

WOMEN'S RIGHTS IN THE NEW CONSTITUTION OF AFGHANISTAN¹

by:

Mariam A. Nawabi²

I. INTRODUCTION

The approach of the Constitutional Commission in re-establishing the legal rights of Afghan women will constitute not only future legal precedent in Afghanistan, but will set forth the current values and ideals of Afghan society. The issue of women's rights should not be seen in isolation, but is part of the need for protection of human rights and protection from unfair discrimination for all of Afghanistan's citizens.

Although women's rights have been violated throughout the past twenty-three years of conflict, such violations run counter to Islamic and Afghan law. Gender equality and equity, an element of human rights, is supported by Islamic law and philosophy, one of whose purposes is the attainment of justice, fairness, and dignity for all human beings. Gender equality and equity are also supported by Afghan legal precedent, evident in the 1964 Constitution and subsequent constitutions, as well as the ratification by Afghanistan of several international treaties.

II. BACKGROUND

Because Afghan women outnumber men by six to four, it has been recognized that Afghan women's full participation in all aspects of life in Afghanistan is critical to the nation's future and development. Women's participation in political life precipitates high levels of transparency, social responsiveness and democratization while minimizing corruption. Economic growth occurs most rapidly in countries with low disparities between women and men in health, education, employment, and property rights.

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

III. ISLAMIC SUPPORT FOR GENDER EQUALITY AND EQUITY

Human rights were embodied in the Qu'ran six centuries before the Magna Carta and nearly fourteen hundred years earlier than the UN instruments. In most cases, reactions to reforms in women's legal rights have arisen not out of contradictions with Islamic philosophy, but as attempts to guard ancient tribal laws and customs.

With regards to the rights of women, Islam provides clear guidance that men and women are equals before Allah. It is a clear teaching of the Qur'an that man and woman are equal in the sight of God, and the Qur'an uses both feminine and masculine terms and imagery to describe the creation of humanity from a single source. Jurisprudence contrary to these principles has often been the result of a misunderstanding or misapplication of the Qur'anic text resulting from cultural distortions or patriarchal bias. Some of the Qur'anic

¹ Copyright, Mariam A. Nawabi, 2003. All rights reserved.

² Mariam A. Nawabi earned her Juris Doctor, cum laude, from the Georgetown University Law Center and her B.A. in International Studies from George Mason University, summa cum laude. She is admitted to practice law in the Commonwealth of Virginia and the District of Columbia in the United States. She currently works as a litigation and intellectual property associate at the Dechert LLP law firm in Washington, D.C. and also works on Afghan legal issues. She can be contacted via email at mnawabi@hotmail.com.

verses that support gender equality and equity are Surah 4, Verse 1; Surah 3, Verse 195; Surah 4, Verse 124; Surah 23, Verse 35; Surah 18, Verse 13; Surah 40, Verse 40.

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

IV. INTERNATIONAL TREATIES

The Qu'ran also provides that Muslims must be faithful to any treaties and contracts they enter into.³ Afghanistan has ratified several key treaties relating to individual rights and liberties.

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

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

Afghanistan is also a member of the International Labour Organization and ratified the Convention Concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951, which provides that men and women must earn equal pay for equal work. Moreover, Afghanistan ratified the Convention Concerning Discrimination in Respect of Employment and Occupation of 1958, which provides that parties agree to undertake programs to stem all discrimination (both race and sex-based) with respect to employment.

Providing gender equality in and before Afghan law in the new Constitution would thus not be alien to Afghan legal history.

V. GENDER EQUALITY AND EQUITY IN CONSTITUTIONS OF OTHER COUNTRIES

A. Constitutions of Muslim Countries

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

The Constitutions of many countries with large Muslim populations provide for equal rights of all its citizens. These nations, among others, include Syria, Algeria, Tunisia, Morocco, Oman, Bangladesh, Tajikistan, Uzbekistan, Turkmenistan, Pakistan, and Lebanon.

Although the Constitutions of these countries provide for equal rights of all its citizens, there are various approaches to doing so.

³ Qu'ran Surah 2, Verse 177; Surah 5, Verse 1.

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

- “All citizens are equal before the law. No discrimination shall prevail because of birth, race, sex, opinion or any other personal or social condition or circumstance.”⁴
- “All persons are equal before the law and the courts. The government guarantees the rights and freedoms of every person regardless of ethnicity, race, sex, language, faith, political beliefs, education, or social or property status. Men and women have equal rights.”⁵
- “All citizens of the Republic of Uzbekistan have the same rights and freedom and are equal before the law regardless of differences in gender, race, nationality, language, religious, social origin, beliefs, and personal or social position. Privileges may be established only by law and must be in accord with the principles of social justice.”⁶ “Women and men have equal rights.”⁷
- “Turkmenistan guarantees the equality of the rights and freedoms of its citizens and, likewise, the equality of citizens before the law regardless of nationality, ethnic origin, property holdings, official status, place of residence, language, religious preference, political convictions, or political party membership.”⁸ “Men and women in Turkmenistan have equal civil rights. A violation of equal rights based on gender will entail legal liability.”⁹

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

- “All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed.”¹⁰
- “All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.”¹¹

⁴ See, CONST. OF ALG., Art. 29.

⁵ See, CONST. TAJ., Art. 17.

⁶ See, CONST. UZB., Art. 18.

⁷ See, CONST. UZB., Art. 46.

⁸ See, CONST. TURKM., Art. 17.

⁹ See, CONST. TURKM., Art. 18.

¹⁰ See, CONST. OF EGYPT, Art. 40.

¹¹ See, CONST. OF TURK., Art. 10.

- “All citizens are equal before the Law, and they are equal in public rights and duties. There shall be no discrimination between them on grounds of gender, origin, colour, language, religion, sect, domicile or social status.”¹²
- “Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable.”¹³
- “All citizens are equal before the law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex alone.”¹⁴

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

- “The State shall guarantee equality of opportunity to all Egyptians.”¹⁵
- “The citizens are equal before the law in their rights and duties ... The state insures the principle of equal opportunities for citizens.”¹⁶ “Every citizen has the right to participate in the political, economic, social, and cultural life. The law regulates this participation.”¹⁷
- “Citizens are equal in all rights and duties.”¹⁸
- “The state shall guarantee equal opportunities for all citizens in the fields of political, economic, social and cultural activities and shall enact the necessary laws for the realization thereof.”¹⁹
- “Every citizen has the right to participate in the political, economic, social and cultural life of the country.”²⁰

4. *Clauses that provide additional protection for women*

¹² See, CONST. OMAN, Art. 17.

¹³ See, CONST. OF TURK., Art. 12.

¹⁴ See, CONST. OF PAK., Art. 25(1) and (2).

¹⁵ See, CONST. OF EGYPT, Art. 8.

¹⁶ See, CONST. SYR., Art. 25.

¹⁷ See, CONST. SYR., Art. 26.

¹⁸ See CONST. OF YEMEN, Art. 40.

¹⁹ See CONST. OF YEMEN, Art. 24.

²⁰ See CONST. OF YEMEN, Art. 41.

- “The state guarantees women all opportunities enabling them to fully and effectively participate in the political, social, cultural, and economic life. The state removes the restrictions that prevent women's development and participation in building the socialist Arab society.”²¹
- “Motherhood and childhood are protected by the state.”²²

5. *Universal application of clauses within a constitution*

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

B. **Recent Post-Conflict Experiences**

Nations that expressly include equal rights laws in their constitutions due to changes in governance, such as South Africa and East Timor, provide the framework to more quickly protect those individuals in its population who had previously suffered discrimination.

Chapter 2 of the South African Constitution, entitled “Bill of Rights,” provides in Article 9 “Equality” that:

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

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

²¹ See, CONST. SYR., Art. 45.

²² See, CONST. UZB., Art. 65.

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

- “1. All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties. 2. No one shall be discriminated against on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition.”²³ “Women and men shall have the same rights and duties in all areas of family life and political, economic, social, cultural.”²⁴

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

VI. EQUAL RIGHTS IN AFGHAN CONSTITUTIONS

A. Constitution of 1964

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

“TO achieve *justice and equality*”

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

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

(emphasis added).

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

“[t]he people of Afghanistan, without *any* discrimination or preference, have equal rights and obligations before the law”²⁵ (emphasis added).

Article 26 of the Constitution provides broad support for individual rights and liberties and makes no distinction in any of its provisions based upon sex. Words such as “human being,” “no one,” “person,” “every Afghan,” are used throughout the 1964 Constitution, supporting the fact that its provisions are universal and cannot be limited based upon sex or other characteristics.

²³ See, CONST. OF EAST TIMOR, Sect. 16.

²⁴ See, CONST. OF EAST TIMOR, Sect. 17.

²⁵ CONST. OF AFG. OF 1964, Art. 25.

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

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

B. Constitution of 1976

The Constitution of 1976 states in Article 27,

“[a]ll the people of Afghanistan, both women and men, without discrimination and privilege, have equal rights and obligations before the law.”²⁶

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

C. Constitution of 1987

The Constitution of 1987 went further and states in Article 28:

Citizens of the Republic of Afghanistan, both men and women, have equal rights and duties before the law, irrespective of their national, racial, linguistic, tribal, educational and social status, religious creed, political conviction, occupation, wealth, and residence. Designation of any illegal privilege or discrimination against rights and duties of citizens are forbidden.²⁷

Article 33 states:

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

D. Constitution of 1990

Articles 28 and 33 of the Constitution of 1987 were unchanged in the Constitution of 1990.²⁸ In the early 1990s, women made up 70% of the teachers, 50% of government workers, 50% of university students, and 40% of physicians.

VII. RECOMMENDATIONS FOR NEW CONSTITUTION OF AFGHANISTAN

²⁶ CONST. OF AFG. OF 1976, Art. 27.

²⁷ CONST. OF AFG. OF 1987, Art. 28.

²⁸ Article 28 was re-numbered as Article 38.

A. Rationale

Due to the violation of women's basic right in Afghanistan during the past years, it is essential that the new Constitution of Afghanistan promotes and preserves women's rights as part of its protection of the individual rights and liberties of all Afghan citizens. Since the constitution provides the framework for the basic rights of individuals and their relationship with other individuals and the state, the protection of gender equity must emanate from that framework. The existence of potential conflicts between women's rights and social and customary pressures should not extinguish or diminish the existence or application of these rights. The legal system must give women the mechanisms and tools to protect their rights, even if social norms do not.

B. Recommendations for Approach and Language of New Constitution

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

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

Words such as "people," "person," "individual," "human being," etc. should be used to make it clear that provisions apply to all persons, regardless of sex or other characteristics.

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

The new Constitution should state in its provision regarding citizenship:

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

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

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

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

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

specific characteristics in the universal clause is to provide clarity and identify those characteristics that are at greater risk of being utilized to discriminate.

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

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

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

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

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

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

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

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

VIII. CONCLUSION

There is support in Afghanistan’s culture and history for the protection of gender equality. The extent of violations of women’s rights in recent years is not the norm upon which Afghan society is based. Years of conflict and war have hindered women’s opportunities for education, training, and economic development. This, in turn, has made it even more difficult for women to advance in all areas of life in Afghanistan.

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

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

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

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