

**RESERVATIONS BASED ON PERSONAL LAWS TO CEDAW: A STUDY OF
EFFECT ON THE STATUS OF EQUALITY OF WOMEN IN INDIA BY
COMPARING IT WITH AFGHANISTAN**

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*“To awake the people, it is the women who should be awakened. Once she is on the move,
the family moves, the nation moves”.*

Jawaharlal Nehru

Abstract

The purpose of the Convention on the Elimination of all Forms of Discrimination Against Women (hereinafter referred to as CEDAW) is to protect and promote the rights of women. India had ratified¹ the Convention with two declarations and a reservation. They are the declarations on Article 5 and 16, and a complete reservation on article 29. With regard to articles 5 (a) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declared that it would abide by and ensure that these provisions would be taken care of in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

This paper deals with the declarations made to CEDAW with respect to stereotyping of women. The researcher wants to expose the reality related to Indian women's position due to such other factors which are not related to its stand on ratification by comparing the position with Afghanistan. Afghanistan has signed the convention without any reservations and therefore the researcher compares two jurisdictions, one which has reservations and the other which does not have any reservation. The Constitution of both these countries embody the same principles.

I Introduction

INDIA AND Afghanistan are both parties to CEDAW.² India has two declarations and a reservation to CEDAW. Afghanistan has no reservations. The writer intends to compare the Indian Position with respect to Reservations, with a country which has both ratified and has no reservations to CEDAW. Secondly the researcher intends to gauge the factors which negatively or positively impact the position of women in terms of stereotyping and in the family laws in these jurisdictions.

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¹ Ratified on July 9, 1993.

² Afghanistan signed and ratified the CEDAW on March 5, 2003.

In both India and Afghanistan religion has a great influence on the rights of the women and personal laws being important. But as far as human rights are concerned, when we talk of a personal law system, what we get is a legal arrangement which has been truncated over time due to many influences.³ What we get to see in these legal arrangements is a system which has both universal and cultural influences. A bearing on the personal laws on the corpus juris of any country depends on how much weight is given to its personal laws.⁴

Like the Indian Constitution which gives equal rights to women and protects their human rights under part III, the Constitution of the Islamic Republic of Afghanistan (2004) sets out the legal framework for the guarding and progress of human rights, including women's rights. It also states that the state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.⁵ Any kind of discrimination and privilege between the citizens of Afghanistan is prohibited.

The citizens of Afghanistan, be it a man or woman, have equal rights and duties before the law.⁶ The State adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam.⁷ However, when there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the *Hanafi* jurisprudence and in a way to serve justice in the best possible manner.⁸

In India *Khap Panchayats* and *Sharia courts* are not given specific legal sanctity.⁹ A plethora of legislations related to women has come to being not only after but even before the ratification of the convention. However, due to the secular feature of the state Constitution, it is bound by limitations of giving due weight to the personal laws of all.

³ Marc Galanter and Jayant Krishnan, *Religion and Personal Law in Secular India*, 271 (Indiana University Press, Bloomington and Indianapolis, 2001).

⁴ *Id.* at 272.

⁵ The Constitution of Afghanistan 2004, Afghanistan, art 7.

⁶ *Id.*, art 22.

⁷ *Id.*, art 54.

⁸ *Id.*, art 130.

⁹ *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386 of 2005.

The feasibility of a unified civil code has been studied time and again with one recent instance being of the Kerala High Court.¹⁰

Also, the words of the declaration indicate that the commitment to equality of women is not being questioned. The government promises to “abide by and ensure these provisions”. It has however indicated the progressive and not immediate attainment of these objectives. It has also qualified its intention to fulfil these obligations under the CEDAW Convention and interpreted its obligations according to the “policy of non-interference”.¹¹

II The position of women in these jurisdictions

Social status of women in India and Afghanistan

A Wings 2014 report by NGO Save the Children looks at how girls have fared on access to healthcare, nutrition, water and sanitation facilities, education and safe spaces and protection from abuse. It says that India bears the burden of being a nation of disappearing daughters. The census of 2011 shows that overall there are 38 million missing women.¹² The boy-girl divide over the last few decades has widened to such an extent that today, in the age group of 0-6 years, there are 7.1 million fewer girls than boys as against 4.2 million in 1991.

However, there is evidence to suggest that some of the variation in sex ratios is due to disparate access to resources. As Yvonne Macpherson¹³ notes, there can be significant differences in gender violence and access to food, healthcare, immunizations between male and female children. This leads to high infant and childhood mortality among girls, which causes changes in sex ratio. Afghanistan fares much lower than India due to non availability of resources to the female population in spite of no reservations to stereotyping and family issues.¹⁴ Therefore, having no reservation to CEDAW has made no difference in the position of women in Afghanistan.

¹⁰ *Agnes Alias Kunjumol v. Regeena Thomas* decided on May 18, 2010.

¹¹ With regard to art. 5 (a) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent. Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> last visited on Feb 21, 2017.

¹² Report of the NGO Save the Children, Wing, 2014.

¹³ Yvonne MacPherson, “Images and Icons: Harnessing the Power of Media to Reduce Sex-Selective Abortion in India”, 15 (2) *Gender and Development* 413-423 (2007).

¹⁴ Available at: <https://www.theguardian.com/world/interactive/2011/jun/15/gender-afghanistan> last visited on Feb 22, 2017.

By the afore mentioned statement the researcher seeks to emphasise the fact that it may be true that the State is not able to do enough for the eradication of certain evils due to factors other than culture and religion.

On the other hand, Afghanistan is the only country in the world where during the last century kings and politicians have been made and undone by struggles relating to women's status. Recently the situation of women under the Taliban rule has been centre stage. The situation of women came to symbolise to western military powers a justification of war in the name of freedom of women.

Women were obliged to travel with a male relative and to wear the burqa. Violations of these obligations resulted in public beatings by militiamen.¹⁵ Women were not allowed to work outside the home, except in strictly limited circumstances in the health care field and on humanitarian projects. Schools for girls older than eight years were closed.¹⁶

Access to the dilapidated Afghan health care system was limited for women resulting in an average life expectancy of forty-five years and extremely high rates of maternal mortality.¹⁷ After the Taliban, war criminals and especially gender based crimes which happened during the war were not held accountable. Violence persisted and the gender crimes continued as there was no one who was accountable due to a failed justice system.¹⁸

The EVAW,¹⁹ enacted in August 2009 in accordance with the Constitution of Afghanistan, is a significant step towards ending violence against women. While maintaining Sharia law, it aims at protecting women from customs, traditions and practices causing violence against women, such as *badal*,²⁰ high dowry and a like and calls for raising public awareness and prosecuting perpetrators of violence against women.²¹ However in an interview as lately as in February 2017 the Director of a leading NGO, Humaira Rasuli suggested that lack of political will has led to non-implementation of EVAW and also

¹⁵ Available at: <https://www.amnesty.org.uk/womens-rights-afghanistan-history> last visited on Feb.22, 2017.

¹⁶ *Ibid.*

¹⁷ Mark A Drumbl, "Rights, Culture, and Crime: The Role of Rule of Law for the women of Afghanistan", Washington and Lee University Working Paper, 2004.

¹⁸ *Ibid.*

¹⁹ Elimination of Violence Against Women 2009, Afghanistan.

²⁰ Badal means vendetta in Pashtun Language.

²¹ Afghanistan Independent Human Rights Commission, 1391st Biennial Report on Violence Against Women in Afghanistan, 2012.

there are some systemic barriers to access to justice and non-recognising of kinds of violence, corruption and misinterpretation of the laws which has made it non-effective.²²

Economic status of Indian and Afghani women

On the criteria of economic participation and opportunity, India was ranked 87th in the World Economic Forum Report on Gender Gap 2016.. Its female to male ratio in labour force participation was 0.36. The disparity in estimated earned income was high with females earning \$1,980 compared to \$8,087 per annum earned by their male counterparts.²³ There is need to identify areas of existing and emerging stereotypes so that necessary actions can be taken in this regard to prevent such labour market disparities. So these disparities are not related to reservations on the face of it.

An analysis of old Indian census data during the three decades between 1960 and 1990 show that there had been marginalisation of female labour force in all the states throughout the country.²⁴ Till date the trend prevails.²⁵ However, according to the neoclassical theory of human capital, we have the twin theories supported by demand and supply forces.

The labour supply theory stresses on lower levels of human capital of women. Since women are lesser educated and trained, they are pushed to ill-paid jobs. The labour demand theories push forward the argument that there are direct and indirect costs of labour in the case of female labourer. The labour market segmentation theories base their arguments on the concept of dual labour market. They stress the existence of segregated labour markets and occupations.²⁶

While thirty three percent of women in India are part of the labour force, it is sixteen percent only in Afghanistan. Also in Afghanistan, in terms of property rights, before marriage any gift given to women is her own and her husband has no legal right to claim on it even after marriage. On marriage she is entitled to receive a marriage gift called Mahr and this is her own property. Even if the wife is rich, she is not required to spend a single penny for household; the full responsibility for her food, clothing, housing, medications and recreation etc. are her husband's.

²²Interview available at: <https://www.dandc.eu/en/article/main-problems-afghan-women-are-lack-security-insufficient-involvement-reconciliation-process> last visited on Feb. 24, 2017.

²³ Report of the World Economic Forum 2014.

²⁴ A Mitra, S Mukhopadhyay, "Female Labour in the Construction Sector", 24(10) *EPW* 524 1989.

²⁵India has fared badly in removing gender-based disparities, ranking 114 out of 142 countries in World Economic Forum's 2014 gender gap index, scoring below average on parameters like economic participation, educational attainment and health and survival.

²⁶ *Ibid.*

The salary of the women is often taken entirely by the husband and his relatives. In Afghanistan women have equal right to property and the Constitution guarantees it. So having no reservations on the matters related to family did not benefit the women in Afghanistan. Also there are no express provisions related to rights of women in statutes. The only reference is in the civil code which mentions the rights of women and that the woman can both own and sell property. She can do this to the exclusion of her husband and relatives.²⁷

Political status compared

There is evidence from India to suggest that women in local government roles make decisions with better outcomes for communities than men do when charged with budget decisions.²⁸ India has scored 15th rank among the 144 countries in the Gender Development Index adjudged on the basis political participation of women.²⁹ They also appear to be more competent representatives than men, obtaining more resources for their constituencies despite having significantly lower education and relevant labour market experience. More equal female representation in political bodies also affects the participation of women in the workforce, suggesting that greater participation of women in politics could serve as a policy tool to positively impact labour force participation by increasing supply and demand of employment opportunities for women.³⁰

Women's political participation is guaranteed under Afghanistan's Constitution. Article 83 of the Constitution gives Afghan women 25% of seats in the lower house, and article 84 guarantees them almost 17% in the upper house.

The political status of women in Afghanistan has customarily been lesser to the men. The status dramatically changes with the passage of time in terms of socio cultural, norm and upon ethnic values.³¹ It is pointed in many societies and communities where women focus the challenges which faces women's during their participation in politics. Some other critics argue, "women's have no capacity and capability to take over some political and social

²⁷ Harakat, Report on Women's Access to Property in Afghanistan, 2011.

²⁸ K. Munshi and R. Rosensweig. The Efficacy of Parochial Politics: Caste, Commitment, and Competence in Indian Local Governments. Center Discussion Paper No. 964. Economic Growth Center, Yale University, September 2008. Available at: http://www.econ.yale.edu/growth_pdf/cdp964.pdf.

²⁹ Gender Development Index, World Economic Forum 2014.

³⁰ Ejaz Ghani, Anandi Mani, "Can Political Empowerment Help Economic Empowerment? Women Leaders and Female Labour Force Participation in India", World Bank Policy Research Working Paper 6675, 2013.

³¹ W. M. Rahimi, *Status of Women: Afghanistan: Social and Human Sciences in Asia and the Pacific*, 6 (1991) mentioned in Mohammad Ibrahim, "Women Participation in Politics: A Case Study of Afghan Women" 4(3) JPAG 438, 2014.

responsibilities, which in itself have been a big obstacle in their way to have equal participation in the arena of socio-political".³²

A Comparison of Important laws of Afghanistan with India

Personal law

Marriage is a Contract in Afghanistan and, in Afghanistan, many a times it is a contract between the parents of an unborn girl and a man who offers them money. A Muslim woman in Afghanistan cannot have a say in the marriage except in certain highly influential families³³ where the women can speak for themselves. A woman or a girl who is young has an option of either living and subjecting herself to the sexual desires of her husband even if she does not like, or to run away in which case she if arrested for the crime of running away from home.

A woman's statement is valuable as only half a man's in Islam. She receives only half the inheritance of her male siblings. A woman's marriage contract is involving her male guardian and her husband, the woman not herself being a party. A man in Afghanistan can have four wives and divorce his wife by simple repudiation of the contract of marriage using the word "Talak", whereas a woman must give particular and specific reasons, several of which are enormously complicated to establish.³⁴ Custody of children reverts to the father, even if the father is abusive. Women who remarry have to lose the keeping of her children. These are real issues of inequality and discrimination that Muslim women face every day in Afghanistan.³⁵

The personal laws of the women in Indian Muslim community are also similar which are discussed in the proceeding sections. But the difference is that a woman facing abuses can easily approach the courts of law and seek justice. So having a reservation on the Articles have not made any difference to the policy of bringing equality in justice in India.

Criminal law

i. Rape

³² Report on Women Political Participation In Afghanistan. Kabul: Open Society Institution, 7, (2005), mentioned in Mohammad Ibrahim, *Supra* note 29.

³³ Cities like Kabul show better trends. *Available at*: <https://iwpr.net/global-voices/action-needed-rural-womens-rights-afghanistan> visited on Feb. 22, 2017.

³⁴ According to the Personal Law guided by the Sharia.

³⁵ *Available at*: <http://www.secularism.org.uk/blog/2013/02/here-is-why-sharia-law-has-no-place-in-britain-or-elsewhere> visited on Jan 1, 2016.

There are rape laws in Afghanistan. But when there are laws in conflict with the Shariat, the courts hesitate in dealing with the laws in the way the international organisations want it to be.³⁶ Rape is sexual intercourse against the will of the victim undertaken by force, threat or intimidation. The defendant's mental state need only be of knowing or aware of having sex. A charge of rape is therefore dependant on the mental state of the victim. It is from her perspective and not the assailant's that the presence of forceful compulsion is determined.

The test is subjective and takes into account the victim's perspective of the surrounding circumstances.³⁷ S.429³⁸ of the Afghan Criminal Code talks of rape and does not talk of verbal consent. If consent is by force there is a rape. Also rape is a gender neutral crime in Afghanistan.

In India, the 1980s witnessed a spate of legislations concerning women, aimed at protecting them from various forms of violence. The amendments in the rape law were the first to come in this process.³⁹ It started with the Supreme Court judgment,⁴⁰ in 1979, said that chastity and character of a woman were reason and basis for believing or disbelieving the allegations of rape.⁴¹

The two major demands of women's groups were that

- i. character and past sexual history of woman should not determine the outcome of rape trials and
- ii. the onus of proving consent should shift from the prosecution to the accused since a rape trial hinges on whether consent or non-consent can be established.

The amendments and additions of several new sections to the Indian Penal Code, 1860 the Code of Criminal Justice and the Indian Evidence Act have since then made significant advances regarding rape in these laws. Courts are directed not to admit

³⁶ Quil Lawrence, For Afghan Women, Rape Law Offers Little Protection, 2011, *available at* : <http://www.npr.org/2011/12/02/143057341/for-afghan-women-rape-law-offers-little-protection> (last visited on Jan. 10, 2017).

³⁷ Una Au, Raaj Narayan, "An Introduction to the Criminal Law of Afghanistan", ALEP, Stanford Law School, CA, 2008 *available at*: <http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP-CRIMINAL-1ST-EDITION.pdf>. (last visited on Feb. 21, 2017).

³⁸ Afghan Penal Code, s. 429

³⁹ Sadhna Arya. *Law, Institutions and Marriage*, 7-8, Delhi University Course Material, BA Foundation, *available at*: http://www.du.ac.in/fileadmin/DU/Academics/course_material/hrge_07.pdf

⁴⁰ *Tuka Ram v. State of Maharastra*, AIR 1979 SC 185.

⁴¹ *Ibid.*

evidence regarding women's past sexual history or character unless compelled by the norms of a fair trial.⁴²

ii. Adultery

As discussed in the preceding section on rape, Afghanistan has combined the offences of rape and adultery. Rape and adultery are two different offences under the IPC.⁴³ Further the offence of adultery is not imputed on a woman even in consensual intercourse cases as a policy that the consent given is something which is subjective and cannot be proved very easily.

An offence of adultery is committed only by a man. Rape being a gender specific crime might lead to an understanding that this offence talks of a stereotyped image of a woman. But owing to the vulnerability of the women in religious text, the penal code has been amended again to reassert this as a gender specific crime. Else what could follow would be a treatment meted out that of a perpetrator to the victim. So here too the fact that India has some reservations to CEDAW did not matter.

iii. Marital rape

Under the IPC where the forced intercourse by a man with his wife is not rape under the provision of rape.⁴⁴ But the woman can approach the courts for complaining if rape was committed by a husband during judicial separation. There being separate laws for rape and adultery, and also the fact that religion does not determine the prosecutions there is protection for the women under the IPC. Further there being uniformity in application of laws for all religions makes it a very effective penal code which secures the women and all the population which could have been harassed under the name of religion. The judges sometimes have to consider religion in doing justice to a particular community.⁴⁵

The issue of marital rape is never considered or reported in Afghanistan, since women have no choice in terms of consenting to sexual intercourse with their spouse. However, women's rights activists say marital rape is a reality and should be dealt with

⁴² Vina Majumdar, *Political Ideology of the Women's Movement's Engagement with Law*, 16, available at <http://www.cwds.ac.in/wp-content/uploads/2016/09/PoliticalIdeology.pdf> visited on 21/02/2017.

⁴³ Indian Penal Code, 1860, India, ss. 375, 497.

⁴⁴ *Id.*, s.375.

⁴⁵ *Vinod Kumar v. State of Kerala*, Criminal Appeal No. of 2014 [Arising out of SLP (Crl.) No.9014 of 2013].

through appropriate legal mechanisms. It is nothing but rape when a husband forcefully copulates with his wife despite her objections.⁴⁶

iv. Dowry and domestic violence

Dowry is defined as the payment of money, goods, and/or property from a bride's family to the groom's family in consideration of the bride's marriage into the groom's family.⁴⁷ The dowry of modern times is quite distinguishable from the dowry of the past, in which the dowry was within the bride's exclusive control.⁴⁸

As one scholar put it: ⁴⁹

It makes a great difference to receive the dowry as a personal gift given to the bride, which only she has the right to decide its use, and the dowry given to the bridegroom or to his family.

This is because when the bride used to receive the dowry as a personal gift, she was afforded a certain degree of economic security and power over the control of resources in the functioning of the marital home.⁵⁰

Today, however, most dowries are given directly to the groom and his parents, rather than being given in the bride's name under her exclusive control.⁵¹ The modern day dowry only allows the bride limited, if any, access to the property and therefore she has no control over the resources in the marriage.

Despite the fact that the payment of dowry has been illegal in India since 1961, due to the passage of the Dowry Prohibition Act, 2005 it is still a widely practiced tradition in much of India. Similarly, the Afghan Civil Code⁵² prescribes that married

⁴⁶ Available at: <http://www.irinnews.org/fr/report/85978/Afghanistan-differentiate-rape-from-adultery-rights-groups> visited on 22/02/2017.

⁴⁷ Sunil Bhawe, "Deterring Dowry Deaths in India: Applying Tort Law to Reverse the Economic Incentives That fuel the Dowry Market", 40 *Suffolk U. L. Rev.* 291, 293 (2007) in Ashley Richard, *Bride-Burning in India and Self-Immolation by Afghan Women due to Domestic Violence: Different Manifestations of the Same Culture of Violence Against Women* available online at http://gallery.mailchimp.com/a35eb465f87889a36d7a50b4a/files/Ashley_Richard_s_Comparative_Family_Law_Paper.pdf.

⁴⁸ Anshu Nangia, "The Tragedy of Bride Burning in India: How Should the Law Address It?" 22 *Brook. J. Int'l L.* 637, 641 (1997). Cited in Ashley Richard, *Bride-Burning in India and Self-Immolation by Afghan Women due to Domestic Violence: Different Manifestations of the Same Culture of Violence Against Women* available at: http://gallery.mailchimp.com/a35eb465f87889a36d7a50b4a/files/Ashley_Richard_s_Comparative_Family_Law_Paper.pdf. (last visited on Feb 10, 2017).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Afghan Civil Code, 1977, art. 2.

women are considered equal partners to their husbands.⁵³ Despite this codification of equality, the reality is that Afghan men are the heads of the family and women are expected to obey their husbands.⁵⁴

India after signing the CEDAW in 1993, had passed The Protection of Women from Domestic Violence Act, 2005. The act recognises all forms of abuse against women in the home, provides protection from husband/partner and their families, and acknowledges rape in marriage as an offence. India fares much better than Afghanistan, Pakistan⁵⁵ and Bangladesh in this area.

Treatment of Sharia and Quranic Principles in India and Afghanistan

There is a criminal code in Afghanistan. But the courts⁵⁶ follow the Shariat and the Quranic principles as per their discretion. Overall, the Quranic rules regarding the treatment of women can still be used today as tools of oppression in the hand of the Muslim man. Any effort she exerts other than that is of no value.⁵⁷

Islam, particularly the Sunni school of Hanafi, is central to Afghan culture. From the mid-18th to mid-19th century, Afghan society was mostly decentralized, leaving different ethnic groups to decide how they should practice and implement Hanafi principles. However, research has shown that family judges often made rulings that ignored the rights of women outlined in Sharia.⁵⁸ So in spite of the fact that Sharia could be used for interpreting the human rights of women for the better, it is being misused.⁵⁹ Article 398 of the Afghan penal code states that a man who sees “his wife or other family members” in a compromising position and kills or injures one or both of them “in order to defend his dignity and respect” will not be prosecuted for violent assault or murder.

⁵³ Nahid Aziz, “What Self-Immolation Means to Afghan Women”, *The Daily Outlook Afghanistan* (Mar.6, 2012), *available at*: http://outlookafghanistan.net/topics.php?post_id=3591#ixzz2TatbNRZY (last visited on Jan. 28, 2017)..

⁵⁴ Musawah, Thematic Report on Article 16: Afghanistan 55th CEDAW Session Geneva, 6 (Switzerland July 2013) *available at*: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/AFG/INT_CEDAW_NGO_AFG_13762_E.pdf (last visited on Feb.22, 2017).

⁵⁵ The domestic violence bill of Pakistan was presented in National assembly in 2009, but could never be passed.

⁵⁶ The Supreme Court (Stera Mahkama) is the highest authority of the judiciary of the Islamic Republic of Afghanistan.

⁵⁷ Al Fadi, “Women under Sharia Law”, 2011 *available at*: http://www.familysecuritymatters.org/publications/id.9930/pub_detail.asp (last visited on Jan. 22, 2017).

⁵⁸ Carol Riphenburg, “Post-Taliban Afghanistan: Changed Outlook for Women?” 44 (3) *AS* 401-422 2004.

⁵⁹ *Ibid.*

An Indian Muslim Woman is much better placed as the Constitution of India is the highest authority and the courts have interpreted the laws of the women in India according to the highest constitutional principles.

Parallel legal mechanisms working in India cannot give arbitrary decisions, and have to follow the principles embodied in the Constitution. Some problems do emerge such as the fatwas of the *Dar ul Qazas* which may ask the father in law to marry the daughter in law as he had raped her,⁶⁰ but these incidents are ridiculed by the larger community and there is a check on such practises.

A similar situation where the larger community prevents such practises cannot be envisaged in a country like Afghanistan. Here reference can be made to the orders of the khap panchayats, about which actor Sharmila Tagore in one of the conferences said, that these courts have no law.⁶¹ And these hold no place in the Indian legal framework.

Judicial Attitude and Redressal in Afghanistan and India

a) *Afghan courts*

The Judiciary in Afghanistan is composed of the Supreme Court, Courts of Appeal and Primary Courts. Travelling courts may be established when needed, on recommendation by the Supreme Court and approval of the President. The courts are duty bound to rely on the reasons, grounds and legal provisions for a decision to issue.⁶²

Before occupying the position as judge, a person must swear in front of chief and members of Supreme Court as follows:

I swear by the name of the Almighty Allah that I perform my duty with full trust and dignity and impartiality, respect and implement provision of Islamic shariah, constitution of Afghanistan and other laws of the country , respect confidentiality of my duty, will not commit any crime , violation of other rights, injustice and bribery directly and in directly.⁶³

⁶⁰ *Vishwa Lochan Madan v. Union of India* writ petition (civil) no. 386 OF 2005, A bench, headed by Justice CK Prasad, said that no religion, including Islam, allows punishing innocent persons and ordered that no 'Darul Qaza' should give verdicts that affects the rights of a person who is not before it.

⁶¹ Sharmila Tagore, 19th Justice Sunanda Bhandare Memorial Lecture, Representation of Women in Indian Cinema and Beyond, at the India International Centre (IIC) on Nov. 27, 2013.

⁶² Available at: <http://www.nyulawglobal.org/globalex/Afghanistan.html> last visited on Feb 24, 2017.

⁶³ Art.59, Law of the Organization and Authority of the Courts of Islamic Republic of Afghanistan, 2005.

The Code of Civil Procedure calls for the creation of specialized family courts in every district. However, as of today, the only functioning specialized family court was at the Supreme Court in Kabul. In the rest of the country, the civil courts, as well as *Shuras* and *Jirgas*, handle family law matters in addition to their other case obligations.

In practice, the courts are not the first mechanism to deal with a legal case.⁶⁴ This is done by the local assemblies, the *Jirga* or *Shura*. The expressions *Jirga* and *Shura* denote the same mechanism: *Jirga* is Pashto, *Shura* in Dari. People favour addressing the local *Jirga* as the first step for the investigation and settlement of legal disputes. Even when a case is referred to the court, the court refers the case back to the *Jirga* in order to find an informal solution first.

The preference to address a local *Jirga* is especially clear in family law matters and where one party is a woman. Addressing an official institution can cause serious harm to the prestige of both parties. Going to court is considered a shameful act for women.

Furthermore, abuses perpetrated by family members against other family members including rape, mistreatment, house imprisonment, and even murder – do not even reach a *Jirga*. Rather they get buried within the house boundaries. Very rarely do such sensitive matters reach the *Jirga* and/or the courts. Confusion about these institutions and their authority is prevalent among the population. Political Islam is an intensely legalistic movement.⁶⁵

Islam's claims to govern virtually all aspects of human life have historically manifested themselves in legal terms in Afghanistan. It is the extent and degree of the implementation of Islamic law which is often cited as the litmus test for the Islamic credentials of an Islamic state.

b) Indian judicial attitude

The Constitution of India is the supreme legal document of the country. There are various levels of judiciary in India, different types of courts, each with varying powers depending on the tier and jurisdiction bestowed upon them. They form a strict hierarchy of importance, in line with the order of the courts in which they sit, with the Supreme Court of India at the top, followed by high courts of respective states with district judges sitting

⁶⁴ John Arquilla, *Afghan Endgames: Strategy and Policy Choices for America's Longest War*, 181 (Georgetown University Press, Washington, 2012).

⁶⁵ Martin Lau, *The Role of Islam in the Legal System of Pakistan*, 5 (Brill NV, Leiden, 2006).

in District Courts and Magistrates of Second Class and Civil Judge (Junior Division) at the bottom.

The matters which are dealt in the family courts in India are matrimonial relief which includes nullity of marriage, judicial separation, divorce, restitution of conjugal rights, declaration as to the validity of marriage and matrimonial status of the person, property of the spouses or any of them and declaration as to the legitimacy of any person, guardianship of a person or custody of any minor, and maintenance proceeding under the code of criminal procedure. The courts apply the law of the land and do not refer to any religious texts, except when interpreting personal laws for doing justice.

“Sharia Courts” do exist in India but their decisions are not binding on the larger community. If the religious minorities do want to go to these courts, they go for resolving personal law issues. They are not imposed on the population. The All India Muslim Personal Law Board focuses primarily to defend the Sharia laws from any law or legislation that they consider infringes on it.⁶⁶ In this role initially it has objected to any change in the Divorce Laws for Muslim women. In this regard it has even published a book *Nikah-O-Talaq*. However, the Judiciary in India is an effective redressal mechanism for the whole population as no religious interpretation can be used against the women.

The courts stand as guardians. However many a times they are faced with restrictions due to various provisions of personal laws which the minorities do not want to be changed. The courts are there only to interpret laws.

This calls for a strong political will in order that all ill practises like polygamy are removed and cannot be allowed to continue with impunity in the name of the Sharia or any other religious laws. This in turn calls for an urgent drafting and implementation of the Uniform Civil Code as envisaged in the Indian Constitution.⁶⁷

III Conclusion

It is observed that the position of women in a country does not necessarily relate to Reservations or declarations. If we look at the laws discussed in the preceding sections, it is very clear that in the case of Afghanistan, the laws which are of pluralistic nature have not been able to bring parity in the genders in spite of having no reservation to CEDAW. On the other hand, in spite of declarations to CEDAW the status of the in India is better

⁶⁶ Vrinda B Narain, *Reclaiming the Nation: Muslim Women and the Law in India*, 93 (University of Toronto Press, Toronto, 2008).

⁶⁷ Constitution of India, 1950, art. 44.

not only legally but also in terms of political participation and in grabbing a bigger share as compared to Afghanistan in the labour market. This comes even when there is no Common Civil Code in India unlike Afghanistan which drafted a code as early as in 1977. Another reason why India has fared better than countries like Afghanistan which have ratified the Convention without any reservations or declarations is that the Indian Constitution guarantees the fundamental right of equality to all women through articles 14 and 15. Article 15(3) promotes affirmative action for the protection of women and does not put personal laws before the Constitutional Principles. Article 13 provides that all laws are to be in consonance with fundamental rights guarantees. There is observation after analysing the preceding sections that it is unlikely that the government of India intended to make binding reservations to the CEDAW Convention that would not be in consonance with the provisions of the Constitution itself. The words of the declaration indicate that the commitment to equality of women is not being questioned. The government promises to “abide by and ensure these provisions”. It has however indicated the progressive and not immediate attainment of these objectives. It has also qualified its intention to fulfil these obligations under the CEDAW Convention and interpreted its obligations according to the “policy of non-interference”. Therefore, the wordings of the declarations show that while the government agrees to abide with its international obligations to assure equality between the sexes, it is discussing the manner and method of attaining such equality through these declarations. Article 44 of the Constitution of India has indicated the attainment of a uniform civil code for all communities as a goal of state policy. It cannot be said that the government intended to make a policy favouring religious communities among others. The position of women in India is very much better than that of the Islamic State of Afghanistan. Though there is a pluralistic society in India, the legal pluralism is limited in this country. It however does not mean that the stereotyping and inequality in family matters does not persist in India. The legal pluralism of Afghanistan is responsible for the poor human rights conditions of the women population in that part of the world. Islam, particularly the Sunni school of Hanafi, is central to Afghan culture. From the mid-18th to mid-19th century, Afghan society was mostly decentralized, leaving different ethnic groups to decide how they should practice and implement Hanafi principles. The courts like *Jirgas* and *Shuras* can never take the place of a proper legal mechanism required for justice to women. India could take a cue from countries like Afghanistan which disregarded both the civil code and the proper meaning of Sharia rights embodied in the Islamic culture. Legal pluralism in India will not be harmful in India as long as there is proper interpretation of the

religious texts keeping in mind the current standards of international law. However with a tendency to misuse the laws, the State should go for a standard code for all religions. There are a lot of variations in the codes of the different religions related to rights of women. Also religion is not the only culprit in curbing the freedoms of women. The global community is contributing to it through economic subjugation by various means. War crimes are an excellent example of how women are ignored even in customary laws. Global community is equally responsible for the subjugation of women in secular as well as religious countries. For example, the reason for persistence of the phenomenon of stereotyping is due to existence of a vicious cycle in the demand and supply process. The historical background of a nation does not necessarily contribute to how religion is viewed in a particular generation. Current circumstances and requirements play a key role. The international treaties, though are good at setting standards may not become binding on nations and need not be binding in all circumstances with full ratifications without any reservations for countries which are vulnerable to world pressures. Having a Unified Civil Code should be a considered. Some of the practises in the religious context need to be addressed sooner or later. The ripe time may just be this.