

LEGAL ANALYSIS OF SEXUAL HARASSMENT OF WOMEN IN AFGHANISTAN

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ABSTRACT

This study legally analyzed the reasons behind sexual harassment of women in Afghanistan and its day-by-day increase in academic, educational and public places, As well as responded to the question, “how can Afghanistan prevent sexual harassment of women within a reformed legal framework by drawing viable solutions from the international framework?”

This study analyzed Important legal issues and inadequacies of Afghanistan's legal framework, like legal provisions, the judiciary system of Afghanistan, informal justice, mediation, women's access to justice, and sentencing regarding sexual harassment of women in Afghanistan, and compared them to the international legal framework.

The descriptive and analytical methods are used in this research by describing the national and international legal texts and laws considered and presenting their legal provisions. Data sources are both primary and secondary. Primary sources include national and international legal texts, law provisions, court decisions and cases. Secondary sources include books, journal articles, websites, newspaper clippings, and various reports. The citation style in the footnotes and bibliography is OSCOLA referencing style.

As a result and outcome of this study, I found out that there are critical legal problems in Afghanistan's legal framework from different aspects that cause an increase in the overall situation of Women's Human rights violations as well as the sexual harassment of women in Afghanistan and Finally after the compare of the national legal framework with the international framework, Important recommendations and remedies were drawn out from the International legal framework to have a better and reformed National framework for Afghanistan, especially in regard of respect, protection and fulfilment of women's rights.

Keywords: Sexual Harassment of Women, Violence Against Women, Women's Human Rights.

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Bu makaleye atıf yapmak için / Cite this article: Azizi H. (2022). Legal Analysis of Sexual Harassment of Women in Afghanistan. *The Journal of World Women Studies*, 7(1), 65-88, <http://doi.org/10.5281/zenodo.7460067>

INTRODUCTION

Sexual harassment of women is one of the critical problems in Afghanistan. Where all females have had to fight and struggle for several years now for their human rights after completely being excluded from most of their fundamental human rights like the right to life, education, employment and much more during the dark period of the Taliban.

Sexual harassment of women is a widespread but hidden phenomenon and problem in Afghanistan that has been increasing every day, and the necessary investigations have not been legally or practically conducted. Victims are usually silent due to the deficiency of availability of justice and the culture of condemning and blaming the victim, family, and social barriers. Some of the victims who raise their voices and go to the police mostly face police misconduct and unprofessional behavior, in some cases even a different kind of harassment by the police, and in many cases, justice is not available for women in the courts.

Afghanistan has the obligation and legal basis for protecting certain human rights under Domestic and international laws; Chapter II of the Afghanistan constitution is about Basic and Fundamental Duties and rights of Citizens, which guarantee the equality and prohibition of discrimination. As well as Afghanistan has international obligations to protect human rights according to Article 7 of the Afghan constitution the government of Afghanistan is obliged to follow the United Nations Charter, the Universal Human Rights Declaration, the interstates treaties and other international conventions to which Afghanistan is a member despite some significant progress for women and the National and international laws and obligations of the government, the Women rights situation, gender-based violence and sexual harassment of women are very critical and there is a rise in the rate of violation of women's rights day by day as well as sexual harassment in educational institutions, public places and workplaces is a daily experience of women and girls, in addition, unchecked sexual harassment is a very important barrier to education, employment, socializing of women and taking part in public life which cause many different problems that generally, no assistance is given to women who seek help from the police.

For the elimination of sexual harassment or any other type of violence against women, strong preventive laws, investigation process and law enforcement is needed in the country, and this research legally analyzes the issue of sexual harassment of women in Afghanistan and focus on the core problems that need more attention and cause an increase in the rate of sexual harassment of women in the country like inadequacy of national laws and legal provisions as well as the unmanaged legal pluralism and conflicts between Afghanistan constitution, Islamic law rules and its customary law, Afghanistan's judicial system and lack of law enforcement, as well as this research paper, has made a critical analysis and comparison between national and international legal framework concerning sexual harassment of women and draw viable solutions using the international legal framework for a reformed national legal framework and has found remedies and solutions for the core problems in this field.

Legal Status of Sexual Harassment of Women in National and International Law Sexual Harassment of Women under Domestic Law of Afghanistan

The legal system of Afghanistan is made up of Islamic law rules (Sharia Law), constitutional law, which is the written law of Afghanistan and statutory law. The supreme law of Afghanistan is the Constitution.

The Afghan government made several institutional and legislative progress in promoting human rights, particularly women's rights, following the fall of the Taliban in 2001.

The establishment of the Afghanistan Independent Human rights commission (AIHRC), the foundation of a Ministry and Departments of Women's Affairs, Gender and Human Rights Units in various ministries and the passing of the law of Elimination of Violence Against Women (EVAW Law) by Presidential Decree in 2009, which has not been ratified by Parliament, are among the various advances and progresses the Afghan government made in the area of human rights, particularly women's rights.ⁱ

Protection of Human rights and equality are guaranteed, and any discrimination and distinction between Afghan citizens are forbidden, and Sexual harassment of women is recognized as a crime in Afghanistan penal code. Chapter II of the Afghanistan constitution is about the basic and Fundamental Duties and rights of Citizens, which guarantees equality and prohibition of discrimination.

Art.22 "Any discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, men and women, have equal rights and duties before the law."ⁱⁱ

Art.24 “Inalienable rights Liberty is the natural right of human beings. This right has no limits unless affecting others' freedoms and the public interest, which shall be regulated by law. Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity”.ⁱⁱⁱ

In the Afghanistan constitution, sexual harassment of women has not been mentioned. Any type of distinction and discrimination between citizens is forbidden, and their fundamental rights and equality are guaranteed between citizens.

According to Afghanistan Penal code second book, part 8, chapter 6 articles (668-672), Sexual harassment of women and children is described as a crime in Afghanistan, and different types of punishments are established for Aggravated and Non-aggravated situations.^{iv}

The (EVAW Law) the elimination of violence against women law was passed by the president at the year 2009 in Afghanistan, but it was opposed severely by parliament^v and has been rejected and not ratified by parliament because of its opposition and contradictions with Islamic sharia law rules and especially article 3 of Afghanistan constitution^{vi}, but it was reconfirmed in 2018.

Sexual Harassment of Women Under International Law

Violence against women has been recognized as a form of violation of women's human rights and a type of discrimination over the past two decades. Now one of the most important subjects of policy and comprehensive legal framework at the international level is the subject of Violence against women as well as the violation of human rights of women and the responsibility to pass and enact laws about violence against women.^{vii}

According to a study by United Nations Secretary-General on violence against women, "one of the greatest challenges of our time" is an intensity to women and the breach and infringement of human rights of women, which has a major severe and negative effect on women's activities and the attainment and realization of their full potential. To create a progressive and better world, the full implementation of the human rights of women and girls is necessary and required. The promotion and protection of women's rights is the responsibility of States, and effective legislation on violence against women and girls is essential to protect women's rights and prevent violation of women's human rights. The principles of equality and non-discrimination are the basis for legislation to combat violence against women and girls.^{viii}

Sexual harassment has been recognized by United Nations and regional treaty systems as a form of discrimination and violence against women. An important starting point for the development of legislation to prevent sexual harassment has been provided by international legal declarations and principles.^{ix}

United Nations

According to General Assembly resolution 48\104 on the declaration on the elimination of violence against women, sexual harassment is recognized as a form of intensity against women, which is forbidden in educational institutions, workplaces and elsewhere.^x

“(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution”^{xi} and promotes the development of criminal, civil or other administrative sanctions and preventive approaches to remove violence against women.^{xii}

“Develop penal, civil, labor and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through Such mechanisms.”^{xiii}

“(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.”^{xiv}

According to The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), States parties have to take reasonable and suitable measures to remove all forms of prejudice against women in all areas, in particular equality before the law, in government, in politics, in educational institutions, in the workplace, in health care and other areas of social and public life.^{xv}

In addition, according to paragraph 178 of the Beijing Platform for Action, sexual harassment is recognized as a form of discrimination and violence against women and calls on various stakeholders like Governments, employers, employees, trade unions, women's organizations and civil society to guarantee and secure that government enact and enforce legislation against sexual harassment.^{xvi}

International Labour Organization (ILO)

ILO committee experts on the Application of conventions and recommendations confirmed sexual harassment as a form of sex discrimination.^{xvii} In addition, sexual harassment in the workplace is prohibited by the ILO's Indigenous and Tribal Peoples Convention (No. 169).^{xviii}

African Union & Sub-regional Bodies

According to the Protocol to the African Charter on Human and Peoples' Rights on the Rights Of Women in Africa, states have an obligation to protect females from any form of abuse, including sexual harassment and remove all forms of discrimination against women and combat and punish sexual harassment in workplaces and educational institutions.^{xix}

Sexual harassment also has been addressed by Sub-regional bodies in Africa like the Southern African Development Community Protocol on Gender and Development, according to article 22 of this protocol states that it must prohibit sexual harassment in all spheres by enacting law provisions and implementation of strategies and policies.^{xx}

Europe

According to the Charter of Fundamental Rights of the European Union, people have the right to freedom from any discrimination, including sexual discrimination, and ensuring equality between males and females in all areas is a further obligation of all States under Article 23 of this Charter.^{xxi}

The first legally binding convention on violence against women and domestic violence in Europe is the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). According to this convention, all states must reform laws and take practical measures to support victims to effectively address violence against women and domestic violence. Furthermore, all relevant actors in each state should be involved in implementing the Istanbul Convention, such as institutions, parliaments and civil society organizations.

Article 40 of the Istanbul Convention states that "Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction."^{xxii}

Organization of American States

According to the Organization of American States, sexual persecution is a form of intensity against women and not a discrimination issue. Accordingly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para) states that States should impose penalties and punishments and enact legal provisions to ensure the rights of women to be free from violence, which includes sexual harassment in education, the workplace, or other settings.^{xxiii}

Relationship between Afghan Constitutional Law, Customary Law, and Religious Law

The complex relationships and interactions between different legal systems, such as the numerous areas of state law, religious law, tribal or customary law, and human rights, are the main concerns of legal pluralism.^{xxiv}

Afghanistan has numerous legal systems, including national law, the 2004 Afghan Constitution, which supports the rights of humans, the religious law of Afghanistan or Islamic Sharia, and customary law, also known as tribal law or community-based dispute resolution, usually held in a traditional tribal assembly (jirga) or religious council (shura), both led by tribal elders who act according to tribal laws to resolve disputes. Priority of reform of centralized state legalism over local methods of crime control and law enforcement is one of the reasons why the phenomenon of legal pluralism in Afghanistan has not yet been addressed and managed, The relationship between Islamic legal rules, interpretations of

Islamic jurisprudence, local customary law, and national or state law, which is also considered the written law of the state, is a good example.^{xxv}

Islamic law pays attention to the relationship between religion and the legal system. Sharia, which means "way", is the most important set of rules in Islamic law. Islamic countries or states have their own laws or legal system but still, follow some Sharia laws in accordance with the Qur'an (the holy book of Muslims) and Prophet Muhammad P.B.U.H. narrations (Hadiths). The agreement and consensus of the scholars in deciding on some special cases (ijma) with comparable reasoning (Qiyas) is also consistent with Sharia. Sharia law has five different schools; the Hanafi School is the most followed.

There is a difference between Islamic law and statutory law because instead of the state, private Islamic law schools (madhab) make decisions, and this type of legal decision-making is recognized and accepted by the state authorities.^{xxvi}

Islamic norms are interpreted by Ulema or religious scholars for the people and the community, they can act as judicial authorities and settle local disputes, and they are the Islamic lawmakers.^{xxvii} In Islamic law, decisions are not made on the basis of the status of previous cases because the people, circumstances and conditions are different.^{xxviii}

In Afghanistan, in all historical periods, such as the monarchy of Ahmad Shah Durrani, the Mujahideen period, the Taliban period, the post-2001 era to the present day, there have been Islamic legal rules and criminal law according to the principles of Sharia in all periods to varying degrees and scales.

There are two types of punishment for offences in Islam which are the absolute one (Hudud); there is no discretion in this punishment which includes: rape, adultery, fornication, drinking alcohol, theft and highway robbery, and the punishment is: For adultery, there is stoning to death, for theft amputation of the hand or foot, for adultery between unmarried persons 100 lashes, and for apostasy death. In all cases, there should be sufficient evidence, usually from four witnesses, besides these rules of Islamic criminal law, the family of the victim should be given some money or property as compensation, and if the family forgives the offender, the problem will be solved, and there will be no punishment. Another type of punishment is not absolute under Islamic criminal law but is at the discretion of the judge (Tazir) and includes Fraud, prostitution, bearing false witness and extortion.

Statutory laws, religious law, customary law and human rights are mostly intertwined in many Islamic states. Islamic Sharia laws and statutory laws coexist in all Islamic states, and this order is recognized as a kind of legal pluralism.

Islamic law has coexisted with secular law in Afghanistan since 1925. When the Amanullah monarchy created a penal code that overlapped with tribal and customary laws^{xxix}. People living in rural areas of Afghanistan do not have access to the state legal system.^{xxx}

Many local customary laws and tribal orders are affected and influenced by state law which aims to promote basic human rights such as the right to have a defender, the right to not marry without consent, to resolve disputes locally, while customary law and tribal orders regulate dispute resolution informally.

Tribal codes in Afghanistan Customary laws and tribal codes are the practices and unwritten laws that have been practiced for centuries and are shaped in a particular region. In Afghanistan, Pashtunwali can be a good example of customary law and tribal codes. The basis of Pashtunwali tribal laws are forgiveness and reparation, they are not punitive but a part of restorative tribal justice that focuses on peace between communities and community rights rather than individuals and persons, and that is the way the Taliban interprets Islam_ While Islam respects individual and individual rights in all aspects _ their goal is to maintain relations between communities and prevent a blood feud even if individual human rights are violated, Nanawati and ba'ad are good examples of Pahtunwali Tribal Code.

Nanawati is a compensation payment made by the family or relatives of the perpetrator to the victim, which can be in cash or by sacrificing a sheep. It is a non-verbal apology by sending a delegation consisting of a woman holding the holy book Qur'an, the mullah who will slaughter the sheep, and the elders; this action or apology cannot be refused according to tribal law and should be accepted by the victim's family to promote forgiveness and reconciliation.^{xxxi}

Another practice is ba'ad which is a clear violation of women's human rights to save community relationships. Ba'ad is a custom practice designed to compensate for murder and to, prevent further murder and to compensate for escape and illicit sexual intercourse^{xxxii} by giving any girl from the family of the offender to the family of the victim.

Pashtunwali tribal code does not include marriage, family and inheritance laws_ while Islamic law pays great attention to them_ in this way, girls and women are excluded from this code, and they are marginalized and deprived of their rights such as inheriting property^{xxxiii}. Pashtuns consider women and girls as their property, gold, and land and women are the honor source of Pashtun men as well as the resources that can be exchanged as reparation for any crime, which *ba'ad* is an example of.

For the first time in Afghanistan after the monarchy system in 1973, Islamic principles were combined with the Afghan constitution according to article 64 of the 1977 constitution, in 1980 the basis for the communist constitution was the statutory law and the constitution itself, but after this regime by the coming of the Mujahideen the Afghan legal system in 1992 was based on Islamic laws and Holy Quran according to article 2 of their charter, and according to article 7 of their charter all legal laws and codes were set aside, by this way during many years the law was Islamized.

Under the Taliban regime, an Islamic emirate was institutionalized in 1996, the basis of which was a strict and radical theocratic law^{xxxiv}. Women and girls had no rights at all, no work, no education, and no freedom.^{xxxv} Disputes were decided in dual systems according to Sharia laws or through *jirga*, and women's rights were violated because they considered women as their property and as an option for the protection of their honour, exchanging them for a crime.

After the fall of the Taliban regime, after many attempts and debates to replace the previous patriarchal justice system^{xxxvi}, a hybrid legal system was introduced, supported by USIP in 2007 and the Afghan judicial system^{xxxvii}. This attempt was to recognize human rights, especially gender and women's rights, in the traditional legal system and to ensure that traditional law did not violate Afghan constitutional law, the rules of Islamic law, and human rights standards.^{xxxviii}

In summary, the Afghan legal system has three sources of law, namely the country's statutory law or constitution, customary practices, and religious/ Islamic Sharia law^{xxxix}, and complications have arisen due to the co-existence of the dual system of formal and informal justice in Afghanistan. Many victims prefer and resort to the informal justice system to resolve or settle their disputes because the formal justice system in Afghanistan is not trustworthy and has weaknesses. The main institutions of traditional justice are *Jirga* and *Shura*.^{xl}

There are separate legal elites, such as Islamic legal experts and statutory legal experts, which is a cause of the dual court system in Afghanistan, the current judicial system and courts are controlled and dominated by Islamic Sharia laws.^{xli}

The current Afghan judicial system is not in favour of women. Because they are caught somewhere between constitutional rights, culture, religious laws, secular law and human rights standards.

The public in Afghanistan has accepted Islamic Sharia law^{xlii}, but the lack of proper understanding and agreed interpretations between the religious leaders of Afghanistan in various legal matters is considerable in different areas such as criminal law, women's rights, international human rights and many more.^{xliii}

One of the reasons for the normalization of violence against women is that Islamic judges rely only on the classical interpretation of Islamic laws and this leads to a restrictive attitude towards women's rights. Judges should be equipped with adequate and accurate knowledge about the Afghan constitution, its national and international responsibilities and obligations, specifically about the rights of women, and they should also be trained under a uniform and non-dual education system.

There should be great harmony between all sources of law of Afghanistan, the constitution, Islamic laws and customary law regarding women and the rights of women. Currently, the legal system of the country lacks harmony between the sources of law and one of the reasons for the lack of harmony is the ambiguities and contradictions in the constitutions of Afghanistan.^{xliv}

Relationship between Afghanistan's National and International legal obligations according to the Afghan constitution

Intensity against women is internationally recognized as a fundamental breach and infringement of rights of human, and this growing recognition has created opportunities to eliminate violence against women.

Physical and sexual abuse are not the only limitations to the scope of domestic violence, domestic violence also includes emotional and economic aspects. Therefore, intensity against women is an important problem of human rights that requires both national and international action.^{xlv}

The issue of state responsibility was repeatedly raised and mentioned by many reporters' Concrete measures, "reasonable steps" to prevent and protect all females from the intensity and to punish perpetrators and compensate victims were recommended by Special Rapporteur Ertürk in 2006.^{xlvi}

As well as guidelines on due diligence standards for violence against women was provided by Special Rapporteur Manjoo.^{xlvii}

Afghanistan is a member of many international human rights instruments:

On 24 January 1983, Afghanistan ratified the International Covenant on Civil and Political Rights (ICCPR) (without any reservations).

On 24 January 1983, Afghanistan ratified to International Covenant on Economic, Social and Cultural Rights (ICESCR) (with reservations to Article 26).

On 14 August 1980, Afghanistan signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and ratified it on 5 March 2003.

On 4 February 1985, Afghanistan signed Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and ratified it on 1 April 1987 (With reservations to Articles 20 and 30).

On 27 April 1994, Afghanistan ratified the Convention on the Rights of the Child and its Optional Protocols on the Sale of Children, Child Prostitution, and Child Pornography and Involvement of Children in Armed Conflict.^{xlviii}

Under all these conventions and treaties to which Afghanistan is a party, all forms of discrimination against women and girls are prohibited. In addition to Afghanistan's international obligations, Afghanistan has an obligation under its Constitution to ensure and guarantee legal protection for women and to ensure that under the law, they are not discriminated against.

According to article 7 of the Afghanistan constitution, Afghanistan has international obligations and duties.

“Article Seven:

The state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

The state prevents all types of terrorist activities, production and consumption of intoxicants (muskirat), production and smuggling of narcotics “.^{xlix}

Afghanistan is the first Muslim country to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) without reservations. Ratification of this convention without reservation is a great step for Afghan women and women's rights, By ratifying this Convention, Afghanistan has accepted and committed to fulfilling its obligations following the objectives of the Convention, which include the emergence and establishment of the principles of equality between male and female, the elimination of discrimination from all laws, the abolition of discriminatory laws and acts against women by any subject, including individuals, organizations and companies, and the establishment of public institutions and courts to protect women from all forms of discrimination in the Afghan legal system,¹ As a result, the constitution of 2004 was drafted.

Article 2(a), article 3, article 5(a) and Article 15 of CEDAW are about the access of women to justice in CEDAW.^{li}

Articles 15, 16 and 17 of CEDAW guarantee equality for women before the law and stop all types of discrimination against women on the basis of education or socioeconomic status, as well as guarantee equality of women's rights in family life.

Article 2ⁱⁱⁱ of CEDAW is very important. It creates appropriate measures and guidelines to eliminate discrimination against women, including the principle of equality between males and females.

Afghanistan's international obligations include equal treatment before the law and the right of all persons to a fair trial following Articles 9, 10 and 14 of the International Covenant on Civil and Political Rights (ICCPR). In addition, Article 2 of the (ICESCR) requires Afghanistan to prohibit sexual discrimination and to ensure that men and women enjoy all rights equally.

According to all of these international instruments Afghanistan has many important obligations to ensure human rights especially women's rights but there are some contradictions in articles of Afghanistan constitution, for example, There is no clear line between Islamic and liberal teachings in the Afghan constitution, In the preamble of the Afghan constitution, it is mentioned that this constitution aims to lead the nation with the principles of rule of law, Islam and democracy but there is a big

contradiction, it is not shown and indicated how it is possible to combine all these different rules of law in the context of Afghanistan^{liii}. It is mentioned in article 3 of the Afghanistan constitution that

“Article 3: No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”.

And at

“Article 7: The state shall observe the United Nations Charter, interstate agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights. The state shall prevent all kinds of terrorist activities, cultivation and smuggling of narcotics, and production and use of intoxicants”.

According to Article 3 of the Constitution, no law may contradict the rules of Islamic law. On the other hand, Article 7 mentions that Afghanistan is obliged to abide by and comply with the Charter of UN, interstate agreements and the treaties and conventions to which Afghanistan is a party.

One article states that no law should violate Islamic laws, and another article demands that the country should fulfill its international obligations, while many articles of international instruments are considered to violate or go against Islamic laws. So it means that fulfilling some national obligations leads to violation of Afghanistan's international obligations and fulfilling some international obligations leads to violation of Islamic laws, as a result in both of ways the constitution, which is supreme law of the land will be violated.

Many Muslim countries have also ratified CEDAW but have made reservations because of the incompatibility of some articles with Islamic laws, such as Egypt, Bangladesh and Morocco. Afghanistan, on the other hand, has ratified CEDAW without reservations, which creates many critical problems, uncertainties and ambiguities.

Article 18 of the UDHR is one of the articles considered incompatible with Islamic laws, as this article promotes not only freedom of religion, but also freedom from religion. Similarly, Article 18 (2) of the ICCPR is about freedom of religion and belief. The fulfilment of these articles as international obligations leads to a clear violation of the national and Islamic laws, and in these cases, the compliance and fulfilment of the national obligations and Islamic laws lead to a violation of the international obligations of the state. In addition, there are lots of articles about women and women's rights in international instruments which Afghanistan is a member, that contradicts Islamic law rules.

In the context of Afghanistan, legal pluralism is not managed and Islamic, secular and customary laws have not emerged and there is a great discrepancy between Islamic legal rules and Afghanistan's international obligations.^{liv}

Article 130 “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner”.^{lv}

This is another very important article of the Constitution that needs more clarity. The question here is whether the judge should choose a Hanafi provision or an international law provision in this type of case? The decision is left to the situation, mood, and attitude of the judge.

Inadequacy of National legal provisions compare to International law (respect and protection of women's right)

Lack of clear and detailed definition of sexual harassment in domestic law compare to international law

Sexual harassment of women in Afghanistan Constitution

In the Afghan constitution, the protection of rights of women, fighting intensity against women and sexual harassment are not directly mentioned and there is no article that speaks only of women's rights, the articles which are about citizen's rights are written in a general and common language like “all citizens of Afghanistan”.

In Article 22 it is mentioned that “Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law” but it is not clear what actions are considered discrimination under the Afghan constitution and laws, writing constitutional articles with general skepticism creates a lot of ambiguity.

The lack of constitutional authority to ensure the prohibition of intensity against women^{lvi} demonstrates Afghanistan's failure to develop laws, guidelines, measures and policies to combat

violence against women. As well as the failure to develop national legislation that provides sufficient redress and remedies for victims of violence against women.

The Afghan Constitution is considered the supreme law of Afghanistan. Chapter 2 of the Afghan Constitution deals with the fundamental rights and duties of citizens, this chapter begins with articles 22 to 59^{lvii} there is no definition and nothing is mentioned about sexual harassment of women in the Afghan Constitution.

Sexual harassment of women in Afghanistan Penal code

In Afghanistan Penal code second book, part 8, chapter 6 articles (668-672), Sexual harassment of women and children is described as a crime, and different types of punishments are established for Aggravated and Non-aggravated situations.

In the Afghan Penal Code, Articles 668 to 672 deal with harassment of women and children and harassment is defined as:

"A person who harms the character and dignity of a woman or child through speech (verbal abuse) or writing, gestures or illegitimate demands, or causes fear and insecurity or psychological pressure, or restricts and reduces the social participation of women or children, is called a perpetrator of the crime of harassment of women and children. As well as harassment over the telephone or social media."^{lviii}

Harassment of women and children is known to be aggravated in any of the following cases:

When the crime is committed by the teacher, coach, doctor, or supervisor using authority and position.

If the crime resulted in physical or psychological harm to the victim

If the crime was committed repeatedly.^{lix}

The penal code defines harassment in 4 categories

1- Speaking or verbal abuse

2- Writing

3- Gesture

4- Illegitimate demands (includes but is limited to verbal abuses or sexual requests, or harassment over the phone or social media)

The act or physical action is not included in this definition, and it is not mentioned whether the act or physical touching is considered sexual harassment, It is only mentioned that it is considered a crime if the act resulted in physical harm, but the question here is whether it is considered a crime of sexual harassment if a person harasses the victim by performing a physical act such as physical touch which does not cause physical harm, This kind of ambiguity in the written laws of Afghanistan causes confusion among the people and distrust of the government and the law.

Sexual harassment of women and The Law of Elimination of Violence against Women (LEVAW)

In 2009, the Law on the Elimination of Violence against Women (EVAW) was enacted by Presidential Decree in accordance with Article 79 of the Afghan Constitution. This law, which was the first and only law to address the rights of Afghan women, the intensity against women, and various problems related to women, including but not limited to polygamy, forced marriages, child marriages, and harassment of women, was strictly rejected by the Afghan Parliament in May 2013^{lx}, but reconfirmed in 2018, according to this law 22 acts of abuse of women are recognized as crimes.

According to Article 3(7) of the EVAW Law, harassment of women is defined as: "Persecution: using words or committing acts by any means which causes damage to the personality, body and spirit of a woman"^{lxi}

But in this law, the "words" and "acts" mentioned in this article are not defined.

Under articles 3(6) and 3(5) of the EVAW Act, intimidation and humiliation of women "Intimidation: committing acts or using words that cause a woman to be afraid" and "Humiliation: Using words or committing acts that result in the degradation of a woman's personality" are related crimes with close definitions.^{lxii}

According to article 30 of the law on EVAW Article 30

1. "If a person harasses/persecutes a woman, considering the circumstances, he/she shall be sentenced to short-term imprisonment of not less than three months.

2. If the crime mentioned in paragraph 1 of this Article has been committed by using authority and position, the offender considering the circumstances, shall be sentenced to short-term imprisonment of not less than six months”^{lxiii}

Despite the relative shortcomings of this law in the area of rights of females in Afghanistan, and despite significant opposition from the Afghan parliament and judiciary, it is very good progress in investigating and reporting violent crimes against women, but despite the efforts of human rights activists and women's rights activists, full implementation of the EVAW law is still an elusive goal.

Sexual harassment of women in International Framework

Sexual harassment has been recognized by United Nations and the regional treaty system as a form of violence against women and discrimination, international principles and statements of law have created a critical point by drafting legislation prohibiting sexual harassment.

United Nations

According to General Assembly resolution 48\104 on the declaration on the elimination of violence against women ,sexual harassment is recognized as a form of violence against women which is forbidden in educational institutions, workplaces and elsewhere.^{lxiv}

Article 2 “(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution”^{lxv} and promotes the development of criminal, civil or other administrative sanctions and preventive approaches to remove violence against women.^{lxvi}

According to The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), States parties have a duty to take reasonable and appropriate measures to eliminate all forms of discrimination against women in all areas, in particular equality before the law, in government, in politics, in educational institutions, in the workplace, in health care and in other areas of social and public life.

In addition, according to paragraph 178 of the Beijing Platform for Action, sexual harassment is recognized as a form of discrimination and violence against women and calls on various stakeholders like Governments, employers, employees, trade unions, women’s organizations and civil society to guarantee and secure that government enact and enforce legislation against sexual harassment.^{lxvii}

Here is a list of some of the most important international and regional instruments which address and recognize sexual harassment as a type of persecution against women and discrimination.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):

- Declaration on the Elimination of Violence against Women
- United Nations Fourth World Conference on Women
- The Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Indigenous and Tribal Peoples Convention, 1989 (No. 169)
- Beijing Platform for action
- Palermo protocol
- Rome status

ILO

- Violence and harassment convention (No.190) 2019
- Discrimination (Employment and Occupation) Convention (No. 111) of 1958
- Indigenous and Tribal Peoples Convention (No. 169)

African Union and Sub-regional bodies

- The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
- Southern African Development Community Protocol on Gender and Development, in article 22, 2015
- Economic Community of West African States
- Europe

Charter of Fundamental Rights of the European Union

Directive 2006/54/EC

Directive 2004/113/EC

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention)

Organization of American States

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belem do Para)^{lxviii}

International law's Suggestions to define sexual harassment

According to Recommendations of UN handbook for legislation on violence against women

Sexual harassment should be defined by legislation as follows:

Sexual harassment should be criminalized.

Sexual harassment should be recognized as a type of discrimination and infringement of human rights of women with health and safety consequences.

Sexual harassment should be defined as sexually determined behaviour that is unwelcome and uncomfortable in both vertical and horizontal relationships involving education, property and transactions, services and receipt of goods, athletic activities, and employment.

Define and clarify unwelcome sexually-determined conduct to include physical conduct, sexual requests or demands, sexually-tinged remarks, displaying pictures, graffiti, sexually explicit posters, or any other unpleasant and unwelcome verbal or non-verbal and physical conduct of a sexual nature.^{lxix}

Legal provisions for Punishment of sexual harassment of women before the Afghanistan law compared to international law.

In the Afghan penal code, sexual harassment of women is recognized as a crime, Articles 668 to 672 deal with harassment of women and children and harassment is defined as:

"A person who harms the character and dignity of a woman or child through speech (verbal abuse) or writing, gestures or illegitimate demands, or causes fear and insecurity or psychological pressure, or restricts and reduces the social participation of women or children, is called a perpetrator of the crime of harassment of women and children. As well as harassment over the telephone or social media."^{lxx}

In the Afghan Penal Code, harassment of women and child are divided into aggravated and non-aggravated crimes, and there are two different types of punishment for each.

Fines

Imprisonment

Fines as punishment for sexual harassment in Afghanistan

Fines as punishment for non-aggravated harassment of women and Child

According to Afghanistan penal code articles 669, 670:

"A person who commits harassment of a woman or child in public places, public transport or any other place shall be fined from five to ten thousand Afghanis"^{lxxi}

"A person who commits harassment of a woman or child in a workplace, educational or health center shall be fined from ten thousand to twenty thousand Afghanis"^{lxxii}

Imprisonment as punishment for sexual harassment in Afghanistan

Imprisonment as punishment for aggravated harassment of women and Child

"The offender shall be sentenced to six months imprisonment if the crime is aggravated

Harassment of women and children is classified as aggravated in any of the following cases:

When the crime is committed by the teacher, coach, doctor, or supervisor using authority and position.

If the crime results in physical or psychological harm to the victim.

If the crime is committed repeatedly"^{lxxiii}

Persons who harass women and children on public transport or in public places are fined between \$58-116 (5-10000 Afg) (08\2021), and the same behavior in health centres, educational institutions, and

workplaces is fined between \$116-232 (10-20000 Afg), and repetition of the same behavior carries a 6-month prison sentence.

According to Nazifa Zaki _a lawmaker_ "Many laws have been made to protect the rights of women in Afghanistan, but in practice, these laws have never been implemented. People must put pressure on the government to enforce the law," she said, adding, "It's our responsibility to monitor the enforcement of this and other laws."^{lxxiv}

Abdul Hai Akhundzada _Representative of Helmand in Wolesi Jirga _ said, "I think the content of this law is too weak," he continued. "Is it logical that a person who physically or verbally harasses women or children should be fined [only] \$80-150?" (now it's \$58-116). According to some legal advocates, this law is very prone to abuse because administrative corruption has become so extensive, and this kind of punishment can be a good source for the police to increase their income illegally.^{lxxv}

At the same time, some people think positively about this law, Head of Women's Rights Organization Qadriya Yazan Even though it takes time to enforce the law, this law is an important message to the public about acceptable behaviour in Afghanistan, and this law is like a milestone to protect the rights of women and children.^{lxxvi}

Conservative social traditions show that progress in Afghanistan remains very slow despite the great improvements in women's rights over the last 20 years.^{lxxvii}

International law's suggestions for sexual harassment Punishment

Here is some important recommendation of UN for the sentencing of violence against women crimes,

Legislation should provide that:

The punishment should be commensurate with the severity and gravity of the crimes of violence against women.

Guidelines for punishment should be developed to ensure consistency in the result of punishment.

Provisions that cause a reduction in punishments or cause exculpation of perpetrators in case of honour crimes should be removed.

For repeated domestic violence, regardless of the level of harm and injury, there should be increasingly severe sanctions.

For several\multiple violations of protection orders there should be increased sanctions.

In criminal cases, compensation payment and restitution from the perpetrator to the victim should be ordered.

While only one element of punishment is compensation, it should not be a substitute for other penalties such as imprisonment.

There should be a compensation program sponsored by the government to apply and receive a fair amount of money for victims of violence against women.^{lxxviii}

Inadequacy of Enforcement of the Law (Fulfilment of Women's Rights) Compare To International Provisions

Afghanistan judiciary system and conflicting legal provisions

STRUCTURE OF JUDICIAL SYSTEM: The court system, which defends, applies and interprets the law, is part of the judicial system as well as a dispute resolution mechanism. Afghan Constitution Chapter 7, including articles 116-135 about the Judiciary System in Afghanistan,^{lxxix} According to article 116 of the constitution:

"The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan. The judiciary shall be comprised of one Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority shall be regulated by law. The Supreme Court shall be the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan". The structure of the judicial power and system is as below

- 1- Supreme Court
- 2- Appeals Courts
- 3- Primary Courts^{lxxx}

According to Article 117 of the Afghan Constitution, the supreme judicial authority is the Supreme Court at the apex of judicial power.

“The Supreme Court shall be comprised of nine members, appointed by the President and with the endorsement of the House of People, and in observance of the provisions of clause three of Article 50 as well as Article 118^{lxxxii} of this Constitution, shall be initially appointed in the following manner: Three members for a period of four years, three members for seven years, and three members for ten years. Later appointments shall be for a period of ten years. Appointment of members for a second term shall not be permitted. The President shall appoint one of its members as Chief Justice of the Supreme Court. Members of the Supreme Court, except under

Circumstances stated in Article 127^{lxxxii} of this Constitution shall not be dismissed till the end of their term”.^{lxxxiii}

The Supreme Court is managed by:

Chief of Supreme Court (the highest representative of judiciary power)

Members of the high council of the Supreme Court

General administration directorate of the judicial power

Professional and administration sections

Authority and jurisdiction of the high council in the judicial area

To interpret the laws

To guarantee the consistency of the judicial process

To revise the court’s decisions

To modify the courts for the handling of the cases

To review and respond to suggestions and proposals made by the courts To make the decision and review the reasons for the restitution of the convicted person.

To separate and process the criminal and punitive cases of judges.

The details of judicial structures:

Supreme Court: For Crimes against public security and interest, commercial, civil, military, public and general crimes.

Appeal Courts In the centre of each province, there is an appeal court which has five divisions: General Criminal, Public Security, Civil and Personal Affairs, Public Rights, Commercial.

Primary Courts: All primary city courts in the centre of provinces and district courts in the centre of districts are included

Other courts: include family and children courts, primarily commercial and counter-narcotics divisions.

Documentation Departments: in the centre of each province, there is a documentation department that does the required documentation, documentation affairs in the district is done by district courts.^{lxxxiv}

The main nine members of the Supreme Court, who have supreme judicial power, are selected by the President with the approval of the House of the People. This method of selecting judges with very low and ordinary requirements _according to Article 118 of the Afghan Constitution _ increases the possibility of abuse and selecting judges based on the personal taste or favour of the President rather than on the talent and merit of the person.

According to article 118 of the Afghan Constitution, the candidate

“*Supreme Court members shall have the following qualifications:*

1. At the time of appointment, the age of the Chief Justice of the Supreme Court and its members shall not be less than forty years.

2. Shall be a citizen of Afghanistan.

3. Shall have higher education in legal studies or Islamic jurisprudence as well as expertise and adequate experience in the judicial system of Afghanistan.

4. Shall have good character as well as a good reputation.

5. Shall not have been convicted, by a court, for crimes against humanity, crimes, or deprivation of civil rights.

6. Shall not be a member of any political party during his term of duty”.^{lxxxv}

A number of questions arise here.

- At what level should the candidate's education be?
- How many years of experience should the candidate have?
- What about knowledge of international law as a qualification?

- There should be a standard examination or national test for candidates who want to become a member of the Supreme Court.

According to article 130 of the Afghan Constitution

“In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within limits set by this Constitution, rule in a way that attains justice in the best manner”.^{lxxxvi}

This article raises many questions and ambiguities

- What is meant by other laws? What laws exactly? International laws?
- If there is no provision in the constitution about something, should international law be applied or Islamic law be?
- If the meaning of "other laws" are provisions of treaties or conventions to which Afghanistan is a party, what if they conflict with the rules of Islamic law?

According to article 131 of the Afghan Constitution

“The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect following the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect”.^{lxxxvii}

- What then of other Islamic schools of thought\sect? And other religious minorities?

In the Afghan constitution, chapter 7, which deals with the judicial system, there is no mention of how many members of the Supreme Court should be women. Are women eligible to be members of the Supreme Court?

And there is no specific and special court only for women's affairs that deals with different types of women's cases, including cases of violence against women.

Afghan Women's Lack of Access to Justice and Lack of Enforcement of Law

In Afghanistan, not all women have good access to justice, and there are many different reasons for women's lack of access to justice:

According to the UNAMA report, despite the EVAW law in Afghanistan since 2009, Afghan women's access to justice remains very much inadequate.

According to the findings of this report, there is a lot of unchecked impunity, which includes honour killings and murders of women, which shows the inadequacy of justice for women. Even many women who file cases in the courts have been pressured to withdraw their cases and agree to mediation. The head of UNAMA Tadamichi Yamamoto says that “the government has taken concrete steps to determine accountability measures, but what we see in reality is that violence against women continues in a brutal form”.^{lxxxviii}

Another important reason for the absence and shortage of justice to Afghan women is the weak capacity of the judiciary, which has led to many shortcomings. There are only a very small number of judges in the courts to hear and deal with people's cases. According to the Asia Foundation's Director of Human Rights, "There is insufficient capacity in the formal judiciary in Afghanistan, there is corruption and a lack of transparency".^{lxxxix}

At the national level, there are 21,300 people for every judge, 76,200 people for every judge in the city of Kandahar, and 60,200 people for every judge in Helmand province. Moreover, there is no capacity in the Supreme Court, especially outside Kabul, to detect, investigate and prosecute cases of judicial misconduct.^{xc}

In Afghanistan, bribes are usually paid to get judicial services and avoid postponements and further costs, which frustrates people, and the reason for this corruption is the low wages of the judiciary system, including judges. Most Afghan women are economically dependent on their family, husband or fathers. In such a judicial system, it is not easy for a woman to pay bribes and get improvements in her case – it is another important reason of the absence and shortage of justice to Afghan women.

The lack of Afghan government accountability for violence against women and girls undermines progress in protecting and advocating of women's rights. According to Human Rights Watch, limited enforcement of the EVAW law has left women and girls in critical situation without protection or justice.^{xc}

The unprofessional behaviour of police and law enforcement institutions towards victims is another important reason for women's lack of access to justice in Afghanistan.

For example, women are usually discouraged and deterred by judges, police and prosecutors from filing a complaint and are pressured to settle the dispute through family mediation instead.

Not only the police or prosecutors but also family members and relatives in most cases discourage the victim and pressure them to withdraw their complaints, and in most cases, women do not have access to a lawyer^{xcii}.

The failure of the police to arrest the perpetrator is another reason for women's lack of access to justice in Afghanistan, as the police are very reluctant to arrest male perpetrators like the victim's husband in most cases.^{xciii}

The virginity test is one of the most important and illegal processes conducted on most girls who report violent crimes against themselves, such as sexual assault, according to WHO guidelines) 2014 these types of tests have no scientific basis and validity, and sometimes these tests lead to many years of imprisonment for women and girls^{xciv}, as well as these processes discourage many women and girls from filing their complaints formally.

Mediation

Mediation is a widely used customary law dispute resolution tool in Afghanistan, which is an important reason for women's lack of access to justice.

In Afghanistan, most women are pressured and forced to withdraw their case once they have filed it and resolve their dispute through mediation, which puts them at risk of living with and reconciling with the perpetrator. By law, mediation is prohibited in cases of particularly serious harm, but even in cases of violent crime, women are pressured to resolve the complaint through mediation.^{xcv}

According to UNAMA observations, mediators who decide about cases are not official and it is not a standardized approach with no oversight mechanism, which is a weak system to protect the rights of women survivors.^{xcvi}

There is no clear and explicit legal provision in Afghan laws that prohibits, allows or defines mediation, but according to the interpretation of (obligation of the state to protect the institution of the family...) Article 54 of the Constitution and Article 39 of the ERAW Law, mediation is allowed in non-criminal cases and by official mediators.^{xcvii}

Mediation should not be used in criminal cases as it normalizes violence against women and undermines people's confidence and trust in the criminal justice system. Using the mediation mechanism to resolve disputes in brutal cases of violence against women is in direct opposition and contradiction to the ERAW Act.^{xcviii}

In many cases, women themselves prefer mediation which is influenced by many factors and reasons like inadequacies in the criminal justice system, corruption, lack of professionalism and abuses of power, in addition to pressures from culture, society and family. There are limited options for women facing violence provided by the existing legal framework as well as there is an absence and lack of available legal provision to obtain civil remedies and restraint orders. Also, their economic dependency is another reason why they prefer mediation.^{xcix}

Suggestions Extracted From International Law

Relationship between Formal Legal System, Customary Law and Religious Law

If there is any conflict in the legal system of any country between the formal legal system, the customary and religious law, cases, and issues should be resolved according to and with due regard to the gender equality standards and human rights of the survivors.

Dealing with a case according to religious or customary law does not preclude it from being tried and brought to court under the judicial system.

In particular, cases of violence against women are settled in many countries according to religious\ customary law, such as the provision of payment of compensation to the family of the survivor, as well as forgiveness ceremonies, which have their place in many customs.

Moreover, the use of customary and/or religious methods to resolve cases usually leaves survivors without any redress.

There should be a clear distinction between the formal legal system and the customary/religious legal system, and the right of survivors should be treated according to and with respect for the equality standards and human rights of survivors.^c

Equal Application of Legislation to All Women and Measures to Combat Multiple Discrimination

In a country's legislation and legal system, all women and girls should be protected from any discrimination based on religion, language, colour, political opinion, race, property, social or national origin, sexual orientation, marital status, refugee or migrant status, AIDS \HIV status, disability or age.

Legislation should accept and recognize that religion, language, colour, political opinion, race, property, social or national origin, sexual orientation, marital status, refugee or migrant status, AIDS \HIV status, disability or age are the factors that shape violence against women and women's experience of violence.

Sometimes different groups of women are discriminated against before the law or the legal system of countries by legal provisions, such as different types of punishments or protections for married and single women or virgin and non-virgin women.

For example, in 2004, provisions in the Turkish Penal Code that provided lesser or no penalties in cases of intensity against unmarried or non-virgin women were repealed, and now it is ensured that all women are equally protected before the law.

In many areas and societies, women face gender-based violence because of their race or ethnicity, which shows that most women experience violence because of their religion, language, colour, political opinion, race, wealth, social or national origin, sexual orientation, marital status, refugee or migrant status, AIDS \HIV status, disability or age. It is very important to legislation to make sure of having\ making particular law provisions for sensitive and appropriate treatment of women who make complaints or who are survivors of violence which suffer from different types of violation.^{ci}

Amendment and/or Removal of Conflicting Legal Provisions

Legislation should eliminate or amend conflicting legal provisions in various areas of law, such as property law, rules and regulation of housing, family and divorce law, labour law and social security law, which conflict with the adopted legislation, to guarantee and ensure a legal framework with consistency that promotes the elimination of violence against women, gender equality and human rights of women.

To have fully effective legislation, reviews and amendments are needed along with the adoption of new legislation on violence against women to guarantee and ensure that the elimination of violence against women and women's human rights are consistently included.^{cii}

Gender-sensitive legislation

Legislation should be gender-sensitive, not gender-blind. Inequalities of men and women and the specific needs of men and women are recognized through gender-sensitive legislation. A gender-sensitive approach to legislation acknowledges that men's and women's experiences of violence are different. According to this approach, violence against women is a consequence of unequal power relations between men and women throughout history as well as discrimination against women .^{ciii}

Specialized Police and Prosecutorial Units, and Specialized Courts

The strengthening and designation of specialized police units, as well as specialized prosecutors' offices for violence against women, should be guaranteed and ensured by law, and sufficient funds should be allocated for their work, as well as for the training of their personnel.

There should be opportunities for women and girls who report violence against women, as well as for survivors of violence against women, to contact female police officers or prosecutors.

Legislation should create specialized courts to handle cases of violence against women. As well as there should be specialized court procedures. Officers working in specialized courts for cases of violence against women should be well trained .^{civ}

Prohibition of mediation

Mediation in all cases of intensity against females before and during legal proceedings should be explicitly prohibited.

Mediation is a dispute resolution mechanism that is an alternative to criminal justice as well as family law processes in many countries. In cases of violence against women, mediation brings many problems, for example, the case is removed from judicial scrutiny, both parties are recognized as equally guilty of the violence, thus reducing the perpetrator's responsibility and giving both parties equal bargaining power. In many countries, mediation is strictly prohibited in cases of violence against women.^{cv}

Penalties for Non-Compliance by Relevant Authorities

Effective sanctions should be provided for and applied to the competent authorities who fail to comply with the law in cases of violence against women.

It is very important to provide penalties and sanctions for authorities and officials entrusted with implementing laws in cases of violence against women, to ensure and guarantee that they carry out their responsibilities fully and correctly.^{cvi}

CONCLUSION

This Research legally analyzed the sexual harassment of women in Afghanistan, and the reasons behind its day-by-day increase in academic, educational and public places, by studying and focusing on many important areas like Afghanistan's legal framework, law provisions, legal pluralism, the judiciary system, informal justice in Afghanistan, mediation, women's access to justice, sentencing regarding sexual harassment of women and law enforcement, on the other hand comparing Afghanistan legal framework with the international legal framework to find out remedies and viable solutions to its shortcomings.

The focus was particularly on finding out the role and contribution of the judicial system in the increase of sexual harassment of women in Afghanistan. To find out the main reasons for Afghanistan's failure to prevent sexual harassment of women and to have recommendations and viable solutions from the international legal framework for having a better legal framework to prevent sexual harassment of women in Afghanistan,

As a result and outcome of this study, I found out that there are critical legal problems in Afghanistan's legal framework from different aspects that cause an increase in the overall situation of violation of Women's Human rights as well as the sexual harassment of women in Afghanistan and Finally after the compare of the national legal framework with the international framework, Important recommendations and remedies were drawn out from the International legal framework to have a better and reformed National framework for Afghanistan, especially in regard of respect, protection and fulfilment of women's rights.

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

ⁱⁱ Afghanistan constitution 2004, art 22.

ⁱⁱⁱ Afghanistan constitution 2004, art 24.

^{iv} Afghanistan Penal code second book 2017, part 8, chapter 6 arts 668-672.

^v Ertürk, *The Due Diligence Standard*, para 92.

^{vi} Ertürk, *The Due Diligence Standard*, para 82.

^{vii} *Developing Legislation on Violence against Women and Girls*, May 2011, UN, page 147.

^{viii} *Developing Legislation on Violence against Women and Girls*, May 2011, UN, page 3, Para 1.

^{ix} *Developing Legislation on Violence against Women and Girls*, May 2011, UN, page 146.

^x *Developing Legislation on Violence against Women and Girls*, May 2011, UN, page 147.

^{xi} General Assembly resolution 48\104 on the declaration on eliminating violence against, article 2 (b).

^{xii} *Developing Legislation on Violence against Women and Girls*, May 2011, UN, page 147.

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^{xiv} General Assembly resolution 48\104 on the declaration on the elimination of violence against, article 4 (f).

^{xv} Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Arts 7-16.

^{xvi} *Developing Legislation on Violence against Women and Girls* 2011, UN, page 146.

^{xvii} Convention no.111 of 1958.

^{xviii} *Developing Legislation on Violence against Women and Girls* 2011, UN, page 146.

- ^{xix} The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 12-
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ⁱⁱ **2(a)** To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

Article 3 States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 5(a) States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women;

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights concerning the law relating to the movement of persons and the freedom to choose their residence and domicile.

ⁱⁱⁱ **Article 2** States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

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- ^{lxxx} Afghanistan supreme court website
<https://supremecourt.gov.af/en/structure-judicial-system>
- ^{lxxxii} Supreme Court members shall have the following qualifications:
1. At the time of appointment the age of the Chief Justice of the Supreme Court and its members shall not be less than forty years.
 2. Shall be a citizen of Afghanistan.
 3. Shall have higher education in legal studies or Islamic jurisprudence as well as expertise and adequate experience in the judicial system of Afghanistan.
 4. Shall have good character as well as a good reputation.
 5. Shall not have been convicted, by a court, for crimes against humanity, crimes, or deprivation of civil rights.
 6. Shall not be a member of any political party during his term of duty.
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