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FORCED MARRIAGES IN AFGHANISTAN AS A VIOLATION OF GIRLS' HUMAN RIGHTS: WHY IS THE STATE NOT PUNISHED INTERNATIONALLY?

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Abstract: The article's central objective is to analyze the responsibility of the Afghan State and the reasons for the prevailing international impunity of the State that neglects the practice of forced marriages with underage girls, which constitute transgressions of Human Rights present in the International Convention on Rights of Children. In view of the ratification of the agreement by Afghanistan and the hard law characteristic that this treaty has acquired, the effectiveness of the Committee on the Rights of the Child will be analyzed in guaranteeing the application of the requirements of the aforementioned Treaty. This research will present, in terms of approach, qualitative characteristics, as it will analyze state responsibility in the face of transgressions of precepts established in treaties. Regarding nature, the research will be of an applied nature, seeking to resolve the issue of impunity in Afghanistan through Regional Human Rights Systems.

Keywords: Afghanistan; Forced marriages; Human rights; Patriarchy; Regional Human Rights Courts.

INTRODUCTION

Child marriage in Afghanistan arises from a patriarchal system endorsed by local traditions and the country's socioeconomic conditions in a way that is completely harmful to girls who are forced into marriage by depriving them, from a young age, of enjoying the most basic rights inherent to any being human. A teenage wife with strictly domestic obligations is deprived of access to education, and girls who do not have access to education are three times more likely to become wives at an early age, as reported by Human Rights Watch.¹ This continuous cycle of related Human Rights violations could be effectively broken if the State followed international recommendations to promote the same

1 HUMAN RIGHTS WATCH. *Afghanistan: Ending Child Marriage and Domestic Violence*. Available on the website: https://www.hrw.org/sites/default/files/related_material/Afghanistan_brochure_0913_09032013.pdf. Accessed in February 14, 2021.

opportunities between men and women, eliminating gender differences and working on the core of the problem.

In rural areas the problem is even more serious, where girls aged 11 and 12 are objects of commercial exchange and in these places the State's campaigns are not very effective. These girls have their lives put at risk, as their bodies are still developing and they do not have adequate physical conditions to bear a child. Premature pregnancy is very common in Afghanistan, and the poorest areas of the country do not provide pregnant women with quality medical care for monitoring; this tradition also involves violations of the girls' right to life and health.

In view of the recurrent practice of marrying girls (who have not reached the age of majority) and adult men in Afghanistan, this article seeks to analyze the international responsibility of the Afghan State and the reasons why the State's impunity prevails in the face of transgressions of requirements of the 1989 International Convention on the Rights of the Child, which was ratified by the country and acquires the character of hard law after such internal processing. The effectiveness of the Committee on the Rights of the Child will be analyzed in ensuring the application of the requirements of the aforementioned Treaty.

This research will present, in terms of approach, qualitative characteristics, as it will analyze state responsibility in the face of transgressions of precepts established in the treaty. Regarding nature, the research will be of an applied nature, seeking to solve Afghanistan's international impunity. As for the objectives, the research will be descriptive and explanatory, in order to provide information on the subject and collect information from the country to present possible conclusions and clarifications on the topic. Regarding procedures, the research will

be bibliographic and documentary, based on the handling of documents made available by the United Nations and non-governmental organizations that will be analyzed.

Patriarchy and Marriage

We first point out the concept of patriarchy. The word, of Greek origin, is formed by the combination of *pater* (father) and *arke* (command). There are different semantics and according to one of the most archaic, the term refers to families organized around a patriarch, in which the mother and offspring would be governed by paternal laws.² Following this definition, patriarchy is limited to the scope of family relationships centered on parents and the conjugal and structural origin of the family is disregarded, which is why a bibliographical review on the topic is necessary.

Historian Gerda Lerner brings together archaeological, historical and cultural data in her work *The Creation of Patriarchy* to theorize about the origin and modus operandi of the patriarchal system present in primary and modern civilizations. According to Lerner³, the family was the basic unit of genesis of patriarchy, but the system is not restricted to it; on the contrary, it is reinforced and expressed by it. In the author's words:

[...] changes within the family do not alter basic male dominance in the public domain, institutions and government. The family not only mirrors the order of the State and educates its children to follow it, but it also creates and always reinforces this order. (LERNER, 2019, p. 266)

Dictionary entries tend to be reductionist regarding the meaning of the word, but Lerner carries out a thorough analysis of the effects of this system beyond family organization. Pateman states that patriarchy was established

alongside the social contract as a system that imposes men's political power over women through the State, not just as a characteristic phenomenon of individual relationships. For the author, the pact originates the two facets of patriarchy: social and sexual. Social, by legitimizing structural male domination over women and sexual, by deliberately allowing these men access to female bodies through marriage.

Saffioti⁴ follows this reasoning, recognizing patriarchy as the mechanism of civil domination-exploitation that has undergone transformations in the last six millennia of humanity depending on the time or place, but always converting differences between the sexes into hierarchical relations of power and domination over women. This not only covers paternalistic rights but also sexual rights, exercised by the marital figure; Therefore, the author emphasizes that before becoming a father, the head of the family is, firstly, the husband who has control over his wife and daughters. Assuming that the father holds authority over the female bodies of the family, they suffer from exploitation from the moment that women's reproductive potential becomes an object of exchange - an ancient practice that continues to this day, in societies with more deeply rooted traditions and high levels of poverty - as Lerner explains:

As early as the second millennium BC, in Mesopotamian societies, daughters of poor families were sold into marriage or prostitution in order to provide economic assistance for their families. [...] The first social role of women defined by gender was to be exchanged in marriage transactions. The obverse gender role of men was to be the one who carried out the exchange or who defined the terms of the exchanges. (LERNER, 2019, p. 262-263)

2 HIRATA, Helena *et al.* **Dicionário Crítico do Feminismo**. São Paulo: UNESP, 2009.

3 LERNER, Gerda. **A criação do patriarcado: história da opressão das mulheres pelos homens**. São Paulo: Cultrix, 2019.

4 SAFFIOTI, Heleith Iara Bongiovani. **Gênero, Patriarcado, Violência**. 2ª edition. São Paulo: Expressão Popular: Fundação Perseu Abramo, 2015.

In the meantime, there is a consensus among the authors that the control of female bodies through forced marriage is a useful, if not the main, tool for maintaining the *status quo* in patriarchal societies.

AFGHANISTAN, SHARIA AND DOMESTIC VIOLENCE

Located in the Middle East, Afghanistan is a country whose Constitution is based on *Sharia*, also called Islamic law. This legal-religious system receives interpretations that are susceptible to change according to local customs and traditions, but it was drawn up based on the teachings of the Quran⁵ and of *Sunna*⁶, therefore, in essence, it presents rules on the behavior, morals and conduct of individuals beyond their rights and duties⁷. Due to the fact that Afghan law is referenced in sacred scriptures, the religious character is inseparable from the country's jurisdiction.

In the context of social relationships, the family structure exerts a strong determinism on the reputation and relationships of individuals, one of the reflections of the influence of Islamic law in everyday life. The family is a crucial institution for an Afghan citizen to be recognized and well-liked by others, it is from there that the first impressions are formed about any subject, and this predominance encourages the need for members to honor their respective ancestors

⁸. When caring for the family name, the man does so out of respect for his consanguinity and also to preserve his own image.

Considering the deep-rooted and central role of the family in Afghan society, we need to break it down to understand the roots of gender inequality present in the country⁹. It is noted that the family is originated and ordered by the patriarch, this being a tradition that grants greater power to boys before they are even aware of such privilege and teaches women from childhood to be docile wives, who accept the decision-making power of their parents, husbands and live to serve them and bear children¹⁰.

Parents' dichotomous expectations before birth demonstrate gender assignments being demarcated according to the children's sex. The man, as he inherits the family name and properties and subsequently continues his own lineage, is consequently more valued: the male baby is a potential head of the family. Girls, as they are later placed in another family when married, do not receive the same importance and the news generates disappointment for the family.¹¹ However, it is common for these marriages to be forced by family members and underage girls are the biggest victims of this negotiation, which usually has economic purposes and is managed by the patriarch.¹²

Among the factors that influence and encourage the occurrence of this fact, we

5 The main sacred book of Islam, it brings together the teachings of the prophet Muhammad on which the Islamic doctrine followed by Muslims is based.

6 Set of words and actions of Muhammad, another source of Islamic doctrine.

7 SANTOS, L. C. F. D. Os atuais impactos sociais da Sharia. **Revista Jurídica Online UNISAL**, São Paulo, v. 1, n. 7, p. 1-8, dez./2016. Available on the website: <http://www.revista.unisal.br/lo/index.php/revdir/article/view/648>. Accessed in February 13, 2021.

8 EMADI, Hafizullah. Family, Women and Gender Issues. In: _____. (org.). **Culture and customs of Afghanistan**. Londres: Greenwood Press, 2005. p. 165-193.

9 UNITED NATIONS POPULATION FUND (UNFPA) AFGHANISTAN. **Child Marriage**. Available on the website: <https://afghanistan.unfpa.org/node/15233>. Accessed in February 14, 2021.

10 EMADI, Hafizullah. op. cit., p. 168.

11 EMADI, Hafizullah. op. cit., p. 177.

12 GLOBAL VOICES. **O que é preciso para acabar com o casamento infantil no Afeganistão**. Available on the website: <https://pt.globalvoices.org/2017/07/30/o-que-e-preciso-para-acabar-com-o-casamento-infantil-no-afeganistao/>. Accessed August 2, 2019

can mention Baad, a term that consists of donating a girl for marriage with an older man as a means of resolving conflicts between rival families.¹³ In some cases, to demonstrate loyalty to another family, a man gives his daughter to her to be the patriarch's (or son's) bride as a show of gratitude; in others, if the woman is an adulterer and thus "dirties" the family's honor, her father or husband is free to take her life and be proud of the feat, receiving congratulations from the local community.¹⁴

It is customary for girls in their early teens to be forced to marry older men rich enough to pay for their dowry, without their being able to speak out against it. The most vulnerable families tend to sell them and even exchange them for animals in this process, aiming to alleviate their situation of extreme poverty¹⁵. This practice of transforming daughters into bargaining objects devoid of autonomy to decide for themselves is so naturalized in Afghanistan that most of society connives at girls' marriages arranged by their parents, especially in rural areas of the country¹⁶, in which there is greater proximity to the Pakistani border. According to data collected by UNICEF in 2001, the percentage of Afghan teenagers between 15 and 18 who are already married is 54%. Early pregnancy is one of the problems triggered by child marriages, and its complications are responsible for the death of one in five Afghan girls between the ages of 15 and 19, according to a UNICEF report¹⁷. As

proof of state negligence, Afghanistan has the highest maternal mortality rates in Asia¹⁸.

A factor that further exacerbates the problem is the alarming rates of domestic violence in Afghanistan. The norms of conduct presented by Sharia do not condemn domestic violence; in fact, they allow women to be attacked by their own husbands if they display disruptive behavior or commit adultery, as a way of disciplining them¹⁹. Given the above, it is noted that the condition of female submission that accompanies marriages exposes girls to physical and sexual violence, and subjecting girls to such situations brings countless harm in terms of the physical and emotional health of the victims.

HUMAN RIGHTS, COMMITTEES AND REGIONAL HUMAN RIGHTS SYSTEMS

The International Convention on the Rights of the Child establishes that Member States are responsible for taking legislative and administrative measures to ensure the well-being and healthy development of all children. According to information from the United Nations, Afghanistan ratified the Convention in 1994²⁰. It must be noted that, according to this treaty, individuals under 18 years of age are considered children, and must have access to education, leisure, health and must have a dignified life. Furthermore, it is stated in the body of the letter that no child must be

13 HUMAN RIGHTS WATCH. **I had to run away**. Available on the website: <https://www.hrw.org/report/2012/03/28/i-had-run-away/imprisonment-women-and-girls-moral-crimes-afghanistan>. Accessed in August 7, 2019.

14 EMADI, Hafizullah. op. cit., p. 171.

15 BBC NEWS. **Menina de 6 anos trocada por cabra**: a tragédia do casamento infantil no Afeganistão. Available on the website: <https://www.bbc.com/portuguese/internacional-37053784>. Accessed in February 14, 2021.

16 GIRLS NOT BRIDES. **Where does it happen: Atlas**. Available on the website: <https://www.girlsnotbrides.org/where-does-it-happen/atlas/afghanistan>. Accessed in February 17, 2021.

17 UNICEF THE NETHERLANDS. **Child Notice Afghanistan**. Available on the website: <https://www.unicef.org/afghanistan/reports/child-notice-afghanistan>. Accessed in February 16, 2021.

18 INDEX MUNDI. **Taxas de mortalidade materna - Ásia**. Available on the website: <https://www.indexmundi.com/map/?v=2223&r=as&l=pt>. Accessed on: February 16, 2021.

19 WARNER, Bill. **Sharia Law for the Non-Muslim**. 1. ed. USA: CSPI, 2010.

20 UNITED NATIONS TREATY COLLECTION. **Convention on The Rights of the Child**. Available on the website: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en. Accessed on: August 2, 2019.

subjected to any type of exploitation or sexual violence, consequences already reported of forced marriages in a patriarchal society.

The custom of forcing teenage girls to get married, placing them in a position of subservience and consequently forcing them to maintain an active sexual life at an early age consists of very serious violations of Human Rights expressed in the Convention, which was adopted and ratified by the country. This decision implies that Afghanistan is obliged to follow it after ratification and the deadline established for entry into force, as the treaty becomes binding, by Valério de Oliveira Mazzuoli ²¹:

International treaties are superior to domestic laws: they revoke previous domestic norms that are contrary to them and must be observed by those that supersede them. All subsequent laws [...] must not be in contradiction with the rules or principles established by the treaties; and, finally, any domestic law relating to them must be interpreted, as far as possible, in accordance with previous conventional law. (MAZZUOLI, 2010, p. 115)

It must be noted that in articles 70 and 71, the Civil Code of Afghanistan establishes the legality of marriages between men who are already adults and girls aged 16 or over; Boys can only get married from the age of 18. Furthermore, this same domestic legislation allows girls aged 15 to marry as long as they have their parents' consent, contrary to the 18 years set by the Convention²².

However, Afghanistan is not punished for human rights violations addressed in the Convention on the Rights of the Child.²³ The Committee on the Rights of the Child, which

is the body created by the United Nations to monitor the implementation of the treaty, can only analyze the reports sent by countries and recommend necessary measures to them through conclusive observations, but it is not effective for the country take the necessary measures to stop customary rights violations within its national territory.

It is assumed that Afghanistan's impunity could be resolved with the creation of a regional court for the Middle East or the Asian continent, with competence to judge such violations of Human Rights covered by the Convention on the Rights of the Child, as the Committee of Children's Rights is not capable of preventing and punishing the transgressions previously exposed. According to Christof Heyns and Frans Viljoen, cited by Flávia Piovesan²⁴:

While the global system for the protection of Human Rights generally suffers from the lack of sanctioning capacity that national systems have, regional systems for the protection of Human Rights have advantages compared to the UN system: they can reflect with greater authenticity the peculiarities and values histories of people from a given region, resulting in a more spontaneous acceptance, and, due to the geographic proximity of the States involved, regional systems have the potential to exert strong pressure on neighboring States, in cases of violations (PIOVESAN, 2013, p. 41).

As explained by Piovesan, the creation of a regional court would have the potential to strengthen the protection of children's Human Rights, which are constantly infringed by the Afghan population and also by the State, which does not propose the necessary changes in legislation. Currently, there are three regional

21 MAZZUOLI, V. D. O. *Curso de Direito Internacional Público*. 5. ed. São Paulo: Revista dos Tribunais, 2011. p. 1-238.

22 STANFORD LAW SCHOOL. *Civil Code of the Republic of Afghanistan*. Available on the website: <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/Civil-Code-of-Afghanistan-ALEP-Translation.pdf>. Accessed on: August 3, 2020.

23 GIRLS NOT BRIDES. *Afeganistão*. Available on the website: <https://www.girlsnotbrides.org/child-marriage/afghanistan/>. Accessed on: August 1, 2020.

24 PIOVESAN, Flávia. *``Direitos Humanos e Justiça Internacional``: ``um estudo comparativo dos sistemas regionais europeu, interamericano e africano``*. 5. ed. São Paulo: Saraiva, 2014. p. 1- 186.

Human Rights systems: African, American and European. The Treaties that originate these organizations are sets of norms valid for States that take regional values into account when formulated. This way, in addition to the fact that the proximity between countries is an incentive for cooperation, there is also no imposition of completely Western values in regions with different cultures - as long as the universality of Human Rights is not violated²⁵.

Another hypothesis of considerable utility would be the creation of an International Court of Human Rights for the United Nations, since the Committees are not competent to impose sanctions on States that violate treaties and laws that protect the dignity of the human person. The following excerpt endorses this hypothesis:

Once again, we insist on the relevance of establishing an International Court of Human Rights within the UN, which would allow the civil liability of States that violate Human Rights, since the global system is limited to the actions of Committees, which have ability to impose moral and political sanctions on defaulting States, but not legal sanctions (PIOVESAN, 2013, p. 43).

Whether it is a regional court or not, it is necessary for it to impose legal sanctions on the Afghan State to prevent future transgressions and so that the rights of children - specifically, girls - are not violated. State impunity, at an international level, in the face of systematic violations of these children's human rights produces irreversible effects that compromise the affected girls' existence in a dignified manner that respects the stages of human development.

CONCLUSION

There is no international legal body capable of imposing sanctions on Afghanistan, which provides the country with comfortable impunity for violations of the Human Rights of women and children and the principles required by the Convention. As the State does not solve and neglects these atrocities, this work suggests the creation of a Regional Human Rights System for the Middle East, a hypothesis that would allow victims themselves the chance to contact an international organization to report the Human Rights violations to which they were submitted and be able to obtain fair compensation, given that at the domestic level the legislation is favorable to violations. Furthermore, the signatory nations could pressure the country in case of non-compliance with the agreement, even if in a non-coercive way, since proximity facilitates regional influence. Finally, the monitoring carried out by the aforementioned System could ensure compliance with standards by all member countries and measure, through data collection and petitions, how recurrent forced marriages are in the country, producing statistics and more thematic reports. accurate than the scant information available.

The country's Civil Code establishes different ages for legal marriage based on the gender of adolescents, which is a serious inconsistency with the Human Rights Convention cited in the body of the text, both for legally allowing 15-year-old girls to be married to parents' consent to restrict this permission to girls, as this condition does not include boys. Therefore, in principle, it is necessary to urgently modify the country's own legislation, equalizing the minimum ages of 18 years for legal marriage, since there is no way to penalize offenders at the domestic level if the country's law does not consider child

25 HEYNS, Christof; PADILLA, David; ZWAAK, Leo. ``Comparação esquemática dos Sistemas Regionais de Direitos Humanos``: ``Revista Internacional de Direitos Humanos``, São Paulo, v. 3, n. 4, p. 160-169, January/2006. Available at: <https://www.scielo.br/pdf/sur/v3n4/09.pdf>. Accessed on: February 14, 2021.

marriage as a violation of the law.

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