provision regarding citizenship:

“The Afghan nation is composed of all individuals, without distinction as to race, ethnicity, colour, descent, sex, religion or sect, language, political opinion or belief, tribe, economic or social status, or disability, who possess the citizenship of the State of Afghanistan in accordance with the provisions of the law. The word Afghan shall apply to each such individual.

Thus, the implementing citizenship law and the provisions of the Constitution that utilize the word “Afghan,” cannot be limited based upon these factors. As a matter of construction, “human being,” “person,” “no one,” “individual,” “people of Afghanistan,” and “Afghan,” are used throughout the 1964 Constitution, sometimes interchangeably within one paragraph. Since the word “Afghan” is defined in Article 1, its meaning will then be clear throughout the Constitution.

⁷⁸ So that all provisions of the Constitution unambiguously apply equally, the following changes should be made. Although it may not make a difference in the Dari version because of grammar, the Pashto and English versions should be drafted in this way for the purposes of clarity. Article 41, paragraph two, line 4- Add “or her” after “his;” Article 43, line 6- Add “or her” after “his;” Article 51, paragraph 1, line 2- Add “or her” after “his;” Article 54, line 1-Add “or her” after “his;” Article 78, line 2- Replace “Chairmen” with “Chairpersons;” Article 82, paragraph 1, line 1- Add “or her” after “his;” Article 91, paragraph 4, line 3- Add “or her” after “his;” Article 93, paragraph 2, line 3-Add “or her” after “his;” Article 99, line 4- Add “or her” after “his;” Article 109, paragraph 3-Replace “Chairman” with “Chairperson.”

It is important to use these words consistently and to be aware of those rights and obligations that are reserved for only Afghan citizens. With the issues of repatriation of refugees, Afghans who have taken the citizenship of other countries, and the rights of foreigners who are within Afghanistan's borders, the word "Afghan," must be used carefully to vest rights as between Afghan citizens and non-citizens.

3. ***In addition to sex, the provision for equality of rights and obligations should simultaneously address other characteristics that are likely to result in unfair discrimination in Afghanistan.***

In addressing gender equality and equity in the laws of Afghanistan, a recommended approach is to simultaneously address other characteristics that may result in discrimination, such as race, ethnicity, political belief or opinion, religion, etc. in relevant provisions. In this way, equality rights are pervasive and apply to characteristics that may potentially be used to discriminate against individuals. The purpose of including specific characteristics in the universal clause is to provide clarity and identify those characteristics that are at greater risk of being utilized to discriminate.

Title 3, Article 25 of the Constitution of 1964 is the main source of principles regarding equality before the law. Two alternatives for the language of a new Article entitled "Equality" are:

"The people of Afghanistan, without any discrimination or preference based upon race, ethnicity, colour, descent, sex, religion or sect, language, political opinion or belief, tribe, economic or social status, or disability shall have equal rights and obligations in and before the law and are entitled to due process of the law." OR

All Afghans shall have equal rights and obligations in and before the law and are entitled to due process of the law. AND

There shall be no discrimination, either by a public or private actor, based upon race, ethnicity, colour, descent, sex, religion or sect, language, political opinion or belief, tribe, economic or social status, or disability.

In addition to one of the above clauses, another clause under the Constitution's general provisions should state:

"It is a fundamental principle of the State to guarantee all Afghans broad and active participation in the political, economic, social, civil, intellectual, and cultural life of the country."

4. *After addressing the Constitution, review of laws and regulations must be completed to ensure that they comport with the Constitution's mandate prohibiting unfair discrimination based upon sex or other characteristics.*

It is crucial to emphasize that attention also needs to be paid to the statutes and laws of the country, especially family laws, to ensure that what is promoted as equality in one arena is not taken away in another. Existing laws that unlawfully discriminate must be repealed or amended. Otherwise, adding protection in the Constitution will be meaningless.

IX. PUTTING WORDS INTO ACTION: IMPLEMENTING LAWS AND ENFORCEMENT MECHANISMS

A. Enforcement of Rights

The effectiveness of the constitutional provisions addressing gender equality and equity depend “on the nature and control exercised over compliance with its provisions.”⁷⁹ Essential control can occur in different ways and involve different institutions and agencies.⁸⁰ While a new constitution and political structure can supplant what existed in Afghanistan, it cannot eliminate the tragic consequences of the old order. The fact that Afghanistan may adopt an exemplary constitution that expounds the great values of liberty and equality and reflects a commitment to social justice is no guarantee that these values will be sustained and triumph. What is essential is that the values become deeply held as an irreducible part of the structure of political, social, and economic life of the nation. As Robert Dahl observed, “[t]o assume that [a] country has remained democratic because of its Constitution seems... an obvious reversal of the relation; it is much more plausible to suppose that the Constitution remained because [the] society is essentially democratic.”⁸¹

The philosophy and practice of human rights cannot survive unless there is a meaningful delivery of socioeconomic services.⁸² Thus, it is not the mere presence of laws guaranteeing gender equality that is an indicator of success, but the enforcement of those rights through the legal and political system and the availability of opportunities for all.

B. Implementing Regulations

Specific areas, among others, for which implementing regulations are needed to address gender equity are:

⁷⁹ I.M. RAUTENBACH AND E.F.J. MALHERBE, CONSTITUTIONAL LAW 292 (1999).

⁸⁰ Nadine Strossen, *Translating a Bill of Rights Paper Guarantee into Meaningful Human Rights Protection*, in KRUGER AND CURRIN, INTERPRETING A BILL OF RIGHTS 50 (1994).

⁸¹ ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 143 (1963).

⁸² GEORGE DEVENISH, CONSTITUTIONAL AND POLITICAL DEVELOPMENTS 33.

1. Equal Access to Education and Training⁸³
2. Right to Work and Move About Independently
3. Right to Inheritance
4. Right to Own Property
5. Right to Deal as Independent Entity in Contractual Relations⁸⁴
6. Right to Security (right to live free from any form of violence, both private and public)
7. Right to Health Care
8. Pregnancy and Maternity Protection

As previously stated, if gender equity has already been provided by Afghanistan's international legal obligations, such as is the case in areas of political participation and equal pay, it is not necessary to enact additional laws, but rather, to enforce those existing obligations.

Not only are specific regulations regarding the above areas necessary, but definitions of the core terminology so that there is clarity regarding meaning for purposes of application. For example, "discrimination" needs to be defined; it is a broad term whose construction can lead to very different outcomes depending upon interpretation. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women⁸⁵ ("Convention") defines discrimination as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Cairo Declaration on Human Rights in Islam and International Women's Rights⁸⁶ ("Cairo Declaration") defines discrimination as:

⁸³ Education in Islam is not a right, but an obligation, regardless of gender. As the Prophet (PUH) said, "The pursuit of knowledge is obligatory for every Muslim, male or female."

⁸⁴ In Islam, a woman is an independent entity, and thus a fully responsible human being. Al-Turabi, Hassan. "On the Position of Women in Islam and in Islamic Society." *Islam for Today* available at <http://www.islamfortoday.com/turabi.htm>.

⁸⁵ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/46 (1979).

⁸⁶ Cairo Declaration on Human Rights in Islam (1990), available at www.humanrights.harvard.edu/regionaldocs/cairo_dec.htm.

any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of women's human rights.

The Convention equates women's equality with their participation in all areas of human life, including the "political, social, economic, and cultural." The Cairo Declaration provides for the elimination of de facto discrimination and accordingly obligates states to enact measures that will modify the customary practices and roles that perpetuate women's subordination.

The laws of Afghanistan must also define discrimination so that there is greater clarity regarding the scope of the term, as used either in the constitution, laws, or other regulations.

X. CONCLUSION

There is support in Afghanistan's culture and history for the protection of gender equality. When that support is cultivated from within, rather than imported from abroad, there is greater likelihood that changes in language in the new Constitution will lead to sustainable changes in the lives of Afghan women. The extent of violations of women's rights in recent years is not the norm upon which Afghan society is based. Years of conflict and war have hindered women's opportunities for education, training, and economic development. This, in turn, has made it even more difficult for women to advance in all areas of life in Afghanistan.

The new legal framework, however, provides hope for millions of Afghan women and hope for the future development of Afghanistan. It will establish the fundamental cornerstones upon which future progress can be made. If lawmakers expressly recognize fundamental rights in this framework, it will make an impact on members of society, and this will further impact perceptions on what is culturally and socially acceptable. The support of Afghan history, Islamic jurisprudence, and constitutional and legal precedent in other Muslim countries can be utilized to educate Afghan society that gender equality and equity is a right, and not a privilege.

Towards this end, it is very important that members of not only the Constitutional Commission, but the Judicial Commission and Human Rights Commission address opposition to women's legal rights in the new Constitution of Afghanistan. This can be done by:

- Framing the issue of women's rights as one of human rights and the protection from unfair discrimination for all of Afghanistan's citizens;
- Utilizing support in Islamic law and philosophy to show that legal protection of gender equality and equity comports with Islamic law and history and with Islamic principles of protecting human rights, promoting justice, and fairness; and
- Utilizing support in Afghan law, including protection in past constitutions and international treaties to which Afghanistan is a party, to show that legal protection of gender equality and equity is not foreign to Afghan history or culture.

Advocating on behalf of gender equality and equity will positively impact Afghan society and thus, the development of Afghanistan as a nation.