

Mandates of the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on violence against women, its causes and consequences.

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Excellency,

We have the honour to address you in our capacities as Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the sale of children, child prostitution and child pornography; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council resolutions 26/5, 24/6, 25/6, 24/3 and 23/25.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the persistence of legislation which directly or indirectly discriminate against women and girls, including provisions allowing for child marriage and polygamy**, and which are rooted in prejudicial, customary or other practices based on stereotyped roles for men and women.

According to the information received:

The Afghan Civil Code sets the minimum age for marriage at 16 years for girls and 18 years for boys. The marriage of a girl as young as 15 years old may be concluded through her father or the competent court. The Code, in fact, only prohibits the marriage of a minor girl whose age is less than 15 (arts 70-71 Civil Code).

Under the Penal Code, any person who through violence, threat or deceit violates the chastity of another is punished, and the punishment can be harsher where the victim is below 18 years old (art.429). The 2009 Law on Elimination of Violence against Women (EVAW) punishes the perpetrator of rape committed on an underage woman. However, differently from the Shiite Personal Status Law,

general laws in Afghanistan allegedly do not require consent of parties to marriage. Furthermore, the EAW law reportedly fails to clearly define the elements that constitute the crime of rape.

General laws in Afghanistan allow a man to marry more than one woman (art.86) and the Shiite Personal Status Law specifies that a man can establish marriage contracts of up to a maximum of four women at a time (art.91). Temporary marriages are also provided for by the latter law (chapter VI).

While recognizing the efforts made to address violence against women in Afghanistan, including through the adoption of the EAW law, as well as the enactment of a general legislation requiring registration of all marriages and providing for the compulsory registration of births, we would like to take this opportunity to express our concern regarding the aforementioned discriminatory legislation. General laws permit girls as young as 16 years old (or 15 years old with father's consent or judicial permission) to get married whereas marriage below 18 years of age is not legally permitted for boys. Permitting girls' marriage under the age of 18 is a discriminatory practice, rooted in prejudicial, customary or other practices based on stereotyped roles for women and men, and girls and boys. Child marriage can lead to trafficking and sale of children for the purposes of child marriage, child slavery, including domestic and sexual slavery, forced labour, sexual violence, severe damage to the physical and mental health of young girls, and can prevent their access to or continuation of their education. Child marriage constitutes an obstacle to women's and girls' opportunities as it impacts on their education and employment opportunities. Furthermore, the discriminatory setting of a higher minimum age of marriage for boys is additional discrimination on the basis of sex.

Furthermore, we would like to point out our concern regarding the reported absence of the requirement of the consent of both parties to marriage, and the failure to properly define in legislation the elements that constitute the crime of rape.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned observations.
2. Please provide details of any measures taken by the Government of Afghanistan to address forced, child and temporary marriages or the definition of rape, in conformity with its international human rights legal obligations.

3. Please explain how charges of *zina*, a crime under the law, or intent to commit *zina*, not a crime under the law, have been used in discriminatory ways towards women and girls, and particularly in rape cases.

We would appreciate receiving a response within 60 days.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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Dainius Puras
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Maud de Boer-Buquicchio
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Rashida Manjoo
Special Rapporteur on violence against women, its causes and consequences

Annex

Reference to international human rights law

Without implying any conclusion to what illustrated in this letter, we would like to take this opportunity to remind your Excellency's Government of its obligations under the Convention on the Rights of the Child (hereinafter "CRC"), which was ratified by Afghanistan on 28 March 1994. Child marriage undermines a number of guiding principles and rights guaranteed under the CRC, including the principle of the best interest of the child (article 3), and the right to be heard (article 12), the right to the enjoyment of the highest attainable standard of health, where States must "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children" (article 24 (3)) and the rights to protection from all forms of physical and mental violence, injury or abuse, including sexual abuse (article 19), sexual exploitation (article 34) and exploitation (article 36). Child marriage also violates the right not to be separated from their parents against their will (article 9); the right to education and to receive educational and vocational information and guidance (article 28) and the right to seek, receive and impart information and ideas (article 13). Furthermore, article 19 CRC requires States to take "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child...".

In its last Concluding Observations (CRC/C/AFG/CO/1), the Committee on the Rights of the Child pointed out its concern about the regulation concerning the maintenance of children that, in accordance to article 256 of the Civil Code, falls under the exclusive responsibility of the father. He has the obligation to maintain a son until he is capable of making his own livelihood, and a daughter until she is married, which, as highlighted by the Committee, greatly contributes to early marriage for girls (para.41). [The Committee was further concerned that children who have lost their father are often considered as orphans and may be separated from their mother, especially if she does not accept to marry a male member of her deceased husband's family.] (para. 42).

The Committee also highlighted that adolescent pregnancy is a consequence of the widespread practice of early marriage, and one of the leading causes of maternal mortality (para. 53). Furthermore, while commending the State for the adoption of the EAW Law in 2009 as a major step forward in the elimination of harmful practices, the Committee expressed its concern about harmful practices such as child marriage, giving away girls as dispute resolution, forced isolation in the home, exchange marriage and "honour" killings. The absence of effective measures to prevent and eliminate early and forced marriages, the fact that the EAW law does not criminalize honour killings, and that the Penal Code (art. 398) exempts perpetrators of honour killings from punishment for murder, and sanctions them with a prison sentence of less than two years, *inter alia*, have been pointed out by the Committee (para. 55).

In paragraph 20 of General Recommendation No. 4 (2003) on *Adolescent health and development in the context of the Convention on the Rights of the Child*, the Committee emphasized the problems related to sexual and reproductive health caused by early marriage and pregnancy. The Committee noted that “in some States parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled under the Convention”. The recommendations of the Committee focused on the necessity to review and reform the legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys (CRC/GC/2003/4).

We also would like to remind your Excellency’s Government of its obligations under the Convention on the Elimination of all forms of discrimination against women (hereinafter CEDAW), which was acceded to by the State on 5 March 2003 without any reservation. In accordance to article 16, the obligation to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations falls on the States Parties. States Parties must ensure to women and men, *inter alia*: the same right to freely to choose a spouse and to enter into marriage only with their free and full consent; the same rights and responsibilities during marriage and at its dissolution; the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children (in all cases the interests of the children shall be paramount). The second paragraph of the same article explicitly provides that “betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage”.

The CEDAW Committee, in its general comment No. 21 (1994) on *Equality in marriage and family relations*, specified that “the minimum age for marriage should be 18 years for both man and woman. When men and women marry, they assume important responsibilities. Consequently, marriage should not be permitted before they have attained full maturity and capacity to act” (para. 36). By ensuring compliance with the Convention, States Parties are required to establish: equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children (para.39).

In this regard, we would like to recall the concerns expressed by the Committee in its last Concluding Observations on Afghanistan (CEDAW/C/AFG/CO/1-2) about the high prevalence of violence against women in the State, in particular domestic violence, rape, battery, laceration and stoning, as well as about the persistence of adverse cultural norms, harmful practices and tradition, such as child marriage, *baad* (settlement of disputes by giving away girls), *badal* (exchange marriages) and forced marriages, including forced marriages of widows. Consequently, other concerns have been pointed out on cases of self-immolation and running away from home as a response to harmful practices and violence against women. On that basis, the Committee recommended to ensure the proper implementation of the ERAW law and “to adopt a comprehensive policy and strategy to eliminate all harmful practices against women and girls, which includes raising the awareness of religious and community leaders with the aim of preventing misinterpretations of sharia law and Islamic principles, in addition to

awareness-raising efforts targeting the general public and the media, in collaboration with civil society and women's organizations" (para. 23).). In this regard, we would also like to bring to your Excellency's Government's attention paragraph 80 of the report of country visit by the Special Rapporteur on violence against women, its causes and consequences to Afghanistan from 9 to 19 July 2005 (E/CN.4/2006/61/Add.5), in which she recommended that the Government of Afghanistan (i) give priority to a clear codification of family law and of the criminal law concerning gender-specific offences in compliance with article 22 of the Constitution, which expressly provides that men and women have equal rights and duties before the law, as well as with the Convention on the Elimination of All Forms of Discrimination against Women; (ii) reiterate through legislation the mandatory character of the registration of marriages and divorces; and (iii) ensure that those involved in the organization of child and forced marriages are prosecuted and punished.

Finally, we would like to emphasize that fact that child marriage can be considered as a form of slavery, taking into consideration the lack of the requirement of free and full consent of both parties to enter into a marriage, as required by international human rights treaties, including article 23 of ICCPR, article 10 of ICESCR and article 16 of CEDAW. In addition, article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which was acceded to by Afghanistan on 16 November 1966, stipulates that State parties "shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist." This includes "any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group" (article 1(c)(i)). The Convention implicitly prohibits forced early marriage. Under article 1(d), States parties are required to abolish any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour. In her 2012 Thematic Report on Servile Marriage, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, highlighted that, given that under international human rights law a child cannot provide informed consent to a marriage, child marriage may be considered forced and falls under the slavery-like practices defined in the Supplementary Convention (A/HRC/21/41, para.14).

We wish to emphasize that the health implications associated with the practice of child marriage are devastating, in terms of, inter alia, sexually transmitted infections, including HIV, complications of pregnancy, obstetric fistula and child birth. Child marriage can also have a significant impact on girls' mental well-being as it often results in separation from family and friends and a lack of freedom to participate in community activities. It often brings an end to a girl's chance of continued education. The Committee on Economic, Social and Cultural Rights has stated that the practice of early marriage also has a negative impact on the rights to education and work (E/1999/22, para.73).

It is relevant to recall the domestic legal framework and particularly article 7 (1) of the Afghan Constitution which 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”; article 22 which stipulates that “Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan – whether men or women – have equal rights and duties before the law”; article 54 which recognizes family as a fundamental unit of society supported by the state, and provides that “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”.

Harmful practices inflicted on women or girls can never be justified in the name of freedom of religion or belief. In this regard, we would like to bring to your Excellency’s Government’s attention paragraph 30 of the 2013 interim report of the Special Rapporteur on freedom of religion or belief to the General Assembly (A/68/290), in which he emphasizes that “... as a human right, freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls.” Furthermore, in paragraph 69 of the 2011 report to the General Assembly (A/65/207), the Special Rapporteur on freedom of religion or belief stresses that “... the mandate needs to continue highlighting discriminatory practices that women have had to suffer over centuries and continue to do so, sometimes in the name of religion or within their religious community. It can no longer be taboo to demand that women’s rights take priority over intolerant beliefs used to justify gender discrimination.”