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**Abdul Rahim Hakimi**

Ph.D. Student, Department of  
ITMS International Thought  
and Muslim Society, UIN  
Sunan Kalijaga Yogyakarta  
(Islamic State University),  
Indonesia

**Noorhaidi Hasan**

Professor, Department of  
(ITMS) Islamic Thought  
Muslim Society, UIN  
Sunan Kalijaga Yogyakarta,  
Indonesia

**Zulkipli Lessy**

Lecturer, Department of  
(ITMS) Islamic Thought  
Muslim Society, UIN  
Sunan Kalijaga Yogyakarta,  
Indonesia

**Bu Ro'fa**

Department of (ITMS) Islamic  
Thought Muslim Society, UIN  
Sunan Kalijaga Yogyakarta,  
Indonesia

**Corresponding Author:**

**Abdul Rahim Hakimi**

Ph.D. Student, Department of  
ITMS International Thought  
and Muslim Society, UIN  
Sunan Kalijaga Yogyakarta  
(Islamic State University),  
Indonesia

## Customary's dynamic relationship with Islamic law in terms of afghan women's rights

**Abdul Rahim Hakimi, Noorhaidi Hasan, Zulkipli Lessy and Bu Ro'fa**

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### Abstract

This article aims to study the dynamic relationship of customary with Islamic Law regarding women's rights in Afghanistan and clarify that while Islamic Law and Positive Law exist; thence, people deprive women. Therefore, it answered the following questions; what is the dynamic relationship between customary and Islamic Law? Why do Afghans prefer customs to Islamic Law and Civil Law? What kind of rights are women deprived of in Afghanistan? Furthermore, this library-based research defined Islamic Law, the customary, and the relationship between the Customary to Islamic Law and statutes. Then, this article argued the legal status of women, like forced marriage, underage marriage, deprivation of the right of inheritance, taking widows as inheritance, and giving daughters for blood money. Likewise, it argued the superiority of customs over the laws, like the fragmentation of the Laws, Ulama's weak position on women's rights, family stigma, women's poverty, women's ignorance, and non-enforcing the laws.

**Keywords:** Dynamic relationship, compulsory marriages, underage marriages, deprivation of inheritance, wergild blood

### Introductions

Human society is composed of men and women. Therefore, humankind is a general term that refers to both groups of men and women, whether old or infant. Man and woman are not superior to one another in terms of their humanity because they are both created from one body or soul. Therefore, both have equal natural and fundamental rights, such as the right to life, rights to freedom, and the right to choose, and they should not oppress each other to deprive them of their God-given right.

### Background

The choice of the dynamic relationship between customary Law and Islamic Law and women's rights in Afghanistan is at a time when Afghan women have always faced various challenges. They have constantly been subjected to different types of cruelty and violence by family members, relatives, and the community and deprived of their rights under the custom of some people in Afghanistan. According to the Afghan Newspaper, the Ministry of Women Affairs has published a report about women's rights in Afghanistan, according to which they registered 4505 cases of violence against women in that ministry in one year <sup>[1]</sup>. Likewise, the Afghanistan Independent Human Rights Commission 2016 published a report on the 235 cases of forced marriages that the institute registered <sup>[2]</sup>. Alike underage marriage was another challenge, UNICEF reported that fifteen percent of girls got married before the legal marriage age.

Furthermore, the United Nations Population Foundation reported that half of the Marriages are Under Age in Afghanistan <sup>[3]</sup>.

<sup>1</sup>. Ali Qaderi, "Chashm Andaz Huqooq Zanan Dar Afghanistan (The Perspective of Women's Rights in Afghanistan)," *Rose Namay Afghanistan*, March 3, 2014, [http://www.dailyafghanistan.com/opinion\\_detail.php?post\\_id=129995](http://www.dailyafghanistan.com/opinion_detail.php?post_id=129995). Accessed: 1/9/2020.

<sup>2</sup>. Khairullah Rasooli, "Thabt 350 Mawred Imdawaj Ijbari Dar Afghanistan (Record of 350 Case of Forced Marriage in Afghanistan)," *Radio Ashna*, July 17, 2016, <https://www.darivoo.com/a/afghanistan-human-rights-commission-registered-235-forced-marriage-cases-last-year/3421686.html>. Accessed: 1/9/2020.

<sup>3</sup>. *Ibid*.

Similarly, another painful issue that half of the Afghan women face is that they feel like property; when their husbands die, they must stay in that home and marry one of the men's family members <sup>[4]</sup>. Also, there is another kind of violation of women's rights, such as giving the daughters as wergild blood, it is customary among Afghans, according to this custom a person who commits a murder crime, the family murderer, gives a daughter to the family of the victim, to ensure the satisfying, but the most victims of this incidence are underage girls <sup>[5]</sup>.

Importance of this research, this research is unique because other researchers have conducted on different aspects of the issue, but none of them talked about the concept that this research deemed to investigate. For instance, (Anicée Van Engeland, 2014) argued about (the balance between Islamic Law, Customary Law, and human rights in Islamic constitutionalism through the Prism of legal Pluralism). (Ayman Shabana, 2010) argued in his book (Custom in Islamic Law and Legal Theory.) (Hamid M. Khan, 2015) under the topic (Islamic Law, Customary Law, and Afghan Informal Justice). Hence, none of these topics argued specifically about the dynamic relationship between Islamic Law and Customary and women's rights in Afghanistan. To conclude, many are not about women's rights in Afghanistan.

Problem; although, according to the claims, the maximum number of people in Afghanistan is close to 99% Muslims; <sup>[6]</sup> Also, the Law of Afghanistan supported Islamic Law as article three of the Constitution Law denied any law to be in contradiction with Islamic beliefs and orders, so this Law stipulated: "No law can be in opposite of the Islamic faith and Islamic decrees <sup>[7]</sup>." Furthermore, the constitution guaranteed women's rights, as stated in Article 44 in the Education Section: "The government has to balance and develop education for women <sup>[8]</sup>. Contrary to all issues, it revealed that deprived the women of their rights.

Purpose, based on this information and evidence, this article aims to study two issues respectively; one is to examine the dynamic relationship between Islamic Law and civil rights with Customary. Another purpose of this article is to investigate who has the authority to implement these three laws, Islamic Law, Civil Law, and custom. Finally, this article seeks to discover what rights the Afghans deprived the women and why.

## Questions

Of course, I should note that explaining each of the mentioned objectives needs to answer the following questions. For example, what is the dynamic relationship between customary and Islamic Law and the civil laws of Afghanistan? Why do Afghans always prefer Customary Law to Islamic law and statute law? What kind of rights are women deprived of in Afghanistan, and why?

<sup>4</sup>. Taherah Hedayati, "Zanan Biwa; Inheritance for Husband's Family," *Subh Kabul Newspaper*, July 10, 2019, <https://subhekabul.com/زنان/heritage-women-in-afghanistan/>. Accessed: 1/10/2020.

<sup>5</sup>. Kawoon Khamoosh, "Rasm 'Ba Bad Dadan' Dar Afghanistan (The Customary of Giving Wergild in Afghanistan)" (London, 2016), [https://www.bbc.com/persian/afghanistan/2016/04/160416\\_i93\\_afghan\\_women](https://www.bbc.com/persian/afghanistan/2016/04/160416_i93_afghan_women). Accessed: 1/10/2020.

<sup>6</sup>. Swedish Committee for Afghanistan, "Religion in Afghanistan" (Afghanistan Kabul, n.d.), <https://swedishcommittee.org/religion/>. Accessed: 5/3/2022.

<sup>7</sup>. Ministry of Justice, *Constitutional Law* (Ministry of Justice, 2004). Art. 3.

<sup>8</sup>. Ministry of Justice. Art., 44.

## Methodology

The procedure in which this article aims to measure the dynamic relationship between Islamic Law and Customary Law and women's rights in Afghanistan is qualitative and library-based analysis research. In other words, the present study is descriptive. Therefore, it seeks to find the root of the qualitative relationship between custom and Islamic Law and the relationship between customary Laws with civil Law to see what has led to the violation of women's rights in Afghanistan. So, it reviews the previous writings about the women's challenges in Afghanistan to find out why women's rights do not ensure in this country and where the barriers are. In other words, this article aims to determine the cause of the loss of women's rights, Customary laws, Islamic laws, Statutes Laws, or any other factor through the writings of others, books, articles, and additional information from international and national organizations.

## Literatures

As mentioned in the introduction, women in Afghanistan face many challenges, like ignoring their rights by family members according to local customs when Islamic Law governs this country. On the other hand, governments have enacted statutes to solve the problem of citizens. Accordingly, the relationship between Islamic Law and custom, and the relationship between these two statutes, raises the question. What factors cause the unrest against women's rights, and why are women always deprived of their rights? Therefore, to find answers to these questions, it is necessary to examine the previous writings and works to find out the particularity of their research and the difference between this research and their research. Of course, this literary review divides into two parts; the first part is about the relationship between custom and Islamic Law and National Law, and the second is in terms of other writings about women's rights in Afghanistan.

## The Relationship of Customary Law with Islamic

The common sense that the Customary forms the main body of the civil rule is correct, but the question is; whether there is a relationship between customary and Islamic Law. Ayman Shabana, in "Custom in Islamic Law and Legal Theory," argued; that looking back to Islamic Law gives a sense that it has been shaping one body of the Islamic Law, and it "has known as a source of Islamic law," and attributed it to Ibrahim Sharia, and had a dynamic relationship with Islamic Law <sup>[9]</sup>. Anicee Ivan, in "The Balance Between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism," argued that there is a close relationship between Islamic Law and Muslim customs. <sup>10</sup> Sometimes, it is not easy to distinguish between Muslim customary and Islamic Law because their customs originate from Islamic ethics <sup>[11]</sup>. Furthermore, Subhi, in "*Al-Urf wa Atharuhoo Fi al-Fatwa*," argued; that whenever was not any clear message regarding the case in Jurisprudence, customary plays an important role

<sup>9</sup>. Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concept of Urf and Adat in the Islamic Legal Tradition*, ed. Khalid Abul Fadl, 1st ed. (New York: PALGRAVE MACMILLAN, 2010), 1-2.

<sup>10</sup>. Anicée Van Engeland, "The Balance between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism," *Cambridge Journal of International and Comparative Law* 3, no. 4 (2014): 1321-1348, 1336. <https://doi.org/10.7574/cjicl.03.04.250>.

<sup>11</sup>. *Ibid*.

[12]. He reasoned from the Holy Qur'an and Prophet's Tradition to prove his argument, which confirms the value of *Urf*.<sup>13</sup> Seddiq al Mahami in (*al-urfu ka Masdarun Men Masadere al-Tashrie*) (*Customary is like one source of Legal Sources*) confirmed the role of *Urf* and knew it as the last choice of judges to infer and find the solution for the case.<sup>14</sup> Hashimi in (*Khulasatu al Mabatheth al Urfi Ledail al Usoolien Wal fuqahā*) (Summary of the Customary Discussion in Idea of Jurisprudence Principles and Jurisprudence Scholars) confirmed even some argued that; Customary does have a natural position and created with human creation, and it is not possible to ignore it from their life.<sup>15</sup> Hanafi Jurisprudence Law is the witness that Customary has been playing as a fundamental rule in Afghanistan for a long time; (Mabsūt Sarakhsi); this book stipulated that if there was not a specific "Nass" (text from Islamic Law), Customary is justifiable. Additionally, "Sharhul Qawā'id Al Fiqhia" (description of Fiqhi Rules) discussed the position of Customary in Shari'ah law, provided that if there was not a 'Nass' to contradict the customary, customary, or Adat is applicable.<sup>16</sup> Hamid M. Khan in (Islamic Law, Customary Law, and Afghanistan informal Justice) also argued that fourteenth Century Islamic law and Customary Law were applicable in Afghanistan, but recent governments have wanted to substitute these two laws with Statutes.<sup>17</sup> Previous writings showed that custom has been moving with Islamic Law and has maintained its dynamism as long as it is not contrary to it.

### The Relationship of Constitutional Law with Religious and Customary

It is fair to start this point with a question; whether the constitution has stability without using different sources such as the religious and customary as the social norms? Anicée Van Engeland (2014) argued that enacting a law without considering the custom and religions of citizens will not be successful and will face challenges in application.<sup>18</sup> In contrast, the constitutional Law; that gets sourced from the culture of people's customs will be more acceptable, and that nation will support it, and people will follow the Law.<sup>19</sup> However, the 1964 Afghanistan Constitution, Article 102, explicitly considers Islamic Law as a source of Law notwithstanding, it did not consider the Customary as the source of Law as stated: "The courts shall apply the

provisions of this constitution and the laws of the state, if there was no ruling for one of the proceeding cases in the constitution and government laws, the judiciary, following the general principles of Hanafi jurisprudence of Islamic law, within the limits which set by this constitution, will issue a ruling in which they consider that ensure the justice in the best possible way.<sup>20</sup> Similarly, the 1976 constitution of Afghanistan explicitly prohibits any laws that were in opposition to the principles of Islam and the constitution, article 64 stating: "No law may violate the principles of the sacred religion of Islam, the republican system, and other values enshrined in this constitution."<sup>21</sup> Also, the 1980 constitution did not make the customary a source of Law; it only mentioned that; if the Law does not exist, the judges should refer to the Shari'ah rulings.<sup>22</sup> On the one hand, the 2004 constitution of Afghanistan article 131 introduced Islamic Law as one of the sources of Law, but it has not introduced custom as the source.<sup>23</sup>

### Position of Customary Law in Civil Law of Afghanistan

Afghanistan's civil Law left the door open for accepting customary as the last source after a positive Law, and Islam Law nonetheless stipulated that Customary could be implemented as Law when it was not contrary to the Law and the principles of the judiciary.<sup>24</sup> Therefore, article one, part two of the Afghanistan Civil Code stated; that whenever there is no specific verdict of the Law, the court should adjudicate according to General Basics elements of Hanafi Islamic Sharia to ensure Justice in the best manner.<sup>25</sup> Additionally, article two says: that if the Law does not exist, or in the absence of general Hanafi jurisprudence basics, the court can issue the adjudication according to customary, provided that Customary was not in contradiction with the purview of the Law or the principles of Justice.<sup>26</sup>

### The Reason for Accepting Customary Law in Muslim Civil Laws

The first approach that *Urf* Customary developed in Muslim countries could have some reasons; as Ayman argued, the Holy Qur'an itself encourages Muslims to refer to Customary under the word *Urf* (customary) and *Maruf* (well-known).<sup>27</sup> Therefore, it opened the door to accepting the Customary and respecting it; for instance, the issue of preparing the facility for the woman by her husband is an example that he quoted from *Al-Tabari*, so he interpreted

<sup>12</sup>. Subhi, Kamil Kamil Salah, *Al-Urf wa Atharuhoo Fi al-Fetwa*, (Customary and its Effect on Issuing Verdict, 2nd edn, (Saudi Arabia, Mecca (Majallatu Al Qalam Elmia), (2014), 7. <https://alkalm.net/mag-book/2/9.pdf>

<sup>13</sup>. *Ibid*.

<sup>14</sup>. Seddiq al Mahami, "Al-Urfu Kamasdaru Min Masader Al-Tashria (Customary Is as One Sources of Legislation)," *Qanoon al Arab*, n.d., <https://www.law-arab.com/2017/03/Custom-legislation.html>.

<sup>15</sup>. Fuad ibn Yahya al Hashemi, "Khulasat Mabaiith Al-Urfi Ledal Usooliyin Wa Al-Fuqaha (the Summary Argument of Customary from Jurisprudence Scholars)," *Al multaqa al Fiqhi*, n.d., <https://www.feqhweb.com/vb/t7871.html>.

<sup>16</sup>. Ahmad ib al Shaikh Mohammad al Zarqa, *Sharh Al Qawaed Al Fiqhia*, ed. Mustafa Ahmad al Zarqa, 2nd ed. (Damascus: Dar al Qalam, 1089), 220. al Maktabat al Shamila.

<sup>17</sup>. Hamid M. Khan, "Islamic Law, Customary Law, and Afghan Informal Justice," *United States Institute of Peace*, 2015, 14. 2. [www.usip.org](http://www.usip.org).

<sup>18</sup>. Anicée Van Engeland, "The Balance between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism," *Cambridge Journal of International and Comparative Law* 3, no. 4 (2014): 1321–1348, 1334, <https://doi.org/10.7574/cjicil.03.04.250>. Accessed: 4/27/2022.

<sup>19</sup>. *Ibid*.

<sup>20</sup>. Justice Ministry, "Qanoon Asasi Afghanistan (Afghanistan Constitution)" (1964), Art., 102. [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).

<sup>21</sup>. Justice Ministry, "Qanoon Asasi Dawlat Jamhoori Afghanistan (Constitution of Republic of Afghanistan)" (1976), [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm). Art. 64.

<sup>22</sup>. Justice Ministry, "Usul Asasi Jamhoori Democratic Afghanistan (Basic Principles of the Democratic Republic of Afghanistan)" (1980), Art. 56, §., 3. [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).

<sup>23</sup>. Ministry of Justice, *Constitutional Law*. Art., 131.

<sup>24</sup>. Ministry Justice, "Afghanistan Civil Law" (n.d.), Art., 1, §., 2. [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).

<sup>25</sup>. *Afghanistan Civil Law*. Art., 1, §., 2.

<sup>26</sup>. *Ibid*.

<sup>27</sup>. Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concept of Urf and Adat in the Islamic Legal Tradition*, ed. Khalid Abul Fadl, 1st ed. (New York: PALGRAVE MACMILLAN, 2010). 51.



*Maruf* (known) as an agreement with shared vision and manner<sup>[28]</sup>. As he argued, *Maruf* (Known) is the opposite of *Munkar* (unacceptable), which is unfair and illogical to the people, in addition to the implicit meaning of *Urf* (Customary) in the Holy Qur'an; Ayman also quoted Ibn Masaud's Hadith, which stated: "Whatever Muslims deem good, is good in the sight of God, and whatever they deem bad, it is bad in the sight of God<sup>[29]</sup>."

### The situation of Women's rights in Afghanistan Compulsory Marriages

Forced marriage is one of the social and legal problems in Afghanistan, where women's rights constantly have been ignored in this country; as the Afghanistan Human Rights Commission surveyed in 2011, the founding showed 1706 cases of forced marriages, three times more than in 2010<sup>[30]</sup>. Likewise, this Commission reported in 2013 that 228 instances of Compulsory Marriages were in all the provinces; in 2015, the record was 235 cases, while the Non-Violence Law has known Compulsory Marriages as a crime<sup>[31]</sup>. Furthermore, this Commission mentioned the consequence of forced marriage and said: that the girls escape from home or burn themselves to rescue themselves from an undesirable situation<sup>[32]</sup>. BBC reported that in the traditional society of Afghanistan, that marriage is done with the consent and will of families, even; sometimes, they do not consider the opinion of the girl, and even the boy, it is hard to give an idea<sup>[33]</sup>.

### Under Age Marriages

Another challenge for girls is underage marriage in Afghanistan. Sometimes when a woman is pregnant, the child is being married before birth; also, as UNICEF reported, fifteen percent of girls have gotten married; whereas they have not completed their legal age, even police who had the responsibility to enforce the Law have been participating in such ceremonies<sup>[34]</sup>. Deutsche Welle reported from United Nations Population Foundation under the topic "Half of the Marriages are Under Age Now," as this report more than 50% are married before reaching the age of fifteen<sup>[35]</sup>.

### Deprivation of Women from Heritage

Khan argued that Women's heritage in Pashtun Wali customary in some Afghanistan regions returns to pre-Islamic customary that Arabs were depriving women of their heritage.

In contrast, in Pashtunwali, only males have the right to own property. Respondents justified bypassing Islamic legal dictates in this case because society would benefit from greater social cohesion. Any loss of women's property will

have explained away in terms of the purported benefits accrued through male guardianship. The survey also found an overall reluctance among women to press for their inheritance rights for fear of social stigma. According to one interviewee, "Women don't dare to ask for their rights from their brothers or relatives because it is shameful." Cases, where women may press for their rights can result in backlash<sup>[36]</sup>.

### Taking the Women's Inheritance

Another issue for the women in Afghanistan is inheriting the widow by death husband family; as Subh Kabul Newspaper (Kabul Morning Newspaper) wrote, Taherah Hadayati reported from Layla, one of Baghlan's Province residents said: I was thinking, that this is my destiny, because in my village and many other villages around us, women are being taken inheritance, it was an accepted tradition, and no one can disagree with," Layla also added about her marriage; "it was shameful for my father in law, to say Zalmai's wife married another man<sup>[37]</sup>." Furthermore, this Newspaper reported that: unfortunately, sometimes parents of a widow do not accept their widow daughter to return to her father's home; nevertheless, the best way to be alive is to marry one of her husband's family members if she would not accept to get married to one of them, she will have blamed by people of the village, and must have threatened to death, like Mena's case, said; twenty years ago, lost her husband, many times her husband's brothers and families had threatened her, whether she must marry or they will kill her<sup>[38]</sup>.

### Giving Girls in Wergild Blood

Although girls have been giving instead of wergild murder like property, Deutsche Welle reported that giving daughters as wergild is customary among Afghans; according to this Customary a person who commits a murder crime, the family of the murderer gives a daughter to the family of the victim, to ensure the satisfying, but the most victims of this incident are underage girls.<sup>39</sup> This report also stated that: unfortunately, the victims of this unfair custom are the girls who do not have any role in the murder case<sup>[40]</sup>. Gowoon Khamoosh, a reporter for BBC, posted a piece of news and said: there is an old customary in Afghanistan, that girls are the victim, marrying the girls to the complaints family instead of wergild, this Customary is most common in rural areas, even in big cities<sup>[41]</sup>.

### The Reasons for Dominating *Urf* (Customary) on Islamic Law and Statutes in Afghanistan The Existence of the Multiplication of Law

What is pluralism of Law? Margarit Davies argued: "Legal pluralism refers to the idea that in any geographical space defined by the conventional boundaries of a nation-state,

<sup>28</sup>. *Ibid*.

<sup>29</sup>. Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concept of Urf and Adat in the Islamic Legal Tradition*.

<sup>30</sup>. Latifah Sultani, "Violence Against Women in Afghanistan is a Concern" (Kabul Afghanistan, 2013), 11. [https://doi.org/Afghanistan Independence Human Rights Commission](https://doi.org/Afghanistan%20Independence%20Human%20Rights%20Commission).

<sup>31</sup>. *Ibid*.

<sup>32</sup>. *Ibid*.

<sup>33</sup>. BBC News, "Izdawaj Ijbari Dar Afghanistan; Nazariyat Wa Tajrabiya Shuma (Forced Marriage in Afghanistan; Your Comments and Experiences)" (London, 2015), [https://www.bbc.com/persian/interactivity/2015/02/150221\\_yt\\_l38\\_afghan\\_marriage](https://www.bbc.com/persian/interactivity/2015/02/150221_yt_l38_afghan_marriage). Accessed: 5/5/2022.

<sup>34</sup>. Rasooli, "Thabt 350 Mawred Izdawaj Ijbari Dar Afghanistan (Record of 350 Case of Forced Marriage in Afghanistan)." Accessed: 5/5/2022.

<sup>35</sup>. *Ibid*.

<sup>36</sup>. Khan, "Islamic Law, Customary Law, and Afghan Informal Justice." 10.

<sup>37</sup>. Hedayati, "Zanan Biwa; Inheritance for Husband's Family."

<sup>38</sup>. Hedayati. (June 10, 2019)

<sup>39</sup>. Deutsche Welle, Half of the marriage is under age in Afghanistan (Afghanistan, issued 2016), <https://www.dw.com/fa-af/-ازدواج-هادر-افغانستان-زیر-عین-صور-ت-می-گیرد>.

<sup>40</sup>. *Ibid*.

<sup>41</sup>. Gowon Khamoosh, "Haq Mirath Wa Haq Malakiat Zamin Bray Zanan Dar Afghanistan (Inheritance and Land Ownership Right for Women in Afghanistan)" (London, 2016), [https://www.bbc.com/persian/afghanistan/2016/04/160416\\_l39\\_afghan\\_women](https://www.bbc.com/persian/afghanistan/2016/04/160416_l39_afghan_women). Accessed: 5/6/2022.

there is more than one law or the legal system <sup>[42]</sup>. Also, J. Griffiths, in "*Legal Pluralism*," argued; that there is more than one legislation structure in the present universe if there is more than one "legal" system in a society, that is Legal Pluralism of Law <sup>[43]</sup>. Another factor of Legal Pluralism would come from the qualification of laws, one of the laws might be powerful, and the second would be a weakness <sup>[44]</sup>. Esther Meininghaus pointed out that there are three laws Islamic Law, Statutes, and Customary, and these laws have the same authority in the country <sup>[45]</sup>.

Understanding this reality that; the Customary shapes the bone body of the positive Law of Muslim countries, constitutions are the witness of this claim thence it creates the multiplicity of Law <sup>[46]</sup>. Nevertheless, under the numerous laws in Afghanistan, women suffer from both Islamic and customary laws as they interpret it according to their understanding that parents have the right to marry their daughters forcefully <sup>[47]</sup>. Nonetheless, as a result of *Urf* (Customary), men force the women to stay home, and they get all the discretion from them <sup>[48]</sup>. Therefore, Esther Meininghaus argued that there were only two applicable laws, Islamic Law or Customary, under the framework of Islamic Law <sup>[49]</sup>. Constitutional Law embodied the pluralism of Law in 1923 <sup>[50]</sup>.

### Poor Stance of Religious Scholars on women's Rights

Religious leaders have a fundamental role in the rights of women in Afghanistan. For instance, they make a marriage contract and participate in wedding parties, and most rural areas trust them. Therefore, as Deutsche Welle wrote under the topic; (Demands from Religious Leaders for Combating Violence Against Women) former president Hamed Karzai asked Ulama to help the government against women's violence <sup>[51]</sup>. In addition, Minister of women affairs Ghazanfar stated that Ulama does have a basic rule to combat the unacceptable Customary and Habits in Afghanistan <sup>[52]</sup>. Esther Meininghaus argued; that religious leaders and tribe leaders respect Islamic Law more than constitutional Law <sup>[53]</sup>. As he argued, ratifying the constitution of 1923 by Amanullah Khan faced challenges from the religious leaders and tribes, religious freedom made anger Ulama and individual freedom angered the

tribes <sup>[54]</sup>. The main problem is what Hamid M. Khan pointed out; if Religious leaders were well trained and shared the Islamic law orders with them, they would apply Islamic Law instead of Customary Law <sup>[55]</sup>. He argued that Islamic scholars have poor education in Islamic Law and have little knowledge even sometimes they think Customary is Islamic Law and apply it <sup>[56]</sup>.

### Family Disgrace

Family Nang (disgrace) is another custom that Afghans take a widow as an inheritance; because of this, they dominate it in every Islamic Law or statute <sup>[57]</sup>. In villages and among some ethnicities, if a woman refuses to marry her brother-in-law, at first, they will kill her; if she remains alive, nobody dares to marry her because of ethnicity, prestige, and the rule of the village is respectful, and as well, they train the girls that they are dependent on humans do have any freedom and are under the control of men <sup>[58]</sup>. Tribes teach the children during the girls' childhood that they are the second-gen of humans, so they must accept the situation that happens to them <sup>[59]</sup>. Likewise, Zainab, a Khust Province residence, mentioned; that in their region, the elders in families have their privacy and dignity, and their daughters and their husbands are foreigners, so how can foreign folks take a share of their property? <sup>[60]</sup> Khan argued; that the construct of the Pashtun customary pivot follows the concepts of "Nang," or family disgrace or honor, and dominates this disgrace in Islamic Law and statutes <sup>[61]</sup>.

### Women's poverty

The economic problem is a big challenge for women in Afghanistan <sup>[62]</sup>. On the one hand, women in rural Afghanistan are housekeepers and do not have the right to work outside the home <sup>[63]</sup>. On the other hand, the dowry that which husband gives to the wife, her father, or other family member takes and does not give to the girl; therefore, women do not have an independent economy, so they have to marry one of the husband's family members because of a dependent economy <sup>[64]</sup>. Additionally, many women work in rural areas, and Afghanistan rags are women's products; making cloths, these economical products are more than caring for the family and custody of children <sup>[65]</sup>. Unfortunately, they do not receive wages. Instead, they think women must do such duties <sup>[66]</sup>.

### Women Ignorance of Their Rights

As the chief of the Independence human rights commission stated, one reason for violating Women's Rights is lack of

<sup>42</sup>. M Cane, P., Kritzer, H., & Davies, "Legal Pluralism," *In the Oxford Handbook of Empirical Legal Research: Oxford University Press*, n.d., <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/97801995424.001.001/oxfordhb/97801995424.001.001>.

<sup>43</sup>. J. Griffiths, *Legal Pluralism*, ed. Neil J. Smelser and Paul B. Baltes (Center for Advanced Study in the Behavioral Sciences, Stanford, CA, USA, 2001), <https://www.sciencedirect.com/topics/computer-science/legal-pluralism>.

<sup>44</sup>. *Ibid.*

<sup>45</sup>. Meininghaus Esther, "Legal Pluralism in Afghanistan," (*ZEF*), *University of Bonn* 72, no. 1864–6638 (2007), <https://doi.org/December2007.1>.

<sup>46</sup>. Engeland, "The Balance between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism." 1335.

<sup>47</sup>. *Ibid.*, 1340.

<sup>48</sup>. *Ibid.*

<sup>49</sup>. Esther Meininghaus, "Legal Pluralism in Afghanistan," *Econstor* 1864–6638, no. 72 (2007), 3, <http://hdl.handle.net/10419/88370>.

<sup>50</sup>. *Ibid.*

<sup>51</sup>. Husain Serat, "Dar-Khast Az Ulamai Din Brayi Mabaraza Ba Khushoonat Alaihi Zanan (Demand from Religion Ulama for Combating Violence Against Women)," D.W. Deutsche Welle, accessed October 10, 2012, <https://www.dw.com/fa-af/دروخواست-از-علمای-دین-برای-مبارزه-با-خشونت-علیه-زنان/a-16295915>.

<sup>52</sup>. *Ibid.*

<sup>53</sup>. Esther, "Legal Pluralism in Afghanistan." 3.

<sup>54</sup>. *Ibid.*

<sup>55</sup>. Khan, "Islamic Law, Customary Law, and Afghan Informal Justice." 1.

<sup>56</sup>. *Ibid.*

<sup>57</sup>. Hedayati, "Zanan Biwa; Inheritance for Husband's Family." (*Saratan* 19, 1398= July 10, 2019).

<sup>58</sup>. *Ibid.*

<sup>59</sup>. *Ibid.*

<sup>60</sup>. Rasooli, "Thabt 350 Mawred Izdawaj Ijbari Dar Afghanistan (Record of 350 Case of Forced Marriage in Afghanistan)."

<sup>61</sup>. Khan, "Islamic Law, Customary Law, and Afghan Informal Justice." 3.

<sup>62</sup>. Hedayati, "Zanan Biwa; Inheritance for Husband's Family."

<sup>63</sup>. *Ibid.*

<sup>64</sup>. *Ibid.*

<sup>65</sup>. Zainab Miry, "Zanan Afghanistan Wa Iqtasad Feministy "Afghanistan Women and Fiminism Economic," *The Daily Afghanistan-e-Ma*, January 11, 2020, [http://www.dailyafghanistan.com/opinion\\_detail.php?post\\_id=151482](http://www.dailyafghanistan.com/opinion_detail.php?post_id=151482).

<sup>66</sup>. *Ibid.*

education, particularly for women in rural areas <sup>[67]</sup>. Irshad, the lecturer at Kundooz University, pointed out that the reason for not giving women inheritance is unaware of women from Islamic law statutes about their rights, so they cannot get their inheritance rights from their families <sup>[68]</sup>. Besides, Masuma Talibi wrote; that the biggest challenges for the women in Afghanistan are lack of education for women, they are ignorant, and they cannot defend their rights against their families <sup>[69]</sup>. In each aspect of life, whether marriage, inheritance or other issues, around 60% of women are also uneducated <sup>[70]</sup>.

### **Non-Enforcing the Law, Lack of Juvenile Courts, and Illiterate Judges**

Sima Samar, Chairwoman of the Independent Human Rights Commission, stated; that the government does not have any political commitment or plan to support women's rights in Afghanistan <sup>[71]</sup>. She also added that even police whose job is enforcing the Law participate in underage marriage ceremonies <sup>[72]</sup>. Besides, Husain Sirat reported; that another reason for underage marriage, the Law has not been implemented in Afghanistan <sup>[73]</sup>. As Voice of America writes, people do not give inheritances to women because of non-enforcing Islamic Law and civil statutes <sup>[74]</sup>. Also, Meininghaus argued that the concerning problem is that there is not a family court and juvenile court in rural areas. Another challenge for the civilians is that they do not have access to the written document from the court, so they do not refer to the courts <sup>[75]</sup>. Furthermore, he pointed out the change laws, that each new government changes the constitution <sup>[76]</sup>. Additionally, he argued that most judges do not have academic knowledge and do not want to train, the police are illiterate, and corruption exists; all factors make the problem harder and harder <sup>[77]</sup>. To conclude the literature, the study of previous writings revealed that from the beginning of the history of Islam, the Customary has been in line with Islamic Law based on the fact that Islamic Law is a way of life for human beings. Because of this, Customary has been moving similarly with Islamic Law. Although the Afghan constitutional Law explicitly considered Islamic Law as one source of Law, it does not mention customary thence, country to that civil Law explicitly considered the customary one of the legal sources after it. Since customary has maintained its nearness to Islamic Law, some constitutions and civil laws have considered it the second source of Laws; nevertheless, customary still deprived women of their rights. These rights are; forced marriage, underage marriage, deprivation of inheritance rights, getting widows as inheritance, giving women in exchange for blood money, and deprivation of education. The reasons for the violation of women's rights were the pluralism of laws, the negligence of scholars toward women's rights, family stigma, women's poverty,

women's lack of awareness of their rights, and non-implementation of the Law.

### **Findings**

Definition of Islamic Law, which refers to jurisprudence and divine Law, shows that custom has kept its balance throughout the history of Islam with Islamic Law. Accordingly, the previous writing conveyed that custom has a close relationship with Islamic Law; sometimes, it is difficult to see the difference between custom and Islamic Law <sup>[78]</sup>. Custom has been one of the sources of Islamic Law and has remained dynamic <sup>[79]</sup>. When there is no text, custom replaces Sharia, as evidenced by the Qur'an and Sunnah <sup>[80]</sup>. Custom is considered the last option for judges to extract a verdict <sup>[81]</sup>. Custom is a human phenomenon, and it is impossible to ignore it in people's lives <sup>[82]</sup>. The custom has been at the forefront of Islamic Law in Afghanistan for fourteen centuries <sup>[83]</sup>. Therefore Customary, as the second source of Islamic Law, has a dynamic and legal validity. Whenever there is no religious and legal text, the judge refers to it when issuing the verdict to bring Justice.

If any explanations scholars mentioned about the customary are analyzed, the result would be that Afghan custom for women is accepted customary. Afghans' attitude toward women is logical among some ethnicities, and it is natural and rational, famous, reasonable, and public, and they are comfortable with it. But the customs of Afghans have two problems; One is that this custom is not common to all Afghans, and the second is that it is against Islamic Law and the civil Law of Afghanistan and violates human rights.

Although Engeland claimed that some Islamic countries constitutions considered the customary as one source of Law, thence contrary to this claim, Afghanistan's constitutions did not realize it as the law source. Contradiction to constitutional Law, the civil Law of Afghanistan articles one and two accepted the customary Law as the second source of Law. The reason that Muslim civil laws got it as a source was that Islamic teachings entered the life of people and became customary among them, so it is not possible to ignore it from the Law, as Engeland claimed. Similarly, as Shaban claimed, the Customary does have the route in Holy Quran and the prophet traditions; nonetheless, Muslims have known it as one source of Civil Law.

As seen in the Literary Review discussion, the custom is closely related to Islamic Law, constitutions, and citizenship laws because it is at the behest of social life. Therefore, a question arises why have women not achieved their rights? Under the Customary Law, women are suffering and have been facing countless such cases.

Literature Review revealed that forced marriage was one of Afghanistan's most neglected aspects of women's rights, as the Afghan Human Rights Commission reported <sup>[84]</sup>. To analyze this case from an Islamic perspective, it needs to

<sup>67</sup>. Rasooli, "Thabt 350 Mawred Izdawaj Ijbari Dar Afghanistan (Record of 350 Case of Forced Marriage in Afghanistan)."

<sup>68</sup>. *Ibid.*

<sup>69</sup>. *Ibid.*

<sup>70</sup>. Talibi, Masooma, (9/10/2012), International Center for Peace Studies.

<sup>71</sup>. *Ibid.*

<sup>72</sup>. *Ibid.*

<sup>73</sup>. Sirat, Husain, (05.09.2016), <https://www.dw.com/fa-af/نیمي-از-دواچها-در-افغانستان-زیر-حسن-صور-ت-میگیرد/a-19527670>

<sup>74</sup>. Voice of America, [da.azadiradio.com](http://da.azadiradio.com) (3/20/2012).

<sup>75</sup>. Esther Meininghaus, 14.

<sup>76</sup>. *Ibid.*

<sup>77</sup>. *Ibid.*, 15.

<sup>78</sup>. Engeland, "The Balance between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism."

<sup>79</sup>. Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concept of Urf and Adat in the Islamic Legal Tradition*. 1-2.

<sup>80</sup>. Shabana.

<sup>81</sup>. Mahami, "Al-Urfu Kamasdaru Min Masader Al-Tashria (Customary Is as One Sources of Legislation)."

<sup>82</sup>. Hashemi.

<sup>83</sup>. Khan, "Islamic Law, Customary Law, and Afghan Informal Justice." 2.

<sup>84</sup>. Sultani, "Violence Against Women in Afghanistan Is a Concern."



present a few instances from Traditions and Fiqh, as Shaybani, in "al-Hujatu ala Ahlel Madina" argued: family heads, like father and grandfather, have the right to marry their children, but they should get the satisfaction of them because they have the right to decide, he reasoned the Tradition that stated Khansa Bent Khadam case, her father married her, then she came to Prophet (PBUH) she said: "my father married me to someone, but from the childhood, I loved to marry Ama Sebyani," the Narrator said: Prophet "peace be upon him" got her divorce, and said: "now you can marry with Ama Sebyani," Muhammad student of Abu Hanifa said: Prophet (PBUH) gave her right of marriage<sup>[85]</sup>. Next, another narration from Abi Salamata ibn Abdur-Rahman said: a woman wanted to get married to her uncle's son, but her father married her to another man; then Prophet realized the case and sent a person to her father, when he came Prophet (PBUH) asked; "did you marry her without her consent?" the man said: yes, Prophet (PBUH) said: "there is no marriage, go and marry anyone you want with"<sup>[86]</sup>. Forced marriage is also one of the prohibited items in Article 5 of the Law on the Elimination of Violence against Women<sup>[87]</sup>.

Underage marriage was another case mentioned in the customary section, as stated in Hanafi Jurisprudence Law. Mohammad ibn Ahmad ibn Abi Suhail Shams al Aemah al Sarakhsi, in "Al-Mabsoot," argued; that Prophet "peace be upon him" married Ayasha when she was six years old<sup>[88]</sup>. The Hanafi School has taken this story as a reason to prove that underage marriage is not prohibited, and they analyzed that father does have the right to marry his little child. If it were not so, Abu Bakr would not have married Aysha to Prophet "peace is upon him," and he would not do such a prohibited issue<sup>[89]</sup>.

Despite this, Ibn Shubrumah and Abu Bakr Asam rejected the idea of Hanafi and argued; that "underage marriage is not allowed," whether it was boy or girl. So, they mentioned this verse, "Hattā Edā Blaghu an-Nikāh," (until they reach the age of marriage) to prove their claim. Nevertheless, legitimization of marriage is for specific purposes like sexual issues boring the child, and maintaining sexual abstention. The child is unable to do such things, so they concluded; that none of the mentioned purposes of marriage meets the goal of marriage, so it is not permitted [the case of the Prophet was specific for him]<sup>[90]</sup>. Besides, in another Narration, Nafea ibn Jubair ibn Mutaem mentioned: When Khansa, daughter of Khaddam has grown up, came to the Prophet and said: my father married me but did not ask me, and now, I have grown up, and have my responsibility, the Prophet said: "there is no marriage between you, marry anyone you would like to marry with," the Narrator said: she married with Aba Lubaba<sup>[91]</sup>.

For this reason, Article 71 of the Afghan Civil Code

stipulates that if the daughter has not reached the age of marriage, the competent father and a competent court can marry her<sup>[92]</sup>. This article raises the question of why marriage is limited only to girls. Why does it give the authority to the courts to marry an underage daughter? Why do they consider the Prophet and Aisha a criterion for getting married too young girls? If they compare the marriage of an underage girl to that, they should also make its conditions a standard. Aisha's husband was a Prophet; are other human beings comparable to the Prophet? Or are fathers have a similarity to Abu Bakr? They have not considered other aspects of the cases, but they only focused on marriage, and such an analogy is not without the problem.

One of the issues addressed in the Literature Review was the deprivation of women of their heritage. In the case of inheritance, if someone looks to the Qur'an that says: "*Yusikūm Allah Fi Awlādikūm Ledakari Methlu Hazhel Unsayain*," (God advises you about your children, each male has two shares of female)<sup>[93]</sup>. There is no ambiguity because it has cleared; it should not have been interpreted wrong not to give the women inheritance. In a Tradition, Anas Ibn Malik said: that Prophet "peace be upon him" said: "one who escapes the inheritance of heir, God, will deprive him of the inheritance on Paradise in the Judgment Day"<sup>[94]</sup>. Taking a widow as an inheritance by a husband's family in Afghanistan was another issue cited in the Literature Review, which needs to investigate Islamic Law and Afghan Law. For this reason, it needs to see the Islamic Law; God said: "Oh, who have believed! You are not allowed to take the women as an inheritance"<sup>[95]</sup>. Also, ibn Khatib in Awzah al Tafasir (the clearest exegeses) argued that you have not permitted to take the wives of your dead and marry them and suppose they are like goods of inheritance, and this is the habit of ignorance<sup>[96]</sup>.

Giving girls in exchange for blood money was another issue discussed in the Literature Review. Further analysis is needed to examine the application of Islamic Law and Afghan Law. Article 5, Number 9 of the Law on the Elimination of Violence against Women criminalizes giving women in exchange for blood money<sup>[97]</sup>.

Why do some Afghans prefer customs to Islamic Law and status law? As explained in the Literature Review, there are several reasons for this situation, existing many laws, on the one hand, Islamic Law, status law, and custom, which causes the people to prefer the customary on both Shari'ah law and statutes<sup>[98]</sup>. The second reason for the superiority of Customary over Islamic Law and civil laws was the weak position of the Ulama regarding women's rights<sup>[99]</sup>. Ulama

<sup>92</sup>. Ministry Justice, "Afghanistan Civil Law" (n.d.), Art. 71. [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).

<sup>93</sup>. Holy Qur'an, chap. 4, Ayah: 11.

<sup>94</sup>. ibn Majah Abu Abdullah Mohammad ibn Yazid Ghazwini, *Sunan Ibn Majah Ta Al Arnoot*, ed. Shuaib al Arnoot - Aadil Murshid - Mohammad Kamel Qara Bulbuli - Abdul Latif Harzallah -, 1st ed. (Darul al Rasalah al Aalamiah, 2009), Tradition no., 2702, al Maktabat al Shamilah.

<sup>95</sup>. Holy Qur'an, Chap. 4, Ayah: 19.

<sup>96</sup>. Mohammad Mohammad Abdul Latif Bin Khatib, *Awzahu Al Tafasir* (Egypt: al Matbaat al Mesria Wa Maktabatuha, 1964), 95, al Maktabat al Shamilah.

<sup>97</sup>. Justice Ministry, Qanoon Manae Khushunat Alaihi Zanan (Law on the Elimination of Violence Against Women). Art. 5, §, 9.

<sup>98</sup>. Esther Meininghaus, "Legal Pluralism in Afghanistan," *Econstor* 1864–6638, no. 72 (2007), 3. <http://hdl.handle.net/10419/88370>.

<sup>99</sup>. Husain Sirat, "Nakhustin Mahakamae Aamalan Suqoot Kabul Bank Barguzar Shud (The First Trial of the Perpetrators of the Fall of Kabul Bank Was Held)," *Deutsche Welle*, November 15, 2012,

<sup>85</sup>. Abu Abdullah Mohammad ibn al Hasan ibn Farqad Shaibani, *AL HUJJATU ALA AHL AL MADINAH*, ed. Mohammad Hasan al Kaylani al Qaderi, 3rd ed. (Bayrut: Aalam al Kutub, 1983), 133. al Maktabat al Shamilah.

<sup>86</sup>. Ibid.

<sup>87</sup>. Justice Ministry, "Qanoon Manae Khushunat Alaihi Zanan (Law on the Elimination of Violence Against Women)," Pub. L. No. 989 (2009), 5, §, 10. [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).

<sup>88</sup>. Mohammad ibn Ahmand ibn Abi Sahl Shamsul Aeimmah Sarakhsi, *Almabsoot* (Bayrut: Darul al Marafat- Bayrut, 1993), 212, Maktabat al Shamilah.

<sup>89</sup>. Ibid.

<sup>90</sup>. Ibid.

<sup>91</sup>. Ibid.

was reluctant to support women's rights, and their lack of sufficient knowledge of Islam law and positive Law was another challenge, so they were silent <sup>[100]</sup>. The third reason for the superiority of custom was the stigma of families; they consider turning to customary is better than Islamic Law and the statute law, so people think it is a better way to protect family privacy <sup>[101]</sup>. The fourth case that preferred custom was poverty and the economic problem of women. Women are dependent on the economy of men and have no income even though they work in hard labor, such as carpet weaving and animal husbandry <sup>[102]</sup>. Thence, they do not receive wages from men to help them without their husbands and live independently <sup>[103]</sup>. The fifth case was the illiteracy of women, which caused them not to get their rights because they did not understand what rights Islam had given them and what statutes considered the rights of women <sup>[104]</sup>. Sixth, the lack of a regular plan was another reason for losing women's rights, lack of law enforcement, lack of professional knowledge of law enforcers such as the police, and corruption in the government were among the cases which deprived women of their rights <sup>[105]</sup>.

### Conclusion

However, history shows that Islamic Law was introduced in Afghanistan 1400 years ago; hence, social behavior shows that a class of people is still being deprived of their rights, contrary to claims that Islam is the religion of equality and Justice. On the other hand, the beginning of the 20th century was called the time of civilization in this country, and Amanullah Khan enacted a constitution to ensure the rights of citizens, but this has not been effective so far. Therefore, this situation needed research to determine the cause of this deficiency and examine the relationship between Islamic Law and the customs and laws of Afghanistan, which originate from Islamic Law. Why are the women, who are half of the society still, deprived of their rights due to local customs? This article examined three key issues: the relationship between Islamic Law and Customary, the prevalence of Customary on Islamic Law and the statutes in Afghanistan, and some of the women's rights cases that deprived women of their rights.

The Customary was in line with Islamic Law and Positive Law; both considered it one of the sources if it does not contradict it, while these Afghan Customaries conflicted with both. In addition, Customs should be public, and people should accept it; thence, the Customs of the Afghans are known only among some tribes and not among all ethnic groups, which reduces their credibility. On the other hand, the Civil Law and the Law of Elimination of Violence against Women of Afghanistan provide the rights for women according to Islamic Law. Forced and underage marriage, which were prevalent among Afghans, conflicted with the Prophet's Hadith (traditions) and the laws of Afghanistan. Furthermore, the Law of the Elimination of

Violence against Women considered the age of marriage 16 for girls and 18 for boys.

Similarly, the deprivation of women from the inheritance is contrary to the explicit text of the Qur'an that determines half of the men's inheritance share for women. Another case where the custom was contrary to Islam was getting a widow as an inheritance from the widow's husband's family. The Holy Quran explicitly forbids this, but some Afghans always practice it. Bad giving (giving girls in exchange for the blood of the slain) is a customary practice of Afghans. Although no explicit text forbids or allows this practice if viewed from a philosophical point of view, girls are not property, so no one has the right to sell them while this is a sale of girls. And this custom is Contrary to the Elimination of Violence against Women Law, and this Law prohibited it. The reasons for the persistence of these rights were many; Such as fragmentation of laws, weak position and lack of knowledge of Ulama to protect women's rights, family stigma, poverty of women, illiteracy of women, lack of regular government plan to protect women's rights, corruption, and other cases. The discussion of the mentioned issues was beyond this article's scope. Finally, even though Islamic Law and civil laws predicted the customary as one source to ensure Justice, hence, still, one part of society has been losing their right under the local Customs.

### References

1. Afghanistan Constitution. Ministry of Justice, 2004.
2. BBC News. Izdawaj Ijbari Dar Afghanistan; Nazariyat Wa Tajrabiya Shuma (Forced Marriage in Afghanistan; Your Comments and Experiences). London, 2015. [https://www.bbc.com/persian/interactivity/2015/02/150221\\_yt\\_l38\\_afghan\\_marriage](https://www.bbc.com/persian/interactivity/2015/02/150221_yt_l38_afghan_marriage).
3. Cane P, Kritzer H, Davies M. Legal Pluralism. In the Oxford Handbook of Empirical Legal Research: Oxford University Press, n.d. <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/97801995424>.
4. Deutsche Welle. Half of the marriage is under age in Afghanistan. Afghanistan issued 2016. <https://www.dw.com/fa-af/-افغانستان-ازدواجها در-نیمی-از-ازدواجها در-افغانستان-از-19527670>.
5. Engeland, Anicée Van. The Balance between Islamic Law, Customary Law and Human Rights in Islamic Constitutionalism Through the Prism of Legal Pluralism. Cambridge Journal of International and Comparative Law. 2014;3(4):1321-1348. <https://doi.org/10.7574/cjicl.03.04.250>.
6. Esther, Meininghaus. Legal Pluralism in Afghanistan. (ZEF), University of Bonn. 2007;72:1864-6638. <https://doi.org/December 2007>.
7. Esther Meininghaus. Legal Pluralism in Afghanistan. Econstor. 2007;72:1864-6638. <http://hdl.handle.net/10419/88370>.
8. Forced Marriage and Underage Marriage Are Still the Cause of Violence in the Society, n.d. <https://af.shafaqna.com/FA/336850>.
9. Ghazwini, ibn Majah Abu Abdullah Mohammad ibn Yazid. *Sunan Ibn Majah Ta Al Arnoot*. Edited by Shuaib al Arnoot - Aadil Murshid - Mohammad Kamel Qara Bulbuli - Abdul Latif Harrzallah -. 1st ed. Darul al Rasalah al Aalamiah, 2009. al Maktabat al Shamilah.
10. Griffiths, J. Legal Pluralism. Edited by Neil J. Smelser and Paul B. Baltes. Center for Advanced Study in the Behavioral Sciences, Stanford, CA, USA, 2001.

<https://www.dw.com/fa-af/شد-ازدواجها در-نیمی-از-ازدواجها در-افغانستان-از-16381522>.

<sup>100</sup>. Khan, "Islamic Law, Customary Law, and Afghan Informal Justice." 1.

<sup>101</sup>. Ibid.

<sup>102</sup>. Hedayati, "Zanan Biwa; Inheritance for Husband's Family."

<sup>103</sup>. Miry, "Zanan Afghanistan Wa Iqtasad Feministy "Afghanistan Women and Fiminism Economic."

<sup>104</sup>. Rasooli, "Thabt 350 Mawred Izdawaj Ijbari Dar Afghanistan (Record of 350 Case of Forced Marriage in Afghanistan)."

<sup>105</sup>. Masooma Talibi, "Waziat Zanan Afghanistan," Markaz Bainul Malali Mutaliat Sulh (International Studies of Peace Center), 2010, <http://peace-ipsc.org/fa/وضعیت-زنان-افغانستان>.



- <https://www.sciencedirect.com/topics/computer-science/legal-pluralism>.
11. Hashemi, Fuada ibn Yahya al. Khulasat Mabahith Al-Urfi Ledal Usooliyin Wa Al-Fuqaha (the Summary Argument of Customary from Jurisprudence Scholars). Al multaqa al Fiqhi, n.d. <https://www.feqhweb.com/vb/t7871.html>.
  12. Hedayati, Taherah. Zanan Biwa; Inheritance for Husband's Family. *Subh Kabul Newspaper*. July 10, 2019. <https://subhekabul.com/زنان-heritage-women-in-afghanistan/>.
  13. Justice, Ministry. Afghanistan Civil Law (n.d.). [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).
  14. Justice Ministry. Qanoon Asasi Afghanistan (Afghanistan Constitution) (1964). [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).
  15. Justice Ministry. Qanoon Asasi Dawlat Jamhoori Afghanistan (Constitution of Republic of Afghanistan) (1976). [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).
  16. Justice Ministry. Qanoon Manae Khushunat Alaihi Zanan (Law on the Elimination of Violence Against Women), Pub. L. No. 989 (2009). [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).
  17. Justice Ministry. Usul Asasi Jamhoori Democratic Afghanistan (Basic Principles of the Democratic Republic of Afghanistan) (1980). [http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://old.moj.gov.af/Content/files/Pages/OfficialGazetteIndex_D-header.htm).
  18. Khamoosh, Gowon. Haq Mirath Wa Haq Malakiat Zamin Bray Zanan Dar Afghanistan (Inheritance and Land Ownership Right for Women in Afghanistan). London, 2016. [https://www.bbc.com/persian/afghanistan/2016/04/160416\\_193\\_afghan\\_women](https://www.bbc.com/persian/afghanistan/2016/04/160416_193_afghan_women).
  19. Khamoosh, Kawoon. Rasm' Ba Bad Dadan' Dar Afghanistan (The Customary of Giving Wergild in Afghanistan). London, 2016. [https://www.bbc.com/persian/afghanistan/2016/04/160416\\_193\\_afghan\\_women](https://www.bbc.com/persian/afghanistan/2016/04/160416_193_afghan_women).
  20. Khan, Hamid M. Islamic Law, Customary Law, and Afghan Informal Justice. *United States Institute of Peace*, 2015, 14. [www.usip.org](http://www.usip.org).
  21. Khatib, Mohammad Mohammad Abdul Latif Bin. *Awzahu Al Tafasir*. Egypt: al Matbaat al Mesria Wa Maktabatuha, 1964. al Maktabat al Shamilah.
  22. Mahami, Seddiq al. Al-Urfu Kamasdaru Min Masader Al-Tashria (Customary Is as One Sources of Legislation). Qanoon al Arab, n.d. <https://www.law-arab.com/2017/03/Custom-legislation.html>.
  23. Mazanan (We the Women). Izdawaj Kudakan Dar Afghanistan: Dukhtar Dar Batn Mother, Namzad Pasar 11 Sala (Child Marriage in Afghanistan: A Girl in the Womb of a Mother, Engaged to an 11-Year-Old Boy). Kabul Afghanistan, 2021. <https://mazanan.com/?p=105150>.
  24. Ministry of Justice. *Constitutional Law*. Ministry of Justice, 2004.
  25. Miry, Zainab. Zanan Afghanistan Wa Iqtasad Feministy Afghanistan Women and Fiminism Economic. *The Daily Afghanistan-e-Ma*. January 11, 2020. [http://www.dailyafghanistan.com/opinion\\_detail.php?post\\_id=151482](http://www.dailyafghanistan.com/opinion_detail.php?post_id=151482).
  26. Qaderi, Ali. Chashm Andaz Huqooq Zanan Dar Afghanistan (The Perspective of Women's Rights in Afghanistan). *Rose Namay Afghanistan*. March 3, 2014. [http://www.dailyafghanistan.com/opinion\\_detail.php?post\\_id=129995](http://www.dailyafghanistan.com/opinion_detail.php?post_id=129995).
  27. Rasooli, Khairullah. Thabt 350 Mawred Izdawaj Ijbari Dar Afghanistan (Record of 350 Case of Forced Marriage in Afghanistan). *Voice of America*. July 17, 2016. <https://www.darivoo.com/a/afghanistan-human-rights-commission-registered-235-forced-marriage-cases-last-year/3421686.html>.
  28. Serat, Husain. Dar-Khast Az Ulamai Din Brayi Mabaraza Ba Khushoonat Alaihi Zanan (Demand from Religion Ulama for Combating Violence Against Women). D.W. Deutsche Welle. Accessed October 10, 2012. <https://www.dw.com/fa-af/-درخواست-از-علمای-دین-برای-مبارزه-با-خشونت-علیه-زنان/a-16295915>.
  29. Shabana, Ayman. *Custom in Islamic Law and Legal Theory: The Development of the Concept of Urf and Adat in the Islamic Legal Tradition*. Edited by Khalid Abul Fadl. 1<sup>st</sup> ed. New York: PALGRAVE MACMILLAN, 2010.
  30. Shaibani, Abu Abdullah Mohammad ibn al Hasan ibn Farqad. *Al-Hujjat Ala Ahl Al-Meddina*. Edited by Mohammad Hasan al Kaylani al Qaderi. 3rd ed. Bayrut: Aalam al Kutub, 1983. al Maktabat al Shamelah.
  31. Shamsul Aeimmah Sarakhsi, Mohammad ibn Ahmand ibn Abi Sahl. *Almabsoot*. Bayrut: Darul al Marafat-Bayrut, 1993. Maktabat al Shamilah.
  32. Sirat, Husain. Nakhustin Mahakamae Aamalan Suqoot Kabul Bank Barguzar Shud (The First Trial of the Perpetrators of the Fall of Kabul Bank Was Held). *Deutsche Welle*. November 15, 2012. <https://www.dw.com/fa-af/نخستین-محاکمه-عاملان-سقوط-کابل-بانک-برگزار-شد/a-16381522>.
  33. Sultani, Latifah. Violence Against Women in Afghanistan Is a Concern. Kabul Afghanistan, 2013. [https://doi.org/Afghanistan Independence Human Rights Commission](https://doi.org/Afghanistan%20Independence%20Human%20Rights%20Commission).
  34. Swedish Committee for Afghanistan. Religion in Afghanistan. Afghanistan Kabul, n.d. <https://swedishcommittee.org/religion/>.
  35. Talibi, Masooma. Waziat Zanan Afghanistan. Markaz Bainul Malali Mutaliat Sulh (International Studies of Peace Center), 2010. <http://peace-ipsc.org/fa/وضعیت-زنان-افغانستان>.
  36. Zarqa, Ahmad ib al Shaikh Mohammad al. *Sharh Al Qawaed Al Fiqhia*. Edited by Mustafa Ahmad al Zarqa. 2nd ed. Damascus: Dar al Qalam, 1089. al Maktabat al Shamila.