

3rd International Conference

**“Family Law Reform and Women’s Rights
in Muslim Countries:
Perspectives and Lessons Learned”**

Seminar Report

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and Democratic Development

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Preface

For the third consecutive year, Rights & Democracy hosted an event, in Kabul, on February 23-24, 2010, on the reform of family laws in Muslim countries.

During our first conference in 2008, speakers with expertise on the Moroccan and Egyptian family laws shared their knowledge on the various articles of these laws with participants. Last year, our conference coincided with the adoption of the Shia Personal Status Law by the Karzai government. The conference provided an opportunity for participants to mobilize and strategize for the law's revision. This year, Egyptian, Palestinian and Moroccan experts came together with Afghan experts to present Shariah-based arguments that were used to advocate for Family Law reform in other countries, or that should be used within Afghanistan.

Since its establishment as an Islamic republic in 2004, Afghanistan requires that its family law respect the rights and responsibilities of men and women as described in Islamic law, or Shariah. It must also respect Afghanistan's national and international human rights commitments, including its constitutional provisions recognizing the equality of women and men, as well as its accession (without reservations) to the Convention on the Elimination of All Forms of Discrimination against Women.

Rights & Democracy's involvement in Afghanistan has been to support the reform of Afghanistan's family law, through the creation of the Family Law Drafting Committee comprised of Afghan experts and hosted by the Ministry of Women's Affairs. The process to prepare the draft reformed Family Law took over 2 years and included researching Shariah-based arguments for reforming the law, analyzing other Muslim countries' experiences, and drawing comparisons with other Afghan laws affecting family matters. More specifically, the work concentrated on the following articles: redefinition of family as a lawful, enabling and equitable unit;

marriage; children's custody; mutual relationship; polygamy; divorce; benefit and interest of children.

The draft reformed law has been sent to the Legislative Department of the Ministry of Justice by the Ministry of Women's Affairs. Much support will be needed from all sectors of Afghan civil society to ensure the proposed reform remains respectful of women's rights through the legislative process.

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Opening Remarks

The seminar opened with brief remarks from Dr. Husn Banou Ghazanfar, Acting Minister of Women's Affairs; Ms. Tahera Mirzad, Head of the Women, Civil Society and Human Rights Commission in the Wolesi Jirga¹; Ms. Heather Cruden, Head of Development at the Embassy of Canada in Kabul; and Ms. Alexandra Gilbert, Coordinator for Afghanistan at Rights & Democracy.

Dr. Husn Banou Ghazanfar noted the ruinous cultural and social effects of the long years of strife in Afghanistan on Afghan women. She also noted that, while few, significant achievements in the area of women's rights have been made, including the recent adoption of the *Elimination of Violence Against Women Act* by Parliament, the drafting of the *Law of Wards and Guardians*, and the current effort to adopt a fair and just family law: "These laws will help to resolve the problems of many women and children," she said.

Ghazanfar also mentioned the efforts of the Ministry of Women's Affairs to reach out to the provinces and focus on areas such as violence against women and forced child marriages. She also acknowledged Rights & Democracy's efforts in its support to the drafting of laws.

Heather Cruden, who spoke on behalf of the Government of Canada, expressed Canada's strong support for the full spectrum of women's rights in Afghanistan.

The Government of Canada works with its partners to support systems of governance and law that "benefit citizens, protect their human rights and ensure the full and equal participation of people, regardless of gender."

Cruden underlined the importance of developing fair, accessible and effective judicial institutions that are fundamental to a modern society. She stressed Canada's support for working closely with women to support their equal participation in such institutions, in their own communities and in the broader society.

¹ House of the People - lower house of the National Assembly of Afghanistan.

Cruden pointed to what she called the long-term partnership between the Government of Canada and Rights & Democracy in Afghanistan, since 2002, that has resulted in significant achievements for Afghan women. These include the adoption of the new Standard Marriage Contract; and support for the review of Afghan family law by the Family Law Drafting Committee and the Ministry of Women's Affairs in order to ensure that Afghan law respects Afghanistan's international legal obligations.

She praised the tenacity of Afghan civil society in mobilizing public debate and pressing to promote and protect women's rights and hoped "this positive trend would continue" and called for civil society actions to hold officials accountable for the "essential building blocks" of democracy in Afghanistan.

Cruden acknowledged the challenges that Afghan women face but stressed the effectiveness that discussions and debate, such as the seminar, have on positive change and reform.

Tahera Mirzad expressed her strong commitment to take an active part in efforts to address the suffering and problems of Afghan women. She said reforming family law in accordance with Islam is a necessary undertaking, and noted that Islam ensures equal rights and salvation for all Muslims.

She argued that the problems facing women in Afghanistan are based on a twisted interpretation of Islam, whereas real Islam affords equal rights to both men and women. Drawing on the historical record, Mirzad said Islam gave women equal political and social rights at a time when much of the rest of the world was mired in intellectual darkness.

She also noted that Muslim women have played active parts in social life throughout the centuries. She said, "The reason why we have problems isn't because we don't have laws or good laws. It's because we don't have a good understanding of laws and we don't apply the laws."

She rhetorically asked if Islam sanctioned the current condition of Afghan women that subjects them to prostitution, rape, sodomy, domestic violence and hundreds of other types of degrading

behaviour. “It’s our wrong traditions and customs that lie at the heart of Afghan women’s predicament.”

Mirzad stressed that Afghan women have proposed “proper reforms” to lessen their pain and to lay the groundwork for the active and constructive participation of Afghan women in public life. Otherwise, she said, 50 percent of Afghan society will be deprived of playing an active role in putting an end to Afghanistan’s current predicament.

Mirzad also talked about “significant challenges” facing her work in the Wolesi Jirga including a lack of sufficient awareness about women’s rights on the part of male members of Parliament and their degree of openness to accepting reforms to laws that directly affect women’s lives. Some so-called *Ulamā*² and mullahs³, she said, “pull a curtain over women’s rights in order to ensure women’s inferior position in society.”

She added that there was a need to do significant groundwork “to prepare people for the changes we want to advocate for based on the tenets of Islam.” She also said that significant groundwork must be laid to support the legal changes that the advocates of Afghan women’s rights aim to pass in Parliament, especially in light of the challenges faced during the passing of the *Violence against Women Act*.⁴ “Some members, who hadn’t even read the law, opposed it because they said ‘it was against *Shariah*.’ In fact, though, that was not the case.”

Alexandra Gilbert from Rights & Democracy presented Rights & Democracy’s work in Afghanistan since 2002, at first to support women’s rights through a project funding mechanism. In 2007, Rights & Democracy introduced support for the drafting or the reform of laws as they pertain to women. The members of the Afghan-led drafting committee, which is hosted by MoWA, have been involved in issuing recommendations on the *Shia Personal Status Law* (SPSL), the *Elimination of Violence against Women Law* (EVAWL), and in drafting the *Law of Wards and Guardians*. The drafting committee has completed the first draft of the reformed *Family Law* (based on Sunni jurisprudence). Their work has been supported by various organizations and community members in the provinces.

² *Ulamā* : the Islamic Scholars

³ Mullah: Muslim man, educated in Islamic theology and sacred law

⁴ Official Gazette number 989

Gilbert was impressed by the commitment of Afghan people wishing to build a more equitable society. She stressed the need for public awareness about legal reforms and called for a collective effort to support reforms to the current draft of the *Family Law*: “I hope that more voices within Afghanistan will join the core group of Afghan advocates that supports the reform of the *Family Law*. I hope this seminar will create this opportunity for like-minded Afghan citizens to meet and to strategize together to make sure that the rights of women are protected.”

Reforming Family Laws

The Wife-Husband Mutual Relationship in Islamic Family Law: Proposing the Codification Methodology in the Qur'an to Implement the Principle of Equality in Marriage

Presenter: Ms. Fouz Abdel Hadi, Technical Advisor from Canada (CGSO-CANADEM), Afghan Ministry of Justice - Taqin

In her presentation, Fouz Abdel Hadi showed how the codification methodology in the Qur'an, the primary source of *Shariah* in Islam, manages the wife-husband relationship on the basis of equality, love and mercy, not on the wife's obedience that implies her inferiority and may cause hatred and violence among spouses.

According to Abdel Hadi, the codification methodology in the Qur'an can help legislators in Afghanistan create a family law that can easily be implemented and reflects the rights of women, based on the following requirements:

- Consistency with the constitutional constraints including Islamic law (Article 3), international human rights law (Article 7), equality (Article 22), the well-being of the family (Article 54), liberty and human dignity (Article 24);
- Suitability of family law with the social conditions of 21st Century Afghanistan including the desire of people to accept equality in marriage;
- Coherence with other laws in the legal system including laws that give women equality in public life and prohibit slavery.

Abdel Hadi defined codification as the process of putting together all legal rules that belong to a branch of law, such as family law, into a single legal document, not only to make the law accessible and to achieve legal certainty, as most codes do, but also to change people's behaviour

and social relationships in favour of gradually moving towards a more ideal society. In her view, codes for social change have three main features that can be found in the Qur'an.

First, codes introduce new principles such as equality that promise evolution towards ideal relationships between people. The Qur'an protects the principle of equality in two forms: formal and substantive. While formal equality gives women and men the same opportunities in both private and public life, substantive equality treats them differently in accordance to their realities in order to achieve equal results.

In keeping with formal equality, the Qur'an does not withhold or limit women's access to opportunities or advantages that are available to men on the basis of biological characteristics. Women in Islam can exercise their right to education, work, and participation in politics exactly as men do. For example, a *sūrat*⁵ of the Qur'an states that all people, men and women, are equal. The only distinction that God made between people is not based on gender characteristics, but rather on the basis of merit or religious adherence.⁶

Abdel Hadi says that formal equality is applied in the context of the marriage contract by giving both the woman and the man the same rights of offer and acceptance as well as stipulating the conditions they want to govern their marital relationship. The Qur'an also obliges spouses to equally consent to keeping the Islamic theme of marriage, love and mercy. Thus, under formal equality, wife and husband are similarly situated, and should be similarly treated.

In addition to introducing formal equality, Abdel Hadi said that the Qur'an was a pioneer in recognizing the principle of substantive equality in marriage by acknowledging the reality of women with regard to giving birth to and nurturing children. Therefore, it assigned the husband the responsibility to provide financial support to the wife and family including shelter, food, clothing, and expenses for essential services such as medication. The husband's responsibility is mandatory because his biological nature does not involve giving birth to and nurturing children, which requires staying at home. Meanwhile, the wife's responsibility is connected to both her choice and biological nature. Although the Qur'an gives women the right to work exactly as men do, it does not oblige the wife to work outside the home to earn a living if she chooses to stay

⁵ Any of the 114 chapters or sections of the Qur'an.

⁶ Verse 13 of *Sūrat⁶ al-Hujarāt* - The Chambers, the forty ninth chapter of the Qur'an.

home to take care of the family. The wife who chooses to take care of the family is entitled to financial support from the husband in exchange for her care-giving. By recognizing the biological reality of the woman, the Qur'an did not assign her a double job: to be a caregiver inside the home and a breadwinner outside the home. Although substantive equality treats women differently based on their biological nature, it creates a mutual relationship between the wife and husband that does not subordinate the wife, but rather gives her role as caregiver an economic value similar to that of the husband.

The second feature of codes for social change is that they adapt ideal principles to new social conditions in order to create rules that the majority of people obey voluntarily. While principles have a fundamental and permanent nature, rules are contextual and temporary. The Qur'an, as a code for social change, had to adapt the principle of equality to the social conditions at the time of its revelation in order to be accepted by the people, and thus implemented voluntarily. For example, society before Islam ignored the human value of women by accepting the killing of female infants and by treating women like property that can be traded to secure debts. In addition, before Islam, women were treated like slaves who had to obey their masters. Disobedient women were severely beaten under pre-Islam laws. For example, the husband could smash the teeth of his wife with burnt bricks and could pull out or twist her ears with impunity. Furthermore, it was very easy for the husband to divorce his wife without having to pay any financial compensation. But it was impossible for the wife to ask for or obtain a divorce because she was part of her husband's "property" and it was only he who could decide to abandon his property. The Qur'an aimed to change these conditions by introducing the principle of equality. However, it had to incorporate the wife's obedience temporarily,⁷ in order to accommodate the social conditions of the 7th century.

The third feature of codes is that all new codes replace the pre-existing laws in the area in question. Therefore, rules that are not mentioned in the new code are effectively repealed whether explicitly or implicitly. Therefore, by giving women human value at birth, the Qur'an repealed the pre-Islam rules that allowed the killing of female infants and treating women as property.

⁷ Verse 34 of *Sūrat an-Nisā'* - The Women, the fourth chapter of the Qur'an.

While confirming the evolving nature of the Qur'anic code, Abdel Hadi used the case of repealing slavery from the laws of contemporary Islamic legal systems as a precedent to be followed by the legislator in order to abolish the wife's obedience obligation from the *Family Law*. Slavery was incorporated in the Qur'an to accommodate the social conditions of 7th-century Arabia. Although masters were obliged to provide slaves with shelter and food, and to treat them kindly, masters could sell their slaves, give them away as a gift, or use them to secure debts. However, in order to encourage the implementation of its ideal principles, including equality, freedom, justice, and human dignity, the Qur'an made freeing slaves a good virtue⁸. Since the end of the 19th century, the institution of slavery has been abolished in many countries where Islam is part of the legal system, including in Egypt, Jordan, and Palestine. Despite its incorporation in the Qur'an, slavery has been abolished because people's conscience has gradually become more oriented towards human rights.

In her concluding statement, Abdel Hadi confirmed that evidence from the Qur'an shows that it aimed to: first, have the principle of formal equality fully implemented in the establishment of the marriage contract; second, have the principle of substantive equality fully implemented in the distribution of rights and obligations between spouses. The husband is responsible for financial support in exchange for the wife's contribution to the family, not to her obedience.

Abdel Hadi also confirmed that the Qur'an aimed to have the theme of marriage, love and mercy fully implemented between spouses⁹.

In keeping with the above-mentioned theme, all sources of violence in marriage should be ended.

Abdel Hadi concluded that evidence from the social context of 7th-century Arabia shows that the wife's obedience was incorporated¹⁰ temporarily in order to accommodate the social conditions that existed at the time of its revelation. These conditions do not exist in 21st-century Afghanistan where people's conscience has become more oriented towards human rights.

⁸ Such as in Verse 92 of *Sūrat an-Nisā'*

⁹ Verse 21 of *Sūrat al-Rūm* - The Romans or Byzantines, the thirtieth chapter of the Qur'an.

¹⁰ Verse 34 of *Sūrat an-Nisā'*.

Finally, Abdel Hadi raised the following question: If slavery was abolished from the Qur'an due to new social conditions in the 19th and 20th centuries, would, by analogy, the wife's obedience rule be abolished in 21st-century Afghanistan?

Family Law Reform: The Moroccan Experience

Presenter: Ms. Saida Kouzzi, Maghreb Regional Legal Officer, Global Rights, Morocco

Saida Kouzzi, a Moroccan lawyer and women's rights advocate, gave a detailed presentation about the state of women's rights in Morocco and the challenges they have faced in reforming the country's family law.

She emphasized the need to preserve cultural identity while launching women's movements to reform existing laws in the light of Islam. But such an effort, in her view, is not easy and demands significant sacrifices.

Kouzzi first highlighted similarities in the social context that required women in Afghanistan and Morocco to become a driving force. In Morocco:

- In 2003, 62 % illiteracy among women, 38 % among men;
- Higher incidence of poverty among women;
- Lack of awareness of laws; in 2000, only 28.3 % had heard about an official gazette on family law;
- Only 14.2 % were aware of the content of the gazette;
- Only 11.7 % of these were women, and 6.9 % were women in the countryside;
- Half of the 14.2 % knew that the family law had been amended in 1993.

She then talked about the women's movement in Morocco and recounted some of its weak points, including:

- Poor planning and limited experience in working on women's issues;

- Most women's associations emerged in the 1980s, and were led by elected women who were called "*Frenchified*," in other words women who did not have an in-depth awareness of Islamic *Shariah*;
- Most associations were symbolic institutions that achieved little in practice and were labelled political associations instead of civil society associations;
- Regional work outside the cities was very limited;
- Women's associations were constantly subjected to threats and attacks;
- The ensemble of women's associations as a whole lacked strong coordination.

Kouzzi then listed some of the strong points of the women's movement and the various associations advocating for greater equity between men and women, including the following:

- A strong desire to bring positive, constructive changes to society;
- Independence in terms of management and funding;
- A desire and openness to learn from other countries;
- Progressively better coordination on complex issues;
- Progressively better coordination with other women's associations in neighbouring countries such as Algeria, Tunisia and other Muslim countries;
- Support from international organizations.

Kouzzi then discussed the reform of family law in Morocco.

The first point she made was that the old law was very rigid and had not changed at all in several years. "It had been considered a sacred law for many years," she said. The law gave strong powers to judges. The gazette-based law was first adopted in 1957. There had been some efforts over the years to bring change but to little avail.

Following the 1980s, the women's movement and women's groups broke into the public arena for the first time in Morocco, which heralded a new push for legal reforms. As a first practical step, women gathered one million signatures to amend the law, including signatures from judges, members of parliament, lawyers, etc. The petition resulted in an amendment in 1993 that was

considered mostly cosmetic. Therefore, “women’s groups stood up again and said the amendments did not address the need in Moroccan society,” Kouzzi said.

In 1998, a stronger effort from women’s groups was launched, which was also based on a national plan. Many opposed the effort. This resulted in two major demonstrations, each drawing about one million people—one to amend the law, another to oppose the amendments.

Given that activities of Islamist groups had increased in Morocco in 2000, women made a conscious and concerted effort to make their way into Parliament so that they could amend the law themselves. Women’s groups also worked hard to get people into the government and Parliament in order to effect this change.

Prior to this effort, there were only seven women MPs in the Moroccan Parliament. Following the women’s campaign, the number jumped to more than 33% of MPs.

In 2001, when women’s groups were under great pressure, the government conducted a public opinion poll on possible reforms. The Royal Commission did not have representation from women’s groups. Therefore, women pursued their advocacy work in public, including through the media and public gatherings.

Following 30 months of work, the Commission submitted a report to the government. In 2003, the Moroccan King delivered a speech in Parliament based on the Commission’s report. In his speech, the King asked for amendments to the *Family Law*.

One hundred amendments were adopted, mostly made possible because of the women who had made their way into Parliament.

Following the weakening of Islamist groups in the country, Moroccan women launched another effort to seek changes in order to further reform the law.

Some of the new amendments included:

- The law used to be called a gazette, now it is a law.
- The age of marriage was raised from 15 to 18.
- Wives and husbands were allowed to sign contracts beyond the marriage contract, for example with respect to their financial dealings. This was an existing tradition among non-Arab— *Al-Amāzīgh*¹¹—Moroccans, which states that “the one who earns owns.” In other words, the law took the legal provision from an existing tradition.
- It allowed girls of marrying age to seek a marriage contract in a court of law if consensus exists. In such cases, the girl does not need a guardian’s permission to marry.
- The new law did not prohibit polygamy but instituted strict conditions that have made it difficult for men to simply marry a second or third woman. If the husband cannot meet the conditions, he will not be able to marry a second woman.
- Divorce by the husband must go through the court system and be registered since men abused the right to divorce, such as divorcing wives for not cooking well.
- The right of men to two kinds of divorce: a) consensual divorce, b) because of discord in the marriage.
- In divorce cases, the husband must pay all expenses for one month. If he does not agree, he is not granted a divorce. If he still insists but cannot pay the one-month alimony, a public assistance fund pays for the wife’s one-month alimony.
- The previous law gave women the right to ask for *khul’*¹² for reasons including harm and the inability of the husband to pay alimony, etc. However, sometimes women cannot prove harm—for instance verbal abuse. The new law divided harm into physical and emotional harm in order to broaden its definition.
- It was difficult for a Moroccan woman to go to court and ask for a divorce due to separation or swearing. The wife needed to prove a one-year disappearance of her husband before she could ask for a separation. If the husband materialized during the separation proceedings, even momentarily, the divorce proceedings were annulled. Therefore, a good law is a good thing, but the main issue is implementation. In this case, when a wife claimed that her husband had disappeared, the unscrupulous husband who

¹¹ The indigenous people of North Africa, Berbers called Mauri or Moors in old European languages.

¹² Consensual separation

lived away from his wife would learn about it and show up before the court to claim he was around and then immediately disappear from his wife's life again. This sort of loophole automatically overrides the wife's claim of disappearance because the husband can keep showing up once every year to claim before the court he is not missing. The wife continues to suffer and is not able to seek divorce. Therefore, there are now two types of divorce under the new law: consensual divorce and divorce based on family discord, a situation where the husband seeks a divorce because peaceful marriage between the spouses is no longer possible.

- The new law gives a mother the right to custody of the children until the age of seven or more if the child has a need or disability that only the mother can provide for.
- Women are entitled to alimony from their husbands.

Kouzzi said some of the amendments were difficult to implement because the law did not carefully provide for the practical application of the provisions.

She gave the example of prosecutors who have the right to return an estranged wife to her husband's home when she leaves. There are no safety mechanisms for women in such cases if they are subject to violence or even when their husbands endanger their lives. Even the prosecutors disagree with this, but because it is part of the law they say they feel obliged to implement it. This was partly because the amendments were adopted without sufficient input from women's associations.

Kouzzi mentioned the issue of the social assistance trust fund when women suffer at the hands of a husband who is unwilling to pay. She also stressed the strong opposition to the law by men.

Kouzzi concluded that it is critical for the various stakeholders to provide their input with respect to new laws in order to prevent or at least minimize legal ambiguities and uncertainties.

Promoting Juvenile Rights through Family Law

Presenter: Judge Homa Alizoy, Head of Juvenile Court, Kabul

Judge Alizoy stressed the fact that there must be harmony and synergy between rights and development in society in order to ensure balanced progress and development. This requires reforms to Afghanistan's laws.

She posited that a family law is created to strengthen the institution of family and ensure the protection, safety and welfare of children.

Sometimes, certain laws do not guarantee the rights of individuals against other individuals. This necessitates reforms and changes to the law.

There must also be legal guarantees for the implementation of personal rights in light of and in accordance with *Shariah*. Not only in the area of husband-wife relations, but also in the areas of child custody and child welfare overall.

The government must also ensure that the law—when reformed—be implemented properly throughout society. Ambiguities, gaps and poor application result in suffering for children and the broader society.

“Our current civil code does not specifically emphasize harmony and the promotion of virtue and prohibition of vice in husband-wife relations.”

This emphasis, if incorporated into the new law, has many benefits, both at the family and societal levels. “It results in a more harmonious, healthier, happier family which can then result in a more harmonious, peaceful society.” Judge Alizoy further argued that children who are exposed to violence and neglected go on to pose challenges and threats to the establishment of a law-abiding society.

Good behaviour is another teaching in Islam. The principle and need of good behaviour—and the need to encode this in the reformed family law—can ensure more love and care towards children on the part of parents and other adults.

“The new law needs to take into account the purpose of the institution of family in order to contribute to a calm and harmonious society.”

Judge Alizoy pointed to Article 54 of the Afghan Constitution that puts the burden of regulating family relations on the government. Therefore, she argued, it is the government’s obligation to ensure that the law is just and applied fairly.

The reformed draft law should also take into account the rights of children explicitly. Children’s education, healthcare, promoting their potential, care of disabled children and care of children without parents, and legal support for children should all also be codified in this new law.

She noted that most of these considerations have already been incorporated into the draft *Family Law*, but advocated the need to ensure that they remain provisions in the final expression of the law.

According to Judge Alizoy, the age of majority and age of marriage must be carefully determined to ensure that children’s rights are not violated. The age of marriage should be set at 18, especially in light of the fact that the country has signed the Convention on the Rights of the Child.

She added that the government should also take into account the need for consent on the part of the two parties engaging in a marriage contract. This is not written explicitly in the present draft.

The law should limit the man’s right to divorce through the court system. “The man must have convincing reasons and justifications for his decision to divorce his wife. The most important reason for this is the need to take into account the welfare of children in a family.”

She said the law should aim to prevent forced marriages, especially for underage girls. The law, she stressed, should at least give girls the right to seek recourse through the court system if they have been forced into marriage.

Judge Alizoy drew attention to child custody which she said is another important area that needs to be taken into account. She said child support payments should be better regulated to ensure that the needs of children are addressed and that they become the focus of custody issues.

The law should also allow children when they reach the right age—when the mother’s custody right expires—to choose the parent with whom they are the happiest. She argued that this preference for the child’s best interests has a religious sanction in *Shariah*.

Family Law Reform: A Practical Approach to Justice

Presenter: Judge Rahima Rezayi, Head of Family Court, Kabul Province

“Is the law we have now a comprehensive and sufficient law? Are there any gaps?”

Judge Rahima began by defining the source of law as any draft proposed by a law-making authority through the legislative process. She also pointed out that traditions are also a source of law in Afghanistan. In Afghanistan, she said, this is conditional to the requirement that the traditions in question do not violate the formal law.

Every law-making institution has the responsibility and duty to uphold the law it helps create. She said it is law that protects the poor, protects security in a country, protects the weak from the strong and establishes the foundation for building sound families.

“Is our current law free of any defects? Is it available to the people?” she asked. The existing family law is neither perfect nor accessible to the people. “We can say clearly that no law but the Qur’an is perfect,” she said.

Afghanistan's present laws are not free of flaws. Though taken from French and Egyptian laws, she said that Afghanistan's laws are still ambiguous and deficient in some areas.

She offered child custody as an example: Article 249 of the Civil Code states that a father can seek custody of his children after age nine for girls and seven for boys through the court system, even if he has not previously paid any child expenses.

Children are also taken away from their mother—for example when the husband dies—and handed over to the father's family.

"I wish the age of custody with the mother were higher. I wish it were 15 years before the father could take over right to custody of the children," she said.

Judge Rahima referred to cancellation of engagement as a second example of ambiguities in existing law: Article 64 of the Civil Code states that both sides to an engagement agreement can cancel the engagement.

However, Judge Rahim said the reality was more complicated and more difficult for the girl. For example, if a girl goes to court to request cancellation of engagement based on this article, the boy can claim the two sides had gone through *Nikāh*¹³ or a formal marriage contract. This simple claim takes the case beyond the purview of Article 64 and leaves the girl in legal limbo because she now has to seek divorce through separation to terminate her relationship with the boy.

"When the case goes to court, the boy disappears. The girl is then left in suspense. Does she have to wait for three years before she asks for *Tafriq*¹⁴—separation—in absentia? The law here is ambiguous."

¹³ Contract of marriage between a female and a male in Islamic law terminology.

¹⁴ Separation or divorce in general. Also used as a technical term for a way of divorcing in which the wife seeks divorce through recourse to the court, on specific grounds such as the prolonged absence of the husband, lack of maintenance and so on. *Tafriq* may thus be termed judicial divorce.

Another example Judge Rahima mentioned was that of an Afghan wife having to wait for five years for an incarcerated husband while having to pay for her children's upkeep without her husband's support.

"This is an injustice against women. The law should instead allow for Tafrīq after six months in these cases."

Also, Afghan women avoid taking their cases to court. Many Afghan women have waited up to 17 years before resorting to the court system to ask for separation.

Judge Rahima therefore argued for a reduction in the waiting period from three years to one year, before a wife can seek separation.

An additional reason for this reduction is the fact that some unscrupulous Afghans marry young girls in Afghanistan through *Nikāḥ*, but do not intend to stay with them beyond satisfying their sexual lust. "If the man has deceived the girl, she now has to wait for at least three years before asking for separation," she said.

Judge Rahima hoped efforts to reform the *Family Law* result in legal provisions that "respond to the needs of our society and one that gives judges freedom so they can apply it based on the principles of fairness and justice."

Overview of the Law-Making Process: SPSL, EVAW and Family Law

Presenter: Zia Moballegh, Acting Country Director, Rights & Democracy

Zia Moballegh began his presentation with a call to the people of Afghanistan to take an active part in efforts to reform and improve Afghan laws. "As committed Afghan citizens, we should not sit silently while there is need for reform and positive change for justice".

The need for social reform as well as human and economic development also compels Afghans to seek reform in the country's legal instruments, an essential building block of a sound society.

"We also need to reform our laws in order to preserve human dignity in light of the tenets of Islam through ensuring their rights." These rights ought to be guaranteed at three levels: personal, social and instrumental.

For example, every citizen should be provided with political rights on these three levels. No one, he said, can in principle compel anyone else to vote for a particular candidate in elections as it is against his/her personal rights. Everybody shall enjoy social and political participation and a transparent due process, with judicial guarantees to support these rights. There are also other rights including the right to life, political activity, work, sexual and family rights, etc.

The question for us, Moballegh pointed out, is whether these rights are protected. "The answer to this question can tell us whether or not our peoples', our citizens', human dignity is ensured."

He pointed out three different sources of law that shape the lives of Afghan citizens: Islamic law, international law and customary practices.

Article 3 of the Constitution prohibits any laws or legal provisions that go against the tenets of Islam. Article 7 states that Afghan law must not be in violation of international legal conventions that the Afghan state is a party to. At the same time, articles 21 to 54 outline the rights and obligations of citizenship and the elimination of discrimination among Afghans.

"Ensuring these rights and seeking justice isn't easy," Moballegh said. "Civil society should recognize this challenge and then prepare itself for the fight."

Moballegh cited the efforts of civil society on the *Elimination of Violence against Women Law* (EVAW). This law has been drafted by the Ministry of Women's Affairs and reviewed by civil

society twice. After it was sent to the department of legislation (*Taqnīn*¹⁵) of the Ministry of Justice, Afghan civil society issued more recommendations to clarify the gaps:

- Highlighting the social perspective of crime rather than the personal perspective;
- Promoting non-custodial measures;
- Emphasizing the well-being and security of family and redefining family;
- Ending domestic violations: protection orders;
- Eliminating discriminatory traditions.

Despite many efforts, the final gazetted version of the EVAW law still has not taken into account the recommendations of civil society. As a result, the following problems remain with the gazetted law: no protection order; no due time for fulfillment of the responsibilities by the concerned ministries; no due process for the commission on EVAW; no provision on marital rape; no provision on crimes under honour killing; no provision on stalking women; no provision on the obligations of the Supreme Court such as jurisdiction, training staff, referring the victim to shelters, etc.; defining very vague responsibilities for the Government of Afghanistan; no provision on reporting the cost of VAW and its effect on the development of Afghanistan; no criteria for civil liability. Moreover, the law emphasizes punitive measures rather than preventive measures and non-custodian punishments.

The *Taqnin*, at the Ministry of Justice, has the responsibility to review all bills before they reach Parliament and the president for final endorsement. This department conducts general assessments before finalizing the bill: cost, need and application assessments along with scrutiny and examination of the draft.

The capacity of the *Taqnin* must be built to ensure more accurate scrutiny from constitutional, human rights instruments and gender perspectives. Lack of transparency and consultation with the target groups of the drafted laws and with civil society are other gaps that must be filled.

¹⁵ Equivalent of “legislation” in the Afghan system of law. Any bill or legal proposal has to be sent to the Ministry of Justice and then to the Parliament. The law is finally signed by the presidency and sent to the journal of record for publication.

Challenges

Civil society has a very important role to play in the legislative process: advocacy, lobbying, public awareness, strategizing the reform of laws, among other roles. However, its role is currently limited.

Moballegh outlined some of the serious challenges the broad spectrum of civil society faces in Afghanistan. One of the primary challenges, he said, was the fact that Afghanistan has to contend with a relatively young civil society that lacks some of the organizational and institutional muscle and experience of a more entrenched, experienced civil society.

He also pointed to the lack of strong popular support in certain areas, abuse of the civil society concept by the government, lack of cooperation from national institutions towards civil society institutions and lack of access to information about government law-making processes, citing for example the near total lack of information shared with civil society institutions about the recent amendments to Afghanistan's electoral law.

Looking ahead

Moballegh expressed his belief that if the government decides to support civil society in Afghanistan, including better access to information, there will be more professional and expert civil society institutions around the country. This would allow civil society to offer more substantial input into the law-making process, which in turn will lead to more constructive and fairer improvements in the law.

Three ways to divorce: Ṭalāq, Tafrīq and Khul'

Supervision of Divorce: A Right

Presenter: Ms. Mahbooba Hoquqmal, Member, Meshrano Jirga

Mahbooba Hoquqmal, a strong advocate of women's rights in Afghanistan, began her remarks with the contention that *Ṭalāq*¹⁶ should not be one-sided. In other words, a husband should not be able to divorce his wife whenever he wishes to do so without good reason.

According to Hoquqmal, *Family Law* must include provisions to ensure that divorce proceedings go through the court so that divorce is based on sound, justifiable reasons. "This will give added guarantees to ensure women's rights." She pointed to Article 131 of the Civil Code that refers to three ways of revoking marriage: *Ṭalāq*, *Khul'*¹⁷ and *Tafrīq*¹⁸.

Divorce (*Ṭalāq*)

Article 135 of the Civil Code defines divorce. The second paragraph of the same article states that *Ṭalāq* is a right of the husband. According to the article, a husband, Hoquqmal said, can undertake *Ṭalāq* proceedings whenever he wishes without having to present good reasons. The husband can also enter a new marriage contract with his wife without having to face any consequences.

¹⁶ Equivalent of divorce in Islamic law terminology, mainly divided into two categories: *Bā'in* (final) and *Raj'i* (husband may change his mind and take wife back or couple may reconcile during a "waiting period" (*'iddah*) lasting three menstrual periods or three months after a divorce is pronounced by the man).

¹⁷ One of the categories of divorce in Islamic law. In this type of divorce, a wife who does not like her husband has to give all or part of her dowry or other property to her husband in order to obtain divorce. Then she has the right to become separated.

¹⁸ Separation or divorce in general. It is also used as a technical term for a way of divorcing in which the wife seeks divorce through recourse to the court, on specific grounds such as the prolonged absence of the husband, lack of maintenance and so on. *Tafrīq* may thus be termed judicial divorce.

Generally divorce is undesirable in Islam. “But divorce has been allowed as a last resort to get out of a broken marriage where one side in the marriage can no longer stay in the marriage,” she said. “But this right has been given to men.”

Hoquqmal said that prominent Muslim scholars have contended that *Talāq* is *harām*¹⁹ and against Islam, and there are no good reasons for it. Furthermore, Hoquqmal noted that some husbands in Afghanistan divorce their wives without even informing them ahead of time.

She also pointed to the fact that because some women are illiterate and their *Talāq* is not registered, their previous husbands can take them to court and accuse them of adultery with someone they have married as a second husband.

Hoquqmal pointed to three factors that pose challenges to women’s rights in divorce issues:

- Patriarchal legal system;
- Inconsistencies within the legal system;
- Backwardness of society.

She argued that most other Islamic countries have been able to use Islamic values and official and non-official legal sources to implement transparent and fair laws.

“The Holy Qur’an descended to reform the dark society of Arabs. It reformed wicked practices but made sure the reforms were within the social customs of the Arabs.”

Hoquqmal pointed to the fact that other countries have limited the husband’s right to divorce his wife at will in many ways. This reform in Afghanistan also requires support and acceptance across the country. Based on this argument, she said, all *Talāqs* should be registered in court.

Another way for a wife to get out of a broken marriage is to force the husband to agree to divorce through the court system. “This is difficult in our society,” Hoquqmal said.

¹⁹ In Islamic jurisprudence, all ordinances are divided to five categories, including *harām*. This category concerns things that are forbidden.

Tafriq

Tafriq occurs under the following conditions:

- The husband has a problem, such as a chronic disease which results in *bā'in Ṭalāq*, that is, the two can reunite when the husband is cured.
- A woman asks the court for *tafriq* because of harm in married life. In such cases, if harm is proven, the court issues *Ṭalāq bā'in*²⁰. If harm cannot be proven, the court can appoint two mediators to resolve the differences between the husband and wife.
- Separation based on *Al-infāq*²¹. According to Article 191 of the Civil Code, if the husband is away and his property and possessions cannot pay for the wife's alimony, she can ask for separation. The court can grant the husband a maximum period of three months following which the wife can be given *tafriq*.
- Separation because of absence. If the husband is absent for three or more years and the wife faces harm because of his absence, she can ask for separation in a court. This is true even if the husband pays alimony for the wife in absentia.
- If the husband is imprisoned for ten years, the wife can ask for separation after the first five years even if the husband continues to pay alimony. In these cases, the court informs the husband through written notices. If the husband continues his absence (which he will in cases of prolonged incarceration), the court can issue a separation.

Khul' (Consensual Separation)

Consensual separation happens through *khul'*. The husband can delegate the authority of divorce to the wife. This happens when a wife can no longer continue with a marriage.

Hoquqmal said there are other circumstances in which a wife can ask for separation, such as abandonment by the husband of his duties towards his wife and children and violence against women. Unfortunately, she said, many such marriages exist across the country.

²⁰ Final divorce: the consequence of a final divorce is that the husband cannot take back his wife during the waiting period. The couple will not be able to come back together again unless they remarry, i.e. a new marriage contract is signed between the two.

²¹ To provide maintenance or alimony for a woman or wife by her husband.

Men who have abandoned their wives and children to marry younger wives, or have developed a gambling addiction, that leads to the abandonment of spousal duties, also constitute grounds for wives to seek separation through the court system.

She contended that Afghan traditions and customs give precedence to men's rights and entitlements and deprive women.

"We can say that women's problems haven't been solved and their problems have never been looked at within the context of true Islamic values and principles. Men's violent and un-Islamic treatment of women has not been addressed so far."

Hoquqmal also decried the lack of proper statistics on incidents of violence against women and unjustified divorces so that proper measures can be taken to prevent catastrophic consequences for Afghan families that negatively affect the lives of children and wives.

Hoquqmal strongly argued that measures to require all divorces to go through the court system and be registered will not only guarantee better Islamic rights for women but also bring Afghan society into line with other Muslim countries that have evolved and changed their laws to bring them closer to the tenets and principles of Islam. Divorce proceedings through the court system will require the husband to present justifiable grounds for divorcing his wife. This will better protect women and children.

She further stressed that the government has a duty to ensure education and public awareness of these issues. However, Afghan women will need additional support and resources, especially in the countryside because of the traditions and customs dominant in the country. For example, Afghan women cannot even ask for their *Mahr*²², their Islamic right, let alone ask for a divorce.

In addition, she noted that Afghanistan is a signatory to international conventions that it needs to adhere to when it comes to women's rights.

²² A gift, mandatory in Islam, which is given by the groom to the bride upon marriage in Islamic cultures.

Harmonizing these conventions with the traditions, customs and religious beliefs of the country is not an easy task. All responsible bodies must work together to reform the laws so that the God-given rights of Afghan women are protected from the predation of violent men and unacceptable customs and traditions.

Hoquqmal stressed that the Afghan government must learn from Algeria, Iraq and other Muslim countries in order to achieve a similar court-based divorce system in Afghanistan.

Divorce and Khul': *Shariah* Perspective

Presenter: Mr. Abdul Wahab Rahmani, Researcher, Ministry of Education

Abdul Wahab Rahmani started with a nod of approval towards collective deliberations such as the seminar at hand in order to discuss topics in detail that can help improve Afghanistan's legal system. These discussions, he added, could also partly satisfy the need for creating research and information on all sorts of legal matters that require more in-depth study.

This need for quality research and analysis comes before the legislating stage where lawmakers create laws.

Wahab said that the first element, analyzing laws and studying legal issues, has been weak in Afghanistan. "Our universities and government institutions responsible for legal issues do not yet have the capacity to enrich our legal discussions," he said. "The discussions here I hope will provide a foundation and the grounds for creating laws that will address our social problems in practical ways."

Focusing on the topic at hand, Wahab said the main point in a discussion on *Khul'* and divorce has to be whether people in a human society could in theory accept that an Afghan woman has the same or similar right to seek separation from her husband through divorce or *khul'* as a man.

Divorce, in general, is sanctioned when married life is no longer tolerable for one or both parties in a marital relationship. He said a key question was who should have the authority over divorce proceedings.

Islam gives the right for divorce to men. “This creates at least two problems,” he said. “First, a man can divorce his wife whenever he wants, for example, when he wants to leave a wife for physical reasons. Second, the husband can hold a woman in a marriage contract for years while the woman suffers from an abusive relationship.”

Another obstacle, he said, is the husband’s ability to provide alimony after a divorce. Muslim women have also been given opportunities in matters of separation. The first is to go through a consensual divorce with the husband. The second is to seek divorce through the court system. The third is seeking *khul’* where the husband agrees to divorce in exchange for the return of his dowry payment or another mutually agreed value.

“If life is no longer tolerable for a wife in a marital relationship, recourse should be available to her”. The law should give women the right to have access to *khul’* so that they can seek separation through legal means.

Wahab argued that men who do not have any justification or reasons should not be able to divorce as they wish. “Divorce is one of the least desirable things,” he said. He also argued that arbitration over divorce must become a requirement; it must become compulsory. He stressed that the arbitration must occur through the court system. “The law must make divorce arbitration compulsory,” he said. He argued that if all divorces happen through the court system, then *khul’* can become a more accessible recourse for separation for women from an intolerable or abusive marriage.

“This must not be conditioned on the man’s consent,” Wahab said. One reason for this, he added, is the need for an in-depth, philosophical look into the need for *khul’* and women’s rights. Many Muslim scholars argue that *khul’* is just a legal recourse for women in the face of men’s access to the right of divorce. *khul’* should, therefore, not require the consent of the husband.

Wahab recounted a Hadīth²³ of the Prophet Muhammad (Peace be Upon Him) about *khul'* that narrates the story of Jamila, daughter of Saloul and wife of Qais. Jamila one day went to the Prophet to seek separation from her husband. The Prophet reportedly asked if she was willing to return to her husband the Qais's garden that he had transferred to her ownership as the marriage dowry. She responded that she did. The Prophet then ordered Qais to let Jamila go in exchange for the return of his garden.

Wahab also argued that in accordance with the Qur'anic principle that guarantees that women's rights are equal to their obligations; women must have the same recourse to ending a marriage as men. "This is another reason for scholars to look into women's right to *khul'* as an equal right to separation as men's right to divorce," he said.

Wahab pointed to the diverse views on *khul'* among the four *madhhabs*²⁴. But he argued that when all are agreed on the principle that when a wife can no longer tolerate marital life with her husband she can give something in *fidyah*²⁵ and seek separation, society should be able to codify this into law so that "we have uniform application of a fair and just law across society."

Khul': Egyptian Perspective

Presenter: Sheikh Nasruddin Sayed Ibrahim, Al-Azhar University, Egypt

Sheikh Nasruddin Sayed Ibrahim began with a definition of *khul'* in *Shariah*: withdrawing from a marriage contract by the wife in return for a *fidyah* or another incentive so that the husband agrees to a divorce.

²³ The collection of Prophet Muhammad's saying (according to the Sunnites) and the Imams too, from the Shiite perspective. Hadith is part of Sunnah, which forms the second source of the Islamic law in authority after the Qur'an.

²⁴ Technically means the school of law (or jurisprudence). There are four Sunnite madhhabs, including Ḥanafī, Ḥanbalī, Mālikī, and Shāfi'ī; and several Shī'ite madhhabs, including the Ja'farī (the most common, e.g. used in Iran) and Zaydī.

²⁵ Compensation in general, but technically it is the compensation paid either because of the violation or negligence of Islamic ordinances (recommended or obligatory), or in exchange for freedom of a prisoner. In this work, *fidyah* represents the amount of money or property paid by wife seeking a divorce from her husband in order to obtain his consent for separation.

The legal scholar from Egypt cited a *hadīth*²⁶ that proved the *Shariah* basis of *khul'*. The *hadīth* concerns a wife who comes to the Prophet Muhammad (Peace be Upon Him) and tells him she is prepared to return the dowry from her husband in return for a divorce. Though there are two slightly different versions of the Prophet's reaction, he ordered the husband to accept the dowry back—a garden he had given to his wife—and to let his wife go in return.

Another basis for *khul'* lies in *fiqh*²⁷ or Islamic jurisprudence according to Ibrahim. Muslim scholars have endorsed *khul'* provided that its required conditions are met.

According to Ibrahim's interpretation, there are three conditions for *khul'*:

- A reason must exist for *khul'*. If there is no justifiable reason for *khul'*, the wife is being disobedient;
- A substitute for divorce must exist that the husband agrees to. For example, the wife agrees to return her dowry or an equivalent value that both sides agree to;
- A request for *khul'* from the wife must not be forced by the husband because a forced *khul'* would further harm the family, a paramount social institution in Islam.

Khul' results in what is known as *Ṭalāq bā'in*, a divorce where the husband cannot go back to his wife unless a new marriage contract is signed between the two.

Khul' does not have an impact on child custody that is different in any way from divorce. That is, the wife takes custody of any children until a certain age and the husband bears the obligation of full alimony.

A child who is born within one year of the date of *khul'* is considered the husband's child.

No further rights exist between a man and woman once they have gone through *khul'*.

²⁶The collection of Prophet Muhammad's sayings, according to the Sunnites, and the Imams, from the Shiite perspective. *Hadīth* is part of *Sunnah*, which forms the second source of the Islamic law in authority after the Qur'an.

²⁷ Literally means understanding, but technically, it is the science of Islamic law or *Shariah*.

Khul' has no impact on non-marital issues such as a business partnership, debts or other agreements between the husband and wife.

The husband cannot impose any unlawful conditions on the wife in order to agree to *khul'* such as the wife's agreeing to give up her child custody rights. *Khul'* forbids any unlawful conditions.

Presenter: Judge Hossam Helal, International Development Law Organization (IDLO)

Hossam Helal began by presenting the Egyptian experience of *khul'* by looking at the relevant laws, problems in its application and the rulings of the country's constitutional court in the matter.

According to Helal, the Egyptian rule states that *khul'* is valid as long as it is based on mutual agreement between the husband and wife. If there is no consent from the husband, the wife can refer her case to a court and ask for *khul'*. If the wife meets all the *khul'* conditions—returning her dowry, etc.—the court can grant her *khul'* and separation from her husband.

A key condition, however, is that the court should first try to bring peace and reconciliation between husband and wife through two court-appointed mediators. This mediation period should not take longer than three months.

The wife retains custody of the children after *khul'*.

The rule governing *khul'* does not require the husband's consent in order to grant *khul'* to an Egyptian wife.

A court's decision in a *khul'* case is considered final. This triggered a debate because a final court decision does not allow for the appeal process, an integral part of Egypt's judicial process.

Following an intense debate, the constitutional court ruled that the *khul'* rule was in accordance with Islamic jurisprudence, and argued that no law can contravene the rules of Islam. The court

further argued that the *khul'* rule was in accordance with the tenets of *Shariah* and therefore the constitutional court could not change or oppose a law that contravened *Shariah*.

Helal stressed the fact that new laws should aim to advance the welfare of society based on principles of fairness and justice and in accordance with the principle of *ijtihad*²⁸.

He noted that most Egyptians follow the *Hanafī*²⁹ *madhhab* but that the *khul'* rule in Egyptian law has been borrowed from the *Mālikī*³⁰ *madhhab*. "*Mālikī madhhab* is also valid in Islam," Helal contended. "This does not mean that all Egyptians should become *Mālikī*."

Helal said that just as Islam gives the right of *Talāq* to the husband when a marriage is untenable for him, it has given the same right to a wife to ask for *khul'* and annul a marriage.

He said that although there is no explicit mention of *khul'* in the Holy Qur'an or *Sunna*³¹, it is a constant and permanent rule in *Shariah* based on *fiqh* rules.

²⁸ In its literal sense means hard striving, but technically is defined as the thorough endeavor of a Muslim scholar to infer Islamic law from its four main sources, namely the Qur'an, the Sunnah, the Ijmā', and the Reason.

²⁹ A Sunnite school of law, putatively founded by Abū Ḥanīfah in the second/eight century. The *Ḥanafī* school is now the most widespread in the world, including from Egypt to Iraq and in the Subcontinent.

³⁰ One of the four Sunnite schools of law, putatively founded by Anas ibn Mālik in the second/eight century. The *Mālikī* school is now predominant in North and West Africa.

³¹ Words and actions of the Prophet Muhammad, according to the Sunnites, and the imams as well according to Shi'ism.

Alimony, child custody, polygamy and consent to marriage

Polygamy: Review of the Moroccan and Egyptian Laws in Light of *Shariah*

Presenter: Mr. Alim Amini, Director, Peace Association - Member of the Family Law Drafting Committee

Alim Amini began his presentation with the Qur’anic reference to polygamy. He argued that most Muslim scholars only emphasize the first part of the Qur’anic verse on polygamy—that refers to the ability of a Muslim man to marry up to four women—while ignoring the latter part of the verse that emphasizes one wife if a man cannot ensure justice among more than one spouse.

Amini said that the first verse states that humans are equal in creation, and that there is no preference of one over another, except in accordance with their degree of piety, religiousness or *taqwā*.

The Holy Qur’an emphasizes the concept of the couple, that is, man and woman are essential halves of a whole couple. “The emphasis here is that both male and female are equal without any distinction,” he said.

Amini stated that the second verse is about social inequality. “If you stop at a traffic light or by the road, dozens of orphans will run up to you and ask for assistance. What does this verse guide us to do, given our present situation?” he asked. “What should we do given that we have countless orphans while at the same time we own golden palaces?”

In this verse, he argued, the Holy Qur’an directs us to return the orphans’ rights.

Amini said the third verse states that if one can fulfil the rights and entitlements of orphans, then he has the right to marry more than one woman.

“If someone can afford it, marrying more than one wife who has orphans will help society,” he said.

Therefore, Amini underlined, the Qur’anic principle emphasizes one wife. The idea of multiple wives is secondary.

“Qur’an emphasizes that if justice can’t be implemented and the rights of orphans can’t be ensured, then it directs Muslims to prefer one wife,” he said. “If we solve our problems based on this Qur’anic guideline, we can find workable solutions to many of our social ills and problems.”

Referring to the Prophet’s multiple wives; Amini said every one of his marriages had a philosophy and a legitimate justification of its own. He argued that the Prophet (Peace be Upon Him) married his first wife, Khadija, at the age of 40, and only remarried at the age of 53, which means He was considerably advanced in age by the time He married His subsequent wives.

As an example, Amini referred to the story of the Prophet’s marriage to a slave tribal leader’s daughter whose owner, upon hearing of the Prophet’s marriage to his slave’s daughter, freed the tribal leader and with him his entire tribe. In this case, Amini argued, the Prophet’s act of marriage served a much larger good. “Every other one of the Prophet’s marriages has such justification.”

The limit of four wives permitted by Islam, Amini said, is indeed a limit imposed by the Qur’an on Muslims who, at the time, had more than four wives. “The Islamic rule does not encourage the taking of wives up to four,” he said. Instead, it actually limited the greater multiplicity of wives.

Obstacles and Limitations to Polygamy

Amini argued that the first verse emphasizes equality of creation between man and woman, which is an argument for limiting the number of wives to one.

The Qur'an also emphasizes the principle of justice, which states that if injustice is feared, only one wife should be taken.

In another instance, the Qur'an states³² that ensuring justice between wives is difficult for a Muslim man, despite his best efforts. That is why the Qur'anic verse emphasizes piety over multiplicity of wives.

The husband's ability (or inability) to afford alimony for multiple wives is another limitation on marrying more than one woman.

Citing a theoretical example, Amini said that if a first wife has stipulated a limitation to one wife as a condition of marriage, and the man then marries a second woman, his marriage to the first wife will become invalid.

Amini cited the examples of other Muslim countries that have adopted a family law that limits polygamy. Moroccan law prohibits polygamy if it results in injustice between wives, or if a wife has included conditions against polygamy in her marriage contract. In addition, if the judge knows there will not be justice between the wives by the husband, he can refuse to administer the second marriage contract. Algerian law includes similar provisions that require *Shariah*-based reasons for more than one marriage, and in Iran, the first wife's consent is required for a second marriage.

Alimony: Right or Responsibility

Presenter: Mr. Alireza Rohani, Advisor, Afghanistan Independent Human Rights Commission (AIHRC)

Alireza Rohani's central argument was that obedience (*tamkīn*³³) is not a requirement for a wife to be entitled to alimony rights, since alimony is needed for survival.

³² Verse 120 of Sūrat an-Nisā'.

³³ In Islamic law, *tamkīn* refers to a woman's obedience to her husband, particularly in regard to sexual intercourse. *Tamkīn* is the woman's presence in the home and thus availability for intercourse. If a woman denies *tamkīn*, she loses

He argued that Islam requires men to provide support for women because women are responsible for child-rearing.

Rohani argued the following points:

- Women are entitled to alimony because they need it and it is their right. Even a wealthy woman is entitled to alimony.
- A wife's alimony is more primary than support for other family members.
- A wife's alimony is considered a debt. A husband is required to pay both past and present alimony payments. In other words, unpaid past alimony expenses becomes a debt for the husband. In addition, the wife's alimony right is a primary debt. This in accordance with the legal code and *Shariah*.
- A wife's alimony is not transferable; that is, if a wife is in debt, the husband cannot deny his wife's alimony rights in exchange for reducing her debt by the amount of her alimony payment.
- If a man denies his wife alimony, she can take from the man's property without his permission in order to meet her needs.
- A man cannot deny a regular alimony payment to his wife because she has not spent all of her previous alimony payments. Alimony paid to a wife becomes her property right away; that is, she can spend or save the money at her discretion.

The requirement of paying alimony to the wife is absolute in Islam; that is, as soon as the marriage contract has been signed, the husband is obliged to provide alimony to his wife.

"This obligation continues until such time as the wife becomes disobedient, at which point she is no longer entitled to alimony," Rohani said.

"Our laws on alimony payment are unclear and ambiguous." He suggested that the law needs to be reformed to encode the following provisions:

most of her marital rights. A man may cite denial of *tamkīn* in court to argue that he does not owe the woman maintenance.

- A wife is entitled to alimony as soon as a marriage contract is signed;
- A husband is always obliged to pay alimony unless he can prove unjustified disobedience by his wife;
- Men must be required to honour unpaid past alimony payments.

Child Custody: An Islamic Jurisprudential Perspective

Presenter: Sheikh Muhammad Buhairi Abdul Ghaffar, Al Azhar University, Egypt

“Our issue is child custody—the custody of the light of our eyes,” said Sheikh Muahmmad Buhairi Abdul Ghaffar, underlining the importance of the issue. “[They are] a generation that takes forward the development of society.”

In other words, Ghaffar argued, child custody is an essential element in the development of human society.

In Islamic jurisprudence, he contended, child custody requires more than the provision of nutrition. It requires all the support necessary to provide adequate education, healthcare and social and moral development for the children until the age the children can look after themselves and take responsibility for their own actions.

“All these duties are the responsibility of the parents,” he said.

Islam requires the Muslim community to find guardians for children who do not have parents or other legal guardians because “when there is no guardianship, children are more vulnerable.”

Ghaffar emphasized that the duty of guardianship is a duty of the broader community in which the children live.

According to Islam, Ghaffar argued, a mother has been created with characteristics of love, mercy and care that are required for the sound development and rearing of children. “A mother, in

other words, has all the qualities to provide full custody to children. This is why the mother has primacy in the right of custody [over the father.]”

He argued that in accordance with Islam, especially the Prophet’s teachings, when a mother meets all the conditions for custody, no one can take this right from her.

In Islam, maturity, freedom and proper mentality are essential for child custody. Anyone who takes custody rights for children must have good morals, intelligence and all other capacities required to rear a sound, healthy child for society. Ghaffar said no one who has bad morals and is a negative model for the child has the right to take custody of a Muslim child.

The other condition for child custody, he said, is the ability to afford child custody. A wife who takes custody should not be married to someone else unless the other husband is *mahram* to the child; that is, someone who the child can legally live within the same house.

Another aspect of child custody is the father’s responsibility to make alimony payments in order to provide for the child’s needs for food, shelter, clothing, etc.

Ghaffar pointed out that in Egypt, the age limit for the mother’s custody is seven for boys and nine for girls. But, he added, a judge and the government can extend this age to nine for boys and eleven for girls if that is in the best interests of the children and society.

The question, he asked, is whether an Islamic government should set a specific age or if it should be determined by the judge based on the child’s circumstances. Ghaffar then stated that there will be no Islamic legal problem with deciding on the *Mālikī* tradition.

“But if the child is looked after properly and is happy with the mother, what is the point of taking custody from her and giving it to the father?” Ghaffar said. “I don’t think there’s any *Shariah* barrier to this.”

The consensus that emerged from the child custody presentation and the subsequent Q&A session was that child custody and related issues must be decided based on the goal of ensuring

the best interests of the child. Islam, Ghaffar said, called for the easiest path that ensured the most welfare for all. Therefore, the principle of ensuring the best interests of the child in custody proceedings is acceptable in both *Shariah* and civil law.

Visiting rights are the shared right of the father and mother, Ghaffar said. No child should be deprived of visiting rights from either of the parents.

“What parents should do is make sure they don’t damage each other in the eyes of their children because that could harm the development and rearing of the children,” he said.

Consent in Marriage

Presenter: Mr. Abdul Majid Samim, Lecturer on Shariah, Herat University

Abdul Majid Samim began by explaining that consent is important beyond a woman’s right in having a say in choosing her husband.

Importance of Establishing a Sound Family

Samim argued that “the roots of all problems in Afghanistan go back to the family. It’s family that brings up a good and noble or corrupt family.”

A discordant family will not be able to rear sound future members of society. “Corrupt members in society cannot advance the welfare of the broader society,” he said “A sick person will cause [more] sickness.”

Samim added that one of the major reasons why so many families end up broken is the lack of consideration given to a girl’s consent when she is “given” to her future husband.

“This results in a forced marriage which results in a sick family, creates sick family members and, in turn, results in a sick society,” he said. “Ours is one of the sickest societies in the world. If we

look at the root cause of a sick family it is that we do not have a good approach to forming families [in the first place].”

Guardianship

Samim stated that a guardian means companion and friend, not enemy. That there are different definitions in Islamic jurisprudence for guardianship, but in general a person can become a guardian who is entitled to inheritance.

There are two types of guardians: 1. for an adult girl, which is compulsory guardianship and 2. for children, which is the father’s responsibility.

Samim added that the guardian’s role is essential because many parents do not know their responsibility and duties towards their children.

“[Some] parents think they own their children, rather than being their guardians,” he said “Parents haggle over who their children should marry, not what their children’s needs and desires are.”

He said the most important authority/duty given to a parent guardian is to supervise the marriage to ensure that the relationship causes no harm to their child.

“If a child marries someone who poses harm to the family and the girl, then parents can prevent that,” he argued.

“Youth is an intoxicating time. Many youth do not see the depth of issues. They usually pay more attention to appearances,” Samim said. “Many romances aren’t real loves. Therefore, the role of the guardian is to provide guidance to their children so that their youth intoxication does not ruin their lives.”

Helping children form sound, healthy families is another parental duty.

“Parents should guide their children towards a sound marriage,” he said. “This should not happen through Gmail.”

It is *mustahabb*³⁴—if you do it, it is good and if you do not, it is not a sin—for children to listen to their parents’ advice. If the guidance is in their best interest, Samim added, then they can accept their parents’ advice. If not, children of the appropriate age do not have to listen to their parents.

In many situations, however, no one even asks for the girl’s consent in a marriage.

In the *Ḥanafī madhhab*, guardians do not have the right to marry their children without their explicit consent unless there is the issue of *kof*—a situation where harm can come from a consensual marriage based on the girl’s personal decision.

In *Mālikī and Shāfi’ī*³⁵ *madhhabs*, the presence of a guardian is required at the moment of *nikāḥ*.

The Role of Women in *nikāḥ*

Samim stated that *Shariah* gives a lot of authority to a Muslim woman in *nikāḥ* – marriage contract—that have not been given to guardians.

He said it is not incumbent on a Muslim woman to seek her guardians’ presence in signing her *nikāḥ*; it is admissible but not required. Therefore, he argued, a Muslim has the right to enter into a consensual marriage without the presence of a guardian.

In other words, a woman does not require a guardian’s presence for a marriage to be considered valid in Islam.

At the other end of the spectrum, if a Muslim woman’s guardians sign a marriage contract on her behalf without her consent, the *nikāḥ* is invalid.

³⁴ Means recommended, is one of the five categories of ordinances in Islamic law; the four others are “wājib” (obligatory), “harām” (forbidden), “makrūh” (disliked, hated), and “jā’iz” (permissible affirmatively and negatively). Committing a *mostahabb* action is followed by reward, but to abstain from it is not sinful. The categories of *mustahabb* and *makrūh* are evident of the moralistic, rather than strictly formal-legal, nature of Islamic law.

³⁵ Sunnite school of law, founded by Abū ‘Abd Allāh Muḥammad ibn Idrīs al-Shāfi’ī in the second/eight century. Indonesia is one of the places where the Shāfi’ī school is important, although it has some adherent in other areas, for example East Africa.

In terms of children, the *nikāḥ* of a girl child is only valid in cases where the *nikāḥ* is in the best interests of the child.

“What we need to do in our country—based on the political problems and our social customs and traditions—is prevent forced marriages,” Samim stated. “When a government official engages in corrupt practices, we can easily say that his behaviour has its roots in his family’s constitution and his upbringing.”

Samim also pointed out that some Afghan men have told him that the reason they marry a second woman is because their parents did not seek their opinion or consent for their first marriage and they are unhappy in those unions.

“They tell me that their first wife was given to them by their fathers without their consent and that their second wife is their own choice,” he said.

Advocacy for Family Law

Presenter: Ms. Shenkay Karokhail, Member of Wolesi Jirga, Afghan Parliament

Shenkay Karokhail underscored the significance of women's issues and the fact that little has been done with respect to a family law so far.

"A family law—an essential element of family relations—has not existed [so far]," she said. "The existing laws in relation to family issues have not been clear or sufficiently just to address women's issues."

She said it was a moment of pride for her to notice that Afghans themselves are gathering together to work and fight for a just family law.

"We are also doing this because we are part of a wider world."

The current draft may have deficiencies, she said, but Afghans have to work hard to improve and reform their laws.

She cautioned that it will not be easy to pass a fair and just law in the system. "We will face challenges in this process," she said. "We [already] saw the challenges and problems we faced with the Shia *Family Law*."

The real question, she suggested, was how can Afghan women advance their legitimate demands and rights? She said it was impossible to seek justice without strong advocacy.

"There is no alternative for Afghans who believe in the equality of man and woman to come together and seek sound laws that take into account the rights and conditions of Afghan women."

Laws are made to solve people's problems, she said, not to add to their pain, regardless of whether government or Parliament passes them.

"If we don't seek justice ourselves, no one will solve our problems for us," she emphasized.

Karokhail said she believed there are men in Afghanistan, just as in Morocco in the case of the marriage contract, who will support the reform of Afghan family law including the registration of marriages and divorces.

She added, however, that Afghan women will not necessarily get everyone to agree with everything they want to reform.

"But if we can get the people who support these reforms together and united, we will be able to achieve a great deal," she said. "The big question is why Afghanistan as a Muslim country can't do the same as other Muslim countries?"

Advocating for Family Law Reform – The Moroccan Experience

Ms. Saida Kouzzi, Maghreb Regional Legal Officer, Global Rights, Morocco

Saida Kouzzi discussed the evolution of the divorce law and divorce proceedings in Morocco over several years. She recounted two divorce stories that inspired her to work for legal reforms in Morocco and to abandon her law practice.

The first story related to a 73-year old woman whose divorce had occurred in absentia. The husband had accused her of stealing his property. Kouzzi said the woman had approached her law practice to seek recourse against her husband's false accusation of stealing. The woman's main problem was that she had to live on the street following the divorce and therefore could not afford to fight her husband in the court system. It emerged that the husband had divorced the woman because she had aged and he wanted to marry a younger wife. "His request had been accepted in the court," Kouzzi said.

The second case related to a woman who had been brutalized with visible signs of beating. The woman had come to ask for compensation for the beating by her husband. She was also asking for a divorce from her husband. Beyond the clear signs of violence on the woman's body, the court required the woman to present witnesses to certify her claim, something she could not do. The court duly rejected her request for divorce.

"That's why I focus on general issues, because I couldn't do anything against the law. My hands were tied."

Kouzzi maintained that laws are not the only answer to the ills of society, but that the implementation of laws, the more important element, is also more challenging. For example, she said that in Morocco women in theory could ask for a divorce in five situations, but because it was almost impossible for them to do so, many Moroccan women decided to advocate for better laws that would better protect their rights.

Kouzzi said Moroccan women determined that the only way to protect women's rights was within the marriage contract. She said the marriage contract at the time was a paper with just the wife and husband's names on it and was of little validity.

"We decided to do something to protect rights of women with a better marriage contract," she said, "because the parties to the marriage could agree on conditions before starting their married life."

Another strong reason for focusing on the marriage contract was that the existing Moroccan law governing marriages had many ambiguous provisions. "Although Morocco tried to institute a better law, there was still discrimination in the law. So we tried to improve the marriage contract." The marriage contract would take into account rights Moroccan women wanted to encode in future laws.

In the marriage contract that emerged, the husband agrees not to marry a second or third wife. “If a man is prepared for this before his wedding, why not put that in writing in the marriage contract,” said Kouzzi.

The first consideration for Moroccan women was *Shariah*. This was because it was rumoured by many in Morocco that the marriage contract idea had been imported from outside. Because of women’s efforts, she said marriage is now considered a contractual agreement in Morocco.

Kouzzi said her fellow Moroccan activists also sought the experiences of fellow Muslim women in other Muslim countries. They led several joint gatherings among women from different countries.

“The purpose was to assess and receive women’s views on marriage contracts,” Kouzzi said. “Unfortunately, we found out that none of the women were aware that the law allowed them to have stronger guarantees put in the marriage contract.”

Therefore, Kouzzi said, the activists wanted to spread awareness among other women and learn from them about the conditions they wanted included in the eventual contract.

She said the first group of women who wanted to include specific conditions in the marriage contract were young women who had not married yet.

“We saw that women welcomed this effort,” Kouzzi said. “Men welcomed the conditions because they did not want their daughters suffering from damaging divorces. They wanted to include alimony obligations on the part of husbands so their daughters and children would be looked after. We were concerned about men’s opposition, but they supported the effort.”

Kouzzi said nearly 1,500 women participated in these gatherings, ranging in age from 17 to 75. She said they also discovered that traditional marriage contracts were in effect in all three countries, but when the paper-based marriage contract came into use, the traditional contracts were repealed.

Kouzzi added that Moroccan women's rights activists later compiled a report outlining the problems of Moroccan women so that people not only in Morocco but elsewhere in the Muslim world could learn about their problems.

Women then agreed to a marriage contract with 18 articles. In addition to serving as a clearly defined agreement between a future husband and wife, the contract serves as a guiding document for people intending to get married.

"There is no doubt that family troubles arise because of disagreements between wife and husband, so it is a good thing to learn about conditions and sign up to them before two people get married."

The purpose, she said, was to help the parties in a marriage learn about their rights and obligations within marriage. She said the guide was in the form of a small booklet that people could have easy access to.

"What surprised us was that the forms we created for the marriage contract were well received by a lot of women, including women whose husbands had already died," she said. "Women were adding conditions we had not anticipated."

Community Mobilization

Mr. Daud Omari, Project Officer, Rights & Democracy

"When we leave Kabul and our cities, we can start to see the problems women face," Daud Omari said.

Omari gave a few of examples to illustrate his argument. He recounted the story of a man in a village who did not have children with his first wife and went on to marry three more wives in succession in the hope that the next one would bear him offspring. The man then went to a medical doctor and found out that he was impotent and would never be able to have children with any of his wives.

The man, Omari reported, had married every one of the four women at least in part because of social pressure from his family, friends and other relatives.

Omari also talked about the fact that men can divorce their wives and accuse women of adultery when their former wives marry other men, claiming they had not officially divorced. He also talked about reports of young girls who are raped and then punished for committing adultery.

Omari underlined the critical importance of raising awareness and seeking feedback from the public before a new law is passed or an existing one is amended.

He also stressed the need to focus on communities outside the major cities in order to involve both rural and urban Afghans in the debate. “Though there are sensitivities among some people towards what we do, we work with influential members of local communities” so that the idea of reform is not opposed right away.

Rights & Democracy tried to include input from people across the country in the draft *Family Law*. He pointed out that the organization has trainers—half of whom are women—in the six provinces where it is active who participate in its annual training.

Arguments to Support the Reform of the *Family Law*

Rights & Democracy trainers, Omari said, “need to use sources and justifications that are acceptable to the people, such as verses from the Holy Qur’an.”

He said the organization did not refer to the *Family Law* when pushing for reforms in the very law. Instead, he said, the organization’s trainers talked about children’s rights and women’s rights and human rights. Then, he said, the organization trained people in the types of laws—civil law, Constitution, etc.—in order to further and more practically promote the cause of education. Only then, Omari added, did the trainers get into issues around the new draft *Family Law*.

He said it was only at this point that the organization addressed the need to reform the *Family Law* based on changing social circumstance and social needs. He used the following categories of arguments:

Religious Arguments

- Women's rights in Islam (1,400 years of history);
- Problem is not religious but an inaccurate human (male) interpretation;
- Customary practices are not Islam (e.g. *bad*);
- The Holy Qur'an stresses equality between men and women in several places.

Comparative Examples

- Present the experience of reforming family laws in other Muslim countries;
- Present *Shariah*-based arguments that have been used to support the reforms.

Sociological Arguments

- Family Law has been reformed many times during 20th century.

National Legal Arguments

- New Afghan Constitution of 2004 recognizes equality and is in line with Islam;
- Gaps in the existing laws to protect women (i.e. no provisions).

International Human Rights Standards

- International human rights conventions ratified by Afghanistan and State obligation to comply with obligations under these conventions.

Economic Development Arguments

- Women can support their family financially.

Omari discussed the reasons why people at the community level chose to engage in this dialogue. Most people are interested in increasing their understanding of the *Family Law*, and to better understand the relation between Islamic principles and human rights standards. They are interested in confronting customary practices with true Muslim beliefs.

Omari then stressed the importance of respecting people’s culture and the need to first secure the people’s trust and confidence before winning their strong support.

“We also need to discuss the advantages of a process, a reform, a change to the community so that we can win their meaningful support,” he said. “We focus, for example, on the religious sanction and support for human rights and women’s rights and human dignity. This makes the changes and reforms we pursue acceptable to our people. We tell them there are no problems with human rights.”

Another example he mentioned was the terrible tradition of giving girls in exchange (or *bad*) for spilled blood or another major dispute that the holy religion of Islam banned 1,400 years ago. “There are terrible misunderstandings about Islam among our people because people still justify *bad*³⁶ within Islam,” he said. “We say this is against Islam and this makes it more acceptable to the people.”

Omari said Rights & Democracy also strives to tell people about lessons learned from other countries, and how those societies have evolved and changed their laws accordingly. Egypt, for example, whose laws have been a basis to set Afghanistan’s child custody age, has in the past few years changed its own laws to raise the custody age limit in response to changed circumstances.

He added that Rights & Democracy focuses more on legal justifications for reform. For example, he said, training manuals stress the constitutional guarantee for equal rights for both men and women and the international conventions and standards Afghanistan has committed to upholding in order to change perceptions about women’s value and place in society.

³⁶ In Dari, *Bad* is naturally, functionally, and in terms of pronunciation equivalent of the word *bad* in English, an adjective describing a noun. Technically it describes a tribal practice and custom in some regions in Afghanistan in which a female, mostly a young girl, is given as “*bad*” to a member of a family or a tribe in order to reconcile a dispute, compensate or exchange a bad action or behavior committed by the family of the girl or by the tribe that she belong to against the first one. In this practice, the girl is called *Bad*, and the custom is named “*Bad-giving*” and “*Bad-taking*”; in other part of the country, instead of *Bad*, the word *Badal* (means “not original”, in place of, as a replacement for) is used. The main negative characteristic of the custom appears when the girl is given to her husband without her consent; she is merely exchanged like a goods.

Omari stated the following as positive changes:

- Communities are involved for the first time in the law-making process;
- Comments have been integrated into the existing draft *Family Law*;
- Changes in public perceptions and increasing buy-in from some community members;
- Development of a discourse on reforming the law rooted in Islam, the Afghan context and the experience of other Muslim countries.

But he pointed out that challenges remain, such as conservatism and patriarchy: dialogue on women's rights can be challenged by individuals who see women's rights as a challenge to their power.

Despite progress, general awareness on the law-making process and the content of laws remains limited, so there is still a lack of understanding on the need to reform the existing law. There is a significant conflict between customary practices and Islam.

Omari concludes by listing the following key recommendations for the new draft *Family Law*, based on focus groups with the community members he worked with:

- Marriages and divorces should be registered. The government should publicize registration and punish those who do not register;
- Marriage age must be raised to 18;
- Women's rights in *Shariah* and law must be included in the school curriculum;
- Public awareness workshops about the rights of women and registration of marriages and divorces must be undertaken. He stressed that the Ministry of *Hajj*³⁷ and Mosques should also help with this awareness-raising effort;
- Family courts should exist at the district level in order to extend access to a significant portion of the population who do not yet have any or proper access to family courts;
- Consent for boys and girls in marriage should be mandatory;
- Customary practices, including early and forced marriages should be eliminated;

³⁷ The pilgrimage to Mecca which is obligatory for every Muslim if she or he is able to perform it. Ability refers chiefly to financial ability.

- The number of female staff should be increased in courts, police departments and prosecutors' offices;
- Awareness workshops should be conducted for *Ulamā'* (Islamic scholars);
- The population registration departments should require marriage certificates when parents obtain ID cards for their children.

Closing comments

Mr. Zia Moballegh, Acting Country Director, Rights & Democracy Afghanistan

Zia Moballegh said the seminar discussions underlined the need for further initiatives such as this so that women's rights activists could continue their dialogue. He hoped the seminar participants would continue to contribute their views and experiences to future gatherings.

He pointed out that Afghans have discovered through thirty years of strife that they cannot solve their problems through force and violence.

"The only path to meaningful solutions for Afghanistan's real problems is substantive discussion and debates of the issues."