

**Divorced Women's Financial Rights In
Afghanistan: Does Mahr Offer
Financial Security To Afghan Divorced
Women?**

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A thesis in fulfilment of the requirements for the degree of
Doctor of Philosophy

Faculty of Law

University of Technology Sydney

June 2019

Certificate of Original Authorship

I, Nasima Rahmani, declare that this thesis is submitted in fulfilment of the requirements for the award of Doctor of Philosophy in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

This document has not been submitted for qualifications at any other academic institution.

This research is supported by the Australian Government Research Training Program.

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Acknowledgements

This thesis is grounded in a deep passion for women's rights. My dissertation owes its existence to my dedication to women's causes in my home country and across the whole Muslim world, where women are routinely victims of violence and misogynistic customs and traditions practised in the name of Islam. The Islam represented by upholders of patriarchy and traditional norms that perpetuate patterns of power in Muslim households, is not the real Islam. I hope this thesis will help to reveal the least of differences in theory and practice of the Islamic injunctions and how women suffer from false interpretations and misguided implementation in the name of this religion.

The thesis would not have come into existence without the support I received throughout my academic journey. First and foremost, as a good Muslim, I am thankful to my God, the most passionate and merciful, who granted me the passion required and put the right people around me to ease my difficulties. Thanking those who created this opportunity, I extend my gratitude to my sponsor organisations in Germany, the Max Planck Foundation and the German Ministry of Foreign Affairs, for generously funding the Hamida Barmaki PhD Scholarship program, through which I was able to pursue my doctoral studies in Australia. I want to express my warmest appreciation to the entire Max Planck Foundation team in Heidelberg, each of whom played a role in initiating the first-ever PhD program for Afghan law lecturers. I deeply appreciate the kind assistance of Dr Roeder Tilmann, Maria Karimzad, Dr Elisa Novic and everybody else on the team, including Marina, the administrator, and Sandra Berg the librarian, of the Max Planck Institute for International Law in Heidelberg.

Moving to Australia and my home university UTS (University of Technology Sydney), where I completed my Master of Laws degree in 2007, I am thankful to Dean Lesley Hitchens, Isabella Alexander the current Research Director and entire research unit of the Law Faculty, as well as the UTS Research School for accepting my candidature and extending their support throughout my studies. The Law research team backed me up during difficult personal challenges, and they did not let me falter when I faced the loss of my father. Indeed, the uniqueness of UTS called me back after my first engagement here.

Everyone in the law faculty and the entire university has always made me feel this is my home, not just a university. I would like to extend my thank you to the Equity and Diversity department of UTS and my friend Joanna and her colleagues, who were always supportive to me. It would be totally unfair if I end this paragraph and do not mention Vicki Sara, the previous Chancellor of UTS, who deemed me worthy of the UTS Chancellor Award in 2012. Despite her busy schedule, she remained aware of my work in Afghanistan, and that was amazing for me to realise. Thank you Professor Sara, you will always be my role model for combining passion and profession to deliver one's best in the workplace.

Without my supervisors and their kind guidance, my task would not been accomplished. Professor Jenni Millbank generously offered her rich experiences and knowledge of research methodologies and Professor Ana Filipa Vrdoljak provided valuable support on the general rules that I needed to consider and apply to my work. She gave me the feeling that I was doing the most important work and was there to assist with everything needed to accomplish it. I admire the professionalism that my principal supervisor, Professor Millbank, demonstrated throughout the supervisory process. She provided me the space and trust I needed to do this job. Our relationship taught me that PhD supervision requires many skills, not just in the relevant field, but also in recognising the strength and weaknesses of each student and arranging working relations based on their needs. I truly believe that were it not for the high quality of this supervision, I would not have been able to come this far; thank you Jenni and Ana both. I also extend my warmest gratitude to Dr Salim Farrar, from the Faculty of Law at The University of Sydney who joined the supervisory panel of my project towards the end of the thesis completion. He brought knowledge and guidance on important aspects from *fiqh* and Islamic law perspectives that I might have neglected to consider had he not reminded me of their significance.

Another person to whom I owe a debt of gratitude is my first editor Martha Musgrove, whose contribution to the thesis is not less than that of my supervisors. A professor of English Literature at the University of Ottawa, Martha is my close friend even though we have never met face to face. She and I have worked together in creating opportunities for young female students lacking financial ability to pursue higher education in private universities in Kabul and initiating fundraising possibilities for that purpose. She worked

with me like a colleague to reduce my workload when I initiated the Scholarship Program for female students in Gawarhshad and the gender studies academic program in 2012. Through the gift of technology, Martha has been able to review my work and correct my written English; moreover, she has given me courage and confidence after drafting the first copies of each chapter to provide it to my supervisors. Thank you Martha, may our friendship last forever and I never feel your absence in my life.

I owe so much to Ros and Tony Strong, generous people who hosted me for most of my study period in the comfort of their home in one of the beautiful locations of Sydney, Drummoyne. My stay with them is one of my fondest memories. Every morning, even in winter, I opened the windows and door of the little house to the scent of the orange jessamine and gardenias next to the room that I stayed in. Ros and Tony became my family for all the time I stayed there, and Ros also helped by reading my first drafts when Martha was not available. Many thanks, Ros and Tony, for the care and love I received from you and for the special treatment on Saturdays...

Michelle Sanson is a dear friend whom I first met in 2006 when she lectured in law at UTS. If not for Michelle, I would have abandoned the idea of doing a PhD in the earliest stages of the scholarship. When I was in Germany developing my proposal, I thought I was not good enough to succeed, but Michelle kept me from giving up. In the middle of a cold winter night in Heidelberg, I and Michelle spent hours on Skype and finally she convinced me I had the potential to do the work. This extraordinarily supportive woman, although not always physically present in Sydney, has always been there to give me energy and help with whatever I needed. Thank you, Michelle, for your timely intervention in the most crucial moments of my journey.

My PhD roommates, who created a friendly shared environment in the Higher Degree Research unit, made my work more tolerable with their presence. I enjoyed the companionship of Elyse Methven and learned a lot from Anthea Vogl (who were there in the first year of my arrival) and her thesis, whenever I needed a good example for framing a section. For the last two years, Hanna Solomon, Lucy and Anais were great company in the

HDR unit. Their friendship and meaningful conversations helped reduce the stress of the long days working towards the end of the project.

I also owe deepest gratitude to two female judges working in the upper echelons of the Afghan judiciary who assisted me in securing permission for the research. I take this opportunity to thank all the research participants, especially the respected judges of the family courts and the lawyers from the capital and the two provinces I visited, for their generous contributions to the main body of the thesis, and the court members who hosted my long days of data gathering.

I am grateful to my family for creating a supportive environment that has allowed me to stand for what I believe in. Despite the challenges it poses for them in traditional Afghan society, my family did not restrict my free movement as a single woman, and they let me break traditional rules by travelling to the farthest reaches of the world to seek the knowledge I would otherwise be deprived of. I owe my career and my professional ‘being’ to my older brother, who stood up against the impossible side of my professional journey and the cultural impediments of becoming Nasima Rahmani rather than an anonymous Nasima living somewhere in a corner of darkness taking on the traditional gender roles assigned to women in Afghanistan; living a life that injects the feelings of ‘nothingness’ in Afghan women’s soul and minds and takes away their self-esteem, when they are taunted by the husbands (who neglect the heavy burden of the household work), for doing nothing but ‘sitting at home and eating’.

Last but not least, I extend my gratitude to Mr Matthew Sidebotham AE ELS ,who assisted with the final copyediting of the thesis in accordance with UTS policy and the university-endorsed *Guidelines for Editing Research Theses*. Thank you Mr Sidebotham for reducing the burden of my work in the submission week; I appreciate your support with further editing and correction of the thesis, most importantly to ensure that Australian English is not taken over by my and Martha’s American English preferences.

Preface

To Hamida,^{*} the victim of immense injustice.

Our neighbour was married to two women. Their house was full of children with whom I spent my entire childhood up to my teenage years, before I was forbidden to play or visit friends outside my home.[†] The elder wife of our neighbour had five children and one of her daughters was my good friend, so I would visit her frequently. The elder wife seemed to be less loved than the younger one and her husband never spent much time with her. She was poorly provided for, and she and her children lived in one room in the corner of the house. In contrast, the younger wife ruled the husband. She lived in the main building, and she had everything. Her status was considered quite luxurious in those years.

The story I want to share is not about my neighbour or his two wives. Rather, it concerns Hamida, the younger sister of the elder wife; Hamida would sometimes visit her sister, which is how I came to know her. Hamida, a beautiful young woman, was married and had six children. But this happily married woman suddenly became miserable, much like her older sister, when her husband married for a second time. Like her older sister, Hamida became an unwanted wife. However, she put up with the situation and continued to live with her children. It became apparent that Hamida's mistreatment was even worse than that which her elder sister experienced. Hamida was forced to live in another house, apart from her husband and his new wife, which should have been good, but she was not provided with enough food or money to support her and the six children. I learned that escalating family quarrels finally resulted in divorce for Hamida. Her brother brought her back to her childhood home, while her six children, the youngest a nine-month-old baby girl, remained with her husband.

The misery of Aunt Hamida affected my friend and her siblings as well. They also shared Hamida's sadness, as she would frequently visit her older sister and remain there for weeks, even months at a time. Whenever I saw her, she was crying because she desperately missed

^{*} Hamida is pseudonym, not the real name of the lady.

[†] Afghan girls must follow strict rules when they reach adolescence to satisfy the moral standards assigned to girls who want to be respected in the society.

the children and the baby she had been forced to leave behind. She also went through great physical pain because she had suddenly stopped nursing the baby. Neighbours and nearby friends tried to help with advice on remedies and devices to express her milk so as to give her some relief, but the problem took some time to resolve.

After her divorce, Hamida did not have a settled home. She had three brothers and the older sister who lived in our neighbourhood. Hamida was supposed to stay with her brothers. In Afghan culture, such a responsibility is most often shared among family members. For instance, if there is an elderly parent to be cared for, the married sons may take turns having that parent live with them. Thus, the dependent relative receives care, even if this obligation is resented by family members. Hamida had to live this way with her brothers, but her sisters-in-law were not happy to have her. The younger sister-in-law, wife of the brother who brought Hamida back home, was particularly resentful.

So, Hamida became burden on her older sister, spending most of her time in our neighbour's house. Even as she was going through so much pain and trauma, she had to endure the taunting and mockery of her brothers' wives, which must have been intolerable. She stayed with her sister so as to have peace and privacy to mourn all that she had lost. She was still young and pretty, and I heard that an elderly widower wanted her to become his second wife. But Hamida had developed so much hatred towards men and remarriage that she never agreed to remarry. She was devastated, and she had neither the patience nor energy for another life that might prove troublesome.

Although a second marriage for men is common in Afghanistan and all first wives suffer in some way or another, Hamida became more vulnerable because of her divorce. Having her nearby often, I became more sensitive to divorced women's problems as I got to know more of Hamida and the misery she went through. That pretty woman is now growing old, and thinking of her unhappy life makes me keenly aware of the injustice visited upon divorced women. Although in those years I knew nothing of women's rights and feminism, thinking of the injustice suffered by Hamida made me angry on behalf of a woman who had lost everything of the life that she had been determined to build. Hamida never knew what *mahr* is or what women's rights mean. Nor at that time did I know enough to educate her.

This thesis is dedicated to Hamida and her miserable experience. I am sure there are many more Hamidas in Afghanistan and in the wider Muslim world.

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Abstract

Divorced women in Afghanistan are not entitled to financial rights beyond three months' *iddat* maintenance. However, it might be argued that they have the right to *mahr*, as well as other possible rights under Islamic law including women's rights to stipulations in the marriage contract and the right to *muta'a*, which may offer some financial security to divorced women, if applicable.

While the three months' *iddat* maintenance is not of sufficient value to alleviate post-divorce financial hardship and the other two mentioned rights may not work well in the Afghan context, the right to *mahr* is important and might carry significant financial value to save a woman from post divorce financial destitute. This thesis assesses *mahr* from that perspective and explores the reality and effectiveness of this right as a reliable source of financial security. The thesis seeks to find whether *mahr* has the capacity to compensate for the lack of post-divorce financial support in the life of Afghan women.

Breaking down the major thesis questions, it first seeks to find out what happens to *mahr* in Afghanistan: why it happens and how it happens. It also poses the questions, do divorced women in Afghanistan generally receive *mahr*; if it is received, what is the average payment; and is this practice consistent across the research areas? If *mahr* is not being paid, what are the reasons and possible obstacles that prevent women from accessing their right to *mahr*?

To explore the answers, the thesis first analyses the available financial remedies offered to women under Sharia law and Afghan jurisdiction. The thesis then assesses the laws and practice for the existing support mechanisms for *mahr* within the current legal system and its application in marital disputes. It responds to the research question by presenting empirical findings from family court summary books (describing 1117 cases decided between 2003 and 2015), in-depth interviews with legal professionals, and the candidate's observations of cases heard in family courts in three provinces in Afghanistan. The thesis concludes that *mahr* does not provide adequate financial support for divorced women, and, as a consequence, a vast majority of them are left with no financial assistance.

Glossary

Bride price: money or property paid by a groom or his family to the family of the woman he is to marry. Unlike *mahr* (or dower), bride price is not settled on the wife-to-be herself.

Fiqh: Islamic jurisprudence or legal interpretation. *Fiqh* elaborates the Sharia through interpretation of the Qur'an and other sources of religious guidance (such as hadiths) to issue rulings (fatwas) on ethical, social and political questions.

Hadith: the words and actions of the Prophet Muhammad SAW. The *hadiths* provide a basis for Sharia and *fiqh*.

Hukm: in the Qur'an, hukm denotes arbitration, judgement or authority. It was later used to refer to political power or to a court decision; in the plural, ahkam, it refers to specific Quranic rules, or to legal rulings derived through fiqh.

Iddat: the period after the death of her husband or a divorce during which a woman may not remarry. For a divorced woman the *iddat* period is three menstrual cycles or, if she is pregnant, until birth. The woman is entitled to receive financial support from her former husband for the duration of *iddat*.

Ijma: the consensus or agreement of Islamic scholars on a point of Islamic law.

Ila: an oath by the husband to abstain from sexual relations with his wife for at least four months; if he fulfils this vow for longer than four months, the marriage is dissolved.

Jehizia: in a broader definition, this is referred to as the dowry (property brought by the wife or paid by the wife's family) to the groom or his family, or used by the bride to help establish the marital household. In the Afghan context in more specific terms, it refers to the gifts a bride receive from her family, friends and relatives, ranging from simple kitchen appliances to jewelry and more expensive gifts if she or her family can afford them.

Khul: divorce without cause/fault, by mutual consent. *Khul* is generally initiated by a woman but requires her husband's agreement and the wife is required to provide some form of compensation to him (often relinquishing her claim to the deferred *mahr*).

Li'an: an oath in which the husband denies being the father of his wife's child (i.e. that his wife has been unfaithful). If the wife swear an oath that she has not been unfaithful but the man nonetheless maintains his denial, the marriage is dissolved.

Madhab: (plural *madahib*) a school of thought within *fiqh*. The major Sunni *madahib* are the Hanafi, Maliki, Shafi'i and Hanbali schools. The rulings of all schools may be observed across the Muslim world, but different schools are dominant in different regions. The Hanafi *madhab* is predominant in Afghanistan

Mahr: a legally required payment of money or property by the groom to the bride at the time of marriage. *Mahr* is legally the property of the wife. The *mahr* is usually specified in the *nikah*. The mahr may be separated into two parts, 'immediate' *mahr*, paid at or immediately after the wedding, and 'deferred' *mahr*, an amount payable at a future date following consummation of the marriage.

Mahr-al-mithl: 'average' *mahr*, the amount of *mahr* to which a woman is entitled where the *mahr* has not been specified or agreed. The amount of *mahr-al-mithl* to which the woman is entitled is based upon her personal qualities, her family status and the general level of *mahr* in her social context.

Muta'a: a consolatory gift (according to juristic scholars) that is recommended by the verse of the holy Qur'an to be provided to a divorced woman.

Nikah: the actual act of marriage in Islam (when the preacher recites the *khutba* (sermon), through which a couple obtains legal and religious legitimacy for cohabitation); or the ceremony at which the marriage contract is finalised. The contract document (or marriage certificate) is called the *nikahnamah* or *nikakhat*.

Qiyas: a process of deductive analogy in which the teachings of the hadith are compared and contrasted with those of the Qur'an, in order to apply a known rule to a new situation and create a new rule.

Sharia: Islamic law based on the teachings of the Qur'an and other sources. Sharia specifies both religious and secular Islamic requirements.

Sunnah: the traditional portion of Muslim law, based on the recorded words and acts of the Prophet Muhammad SAW.

Surah: the chapters of the holy Qur'an, identified by a descriptive title, e.g. the *Nisa* Surah ('The Women'). In total, there are 114 Surah in the Qur'an.

Tafriq: a form of divorce initiated by a wife on specific grounds recognised by the law, such as domestic abuse, abandonment or the husband's incurable disease. If *tafriq* is granted, the marriage is dissolved.

Talaq: the husband's right to dissolve the marriage by simply announcing to his wife that he repudiates her. In a talaq divorce the husband must pay the wife her deferred *mahr*.

Toyana: see **bride price**

List of Abbreviations

ACC	Afghan Civil Code
AFN	Afghani, the basic unit of Afghan currency
AIBA	Afghan Independent Bar Association
AREU	Afghanistan Research and Evaluation Unit
AU\$	Australian dollar
CEDAW	United Nations Convention on the Elimination of all Forms of Discrimination Against Women
CPC	Civil Procedures Code
CSO	Central Statistics Office
GIHE	Gawharshad Institute of Higher Education
MPI	Max Planck Institute
NGO	Non-Government Organisation
OHCHR	Office of the High Commission for Human Rights
PDPA	People's Democratic Party of Afghanistan
UNAMA	UN Assistance Mission in Afghanistan
US	United States (of America)
US\$	US dollar
UTS	University of Technology Sydney
WCLRF	Women and Children Legal Research Foundation

