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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30 June 2019

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 Aunty 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

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[*] 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

Introduction

1. Background

This thesis explores the financial rights of Afghan women after divorce. In particular, it examines *mahr* as a legal institution with the potential to alleviate women's post-divorce financial hardship (Quraishi, 2008: 173; Esposito, 2001: 23). Afghan law is silent on women's rights to post-divorce financial support. In official terms, there is no specific financial entitlement for a divorced woman in Afghanistan, except *iddat* maintenance.[1] However, under Islamic law, several options exist that may grant women some post-divorce financial support. A woman's right to *mahr*[2] is the major form of such rights.

This thesis investigates the potential of *mahr* under Afghan law to fill the gap between a woman's financial security in marriage and her post-divorce financial vulnerability. It seeks to answer the research question through an empirical study that reveals the realities of *mahr* practice in Afghanistan and lays bare truths rarely spoken in Afghan society. By employing grounded theory methods of qualitative research, this thesis aims to answer the question 'Does *mahr* offer financial security to divorced women in Afghanistan?'

The key argument of this thesis is that *mahr* in Afghanistan does not provide the economic security that Islamic law vests in this right and that divorced women have a right to expect. The data set that underpins this argument is the product of qualitative and quantitative inquiries. These include 40 in-depth interviews with legal practitioners, analysis of court records for more than 1000 divorce cases decided between 2003 and 2015, and non-participant observation of 18 court sessions conducted between May and September 2016, adjudicating divorce cases in three provinces of Afghanistan.

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[1] *Iddat* maintenance requires a man to support his divorced wife for a period of three months; see Chapter 1 for further detail.

[2] The right to *mahr* requires the husband to offer a gift entailing monetary value to his wife upon marriage; see chapters 1 and 2 for further detail.

The research problem is grounded in the living realities of divorced women in Afghanistan. While Afghan women make sacrifices to build a family life, their share of marital assets is often negligible at the end of their marriages. In addition, no protective mechanism exists to remedy their financial hardship. Housekeeping and family care are the primary responsibilities of the majority of Afghan women, who are often illiterate and not employed in the formal work sector.[3] Even the limited number of women who have access to work and educational opportunities face similar distress post-divorce.

Apart from providing household labour and family care, women in Afghanistan work with their families in agriculture and small-scale forestry, as well as other activities that families engage in collectively (Fielden & Azerbaijani-Mohadam, 2001: 6). For example, carpet weaving is a common source of income for the families in the north of the country. In this way, women's time and energy are often dedicated to activities that are major sources of family income.

However, if a marriage ends, the husband takes everything, while the wife usually leaves the marital home empty-handed and must return to her native family. Under Article 255 of the Afghan Civil Code (ACC), the responsibility for maintaining an unmarried woman not able to provide for herself rests with a male relative during the time she lives in his residence. This requirement does not solve a divorced woman's financial need, due to the stigma surrounding marriage breakdown in Afghanistan. No family is happy to accept a divorced sister or daughter, except in rare cases where her relatives initiated the divorce. This is not just the case for Afghan divorced women. Kirti Singh (2013: 187–188), in a study of divorced women in India, notes that women are often forced to return to their natal homes as they have no other place to live. As in Afghanistan, they are unwelcome, living as unwanted guests forever indebted to their parents and male siblings.

The current thesis is built on the argument that *mahr* could be a possible (perhaps the only possible) source of financial security for a divorced woman, but that in the context of

[3] Many reports address the unpaid work undertaken by women worldwide; see for example Efroymson (2010); Fälth & Blackden (2009); World Bank (2012); OECD (2014). Afghan women may contribute more than other women given their relatively large and extended families.

Afghanistan there are challenges that threaten that right or deprive her of it. For example, *mahr* in the Afghan context is often not respected culturally. Bride price is a more common practice in the country and its cultural prominence diminishes recognition of *mahr*. Where *mahr* is observed and practised (mostly in the capital, Kabul), women may sacrifice it for the sake of quick access to divorce or custody of their children, or they may abandon their claim in response to pressure placed on them. Complicated court procedures and other challenges, described in later chapters, also affect a *mahr* claim. These challenges tend to undermine the utility of *mahr*, preventing women from collecting a benefit to which she is entitled. The arguments supporting the overarching claim of this thesis are each addressed in a chapter of this thesis.

The first argument states that *mahr* is not a well-recognised and accepted concept in Afghan culture because the traditional bride price custom in the country precedes *mahr* and is more prevalent. The subsidiary argument demonstrates that, even where practised and recognised to some extent, forgoing *mahr* is considered a trade-off by women, the necessary price they must pay for a timely divorce. The third argument suggests that where women decide to pursue a *mahr* claim, overwhelming challenges pile up that prevent them from proceeding with their cases. The challenges are so strong and discouraging that women feel obliged to cease proceedings already underway, or even before their case begins. The fourth ancillary argument says that even winning a *mahr* case in the court does not mean a woman will receive the money owed to her. A court verdict that orders a husband to submit the decided *mahr* amount does not guarantee that the wife will achieve her goal of securing her financial rights.

2. The Context: Afghanistan, the Legal System and Women's Rights

Afghanistan is a small, landlocked country in the centre of Asia. The *World Population Review* estimates its current population at about 37 million.[4] In its 2016 report, the Afghan

[4] *World Population Review*, available at <http://worldpopulationreview.com/>, last accessed 16 December 2018.

Central Statistics Office (CSO) estimates the total population at 29.7 million.[5] The country is bordered by Pakistan to the south-east and Iran to the south-west. Countries once part of the Soviet Union, such as Tajikistan, Uzbekistan and Turkmenistan, are located to the north, and China abuts Afghanistan along a short border in the north-east.

Afghanistan's location at a strategic point of Asia has long been a source of problems for the country; war, social instability and economic insecurity are the costs Afghanistan pays for its location (Sultani, 2012: para 1). From Alexander the Great (330 BCE) to the descendants of Timur and Gangiz and, in the modern era, Great Britain (1839–1842, 1878–1880, and 1919) and Russia (1979–1989), many major powers have tried to gain control over Afghanistan, considering it a stepping stone for access to the entire region (Idrees & Anwar, 2017: 1). Most invaders of Afghanistan, both historical and modern, are attracted by the region's natural resources, including minerals, oil and natural gas (Sultani, 2012: para 3).

As a result of frequent wars, and especially after the Soviet invasion in 1978, the country has turned into a highly fragile state. It is one of the poorest countries in the world (Rahman, 2016: 1). A poverty status update report published by World Bank and the Afghan Ministry of Economy indicates that 36% of the population lives under the poverty line (2015: 6). Other reports also estimate that 20% of Afghans live just above the poverty line, and their status is so unstable that they are likely to fall into poverty (Rahman, ibid). Thus, over 56% of the total Afghan population in the country are poor. This grim statistic prevails throughout the country, despite the volume of international aid that flooded into Afghanistan after the US-led invasion in 2002 and the overall economic growth that resulted from this increased aid (World Bank and Ministry of Economy, 2015: 6 and 10; Floreani et al., 2016: para 1).[6] This bleak economic picture limits the opportunities for most Afghans, and especially women, have to rise above subsistence existence. The overall

[5] The CSO report covers the population currently residing in the country, not those who migrated and currently live in other countries across the world.

[6] Although the Marshall Plan type of aid that was expected in Afghanistan at the outset of the US-led invasion and the fall of the Taliban in 2001 (Goodhand, 2002: 837) was not delivered effectively enough to solve Afghanistan's economic problems (Bjelica, 2018: 2), the Afghan government on its own could not have achieved the progress that has been made so far, much less have survived in the face the increasing insurgencies of the last decade.

economic conditions in the country, and the living standards of families in particular, play a decisive role in a woman's access to *mahr* or other financial rights. Chapter 4 will shed more light on this matter.

3. Ethnicity and Religion

Diversity of ethnic background is a distinctive feature of the Afghan population (Haber et al., 2012: 1). Fourteen ethnic groups are named under Article 4 of the 2004 Constitution, but the major groups are Pashtun, Tajik, Hazara, Uzbek, Turkman, Baloch and Pashaee. Pashtuns and Tajiks are the two largest groups, followed by Hazara and Uzbek (Mazhar et al., 2012: 98). Formally recognised languages spoken in the country are Pashtu and Dari.

While no official statistics exist, Minakshi Das suggests that 99.9% of Afghans are Muslim, of whom 80% are Sunni and 20% Shia. The remaining 0.1% includes Hindus, Sikhs and Jews (2009: 9). The religious affiliations reported by Das are supported in other studies, including Wang (2016: 216), Johnson (2003) and the Swedish Committee for Afghanistan. Wardak's report on the legal system in Afghanistan provides a more accurate Shia–Sunni breakdown, identifying 15–20% as Shia, and 80–85% as Sunni Muslim. Sunni Muslims in Afghanistan follow the Hanafi school of thought, while Shias are predominantly Jafari followers (Wang, 2014: 216).

Thus, the majority of the population is influenced and directed by Sharia law, including in the treatment of women who are divorced by their husbands or who seek a divorce in their own right. The traditions and customs among different ethnic backgrounds differs to a considerable degree (although there are common features at the general level). For example, bride price is a common practice among all ethnicities, but the amount and prevalence differs from one area to another. Uzbeks and Tajiks in the north, and Pashtuns in the south-east, charge the highest possible amounts as bride price.

4. Women's Rights in Afghanistan

Any discussion of the current status of women's financial rights in Afghanistan requires some preliminary insights into the general history and circumstances that have affected women's life in the country and paved the way to the current situation. This is essential to

understand, in particular, how and when laws concerning women's rights came into existence and the extent to which they were able to positively impact the situation. This section briefly outlines the history of women's rights in Afghanistan, and is followed by a short introduction to the legislative initiatives that resulted in the emergence of laws that addressed women's issues.

Women are estimated to form 48.9% of the population of Afghanistan (CSO, 2016: 4).[7] The majority of women are illiterate and are not employed in the paid workforce.[8] Women's subordination to men and their lack of basic rights are chronic problems in Afghanistan. The first-ever legislative attempts to improve women's rights occurred in the late nineteenth century, but the history of women's rights in Afghanistan since then—as reflected in the work of Nancy Dupree (1992), Huma Ahmed-Ghosh (2004; 2006) and Humaira Haqmal (2012)—reveals fluctuations those , as well as incremental progress.

For example, during the reign of King Amanullah (1919–1929) women's rights became an important topic, leading to resistance among opponents of the King and, eventually, the end of his reign. This period was followed by nine months' tyranny during what is known as 'The Rebellions', when all schools were closed, and the limited number of women who had been encouraged by the Royal Family to appear in public were once again required to be veiled and confined to private spaces (Dupree, 1992; Ghosh, 2003: 5). Only schools for male students were reopened in 1930. In 1932, girl's schools were reopened, but Amanullah's fate encouraged subsequent leaders to avoid similar mistakes. Thus, women's rights progressed slowly in the following decades. In the 1950s and the decades after, broader opportunities for public roles were opened to women and access to their rights was encouraged (Haqmal, 2012: 215; Ghosh, 2003: 6).

In 1978, the PDPA (People's Democratic Party of Afghanistan), a Soviet-backed regime, seized power through a coup. Radical reforms that liberated women were introduced, albeit mostly in Kabul. Although the ensuing war brought misery for the Afghan population, this

[7] CSO, *Survey of Living Conditions* (SLC).
[8] No accurate survey-based data show precise literacy and employment rates. The figures estimated by the World Bank and the CSO suggest 18–21% of the population are literate adult women, and secondary school-age girls are reported at 40–42%. The World Bank puts the employment rate for 2017 at 19.49%.

short revolutionary period is important in the history of women's rights, particularly in the emancipation of Afghan women. The Communist regime guaranteed equality for women in work, educational opportunities and access to health care facilities in its Constitution (International Crisis Group, 2013: 1; Roshan, 2004: 271; Shannon, 2001: 421). However, from the perspective of people who lived in Afghanistan at that time, the freedoms introduced were radical and imposed without general consent. For example, education for women became compulsory, and people had to send their daughters to schools whether they wished to or not. These reforms (along with land reform policies) triggered even stronger resistance to the regime than that encountered by King Amanullah (International Crisis Group, 2013: 2) and generated a strong backlash that took the country into a bloody war with the government and its Russian supporters (Ghosh, 2003: 7).

Nonetheless, the period of the Soviet-backed regime to 1989 saw steady progress for urban women although no other major steps were taken to introduce further radical changes in their status. Rather, Decree No.7, which abolished the bride price custom and limited wedding expenses, was quickly repealed due to popular resistance (Rastin-Tehrani & Yassari, 2012: 12).[9] While women in urban areas did not face discrimination or inequality in this period (Middleton, 2001: 423), the war made life difficult for women in rural areas, and internal displacement was a major problem for women living far from the cities and areas controlled by the government. An estimated seven million people were displaced during the war with the Russians (Cortright and Wall, 2012: 7). Dupree (1992: 35) points out that no meaningful change happened in women's life during this period, but there is no discrimination against women reported either.

April 1992, a significant date in the life of women, especially in Kabul, marked the beginning of *mujahideen* barbarism in the city and the complete chaos that persisted for the next three years, to 1994. A Human Rights Watch report, *Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity* (2005), describes the battle for Kabul waged during this time. The candidate, who was an eyewitness to these events, can

[9] Decree No. 7 of 18 October 1978. The decree also fixed the upper limit of *mahr* at 300 AFN and introduced a penalty of three years' imprisonment for violators (Rastin-Tehrani & Yassari, 2012: 12).

verify that women in Kabul experienced a shocking change in their situation, losing the freedom and equality that had prevailed in the city before the war. However, the immediate violence— shelling, rocket attacks and the killing of innocent bystanders—was so frightening that what happened to women's rights scarcely drew attention. The International Crisis Group's *Asia Report* (2013) sheds light on women's situation:

> As the country descended into anarchy, rival mujahidin militias and aligned criminal groups attacked and looted the civilian population. Women were raped, abducted, kept as sex slaves or sold into prostitution. Human rights groups recorded accounts of women committing suicide or parents killing their daughters to prevent them from being subjected to sexual violence. Hundreds of thousands of Afghans were displaced or forced into exile, among them women who had benefited from educational and professional opportunities under the Soviet-backed regime.

Given what women endured in Kabul during the civil war of 1992–1994, the loss of previous entitlements seemed insignificant in the struggle to survive and avoid rape and kidnapping at the hands of gunmen. Many young women committed suicide in those years to save themselves from rape and forced marriages (Ghosh, 2003: 7). Despite this, towards the end of the *mujahideen* period, the situation improved enough to provide a stark contrast with the following five years of Taliban control in Afghanistan.

It was August 1996 when the Taliban arrived in Kabul, marking the start of another stage of trouble and misery in the status of women. The impact of their arrival in the first days was not as great a shock to Kabul women as that of the *mujahideen* because most residents were weary of atrocities, insecurity and increased crime levels in the city. The Taliban's initial agenda of disarming gunmen and establishing peace actually appealed to many (Johnson & Mason, 2007: 74). The situation of women was hardly of interest; people concentrated primarily on basic safety and stability. The Taliban had captured two other provinces—Kandahar in 1994 and Herat in 1995—before their arrival in Kabul. Thus, it was already clear that their seizure of Kabul would end women's presence in the public sphere.

As anticipated, women lost their right to education and employment; they were no longer allowed to appear in public without a male guardian; and they were beaten if they were seen alone in the markets and streets (Cortright & Wall, 2012: 8). The slight improvement at the end of the *mujahideen* period seemed in retrospect a wish fulfilled that would never

come true again. New rules governed women's clothing; for example, they would be beaten for wearing sandals in public (Amnesty International, 2011: 6; International Crisis Group, 2006: 16). Many women who had no family support became street beggars when they lost their jobs and salaries (Roshan, 2013: 274).

Just as the Taliban were bringing the whole country under their control, and thus destroying any hope for women of having a normal life, their tyranny ended. With the arrival of the US-led international coalition at the end of 2001, lost opportunities were returned to women. They were able to return to schools, universities and workplaces. From the perspective of those women who had lived their entire life in Afghanistan and experienced severe constraints, this new environment seemed miraculous.

Yet, since the US-led intervention in Afghanistan was associated with a women's liberation agenda (Kasa, 2014: iv; Nijat & Murtazashviti, 2015: 2), the outcomes did not meet the expectations of women's rights defenders. Many reports describe the limitations of what has been achieved and the lack of success in addressing women's fundamental problems in this period (see e.g. Amnesty International, 2011, and Cortright and Wall's 2012 report *Afghan Women Speak*). However, the candidate believes that there is no comparison between what women have gained in the current period with any of the mentioned periods in the past.

Despite the continued security threats that affected distribution of aid and development activities, thousands of women benefited from new and increased opportunities in the fields of employment and education, legal services, health care and political participation (Kasa, 2014; Powell, 2014; *Country of Origins Report: Afghanistan*, 2016: 81). While it is true that these opportunities were limited to women living in larger cities, almost every aspect of women's rights has improved since 2001, and some women have reached levels of progress that could not have been expected when the Taliban were ousted (USIP, 2015: 2).

5. Afghan Legal System and Family Law

The legal system in Afghanistan combined guidance from three sources: state legislation, Sharia law and customary law (Barfield, 2008: 6; Wang, 2014: 216). Written law at the

national level dates back to the time of Abdur Rahman Khan, Amir of Afghanistan from 1880 to 1901, and his efforts to centralise state authority through unification of the local powers exercised by the tribal leaders. Abdur Rahman began to codify systems and develop regulations to govern state affairs (ALEP, 2016: 6). His initial legislative efforts were later expanded by the young reformist King Amanullah Khan, who enacted the first constitution and the first-ever marriage law in Afghanistan in 1921.

The marriage law adopted by the King limited polygamy and banned excessive marriage expenses. Legislation also prohibited child marriages and the custom of *bad*.[10] However, in 1923 the King had to amend the law, along with the new constitution, in the face of protests against his reforms among the population. The amended law formally introduced in 1926 repealed the 1921 marriage law (Tehrani & Yassari, 2012: 8). Further amendments to the marriage law were introduced in the following years. Up to 1977, six separate statutes were adopted to regulate family law in Afghanistan. However, the changes were not major and only concerned wedding costs.

Given that Afghanistan is a Muslim country where Sunni and Shia followers live together, Islamic Sharia establishes an important pillar of the legal system, dominating the Personal Status Law in particular. This law refers to provisions embodied in the first volume of the Afghan Civil Code (ACC) enacted in 1955 and expanded in 1977 (Adalatkhah, 2017: 41). This Personal Status section of the law, which could be called the Afghan Family Law, is largely based on Islamic Sharia, mainly the Hanafi school of thought. However, the section also includes provisions from other Sunni *madahib*, such as the Maliki school of thought (Schneider, 2007: 109). According to Kamali (1985: 158), the divorce section of the law is more representative of Maliki jurisprudence. These provisions allow an Afghan woman to refer to the courts demanding a *tafriq*, or fault-based divorce, which would have been impossible had the law not referred to Maliki sources.

[10] *Bad* is a traditional practice in Afghanistan through which women are used to settle conflicts and disputes such as murder, rape or abduction of a woman. See the Women and Children Legal Research Foundation (WCLRF), *Bad: A Painful Sedative*, available at www.wclrf.org.af/, last accessed 23June 2019.

The Hanafi *madhab* was formally accepted as the basis for Afghan law in 1885, and it was reflected in the first-ever Afghan 'code of procedures and ethics', called *Asass–al-Quzat* ('Fundamental Rules for Judges'), adopted at the time of Abdur Rahman (Wang, 2014 : 217). Later, it was reaffirmed by the 1925 Constitution of King Amanullah (ALEP, 2016: 10). Hanafi jurisprudence continued to be the major source of law confirmed in subsequent constitutions adopted in Afghanistan.

Adoption of the 2004 Constitution opened the way for Shia law to be part of the formal Afghan legal system. Previously, Shia *fiqh* (jurisprudence) was not officially recognised legislation (AREU, 2009: 2), although Shia followers were free to practise it. The most recent Constitution, adopted after the Taliban withdrawal in 2004, allows followers of other *madahib* to practise their own religion within the limits of the law. It was at this time that Shia religious leaders lobbied for the Shia Personal Status Law to be officially recognised. Currently, apart from the provisions of the Civil Code that govern family matters, the Shia Personal Status Law is also applied in the courts. Thus, this thesis considers both laws in addressing *mahr* issues in Afghanistan.

Another pillar of the Afghan legal system is customary law, or the customs and traditions used to solve disputes within families and local communities (ILF, 2004: 8; Barfield, 2008: 7). The most common manifestations of this include gatherings of extended family members and community elders to solve a dispute before it escalates and requires resolution through the court or other formal institutions (Wardak, 2007: 326; Rastin-Tehrani & Yassari, 2012: 4). Although called customary laws, these mechanisms are deeply associated with Islam to the extent that, in some communities, people consider them religious norms (LandInfo, 2011: 5; Barfield, 2008: 4). However, some aspects of these mechanisms are not consistent with Islam or other applicable laws (Rastin-Tehrani & Yassari, 2012: 4).

The practice of *mahr* is influenced by all of these sources of law in Afghanistan. *Mahr* originates in Islamic Sharia, but it is also present in the codified law of the country. The research findings in Chapters 5 to 8 show that even where a *mahr* dispute is heard in the court, some aspects might still be resolved through customary law. For example, if a

husband is not willing to pay what is considered a high *mahr*, a court might order negotiations among elders of the two parties to reach to an agreement on the amount the man can afford to pay. Similarly, *mahr* disputes may be addressed through gatherings of elders rather than through the courts.

6. Problem Statement

The consequences of divorce are severe for women in Afghanistan. Although divorce has been rare due to the social stigma attached to it (Kamali, 1985: 145), divorce rates have been increasing since the fall of Taliban (Tait & Goldin, 2009; Fakhri, 2011; Muhseni & Tarakhil, 2005; Habib, 2015). The most recent news report in this regard notes a 25% increase in the divorce rate from 2018 to 2019 (BBC, 2019). Yet not a single empirical study exists to describe the consequences of this situation. This knowledge gap may be explained by the sensitivity attached to the topic of divorce, primarily due to prohibitions against divorce in Islamic law. Because this data scarcity creates a major obstacle in presenting a problem statement, information from studies conducted in other countries is also considered in the thesis. This approach recognises that divorce tends to create problems for women, regardless of their country of origin.

Many studies and academic research reports address the implications of divorce for women in developed western countries.[11] However, in countries that have a culture similar to that of Afghanistan, much less research has been conducted and reported. Finding studies in Muslim contexts has been particularly difficult, perhaps because divorce is a taboo in Islamic culture. Nonetheless, some research is available on divorced women's financial status in Muslim countries and is introduced in the following sections. These have been reviewed to partly fill the gap in Afghan data. The following section gives an overall picture of the problem and its depth in Afghanistan, before the discussion moves to divorce

[11] Examples of such studies include Espenshade (1979); Kitson & Morgan, (1990); Sweeney (1979); Smyth & Weston (2000); van Eeden-Morefield (2007); Dewilde & Uunk (2008); Gadalla (2008); Vaus et al. (2014).

in similar countries. The last part explores the topic in western countries and analyses the issues and solutions in the Afghan context.

7. Afghan Women and the Financial Effects of Divorce

Basic sources of information, such as newspaper articles and internet-based reports, describe general issues related to the financial status of divorced women in Afghanistan.[12] Though not comparable to rigorous academic studies, these materials still have some value in that they are based on interviews with family court judges, lawyers representing women in divorce proceedings, women's rights defenders and government authorities in charge of women's programs or organisations. Examples of such texts include Speassaly (2016), Fakhri (2011), and Muhseni and Tarakhil (2005). Although these reports do not say much about the economic implications of divorce, the topic is not entirely disregarded.

These non-academic materials note the rapid increase in recent years in the number of Afghan women turning to the courts to seek divorce (Habib, 2015; Tait & Goldin, 2009; Muhseni & Tarakhil, 2005). This trend draws attention to the financial implications of divorce for women and exposes the reality of their dire economic position after divorce. For example, an article published in *Afghanistan Today* quotes an official in charge of women's affairs who says, 'After divorce, many women stand helplessly on the streets' (Fakhri, 2011). The official warns lawyers who represent women clients to keep this probable outcome in mind and not recommend divorce as the only solution for their clients' family problems. Although this advice does not seem likely to solve the problem of marriage breakdown, it indicates the financial implications of divorce for women in Afghanistan. The reviewed sources also report on the almost complete financial dependence of women on their husbands and their inability to support themselves.[13]

A short article on the weblog *Pashtun Women's Viewpoint* provides a comprehensive description of the effects of divorce on Afghan women. The blogger attributes women's

[12] See Fakhri (2011); IRIN (2015); Kakar (2013); Motevalli (2009); Saber (2009); Sieff (2012).
[13] Suraya Pakzad, Director of the Voice of Women organisation in Herat (which provides safe houses and legal services to women), is quoted as stating that increases in the number of divorces have reduced the number of self-immolations and suicide cases in Herat (Motevalli, 2009). Ninety incidents were referred to VOW in 2006 (Tait& Goldin, 2009).

severe financial hardship after divorce to the lack of employment opportunities, which, in turn, is associated with women's illiteracy (Kakar, 2014: 5). The writer also illustrates the difficulties and challenges a divorced woman is likely to face, including stigma and rejection by her family and society, who consider a divorced woman to be a bad influence.[14]

8. Divorced Women in Other Muslim Countries

The financial effect of divorce on women is rarely addressed academically in other Muslim countries. Although not a primarily Muslim culture, India shares some characteristics with Afghanistan and Indian studies on divorced women are relevant in considering the status of divorced women in Afghanistan. A comparative study of psychological wellbeing of women after divorce in India revealed that Muslim and Hindu women reported the same effects (Kaneez, 2015: 70).[15] Another study of separated, divorced and abandoned women in India describes the financial distress women of all social and economic classes face after divorce. Their living standards drop and, evicted from the marital home, they often have no alternative but to return to their birth families. Middle-class women fall into poverty; poor women struggle to survive (Singh, 2013: 187–188).

In the mentioned research, Singh studied 405 women in four main regions of India (Delhi, Kolkata, Mumbai and Chennai) to explore their financial status and economic entitlements. Apart from general disadvantage, the most common similarity between Indian divorced women in this study and those in Afghanistan is the dependence on their natal families, despite the fact that they are not wanted or welcomed there. Singh reports that divorced women's status is worse than that of widows. Referring to other studies she reviewed in this regard, she says, 'In some studies … [divorced women] are described as women "even more despised ... in a twilight zone of neither being respectably married nor widowed—especially those who have themselves left their partners"' (Singh, 2013: 1).

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[14] Country Policy Information Note on Afghanistan on the UK Visa and Immigration website (Home Office, 2016: 17).

[15] In the study, the researcher interviewed 25 Hindu and 30 Muslim women. Although her focus is not economic she notes similar economic 'difficulties' affecting both groups (Kaneez, 2015: 70).

In Afghanistan, divorced women are forced to go back to their parental families for two main reasons (Kakar, 2014). First, it is neither safe nor morally acceptable for an Afghan woman to live on her own. The presence of a *mahram* or guardian is an essential part of Afghan culture. Second, women do not usually have the financial resources to support themselves. Women who work and have a regular income are relatively rare. In general, divorced women are a burden on their natal family. Article 255 of the Afghan Civil Law refers to this dependence.[16] While this article seems to provide a solution, it is unsatisfactory, given the stigma attached to divorce in Afghan culture. Most often, the difficult life a divorced woman faces once she returns to her family causes severe stress and mental health problems that may paralyse her entire life.[17] This is especially true if her parents are no longer living and a woman must live with her brother's family. The study of Sabia Hussain (interview with 30 divorced women in India) reflected the same point (2011: 32).

An older study (Merchant, 1992) reporting on interviews with 100 divorced Muslim women in India, identifies the same hardships that more recent studies record. Merchant notes that financial problems were the challenge cited most frequently (76%) as being faced by women after divorce, followed by housing and other day-to-day problems such as emotional stress, difficulties in child–parent relationships, and threats from husbands. (1992: 78). Similarly, Sabiha Hussain (2011), cited above, found no positive outcomes for divorced women.

Social and economic vulnerability among divorced or abandoned women and their children in Bangladesh is described in an article based on the findings of a joint research project of BRAC and ICDDR, conducted in 1995. This research investigated the situation of divorced, abandoned and widowed women. Eighteen women were interviewed, of whom two were widowed, five divorced and the rest abandoned (Momen et al., 1995: 5). In

[16] Article 255 states, 'maintenance of a woman who does not have a husband and is not able to provide for herself, is provided by the Mahram [guardian], in whose residence she stays. This is for the time that she lives in his residence.'

[17] A study of mental health in Afghanistan found that, along with other vulnerable groups, divorced, separated and widowed women are at higher risk of mental health problems (mostly from social exclusion) than others in the population (Trani & Bakhshi, 2013: 19).

Afghanistan, abandoned women are a subset of divorced women. A husband will abandon an unwanted wife, and she will not ask for divorce due to the fear of associated stigma. In this study, the findings revealed that the financial inability to manage a decent life for these women and their dependent children was the 'most common problem' reported. The studied women did not have access to 'sources of regular income' (Momen, et al., 1995: 8).

The situation of divorced women in other Muslim countries does not differ much from that in Afghanistan, although the latter country is more backward and poorer in comparison. A research paper on social and economic problems faced by 113 Jordanian divorced women reveals that they face many social and economic problems. The research further indicates that, due to their low level of education, these women struggle to find good jobs (Nassar, 2015: 136).

Taken together, these studies show that divorced women in less-developed countries suffer from severe financial problems. These findings may well be extrapolated to Afghanistan, especially as, in terms of social progress and economic development, that country is far behind India, Bangladesh and Jordan. That is to say, if divorced women suffer financially in those more developed countries, clearly women will encounter even worse conditions in Afghanistan unless they are educated or come from wealthy families. Is there hope for improvement in the status of divorced women? The next section explores this topic after a quick survey of the status of divorced women in western societies.

9. Financial Implications for Women of Divorce in the West and Relevance for Afghan Women

In contrast to the scarcity of literature on this topic in Muslim countries, there is an extensive body of academic studies, including longitudinal surveys, considering the financial consequences of divorce for women in western countries (see, for example, Fagan & Churchill, 2012; Hawkins & Fackrell, 2009: 109; Holden & Smoke, 1991). Most of these studies reveal greater financial vulnerability among women compared to men post-divorce (Hoffman & Duncan, 1988; Vaus et al., 2014; Peterson, 1996; Holden & Smock, 1991). Financial loss associated with divorce leads women into poverty and dependency on social welfare programs, a support mechanism that is not necessarily available in Afghanistan

(Dewilde & Uunk 2008: 393; Sweeney, 1997: 479).[18] In western countries, one in five divorced women falls into poverty (Hawkins & Fackrell, 2009: 109). Similarly, the Australian Institute of Family Studies, drawing from previous research, maintains that women and their children suffer greater financial disadvantage after divorce than men (Smyth & Weston, 2000: 1). [19] The research paper notes that 'women's economic vulnerability caused by divorce still continued to hold' (ibid: 8).

Women in developed countries may fall into poverty after divorce because having children and consequent child care responsibilities exerts a negative effect on a mother's financial position (Kitson & Morgan 1990: 920; Espenshade, 1979: 623). Relative attachment to the labour market is reported as the first and most important factor that places men in a better financial position after divorce (Delide & Uunk, 2008: 393). Kitson and Morgan agree that discrepancies in salaries based on gender and lower engagement of women in the workforce are compounding factors. As such, divorce can be destructive in financial terms even among those rich and blessed with opportunities in the western world.

Yet, despite their post-divorce financial challenges, women in western countries have better chances of recovery than women in less-developed nations. Studies based on longitudinal surveys tracking the status of participants over time indicate that, following an immediate drop in income after divorce, women's financial position gradually improves and returns to pre-divorce levels. This recovery period is estimated at four, six and nine years respectively in the cited studies (Gadalla, 2008; Vaus et al., 2014; Fisher & Low, 2015). For example, the study conducted in Australia (Vaus et al., 2014: 17) used longitudinal data from 2001 to 2010 to assess the financial implications of divorce on women. The research findings report that although in the short term divorce has a negative impact on women's financial welfare, the situation begins to improve after a period of six years.

The studies also indicate that, in the long run, factors contributing to the improvement in women's financial status include re-partnering, women's increasing attachment to the labour

[18] The studies referenced include Duncan and Hoffman (1985); Burkhauser and Duncan (1989); Holden and Smock (1991); Smock (1994); Jarvis and Jenkins (1999); Poortman (2000); and Andre et al. (2006).
[19] Research Paper No. 23, December 2000.

market, and social schemes introduced by governments, mostly as child support awards. To assess the possibility of Afghan women recovering from the negative financial implications of divorce, these three factors will be examined in the Afghan context in the following sections.

10. Labour Force Participation

Many studies reflect on the increase of divorced women's participation in the labour market (see, for example, Duncan & Hoffman, 1985; Peterson, 1989, in Kitson & Morgan, 1990: 914). In 1979, Sweeney reported on a dramatic increase in women's workforce participation over the preceding 30 years (1979: 498), and this trend has probably increased further in recent years. Vaus et al. also reveal an increase in the employment rate of divorced women with dependent children (2014: 17).[20] The increased labour force participation of women in the west is also rooted in the improved educational opportunities available to them.

The same level of opportunity and government-sponsored support cannot be expected in Afghanistan, where women's literacy rate is estimated to be only 15–17% (Powell, 2014: 5; Home Office, 2016: 15). Even a literacy rate of 17% does not necessarily mean proper education at higher levels or skill development training that would open employment windows for women. A study recently conducted by the Afghan Central Statistics Office (CSO) found that 84% of women in Afghanistan are illiterate, and only 2% have access to higher education.[21] Education has a direct link to employment. A similar finding is reflected in the Asia Foundation 2016 survey of Afghan people. This study found that the relationship between women's education and employment is strong, and women having at

[20] The Australian Institute of Family Studies (2012) notes that 'some women were able to recover their income after six years through re-partnering, increased labour force participation, and an increased proportion of income coming from government benefits'.

[21] Zabihullah Jahanmal, 'Survey Finds 84% of Women Illiterate' (February 2017), available at <www.tolonews.com/afghanistan/survey-finds-84-percent-women-illiterate>, last accessed 31 October 2018). The United Nations Development Fund estimates Afghan women's labour force participation at 15.8 % (Home Office, 2016: 15); Powell (2014: 5) says it is below 20%.

least some schooling are more likely to be employed. The survey reports that 13.2% of women reported that they work outside the home.[22] The International Labour Organisation estimates Afghan women's employment rate at 16%.[23]

As preconditions of economic independence, education and sufficient regular income are important factors that Afghan women, except for a small percentage, cannot generally access. In a study of effects on highly educated divorced women in Bangladesh, Kazi Nadira Parvez (2011) argues that marital dissolution does not necessarily drag women into poverty, particularly those who had a job before divorce. She further adds that women who did not have a job before divorce started to work immediately afterwards to take charge of their expenses or get rid of divorce 'anxiety' (Parvez, 2011: 84). A study of divorce effects on highly educated and professional women in Turkey conducted by Serap Kavas for her PhD dissertation (2010) produced similar findings. The 31 interviewed women reported no major financial burden after divorce except for three participants who said they were deeply affected (2010: 140). Kavas' study also showed that even women who did not have a job before divorce did not delay entering the labour force, so as to avoid possible hardship (2010: 41).

These two studies show that availability of opportunities makes a significant difference in the lives of divorced women, while the figures presented on Afghan women's status starkly illustrate the limited access to employment opportunities that they enjoy. Kakar's short news article, the only available source on divorce information in Afghanistan, says that 'because the majority of women in Afghanistan are not educated, they cannot work outside their homes to provide for themselves' (2014: para 5). Education and work opportunities, though improved considerably in the last 18 years, remain a distant dream for most of the female population.

11. Social Support Schemes and Divorced Women

[22] The Asia Foundation, *Afghanistan in 2016: A Survey of the Afghan People*, Research Report (2016), available at <http://asiafoundation.org/where-we-work/afghanistan/survey/>, last accessed April 25.
[23] <http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?name_desc=false>.

Apart from increasing attachment to the labour market, a useful financial recovery route available for women with dependent children in the western countries is to seek state support. In Australia, where the candidate is pursuing her PhD studies, there are two components to the social support mechanisms available to divorced women. One is the Family Tax Benefit, or state support for women and children (Parkinson, 2007: 186), and the second is legislation mandating child support from a non-custodial parent to the custodial parent (ibid: 182).[24]

This type of assistance to divorced women is not applicable in the context of Afghanistan. Under the Afghan Civil Code, a mother has limited entitlement to the custody of her children; up to seven years for a son and nine years for a daughter.[25] A divorced women can officially claim child support in the form of maintenance for young children who might remain with her until the end of the custody age. However, a mother may not receive this support, as to avoid the burden, her husband may not allow the children to remain with their mother. This maintenance should come from the father, though not explicitly mentioned in the law.[26] Men resist paying support for their children, and, if they do pay, the amount is usually insufficient for basic needs. For example, maintenance of US$30–40 per child would not cover even the most basic needs (Sarwary, 2017: 3). The financial burden after divorce and the fear of losing their children are the main reasons women in Afghanistan tolerate abusive husbands and miserable marriages (Sarwary, 2017; Kakar, 2014: 2).[27]

Thus, it is unlikely that a divorced woman who has custody of her children will receive adequate support from her husband, and the Afghan government does not offer any complementary support mechanism to fill the gap.

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[24] The significant role of the Australian child support mechanism is also mentioned in Vaus et al. (2014: 12).
[25] A judge may extend this period to a maximum two years if needed (Art 250). Under Art 151, the law allows a judge to consider the best interests of a child where the custodial person, even if the father of the child, is deemed unsuitable.
[26] Under Islamic law, a father is responsible for his children's maintenance until his son reaches puberty or the capacity to earn for himself, and his daughter until she gets married (Herawi, 2012: 206; *Al-Hidaya*, Vol. 2: 202). This is reflected in Art 256 of the Afghan Civil Code.
[27] Frozan Sarwary, 'Afghanistan's Custody Laws Force Women Into Staying in Violent Marriages', *Freewomenwriters.org* (posted 26 May 2017), available at <www.freewomenwriters.org/2017/05/26/afghanistans-custody-laws-force-women-staying-violent-marriages/>.

12. Remarriage: A Factor in Recovering from Financial Loss

Another factor that assists divorced women in western societies in overcoming the financial hardship of divorce is re-partnering or remarriage (Holden & Smock 1991; Kitson & Morgan 1990). Dewilde and Uunk (2008) point to the positive impact of remarriage on 'post-divorce income', reporting that 'divorced women with greater financial distress have higher rates of remarriage than those experiencing weaker distress' (2008: 404).[28] The impact of remarriage/partnering is also indicated by Sweeny (1997).[29]

With regard to remarriage, while it is not impossible for a divorced Afghan woman to remarry, the likelihood of her doing so is not high. Kakar (2014: 1) notes that even a young, childless divorced woman cannot easily remarry, because both Afghan men and their families prefer that he select someone who has never married. This is because a divorced woman is considered a disgrace in Afghanistan and a bad influence on other women. The only option for a divorced woman is an older man, possibly one who has been widowed or divorced himself.

Kakar mentions that once a woman has appeared in court and has been labelled 'divorced,' she will not be trusted again to serve as a good wife and behave as obedient daughter-in-law, two characteristics essential in a 'good' Afghan wife. Thus, compared to western women, divorced women in Afghanistan are much less likely to improve their financial status through remarriage.

13. Theoretical Framework and Methodology

While the theoretical framework for the research is largely practice-based, and the data gathered through grounded theory methodology furnish the premise for building its argument, the approach is also informed by feminist theory. Feminist research goes well with grounded theory, as both methods rely on the voices of the research participants to

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[28] A similar finding was reported by the Australian Institute of Family Studies (Smyth & Weston, 2000: 19).
[29] Derived from findings of the Wisconsin Longitudinal Study (WLS) data set of high school graduates, Further studies report on reduction of economic insecurity among divorced women who remarry include Moorefield and Pasley (2007: 22) who refer to Amato (2000), Shapiro (1996) and Vogler (2005) to make that point.

generate information and knowledge (Keddy et al., 1996: 450). Although many studies have been conducted in Afghanistan on the status of women since the fall of the Taliban, divorced women's status has received little attention due to the sensitivity of the topic. This thesis aims to give voice to these women (although not directly) and lay bare the discrimination that strongly affects their economic wellbeing. Thus, adopting a feminist theory approach to the research is essential to provide a lens that will assist the candidate to better analyse the data findings.

Feminist Theory

As a broad concept, feminism is concerned with social inequalities that result in discrimination against women. Feminism involves working to improve the status of women and fighting against the prejudices that subordinate them (McCann & Kim, 2013: 1). Yet, a widely accepted and detailed definition of feminism is difficult to find. Feminist scholars seem reluctant to accept a universal definition. bell hooks (2000) gives a convincing reason for this lack of unified definition for feminism. She argues that, in the eyes of many people, the feminist movement is a mission to bring equality between men and women, but that this simply not possible. She points out that because not all men are equal, it is difficult to know 'which men do women want to be equal to?'. Furthermore, she believes that equality is not a core mission for all women (2000: 18). Based on her argument, if the focus is equality, then issues of 'race and class', core causes of human suffering from discrimination and exploitation, will be ignored (2000: 19).[30]

Based on hooks's argument, a more suitable definition for feminism might be one presented by Barbara Smith. According to her, 'feminism is … the political theory and practice that struggles to free all women: women of color, working-class women, poor women, disabled women, lesbian women, old women, as well as white, economically privileged heterosexual women'. She argues that 'anything less than this vision of total freedom is not feminism, but merely female self-aggrandizement' (Smith, 1980: 48). Understanding feminism requires understanding its history, specifically the 'waves' featured over the last century

[30] Rejecting the term *equality* in defining feminism is crucial to understanding Islamic feminism, as discussed in subsequent chapters.

and a half. In the following summary, the first two waves are framed primarily based on an article by Judy Whipps, published in *Philosophy: Feminism* (2017) and the third wave based on Iannello's writing (2015).

The First Wave

The first wave of the feminist movement occurred between 1848 and 1920. This wave is now referred to as liberal feminism, because women active in that period in the US fought for equality among all members of society.[31] Pioneer women calling for equality and liberation of women often were also engaged in abolitionist movements, which eventually led to amendments in the US Constitution (Whipps, 2017: 5). First wave feminists demanded the right to vote and access to education.[32] The first wave formally dates from the 1948 Seneca Falls Conference, when 300 men and women participated and discussed equality for women as principal agenda item of the conference (Rampton, 2008: para 4). One of the major points of advocacy for first wave activists was passing the Equal Rights Amendments (ERA) Act. To work toward this goal, that National Organization for Women was established in 1966 (Whipps, ibid: 18).[33]

Second Wave

The second, more radical wave lasted from the 1960s to the 1980s. The focus of this wave was civil and reproductive rights. Feminists in this period were concerned with consciousness-raising among women. Activist women were inspired by writers such as Simone de Beauvoir and her historic book, *The Second Sex* (1953); Betty Friedan, author of

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[31] The struggle for women's rights began many years before the first wave activism, but these actions tended to be individual and did not result in change at the political level. Whipps refers to the work of early feminists such as Hildegard von Bingen (1098–1179), Margaret Cavendish (1623–1673) and Anne Bradstreet (c.1612–1672).

[32] Women in in the US won the right to vote in 1920. New Zealand was the first to enfranchise women, in 1893 (Harrison & Boyd, 2015: 296).

[33] Among the first wave feminists, some women were uncertain whether equality with men would improve their status and whether women should fight for this goal in a society tailored for men. Consideration of women's special needs, such as during pregnancy, created reluctance among some women to demand full equality. This cause was then taken up by the second wave. Whipps describes how some feminist authors such as Wendy Williams (1977) argued that women cannot demand equality in some rights and reject it in others. Christine Littleton (1977) suggested another model that would accommodate equality and difference and recognise gender roles without considering whether those roles were based on biology or culture and social structures (Whipps, 2017: 18).

The Feminine Mystique (1963); and Kate Millet, author of *Sexual Politics* (1970) (Harrison & Boyd, 2015: 298). Second wave feminists, building on what had not been achieved in the first wave, gradually learned that achieving legal rights alone would not bring about the changes required to ensure equality. Nor could legal rights entirely eliminate existing oppression and discrimination against women. Therefore, they advocated for institutional change and amendments to social structures. Yet second wave feminism, focusing on civil rights as political rights, did not achieve the improvement in women's status it sought (Whipps, 2017: 14). At this time, feminists realised that some women face multiple types of oppression, and this realisation led to the emergence of feminist categories such as Black feminism, Marxist feminism, anarchist feminism, ecofeminism, and postcolonial feminism. Still, there are women who 'did not hear their voices in the general feminist movement' (Whipps, ibid: 14). The most important achievement of this phase is the 'distinction between sex and gender', based on de Beauvoir's work.

Third Wave

Third wave feminism is generally dated to the 1990s. Some scholars argue that this period of feminism lasted until 2000, while others believe it continues to the present. In 1998, *Time Magazine* published an article titled 'Is Feminism Dead?'. This provocative headline encouraged feminists to question whether their movement was, indeed, still vital. Perhaps after the UN Year of Women (1975), the women's decade that followed (1976–86), and achievements for women across the globe, women thought much had already been accomplished, and the feminist movement became less important to them.[34] Undoubtedly women achieved remarkable civil rights in this period, gaining access to birth control options and to technological advances that made household work easier, freeing up time for personal development. At this time, some feminists believed reflection on what had been achieved so far was needed, rather than developing new plans (Harrison & Boyd, 2015: 299).

[34] More information about the UN year and decade can be found in Bunch and Samantha (2000) and Ghodsee (2009).

Possibly in reaction to the *Time Magazine* article, and the introduction of the phrase 'post feminism' in the media, feminists took action to indicate the movement was still live. For example, the Third Wave Foundation established in the United States to support feminists aged 15 to 30, and several magazines and journals dedicated to feminism (for example, *Bitch* and *Bust*) were founded. Another important trend was the emergence of female music bands, such as Riot Grrrls, that represented women's empowerment on stage (Iannello, 2015: 315).

In general, the third wave feminists value womanhood, often enjoying what first wave feminists rejected, such as wearing high-heeled shoes, bras or make-up. Third wave feminists view womanhood as a desirable quality and do not want to be perceived as victims. Feminist writer Germaine Greer discussed the significance of family life and raising children in her book, *Sex and Destiny*, published in 1984 (Harrison, ibid: 299).

Third wave feminists question whether there is need for a feminist movement such as those of the first and second waves. There is a tendency in this third wave generation to avoid the feminist label altogether. In a survey of 300 young women in the United States, only 21 per cent expressed willingness to call themselves feminists and 83% were happy to take an individual approach against discrimination on the basis of sex in America (Iannello, 2015: 317). What is most most significant about third wave feminism is the value it places on diversity; third wave feminism is not about a common shared identity but, rather, is characterised by its embrace of 'disunity' (Iannello, 2015: 315; Rampton, 2008: para. 13). Third wave feminism represents a new form, one that could be called individualistic.

A primary concern of third wave feminism is widespread violence against women. Nonetheless, there is widely accepted views that, in the presence of current social media and internet opportunities, a feminist movement for fighting inequalities is no longer needed. This argument suggests that women can use other forms of power to achieve their goals, including combatting gender-based violence (Harrison, 2015: 300; Rampton, 2008: paras 12–13).

The third wave feminist period (1990s) also gave birth to another form of feminism that, despite changes and flexibility in feminist thinking, is yet to be accepted within the general

brand.[35] Islamic feminism is perhaps the newest and most controversial movement, as many believe that the terms Islam and feminism are completely incompatible. Scholars and activists who believe Islamic feminism is possible, call for justice and the end of oppression in the name of Islam. They advocate for reinterpretation of the main Islamic law sources to better understand the egalitarian message vested in Islam and to ensure the operation of this message in the lives of Muslim women. Islamic feminists believe the source of Islam, the Qur'an, is beneficial to women, but subsequent Islamic jurists' interpretations of the Qur'an and Hadith have created problems (Mir-Hosseini 2004; 2011; Badran, 2002; 2010).[36] The current thesis is inspired by the work of Muslim feminist authors, who fight against discrimination and injustice in the name of Islam.

14. Methodology

The argument of this thesis is built on the findings of comprehensive research employing three methods of qualitative research within a grounded theory methodology. The resulting dataset comprises the results of: a court document review of 1117 divorce cases referred to Afghan family courts between 2003 and 2015; in-person observations by the candidate during court hearings of around 60 divorce cases in three family courts; and the candidate's interviews with 29 lawyers who represented women in divorce and *mahr* cases and 11 judges of the three family courts studied. [37]

Given the importance of *mahr* in Islamic teachings, court authorities must ensure *mahr* is dealt with before a divorce decree is issued. Review of the records was undertaken to provide details on common *mahr* rates and the percentage of success in *mahr* claims. Another objective of the review of the court records and court observations was to identify

[35] Feminism is not limited to one form, although the focus of all feminist theories is to improve women's situation. The types of feminism described in the work of Rich (2014) and Evans (1998) include liberal, socialist and Marxist, radical, postmodern, post-colonial, black, cultural, French, African American, and Indigenous feminism (Rich, 2014: 235; Evans, 1998).

[36] In her 2007 doctoral thesis, Aisha Shahid explains that there are three groups among Muslim feminists. For the first group, the only point of reference is the Qur'an; the second group advocates for reinterpretation of the Qur'an to extract the original injunctions of Sharia; and the third group calls for re-examining hadiths (Shahid, 2007: 42).

[37] This timeframe was selected because during the Afghanistan civil war almost every bit of infrastructure, especially in Kabul, was destroyed. Document centres and libraries were destroyed, information prior to 1992 was largely lost.

whether *mahr* is part of divorce case proceeding. Although access to court records was limited (due to lack of a proper case management system and further limitations arising from the procedures and formalities), the candidate managed to review enough cases for each year to generate a picture of the status of *mahr* in cases referred to Afghan courts by those seeking a divorce.

The data is verified through triangulation of the research methodologies. To collect valid data, more than one method was employed. The findings from the court records were tested through non-participant observation of the court procedures for hearings of around 60 cases of divorce; of these only 18 are described, as the rest, were mostly women-initiated divorces in which *mahr* is not always the main question to address. Since review of the court records revealed significant information about *mahr* practice in Afghanistan, the findings of the document review were tested against eyewitness observations in the courts. These observations, presented in Chapter 6, clarified the previous findings and reaffirmed the thesis's argument.

The third method for data collection involved in-depth, semi-structured interviews with legal professionals, including 29 lawyers and 11 judges. This part of the data forms the core source of research analysis. The interview questions for both groups were slightly different. Interviews with lawyers aimed to generate further information and to test the findings from court records and observations of case hearing procedures. Judges were asked to discuss all findings from the previous methods and to explore the causes that led to these findings. Chapters 7 and 8 are based on the findings of the interviews with professionals. They mainly reflect that seeking *mahr* is a complicated battle at every stage of the process.

15. Overview of the Chapters

To examine the financial rights of women in Afghanistan, the thesis refers to Islamic law as the main body of principles governing family matters in Afghanistan. The first two chapters cover the nature of women's financial rights in Islam and in the Afghan context in particular. The candidate believes it is essential to introduce these laws at the outset of thesis as they may offer some protection to divorced women. A description of these rights in the context of Afghanistan leads to the conclusion that *mahr* carries greater weight and

offers better protection to divorced women. Furthermore, it does not lapse after divorce and it is more broadly accepted in Afghanistan than other available options.

The thesis begins with a discussion of women's financial rights at the time of marriage and at divorce. The chapter introduces different forms of financial rights available—in theory—to a Muslim woman and how divorce deprives her of such rights. These rights include *mahr*, maintenance and inheritance. The discussion then turns to post-divorce rights, which are limited to *iddat* maintenance and other rights that might be available to a divorced woman under certain conditions.

In the second chapter, the thesis examines *mahr*, as a major form of women's financial rights in Islam, most often expected to fill the gap between their financial status in marriage and their post-divorce situation. The chapter defines *mahr* and presents its philosophy through primary and secondary sources. The chapter provides an overview of perspectives from scholars and jurists, describing their views of *mahr* from classic times to those modern scholars and authors who hold differing views about this potentially powerful legal instrument of Islamic law. This detailed discussion of *mahr* shows the actual effectiveness of *mahr* and provides a lens through which the practice of *mahr* in Afghanistan can be assessed.

Chapter 3 describes theoretical perspectives on the research, including an introduction to the methodology, and provides justification as to the choice of methodology for the research. It explains that, in view of the dearth of available data and previous studies on divorced women's status and rights in Afghanistan, deploying a qualitative research method through application of the grounded theory methodology is the appropriate choice. The chapter explains that the selected data collection tools have worked well to provide the thesis with a unique dataset that provides a suitable balance in the expected findings resulted from each set of the collected data.

Given the potential strength the *mahr* concept possesses, the thesis focuses on the practical aspects of its application and implementation in the Afghan legal system to respond to the research question. The chapter describes how findings are built upon a dataset that has been collected in compliance with the Australian research regulations and within UTS HREC

committee requirements and approved conditions for the candidate. The chapter gives a detailed overview of how the research was conducted in the field and what informed the choices of court summary books for 1117 previously decided divorce cases between 2003 and 2015.

The resulting data are presented over four chapters. These establish the main body of the thesis in response to the research questions. These chapters are designed to demonstrate how application of the law in practice fails to support women, mainly because of the social norms peculiar to Afghanistan and the dominant culture in the country. These chapters indicate that Afghan women are significantly deprived of basic protection in the face of challenges that affect their claims, often because of the complicated court procedures that do not recognise or reflect the restrictions imposed on Afghan women in their daily life.

Chapter 4 examines the *mahr* concept in the Afghan context, investigating whether *mahr* is the only form of this legal institution or, if it is practised in other forms as well. Presenting the interviewees' viewpoints, the chapter then explores *mahr* in the current Afghan laws and legal systems to show how effectively it is addressed and protected.

Chapter 5 describes how *mahr* is practised in Afghan courts, particularly how it functions in divorce cases initiated by women and men respectively. The chapter is based on a review of court summary books in three provinces. It presents findings of the cases examined for each year to indicate the percentage of women who pursue their *mahr* and the outcomes of those cases.

Chapter 6 takes the reader into the courts of Afghanistan to assess the findings of the court summary data against ongoing court practices. The candidate provides eyewitness accounts of Afghan family courts. The chapter's body is based on notes taken during court observations.

The findings of Chapters 5 and 6 are brought into the interviews of legal professionals that form the basis of discussion in Chapters 7 and 8. These two chapters are built on data collected through interviews with 40 lawyers who advocate for women in family courts in relation to their claims for divorce and *mahr*, and with judges who work in the family

courts. These two chapters are essential and unique in the history of the research in Afghanistan as, for the first time, they unfold realities normally not available for discussion.

Chapter 9 provides the concluding discussion of the research. The chapter weaves the arguments presented in previous chapters together to establish the thesis's argument through the research findings. It also presents some recommendations for possible interventions through government and civil society organisations that would help improve the current situation. The presented solutions come from review of the available remedies in a number of Muslim countries, some of which have gone through some previous reform processes to improve their family law in the relevant areas.

16. Conclusion

This chapter, in the form of an introduction, has established that the thesis explores the *mahr* concept and practice as a possible response to the lack of post-divorce financial support for women in Afghanistan. It also established that this lack is a major legal and social problem and requires urgent attention, but it is rarely discussed in Afghanistan. Given the scarcity of literature dealing with the status of divorced women in Afghanistan, the depth and breadth of the problem is described through reference to divorced women's status in developed countries and some Muslim countries with relatively similar culture and context to that of Afghanistan.

The next chapter is the first milestone in developing the thesis's premises. Describing the financial rights of women under Islamic law, it argues that a married woman is generally well supported financially under Islamic law; her husband is responsible for meeting her needs, provided she is an obedient woman and does nothing to infringe her marital duties. The chapter also argues that divorce takes away financial entitlements granted through marriage, as well as the right to inherit from a husband, thus leaving a woman with a claim only to three months' maintenance. In such circumstances, the one source of hope for a woman is *mahr*, if nothing has happened to deprive her of that right as well. This paves way for thesis to take up the *mahr* concept and assess it from theoretical and practical perspectives in the following eight chapters.

Chapter 1. Women's Financial Rights in Islam

1.1. Introduction

The introduction to the thesis outlined a stark reality of life for Afghan women, namely the lack of adequate financial support after divorce. It also noted that the right attributed to the post-divorce period is limited to the three months' *iddat* maintenance,[38] which is barely equivalent to AU$120 in value. This would be less a third of the cost of food for one person in a month.[39] And over and above the cost of food, a divorced woman has suddenly lost everything she had access to in the marital house. She may need accommodation to rent, clothes to buy (in cases where she has left the house in anger or the husband has refused to let her take any), a need for medicine may arise, and so on. If she has any children with her, the financial hardship can be even harder to bear. Thus, it is apparent that three months' *iddat* maintenance is not sufficient as a post-divorce financial support. This provides grounds for the argument of the current thesis that Afghan women do not have access to adequate financial support after divorce. However, it was stressed in the introduction that women are entitled to specific financial rights under Islamic law, and that these might form the basis for a counter-argument to negate the thesis' argument. This chapter discusses these rights and assesses them in the case of divorce and the conditions applicable to divorced women in Afghanistan.

It is essential to add this chapter to the thesis as the personal status provisions in the Afghan Civil Code are entirely based on Islamic law. Therefore, it is necessary to see what rights are available to women in Islam and whether they are applicable in post-divorce circumstances; and if these rights are applicable in Afghanistan as well. This chapter builds

[38] The Afghan Civil Code (Arts 212–216) provides for the *iddat* maintenance.
[39] Considering the cost of food for a middle-class person in Kabul, if AU$5 is allocated to dinner, AU$5 for lunch and AU$3 for breakfast, the monthly total for expenses will reach AU$390. At the rate of 50 AFN for one AUD, this equates to 19,500 AFN, while in 90 percent of the cases that are reviewed for this research, the three months *iddat* maintenance is calculated at 2000 AFN per month, or 6000 AFN for the three months.

premises for the main argument of the thesis, namely that there is no adequate financial support available for Afghan women after divorce.

First, it introduces the general forms of financial rights for women and then looks at those rights that are applicable after divorce. The chapter also explores further avenues through which some financial support could be secured for women, such as the right to *muta'a* and the right to stipulations in the marriage contract. The second chapter of the thesis focuses wholly on *mahr* in Islamic theories and literature. The order of the discussed topics in this chapter represents the importance of these rights as immediate effects of *nikah*; however, the section on inheritance assesses the topic in general. The right to maintenance is discussed first, then the right to *mahr*—briefly assessed from Qur'anic and Sunnah perspectives[40]—and the right to inheritance, followed by *iddat* maintenance and the possibilities of *muta'a* and stipulations in the marriage contract. These rights provide the overall financial context for the detailed discussion of *mahr* in this thesis.

1.2. Women's Financial Rights Under Islamic Law

1.2.1. A Brief Review of the Islamic Law/Shari'a

Islamic law, also called Shari'a, is the code of conduct that Muslims are called to follow. The term refers both to a set a of rules that come from divine law and to jurisprudential orders (*fiqhi ahkam*) derived from those injunctions. While in practice Shari'a and *fiqh* are considered identical concepts, they differ considerably in their literal meanings. Shari'a translates into the concept of a path that leads to water, or the source of water. This path is supposed to guide humankind to God; in other words, it is the path leading humankind to 'felicity and salvation' (Kamali, 2008: 2; Doi, 1984: 2). From a religious perspective, if humans observe Shari'a and follow its directions, they will be kept from going astray and will be led to God, the final destiny for all humans. Kamali describes Shari'a in its common meaning as 'commands, prohibitions, guidance and principles that God has addressed to mankind, pertaining to their conduct in this world and salvation in the next' (2008: 2/19).

[40] The right to *mahr* is not detailed here as the next chapter is fully dedicated to it.

There are two major sources for Shari'a: the holy Qur'an, which is the collection of God's words directly revealed to the Prophet Muhammad SAW, and the Hadith, the indirect revelations to him manifested in his deeds and rulings in the course of his life (Nasir, 2002: 3; Huda, 2012: 1).[41] This latter source of Shari'a is also referred to as *sunna*. In literal terms, *sunna* means the 'beaten track' followed by the Prophet and the early community of Muslims. *Hadith*, 'the story of a particular occurrence' (Fyzee, 1974: 20), is the basis for the knowledge of *sunnah*, and are said to be the most significant source of Islamic law (Hallaq: 1997: 1: Ali, 1977: ix-vi). As Ali explains:

> Hadith, as a common noun, simply means talk, or conversation but in a technical, religious sense, it is used for individual, reported sayings of the prophet, his companions, the first caliphs and others of the pious scholars in early Islam, and from this usage, it has become a generic term for the whole corpus of these sayings. (1977: v)

The importance of *Hadith* comes from the fact that years after the death of the Prophet SAW, new problems arose in the lives of Muslims to which the Qur'an was not responsive. Thus, solutions were sought in the conduct of Muhammad, and analogical deductions were made where an answer was not available in the *sunna*. Therefore, the need arose to compile the *Hadith*, and enormous efforts were made to distinguish true *Hadith* from stories merely attributed to the Prophet. The most authentic of the many *Hadith* books that emerged at the time are the works of Bukhari, who died in 256/870, and the work of Muslim (d. 261/875), (Ali, 1977: vi–vii).

In contrast to Shari'a – that is, divine law – *fiqh* refers to manmade rules developed or 'extracted' from the Qur'an and the *sunna* (Nasir, 2002: 3; Huda, 2012: 1; Mir-Hosseini, 2009: 25). In other words, *fiqh* is what the Islamic schools present through various methods to generate solutions to situations for which there is no ruling (*hukm*) in the Qur'an or *Hadith* (Kamali, 2008: 2). In its literal meaning, *fiqh* refers to 'deep understanding'; it is also called the science of Islamic law. Based on the views of classical scholars, 'fiqh is the knowledge of one's rights and obligations, derived from the Qur'an or the sunna of the

[41] The main source of Shari'a, the holy book of Muslims, was revealed to the Prophet SAW over a period of twenty-three years, AD 610–632.

Prophet, or the consensus of opinions among the learned (ijma), or analogical deductions (qiyas)' (Fyzee,1974: 18). It is notable here that fiqh is the major source of concern for Islamic feminism, as it is based on juristic interpretation. This matter will be further elaborated under the section on Islamic feminism in Chapter Three.

Fiqh consists of rules generated through *ijma* and *qiyas*. *Ijma*, which is ranked above *qiyas*, forms the third source of Islamic law. Literally, *ijma* is a decision through a consensus among Islamic scholars. Doi describes it as consensus opinions of the *muftis* and *sahaba* (jurists and companions of the Prophet SAW) on a difficult question regarding which there is no injunction in the Qur'an or *Hadith* (Doi,1984: 64). Application of *ijma* is not available for every matter that affects Muslims. For example, *ijma* was not applied in issues related to military and administrative decisions made in the Muslim Caliphate. While a great body of *fiqh* law owes its existence to *ijma*, with *ijtihad* – the 'closing of the gate' of Islamic interpretation – *ijma* is no longer used to make new decisions (Kamali, 2003: 57). *Ijma* was applied primarily during the years when the companions of the Prophet SAW were still alive, and then during the lives of their successors and the generation immediately after the successors (Kamali, 2003: 57)

Another source of Islamic law, *qiyas*, is translated as measuring or comparing something (Kamali, 2003: 179). In technical terms, a *qiyas* is the application of an existing Islamic decision (*hukm*, mostly from the Qur'an) to a new case for which there is no rule in Shari'a. This deductive process is used when a second situation has a similar cause to an existing problem for which a Quranic *hukm* exists (Hallaq, 1997: 1; Kamali, 2003: 180). Some scholars suggest that the *qiyas* was introduced by Abu Hanifa, the Sunni Imam, to avoid deviations from Islamic 'legal points' by Muslims who engaged in different philosophical studies and scholars who travelled and lived in other cultures and imported new philosophical views to the Islamic world of their time (Doi, 1984: 70).[42] A *qiyas* is not acceptable to all Muslims; for instance, Imam Malik did not rely on this approach very

[42] Fyzee argues that Imam Abu-Hanifa used qiyas frequently because the science of hadith was not fully developed at that time (1974: 34).

much (Fyzee, 1974: 34). In Shia *fiqh*, the reasoning of human intelligence or wisdom (*aql*/*mantiq*) is preferred to *qiyas* (Huda, 2012: 1).

1.2.2. Sects and Schools in Islamic Law

A significant issue in Islamic law is the differences that exist among various schools of thought. While differences between the four Sunni schools on *fiqhi* points are a matter of interpretation, the Shia–Sunni dichotomy relates to political issues. The Sunni–Shia division emerged during the selection of the successor for the Islamic Caliphate (Kamali, 2008: 4/2).[43] After the death of the Prophet SAW, a group of Muslims disagreed on how his successor should be selected from his companions and close friends. One group believed the Prophet had already appointed Ali, his cousin and son-in-law, to the leadership, and thus there was no room for the selection principle to be used (Fayzee, 1974: 39; Nasir, 2002: 5). The conflict resulted in the emergence of the Shia sect in Islam as a small group detached from the major group of Muslims (the term Shia means 'branch').

In the second and third centuries of Islamic legal history, the two sects remained relatively close, and there were no major differences in the *fiqhi* rules applied by either of the two schools of thought. The Shia sect of Islam (along with the Kharijis) emerged in Iraq, (Schacht, 1964: 17) and it has many sub-sets, of which the Athna-Asharis and Ismailis are the major groups (Fyzee, 1974: 40).

Development of Schools of Thought

The development of Islamic law is most often classified into four, five or six periods. Schacht (1964: 18) emphasises the importance of the first century for laying the foundations of Islamic law, and other scholars agree that Islamic law refers to the system developed in the first three centuries of Islam (Na'im, 2002: 2). In the life of the Prophet, the first ten years of his *hijra* (migration from Makeh to Madina) are considered significant in the development of Islamic law, as the most important legal decisions of his time were made in this period (Fyzee,1974: 32).

[43] The citation refers to Chapter 4, page two of the Google scholar version of the book.

After his death, four Caliphs ruled Muslims for 30 years, comprising the second period in the life of Islamic law. The Caliphs followed the footsteps of the Prophet in managing the affairs of Muslim society (Fyzee,1974: 32). Among the four Caliphs, Umar is notable for his efforts to expand Islamic territory and the successful administration of the young state that generated Islamic civilisation (Hallaq, 2005: 29). The major outcome of the second period was the development of the Prophet's *sunna*.

The third period, extending from the end of the Caliphs' time to the third century, is significant for the formation of Islamic schools and collection of *Hadith* with their established authority as superior to collections of *sunna* (Fyzee, 1974: 33; Schacht, 1964: 15: Na'im, 2002: 4). Of the many schools that emerged in this period, only a few survived, of which the Hanafi (767/146), Malik (174/795), Shafi (820/199) and the Hanbali (855/234) are the most important, along with the Shia school of Imam Jafar Sadeq (765/144) (An-Na'im, 2002: 5).[44]

The Hanafi school is known as the most liberal, and Shafi himself is ranked as a highly qualified Imam.[45] He was the founder of Usul science in *fiqh* as well as the theory of Islamic jurisprudence (Fyzee, 1974: 34). The Hanbali school of Islamic thought is considered less important. The division between Shia and Sunni jurisprudence came three decades after the death of the Prophet (Kamali, 2008: 19). The Turkish revolution and end of the Caliphate in 1922–1924 is considered end of the fourth period in Islamic legal development. After this era, Islamic law becomes subject to change as a result of the enactment of modern laws in Muslim countries (Fyzee, 1974: 36). Islamic law for the purpose of this thesis refers to these laws that are developed in the modern period. The following section describes the financial rights to which women may be entitled under Islamic law.

[44] The years indicate the dates these jurists died.
[45] He was the student of Imam Malik and Imam Muhammad who was one of the two famous pupils of Imam Abu Hanifa.

1.2.3. Financial Rights of Women in Islamic Law

The major forms of marriage-related financial rights for women in Islamic law are the right to *mahr* and maintenance, to inheritance and to *iddat* maintenance. In the most authentic classic sources of Sunni *fiqh*, such as the *Al-Hidaya*, these are addressed in the *nikah* and inheritance chapters, but in modern Islamic family law books, as well as those about women's rights, these entitlements are referred to as women's financial rights (Nasir, 2009; Doi, 1992; Engineer, 1992; Ali, 2004; Khan, 2000). Two family law books published in the recent years in Kabul and used in the Family Law courses taught in Kabul University, Adalatkhwah (2017) and Abdullah (2010), offer similar information. In Persian academic literature, mostly published in Iran, the right to *jehizia* and other rights such as *nehla* (small gifts) and *ujratul mithl* (payment for household chores) are also mentioned (Mihrpour et al., 2014; Movahedian, 2015). The *Family Law* books authored by Roshan (2016), Katouzian (2015) and Gurji et al. (1993) are further examples in this regard. However, the Persian books do not specifically mention the right to inheritance in this classification, although the discussion is included in the *nikah* chapters.

From a theoretical perspective, and based on these various rights, a married woman should not need to worry about financial security if her husband is still alive, because he is responsible for maintaining his wife and paying household expenses (Marghinani/Nyazee: 1045;[46] Ali, 2011: 2 80; Siddiqui, 2015: 161). However, there may be circumstances in which a woman is still in a marriage, but such economic protection does not exist. First and foremost, she loses the maintenance if she is considered a disobedient wife. This literally means that she is not offering *tamkin* to the husband—that is, she is refusing sexual intercourse for no valid reason—or she has left the marital home without the husband's permission or prior consent (Ali, 2011: 282; Baillie, 2011: 98). In another case, a husband may be financially incapable of fulfilling his obligations. Also, if he is married to more than one wife, he may not treat all his wives equally. This is especially evident in Afghanistan,

[46] The Sunni *fiqh* classic *Al-Hidaya fi Sharh Bidayat al-Mubtadi*, authored by Burhan al-Din al-Farghani al-Marghinani (d. 1197/593 AH), previously translated into English from Persian, is now available in a direct translation from its Arabic sources by Dr Imran Ahsan Khan Nyazee. To distinguish this translation from other *Al-Hidaya* versions the candidate has used, this translation is hereafter cited as (Marghinani/Nyazee: page no). Citations of *Al-Hidaya* with its volume and page number are of another version of the book in Persian or Arabic.

where men who marry several wives tend to abandon the earlier ones (Max Planck Institute, 2005: 20).[47] Theoretically, such treatment is not permitted, as one of the conditions of polygamy in Islam is equity for all wives (Abdullah, 2010: 206; Jaafar Mohammad & Lehmann, 2011: 6). Islam does not permit unequal treatment of wives or preference for one, 'at the cost of another' (Philips & Jones, 2005: 56).

The husband's obligation to maintain his wife in Islam means that, while still in a marriage, a Muslim woman is financially secure, because her husband must provide for her. However, if the marriage breaks down for any reason, she may not have any financial resources to rely on for the rest of her life. Divorce has 'severe economic consequences for women which are harsher in the Afghan context' (USIP, 2014: 26). When divorce becomes effective, the right to ongoing maintenance and the right to inherit from a husband lapse (Doi, 1992: 167; *Tashil-Al-Hidaya*, Vol 3: 616).

On the right to maintenance, the Persian translation of *Sharhul-Hidaya* refers to the view of Imam Shafi that a divorced woman is not entitled to maintenance except for the three-month *iddat* period, discussed below (*Shah Faisal*, Vol 3: 616). However, this length of maintenance is not something to count on, particularly in the Afghan context, where, in around 90 per cent of the 1117 cases reviewed for this research, the decided or paid amount for *iddat* maintenance was just AFN 6000,[48] for the entire three-month period.

Moreover, while the right to inherit from parents may work for Muslim women in other countries, it is not fully effective in Afghanistan.[49] Culturally, a request by a woman for parental inheritance is considered a dishonour to her family (USIP, 2014: 20). If the sharing of an inheritance is disputed, a woman may get a portion, but she is then likely to be treated

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[47] Although polygamy is not a matter of interest to this thesis, to explain briefly, the most common problem with polygamy in Afghanistan is that most men abandon their first wife and her children, leading to serious problems for that woman, including economic vulnerability (MPI, 2005: 20; WCLRF, 2006: 40).
[48] Equivalent to around AUD 120.
[49] This does not mean that no woman in Afghanistan receives her inheritance. The Islamic law of inheritance is in effect, but, culturally, Afghan parents expect their daughters and sisters to claim *mahr* instead. Some believe if women take *jehizia* from a parent, that is enough, but the basic reason arises from poverty and a poor economy. Most family assets consist of land that may not have commercial value.

badly and estranged from other family members, as in Afghan families only brothers typically inherit the family property on the death of the parents (QARA, 2011: 11).[50]

Effectively, the only post-divorce financial right for a Muslim woman is the three-month *iddat* maintenance. If a divorcing wife is pregnant, the maintenance will be extended until the baby is delivered (Siddique, 2015: 164; *Al-Hidaya*, Vol 2: 200). In some circumstances, it is possible to extend this until the child is weaned, but that depends on the will of the husband and the divorced wife.

1.2.4. Woman's Right to Mahr

Since discussion of women's financial rights in Islam focuses on *mahr*, a detailed description of the right is essential. This section addresses the topic from the Qur'anic and hadith perspectives to address the legitimacy of the right in Islam based on the major two sources of Sharia law. Chapter 2 is entirely dedicated to *mahr*, exploring the topic in more detail in the literature.

Mahr in the Qur'an

The term *mahr* does not appear in the Qur'an. Equivalent Qur'anic terms for *mahr* connote meanings such as gift, present or charity. However, the Qur'an frequently emphasises the importance of *mahr* and the necessity of its payment, and these references in turn point to *mahr* as an essential requirement of *nikah*.

Several verses emphasise the payment of *mahr*. Verse 4 of the *Nisa* chapter (4:4) of the Qur'an is considered the most express order for payment of *mahr*, as most of the text written on *mahr* from an Islamic law perspective refers to it. The verse calls on men to 'give women their due dowries, equitably'. The next verse giving the same order is 4:24 which advises men that they are free to marry any women they wish (except married women), provided they pay them *mahr*. Similarly, Verse 25 in the same chapter allows men to marry slave women if they cannot afford free women of their choice, but the verse

[50] In research conducted by the WCLRF, 44% of participants agreed with the statement 'women should not get their inheritance', and 45% responded that women cannot have their inheritance because this would contradict 'a cultural rule'. Similarly, 7.9% of the interviewees said that a woman's claiming an inheritance will lead to 'animosity' (WCLRF, 2013: 1).

stresses again that *mahr* should be paid. Verse 5:5 specifies that men are permitted to marry chaste women who are believers, but again, the emphasis is on payment of *mahr*. Because these three verses clearly require *mahr* payment, avoiding this charge is considered unacceptable to God.

Verse 33:50 mentions the term 'pay', advising the Prophet SAW which women he can marry and that his wives, to whom he has paid *mahr,* are halal.[51] Verse 10 of Surah 60 also reaffirms a man's obligation to pay *mahr*. The main command in the verse urges Muslim men not to send back women who seek refuge with Muslims after leaving their disbeliever husbands. It recommends that they keep such women but return their dowry to the husbands they left behind. In short, Muslim men may marry these women, if they have paid their *mahr*.

In addition to the clear requirement for payment of *mahr* as an essential part of *nikah*, the Qur'an also calls on men not to take back *mahr* from their women in case of divorce. Thus, if a man wishes to divorce his current wife to marry another woman, he may not seek repayment of the *mahr* from her. This guidance comes in verses 4:20 and 4:21, as well as 2:229:[52]

> But if you intend to replace a wife by another and you have given one of them a cantar [cowhide bag full of gold, i.e. a great amount] as mahr, take not the least bit of it back; would you take it wrongfully without a right and [with] a manifest sin? (4:20) And how could you take it [back] while you have gone in unto each other, and they have taken from you a firm and strong covenant? (4:21)

Verse 2:229 concerns the number of divorces permitted in a marriage, but it also refers to the *mahr* requirement. The verse specifies that in case of *khul* divorce, it is acceptable to seek return of *mahr*:

> And it is not lawful for you [men] to take back [from your wives] any of your *mahr*, which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah [i.e. to deal with each other on a fair basis]. Then if you fear that they would not be able to keep the limits ordained by Allah, then there is

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[51] 'O Prophet (Muhammad)! Verily, we have made lawful to you your wives, to whom you have paid their *mahr*' (33:50).
[52] Verse 4:19 also prohibits men from taking back part of *mahr* given to women.

> no sin on either of them if she gives back [the *mahr* or a part of it] for her *al-khul* [divorce]. These are the limits ordained by Allah, so do not transgress them.

Verse 237 from *Surah Baqara*, specifies the status of *mahr* in cases of divorce before and after sexual consummation:

> And if you divorce them before you have touched [had sexual relations with] them, and you have appointed unto them the *mahr*, then pay half of that [*mahr*], unless they [the women] agree to forgo it, or he [the husband], in whose hands is the marriage tie, agrees to forgo and give her full appointed *mahr*. And to forgo and give [her the full *mahr*] is nearer to *at-Taqwa* [piety, righteousness] … And do not forget liberality between yourselves. Truly, Allah is All-Seer of what you do. (2:237)

This verse clarifies that once *mahr* is fixed, it is payable even if the woman is divorced before marriage consummation. However, in that case, half of the fixed *mahr* is mandatory, although the man is encouraged to give the full amount. Indeed, the verse encourages both parties to forgo half to the other. Verse 236 is considered a reference source for scholars on the right to *muta'a*, and it raises the possibility that if *mahr* is not fixed on marriage, the marriage is still acceptable, but *mahr* must be fixed and paid later. The term 'suitable gift' in this verse is *muta'a* in Arabic, and therefore, this verse is the main source for interpretations of *muta'a*, further explained in the following section.[53]

These verses are the source of *mahr* laws in Sharia. Some of them cover more than one topic related to *mahr*. For instance, the last part of Verse 4:24 allows negotiation on the amount of *mahr*, and Verse 4:4 permits men to enjoy *mahr* if their wives bestow either the whole or a part of the *mahr* on them.

On the question of whether *mahr* can be cash or 'in kind', some literature refers to two verses of Surah 28 in which Moses agreed to work for eight years as servant to the man who had proposed him to marry one of his daughters. Although there is no clear command to Muslims and the verse narrates only the story of Moses, some scholars consider that such work or service can be considered *mahr* (Takami, 2017: 121).

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[53] 'There is no sin on you, if you divorce women while yet you have not touched them, nor appointed unto them their *mahr.* But bestow on them (a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good' (2:236).

As such, the Qur'an places great importance on *mahr*, but in practice, especially in the Afghan context, significance and respect are not vested in the concept. The research findings presented in subsequent chapters of this thesis reveal different dimensions of *mahr* application. In this chapter, given that Sunnah is the second most important source of Islamic law, *mahr* is explored in the conduct of the Prophet Muhmmad SAW. The next section briefly touches on *mahr* in the Sunnah.

Mahr in Hadiths

Compared to references in the Qur'an, there are few hadiths concerning the Prophet Muhammad SAW and *mahr*. The most famous hadith, frequently mentioned in Islamic literature, is one concerning the teaching of Qur'an as *mahr*. The story goes that one day in a gathering of people, a woman approached the Prophet (SAW), saying she would like to present herself to him, meaning she wanted him to accept her as one of his wives. He looked at her but remained silent. The woman repeated her proposal three times, but he did not respond, only lowering his eyes. One of his companions said, 'Oh, messenger of Allah, if you don't need her, marry her to me'. The Prophet SAW asked what he had to offer as *mahr*, and the man said he had nothing. Then the Prophet SAW told him to go and search his home to find something, even if only an iron ring. The man went to his home but returned empty-handed. He had only the trousers he was wearing, without even another piece of clothing to cover to his upper body. Then the Prophet SAW asked if he knew some verses of Qur'an. When the man said he did, the Prophet SAW married the woman to him, assigning to him the task of teaching those verses to his wife as her *mahr*. This hadith is mentioned in *Sahih Bukhari* (Vol 6: 27 and Vol 3: 702) and *Sahih Muslim* (Vol 1: 536). The story also appears in the *Termezi* textbook edited by Alama Taqi Osmani (Vol 3: 322).[54]

Further hadiths from the Prophet SAW indicate that he granted freedom to two slave women for their *mahr* and then married them (Vasei & Amiry, 2013: 84). *Bukhari* (Vol 3: 668) and *Muslim* (Vol 1: 530) report that when a Muslim army invaded Khaibar and was victorious over the Bani Quraiza and Bani Nazir tribes, Safyia, the daughter of Bani

[54] There are reported to be six major hadith collections in Islam; while there may be more than these, others are not highly regarded. *Sahih al-Bukhari* is considered the most authentic hadith book, followed by *Sahih al-Muslim*, *Sunnah Abu Dawood* and *Jami Termedhzi*.

Quraiza's chief, was taken slave by Dihya, one of the Sahaba.[55] A messenger came to the Prophet SAW, complaining that it would not be fair on Safyia to go with Dihya; rather, she deserved to be with him (the Prophet SAW). The Prophet SAW called on both, proposing that Dihya get another slave. Then he asked Safyia if she would like, in exchange for her freedom, to marry the Prophet SAW, and she agreed.

A similar story is told about Juraira, his other wife. In the expedition of al-Muraysi and Banu al-Mustaliq, Juraira, the daughter of the tribe's chief, was given in slavery to Sabet ibne Qais Ibne Shamass.[56] Juraira negotiated the price for her freedom with him, and then rushed to the Prophet Muhammad SAW to ask for assistance with that money. The Messenger of God proposed that she marry him, and he would free her in exchange for her *mahr*. She agreed, and later her father and entire tribe converted to Islam.[57]

Another hadith concerns the *mahr* of a woman who was separated from her husband through *li'an* (mutual repudiation). The man accused his wife of adultery and was separated from her for that reason; he asked what would happen to the wealth/property he had given in *mahr*. The Prophet SAW responded that the husband had no right to the *mahr* for two reasons: first, if he was right in his accusation, he had already consummated his marriage, and therefore the *mahr* given to the woman belonged to her; on the other hand, if he was lying, he was too far from the truth to be eligible to claim back the *mahr* (*Bukhari*, Vol 3: 786).

Further excerpts from books of hadith describe suggestions from the Prophet SAW to keep *mahr* at a reasonable amount, but he clearly recommended it be paid. The highest amount of *mahr* for his wives, reported in *Sahih Muslim*, is 500 dirham (Vol 1: 536); however, as noted above, he also suggested a *mahr* of only an iron ring (*Bukhari*, Vol 3: 703). *Muslim* reports that Abdur-Rahman bin Auf married a woman from Ansaar and when the Prophet

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[55] 'Sahaba' refers to the first few Muslims who were friends with the Prophet SAW.

[56] The main source of this citation is a YouTube lecture, 'Seerah of Prophet Muhammad 52—Background of the wives of Muhammad-Yasir Qadhi' (posted 6 March 2013), available at <https://www.youtube.com/watch?v=NZD-MuFCoEQ>.

[57] In the hadith, when the father of Juraira came to take her with him, the Prophet SAW gave her the right to choose if she wanted to go. This means that she was given the right to divorce, but she decided to stay as his wife. From this hadith, *fiqh* scholars have determined that a woman can negotiate the right of *talaq* with her husband if he agrees to give it to her.

SAW asked him how much *mahr* he paid, the man answered, 'a small amount of gold, worth about five dirham' (Vol 1: 536). In *Bukhari* this is reported to be gold equivalent in size to a date stone.

There is also another *hadith* reported from Ibn Umar that Prophet SAW declared *shighar nikah* to be forbidden (Ali, 1977: 273). This is a very common type of *nikah* among Afghans as well (explained in Chapter Five), in which one woman is married in exchange for another woman, mostly to avoid payment of the bride price and reduction in wedding expenses. It is said that Prophet SAW called such a *nikah* in which women are exchanged for each other's *mahr* to be illegitimate from an Islamic perspective.

In summary, at the time of the Prophet SAW, how the amount of *mahr* was determined seems to be less important than the actual act of giving.

Mahr in Islamic Schools of Thought

The attention paid to *mahr* in the Qur'an and many verses guiding *mahr* affairs does not leave much room for major differences among *fiqh* scholars. Since the main rules on *mahr* are presented there, the discrepancies in views of jurists and their pupils are not of great significance. Rather, there is 'uniformity' in opinions of *fiqh* scholars on *mahr* (Mir-Hosseini, 2000: 73) and the differences among Muslim schools of thought in defining *mahr* are relatively trivial. As the quote below states:

> Shafi's define it as that mal which validates conjugal rights to man. But other jurists have defined mahr as that mal which is given to the woman in consideration of the benefits taken from her. It means only that mal which is given in case of a proper and genuine marriage. (Al-Fiqh al-Mazahib al-Arba'ha, in Wani, 1996: 11)

Thus, it is not necessary to examine more closely these minor discrepancies in the views of juristic scholars from each school of thought on every matter related to *mahr* in this section. The next chapter focuses exclusively on the topic of *mahr* and, where relevant, the differences in jurisprudential approaches are highlighted there.

1.2.5. Women's Right to Maintenance

The major financial right for a married Muslim woman is maintenance. The Arabic term for such maintenance is *nafaqah*, and it comes into immediate effect with a *sahih* or valid

nikah.[58] All the classic and modern writings addressing *nikah* and family law matters agree on this, with no disagreement as to a wife's right to maintenance, provided the conditions for that entitlement are met. The husband is required to provide based on his financial means (Mansoori, 2012 : 98). In the *Al-Hidaya*, it is clearly stated that 'the moment a wife submits herself to her husband in his residence, provision of food, clothing and shelter to her becomes obligatory' (Vol 2: 191).[59] Feminists believe this obligation on the men to provide *mahr* and *nafaqa* for the wife puts them in a position of authority to then rule women and their sexuality (for further details, see discussion in the section on *mahr* and liberal feminist views).

The obligation of maintaining a wife comes first on the list of financial duties a husband is expected to undertake (Fyzee, 1974: 212).[60] However, if a wife is a minor and unable to have sexual intercourse with her husband, she is not entitled to maintenance, even if she resides in the same house as her husband (Marghinani/Nyazee: 1048). The marriage of Prophet Mohammad SAW and Ayisha, his youngest wife, who was given to him in *nikah* two years before she reached the age of puberty, is an example of this exception. However, he did not take her to his home, nor did he provide for her as she was still a minor and not capable of performing her marital duties (Doi, 1984: 205).

Nafaqah/maintenance includes food, clothing, shelter (Marghinani/Nyazee: 1045). Medication is not mentioned in the classic sources, and it is often subject to differences among *fiqh* scholars. Contemporary scholars consider medication part of the *nafaqah* (*Bukhari*, Vol 6: 80). If a woman's social status requires her to have servants at home to do chores for her, or if she is not able to do the household work due to some illness or disability, provision of servants could also be part of the maintenance (Nasir, 2009: 105). A

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[58] Marriage in Islamic law could be classified into *sahih* (valid/sound), *batil* (void) or *fasid* (unlawful). In a *sahih* marriage, all the conditions and procedural requirements are met (Esposito, 2001: 18), producing immediate results such as *mahr*, maintenance, inheritance and kinship.

[59] *Al-Hidaya* justifies the obligation on the husband based on two reasons. First, on the basis of provisions in the Qur'an and hadith; second, *nafaqah* is obligatory for a husband as the wife's status is similar to that of imprisonment with the husband.

[60] The obligation of *nafaqa* in Islam includes children, parents, and siblings who might be poor and have no other means of living. Under Islamic law, only the maintenance of wife and minor children is obligatory for a man (Nasir, 2002: 173). In case of other relatives, including parents and siblings, if they are poor, provision of maintenance to them becomes an obligation based on the verse (4:211).

wife cannot be obliged to live with other relatives of her husband in the same house, especially if he has another wife (Fyzee, 1974: 213). Under Afghan law, a man who is married to two women cannot force them to live together; separate housing should be provided for them (Art 116, ACC). If a husband is not fulfilling his responsibility in this regard, his wife can take legal action against him.

The right to maintenance may also lapses based on a wife's failure to comply with her marital obligations (Ali, 2011: 282). Jurists have provided a list of occasions on which a wife will lose her right to maintenance. According to some scholars (Mansoori, 2012: 99; Doi, 1984: 205), these include:

- if a wife moved from her matrimonial home to some other place without her husband's permission or without any religious reason, taking her possessions with her;
- if she travelled without his permission;
- if she put on *ihram* for *hajj* without her husband's permission (if he went with her or she travelled with his permission, the maintenance will be given);
- if she refuses sexual intercourse with her husband;
- if she is imprisoned after committing a crime; and
- if her husband dies and she becomes a widow. In such a case, her right of inheritance supervenes.

In most of the relevant books, a wife's disobedience (*noshooze*), especially rejecting sexual intercourse with her husband (*tamkin*) is the first ground for losing the right to maintenance. However, *Al-Hidaya*, the most valued source of Hanafi *fiqh*, does not endorse this view. The book's reasoning (Vol 2: 192; Marghinani/Nyazee: 1048) in the *nafaqa* chapter suggests that if the wife is still in the husband's house, her status is considered that of imprisonment because, for example, he might force her to have sex. Therefore, her entitlement to the right of maintenance does not lapse. She loses the right if she has left the marital house, and she will not be entitled to it until she returns there.

1.2.6. Women's Right to Inheritance

Women's right to inheritance in Islam is complicated, and it tends to be widely used as the basis for criticising Islam. Under Islamic law, the share a woman is entitled to inherit is half of that allocated to a man (Harari, 2017: 2; Mir-Hosseini, 2013: 11). However, Islamic law scholars present defences against this critique. Firstly, it is argued that at the time Islam recognised the right of inheritance for women and gave them a share in the wealth and property of a deceased relative, Arabs did not perceive women as deserving of such a right (Chaudhry, 1998: 513). Pre-Islamic Arabic societies recognised only agnatic relations with inheritance, and since women did not participate in wars where plunder was captured, they were not seen as deserving of a share in any inheritance based on such booty (Cheema, 2017: 26; Ali, 2004: 87).

Secondly, and the most frequently presented argument to justify gender difference in inheritance rights, is that a woman is maintained by her husband, she has a right to *mahr* and so on. Cheema (2017: 25) lists these differences and women's financial privileges as:

1. Male relatives are required to provide to their female relatives.
2. A Muslim woman is not legally required to spend on others in the family.
3. Muslim men have more financial responsibilities but women do not.
4. Muslim men are obliged to pay dower and maintenance.
5. It is the husband who bears the cost of living and education of children etc.

This argument seems to assume that married women already have financial resources, and thus they do not need a large inheritance. Obviously, this argument may not work for every woman, as the amount of *mahr* is not fixed and there are women who never marry (Ali, 2004: 87). However, Zainab Chaudhry, in *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islam*, refutes the claim of gender bias or discrimination in Islamic inheritance law, arguing such claims are baseless and 'false' (1998: 554). In a detailed explanation of inheritance law and its functions, she provides four examples in which a woman received either equal or double shares compared to male heirs (ibid: 535–536).

Amina Wadud presents a similar message in *Qur'an and Woman*, where she describes the share of a female heir when she is an only child. In such a case she would receive half of an estate, and the remaining half would then be divided among the rest of the heirs (1999: 87).

For her inheritance share under Islamic law, a married woman is entitled to one-fourth of her deceased husband's property or wealth. This is in cases where the husband does not have a child, whether from this wife or from another woman (Moors, 1995: 51; Khan, 2007: 126). If he does have a child, then the wife's share is one-eighth. The child does not affect the wife's status in Shia law; however, she is not entitled to the real property and she can only claim the cost of it (Khan, 2007: 126). The real question of equity may arise with the status of women who must share this one-eighth portion. The one-eighth share would be divided equally among his wives if the deceased husband was married to more than one woman (Moors, 1995: 51; Baillie, 2011: 699).

However, what matters in this context is that a wife's right to inherit from her husband lapses with divorce (Doi, 1992: 167). The two parties will not be able to inherit from each other once the *iddat* period is over. The Maliki school of thought suggests that if a wife is divorced when her husband has an illness from which he does not recover, she will still be entitled to an inheritance. That is because the divorce might be intentional to deprive her of her rights. Maliki thought permits a wife to inherit in such an event, even if she has already remarried (Doi, 1992: 167). In his *Introduction to Islamic Law*, Schacht (1964: 168) argues that divorce based on a husband being bed-ridden does not affect his wife's right to inheritance.

1.2.7. Women's Financial Rights After Divorce

As mentioned above, when it comes to divorce, the right to maintenance and right to inheritance from the husband cease, but the right to *iddat* maintenance applies for up to three months/three menstrual cycles. This section assesses the right to *iddat* maintenance, especially for Afghan women.

Iddat Maintenance for Divorced Woman

Iddat is a limited right to the provision of maintenance to a divorced woman. In other words, *iddat* allows a woman to benefit from a level of maintenance like that provided to

her during marriage. *Iddat* begins from the first day that divorce is pronounced and ends after three months—that is, after the woman has gone through three menstrual cycles. The term *iddat* is rooted in the Arabic *al-Adad*, which means number. In Sharia law, *iddat* refers to a waiting period of three months or three menstruation cycles in which a divorced woman should avoid remarriage (Marghinani/Nyazee: 1010; Mansoori, 2012: 181). Remarriage is prohibited in this period mainly to determine whether the woman is pregnant. In such a case, the *iddat* period is extended until the baby's delivery (*Al-Hidaya*, Vol 2: 170; Abd al Ati, 1977: 25).[61]

The Qur'anic injunction for divorce related *iddat* is vested in Verse 2:228, which orders a divorced woman to wait for three monthly cycles. The philosophy of *iddat* suggests this waiting time is essential to clarify that the woman is not pregnant, leading to future confusion over paternity (Marghinani/Nyazee: 1010; Doi, 1992: 100). In addition, *iddat* allows a husband to reconsider leaving his wife, and, in the case of a widow's *iddat*, to give her time to mourn her husband's death (Mansoori, 2012: 186; Nasir, 2002: 137). As Doi suggests, Islam prefers reconciliation to separation between spouses, and thus this physical separation period is a time for rethinking a divorce for the sake of children and other family members (1992: 100).

Abd al Ati explains that since *iddat* allows for 'probation, reconsideration and transition', a long period would be difficult to go through and a shorter time 'more tempting'; thus, three months is considered appropriate (1977: 246). The type of divorce, whether *talaq* or divorce initiated by a woman, does not affect the obligation of *iddat*. This means any type of marriage dissolution, and even valid retirement, will be followed by *iddat* (Rahman, 1978: 681).[62] However, if no consummation has happened before divorce and the couple were not together in a valid retirement, there is no requirement for a wife to remain in *iddat* (Esposito, 2001: 20).

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[61] A widow is also required to wait for this period before she remarries; the specific *iddat* period for her is four months and ten days, again three menstrual cycles (*Al-Hidaya*, Vol. 2: 171). In both type of *iddat*, if the woman is pregnant, maintenance continues till the end of pregnancy (Siddiqui, 2015: 164).
[62] Valid retirement is the time of full privacy between husband and wife where others cannot see them.

During *iddat*, a husband is obliged to maintain his former wife (*Osmani*, Vol3: 230). If she is pregnant, the maintenance is extended to cover the entire pregnancy plus two years of nursing (Esposito, 2001: 35). A woman receiving *iddat* is not required to leave home during this period; she does not need to go out as her maintenance is provided by her husband (Herawee, 2012: 192). The *iddat* period requirement comes from Verse 2:228 of the Qur'an where the Prophet SAW was reported to have ordered Fatimah, the daughter of Qais, to remain in her husband Umar Maktum's house during her *iddat* period (Doi, 1992: 100). Even if a woman was away from her husband's home when the divorce occurred, she was still required to return to the husband's house for the entire period (*Sharhul-Hidaya*, Vol 3: 554; Doi, 1992: 104).

Given the purpose of *iddat*, the waiting period and maintenance are clearly intended to ensure that a man's right to return to his wife is safeguarded while he considers his wish to end the marriage. Therefore, *iddat* cannot accurately be called a right for a woman, even though she also benefits from the practice. The philosophy of *iddat* implies that it protects the interest of the husband and any possible child, while removing any future confusion about paternity that may lead to disputes. The interests of the wife come after these prior concerns. One of the main purposes of *iddat* is also to allow the couple rethink their desire for divorce and to leave a door open to a possible reconciliation (Ali, 1990: 501). To give effect to these rights, the husband is accountable for providing financial support to his wife. This responsibility tends to support the conclusion that *iddat* maintenance is a post-divorce financial right for a woman; however, this does not really seem to be the nature of the right.

Iddat Maintenance in the Afghanistan Context

Looking at *iddat* in Afghanistan, two things need to be emphasised: first, the possibility of woman's residence during the *iddat period in the* marital house, and, second, the amount a woman is likely to receive. This latter element is reflected in the research conducted for this thesis. On the former, one could say that in practical terms, from the perspective of someone who has lived in Afghanistan and knows the culture well, a woman will not wish to remain in the same house with her husband after divorce. This is easy to explain. When problems between married couples become so acute that they wish to divorce, probably they no longer want to continue living under the same ceiling. In Afghanistan, if the

divorce is initiated by wife, it invariably means that the relationship has descended to a level where her husband's house is no longer safe for her.[63]

Many reports describe domestic violence in Afghanistan and its miserable consequences for women (see e.g. Global Rights, 2008). In numerous cases, the victims opt to end their life by suicide or self-immolation (Human Rights Watch, 2012: 55). Women who fight for divorce are often placed in safe houses run by NGOs that work for women's rights improvement (Uitert, 2015; Human Rights Watch, 2012: 4).[64] Often, women are not even safe with their own families (Human Rights Watch, 2012: 4) because divorce carries a stigma associated with dishonour to a family, they will not support a sister or daughter who seeks it. In addition, a husband who is keen to punish his wife for dishonouring him in society by seeking divorce can track her and continue his harassment. Thus, it is not practical for a woman to remain in her husband's house if she has initiated the divorce.

If divorce is initiated by a husband, the wife might be willing to stay even if she is not happy to be divorced, but her husband may not allow her to remain. Most often, divorced women are evicted from their home, the common way husbands deal with unwanted women in Afghanistan. More importantly, the woman's brothers and father may not allow her to stay in her former husband's home, as she is no longer considered *mahram* for that man. This attitude mostly comes from a lack of awareness about the types of divorce. Many Afghans may not know that there are three rights of divorce for a married man, and he still has the right to return to his wife in the first type (Doi, 1992: 84). Therefore, either a woman leaves immediately after she learns from her husband that she is being divorced, or, in most divorce cases, the husband evicts the wife from the house.

As for the amount paid in *iddat*, court observations undertaken for this research revealed that when women-initiated divorce cases proceed in the courts, *iddat* maintenance is mentioned and addressed. However, the amount is usually trivial, scarcely covering a single

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[63] Interview with Judge 22.

[64] Mareile van Uitert, 'Afghan Shelter Provides Security for Abused Women' *Al-Jazeera* (posted 27 July 2015), available at <www.aljazeera.com/indepth/inpictures/2015/07/afghan-shelter-security-abused-women-150721112404787.html>, last visited 25 June 2019.

person's cost of living for one month.[65] Court records show that in almost 90 per cent of cases that were reviewed, allocation for a three-month period amounted to 6000 AFN, or about AU$115–120. The interviewed Lawyers (2 and 26) said the amount awarded to women by the court for *iddat* maintenance is so small as to be humiliating.

Iddat Maintenance in Afghan Civil Code (ACC)

Iddat maintenance is regulated under Articles 212–216 in the Afghan Civil Code (ACC). The law clearly states that in *tafriq* cases in which a woman initiates the divorce, the right to *iddat* maintenance collapses if it is proven that she committed a fault that caused the divorce (Art 114). This is similar to the *mahr* provision under Article 218 that deprives a woman of *mahr* if it is found that she caused the conflict that ends in divorce. These articles mean that if a woman is considered at fault in the divorce, she loses all her financial rights. The law also stipulates that if a woman does not claim the right during her *iddat* period, she loses the entitlement to claim it when the period ends (Art 116).

Seeking Maintenance Beyond the Iddat Period

Regardless of whether an *iddat* maintenance amount is sufficient to provide financial security for a divorced woman, this short-term support ceases about three months after divorce. Thus, a woman with no other source of income and dependent on maintenance from her husband during her married life is very likely to fall into destitution after divorce. Yet, pointing out this problem and its negative effects on Muslim women tends to trigger confrontation from conservative Muslim communities, especially among men. India's experience in the aftermath of that country's Supreme Court decision in the mid-1980s on the Shah Bano case is indicative of how sensitive Muslims can become when a woman demands maintenance. Although Shah Bano's case was strongly politicised and is not fully relevant to this argument, the problem would not have escalated if her husband had not confronted her with a legitimate demand, based on the fact that Islam does not provide for a divorced woman beyond the *iddat* period. This is the major point of the case that requires it to be mentioned here.

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[65] In the court records reviewed, along with the *mahr* amount, *iddat* maintenance is also recorded.

In this case, Shah Bano Begum, the mother of five children, was kicked out of the marital home when her husband Mohd. Ahmad Khan, a lawyer by profession, married for the second time. Shah Bano referred to court asking for maintenance, and the court ordered the husband to pay a small amount. He then sought remedy for rejection of the court order in divorcing the wife, as, under Islamic Law, there is no maintenance for the divorced wife after the three months of *iddat* period (Mansoori, 2012: 106–108). The husband challenged the Magistrates Court's order and took the case to the Supreme Court of India. But the latter's upholding of the lower court's verdict resulted in political turmoil that eventually resulted in the assassination of the Prime Minister Rajiv Gandhi. A more detailed version of the case with the relevant citations is provided below.[66]

There is no clear answer to the shortage of financial support for divorced women in Islam, although contemporary scholars have tried to extract one. For instance in response to a targeted question in a public lecture, Dr Zakir Naik (a famous Muslim scholar in India) responded that a divorced Muslim woman can remarry and get another *mahr*. He added that it would be unfair on a man to pay *mahr*, provide maintenance during the marriage and then continue supporting the divorced wife. He said that God is extremely just, he did not place women so high to harm men; that is why God has not put this responsibility on men. The divorced woman if cannot marry again, she might have a son to maintain her and in lack of

[66] Shah Bano Begum married Muhammad Ahmad Khan in 1932. In 1946, her husband married another wife and evicted Shah Bano from the family home, along with their five children, in 1975 (Mody, 1987: 936). Shah Bano filed a case in the Magistrates Court in 1987, claiming maintenance of Rs 500 per month (Mody, 1978: 936). In response, Ahmad Khan divorced Shahbano and then argued that, based on Islamic family law, he had no obligation to maintain her beyond the *iddat* period. He also said that her *mahr* had been paid and she had been maintained for the two years. Under Section 125 of the Criminal Procedure Court of India, the Magistrates Court decided that Rs 25 (AU$2) per month should be paid to Shah Bano (Rahman, 1990: 478). Ahmad Khan appealed this decision to the Supreme Court of India. He argued that, according to the Muslim Personal Law, his maintenance duty ended after *iddat*. The Supreme Court not only upheld the original decision, but also increased the amount of maintenance to Rs 179.2 (Mody, 1987: 936). This decision angered the Muslim conservative community and a political crisis resulted (Hassan, 1989: 44). The Muslim opposition forced Prime Minister Gandhi to enact a new law, the *Muslim Divorced Women's Protection Act of 1986*, which nullified the Supreme Court of India decision (Rahman, 1990: 481) but reaffirmed the payment of *iddat* maintenance and other rights under Islamic law. Despite this, the country became embroiled in political confrontations and media reports indicate that the conflict that arose (mainly among the Hindu population) eventually resulted in Gandhi's assassination in 1991.

that, government can take the responsibility. Where government does not do that, it is the Muslim society that should be responsible for maintenance of divorced women'.[67]

Another contemporary Islamic scholar, Maulana Wahiddudin Khan, believes that divorced women would not fall into poverty if their right to inheritance were paid properly (2000: 174). He further argues the existing gap could be bridged through application of other maintenance regulations under Islam, though these have no direct link to the divorce law. In similar fashion to Dr Naik, Maulana Wahiddudin also suggests that a divorced woman should be maintained by her father, as this was his responsibility before she married (2000: 175).

However, the book *Sharh-al Mukhtasar* on *Sahih Bukhari* by Dr Firoz Herawee (2007, Vol 6: 81) suggests that a father is not responsible for the *nafaqah* of a divorced daughter because the responsibility is hers alone after divorce. Quoting from *Fath al-Qadir*, a famous Islamic book, he submits that if a divorced woman has a son who can earn and provide for his mother, he should support her. In absence of father and son, she should be maintained by her brother, uncle or other male relatives (2000: 175). The responsibility rests with the state to pay her from the *baitulmal*, or state treasury, if there is no male family member to take care of her. The same view is reflected in the *Outlines of Muhammadan Laws* by Fyzee (1974: 214).

It seems this view is being adopted as a solution by more authors whose work relates to this topic. A recently published Islamic family law book in Pakistan, authored by Dr Muhammad Tahir Mansoori, also touches upon the matter as a newly emerged debate in the Islamic literature (2012: 108). Mansoori argues that it would call into question the dignity of a divorced woman to rely on support from a man who no longer has *mahram* relations with her (ibid: 109). The same reasoning was provided in response to the quest for maintenance by divorced women in Pakistan and Bangladesh (this matter is explored further in the next section).

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[67] Dr Naik's video, 'Should husband give maintenance to wife after divorce', is available at <www.youtube.com/watch?v=3Igywf2An80> (last visited 17 October 2018).

Additionally, a dominant thread in Islamic thought sees the solution in the remarriage of the divorced woman. And those who are in dire need of financial support are required to seek such a remedy even sooner (Rehman, 1988: 27).

However, these authors, jurists and lawmakers fail to consider that a woman who lives with a man for 10, 15 or 20 years invests everything that she has in that marriage. She puts her time and energy into building a married life, looking after the family and children and enabling her husband to earn money, even if she does not make a direct financial contribution. She should not be considered a servant for the three meals a day she gets as part of that household. This is an absolute injustice from a feminist perspective, whether it is Islamic feminism or secular. The Islamic feminist movement is intended to give voice to these women. If she shares a life with the husband, she has a right to everything that relates to that marriage. The matter needs to be analysed based on the requirements and available opportunities for women in the current era, not juristic views shaped 1400 years ago.

1.3. Other Financial Support Options

What else can a divorced woman hope for as a source of post-divorce financial support under Islamic law?

The right to *mahr-al-muta'a* is a narrow path that can lead the divorced woman to some financial gain, as is the right to conditions/stipulations in the marriage contract. However, gains through *muta'a* may not be significant, and stipulations in marriage contracts are not absolute as the proposed conditions are subject to acceptance by the husband. Thus, among all these financial rights attributed to women, deferred *mahr*, which could be the divorced woman's best hope, is discussed in Chapter 2; *muta'a* and stipulations in a marriage contract are further explained in the following two sections.

Muta'a

Muta'a could be a possible, although not major, route to some post-divorce financial support. The term refers to a 'consolatory' gift given to a divorced wife (Mohd & Abdul Malik, 2009: 35) to compensate her for the unhappy situation divorce brings about. *Muta'a* is not addressed as a stand-alone topic in Islamic literature; rather, it is included with *mahr*

discussions (Mohd & Abdul Malik, 2009: 35). From a linguistic perspective, the term means 'enjoyment and happiness' in Arabic, as opposed to 'gloominess and depression and grief' (Sheikh, 208: para 5).[68] Extending this meaning, one could say that the Qur'an calls upon men to make divorced women happy by giving them what they are entitled to. However, this meaning does not reflect how jurists characterise *muta'a*, except for those who advocate for post-divorce support to women.

The legitimacy and legal basis for *muta'a* is based on verses of the holy Qur'an. Verses 2:236 and 33:49 explicitly mention the term.[69] The first verse states that if a marriage is not consummated and a dower is not fixed, there is no fault on the man who divorces his wife. However, based on his financial ability, the man should provide a suitable gift to his wife and set her free in a graceful manner. The second verse specifies that such a divorced woman is not expected to wait for the *iddat* period, an implicit indication that she can remarry if she wishes. Again, the verse recommends that a suitable gift be provided to the woman to ensure fair compensation for the divorce.

The verses have triggered discussions and different interpretations among Islamic scholars. Hanafi jurists allow the payment of *muta'a* only where the divorced woman's *mahr* had not been determined and the marriage was not consummated. They also stipulate the amount should not go beyond 50 per cent of the *mahr-al-mithl*[70] (*Al-Mabsut*, Vol 3: 71–72); *Al-Hidaya*, Vol 2: 33; Shahid, 2013: 202). Classic sources of Sunni jurisprudence argue that *mahr* and *muta'a* cannot go together. If a woman has a fixed *mahr,* she receives that of course, and if divorce happens before consummation, she still gets the half, so there is no need for *muta'a* when *mahr* exists. If *mahr* is not fixed upon marriage, *mahr-al-mithl* applies, and *mahr-al-mithl* is not divisible in case of divorce before consummation. Under

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[68] These terms are descriptive of those divorcees who are deprived of their rights and rejected by family and society, such as those in Afghanistan.

[69] Verse 2:236: 'You commit no error by divorcing women before having touched them, or before having set the dowry for them. And compensate them—the wealthy according to his means, and the poor according to his means—with a fair compensation, a duty upon the doers of good.' Verse 33:49: 'O you who believe! When you marry believing women, but then divorce them before you have touched them, there is no waiting period for you to observe in respect to them; but compensate them and release them in a graceful manner.'

[70] Since Hanafi is the predominant Islamic school of thought in Afghanistan, the Afghan Civil Code has adopted the same position.

the circumstances in which *mahr* collapses (i.e. woman-initiated divorce), *muta'a* applies. As such, Hanafis argue that *muta'a* cannot be combined with *mahr.* It only applies when *mahr* is not fixed and divorce happens before consummation takes place (*Al-Mabsut,* Vol 3: 71; *Al-Lubab,* Vol 1: 152).

According to *Al-Hidaya*, and the other two books mentioned above, *muta'a* refers to three pieces of the woman's clothing, including headscarf and trousers (Vol 2: 33).[71] It is also recommended that the financial ability of the husband should be considered when deciding the amount, as the actual verse suggests that a rich man should pay based on his means and the poor based on his ability (2:236).

Muta'a is viewed similarly in the Imami/Shia school of thought. The same definition is used, and it is to be paid in the same conditions. In the current literature in Iran, *muta'a* is described as a type of *mahr* that is paid when the actual *mahr* is not determined and *mahr-al-mithl* cannot be applied [72]; that is, when divorce takes place before consummation, and *mahr* has not been decided (Katouzian, 2005: 141). The same wording is used to define *muta'a* in the work of other authors in Persian literature, such as Gurji et al. (2013: 239), Hayati (2014: 206) and Damad (2014: 263).

In Iranian literature, *muta'a* is used along with the term *mahr* as *mahr-al-muta'a* and described in the same chapters as the *mahr* topic. The question of whether *muta'a* is a type of *mahr* is explored by Amir Hamza Salarzayee (2008) in an article titled 'Is Muta'a Mahr?' He suggests that *muta'a* is not *mahr* and, therefore, it should not be called *mahr-al-muta'a*. Rather, he proposes that the word *muta'a* alone, or *nehla*, should be used to refer to this concept (Salarzayee, 2008: 103).[73] Notably, *nehla* is mentioned in every book or article in Persian literature where the focus of the discussion is a wife's financial rights in Islam, but it is not explicitly stated that the term refers to *muta'a*.

[71] The reference page in the original Arabic text of the book is 241.
[72] *Mahr-al-musama* or the fixed *mahr*, in the absence of which *mahr-al-mithl* is applicable.
[73] The term means gift or present.

Post-Divorce Support Through Muta'a

Some Muslim scholars have argued that the *muta'a* concept could constitute post-divorce financial support for divorced women. For instance, Adam El-Sheikh has called for post-divorce maintenance, saying that divorced women are subject to destitution and suffer from lack of financial support. He believes this is because an important part of Islamic jurisprudence is not practised as it should be (Sheikh, 2008: para 2).[74] Sheikh refers to the same verses of the Qur'an that are frequently used to argue for post-divorce financial support (i.e. 2:236, 2:241, 33:28 and 33:49). He recognises women's vulnerability caused by the sacrifices they make for the sake of marriage and serving their husbands and children. Sheikh calls upon Muslim jurists to recognise the need of divorced women; to 'revive' the practice of *muta'a*, for the sake of 'fairness and justice'; and, above all, to apply the Islamic law.

Similarly, Professor. Ayesha Shahid, a UK-based Pakistani scholar, has also used the term to advocate for financial support to divorced women (2007; 2013). According to Shahid, the dire need of women for post-divorce financial support, was raised three times in Pakistan, but no gain was achieved.[75] She reports that the topic of post-divorce maintenance through provision of *muta'a* was first raised for discussion in 1955, when a report by the Commission on Marriage and Family Laws called attention to the plight of 'arbitrarily' divorced women who are left without financial support. But a member of the commission rejected the proposal, questioning the 'chastity' of a divorcée still being linked to her ex-husband through continued support (Shahid, 2013: 206).

The Law and Justice Commission of Pakistan raised the issue again in 1988; this time it was held that *muta'a* is just a 'parting or consolatory gift'. It does not mean provision of 'regular maintenance'. In 2009, the question of *muta'a* payment to a divorced wife was put forward again, with a proposal that it should be included in the marriage contract. However,

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[74] The article is downloaded from International Institute of Islamic Thought website at <www.iiit.org/uploads/4/9/9/6/49960591/post_divorce.pdf>, last visited 18 March 2017.

[75] Shahid notes that Pakistan family law is silent on post-divorce support, and therefore, in Pakistan, while judges empathise with women's demands in other family disputes, requests for post-divorce maintenance after the *iddat* period are rejected due to the lack of a legal basis and authority to allow the payment (2013: 206).

after seeking the opinions of the Council of Islamic Ideology, the payment of *muta'a* to divorced wife was completely rejected beyond the *iddat* period (Shahid, 2013: 208).[76] This could be a clear indication on a possible outcome for such an advocacy in Afghanistan as well.

Nonetheless, some Muslim countries have used *muta'a* as a possible basis to offer limited financial protections to divorced women, in particular those who become victims of arbitrary divorce at the will of men. Such countries, including Morocco, Syria, Egypt, Malaysia, Iran and some others, will be briefly discussed in the conclusion of the thesis.

Stipulations in Marriage Contracts

Another possible avenue that might offer a divorced woman some financial gain could be to stipulate such a right in the marriage contract. Verse 5:1 of the Qur'an is the main source that emphasises the significance of contracts and the obligations derived from them: 'O, you who believe! Fulfil all your commitments.'[77] Therefore, stipulations within a marriage contract could be an important source of created rights for married women.

A stipulation in a marriage contract refers to a commitment through which one party can hold the other obliged to perform an action, achieve a specific result or create a certain quality (Mirshamsi, 2008: 163). Examples of marriage contract stipulations include 'limiting the husband's ability to get another wife' or 'equal access to divorce', the two most frequently mentioned in the relevant literature (Quraishi-Landes, 2013: 176). Further examples include conditions on dividing marital property at the end of marriage, allowing a wife to remain in her hometown,[78] not having children, not having sexual relations for a

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[76] Shahid (2013) compares post-divorce maintenance in Pakistan and Bangladesh. In Bangladesh, she indicates that contrary to what happened in Pakistan, the courts extended support to divorced women (*Hafizur Rehman vs Shamsun Nehar Begum*). The court held that maintenance could be extended beyond the *iddat* period, and a man who divorced his wife should maintain her until she married again (Shahid, 2013: 210). However, the decision did not survive strong critiques from religious scholars and the Appellate Division of the Supreme Court of Bangladesh 'overruled' the decision.

[77] Yusuf Ali translation.

[78] The domicile of a wife in Islam is where her husband lives, and after the marriage he can take her wherever he lives, to another city or even another country. Thus, women may add conditions to a marriage contract to prevent a husband from moving them.

specific period,[79] and conditions about *mahr* (Mirshamsi, 2008: 170; Moballegh, 2014: para 25).

In the early years of Islam, marriage contract stipulations were used to preserve rights for women that could not be obtained otherwise. For instance, two sample contracts from 256 and 279 AH, quoted in Sonbol's article 'History of Marriage Contracts in Egypt', both contain a condition whereby a husband must divorce his second wife at any time the first wife asks him to do so (Sonbol, in Quraishi & Vogel, 2008: 95). Although imposing such a condition is prohibited by the Prophet SAW (*Bukhari*, Vol 6: 36), it still shows the long history behind the practice of this right by women in Muslim territories. [80]

Types of Stipulations

Based on a description given by Lynn Welchman, there are three types of stipulations, valid, irregular and void (1994: 56). In Persian literature, stipulations or conditions that could be imposed in a contract are divided into two main types: *batil* (void) and *sahih* (valid). The first type is again divided between those that bring the same effects to the contract and those that cannot affect the contract (Parwin, 2012: 34). Thus, this sub-classification results in three types of stipulation to which Welchman refers.

1. ***Batil* (void) stipulations:** *Batil* stipulations have the effect of making a contract void (Ali, in Quraishi & Vogel, 2008: 21). A requirement of a contract is that the conditions imposed cannot go against the nature and purpose of the contract (Parwin, 2012: 34; Nazemizadeh & Nikdosti, 2013: 196). In this type of stipulation, the condition opposes the actual purpose of the contract; therefore, it is not considered valid and voids the contract. For instance, one of the marriage parties might stipulate that they want the right to cancel *nikah* for few days. Because such a condition is against the very nature of *nikah*, both the stipulation and the marriage

[79] This condition is mentioned in Irani literature. Mohsen Nazemizadeh and Mujtaba Nikdousti (2013) have assessed the pros and cons regarding the validity of the condition and conclude that the condition could be approved, reflecting the Imami school. This stipulation would not be endorsed by Hanafis as they only agree with conditions that are not against the marriage purpose.

[80] In the *Sharhul–Mukhtasar* of *Sahih Bukhari*, Hadith No. 1852, it is reported by Abu Huraira that the Messenger of Allah said: 'It is not appropriate for the Muslim woman to demand divorce of her Muslim sister in favour of herself.'

contract are void (Mirshamsi, 2011: 165). Similarly, one party might seek to impose the condition that the couple never lives together and lead independent lives. This condition contravenes the Islamic marriage requirement that a couple live together and build a family (Parwin: 2012: 34). So, neither this marriage contract nor the stipulation imposed is valid. However, where stipulations are contradictory to the basic purpose of marriage, the Hanbali school of thought allows the marriage to remain valid while voiding the stipulation (Ali, in Quraishi & Vogel, 2008: 22).

2. ***Fasid* (corrupt)[81] stipulations**: These stipulations are invalid by their own nature, but they do not affect the marriage contract (Mirshamsi, 2011: 165). They range from conditions that are impractical to those in which there is no benefit to any party (Parwin, 2012: 33). An example of the first would be a condition that requires one spouse to teach the other a new language in three days. Because this is not practical, the stipulation is considered void. However, the stipulation, even though unachievable, does not render contract invalid. Another example might involve a wife demanding her husband never divorce her (Adullah, 2010: 236). Such a condition is considered *fasid*.
3. ***Sahih* (valid) stipulations:** These stipulations are valid and, if included in a marriage contract and not carried out, create a discretionary power for one party to choose to remain in the marriage or terminate it. For example, if a husband imposes a condition that the woman he marries be a virgin, and if that proves to be not the case, he can annul the contract (Mirshamsi, 2011: 165). Similarly, a wife may stipulate that that her husband cannot marry another woman. If the husband ignores this stipulation and remarries, then his wife can choose to leave the marriage. Such valid stipulations are usually based on a quality required in the other party (such as virginity or a level of education), a result to be achieved, or an action to be performed (Parwin, 2012: 35). Hanafis give validity to this category of the conditions only. In the words of Welchman, for them, 'those stipulations that reinforce something already required by the marriage contract and by marriage' are acceptable, but not others.

[81] Welchman in the above note refers to this category as 'irregular' stipulations.

The Enforcement Power of Stipulation

Given the wording of the conditions in marriage contracts, it can be assumed that any stipulations imposed by a woman will not have power enough to stand against a general rule, or, as Lucy Carrol (1982: 280) terms it, 'general policy' or a right of entitlement for a man. However, such stipulations could provide a woman with a remedy or compensation in response to a breach of the condition imposed in the contract. For example, where a man has the right to marry four wives, his first wife can impose the condition that he cannot marry another wife while she is alive. The man may accept this condition and sign the marriage contract.

Nonetheless, this stipulation will not prevent the husband from marrying another wife. Rather, a further stipulation would be required as an enforcement mechanism should the husband breach the first condition by taking another wife. This means the stipulated condition creates a ground for the wife to be compensated for the breach of the agreed term. This ground could then generate an option for the woman, enabling her to initiate divorce herself or to live separately from the second wife, either obtaining another house with extra maintenance or permission to live with her parents and be maintained while there (Carrol, 1982: 280).

Stipulation and Possibility of Division in the Marital Assets in Islam

Under Islamic law, a husband controls family finances, as he is responsible for maintaining his wife (*Al-Hidaya*, Vol 2: 191; Shamsudin, 2012: 15). No source in Islamic literature devoted to *nikah* in Islam denies this clear rule. The legitimacy for this responsibility comes from Verse 34 of *Nisa*[82] which says, 'men are protectors and maintainers of the women', as well as Verse 233 of the *Baqara* Surah. From a theoretical point of view, women have nothing to do with family expenses, but every woman may independently manage any wealth she has. Thus, there is no joint financial system governing family assets in Islam, and both husband and wife are liberated from each other in this regard (Moors, 1994: 304; Bafeqi, 2011: 11). However, this independence also means that a woman has no share in

[82] Women's Sura/Chapter in the Holy Qur'an. The verse is also famous for being the source of great controversy about women's control by men.

family assets if the marriage ends. In traditional Muslim life, a woman's job is to stay at home and take care of her family, while the husband is considered the provider and the breadwinner. Yet her family care responsibility does not create a right for her to share in marital assets.

Stipulations in the Marriage Contract

Although a condition providing for division of marital assets post-divorce should be the most sought-after stipulation for a marriage contract, not much evidence indicates this right is widely used by women. Commonality in application of stipulations depends on the dominant school of thought in each country and the likelihood of its ultimate enforcement (Welchman 2007: 99). This means that where the overall conditions support practice of the right, it could be applied, but no wider application of it is reported in the world of Islam.

In Tunisia, women have a long history of using stipulations in their marriage contracts for variety of conditions, mostly for banning a husband from choosing a second wife (Largueche, 2010: 4). A stipulation also can be used to get a husband to agree to division of the marital assets and property (Ben Salem, 2010: 8). In Saudi Arabia, where Hanbali *fiqh* is the dominant school, broader use of the stipulations is reported among middle-class women, but mostly for securing the right to continuation of education and freedom of work for the woman after the wedding. Women may also use it for demanding separate housing from the husband's mother and family etc. (Lynn, 2008: 20). Lynn's article indicates that imposing conditions such as limiting the husband's right for second marriage or delegating the right of divorce to the wife, is not common among Saudi women. She does not mention whether Saudi women use the right to stipulations in the marriage contract for division of the marital assets/property.

Similarly to Tunisia, in Iran, women are allowed to use the right to demand a share of the marital assets. Article 1119 of the Civil Law states that 'a marrying couple may include any condition in the marriage contract, provided that it is not against the general nature of the contract'. However, this right is enforceable only if the divorce was not initiated by the woman herself and, she was not at fault for the marriage breakdown (Mir-Hosseini, 2012: 69). While women's rights defenders believe that stipulations in the marriage contract are a

way to gain financial security for women after divorce (Parwin, 2002: 32; Jafari & Ghaisarian, 2017: 22), the idea is not fully supported by scholars, who cast doubt on the validity of the condition.

In summary, if division of property is not adequately enforceable and beneficial in Iran, it is unlikely that it would do better in Afghanistan. Iran is far more progressive in every aspect and has a better environment for implementing women's rights according to Sharia law. In addition, more Iranian women are educated and aware of their rights, and the dominance of Jaffari *fiqh* also provides opportunities for adopting changes to the laws and regulations. In contrast, Afghanistan is not a well-educated society, and most women don't know about even their basic rights and the right to *mahr*, let alone a less-practised right such as stipulating conditions in the marriage contract. Furthermore, Afghanistan is predominantly a Hanafi *mahdhab* follower and, as mentioned earlier, Hanafis have a stricter policy on giving validity to stipulations in the marriage contract, accepting only *sahih* conditions. The next section sheds light on the matter in Afghan context.

Stipulations in the Marriage Contract in the Afghan Context

Including stipulations in the marriage contract in general, or in particular for division of the marital assets, is not common in Afghanistan, and sources describing it are difficult to find. Article 68 of the Civil Code of Afghanistan adheres to the *sahih* condition endorsed by the Hanafis: 'If a condition included in the marriage contract is against the law and purpose of marriage, the contract shall be valid, but the condition is void.' Apparently, this does not imply that division of the marital assets would be against the purpose of marriage; however, it would seem to remain subject to the interpretation of a judge and their understanding of contract law on various types of conditions.

Further reference in the Civil Code to conditions in the marriage contract is found in Article 67.[83] This article makes it clear that impractical conditions cannot be imposed in a contract. Article 88 seems to provide legitimacy for stipulations in the marriage contract. It reads: 'Woman may, while entering into a marriage contract, stipulate the condition that if

[83] Article 67 reads: 'Marriage cannot be concluded if subjected to an unrealized condition or time in the future.'

the husband marries another woman contrary to provisions of Article (86) of this law, the power to divorce shall be transferred to her. This condition shall only be valid when interpolated into a marriage deed.'[84]

The candidate has never come across any case in which a woman has imposed such a condition. However, she has heard of two women activists and famous young leaders in Afghanistan who recently imposed such a condition in their marriage contract. It is notable that both come from Shia background and married men from the same background. While the Shiite Personal Status Law of Afghanistan does provide opportunity for women to adopt such conditions into their marriage contracts, it is not very common to do so, even among the Shia population.

The Shiite Personal Status Law allows women to include the following conditions in a marriage contract:

1. avoid marrying another woman, whether temporarily or permanently;
2. the choice of domicile;
3. right to unconditional divorce or divorce based on the following grounds:
    - lack of maintenance that would result in hardship for the wife,
    - the husband's conviction to lifelong imprisonment,
    - the husband's affliction with an incurable disease, and
    - his absence for more than three years.

As can be seen, there is no reference to the division of marital property. One can then conclude that although there is a legal basis for inclusion of conditions in Afghan marriage contract, these are not accepted culturally nor are they practised widely. Therefore, such conditions are not well known. Yet, as more women become empowered through education

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[84] Article 86 says: 'Marriage with more than one woman is permissible upon realization of the following circumstances:
1. When there is no fear of injustice among wives.
2. When the person has sufficient financial ability to sustain alimony of the wives such as food, clothing, residence and appropriate medical treatment.
3. When there is a legitimate interest such as in fertility of the first wife or her having difficulty curable illnesses.'

and employment, they may become confident enough to stand up for their rights and practise the use of conditions in marriage contracts. The candidate's two activist friends are examples of that ideal situation that might prevail in the future.

1.4. Summary

Following the introduction, which established there is inadequate financial support for Afghan woman after divorce, this chapter outlined the financial rights available to women under Islamic law. It assessed these rights and their conditions of applicability in the context of Afghanistan, a country with conservative customs and traditions.

The major forms of women's financial rights presented in the chapter are the rights to *mahr*, maintenance, inheritance and *iddat* maintenance. The chapter argued that of these, the rights to maintenance and inheritance from the husband lapse on divorce, although the right to maintenance remains applicable for three months. The right to *mahr*, if it is deferred to the future, is claimable after divorce, and if the amount is unusually high it could be a source of support for divorced women. However, the question of whether *mahr* works this way in present-day Afghanistan needs to be explored. The right to inheritance from the father is not very promising in Afghanistan, as culturally it is not considered appropriate for women to claim it.

The right to *iddat* maintenance, though specified for a short period, is the only right that can be unequivocally considered a post-divorce financial right for divorced woman. As mentioned, this right is an extension of a husband's obligation to his wife while she completes three menstrual cycles, before she leaves the matrimonial home. The rationale for imposing this obligation on the man is vested in two reasons. It allows him, first, a chance to reconsider divorcing his wife, perhaps correcting the actions that led to marriage breakdown; and second, to ensure the wife is not carrying an embryo in her womb.

Through detailed explanation of each right, the chapter further explained that the right to *muta'a* and the right to stipulations in the marriage contract are also possible ways for divorced women to claim some financial support. However, neither is strong enough in their nature and normative power to satisfy that purpose. The right to *muta'a*, as defined in

this chapter, is recognised as only a minor gift to compensate a woman who is divorced before marriage consummation and only when there is no fixed *mahr* for her. Although the Qur'an provides that a rich man should provide based on his financial ability and a poor man, based on his means, jurists claim that it replaces *mahr-al-mithl* and should not go beyond half its amount (*Al-Hidaya*, Vol 2: 36). The Afghan Civil Code limits *muta'a* to few pieces of clothing required for a Muslim woman or cash, but no more than half of the *mahr-al-mithl* (Art 107). That means there is no financial value vested in the *muta'a* that could benefit a divorced woman, unless the husband is rich and he decides to give more to the divorced wife. Further, the chapter argued that the right to stipulate conditions in a marriage contract does not work in the context of Afghanistan, particularly among those following the Sunni *madhab*. No evidence of the use or enforcement of such conditions was found in the cases reviewed for the thesis research, indicating that this right rarely is exercised in practice.

In a nutshell, none of the aforementioned rights works adequately for an Afghan divorced woman. Afghanistan is a traditional society with conservative customs and Islamic injunctions that may supersede the law. Thus, the current thesis argues that there is no adequate financial support for divorced women in Afghanistan to save them from destitution following divorce. However, a remarkable amount of the deferred *mahr* may fill that gap as it is mostly argued to be an economic support for women (Varshney & Jahan, 2014: 247; Arikewuyo, 2016: 38).

Thus, the thesis assesses the role and importance of *mahr* in providing economic security to divorced women in Afghanistan. Since the argument is built on practical data from the field, it is essential to provide a detailed understanding of the research topic before moving to the main body of the research. As such, the role of next chapter is essential in the current thesis to draw a picture of the *mahr* described in literature. In turn, this picture enables the candidate and the reader to identify the truth of *mahr* and depth of the problem based on the difference between rhetoric and reality on the ground. Assessing the differences of the two pictures drawn of *mahr* in the theory and practice in Afghanistan leads to building the theory that responds to the research question. Chapter Two analyses the recognition, origins, philosophy, functions and applicable rules of *mahr* in Islamic law.

Chapter 2. *Mahr* in Theory

2.1. Introduction

Chapter 1 established that there are few possible options through which a divorced Muslim woman can seek financial support. Apart from *iddat* maintenance, which is not really meant to be a post-divorce support, she can include a condition in the marriage contract to enable a request for division of the marital assets later; she may have a chance to be supported through *muta'a*, depending on her country's legal practice in that regard; and, along with these, she could claim her right to *mahr*, if not paid before. In the context of Afghanistan, it is the last of these that is most promising in terms of its potential for offering some financial security to divorced women.

This chapter unfolds the *mahr* concept from a theoretical perspective. In a continuation of the debate on *mahr* in the first chapter, it provides the results of a literature search, conducted in both academic and Islamic sources, to present the juristical and scholarly views on the *mahr* as well as meanings attributed to the concept and its background, history and further necessary details. The aim is to give a picture of *mahr* as introduced in Islamic teachings and as portrayed in books. This background is essential to show the difference between *mahr* as it was intended to be applied and its actual application in Afghanistan, presented in the following chapters.

The literature reviewed is not restricted to materials in English, but also includes books and articles written in Persian, verses of the Qur'an, and hadiths of the Prophet from the authentical hadith books. The Persian literature is particularly relevant for the reason that not much could be found on the *mahr* topic in Afghanistan; given that the Dari dialect of Persian is spoken there and that Iran and Afghanistan share the same culture and follow the same religion, a review of materials produced in Persian is the best, if not the only possible, way to fill the gap. In the meantime, it fulfills the need for consideration of the Shia *madhab* sources in the chapter.

As for materials reviewed in English, *mahr* is not treated as a major topic in the literature related to Muslim family law. In fact, it is difficult to find books dedicated to this subject. The most relevant book on *mahr* found so far is *The Islamic Institution of Mahr: A Study of its Philosophy, Working and Related Legislation in the Contemporary World* by Mohmmad Afzal Wani (1996). That book arose from the author's PhD thesis, submitted in 1957.

Nonetheless, *mahr* is an essential part of academic and law text books on Muslim family law, particularly sections related to marriage and divorce in Islam. *Mahr* is also addressed in literature related to women's rights in Islam as well as the financial rights of men and women in Sharia law. In such literature, although volumes and pages dedicated to it are few, *mahr* is frequently described, mainly to shed light on Islamic legal rules and regulations governing it as a significant marital legal institution. The candidate has included selective sources of Muslim authors for crafting this chapter.

In contrast, *mahr* has become a popular topic in more recent literature. Articles come mostly from Muslim scholars who live in western countries or those who have pursued their higher education in English. An apparent reason for this new interest in *mahr* could be increased Muslim migration to western countries. A handful of academic writings have emerged that explore *mahr* practice in western law such as under German, Canadian, British and American courts. Some have gone further to address it at the legislative level—for example, Freeland's *The Islamic Institution of Mahr and American Law* (2001).[85]

A good example in this regard is Pascale Fournier's *Muslim Marriage in Western Courts: Lost in Transplantation* (2010). The rest of the reviewed material from contemporary sources consists mostly of articles. Some of these do not necessarily carry the weight expected from an academic study, as they are not all published in peer-reviewed journals. Like classical texts, contemporary materials are primarily theoretical and provide less information on practical application of *mahr*.

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[85] Further examples of this emerging literature include Schawlowski (2011), Fareen (2013) and Blenkhorn (2002). Julie Mcfarlane has addressed these concerns in passing in her research on divorce in American and Canadian courts. Pascale Fournier's work stands out among all those written on Muslim family law in English-language literature.

In Persian literature, no academic research has been found so far that addresses *mahr* in the context of Afghanistan; nonetheless, the topic is an essential part of family law texts used in Iranian universities as well as those in Afghanistan. In contrast to the limited materials in Afghanistan, there is a rich body of Persian literature on *mahr* produced in Iran, covering almost every aspect of the practice, but again from a theoretical point of view. It is notable that in this chapter, the candidate has included the original sources of mahr knowledge from the Sunni fiqh but similar sources of the Shia fiqh are cited within in the work of the most recently published scholars in Iran, whose work was accessible for her to purchase in the book markets in Tehran.

Based on all the literature reviewed, this chapter includes an introduction to *mahr*, its meaning and definition, followed by the background and philosophy of the concept. In the section on philosophy, *mahr* is explored in its form as a gift of honour and prestige to a wife, as well as from the viewpoint of those jurists who consider it a price paid for the pleasure that husband takes from his wife. The section also looks at the validity or lack thereof of marriage/*nikah* in the presence and absence of *mahr* as an essential requirement. In addition, the chapter explains the amount and types of *mahr* derived from the Qur'an and Sunnah standpoint and different schools of thought in Islam.

2.2. Definition of *Mahr*

The term *mahr* itself is not mentioned in the Qur'an, although its synonyms are frequently used. Based on the meanings assigned to these synonyms in Islamic first-hand sources such as Qur'anic verses, scholars have provided several definitions of *mahr*. Perhaps this variety of definitions is the reason that *mahr* is not defined in the laws of Muslim countries, nor is it defined in most of family law books and other forms of literature dedicated to it. Often, authors go directly to discussing *mahr* without providing a clear definition.

Mahr is an Arabic term, translated as *cabin* in Persian. *Cabin*, in turn, has numerous meanings such as gift, present, honesty, obligation, reward or charity (Ismaili, 1390; Damad, 2014; Ismail Mohammadi, 2014). The reason that *mahr* is 'widely' used in the *fiqh*, while there is no mention of it in the Qur'an, might be because *mahr* was a recognised custom in the pre-Islamic Arab world (Wani, 1996: 2; Wadoodi, 1992: 147).

The synonyms used for *mahr* include:

- *Sadaq*/Honesty: It symbolises the truth and honesty of a man who is willing to marry a woman. The term is used in Verse 4.4 of the holy Qur'an, which directs men to 'give women their dower graciously or with a willing heart'. The verse was sent to prohibit Arabs from stealing the *mahr* of their daughters (Wani, 1996: 3).
- *Nahla*/Gift or Present: The word *nahla* takes its roots from the term *nahel*, which means 'bee' in Arabic, the little flying insect that produces honey. The word conveys the message that the presented gift should be cost-free and given willingly. It also means that such gifts are similar to what a bee does, giving honey without expectations. *Nahla* also means a gift from God.
- *Faridha*/Obligation: This synonym means a duty or responsibility. *Faridha* is what God orders his slaves to do; *faridha* in Islam is also equivalent to an obligation, which Muslims are required to perform mindfully. The term is used in Verse 4:24 in the Qur'an, *mahr is* a binding obligation on men to pay.
- *Ajer*/Reward: The sense means a benefit one can take, implying that *mahr* is a gift without cost, used in Verse 4:24.
- *Sadaqa*/Charity: Giving something free of charge.

In the English-language literature, *mahr* is translated as dower, bride price and dowry. However, Wani (1996: 246) submits that *mahr* in Islam is different from each of these concepts, and thus that these terms are inaccurate substitutes for *mahr*. He suggests that only the word *mahr* should be used to address the concept, but he goes on to say that 'no serious study has been made about the exploration of the real meaning of *mahr* and its utility' (1996: 245).

Among the many definitions given to *mahr*, the most common says that: *mahr* is a *mal*[86] that can be given to a wife upon marriage/*nikah* (Azhari & Ali, 2015: 2; Singh, 2010: 59). It can be anything of value, such as a piece of land or property, gold, cash or anything

[86] *Mal* is a Persian word that does not have a comparable meaning in English, but it can be translated as goods and property, including jewelry or anything else with a monetary value.

exchangeable for money, including the benefit that one could take from something (Al-Hibri, 2000: 51; Singh, 2010: 62). Used in this sense, the amount of *mahr* is subject to agreement between the parties (Ismaili, 1390/2011). 'The Dower (Mahr, Sadaq, or Oqr, also referred to in the Quran as Nehla, Ajr and Fareeda-portion) is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage' (Nasir: 2002: 83).

Wani (1996: 17) believes that the best definition for *mahr* is found in Verse 4:4 of the Qur'an, which suggests men must give women their *mahr* as a 'gift-spontaneous'—that is, a gift given with a willing heart. In the translation used for the purpose of this research, the same sentence is translated as 'Give women their *mahr* graciously', suggesting a similar meaning. Rahman, in *A Code of Muslim Family Law*, describes *mahr* as a financial gain: 'Dower (Mahr) is that financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage' (1980: 218).

In the Persian literature, quite often the term *mal* is used to define *mahr*. For instance, Mahmoudi (1393/2014), in *Mahr and Its Adjustment Methods to the Current Rate*, says: '*Mahr* is a '*mal'* that a woman can possess because of marriage and the man is obliged to pay it. It stems from the law and it is not contractual. The amount of *mahr* is based on the mutual agreement between the two parties' (2014: 19). The Persian term *mal* could thus be translated as 'property' or 'goods' in English. However, practically speaking, *mahr* is not usually property or goods; it is more often an amount of money in cash or gold. So, *mal* can refer to anything that is exchangeable for money, as mentioned before.

Similarly, from the viewpoint of another Persian author, *mahr* is a specific *mal* that a woman comes to own because of *nikah*, and the man is obliged to pay it on the basis of law and Sharia (Poladi, 1388/2009: 39). Mahnaz Ismaili (1390/2011) gives a brief definition of *mahr* in her book *Philosophy of Mahr from Fiqh and Law Perspective*: '*Mahr* is *mal* that the husband transfers ownership of to the wife for the sake of *nikah*/marriage' (2011: 13).

2.3. Philosophy of *Mahr* and Its Role in Marriage

The concept of *mahr* and its philosophy have been a matter of debate among classic *fiqh* jurists as well as contemporary scholars. The question of why a woman is entitled to *mahr* therefore tends to receive diverse, controversial answers. The era in which these debaters lived and the socioeconomic environment from which they came out have strongly influenced their reasoning and framed the interpretations provided. Classic *fiqh* scholars and jurists have drawn a picture of *mahr* that is not accepted by most modern scholars. The different views presented centre on why *mahr* exists and its function. This section addresses the classic and modern views of *mahr* along with those of the feminist scholars.

Classic *fiqh* scholars and jurists consider *mahr* a price for the sexual enjoyment or sexual benefit that a wife offers to her husband, and he is therefore duty-bound to present a gift of appreciation and honour to her (Pouladi, 2009: 34). The heated debate on the lapse of fixed *mahr* from full amount to half in case of divorce before consummation is a clear indication of that. The fact that to determine the right amount in *mahr-al-mithl* involves considering the woman's beauty and other qualifications further proves that *mahr* is dealt with as the price of woman. The Sunni *fiqh* classic sources *Al-Hidaya* (Marghinani/Nyazee 788), *Al-Mabsut* (Vol 3: 71) and *Al-Lubab* (Vol 1: 150) all address the matter.

Interestingly, a great level of modesty can be witnessed in the language of Sunni scholars discussing the matter, though they also consider the *mahr* a sale contract. The wording used in the Imami literature of classic scholars clearly indicates that, for these scholars, *mahr* is the cost of consummation. In some discussions, the vocabulary employed to discuss the matter is forthright and not suitable for academic literature. For example, Azar Soki quotes from al-Hilli, a famous Shia scholar, that '*mahr* is the *mal* that a husband should pay in exchange for the right to benefit from sexual pleasure from a woman', and Shaikh Ansari is quoted that '*mahr* is in exchange for *baza*[87] and woman can withhold herself from submission until she is paid, because the *mahr* and sexual intercourse are in exchange for each other and one could be delayed until the other is given' (Soki, 2012: 53).

[87] *Baza* is an Arabic term, means cutting, causing a wound etc., also used for the first act of sexual intercourse with a woman, or penetration in more accurate translation.

The rationale for such reasoning among Imami *fiqh* scholars is vested in their assumption that the *mahr* contract is considered an equal exchange. According to Fahimi (2012: 70), Imami *fiqh* views of *mahr* can be divided in two categories: those who put *mahr* in the group of exchange contracts and those who say a *mahr* contract is more than an exchange. The above arguments belong in the first category. For instance, Shaykh Tusi (995–1067) considers *mahr* to be a contractual exchange. Fahimi reports Tusi saying that 'if a man marries a woman for a specified *mahr* (meaning if *mahr* is determined and the subject is known), the woman becomes the owner of that *mahr* based on the contract of marriage, and the man possesses the right to *baza*, because *nikah* is a contract of exchange' (Shaykh Tusi, 1387/2008: 310, v.4, in Fahimi, 2012: 70). Similar reasoning on part of the Shia scholars is quoted in Pascale Fournier's work as well (2010: 13).

Sahib-e-Jawaher (1788–1850), another well-known Imami *fiqh* scholar, defends the above position on the basis that in exchange contracts, the parties can delay submission of the promised good until the other party fulfills their obligation of submission (Najafi, 1981: 41, v. 31 in Fahimi, 2012: 70). Mahnaz Ismaili quotes Shaykh Tusi that if *mahr* is paid and the woman has still not submitted herself, the husband can stop maintaining her as she would be considered a *nasheza* [disobedient]' (Tusi, in Islamaili, 2011: 41).

It should be noted that such perceptions are not limited to the classic scholars. Some contemporary scholars also express similar views. For instance, Maulana Maudoodi, a Pakistani Sunni scholar considers *mahr* the price for the superiority of a man over a woman in the division of family responsibilities (1983: 15). He believes that although man is superior in his 'nature,' in practical terms his role as household manager is his reward for the money he presents to the wife 'in the form of dowry'.

2.4. Modern Views of Mahr

In contrast to what classic scholars say, the picture contemporary scholars have been trying to draw around *mahr* is more acceptable to the current time readers. In the view of some modern scholars, *mahr* is a gift or something to strengthen the economic position of a woman entering marriage. For instance, Doi, believes that *mahr* is not an exchange for anything, but rather is freely given to a woman as a gift indicating respect (1992: 157). He

also emphasises the economic value of *mahr* for women, and says that by giving *mahr*, the man indeed admits the 'independence' of his wife. By this, he refers to the ownership of the property that she becomes entitled to.

Similarly, for Engineer (1992: 111), *mahr* is a gift, 'a token of love, truthfulness and sincerity from the bridegroom'. Nasir joins these two scholars in a similar interpretation. For him, 'it is an obligatory and fit gift by the man to win her [his wife's] heart and to honor marriage' (2002: 83). To defend his position, he refers to the legislator that defines *mahr* in Article 16 of the Moroccan Family Law as: 'The property given by the husband to indicate his willingness to contract marriage, to establish a family and to lay the foundations for affection and companionship' (Nasir, 2002: 83).

Aziza Al-Hibri, one of the great contributors to the Islamic feminism literature, sees Mahr as sign of 'serious commitment from the man and a "gesture of good will"'. She also perceives deferred Mahr to be a source of financial security (2000: 59). John Esposito believes *mahr* is a counterpart for the right of divorce that Islam has granted as a solid and exclusive right for men (Esposito & DeLong, 2001: 24). By this, Esposito means that *mahr* is a defensive mechanism provided to a woman to control her husband.

Wani concludes at the end of his book that 'mahr serves as a key-stone of the arch on which a Muslim home rests' (Wani, 1996: 247). In his view, *mahr* is a gift freely given in appreciation of a woman's willingness to enter marriage with the man who proposes to her. The very gesture of freely presenting a gift out of sincerity and truthfulness is intended to strengthen the position of the family and trigger love and affection between the parties.

2.4.1. Modern Views of Mahr in the Persian Literature

In the Persian literature published in Iran, Mahnaz Ismaeli (2011: 14), has written the philosophy of mahr is rooted in the relationship between a man and a woman: the initiation of love that comes from the man and the division of responsibilities between the two. This means women are gifted with a financial present to ensure their economic position is strong. At the same time, Ismaeli, referring to the exclusive right of divorce at the hands of men, suggests perhaps *mahr* is considered for woman to counter-balance divorce for man (Ismaili, 2011: 14). Scholars such as Katouzian (2015: 131) and Damad (2014: 234) believe

that '*mahr* is a non-exchangeable gift that should be given to the woman with willingness and pleasure'.

The view point of Ali Abass Hayati is an interesting combination of the classic and contemporary scholars' perspectives. He begins with the same point mentioned above by Ismaili, that *mahr* is essential to pay for winning the woman's heart (2014: 188). In his second point, he says that men are concerned to marry those women who save their chastity and protect their virginity for their husband. Since loss of virginity after the marriage is a harm to woman—for the reason that she is thereafter less marriageable to other men—she deserves to be paid something.[88] He also emphasises the role of *mahr* in restraining men from arbitrary exercise of their right to divorce and financial assistance to the woman in the difficult times they face after divorce (Hayati, 2014: 189).

Some scholars in Iran also argue that *mahr* is none of the above, but an effect of marriage. For them, it is a gift that should be presented to a wife with honour and affection. It is not the cost of anything, nor paid in exchange for anything; rather, it is a responsibility generated by the act of marriage (Katouzian, 2015: 131). This group further argue that such reasoning about *mahr* to consider it a sale contract contradicts the philosophy contained in the holy Qur'an. The authors claim that 'if *mahr* was the price for a woman, it would have been essential to determine the amount at the beginning, before the contract or *nikah* takes place'. Otherwise, the contract would have been invalid (Safayee et al., 2013: 228).

2.4.2. Mahr Through the Feminist Lens

The view that *mahr* is the cost of a woman's sexuality is also that of feminist scholars. Ziba Mir-Hosseini, in her book *Marriage on Trial* (2000: 73), bases her argument on the right of a woman to refuse consummation of the marriage if she has not obtained *mahr*. She argues that Iranian Civil Code, in Article 1085, supports this notion as it does not allow a woman to 'refrain' from her sexual duty to her husband if she submitted herself to him once, before the *mahr* was paid. However, this does not affect her entitlement to the right of *mahr*. This

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lack of permission to refuse sexual congress mainly comes from Shia scholars, and it is reflected in the Shiite Personal Status Law of Afghanistan (Art 102: 2).

The other basis on which feminist scholars defend their position against *mahr* is the classic jurist viewpoint that compares a *mahr* agreement to a sales contract as discussed before (Mir-Hosseini, 2000: 72). Liberal feminist scholars use this point to critique *mahr* for damaging women's honour and autonomy; they describe the deal as the sale of a woman's vagina (Fournier, 2010: 16; Spencer, 2011: 7).[89] Possibly, that notion of 'sale' and the philosophy that *fiqh* jurists draw on for *mahr* causes educated women who are well-established financially to find it hard to accept the gift at the cost of their honour and pride.

A study of Palestinian women in the West Bank found a movement of upper-class women against *mahr*. By refusing to accept a significant *mahr*, they advocate against *it* to free themselves from the 'traditional roles' assigned to women (Jacobson, 2003: 151). The resistance of these women and those who were educated or lived in western cultures is also mentioned in the work of Quraishi (2013: 173) and, Mir-Hosseini in the above-cited book. Mir-Hosseini indicates that 'modern' women in Iran, before the 1979 Islamic Revolution, would seek only one gold coin or the holy Qur'an as *mahr* to maintain equality in the marriage. But she also mentions that women regretted doing so when their 'romantic marriages break down' (2000: 75).

2.5. The Legal Status of *Mahr*: Is It a Condition for Valid Marriage?

Although *mahr* is considered an important element of marriage contract in Islam, if not fixed up on *nikah,* the marriage is still valid and lack of *mahr* does not affect the legal status of the marriage. Al-Hidaya suggests that though still obligatory due to its significance in Sharia, it is not necessary to mention *mahr* for the 'validity' purpose. The same rule is applicable on the agreement that excludes *mahr* from the marriage contract (Marghinani/Nyazee, 2015: 769). Verse 2:236[90] is the basis for such argument, as it says

[89] Katherine Spencer refers to Fournier (2007) for that statement.
[90] Qur'an 2:236: 'You commit no error by divorcing women before having touched them, or before having set the dowry for them. And compensate them—the wealthy according to his means, and the poor according to his means—with a fair compensation, a duty upon the doers of good.'

that if *mahr* is not determined up on *nikah*, the marriage is still valid.[91] That is because a divorce could happen where a valid marriage exists (Nasir, 2002: 83). However, this situation does not affect the wife's right to *mahr*, which according to Nasir is 'inalienable and imprescriptible'.

Among jurists, only Malikis consider such a *nikah* invalid, and only if a marriage has not yet been consummated. If the marriage has been consummated, they consider it valid and call for the payment of *mahr*. If not consummated, Malikis say the marriage should be considered invalid. Other jurists suggest that *nikah* is still valid even if *mahr* has not been determined, but a woman would be entitled to *mahr-el-mithl* only.[92].

The leading Persian scholar in private law domain, Nasir Katouzian,[93] suggests that the legitimacy of *mahr* comes from the law, not from the marriage contract. In turn, this suggests the basis of *mahr* is not a contractual matter decided privately by parties, but rather a legal obligation (Katouzian, 2015: 131). Therefore, even if a husband and wife do not determine *mahr* during their marriage session, or if they come to an agreement to remove a woman's entitlement to *mahr*, a husband cannot be excused from his obligation to pay the *mahr*. At a minimum, he will remain duty-bound to pay it when a request is made (Katouzian, 2015: 131).[94]

To conclude, whether *mahr* is mentioned and determined at the time of *nikah* or not, it is a defined right for a woman because it is an outcome of marriage (Wani, 1996: 14). Therefore, it is a legal right. When a man and woman contract a marriage, a result of that

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[91] In the case that marriage parties have agreed no *mahr* is required, the majority of jurists believe that such a condition is invalid, but the marriage contract itself is valid (Gurji et al., 2014: 229).

[92] *Mahr-al-mithl* means 'the like *mahr*' and is an Arabic term. The English terms used for it in the literature include customary *mahr*, proper *mahr* and fair *mahr*. It is introduced further in the section on 'Types of Mahr'.

[93] Nasir Katouzian has been called the 'the Father of Iranian law'. He was an Iranian legal scholar who lived between 1931 and 2014. He published more than 57 books, most of which are still taught in law schools in Iran and Afghanistan and used in private law practice.

[94] In the law of Iran, which follows the Imami school of thought, if *mahr* has not been determined but the marriage has been consummated, a woman is entitled to *mahr-al-mithl*. If no consummation has taken place, the couple can agree to a *mahr*, or ask a judge to do so. However, if no *mahr* has been determined and the marriage has not been consummated but divorce has taken place, there is no *mahr* for the woman. Article 1087 of Iranian law suggest *mahr-al-muta'a*[94] only (Safayee, 2006: 182).

contract is *mahr*, whether stipulated or not, and it is enforceable. 'No husband can shirk this obligation unless his wife has granted him respite' (Ilyas & Syed, 2009: 123). However, in cases where it is not mentioned, then the type of *mahr* differs from a specified amount. In that case, her overall characteristics and the financial circumstances of the husband will be considered to determine the *mahr-al-mithl* for the woman.

2.6. Background to *Mahr*

Persian literature provides interesting descriptions of the history and background to *mahr*. For instance, some Persian texts indicate that in early recorded history, when human beings were still living a tribal life, marriage among people who had blood relationships to each other was not desirable. Therefore, the young men of the tribe would go to other tribes to select their wives. Since war and bloodshed were more common among the tribes of that time, young men would kidnap their favourite women and bring them to their own tribes to live with them (Pouladi, 2009: 39). When conflicts and wars among the tribes gradually changed to more peaceful coexistence, men stopped kidnapping women and instead would go and work for a man for some years as a servant and then marry his daughter in exchange for their labour (Mahmoudi, 2014: 19).

As wealth increased and the economy improved, men found it easier to provide a gift to a potential father-in-law rather than serving him in exchange for his daughter. Thus, the concept of a dowry came into existence (Pouladi, 2009: 39). In its origins, *mahr* is like a dowry, a well-known concept across the globe, and giving a gift to a bride's father or family is an old custom. The Code of Hammurabi mentions of this kind of gift-giving, as does Roman law, and it was also a custom among the ancient Greeks. In the latter case, a man would not allow his daughter to marry if he had not received a gift (Pouladi, 2014: 45). In ancient Babylonian civilisation, a man was obliged to pay a gift to his wife's father, and eventually the father-in-law would return the value of the gift to his daughter in form of *jehiz*[95] (Ismaeili, 2011: 29). Similarly, among the ancient Germans a man would grant

[95] The gifts given to the daughter by her parents upon her marriage to take to the husband's home.

ownership of a saddled horse, along with a sword, shield and spear as gifts to his wife at the time of their marriage (Ismaili, 2011: 30).

Dowry-giving was also a common practice among pre-Islamic Arabs. A groom was expected to give a valuable gift to the bride's father and her grandfather. When Islam came into being in the Arabian Peninsula, a dowry practice already existed (Wasei & Amiri, 2013). Islam accepted the custom but in a different form. Dowry became *mahr*, and the right to possess it was granted to the wife only, not her father or any other family member[96] (Wadoodi, 1992: 147; Ismaili, 2011). However, the bride had the right to bestow the gift on anyone she wished, inside or outside her family (Wasei & Amiri, 2013).

Wani mentions that in pre-Islamic Arabia, apart from the formal marriage as a regular form of nuptial relations, Arab men also had informal out-of-wedlock relations, and in these, payment of some form of gift was common (Wani, 1996: 31; Wadoodi, 1992). For a regular marriage, payment of *mahr* was essential, otherwise that marriage would not be considered legitimate (obligatory *mahr* could have been avoided by '*shigar*' *nikah* in which women were exchanged[97]). Wani mentions that neither of these two practices in the pagan Arab society resembled the *mahr* institution in Islam.

2.7. Types of *Mahr*

None of the four major classic sources in the Sunni fiqh (*Al-Hidaya*, Vols 1&2; *Al-Mabsut*, Vol 3; *Al-Lubab*, Vol 1; and *Fatawai-Alamgiri*, Vol 2), bring a specific discussion on the types of mahr. However, the two major forms of *mahr-al-musama and mahr al-mithl* as well as *muta'a* are frequently addressed and assessed in the relevant chapters in these books. This shows there are two major types of mahr and the muta'a. In English, the first two forms are fixed *mahr*, also called specified *mahr*, and customary *mahr*, which is not specified at the time of marriage and *nikah (mahr-al-mithl*). The latter type is also called proper *mahr* (Baillie, 2011: 95; Manssori, 2012;71), or in some literature it is referred to as

[96] This is clearly vested in Verse 4:4 of the holy Qur'an.
[97] Such a practice was apparently common in pre-Islamic Arab society and should have been abandoned by Muslims on conversion to Islam. However, the practice is still common in Afghanistan today, mostly in those areas where demanding a bride price is practised. In these cases, *shigar nikah* is used as an option to avoid heavy marriage costs.

fair *mahr*. The fixed form, determined and specified upon *nikah*, is the most common type. The Arabic term for fixed *mahr* is *mahr-al-Musama* (Esposito & DeLong, 2001: 24), and the same term is also used in the Persian language to refer to fixed *mahr*. In brief, *musama* means 'naming'—the meaning that could be drawn from the decision that is made, nominating an amount of money or property, that is then called the *mahr* of the woman who is to get married.

According to the Hanafi school, specified *mahr* is divided into prompt and deferred, called *mu'ajjal* and *mu'akhar*[98] respectively in Arabic (Doi, 1992: 162; Rahman, 1978: 221; Nasir, 2002: 86; Esposito & DeLong, 2001: 24; Pearl & Menski, 1998: 179). As the names suggest, prompt *mahr* is paid at the time of *nikah* and marriage, while payment of deferred *mahr* is delayed to the future. Deferred *mahr* becomes applicable if a marriage ends due to the death of a husband or divorce; most scholars agree upon this (see for instance, Rahman 1978: 221; Doi 1992: 162). Nasir suggests that deferred *mahr* would be applicable even if no agreement had been made on a specific date for payment (2002: 86).

Fixed/specified *mahr* is registered in a court or recorded by a judge/*qadi* (Esposito & DeLong, 2001: 24). The following chapters will show that this requirement of registration or other valid proof of *mahr* becomes essential if *mahr* disputes arise between a married couple. Validity of the contract is the condition that makes *mahr* binding on a husband. If any problem arises that may negate the validity of the contract, or if something prevents enforcement of it, *mahr al-mithl* is the ultimate solution (Nasir, 2002: 86).

If *mahr* is not determined upon *nikah*, the unspecified *mahr* (*mahr-al-mithl*) becomes applicable (Esposito & DeLong, 2001: 24; Pearl & Menski, 1998: 180), and this is also referred to as customary *mahr*. In this case, a woman is not able to demand what she wants in *mahr*. Rather, the overall financial ability of the groom and her position are considered in deciding the amount of *mahr-al-mithl* (Pearl & Menski, 1998: 180). The term *mithl* means 'like' or 'as such', suggesting that *mahr* can be decided by analogy and looking into similar cases, including the woman's sisters or relative; if no similar cases are available in a

[98] The meanings of the mentioned two terms in English are 'immediate' and 'delayed'.

woman's immediate family, the *mahr* may be set according to what women in the neighbourhood or even the entire district or region have received (Rahman, 1978: 223). Also, the age, beauty, education, social position and other characteristics of the woman will be considered as determining factors and the basis of comparison to set the amount (Rahman, 1978: 223; Esposito & DeLong, 2001: 24).

In Persian literature, there is also mention of two other types of *mahr*. If *mahr* is not determined upon *nikah* and the husband divorces the wife before their marriage is consummated, Imami *fiqh* suggests that the woman is entitled to *mahr-al-muta'a* (Pouladi, 2009: 66; Isamili, 2011: 20; Safayee, 2013: 239). Despite the conditions that are taken into consideration for *mahr-al-mithl* (e.g. the woman's beauty, age, education, social position and wealth), in establishing *muta'a* what matters is the financial status of the man. This means *muta'a* is given based on the financial ability of the husband (Isamili, 2011: 20; Mahmoudi, 2014: 23). The legitimacy of the *muta'a* is attributed to Verse 2:236 in the Qur'an which says, 'There is no fault on you if you divorce women before marriage is consummated or before *mahr* is determined.'

The rationale for payment of *mahr-al-muta'a* is described by Pouladi and Ismaili as fair treatment for the damage a woman endures because of the insult and harm to her in being divorced before a marriage is consummated (Pouladi, 2009: 67). Payment of *muta'a* from Imami *fiqh* scholars' perspective is considered obligatory, but scholars from other schools look at it as a fair treatment (Islamaili, 2011: 21). Some scholars believe the amount of this *mahr* could be equivalent to a dress, including trousers and a headscarf. This argument refers to the hadith from Ayesha, the wife Prophet SAW, that 'a woman needs these three pieces of clothes for praying and that should also be given to the divorced woman' (Adalatkhwah, 2008: 188). *Muta'a* is described in the same terms in the Afghan Civil Law; it says *muta'a* is a common dress and similar stuff (Art 107).

> In case of separation[99] of spouses before consummation of marriage or full privacy, a wife is entitled to maintenance, that is, the usual clothing and the like. In determining

[99] In Article 105, the law specifies: ' If separation takes place before consummation of marriage or full privacy, in case the dowry is contractually agreed, wife is entitled to half of it, and if it is not fixed, to half of the customary dowry.'

> this maintenance, the husband's financial ability should be taken into account, and in no way may the price of maintenance exceed that of the customary dowry.

Another type of *mahr*, described in a few Persian books, is referred to as *mahr-al-mufawza* which can be translated as 'transferred *mahr*'. Mahnaz Ismaili suggests that, in some instances, a woman may authorise her husband to determine *mahr* for her. In this case, she transfers her right to her husband, and this *mahr* is called *mufawaza*, or transferred *mahr* (Ismaili, 2011: 24). The Afghan Civil Law, under Article 104, does not use this name, but the article indicates that in cases where a woman transfers the right to her husband, the wife (whose marriage is not yet consummated) may request a *mahr* specification: 'If the husband denies her claim, she can refer to court and ask for *mahr-al-mithl*.' However, the text implies that if a marriage is already consummated, this section is not applicable. This shows that transfer of the woman's authority to demand *mahr* to the husband is recognised, but not discussed as a separate form of *mahr*. *Mahr-al-mufawaza* is not mentioned by other scholars so it cannot be defined as independent type of *mahr* in itself.

2.8. The Amount of *Mahr*

Neither classic *fiqh* sources nor contemporary indicate that a ceiling exists for the amount that can be assigned as *mahr*. This consensus among scholars and classic *fiqh* jurists seems to have come from a famous story in which a woman from Quraish confronted the second Caliph of Islam for attempting to limit a *mahr* to a maximum of 400 dirham (Al-Hibri, 2000: 59). The story is also mentioned in other English books frequently mentioned here.[100] The basis for the women's argument was Verse 4:20 of *Nisa* in which the Qur'an calls upon men who want to divorce their wives not to take back what had been given, even if it is *qintar*.[101] The woman asked the Caliph, reciting this verse, that if God has not limited *mahr*, why should he? Admitting his mistake, Umar RA apologised, saying to the people that it is permissible for whoever wishes to do so to give great wealth in *mahr* (Al-Hibri, 2000: 59; Doi, 1992: 60). It is most likely because of this story that *fiqh* jurists have not fixed a maximum limit for *mahr*.

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[100] (Doi, 1992: 160; Nasir, 2002: 85; Maudoodi, 1983: 75; Engineer, 1992: 112).
[101] The term means a large bag made of cowhide and filled with gold.

However, it is also reported that the Prophet Muhammad SAW encouraged Muslims to keep the amount of *mahr* relatively low so that it would not be beyond the financial ability of a husband to pay (Maudoodi, 1983: 75), as high *mahr*s can create tension. Some reports from Imami scholars, although not unanimous, agree that crossing the *mahr-al-Sunnah* is not acceptable, and the excess amount should be returned (Pouladi, 2009: 58). *Mahr-al-Sunnah* refers to the maximum amounts Muhammad SAW paid for his wives and assigned to his daughters. The highest *mahr* he paid was 500 dirham for Maimouna, his last wife, and 400 dirham for his beloved daughter, Fatima RA (Wani, 1996: 72). However, this view of returning the excess amount is not supported by all Shia scholars because of Verse 20 of the *Nisa* in the Qur'an (Pouladi, 2009: 57).

As for the minimum amount of *mahr*, no floor has been imposed by Hanbali and Shafi jurists or by the Shias. The two Sunni schools of Hanafi and Maliki, do set a base, namely ten dirham for Hanafis and three dirham for Malikis (Doi, 1992: 160; Pearl & Menski, 1998: 179). If someone sets a *mahr* of less than 10 dirham, the woman will receive the full ten as nominating a small amount would equate to no nomination at all (Marghinani/Nyazee, 770).

According to Pearl and Menski, Hanafis and Malikis have fixed this base amount through analogy. They picked an amount comparable to the value of stolen goods for which a thief can be punished by the loss of an arm in *hudud* punishment (1998: 179) For Imami scholars, although no lower limit is set on *mahr*, it has been suggested that whatever the amount determined, it should have some financial value (Pouladi, 2009: 56); otherwise, the amount cannot be considered *mahr*. Some have argued that even half of what is assigned as *mahr* should be of monetary value because, if a woman is divorced before her marriage is consummated, what is paid as *mahr* cannot be something of no value, as that would bring into question the validity of *mahr* (Pouladi, 2009: 56). This point is raised in Al-Hidaya as well (mentioned earlier).

Respecting the minimum amount allowed for *mahr*, another reference point is the hadith from Prophet Muhammad SAW (as noted in the previous chapter) in which he questioned one of his companions on what to give the woman he wanted to marry. The companion did

not have even a ring of iron to give her, and the Prophet SAW asked him if he knew any verse of the Qur'an by heart, suggesting his companion teach whatever he knew from the Qur'an to the woman as *mahr* (*Sahih Bukhari*, Vol 6: 27 and Vol 3: 702; *Sahih Muslim,* Vol 1: 536).

As reflected in the argument of the woman who confronted the second Caliph, it is important to emphasise that whatever the amount of *mahr* decided and given to a woman, the Qur'anic verse suggests that it should not be taken back from her, if she is divorced. *Mahr* can only be taken back when a wife decides to do *khul* to end the marriage (Engineer, 1992: 112). In this case, she uses the *mahr* to purchase her freedom.

Despite advice from classic and contemporary *fiqh* scholars, particularly those from the Shia sect, encouraging Muslims to keep *mahr* rates low (Baillie, 2011: 68), there are reports of *mahr* of high value being assigned, even at the time of the Prophet Muhmmad SAW and his Caliphs and their successors. In an article on traditions and customs of *mahr* among Muslims in the first and second centuries, the authors (Vasei & Amiry 2013: 85), describe increases in the values of *mahr*, along with expansion of Islamic lands and influx of wealth and war treasure to the Islamic Caliphate. This occurred during the time that Amawid and Abassid leaders became richer through expansion of Islam and the wealth received from conquered lands. The increased financial capability was reflected in the gifts and dowers that Arab leaders presented to some of their women.

The article indicates that there are confirmed historical reports that Talha Ibn Ubaidullah assigned a 100,000 dirham[102] *mahr* to Ume Gulthom, the daughter of Abu Bakr, the first Caliph of Islam. Similar reports indicate that Umar ibn al-Khettab, the second Caliph, married Um Gulthom, the daughter of Hazarat Ali, for a *mahr* of 40,000 dirham.[103] The same woman was remarried to Sa'id ibn Aass after the death of Umar for 100,000 dirham (Vasei & Amiry 2013: 85).

[102] At current rates (as of 2 February 2018) this would be equivalent to AU$33,850.
[103] As of 2 February 2018, equivalent to AU$13,538.

There are also reports that the highest *mahr* paid to the wives of Prophet SAW was 4000 dirham to Um Habiba, the daughter Abu Suffyan, which was not paid by the Messenger of God himself (Vasei & Amiry 2013: 85). At the time she lived in Abyssinia, Muhammad SAW sent her proposal and the ruler of Abassynia who was supportive of the Prophet, celebrated the marriage there and paid the *mahr* himself, and sent her to Prophet SAW with many gifts. As noted earlier, it is reported that for his other wives, the highest *mahr* was 500 dirham and for his daughter Fatima, it was 400 dirham (Doi, 1992: 162; Baillie, 2011: 68).

2.9. What Can be Assigned as *Mahr*?

According to *Al-Hidaya* (Vol 1: 241) and *Fatawa-i-Alamgiri* (Vol 2: 180), whatever has monetary value could be given as *mahr* and all *fiqh* scholars past and present agree up on that. Thus, *mahr* could be cash, property, land, house, gold, silver, jewelry, livestock and even the benefit that could be derived from something (Abdullah, 2014; Singh, 2010: 64).

However, what is assigned as *mahr* must not be *haram* or otherwise unlawful from an Islamic perspective. For example, wine or pork meat cannot comprise *mahr*. If a *mahr* contract were fixed with such items, the husband would be liable to pay *mahr-al-mithl* only (Marghinani/Nyazee: 786). According to Imam Malik, in this case the *mahr* contract is not valid; however, if a marriage is already consummated, then the contract is valid, but *mahr-al-mithl* is applicable

It is also important that what is to be included as *mahr* is described clearly and with certainty. That means that what is nominated as *mahr* should be described in detail, including its characteristics or amount (if it is money), and not declared ambiguously (Doi, 1992: 161). In general, the conditions that should be considered for *mahr* are financial value, clarity and certainty. This means that nothing vague, such as ‘a horse’ or ‘a house’ without specific details, may be included in *mahr* (Adalatkhwah, 2008: 187). Additionally, there is a condition stating that what is assigned as *mahr* should be something that can be obtained and possessed. For instance, stars in the sky, fish in the water, or the moon could not be the subject of *mahr* (Abdullah, 2014). Maliki jurists’ also require that what is given in *mahr* should be easy to define. Also, it is mentioned that nothing included in *mahr* can

be a misappropriated or stolen object (Adalatkhwah, 2008: 186). On the matter of assigning personal services to a woman as *mahr*, Hanafi jurists do not agree that a free man can enter into such an agreement, and if such a contract is made, the wife is entitled to *mahr-al-mithl* only. (Marghinani/Nyazee, 779).

2.10. Enforcement of *Mahr*

Two issues need to be explored and clarified regarding *mahr* enforcement: first, the time *mahr* is paid or enforced; second, the liability for payment, that is, the person responsible for *mahr* payment. In theory, the husband should be responsible, but in most Afghan marriages the groom is not financially capable of paying his marriage expenses or *mahr*. Thus, the groom's father or, in his absence, grandfather/uncle usually pays for their son's marriage costs (UNAMA, 2010: ii; LandInfo, 2011: 6). If neither of them is alive, other male elders of the family may fulfil the conduct of marriage. In exceptional cases, a young man may have earned enough to take care of his wedding expenses, but in general this is not the case.[104]

An exploration of the enforcement of *mahr* is important to the research findings for this thesis, which show that ambiguities in liability have resulted in serious difficulties for Afghan women who pursue their *mahr* cases. In the literature, the time of *mahr* payment is not given much emphasis, but the payment itself is considered essential, whether at the time of marriage consummation or later. The flexibility expressed with the time of payment is linked to Verse 2:236 of the holy Qur'an which suggests 'there is no blame on you if you divorce women when you have not touched them or appointed them a dowry'. Jurists have concluded from this verse that if *mahr* is not completely neglected, it is still valid if not determined upon *nikah* or paid immediately.

The literature reviewed suggests that if *mahr* is fixed, the entire amount becomes due upon divorce; this is also applicable if either of the marriage parties dies (Rahman, 1978: 232). Hanbali and Shafi schools allow the entire *mahr* to be deferred to the future, provided it is

[104] That is mainly because Afghans allow their children to marry at relatively young ages, before they reach a level of independence to take financial responsibility.

not forgotten. Although permission for delay is given in cases where *mahr* is not ready, both schools of thought indicate that if the amount is available, payment should not be delayed (Doi, 1992: 161). These views seem to carry particular weight as they are closer to the practice of *mahr* at the time of the Prophet SAW. A review of hadiths reported from Muhammad SAW reflects that, at his time, payment of *mahr* took place when a marriage service was conducted (Wani, 1996: 115). Malikis also suggest *mahr* could be given to a wife on her wedding day, unless she is happy to delay it. On a fixed *mahr*, Malikis have the same view as Hanafi: half of *mahr* should be paid immediately, and half deferred.

On the matter of enforcement, differentiating between two versions of *mahr* payment, prompt and deferred, is important. If a marriage contract does not specify whether a payment is prompt or deferred and only the amount is mentioned, it is assumed that *mahr* payment will be prompt (Pearl & Menski, 1998: 180). Also according to Rahman (1978: 227), under the Shia *fiqh*, if no time is specified for the payment in the marriage contract, the *mahr* is considered to be prompt. However, the Hanafi school leaves the time of payment to be decided based on custom (Rahman, 1978, 227). Al-Hidaya stipulates that if mahr is not deferred to the future, the woman has a right to refuse sexual conjugation till it is paid to her (Marghinani/Nyazee: 793).

However, there are disagreements on continuation of this right if a wife submits herself to the husband before the payment is made. Some jurists consider this right limited to the pre-consummation period, believing that a woman retains her right only if the marriage is not consummated; if she agrees to submit herself even once, then she loses the right to reject further sexual congress on the basis that *mahr* is not yet paid (Pearl & Menski, 1998: 180). Nonetheless, Abu Hanifa himself (but not his disciples Muhammad and Shaybani) states that a woman is entitled to abstain from submission after the consummation as well (Marghinani/Nyazee: 793). On this matter, only Doi mentions that Shafis allow a woman to refuse consummation before payment of *mahr* and refer to court for annulment of the marriage if *mahr* is not going to be paid (1992: 161).

On the matter of liability for *mahr* payment, many verses of the Qur'an clearly show that the husband is ordered by God to pay *mahr*, so it obvious that he is responsible for paying

the *mahr*. However, when a father or anyone acting as guardian conducts a marriage, especially for a minor son, questions arise about who is responsible for the payment. Under the Hanafi *fiqh*, the father of the groom cannot be held responsible for payment of the *mahr*. In this regard Rahman (1978: 227) notes:

> The liability for payment of dower is directly that of the husband except when he, during his minority, has been contracted into marriage by his guardian. The liability in that event shall be that of the guardian. If the husband, on attaining majority, maintains the marriage intact, the liability of the dower shall be that of the husband and the guardian shall stand exonerated.

Based on this view, the father or whoever is guardian could be responsible for the *mahr*, if the husband is still a minor. When the groom attains majority age and accepts the marriage conducted for him, the responsibility for *mahr* and its payment transfers to him (Rahman, 1978: 227). But if the minor dies before reaching the age of puberty, the guardian is accountable to the widow for payment of the *mahr* (Doi, 1992: 227). Wani (1996: 126) offers a similar view, that under Hanafi law there is no responsibility for a guardian to pay the *mahr*, although he can pay from the property that belongs to the groom. But if the father or the guardian has taken the responsibility upon himself to pay it, then he is liable.

Among the Imami *fiqh* scholars, two views are presented on the status of another's property being included in a *mahr*. First, if the owner himself directly assigns his property in the *mahr* or if he agrees to that assignment by the husband, there is no problem. However, given the attribution of an 'exchange contract' to *mahr*, the payment of *mahr* with the property of another is not acceptable (Soki, 2012: 68). This view is not generally agreed upon. On the other hand, if the property of another person is assigned as *mahr* by the husband but the actual owner of the property does not agree, the husband is not relieved of his liability. He must give the property or replace it with something comparable (Soki, 2012: 68; Damad, 2014: 227). Some jurists say assigned *mahr* is invalid because it is not the property of the husband; therefore, the wife is eligible for *mahr-al-mithl* only (Damad, 2014: 227). On liability of a guardian under the Shia *fiqh*, Wani suggests that in *Shia fiqh* if a husband is not financially capable of paying the *mahr*, the liability may fall on the guardian who conducted the marriage (1996: 126).

The Personal Status Law of Afghanistan is silent on liability for *mahr* payment, providing no guidance on whose property can be assigned in *mahr* whose not.[105] But the Personal Status Law of Shiite, provides for that (for further detail, see Chapter 4).

2.11. Remission of *Mahr*

Frequent references to Verse 4:4 of the holy Qur'an in the literature show that this verse is considered the main source of the ordinance on *mahr*. The first part of the *Aya* clearly indicates that *mahr* is the property of a wife. However, the second sentence allows a husband to enjoy the full *mahr* or part of it if the wife is happy to remit it to him.[106] Remission of the mahr on part of the woman is a major discussion of the mahr topic. The *Al-Hidaya* (Marghinani/Nyazee: 780), *Fatawa-i-Alamgiri* (Vol 2: 204) and *Al-Mabsut* (Vol 3: 75), address the different circumstances and consequences of remission. But the main point in this matter is whether the woman is happy to bestow the mahr up on husband or not, and whether she can retract her act of bestowal later. The research findings indicate that one reason for loss of *mahr* in case of Afghan women is women's intentional or unconscious act of remission.

Some scholars suggest if a woman reclaims her *mahr* after remission, this action means she was not happy to remit it 'cheerfully' as the verse cited above requires. They believe that, in such a case, the woman has the right to change her mind and demand the return of her gift (Ilyas & Syed, 2009). The second Caliph of Islam, Umar RA, is reported to have written to a judge (*qadi*) that '[w]omen remit *mahr* cheerfully, but also under coercion. So, if a woman wants to go back upon her earlier plighted word, she may be allowed that freedom' (Ilyas & Syed, 2009). Doi adds this interpretation on the part of the Caliph: 'The very fact that she demands her *mahr* is clear proof that she did not remit it out of her free will' (1992: 156).

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[105] But it should be mentioned that the Afghan Constitution, under Articles 130–131, provides that where law provisions are lacking, civil matters may be decided according to Sharia rules of Hanafi and Shia *fiqh*.
[106] Verse 4.4: 'Give women their dowries graciously. But if they willingly forgo some of it, then consume it with enjoyment and pleasure'.

On the issue of remission, it is also important to point that a woman has free will to release her husband from his obligation to pay *mahr*, but if she is a minor her father or guardian has no right to remit the *mahr* to her husband, acting on her behalf (Rahman, 1978: 235). This is also reflected in Article 103 of the Afghan Civil Code (ACC).

2.12. *Mahr* for Divorcees

On the matter of a divorced woman's *mahr*, a key question to pose is the status of marriage, consummated or not consummated. Jurists have analysed these conditions in the light of verses 2:236 and 2:237, which contain clear injunctions for these circumstances. According to Hanafis, if the marriage is consummated, the woman is entitled to full *mahr*, and if divorce occurs before consummation, the woman gets half of the fixed amount. The same rule applies on the full privacy condition as well (*Al-Lubab*, Vol 1: 149; Marghinani/Nyazee; 772).[107] If *mahr* is not fixed upon *nikah*, the woman becomes entitled to *mahr-al-mithl*. This applies in cases that marriage is consummated, as well as the occasion of full privacy between the couple or death of the husband. If the divorce happens before consummation, Hanafis believe that *mahr al-mithl* is not applicable, as it cannot be divided in half. In that case the wife is entitled to *muta'a* only (*Al-Lubab*, Vol 1: 150). Where divorce is initiated by the woman (before consummation), there is nothing for her (*Al-Mabsut*, Vol 3: 71–72).[108]

There is no difference among jurists about *mahr* in cases where a marriage is dissolved before consummation and when no *mahr* was fixed at the time of *nikah*. However, under the Imami school, the wording is more explicit that there is no *mahr* for a woman whose marriage is conducted without any *mahr* specification and who is divorced before consummation (Katouzian, 2015: 141; Rasouli, 2008: 65). In such a case, the woman is entitled to receive *muta'a* (Safayee, 2013: 239; Hayati, 2014: 206). This position is confirmed by other Imami scholars, and it is also reflected in Article 1093 of the Civil Code

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[107] According to Hanafi and Maliki jurists, the moment of valid retirement—that is, when a newly-wed husband and wife retire to privacy—makes the whole amount of *mahr* payable (Marghinani/Nyazee: 774).
[108] Where a woman initiates divorce before consummation, jurists suggest she loses the right to claim *mahr* (David & Menski 1998: 180). Nasir indicates that the same situation applies to the marriage of a husband who is still a minor and whose marriage is arranged by a guardian (2002: 93).

of Iran and Article 107 of the Afghan Civil Code. Nonetheless, if *mahr* is determined, the woman is entitled to just half of the fixed amount, and this view is generally accepted.

2.12.1. Mahr in Different Forms of Divorce

When determining the allocation of *mahr* to divorced women, the type of divorce is the most important determining factor.[109] Under Islamic law, there are different forms of marriage dissolution. This topic is the longest and the most detailed section of the Muslim Family Law, and it is not easy to describe concisely. Nevertheless, as *mahr* is not treated equally under each of these forms of divorce, the main concepts will be briefly described here. Basically, there are three ways a marriage can be dissolved: divorce by *talaq*, the exclusive right for men; divorce by mutual consent of both parties to the marriage, known as *khul* or *khula*; and divorce through the intervention of the court (Tucker, 2008: 86). This last form may be at the request of a wife or a husband, or a court may initiate an action in cases where the marriage bond is considered no longer valid under Islamic law. The most common of the three form of marriage dissociation is *talaq*, which quite often happens outside of court system (Tucker, 1985: 53).

Talaq, most often referred to as 'repudiation' in English, is defined as 'the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorised to do so, using the word *talaq* or a derivative or a synonym thereof' (Nasir, 2009: 120). In another definition, Rahim submits that *talaq* is 'the dissolution of marriage by the husband's own act, that is by his making a declaration to that effect in appropriate words' (1952: 335). A similar definition by Pascale Fournier states that *talaq* 'is a unilateral act which dissolves the marriage contract by a declaration made only by the husband' (2010: 21).

Talaq is divided into two main types. The first is the revocable divorce (*raji talaq*), which allows a husband to 'revert' to his wife during the *iddat* period and resume the martial relationship. If he does, the divorce is not effective and the marriage is still valid. However, if the husband does not express his interest in reunion through words or conduct, the

[109] If *mahr* has not been paid before.

revocable option will expire by the end of the *iddat* period. In such a case, the divorce turns into *ba'in talaq*, the second form of this divorce (Rahim, 1952: 336; Ali, 1990: 502).

Ba'in talaq is irrevocable; that is, there is no right of return when the *iddat* period is over and the marriage has been dissolved. This form of divorce is sub-divided into minor and major forms. In the minor form, a husband can remarry the divorced wife through conducting a new *nikah* and presenting her new *mahr*. In the second form, the major *ba'in*,[110] reunion is not possible unless the wife has remarried, her second marriage has been consummated, but the marriage has resulted in divorce. In this case, the first husband has a chance to propose to the woman again, once the *iddat* period is finished (Khadduri & Liebesny, 1995: 148; Rahim, 1952: 337).

Talaq Procedures: *Sunni* and *Bed'i Talaq*

From a procedural perspective, *talaq* may be pronounced directly or indirectly, but in both cases it comes into effect. Al-Hidaya suggests that *talaq* may be pronounced in two ways: a direct or an indirect expression. In the direct (*sarih* or 'clear') expression there is a statement of divorce, such as 'I divorced you', 'You are divorced', or 'You are a free woman'. Al-Hidaya explains that these words are specified for divorce; therefore, use of them clearly transfers the message and does not need to indicate any intention. The moment the words are expressed, divorce has occurred (Marghinani/Nyazee: 859). Indirect *talaq*, referred to as *kinaya* or 'allusive expression', may be performed by indirect speech or a gesture or indicated in written words. In this form of divorce, where the intention of the husband may not be well understood, clarity of the husband's intention is important (Rahim, 1952: 338).

From procedural and conduct perspectives, *talaq* is also divided into *sunni* and *bed'i* forms. *Sunni talaq* is the form suggested by the Prophet SAW; *bed'i* was introduced after his

[110] When the man remarry his divorced (minor ba'in) wife, and divorces her again, this divorce is major ba'in and considered to be a third divorce. After which, there is no permission for reunion, he can't marry her after this second divorce.

death, and therefore is considered an innovation in Islam.[111] There are two ways to perform *talaq*: *Ahassan* and *Hassan*. *Ahassan* means the most appropriate, and *Hassan* means good or approved (Ali, 1990: 503; Doi, 1992: 85). These divorce procedures were recommended by the Prophet SAW. *Ahassan* divorce requires that *talaq* be pronounced once when the wife has finished with her menstruation and before the *iddat* period. This form of divorce is also mentioned in Qur'an Sura 65: 1. *Hassan talaq* is pronounced once after each of the three menstrual cycles of the wife (*Rahim*, 336; Ali, 1990). The 'triple *talaq*' that is commonly practised by men is the *bed'i talaq* and was not introduced by the Prophet Muhammad SAW.

Talaq is not permitted during the menstrual period of a wife, based on the probability that, due to the lack of cohabitation between the couple, the husband may not be in a sound state of mind in his feelings towards his wife and might take a hasty action he may not really intend (Ali, 1990: 500; Doi, i1992). Ali refers to a *hadith* from Prophet Muhammad SAW in which he ordered Ibn Umar to take his wife back when he heard she was divorced during her menstruation. This means that Islam requires divorce to be given ample time and the parties to make the decision with due consideration.

Talaq in Sunni procedures is slightly different than in its Shia form. The major difference is the requirement for the presence of two witnesses to hear the divorce statement. Also, the divorce procedure in Shia law requires the pronouncement to be in Arabic (Mulla, 2018: 464).[112] Also, in Shia jurisprudence, a written divorce is acceptable only if the husband is not able to speak the words due to some physical disability (Mulla, 2018: 466). While such formality is not required in Sunni Islam for a *talaq* to be considered valid, in Afghan court procedures, when *talaq* is recorded the two witnesses must sign documents to allow the

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[111] *Talaq bid'i* is not recognised in Shia Islam (Mulla, 2018: 467; Baillie, 2011: 118). Further, *talaq* under coercion is not acceptable in Shia law (Mulla, 2018: 467/Baillie, 2011: 108), nor is it accepted in other Sunni schools. Only the Hanafi school gives validity to this type of divorce. The Afghan Civil Code does not recognise it either. Divorce without intention, even when pronounced in a state of drunkenness or anger, is considered valid by Abu Hanifa but not by other imams (Doi, 92: 89) Divorce under coercion is binding under the Hanafi school (*Rahim*, 43). A detailed explanation of the differences between Shia and Sunni divorce is contained in the *Encyclopedia of Islamic Law* (Baillie, 2011, published in India; Mulla, 2018, published in Pakistan).

[112] This is a reference to *Principles of Muhammadan Law* by Dinshah Fardunji Mulla, revised by Hidayatullah (2018) and widely used in Pakistan.

divorce to be formally registered. However, this does not mean that if *talaq* is not registered it is not valid.

Khul divorce is rarely practised in Muslim society although it is authorised by Shari'a injunctions and supported by all of the Islamic schools (Fortier, 2012: 159). This form of marriage dissolution is also called divorce by mutual consent; to obtain a divorce, a wife gives her husband an amount of money or some other asset or she returns her *mahr*. The term in Arabic means to take out or take off, such as taking off one's clothes (Rahman, 1987: 513; Nasir, 2002: 115). The metaphoric connotation comes from Verse 2:187 in the holy Qur'an which depicts a wife and husband to be the dress of each other. This type of divorce is also called *mubar'a*/*mubaraat*. Fyzee distinguishes between a marriage ended by agreement (*mubar'a*), and one where a woman brings forward a proposal for separation, then pays something to the husband in exchange. This latter is called *khula* (1974: 163).[113]

The third form of marriage dissolution under Islamic law, divorce through court procedures, is known as *faskh*, and also as *tafriq* or separation. In some of the reviewed literature, *faskh* is the only method of judicial intervention for dissolving a marriage, including any separation that a woman seeks. For example, Rahim (1952: 339), Rahman (1978: 565–652), Doi (1992: 90–92), and Fyzee (1974: 166–68) make no clear distinction between the two terms.[114] The Afghan Civil Code (ACC) uses the word *faskh* for breach of marriage due to a disruption that may occur during or after the conclusion of a marriage contract (Art 132).

The causes of *faskh* at the time a marriage ends may include a lack of accuracy in the marriage contract[115], choosing the option of discernment,[116] or a shortage of *mahr* from

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[113] The difference in spelling comes from the pronunciation of the term *khul* in Arabic; some scholars spell the word as *khul*, and others *khula*, which is closer the actual Arabic pronunciation.

[114] The English terms for *tafriq* are separation, rescission or cancellation, and all these terms are used in the literature.

[115] These requirements are the presence of two adult witnesses in the *nikah* session, *ijab* (offer) and *qabul* (acceptance), to happen in the same session and not by delayed to the future, bisexuality of the parties of the marriage party according to ACC.

[116] This is a reference to the conditions that give discretion to a minor or mentally incapacitated person to reject the marriage conducted for her/him by the guardian upon reaching puberty or recovering from mental illness.

mahr-al-mithl.[117] If any of these conditions occurs during the *nikah* session or later, the marriage is dissolved *ipso facto*, and the court will confirm that status. Similarly, *faskh* conditions might occur after a marriage, such as through the apostasy of either party, or an act by either that would create a degree of prohibition by affinity.[118] The third condition is *li'an* ('imprecation'). These conditions are stipulated in Articles 132 and 133 of the ACC. The law clarifies that dissolution of marriage in each of these conditions will be decreed by the final decision of Court. The articles also state that the second category is based on mutual consent of the parties.

In the Afghan law context, *tafriq* refers to the fault-based divorce that allows a woman to refer to court and seek divorce, but she must prove the fault. According to Nasir, *tafriq* has become more common with the introduction of progressive family laws that allow women to seek divorce through judicial acts. He states: 'Modern legislators have revived provisions inspired by Shari'a to safeguard the rights of women even further.' However, the Hanafi school of thought does not allow court intervention to dissolve a marriage, as they perceive divorce to be the exclusive right of the husband, unless the husband is impotent and the wife was not aware of it at the time of *nikah* (Nasir, 2009: 135).

Nonetheless, other jurists do so and the right of divorce for a woman is based on *sunna* of the Prophet and verses of the Qur'an. Maulana Muhammad Ali, the Qur'an translator, a Pakistani scholar of Islamic law, refers to two *hadith* from the Prophet SAW on the matter (Ali, 1990: 498). The first refers to the Prophet's marriage with Umaima or Ibnat al-jaun. It is reported that when the Prophet entered into her place, she said 'I take refuge in God from you'. He immediately left, she was divorced, and she was sent back to her tribe with some gifts. What happened between the Prophet and the woman is interpreted as if she had been given the right to seek divorce through her action of rejecting cohabitation with the Prophet.

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[117] This means the amount of *mahr* assigned to a woman cannot be less than *mahr-al-mithl*; if it is, the marriage is not valid and can be dissolved *ipso facto*.

[118] An example of this would be to later identity that the mother of either party to the marriage breastfed the other one in childhood, but the marriage parties were not aware of this when they got married. At the very moment this becomes known to them, marriage is *faskh*, *ipso facto*, as the two are considered brother and sister in Islam.

The second example is the famous story of *khul* divorce between Thabit Ibn Qais and his wife. She went to the Prophet, telling him she did not like Thabit. The Prophet asked whether she would like to return the orchard she received from her husband and free herself. This *hadith* is frequently quoted to justify *khul* divorce in Islam. The wife agreed, and the Prophet SAW advised Thabit to take that offer and divorce his wife (Ali, 1977: 285). Both these examples are considered the basis for a woman's right to seek divorce through the courts. Ali also refers to Verse 2:229 of the holy Qur'an as the religious basis of this women's right.

Some scholars provide a long list of causes for which a woman is allowed to seek divorce through the courts (Khan, 2006: 500; Doi, 1992: 91), but most often the grounds are limited to four, of which *tafriq*, based on harm, may include more than one reason. The first ground is where a husband has an incurable disease, such as impotence, or any other illness that might be transferred to his wife. This is the only basis on which Hanafis allow a woman to seek divorce (Rahman, 1978: 564). Another cause that allows a woman to seek *tafriq* is the absence of her husband, whose whereabouts are not known. On this point, the Hanafi school suggests the wife should wait for 100–120 years or until the husband's death is verified. Shafi's suggest a seven-year wait, but Malikis give the divorce permission after four years, as do the Shia and Hanbali school (Ali, 1990: 500; Rahman, ibid). The Afghan Civil Code has adopted the same viewpoint as the Malikis, permitting women seek divorce through the courts, although the waiting period is now reduced to three years.

A woman may also seek divorce if she is harmed somehow, including a variety of situations such domestic violence, the misbehavior of her husband, or an addiction that would make life difficult for a wife (Khan, 2006: 501–502). The wife must prove the grounds she claims in court. Similarly, the law allows a woman to seek separation from her husband if he fails to maintain her (Khan, ibid; Doi, 1992: 9). This basis also includes the situation where a husband is sentenced to ten years' imprisonment in Afghan Civil Code. If five years have passed, the woman can seek divorce from the court. The provisions governing these conditions are covered under Articles 176–197 of the ACC.

Li'an or 'divorce by mutual imprecation' is a type of marriage dissolution that is not commonly applied, although rooted in the Islamic practices reported from the Prophet SAW. It refers to a situation where a husband accuses his wife of adultery, but she denies the claim (Fyzee, 1974: 166). Under Islamic law, a false accusation in which the husband cannot present four witnesses to certify what he claims makes him subject to punishment of 80 lashes for *qadhf* (defamation) (Rahman, 1978: 504). In the absence of proof and when husband still insists, then a judge calls on both parties to swear oaths and imprecate each other if they are lying. *Li'an* falls in the category of *faskh* divorce (Rahim, 1952: 339).

2.13. How is Mahr Dealt with in Divorce Cases?

Among all types of marriage dissolution, the husband-initiated divorce, *talaq*, provides a woman with better chances of obtaining *mahr.* This is also reflected in Tucker in the study of Tucker (1985: 55). Jurists agree that a woman whose *mahr* is fixed upon *nikah* is entitled to receive the amount in full upon *talaq*, if her marriage is consummated. From classical juristic accounts through to contemporary publications, all literature agrees on this. This right is based on the Qur'anic verses reported in Chapter One of this thesis (34). Verse 4:20 of the holy Qur'an calls up on men not take back what they have given as *mahr* from the women they wish to divorce, even if it is a bag full of gold. Verse 4:21 further emphasises this matter in divorce after consummation. If no sexual union has happened before divorce, half of the fixed *mahr* is payable. Where no *mahr* is fixed, the wife gets *mahr al-mithl* (see Chapter One, page 35).

In the context of Afghanistan, when a man refers to court to divorce his wife (in the capital at least), the court will ask him to pay *mahr* (Lawyer 39 and Judge 23). This claim was supported through observations conducted in the Kabul courts. In a case of divorce initiated by a husband, the wife is a victim who can do nothing to prevent an unwanted divorce. In such cases, as witnessed by the candidate, the only thing the court can do for a wife is to make sure she does not lose her *mahr*. However, the research data indicates that such action is not helpful, as in most cases the amount determined for *mahr* is very low or has already been paid in the form of a bride price.

Considering *tafriq* divorce in general, there is not much hope for *mahr* because women

seeking divorce are more likely to lose this right as price for obtaining divorce. *Al-Mabsut*, a classic text on *sunni fiqh*, suggests that in a divorce initiated by a woman, she has no entitlement to *mahr*, (whether fixed *mahr* or *mahr al-mithl*) or *muta'a,* in particular if divorce initiation is before consummation. In a case of *fasid* (invalid) *nikah* in which *mahr* has not been fixed, *muta'a* is not given either, because *muta'a* is equal to half of *mahr al-mithl* applicable in the absence of a fixed *mahr* (71-72). *Hidaya* and *Al-Lubab* do not specifically address a woman-initiated divorce; however, with regard to *faskh* in *fasid nikah*, they hold the same position. If a marriage has not been consummated, the former text says the wife deserves the full fixed *mahr* and, if that is not determined, *mahr al-mithl* is applicable ((Marghinani/Nyazee: 788; *Al-Lubab*: 14).

On the same topic, *Fatawa-i-Alamgiri*, another classic Sunni text, explains that in a *fasid nikah*, if sexual union has happened the woman deserves the same *mahr* as she would receive under a valid *nikah.* If no intercourse has taken place, the husband has no obligation to pay *mahr*, nor does the woman have to go through the waiting/*iddat* (Wadoodi, 1992: 191). Given these descriptions in the major Sunni texts about *faskh* divorce in *faisd nikah*, it could be said that the same is applicable in *tafriq talaq* as well, as *faskh* in these books is divorce through judicial intervention. In a *tafriq* divorce in Afghanistan, if the wife is found guilty of causing conflict in the marriage, according to Article 118 of the ACC, the arbitrators appointed by the court to reconcile the couple might recommend removal of *mahr*, in full or half. Moors reports a similar effect, based on her study conducted in Jabal Nablus, Palestine. She reports: 'If responsibility for the discord lay with the wife, the court would impose a *khul'* divorce, requiring the wife to renounce her dower and maintenance rights' (1994: 307).

In a case of *khul*, given that this type divorce requires the woman to pay in order to be able to leave a marriage, the first thing that a wife may think of is to return her *mahr*, if it is sufficient to make a deal. Therefore, it is highly unlikely that a woman could have both *mahr* and a divorce. In a study of peasant and urban lower class women of Egypt by Judith Tucker, it is reported that although many women made use of the right to seek divorce, quite often, due to the economic burden of this type of divorce, women had to pause the procedures for *khul* (1985: 54).

A *khul* divorce is reported in the research data of this thesis to be one of the main reasons for the loss of *mahr* in women-initiated divorces in Afghanistan. The court summary data clearly indicates that the highest number of divorce cases reviewed through the research were ones in which women gave up their *mahr* or traded it for divorce.[119] Lynn Welchman's study of Shari'a courts in the West Bank support this observation about *khul* divorce (2000: 319). Regarding *faskh* divorce in Afghanistan and women's chances of *mahr* through this type of marriage dissolution, not much could be said as the conditions leading to the situation may not happen at the hand of either party to the marriage, except for *li'an*. Thus, the decision whether a woman could obtain a *mahr* or lose it might be circumstantial, and judges may decide according to the facts of each individual case.

2.14. Widows' *Mahr*

The death of a husband has no effect on fixed *mahr*. If the *mahr* is not paid during the husband's life, a wife can ask for it after his death because she is entitled to it according to her *nikah*; there is no reason she would lose this right (Vaziryfard & Mosiond, 2013). According to Fyzee, widows who have not received their *mahr* are granted a 'special right' in Islam to enforce their *mahr*. This is called 'the widow's right of retention' (1974: 142). He further explains:

This means if a husband dies and the *mahr* is not paid to the wife, Islam considers it a debt chargeable to the husband's estate. When a Muslim person dies, it is very important to pay his debts before the inherited property is divided among heirs. What Fyzee refers to is indeed the special right that puts a wife above all other creditors so that she may receive her *mahr* from the property or any other wealth that the husband has left (Rahman, 1978: 242). If she is not treated fairly, then she may confiscate property to the value of her *mahr* from her husband's estate. However, this right does not mean she can have the ownership of that particular possessed property (Rahman, ibid).

What safeguards this right for the woman is the law of inheritance, under which the property cannot be divided among the heirs unless the debts of the deceased are paid first

[119] For further detail, see Chapter 5.

(Kalanauri, Year: 2). The basis for this rule in Islamic inheritance law stems from Verse 11 of *Nisa* in the holy Qur'an, which describes the division of property among heirs. The heirs of the deceased person have no 'personal' responsibility for the payment of *mahr*, but they are required to treat *mahr* as one of the debts of the deceased, with the difference that *mahr* takes precedence over other debts (Rahman, 1978: 242).

If a husband dies before a marriage is consummated, the wife is entitled to her full *mahr* which means the *mahr* determined upon *nikah* is still valid and applicable (Ali, 1990: 462). If there is no fixed *mahr*, *mahr-al-mithl* is applicable. This ruling is derived from a story attributed to Abdullah Ibn Masoud concerning a woman whose husband died before her *mahr* was fixed and before the marriage was consummated. He ruled that she was entitled to *mahr-al-mithl* (Ilyas & Syed, 2009: 48), which is the same customary *mahr* decided based on the *mahr* for women of her family, such as sisters or cousins (Ilyas & Syed, 2009: 48; Doi, 1992: 157). In the Shia *fiqh*, if a husband dies before the marriage is consummated, his wife is not entitled to receive *mahr* (Azar Soki, 2012: 51).

2.15. Summary

This chapter explored *mahr* in scholarly research in English and Persian academic literature. It establishes that *mahr* can be defined in different ways, but no matter what language and vocabulary are used, it is a monetary gift that a husband should pay his wife upon marriage. Otherwise, a marriage is not a *sahih* or valid marriage from an Islamic perspective. *Fiqh* scholars support this idea; Malikis take a slightly different position, believing if a marriage is not yet consummated, it is invalid, and if consummated, the marriage is valid but *mahr* must be paid.

The chapter also established that the views of contemporary scholars who try to describe a *mahr* that matches modern values concerning marital relations differ significantly from those of classical scholars. In the latter's view, *mahr* is deemed as a sale contract and considered to be the cost of marriage consummation. The former scholars refer to *mahr* as a gift of love and affection to a woman and a token of appreciation for the marriage and the woman for accepting the proposal. Feminist scholars share the same view as jurist scholars, but their view also reflects frustration caused by a strictly juristic understanding of *mahr*.

Presenting the views of Islamic schools on *mahr*, the chapter argued that there is no major difference about *mahr* in the various Islamic schools of thought. While the minimum amount of *mahr* cannot be less than ten dirham in Sunni jurisprudence, it could go below that in Shia *fiqh*. A maximum is not specified in either case. The chapter also suggests that the *mahr* content can be anything of value, excluding *haram* (forbidden) items or things impossible to deliver, such as stars of the sky or similar concepts. Little in classical jurisprudence describes *mahr* as compensation for divorce. Rather, as indicated above, it is associated with a woman's sexual duties to her husband.

In addition, this chapter provides a better understanding of *mahr* before it is studied from a practical perspective in Afghanistan. The most important point in the findings of this chapter is the condition in which *mahr* collapses. From a theoretical perspective, *mahr* collapses in a woman-initiated divorce occurring before the marriage is consummated. If the husband initiates divorce before the marriage consummation, the woman is still entitled to half of the fixed *mahr*. However, in practice and according to Afghan law, even in a consummated marriage, if a woman is found guilty of the cause of divorce, she may lose half or the entire *mahr*. If classical jurists perceive *mahr* to be cost of marriage consummation, depriving a woman of her *mahr*, even if her husband has no fault in the marriage breakdown, seems unfair because the wife has already lost her virginity in the marriage. This debate requires a broader theoretical discussion that is not within the scope of this thesis. Chapter 4 explores *mahr* in the context of Afghan laws and culture, but first Chapter 3 presents the research methods and choices of methodology.

Chapter 3. Research Methodology

3.1. Introduction

The problem statement and the previous two chapters established that divorced women in Afghanistan are deprived of meaningful financial assistance. The only formally recognised post-divorce financial right of women is a three-month *iddat* maintenance, the amount of which is less than A$120 at the current exchange rate. This amount is so trivial compared to what a Muslim woman loses after divorce that it can scarcely be counted as a source of support. In the absence of adequate and specific financial support for divorced women, the only other source of hope for women is *mahr*.

Earlier chapters also explained that one of the functions of *mahr* – particularly *mahr* that is deferred to the future and can be claimed after divorce – is to strengthen the economic position of women. As indicated in the first chapter, apart from *mahr*, women's financial rights in Islamic law include the right to inheritance and *iddat* maintenance. Women who are not entitled to receive *mahr* may have a right to claim *muta'a*.[120] Furthermore, Muslim women have the option of adding a condition in their marriage contracts that would allow them to claim a part of the marital assets – assuming the groom will would accept this condition.

Chapter 2 also established that the right to *mahr*, along with the right to inheritance and maintenance, may in principle generate a stronger economic position for a woman compared to that of men. However, while the power of *mahr* is undoubtedly an economic protection for Muslim women, the principles expounded in academic studies and Islamic teachings are not necessarily representative of the lived reality. This thesis compares and analyses the expectations of *mahr* versus its practice in Afghanistan. This chapter explains the methodology used for the research and presents justifications for the choice of research

[120] Chapter 1 describes *muta'a* in more detail.

method, data-gathering methodologies and the conditions imposed on the fieldwork, along with other issues that affected the research.

Apart from the flexibility and technical compatibility offered by the grounded theory method within qualitative research, several other factors governed the candidate's choice of methodology for this dissertation. First, an early literature search revealed that no academic studies had been undertaken, or theoretical frameworks developed, concerning the post-divorce financial rights of Afghan women. Because of this gap, the candidate necessarily relied on qualitative, empirical research methods, including field data-gathering, interviews with Afghan legal experts and practitioners, and personal observations of how courts in three urban centres dealt with divorce cases and their *mahr* aspect.

The second significant consideration was the challenging environment in which this thesis was conducted. Afghanistan has a very limited history of academic research, and traditional cultural attitudes make topics such as divorce taboo. This limited the extent and quality of the information the candidate planned to gather. Third, throughout the period the candidate was gathering information, the security situation in Afghanistan was extremely volatile. That needed to be considered as a possible impacting factor at the research design stages. Despite these obstacles, the candidate's choice of methodologies resulted in the accumulation of a rich data set that paints a clear picture of the lack of financial protection for Afghan women after divorce.

3.2. Research Methods

Extensive searches at the primary stages of this PhD research indicated that not a single academic study exists concerning the financial status of divorced women in Afghanistan. For this reason, the analysis underpinning this dissertation needed to be empirical so as to collect first-hand data from the field and generate knowledge that is currently lacking. The rationale for using qualitative methods in the absence of theories is well described by Merriam and Tisdell (2016: 17): 'Often qualitative researchers undertake a qualitative study because there is a lack of theory or an existing theory fails to adequately explain a phenomenon'. Thus, the qualitative research approach was identified as the best method for collecting the data for this thesis.

An additional reason for adopting a qualitative approach is that the court data used in the research are the basis for quantitative data as well, providing a context for most of the qualitative data coming from the interviews and observations. For the sake of this dissertation, qualitative methods are also essential to analyse, interpret and explain this quantitative data; the numbers alone not necessarily tell us why something happened or what should be done to fix it.

To explore actual *mahr* practice in Afghanistan as a response to women's financial needs after divorce, the thesis relies on both the experience of professionals who deal with divorce cases and eyewitness observations of practices in family courts. Rooted in positivism, 'qualitative research is an approach that allows the researcher to examine people's experiences in everyday life in detail' (Hennink et al., 2011: 9). Van Manen refers to qualitative research as 'an umbrella term covering an array of interpretive techniques' (1979: 520, in Meriam & Tisdell, 2016: 15). Using the techniques of qualitative research, this thesis analysed, and interpreted words presented in interviews with legal professionals. Additionally, non-participant observation by the candidate was used to gather data that corroborates the meaning generated from interviews. Finally, court documents – specifically, divorce case records – were compared with the observations reported professionals who deal with divorce cases in the course of their daily practice as lawyers and judges.

3.2.1. Approach to the Research

The study approach adopted is grounded theory, focused on women's experiences of divorce and concerned to remediate their poverty. The main body of the research is strongly based on practical data collected from the field, and the thesis is therefore not strongly theory-oriented. However, given it is addressing women's causes, the approach to the research is self-evidently based on feminist theory, in particular (although influenced by multiple streams of feminist thought) Islamic feminist theory. Although still in its developmental stage, and too new to have attracted its due credit and wider acceptance, Islamic feminism seeks justice and equality for Muslim women; it was, therefore, perceived to be the best choice of informing theory.

Other factors leading to the choice of this model involves the issue of acceptance for the argument and findings of the thesis within Afghanistan, as well as the safety and security concerns of the candidate, as this is the first time such an issue has been brought to public attention in that country. Given that divorce in general is a taboo in Afghanistan, and is scarcely written about in a critical manner, the topic will inevitably arouse negative comments and refutation of the current work. This concern arises from the fact that, since the ousting of the Taliban and the intervention of the international community, women's issues have received considerable attention, in particular from international non-governmental organisations (INGOs) and donor countries (AREU, 2008: 15). Terms such as 'gender', 'women's rights' and 'domestic violence' are frequently used to justify projects and programs and to raise awareness of and work towards gender equality.

While these efforts have been fruitful, and have had a positive impact on women's rights to some extent in major cities of the country (Wimpelmann, 2012: 2), they have also triggered sensitivity towards foreign-led work to improve women's rights in Afghanistan. The Afghan public – particularly men – exhibit extreme resistance to gender equality and concepts such as women's rights, reducing violence against women, feminism etc. They perceive these terms as being imposed on them by foreign countries, along with other interventions by western society in Afghanistan (USIP, 2014: 3; Wimpelmann, 2012: 2: AREU, 2008: 7). Therefore, conservative-minded people in Afghanistan show little acceptance of these terms and concepts. The candidate neither has the desire nor sees the value in triggering additional resistance and the adoption of an Islamic feminist theoretical stance goes some way to mitigating this risk.

3.2.2. Islamic Feminist Theory

Islamic feminism is a relatively new field of scholarship that has emerged in recent decades, growing to influence research and literature on women's rights in Muslim countries. According to one of its pioneers, Margot Badran,[121] Islamic feminism is highly contested but nonetheless widely accepted, or 'firmly embraced' in her words (2002: Para

[121] She is an American historian of women and gender issues who has extensively written about feminism in the Arab world.

1). Although perceived by some as incompatible with feminism considered as a western or secular identity, Islamic feminism shares the common goal of women's empowerment with the general feminist concept (Mir-Hosseini, 2004: 3; Shahid, 2007: 43).

Badran defines Islamic feminism as 'a feminist discourse and practice articulated within an Islamic paradigm'. She continues, 'Islamic feminism, which derives its understanding and mandate from the Qur'an, seeks rights and justice for women and for men in the totality of their existence' (Badran, 2002: para1). Badran further adds that the core Islamic feminist agenda is to transmit the message that Islam does not promote violence against women, as Islam calls for justice not violence. She emphasises that Qur'anic verses promote equality between men and women, but male interpreters fail to see this principle (Badran, 2002: 2, 20). In other words, Islamic feminism seeks to reinterpret the Qur'anic sources so as to unveil the truth vested in the religion, namely, that is not against equality and does not aim to discriminate against women, but rather calls for justice for women (Al-Sharmani, 2014: 83).

Given that the goals and objectives of the Islamic feminism closely match the objective of this thesis—to expose existing discrimination against divorced women and to seek justice for them by revealing the reasons for their financial destitution—the theory is arguably the right choice for informing the theoretical perspectives of the current thesis. Divorced women's financial destitution in Afghanistan is a direct result of injustice and unfair treatment in how marital assets and properties are allocated. While the husband takes everything, the wife must walk away empty-handed from a broken marriage. In light of the Islamic feminist perspective, this thesis aims to become a voice for divorced women and lay bare their problems by drawing attention to their plight. It is hoped that this project will open the way to further such studies on the topic and cast light into the dark corners of divorced women's life in Afghanistan.

The Core Belief and Mission of Islamic Feminism

Islamic feminists believe that the concept of equality is vested in the Qur'an and that it promotes women's rights and gender equality. The leading female scholars in the field of

Qur'an studies, Amina Wadud, Aziza Al-Hibray and Riffat Hassan,[122] argue for this concept in their work. They say the prime messages of the Qur'an are justice and equality. They argue that what the jurist scholars interpret from the text of Qur'an does not reflect these messages. Thus, they believe Islamic feminism reclaims the primary principles of Islam.

In their advocacy for gender justice in Islam, Islamic feminists argue that traditional juristic scholars who have interpreted the Qur'an and *hadith* to develop *fiqh* rules were influenced by the socio-economic and cultural contexts of their time, and their interpretations no longer serve the needs of current Islamic societies (Hassan, 2014: 41; Amina, 1999: 50; Mir-Hosseini, 2013: 1). Ayesha Hidayatullah presents a similar view in her work (2014: 75). Even Muslim scholars who do not support the idea of compatibility between Islam and feminism share this view. For example, Asma Baralas, who resists being called an Islamic feminist, believes that the Qur'an does not support patriarchy, but juristic scholars cannot read that message (2002: 80). She bases her argument on Verse 4:1 in the Qur'an.[123]

Major Viewpoints in the Argument Against Islamic Feminism

Those opposing Islamic feminism argue that Islam and feminism are not compatible. As an example of the rejection of the concept of Islamic feminism, Moghissi, a US-based Iranian scholar, questions the compatibility of Islam and feminism, arguing that Islam, as a 'pre-established moral and legal order' with its own set ideas, texts and teachings applicable to women, cannot be compatible with the concept of feminism. The two simply clash (1999: 126). Similarly, Moghadam—another US-based Iranian professor of sociology and gender studies—although not against Islamic feminism, disagrees that the solution to Muslim women's problem can be sought only within Islam. In her words:

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[122] In her 2007 doctoral thesis, Aisha Shahid explains that there are three groups among Muslim feminists. For the first group, the only point of reference is the Qur'an; the second group advocates for reinterpretation of the Qur'an to extract the original injunctions of Sharia to which the three mentioned ladies belong; and the third group calls for re-examining hadiths (Shahid, 2007: 42).

[123] 4:1 "O people! Fear your Lord, who created you from a single soul, and created from it its mate, and propagated from them many men and women. And revere God whom you ask about, and the parents. Surely, God is Watchful over you".

> Feminism is a theoretical perspective and practice that criticizes social and gender inequalities, aims at women's empowerment and seeks to transform knowledge and in some interpretations, to transform socio–economic structures, political power, and international relations. Women and not religion, should be at the center of that theory and practice. It is not possible to defend as feminist the view that women attain equal status only in the context of Islam. This is a fundamentalist view, not one compatible with feminism. (2002: 1165

The main argument opponents put forward is that Islamic feminists impose their views of equality on the Qur'anic texts selected especially for this advocacy purpose. For example, Aysha Abdullah (2014: 150) and Raja Rhouni (2010: 35) argue that Islamic feminist scholars impose the notion of equality between man and woman by picking certain verses of the Qur'an and applying their own interpretation to make the verses fit current gender equality requirements. Although not entirely against Islamic feminism, Hidayatullah does not support distorting Qur'anic text to favour women's interests without indicating the purpose of the exercise. She finds herself agreeing with critiques that suggest Islamic feminists are imposing their own interpretation on the Qur'an, and that this is not much different from what has happened in the jurist interpretations favouring men in exegesis of the Qur'anic texts (2014: 151). Karen Bauer reflects the same view in her PhD dissertation (2008: 182).

Critiques of Islamic feminism are not limited to the cited scholars. During its relatively short history, Islamic feminism has triggered much debate. In the words of Mulki Al-Sharmani, Islamic feminism has been prematurely both 'celebrated' and 'rejected' (2014: 92). While scholars devoted to Islamic feminism (such as Badran, Mir-Hosseini and Omaima Abou-Bakr) strongly argue for its importance for Muslim women, others oppose it, unable to see the logic of combining Islam with feminism as presented above. On the progressive side of the debate, the most frequently mentioned names among those addressing Islamic feminism are Haideh Moghessi and Neyerah Tohidi; among the more traditional religious scholars is found Asma Barlas from Pakistan, who reportedly does not like the Islamic feminist label (Badran: 2005: 15).

Importance of Islamic Feminism

While debating the legitimacy of the Islamic feminism, it is also important to consider the daily struggles and practical realities of Muslim women living in traditional Islamic societies. The core of their subordination and discrimination is rooted in the patriarchy and cultural traditions.[124] This is largely reflected in the work of Riffat Hassan, Mir-Hosseini and many other contemporary female scholars. In their view, Islamic feminism that argues for justice for women based on reinterpretation of Qur'anic verses and seeking a way forward for Muslim women is vital because it fights against the cultural and patriarchal norms that discriminate against women.

Ambar Ahmad also draws attention to this matter and to the achievements of the knowledgeable scholars of Islamic feminism who have succeeded in provoking remarkable reforms in Muslim societies. Ahmad notes:

> While it was easier for authorities in Muslim societies to brush aside feminist questions earlier, only labeling feminism as alien, western, anti-Islam, and corrupt, knowledgeable interrogations by Islamic feminists have made it impossible dismiss these questions anymore. By virtue of language used and stratagem employed, the questions have gained legitimacy and widespread visibility. This is an important step against challenging patriarchy. (2015: 9)

Thus, fighting against patriarchy is major theme in Islamic feminism and a major point of argument in its favour. Mir-Hosseini, a major contributor to the literature in this field,

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[124] A reflection on women's status in Afghanistan and the severe violence perpetuated against them may help to justify the matter. The most recent case of violence and abuse of women's rights in Afghanistan according to Nikzad from *Tolonews* (8 January 2020), involves a 15-year-old bride who has been tortured since she married a year ago. The reporting of the case does not say why the girl is suffering, but a Women's Department official in the province reported that most likely doctors will have to amputate both her legs to save her life. The girl's mother told a reporter that in the past six to seven months the girl, Lal Bibi, was beaten daily, but they didn't know about it. When the parents heard about their daughter's status, they kidnapped her from her in-laws to take her to the hospital. Ayesha's case is widely known: a 14-year-old whose husband cut off her nose to punish her for running away from severe abuse and daily battering. Sahargul, another well-known case, was tortured and starved by her husband and in-laws for seven months in a basement prison in their house for refusing to become a prostitute. She was 15 at the time. Sitara's nose and ear were both cut off when she refused to give her wages from doing laundry and cleaning to her husband to support his drug addiction. She desperately needed her earnings to feed their five children. A search of online sources would reveal many more cases, indicating the number of women who were killed or who committed suicide might reach 50 or more. In addition, human rights agencies report recording 5,000 to 10,000 cases of gender-based violence.

addresses the issue in several print publications and web articles. One of her primary concerns is the patriarchal causes of women's subordination that are put in place by *fiqh* jurists in the name of Islam. As Riffat justifies the need for Islamic feminism, it is true that Islamic tradition prefers to confine women to their homes, segregating them from men and society in general in the name of religion (1999: 252). This segregation from social and civic life obviously limits women's opportunities, including access to education and employment, as well as other aspects of modern life. As a result, women lack the religious knowledge to understand the myths perpetuated in Muslim cultures in the name of religion, which is different from the truth embedded in Islam (1999: 253).[125]

To summarize, whether accepted as a branch of feminism or considered an academic project or a movement, Islamic feminism is of paramount importance for women living in the Muslim world. Islamic countries are predominantly traditional and conservative societies where a secular approach to change and improvement may fail. The 1979 Islamic Revolution in Iran and that in Afghanistan in 1992 demonstrate this claim. In advocating for change and reform, the language of the Qur'an and Islam work much better than any other approach.

History and Origins of Islamic Feminism

Islamic feminism began to emerge in the 1990s. Ziba Mir-Hossieni, a major pioneer of the movement and the author who has made the largest contribution to the scholarship, relates the birth of Islamic feminism to two major factors. The first was the adoption of the United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), which holds its member countries accountable to work for gender equality and provided 'language, tools and [a] reference point' for that work (Mir-Hosseini, 2011: 3).

[125] Almost everyone who has written about Islamic feminism provides information on the type and nature of the contributions that feminist or non-feminist scholars have made to the field. A good source for detailed information in this regard is the article by Mulki Al-Sharmani, 'Islamic Feminism Transnational and National Reflections' (2014). A review of this article and of the wider literature on Islamic feminism indicates that Mir-Hosseini, with dozens of publications, has made a major contribution to the field. In addition, Badran and Omaima Abou-Bakr are significant contributors to the field. Aziza Al-Hibri, Riffat Hassan, Amina Wadud and Asma Barlas have done important work engaging with the Qur'an and Hadith, although Barlas refuses to be called a feminist. In the list of contributors, Sa'diyya Shaikh is also repeatedly mentioned. Al-Sharmani also refers to the work of Alfaruqi (2000) and Neven Reda (2013), and Kecial Ali (2010; 2012) and Turkish Hidayet Tuksal are mentioned by Badran in her 2002 article.

The second was the Islamic revolution in Iran and its discriminatory policies against women in the name of Islam (Ibid: 3).

However, the short history of Islamic feminism does not negate the fact that feminist discourses in Asian countries have a longer history. Kumari (1986) links the birth of feminist discourses in Asian countries to liberation movements against colonialism and foreign aggression (on this, see also Badran, 2005: 7–8). Kumari indicates that the ideological and political changes in these countries in the eighteenth and early nineteenth centuries paved the way for women's emancipation as well (1986: 2–3). Her argument is reflected in the history of Afghan independence from Great Britain in the early twentieth century and the efforts of Amanullah Khan for reform and women's emancipation (Kumari, 1986: 71–72).

Badran and Mariam Cooke, the authors of *Opening the Gates: An Anthropology of Arab Feminist Writing*, divide feminist history in the Arab countries into three periods: 'invisible' feminism (1860s–1920s), which mostly involved the expression of ideas through literary work and poetry among Egyptian women of the upper and middle classes; social activism (1920s–1960s) in countries such as Egypt, Lebanon, Iraq, Syria and Sudan; and the third period, resurgent feminism, from the 1970s to date (Alak, 2015: 31). Leila Ahmed also reviews the Egyptian history of early feminists such as Malak Hifni Nassef, Huda Sha'rawi, Mai Ziyada and others from the early 1900s, in Chapter 9 of her famous book *Women and Gender in Islam* (1992: 169–188).

Badran, in a 2005 article also links the birth of modern Islamic feminism to the political Islam governing Iran and the reformist movement in Egypt in 1970s:

> In the final third of the twentieth century, new groups and classes—mainly the recently urbanized entering the middle class—experiencing the pushes and pulls of modernity (expressed in uneven access to new opportunities and uncertain benefits) and an accompanying cultural anomie, were attracted to Islamism with its simultaneous critique of state and society and its recuperation of the comforts and assurance of the 'traditional' (patriarchal) culture. (2005: 8)

She explains that this new Islamist movement pushed women back to the pre-reform and pre-modernisation status they had lived in. She attributes the rise of Islamic feminism to

several reasons, the main one being the conservative interpretation of Islam by self-identified 'Islamic governments'. Women became concerned about the reinstatement of their secondary status and loss of the employment they and their dependents had relied on. More importantly, increases in women's access to education and the arrival of information technology led to new awareness of the importance of human rights. Women obtained the knowledge and understanding to reflect on their status (Badran, 2005: 9). Thus, Islamic feminist scholarship came into existence.

Valentine Moghadam relates Islamic feminist history to the first time that Afsaneh Najmabadi used the term, in her talk to the SOAS[126] in February 1994. Post-revolutionary Iran is considered the birthplace of Islamic feminism, where female scholars—along with some allied men—started to use verses of the Qur'an to critique laws and policies that discriminated against women and to appeal for a fresh look at such laws (Badran, 2005: 9). Women's magazines and women's studies journals published in Iran, such as *Zanan* (1992, a women's magazine) and *Farzaneh* (a women's studies journal), and their editors and directors such as Shahal Sherkat, are considered major contributors to the foundation of Islamic feminism and its accompanying scholarship (Moghadam, 2002: 1144: Badran, 2002: para 4; Mir-Hosseini, 2011: 4).

Mir-Hosseini (2011: 4) indicates that when the Iranian Revolutionary government started to 'Islamise' the previously reformed laws and take away many rights of women, it resulted in tension between Islamists and feminists, and the gap between them widened steadily. In the early 1990s a new 'gender discourse' emerged (ibid). Mir-Hosseini says she first used the term to describe the few women who, during the time of Reza Shah, were active in anti-government movements, calling for Islamic reform. Later, under the Islamic government, these women started to defend women's rights (ibid). In an interview with the Persian-language BBC program *Pargar*, Mir-Hosseini stated that she could find no alternative to

[126] School of Oriental and African Studies, London University.

'Islamic feminists' to refer to such women as Shahla Sherkat, Azam Taleqani and Zahra Rahnavard.[127]

To summarise, whether accepted as a branch of feminism or considered an academic project or a movement, Islamic feminism is of paramount importance for women living in the Muslim world. Islamic countries are predominantly traditional and conservative societies where a secular approach to change and improvement may fail. The 1979 Islamic Revolution in Iran and that in Afghanistan in 1992 demonstrate this claim. In advocating for change and reform, the language of the Qur'an and Islam work much better than any other approach.

3.2.3. Rationale for Grounded Theory

Given the scarcity of data on the thesis topic in Afghanistan, the current dissertation is strongly dependent on data gathered from the field for building the basis for analysis and generating the missing theory. The research method that best supports this approach is grounded theory. Grounded theory is a method of qualitative research first developed and introduced by Glaser and Strauss in their *Discovery of Grounded Theory* (1967). In this method of research, all that matters is the data; as Glaser indicates, 'all is data' in grounded theory (1998: 8). Systematic data collection and analysis leads to generation of the theory (Strauss & Corbin, 1990: 23). The tools offered by grounded theory method are used to collect data, analyse it and develop a theory on the practice of *mahr* in Afghanistan that should reveal the gap between expectations and practice. As Charmaz suggests, 'grounded theory guides the candidate, provides the focus and flexibility. The strategies of grounded theory assist the candidate to get started, stay focused and successfully finish a research project' (2014: 3).

3.3. Design of the Study

As mentioned earlier, the main research method for this study is qualitative research. While there is no intention to use mixed methods or combine qualitative and quantitative

[127] Video available at <www.youtube.com/watch?v=EZxLHYQa6nc>, last viewed 29 May 2019.

researches, a major part of the data gathered for the thesis consists of quantitative materials gathered from court files. This was done for two purposes: first, and most importantly, to establish a context for the data coming from the interviews and observations; and, second, to allow triangulation and confirmation of the research findings.

An important criterion for choosing the research methodology was to ensure credibility and compatibility of the research data with the conditions imposed on the research by the UTS HREC committee.[128] Afghanistan has been in a state of war since 1978 and this conflict has infiltrated every aspect of life in the country, including academic research, which came to a standstill during the period of war with the USSR and the Civil War (1978–2001) (Schneider, 2007: 107). Only a few research-based books were published during this period. Since the fall of the Taliban in 2001, many studies have been conducted, especially by international organisations and foreign researchers who visited the country. However, no legal framework exists to govern research status, regulate the research environment or impose conditions that would ensure the safety and security of research participants and prevent harm to them. This holds true also for the researchers themselves.

Thus, it was anticipated that collecting data through only one methodology might not guarantee accuracy and validity of the theory that would be framed based on the findings of the research. To tackle this concern, more than one search tool was used to allow comparison of the data. The background information extracted from the court records is vital, as there are no prior studies available to give a true picture of *mahr* conduct in Afghanistan. A general account based on real cases decided in the courts over the last two decades thus has an essential role to play in this thesis. Over 1000 cases have been reviewed.

The main source of research data is in-depth interviews with 40 lawyers and judges who deal with women's divorce cases daily. In the book *A Practical Introduction to In-depth Interviews*, Morris refers to properly conducted interviews as a 'powerful' tool for gathering data (2015: 2). The information shared by research participants is an important

[128] Human Research Ethics Committee (HREC); the reference number for approval of the research is 2015000212.

source of new knowledge. By designing slightly different questions for each group – judges and lawyers – the candidate created an opportunity to cross-check the information obtained from the research participants. This technique provided more insight and ensured the data has strong validity.

Another method used for data collection is observation. In general terms, '[o]bservation is a research method that enables researchers to systematically observe and record people's behavior, actions and interactions' (Hennink et al., 2011: 170). Flick describes five types of observation, two of which were relevant to this thesis. First, covert versus overt observation reflects the visibility or non-visibility of the researcher in the scene. In other words, it shows whether the participants know they are being observed. The second category of observation is described as participant versus non-participant, indicative of the extent of a researcher's involvement in the activity (2014: 308).

Overt observation was conducted for this thesis; that is, the court members and judges were clearly aware of the candidate's presence; however, the research intervention was non-participatory. The main purpose was to gather information and see how *mahr* is dealt with in divorce cases. Over 60 cases were observed; cases in which no element of *mahr* was present were disregarded for narration purposes. The observations in Kabul, when compared to those conducted in the provinces, revealed significant differences in the treatment of *mahr*, showing the extent to which *mahr* is recognised among the right-holders and how it is regarded by legal practitioners. The gathered data simultaneously verify each other in terms of credibility by presenting similar results.

3.3.1. Sampling

The sampling criteria for this research involved gathering as much information as possible on post-Taliban family law outcomes in response to the *mahr* element in divorce cases. The sampling structure was defined beforehand, and purposive sampling was determined to be a suitable way of designing the research, selecting the data-gathering methodologies, choosing the research participants and identifying the targeted geographical areas. Purposive sampling requires that the research sample be responsive to the research

objectives. It is the 'nature of research objectives' and the 'working context' of the research that define the best sampling strategy (Palys, 2008: para 1; Flick, 2014: 168).

3.3.2. Choice of Research Areas

The criterion for the selection of the research area was the existence of a specialist family court. When the research plan was designed there were five family courts in Afghanistan, and the initial idea was to conduct research in all of them, allowing a comparison of the family court in the capital with those in the provinces. This approach would test the hypothesis that, due to the geographic focus of development work over the last two decades of international intervention in Afghanistan, women's status has improved more in Kabul than in other areas of the country. Although cities are doing much better than rural areas, in the provinces the situation has not improved significantly, and this relative lack of progress affects women's socioeconomic status.

However, conditions imposed by the UTS Ethics Committee altered the focus of the study, and security also became another essential element to be considered. The Australian Department of Foreign Affairs and Trade has declared Afghanistan to be a high-risk zone, and Australian citizens are not permitted to travel there. These conditions are also imposed on national and international students. To meet the HREC conditions, two provinces were dropped from the list because of major security concerns, and the research was limited to three provinces.

3.3.3. Choice of Research Participants

Because they are the main holders of the right to *mahr*, interviews with women should have been a major part of the research data. However, given the sensitive and controversial nature of the topic, it was assumed that only professionals would be willing and able to provide the required data and that legal practitioners would be a good source of the information needed to develop the thesis. Moreover, the scale of the PhD meant that it was not feasible to interview women themselves. Since lawyers represent many women and have experience of multiple divorce cases, their views were considered more insightful for this research than those of clients likely to have a narrower experience of divorce proceedings. Thus, women were dropped from the list of research participants.

Within the legal community, the first category selected for interviews was lawyers recruited by legal aid-providing organisations and organisations that work for women's rights in Afghanistan. This decision was based on the hypothesis that access to these lawyers would be much easier through these groups' leadership and management authorities, and this proved to be the case. In interviews with these salaried lawyers, some degree of bias and a tendency to highlight only the positive aspects of their work were identified. Therefore, it was decided that a second category should be independent lawyers, those who practice law or work in partnership with another lawyer through their own law firms. Altogether, 29 lawyers were interviewed, of whom five were independent lawyers and 24 were from organisations that either work for women's rights or provide legal aid services.

In selecting judges, the primary criterion was to interview only those judges with prior experience in handling family dispute cases. Access to and availability of judges were also important factors, as some judges would not agree to participate. Given these criteria, the candidate was able to speak with only those judges working in three family courts. There was no possibility of including in the research judges beyond the three already-mentioned courts, as no judge is permitted to participate in any interview or express their views in the media without prior permission from the Supreme Court. The candidate had permission to work with only three family courts, so that their judges alone were to take part in the research. Even so, in the province At Family Court, none of the judges approached accepted the candidate's request except for three who were introduced by the head of court.

3.4. Data Collection

Three data collection methods are used in this study: review of the court registry books, conducting interviews and non-participant observation. The criteria for selection, procedures and challenges for each are described below.

3.4.1. Court Documents

Varying from different types of written texts to recorded visual images, documents are an important source of data (Charmaz, 2014: 45) in qualitative research. A major part of the data for the current research comes from review of documents in the form of court records. Lincoln and Guba differentiate documents from records. For them, records are formal in

context; that is, records come from political and administrative backgrounds, while documents are the results of 'personal activities' (1985: 227). The court records reviewed for this research are administrative records, from the court summary books that contain records of divorce cases.

Review of the court records was included in the research methods for two main purposes: first, to find out about women's access to *mahr* when seeking divorce; and, second, to establish premises for framing findings from the main body of the data, including interviews and observations, and to allow assessment of that data. These data collection methodologies proved to be the best choices for research purpose as the three sources reflected similar findings and thus simultaneously confirm each other and convey the same message about the reality of *mahr* in Afghanistan.

Purposive sampling was also used for selection of the period for the court records. It was decided to review case record samples for the period 2003–2015 for two reasons. Firstly, from the candidate's understanding and experience, this time can be seen as a golden period in the history of women's rights in Afghanistan. The intervention of the international community in December 2001 to liberate Afghanistan from the Taliban opened a window of opportunity for women as well (Crisis Group, 2013: i).

Women's freedom and access to work and education, which were severely curtailed with the arrival of the *mujahedeen* in 1992 and later banned entirely upon the arrival of the Taliban in 1996, were restored with the help of the international community. Women were again able to leave their homes and go back to schools and universities and restart the work from which they had been excluded during the period of the Taliban (Kasa, 2014: iv; Amnesty International, 2012: 3). [129] In addition, international organisations played a remarkable role in creating jobs and providing educational opportunities, even to the level of study abroad (Amnesty International, 2012: 3; Crisis Group, 2013: i). Although difficult to support with hard statistical evidence, one may say that Afghan women had never seen this level of attention to their plight in the country's history.

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[129] The Amnesty International Report is accessible at <www.amnestyusa.org/pdfs/Afghanistan.pdf>.

The level of legal services provided to women in this period has been relatively high, and enormous amounts of funds donated to Afghanistan have been spent in support of women. Arguably, if in this period women have not been able to claim their rights and refer to the courts to file cases against abusers and those violating their rights, whether husband or other family members, or to claim divorce, they would not have been able to do so in the past.

Particularly at the time of Taliban, divorce was banned because women were denied all rights except for limited employment in the health sector (Crisis Group, 2013: 5). The candidate witnessed one case in which the primary court of the district (where the claimant lived) responded to her claim of divorce with the statement that women in Islam had no right to divorce, and only her husband could divorce her. After the fall of Taliban, legal services increased in Afghanistan (Han, 2013:1), and provided women with greater access to legal aid through women's NGOs (USIP, 2013: 6). It is for these reasons that the candidate asserts in the period (2003–2015) women have had greater access to courts and therefore, that the divorce rate is high compared to previous periods.[130]

In addition, tremendous work has been done in this period through national and international organisations to raise awareness of women's rights. The number of local and international NGOs registered with the Ministry of Economy in Afghanistan, and the activity reports of those NGOs, indicate this growth in human rights activity.[131] No other era in Afghanistan has witnessed such a period of sensitivity towards women's rights and gender issues. For all these reasons, this period was selected for the study.

Types of Documents Selected

Given the severe shortage of information about the research topic, reviewing previous records of divorce cases in the courts was essential to establishing a context for the qualitative data from interviews and observations. A combination of these two types of data is considered necessary for this thesis. The quantitative data extracted from the court

[130] The review of court records clearly indicated that the divorce rate is increasing.
[131] The number of NGOs was over 3000.

records reveals how much *mahr* is paid to women; the number of women, from those referring to the courts seeking divorce, who also opt to seek *mahr*; and the number of *mahr* seekers who succeed in their quest. However, relying on court data alone would leave a knowledge gap as to how and why amounts are, or are not, paid to women, and how and why *mahr* seekers fail. The two forms of quantitative and qualitative data complement each other in generating a factual response to the research question.

A purposive sampling strategy was also applied to the document selection. At the design stage, the candidate was confident in the choice of court registry books that contained information on previously decided *tafriq* cases. She expected the data contained in *tafriq* books to answer the list of questions developed for this purpose. Thus, court officials were asked for the books that contained information on *tafriq* cases that had been decided in previous years.

The request was initially denied by the court authorities and clerks, on the basis that no registry book existed which contained all the information needed. Officials in the Kabul court advised that all the papers related to *tafriq* cases were kept in files, not in registry books. The candidate began by looking into *tafriq* case files in search of the required data. The questions designed for review of the court records were intended to seek information on:

1. the period that a divorcee and her ex-husband were married;
2. the number of children born to the couple;
3. the parent who was awarded child custody after divorce;
4. whether the woman was entitled to alimony or maintenance of the children to be paid by the father;
5. the employment status of both parties;
6. the amount of the couple's income;
7. whether the couple lived independently or in the husband's family home;
8. whether *mahr* was granted to the woman; and

9. how much *mahr* was granted or reasons for not granting *mahr*.

There were also two questions about the bride price:

1. whether the husband had paid dowry; and
2. if so, how much.

The case files presented to the candidate each contained 20–40 pages of information. These included the applicant's petition in some files, along with the response from the defendant; the court's decision in the form of a long document; and other evidence, such as reports from experts (hospital staff or police) if these were part of the file documents.[132] However, much less information than expected was located in those files. For example, the candidate was surprised to see that from the entire indictment/petition letter, often more than five pages, no more than one or two questions listed could be answered. The whole text was dedicated to an explanation of the problem between husband and wife: how it developed, how the marriage came about, and how violently the wife was treated.[133] Similarly, the defendant's paper had the same kind of information, and most of the court decisions were based on these two papers. As such, it was hard to find the right data for feeding into the research questions.

Moreover, there was no mention of *mahr* in most of the reviewed cases, unless the case was a claim for *mahr* itself, and few cases reflected a *mahr* dispute. After spending considerable time on fruitless efforts searching the *tafriq* case files, the candidate met with the Manager of Court Administration to explore why the petitions and the court decisions in the *tafriq* case folders did not mention *mahr*. The explanation revealed that divorce claims cannot be combined with *mahr* claims in the same time. The court procedures require women to file one case at a time, and usually women are encouraged to finalise their divorce claim and

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[132] This petition document is a request from a claimant to court and contains justification for the claim. Most often it is written by petition writers who set on streets close to the courts for doing this business. While some information about the claimant (name, father's name, grandfather's name, residence, national ID card number) is an essential part of the written form, further basic information can be included in the beginning of the written petition. This latter information was mostly missing in the files reviewed for the research.

[133] Divorce cases initiated by women are mostly violence-based complaints in which a woman has no other remedy to avoid an abusive marriage and ends up seeking *tafriq*.

then return to the court to file a *mahr* case. It was suggested that *talaq* case registry books would be a better option to find *mahr* decisions. Thus, the focus was shifted to *talaq* case registry books.

In the list of official court documents under Article 37 of the Civil Procedures Code, these books were the only source of recorded information about cases that could be useful for research purposes. Thus, these books became the focus of the review for the court records component of the research. However, the prepared list of questions for review of the court records could not be entirely answered through *talaq* registry books either, as these contained only brief information about the divorcing parties. Each page in the book was dedicated to one case, summarising in a few lines why the husband wished to divorce his wife. The page also required the name, father's name and grandfather's name of the parties, their main and current residences and space for photos of the parties along with photos of two witnesses. This was all information that could be found. However, these registry books were still relevant to the research, as the back of the page indicated whether *mahr* had been paid or relinquished by the wife, or the husband had been discharged from the payment responsibility by the wife.

3.4.2. Interviews

The interview as a 'purposeful conversation' has been described as 'a one to one method of data collection that involves an interviewer and interviewee discussing specific topics in depth' (Hennink et al., 2011: 109). Semi-structured interviews were the most useful type for this research, as they allow the research topic to be discussed openly, which is not possible in 'standardised' interviews and those using questionnaires (Flick, 2014: 207). In light of the purposive sampling strategy, a semi-structured, open-ended interview method was used to collect data from the legal practitioners.

The research objective for interviews was to obtain a picture of the practical realities of *mahr* and the challenges women face in seeking it. Given that lawyers representing divorce applicants and judges working in family courts are directly involved with *mahr* claims, they were deemed to be essential research participants for this thesis. In addition, these two groups of legal professionals are the most reliable source of information on the practical

aspects of the family law domain in Afghanistan, and thus, the most suitable to give opinions on *mahr*.

Before embarking on the research, the candidate assumed that 50 interviews should be conducted to get a broad perspective for analysis. However, during the interview procedures it was determined that a smaller number would be sufficient. After conducting 25–30 interviews, the candidate found that the answers offered by research participants tended to be similar. Therefore 29 interviews with lawyers and 11 with judges provided enough data to be fed into the research.

Choice of Interview Participants

Apart from the consent of the interview participants, the most important criterion was the length of experience working with women's cases for the lawyers and length of service in the family courts for judges. In choosing lawyers, priority was given to those working with agencies and NGOs that provide legal aid for women, given that the bulk of legal representation for women seeking divorce or support with other legal problems is provided through such NGOs and agencies.

To reach lawyers employed with women's NGOs, the directors and leading authorities of these agencies were contacted and permission was sought to include their nominated lawyers in the list of research participants. The agencies included Women for Afghan Women (WAW), Medica Mondiale Afghanistan (MMA), Humanitarian Aid for Women and Children in Afghanistan (HAWCA) and Voice of Women (VAW).

Although the number of freelance lawyers in Afghanistan is limited and legal representation as a form of business is not as common as in Australia or other western countries, some successful lawyers were included in the list of research participants. The

snowballing method was used to reach candidates for interviews.[134] All the freelance lawyers interviewed are members of the Afghan Independent Bar Association (AIBA).

There was no element of choice in the selection of judges, as judges are not permitted to conduct interviews without prior permission from the Supreme Court. Although official permission was obtained, judges were still not confident in agreeing to the interview requests, except for those nominated by their superiors. Even among those nominated, some showed no interest in taking part in the research. For instance, the only man in the group of four judges introduced to the candidate in Province A declined to be interviewed. In the two provincial courts, the judges interviewed were the only ones working there. Altogether, 11 judges were interviewed and the data gathered through those interviews was found adequate for the research purpose.

Interview Setting

The choice of the interview setting was left to the interviewees. They were asked to decide on the location that would be most convenient and comfortable for them. Judges were interviewed in the relevant courts, as they refused to go out. Some of the lawyers were interviewed in their workplaces, and others expressed their willingness to come to the candidate's office at the Gawharshad Institute of Higher Education (GIHE) in Kabul. For this group, transportation costs were paid; interviews were scheduled for lunch time and lunch was also provided to ensure cultural appropriateness. Lawyers in the provinces were all interviewed in their offices.

Obtaining Verbal and Written Consent

Before embarking on the interview with each participant, detailed information was provided verbally about the research project. In addition, information sheets and consent sheets (developed and translated into Dari before the candidate travelled to Afghanistan) were provided, and enough time was allowed for participants read about and reflect on the research project. The consent to interview was audio-recorded and some of the participants

[134] Snowball or chain referral sampling yields a study sample through referrals made among people who share links with or know of others who possess some characteristics that are of research interest (Biernacki & Waldrof 1981: 141).

also signed a consent sheet. Those who were reluctant to allow recording of their voice for interview purposes were excluded from the list of participants from the outset.

Interview Atmosphere

Interviews were conducted in dialogue with face-to-face interaction. However, the candidate avoided giving opinions and raised open-ended questions, and participants seemed happy to give long answers and to expand on information. A digital recorder and, on some occasions, the candidate's iPhone were used to record interviews. If interviews took place in the researcher's office, they were transferred to a laptop immediately; if conducted in the interviewee's workplace or a place of their choosing, interviews were transferred to a laptop as soon as possible. When the researcher returned to the university campus, research data was transferred to her UTS desktop and then moved to the UTS research data-storing space on 'OwnCloud'.

Reflections on the Credibility of Interview Content

Judges maintained a high degree of caution while providing their statements and answering interview questions. None expressed a single negative sentiment about the system, and they defended their positions strongly. However, female judges expressed some level of sympathy with those women who stood to lose a lot through divorce and who were the most vulnerable among the cases heard. These vulnerable women were those divorced against their will or who had been abused; their appearance clearly demonstrated the misery of violation and abusive marriages.

The responses of staff lawyers also exhibited a dependency on their workplace and employment. Those employed by NGOs were more concerned to share success stories and show how cases they had represented succeeded, but they were well aware of the challenges confronting them in the courts. No-one in this group displayed much bias towards women in what they expressed. They spoke about the realities as they experienced them and as observed by the researcher herself.

The freelance lawyers were more competitive and knowledgeable in expressing their views and providing information. Although projecting themselves as highly successful lawyers

(perhaps for marketing purposes), they were articulate and clearly described the actual situation. In contrast to the lawyers, the judges made constant efforts to paint a picture that was appropriate from their perspective as government employees. The data gathered through the interviews were very rich and have added immensely to the value of the thesis and the knowledge it creates.

Shortcomings and Challenges

As anticipated in the ethics application, some participants were reluctant to talk freely or provide information. Their reluctance mostly came about because the importance of research is not well understood in Afghan society, where very little primary research is undertaken. People are not aware that by participating in a research project they contribute to the creation of knowledge. As such, in deciding whether to take part in a research project, they think of what the contribution brings to them personally, whether or not it will confer some kind of benefit. If there is nothing of interest to them, they prefer not to participate. This attitude was seen in interviews even among some lawyers and judges who are well-educated members of society.

3.4.3. Observation Sessions

Compared to the other two methods, observations posed more challenges, as the court authorities in Province A appeared reluctant to agree. The Supreme Court letter (see section 3.5.1, below) made it easier in the other two provinces. The choice of observation type as 'non-participant' would have been compulsory even if the research required participant observation. In case of the latter, permission would not be granted because Family Court sessions do not allow public participation. Nonetheless, the observation of the court hearings for *tafriq* and *talaq* cases is an essential complementary research method to ensure data collected through interviews and review of the court records is verified and completed.

According to Parke and Griffiths, a problem with non-participant observation is sole reliance on what is being observed. This means that lack of participation in the process may limit the data to some extent (2008: 65). However, in the current study observational data-gathering is complemented by other two methods. Initially, the criterion for court observations was to look into *tafriq* cases going through the final stages of hearing and

decision-making in the courts, to learn whether the judgment of a *tafriq* or divorce case correlates with a decision on a woman's right to *mahr* if she had sought divorce. Later, it was found that *tafriq* cases are not heard at the same time as a request for *mahr*. As such, there was not much benefit for the researcher in attending *tafriq* cases when she was seeking *mahr* information. Nevertheless, observing some cases to see whether the topic was raised in the discussions was necessary. Some of the challenges the researcher faced in the fieldwork, including barriers imposed on her visits to the court and suggestions provided by the court officials, as well as her own interactions with lawyers and clerks, led her to drop the previously-defined criterion for court observations and to seek instead opportunities that would allow her to watch case hearings of both *tafriq* and *talaq* cases. Otherwise, she could not have conducted the non-participant observation component of the research.

3.5. Challenges Posed by Securing Permission for the Research

To conduct the observations and the entire research, official permission from the Supreme Court of Afghanistan was required. For work with the Kabul Family Court, permission was obtained six months prior to the commencement of research. The letter of permission provided to the researcher was not a direct order for the Family Court to provide unconditional cooperation; rather, the letter asked for assistance within the boundaries of the law, and this provided leeway for officials not to provide effective assistance.

Given that no specific law governs research in Afghanistan, one way of understanding the wording of the letter would be that Court authorities had no obligation to cooperate. In fact, the letter could be interpreted as offering court officials the power to disallow observations. Nonetheless, no major objection was expressed at the beginning that would have discouraged the researcher, although challenges arose later.

Observations conducted for the research were divided into two phases. The first phase included the time the researcher spent in the Kabul Family Court before changes in the

court's structure took place.[135] This period lasted from November 2015 to May 2016. During this time, the candidate reviewed the court records, attending the court two to three times a week. In response to her request for observer status, she was kept waiting and told that she would be invited in *talaq* case hearings. But she was invited to one case only, while the plan was to conduct 15–20 non-participant observations.

The case heard was a short session of divorce, lasting about five minutes, pronounced on behalf of a husband in front of the judge. However, the shortage of observation opportunities was latter compensated by the researcher's reference to one of the new family courts in the revised structure. In May 2016, the Kabul Family Court was upgraded to an Appeal Court and two primary family courts were established to reduce the work load. This enabled the candidate to obtain further official permission through her contacts in judiciary organisations to conduct observations in the second phase. Had she been able to do more in the first phase, the observation chapter in this thesis would have been more extensive.

Observation in the provinces was much easier, as provincial courts were more open to the researcher and she could sit inside courtrooms. The researcher was given a seat where the heads of the courts and other judiciary team members were based to receive clients, hear cases and declare decisions. This location provided a good opportunity to observe many cases referred to the court. During her stay of five days in one of the two provinces (Province B), the candidate observed around around 35 cases, of which more than ten were decided.

Observation in the second province took place after changes in the court system had already been enforced. When the candidate made her first trip to present the letter from the Supreme Court, the head of the Family Court was reluctant to allow the researcher access to the court books or to sit in the court room for observation purposes, but he agreed to talk to her when she returned to undertake the research. After the courts' restructuring, the Head of the Court also changed, with the new officer allowing observations and court records

[135] In May 2016, the civil courts structure and administration within the legal system was changed and the Family Court in the capital was restructured to create three family courts instead of one. Just before these changes, the court closed and normal case hearing procedures were stopped for couple of months.

review along with the interviews. Over the period of three days that the researcher sat in the courtroom of the second province (Province B), around 15 cases were observed. The status of the *mahr* element in the observed cases was not different from that observed in the first province.

3.6. Data Analysis

To ensure greater level of accuracy in the research findings, the collected and applied methods for gathering have been triangulated. In social sciences, triangulation refers to 'combining data from different sources to study a particular social phenomenon' (UNAIDS, 2010: 13). Triangulation, as its name suggests, is rooted in mathematics. It was introduced to social science research by Denzin in the 1970s (UNAIDS, ibid). In their definition of triangulation, Yeasmin and Rahman (2012: 156) note that:

> 'Triangulation' is a process of verification that increases validity by incorporating several viewpoints and methods. In the social sciences, it refers to the combination of two or more theories, data sources, methods or investigators in one study of single phenomenon to converge on a single construct and can be employed in both quantitative (validation) and qualitative (inquiry) studies.

In the classical approach, triangulation was applied to confirm and validate research findings (Yeasmin & Rahman, 2012: 158). Some authors call it a tool for validation (Web, 1966; Campbell, 1966; Smith & Kleine, 1986; Denzin, 1978, in Yeasmin & Rahman, 2012: 159). However, authors such as Flick and Olsen argue that it is more than a tool for assessment and 'validation'. From their perspective, triangulation is about obtaining a deeper understanding of the data collected through the methods used (Flick, 2014: 184; Olsen , 2004: 1). Defining triangulation, Flick (2014: 184) suggests that:

> Triangulation means that researchers take different perspectives on an issue under study or – more generally speaking – in answering research questions. These perspectives can be substantiated by using several methods and/or in several theoretical approaches. They are, or should be, linked.

The definition further suggests that triangulation could be referred to as a combination of different types of data or different methods used for data collection (Flick, 2014: 184). Nonetheless, in this thesis it is used as a source of validity for the research methodologies

and collected data. Using triangulation to establish the validity of the data worked well for this research, as the obtained result is reflective of what was expected.

3.5.1. Coding of Data

As mentioned above, the dataset includes 40 interviews, 18 observations and more than 1000 case reviews. Interviews were first transcribed in the Dari language. Each interview produced an average of 7–9 pages of text; the shortest were about five pages, and the longest ten pages, of interview transcript. To start reducing and summarising the raw data, the major sections of interview transcripts of interest to the thesis were translated into English and moved into tables in Excel spreadsheets for coding. The researcher's observation notes were also processed into detailed narratives before being coded, as an essential preliminary to the analysis stage.

According to Charmaz, 'coding means naming segments of data with a label that simultaneously categorizes, summarizes and accounts for each piece of data' (2014: 111). When the transcription phase is finished and a researcher is left with a large quantity of raw data, coding is a way to systematically reduce and prepare for the next stages. Coding bridges the gap between data collection stage and 'the emergent theory' (ibid: 113) and comes into existence from 'actions and understanding' of the researcher using the grounded theory method (ibid: 115). On the role of coding in opening the way to grounded theory, Charmaz argues (2014: 113):

> Grounded theory generates the bones of your analysis. Theoretical centrality and integration will assemble these bones into a working skeleton. Thus, coding is more than a beginning; it shapes an analytic frame from which you build the analysis.

The coding process for the interview data began with repeated reading of the transcripts and creation of titles for the pieces of reviewed data. Charmaz describes two phases for coding: initial coding and focused coding. In the initial phase, a researcher is willing to capture as many ideas as possible; therefore, 'each word and segment of data is coded'. Organising the generated codes into categories of similar concepts and ideas gives way to the second phase, selective coding. Charmaz explains that in the focused coding phase, the most 'salient' codes are put together, leading to generation of categories (2014: 114). The created categories in the data for this thesis then led to the appearance of specific themes that are analysed in four

chapters of the thesis. Each subtitle in the fifth, sixth and seventh chapters is reflective of the identified themes that, in some cases, are merged with similar themes for analysis purposes.

Observation notes are described in a narrative manner and then analysed in light of the major findings from the interviews and the court data for comparison and assessment purposes. What matters in the court data is primarily the quantitative data; therefore, the information is presented in tables and charts and described on the basis of differences that appear in the figures. This means the number of women who have received *mahr* and those who have given up their request for this financial right are highlighted along with the amounts in the mentioned categories. The charts and tables are meant to show the number of women who receive *mahr* and whether the amount received is sufficient for the basic needs of a divorced woman.

3.6. Summary

The premise for this dissertation is built on a rich dataset that provides a unique aspect to the thesis. Such distinctiveness adds immensely to the value of the generated knowledge, primarily because no similar work has been conducted before in the field of divorce and women's financial rights in Afghanistan. The different methods of gathering data validate each other in uncovering the realities of *mahr* practice in Afghanistan, and they reveal dark aspects of gender disparities that have never before been explored. In turn, this reflects divorced women's economic disempowerment in the face of the loss caused by divorce and the many other challenges women encounter when a marriage ends.

This chapter outlined the data collection strategies and further perspectives that shape the conceptual framework of the study and the research design. The rationale for the choice of research method and methodologies used in the study is explained and the benefits and drawbacks are described. The chapter indicates that the conceptual framework for the thesis is strongly based on the real, 'on the ground' *mahr* practices in Afghan family courts, alongside local customs and traditions. The findings of the data shape the thesis and it is therefore appropriate to a grounded theory methodology.

Explaining the methods and strategies of the research conducted in the field, this chapter is positioned to integrate the theoretical aspects of *mahr* and women's financial rights in Shari'a law (addressed in the first two chapters of the thesis) with the practical aspects of *mahr* application on the ground (in the chapters to come). This chapter first opens door to the discussion of *mahr* as a legal concept (next chapter), which includes perspectives from the Afghan legal framework in the form of applicable laws and regulations on *mahr*. The following chapter also touches on the practice of *mahr* and addresses existing customs and traditions that undermine its value, such as the prevailing custom of bride price.

Then it connects the first two chapters of the thesis – on theoretical aspects of women's financial rights and *mahr* as a major element governing marriage in Islamic law – with the second part of the dissertation, deriving from the fieldwork. Since the main body of the research is based on first-hand empirical data, it is essential to describe the methods and tools employed for gathering it. Without this, it would have been difficult to achieve the study goals of exposing the difference between *mahr* in Islamic teachings, which is mostly a rhetorical concept, and how the right is generally implemented in Afghan society.

Chapter 4. *Mahr* in Afghan Law and its Cultural Context

4.1. Introduction

This chapter sets out the legal and cultural perspectives that establish the context for *mahr* in Afghanistan. In support of the argument of this thesis – that *mahr* cannot offer the financial protection the vast majority of divorced women in Afghanistan require – the chapter explores the limitations and deficiencies in the legal system and the impediments of the culture of bride price impose on the *mahr* system. The chapter is divided into two sections. The first reviews the legal and regulatory framework that defines *mahr* as a financial right for women and sets the boundaries within which *mahr* can be claimed. In this section, two versions of *mahr* provisions, contained in the personal status laws of the Afghan Civil Code (ACC) and Shiite Personal Status law in Afghanistan respectively, are introduced. Detailed descriptions of existing provisions highlight shortcomings in these laws and show how limited their provisions are in offering protection to *mahr* seekers.

The second section assesses the cultural context in which the practice of bride price emerges as an obstacle to *mahr*. Drawing on open sources and the views of the research participants, the chapter in this section argues that bride price has a stronger institutional identity than *mahr* in practice. In addition, it demonstrates how Afghan society pays more attention to custom than it does to laws and Sharia norms. The secondary sources used in this section indicate the complexities women must navigate when making *mahr* claims. The picture of laws and culture in Afghanistan presented in this chapter supports the argument that *mahr*, while remaining 'on the books' of Sharia and the legal system, cannot guarantee women's access to their rights.

The chapter begins with a general reference to the law in Afghanistan and its three dimensions – civil society, Sharia and customary law. This paves the way for a presentation and analysis of *mahr* provisions in the Personal Status section of the Civil Code, followed

by provisions in the Shiite version of law adopted in 2008, the new Wedding Law of 2015 and a drafted version of the Family Code, which is still in the process of development. The chapter then discusses the custom of bride price, and also deals with *jehizia* and its provisions in Shiite Personal Status law. The chapter is framed to provide a context for the problems faced by women who seek *mahr*. These problems are explained in the later chapters of the thesis.

4.2. A General Description of Law in Afghanistan

Law in Afghanistan is combination of statutory laws, Islamic Sharia and customary laws (Wang, 2014 & 2016; Rastin-Tehrani & Yassari, 2012: 3). The history of written law dates to the time of Amir Abdur Rahman Khan (1880–1901) and his efforts to centralise state authority through unification of the local powers exercised by tribes. His intention was to establish full control over local tribal powers. Amir began to codify systems and develop regulations to govern state affairs (ALEP, 2016: 6). In 1885, under the 'code of procedures and ethics' adopted by Amir[136] – the first-ever drafted code in Afghanistan – the Hanafi school became the leading source of Islamic law in the country (Wang, 2014: 217). This was reaffirmed in the 1925 Constitution adopted at the time of King Amanullah (ALEP, 2016: 10) and the Hanafi school continued to be the major source of law under every constitution adopted in Afghanistan until 2008.

The law governing *mahr* is encapsulated in a section of the Afghan Personal Status Law contained in the first volume of the Civil Code of Afghanistan, adopted in 1977. The *mahr* section in this law contains 17 provisions (pages 33–38 of the Code). Additional provisions addressing *mahr*-related issues are scattered throughout other sections. For many decades, this version of the Personal Status Law remained the official law on family matters in Afghanistan. While Shia Madhab followers (who constitute 15–20% of the Afghan population) have remained free to apply their own Personal Status Law, these provisions

[136] Asass-al-Quzat (Fundamental Rules for Judges), which was a basic code of procedures for judges to conduct their daily affairs and make decisions about cases (ALEP, 2011: 7).

were not adopted into the formal legal system until 2008. Currently, both Shia and Sunni personal status laws are applied in the courts, and both have a section on *mahr*.[137]

4.2.1. The Law of Mahr in the Civil Code of Afghanistan

The only available English version of the Civil Code translates the term *mahr* as 'dowry'. The first obvious problem in the law is that, other than this translation, the term '*mahr*' is not defined. Rather, provisions jump immediately into a description of what entitles a woman to be granted *mahr*.

Under Article 98, the first provision in the *mahr* section, the conditions that legitimise access to full *mahr* include consummation of a marriage, full privacy[138] and death of either of the two parties in matrimonial relationship. Article 99 then enumerates the types of *mahr*, but again without giving a definition. The section states that a wife is entitled to *mahr-al musama*. The English version translates this term as 'contractual *mahr*', which refers to fixed *mahr*.[139] If this situation does not prevail, a wife can still claim *mahr-al-mithl*.

According to Article 133 of the Civil Code, a fixed *mahr* less than the common amount is considered a disruption of marriage procedures and would cause cancellation of the marriage contract. On the question of what can be given as *mahr*, Article 100 provides that any good or type of property that can be possessed can also be the subject of *mahr*. The lack of elaboration and an absence of clarity in this article are the source of many problems for women making *mahr* claims. For example, the article does not indicate whose property is eligible for use as *mahr*. Most *mahr* cases fail or cannot be heard at all in the court because the property nominated as *mahr* is not actually owned by the husband.[140]

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[137] The Personal Status Law (in the 1977 ACC), although mostly based in the Hanafi school of thought, also contains some provisions borrowed from other Sunni schools such as Malikis (Max Planck Institute, 2005: 8).
[138] Full privacy, previously mentioned as 'valid retirement' refers to a situation in which, a man and woman have spent time together where no one else could see them.
[139] The only available translation of the Afghan Civil Code is provided by the Afghanistan Legal Education Project (ALEP), which is a student-driven initiative under the Stanford University Rule of Law Program. The web page can be found at <https://law.stanford.edu/alep/#slsnav-publications>.
[140] This comes from the research findings and Chapters 7 and 8 will elaborate further on it.

In two subsections, Article 101 addresses determination of the payment schedule. It clarifies that all or part of *mahr* can either be determined as subject to immediate payment or considered eligible for deferred payment. In effect, the article makes immediate or deferred payment optional. The article states that if a payment time is not specified, custom can be followed and, further, that the payment period may be shorter in case of *tafriq* or the death of the husband.

Article 102 seems to reflect the goodwill of the lawmakers who framed these provisions, as it allows a husband to increase the amount of *mahr* after consummation of a marriage. There are three conditions to this possible increment. First, the increased amount should be specified. Second, the wife or her guardian must accept the increase. Third, the couple is still bound by the marriage relationship.

Similarly, the next article confers authority on a wife to excuse her husband from paying all or part of *mahr*. However, such a release will be permitted only if the wife has reached the age of puberty and is determined to be of sound mind (Art 103). Notably, the father of a woman who has not reached the legal marriage age does not have the right to allow her husband to avoid his *mahr* obligation.[141]

The first part of this article is a major challenge for women's claims. As lawyers interviewed for this research pointed out, one possible way for a man to oppose his wife's request for *mahr* and to cause deliberate delays in the procedures is to tell the court that his wife has acquitted him of *mahr* payment. If no proof to the contrary can be provided, a woman will have great difficulty opposing such a claim. According to the interviewed lawyers, men may further argue that a wife's statement was made in absolute privacy. Such an allegation by a man might be useless before an Australian court, but in the context of Afghanistan the ultimate course for the court would be to invite the husband to swear an oath and that, in turn, would end the dispute.

Article 104 allows a woman who had transferred to her husband determination of the amount of her *mahr* to demand that the *mahr* be fixed, if this has not already taken place.

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[141] According to Art 70 of the Afghan Civil Code, the age of marriage is 16 for girls and 18 for boys.

However, the provision stipulates that this should happen before consummation of the marriage. If *mahr* determination is refused, the wife can take action through the court.

The right to *mahr* is diminished or disappears under the conditions specified in Article 105. If *mahr* is determined and the husband decides to divorce his wife before consummation or full privacy has occurred between the couple, the wife loses half of the fixed amount. If *mahr* is not determined, the wife is still entitled to claim half of the customary *mahr*. In this case, if a wife decides to end the marriage before consummation and full privacy, the right to *mahr* collapses entirely, according to Article 106.

Article 107 provides that *muta'a* is still applicable in cases where *mahr* has collapsed. It specifies that *Muta'a* include ordinary clothing and similar household goods necessary for daily life that a wife has used in her husband's home. The amount of *muta'a* cannot be greater than half the customary *mahr*. This provision also makes clear that a husband's financial ability should be taken into consideration in determining the amount of *muta'a*.

While many scholars cite *muta'a* in defending provision of post-divorce financial support to divorcees (Shahid, 2013 & 2007; Rehman, 1998; Pereira, 2000), Afghan law has taken a strict position in Article 108, stipulating that a woman has no right to *muta'a* if *talaq* has happened before consummation and a determined amount of *mahr* exists. Subsection 2 of this article says that in a case of *talaq* after consummation, provision of *muta'a* is permissible whether or not *mahr* has been determined. In Article 107, this right is confined to a small number of of dresses and other essential things a woman might need in everyday life.

Article 109 seems to prohibit a deliberate increase in the amount of *mahr* by a man who has a terminal illness and wants to increase the *mahr* for his wife. This article stipulates that such increases are subject to the law of inheritance.

Article 110 specifies that *mahr* is the property of wife, and she can exercise her right through any act of possession that she chooses. Article 111 then provides that if wife donates her *mahr* to the husband, in part or full, and divorce happens before consummation of the marriage, the husband is not permitted to ask for half the *mahr*. This means that there is no room for further submission, as *mahr* has already been transferred to him by the act of

donation. Under Article 112, a husband has no right to demand anything from his wife as *mahr* if she has already donated it and divorce happens before consummation. This condition is applicable in cases where the form of *mahr* is not cash or fungible goods. Similarly, Article 114 does not allow a father to give away any part of his daughter's *mahr*.

Article 114, the last of the *mahr* sections in the Civil Code, stipulates that a wife cannot be obliged to transfer *mahr* to her husband or another person. If she dies before she receives her *mahr*, the heirs of the wife may still have the right to demand it from her husband. In a case where a husband has died, his heirs could be asked to provide *mahr*.

While this article is the final provision on the *mahr* section of the Afghan Civil Code, other articles in the law also relate to *mahr* – for example, provisions found the alimony section or the section on *tafriq*. These supplementary articles are briefly described below.

4.2.2. Other Provisions on Mahr in the Civil Code

Apart from the provisions that come under the *mahr* section, there are other articles in the law dealing with the *mahr* topic as well. Article 75 waives the responsibility for *mahr* payment by an agent (*wakil*), unless it is explicitly guaranteed. Article 117.2 allows a wife to refuse to go to her husband's residence if *mahr* has not been paid. Article 158 suggests that any property accepted as *mahr* can be exchanged for a *khul* divorce. Article 163 stipulates:

> If khol [*khul*] has been exchanged for all the dowry, in case all or part of the dowry has already been delivered to a wife, she shall be obligated to return the amount she received. Otherwise, her husband shall not have the obligation to pay the dowry, whether or not khol has taken place before or after the marriage consummation.

In the section on *tafriq*, one provision creates serious problems. Article 188 allows *mahr* to lapse if a wife has initiated the divorce. Section 2 of this article reads that if 'a wife is the source of dispute, arbitrators shall decide for separation in exchange for all or part of the dowry'. This article prevents *mahr* and *tafriq* cases being heard simultaneously in court because it must first be established whether a woman's right to *mahr* will be removed due to her guilt in causing a conflict that leads to divorce.

A similar condition governs *iddat* maintenance entitlement as well:

> Any separation that occurs due to the fault of wife and based on her demand shall result in extinguishment of her alimony[that is, maintenance] during the waiting period. In this case, the wife shall not be re-entitled to alimony even if the cause of separation is eliminated before completion of the waiting period. (Art 214)

The wording in this article shows how framers of the law limited the right to *mahr* or maintenance in cases where a woman is considered at fault in a divorce. Article 213 removes this condition only in the case of a woman who 'has rescinded the marriage contract on the basis of puberty option, in completeness of dowry or disability of the husband, provided that she is not in fault in the mentioned case. In relation to maintenance entitlement, Article 216 deprives a woman of the right to demand maintenance if it is not requested during the *iddat* period.

If a wife is divorced and then her husband decides to remarry her after her *iddat* period is over, the woman becomes entitled to a new *mahr* in full portion. This is reflected in Article 210, which reads:

> If the husband divorces his wife by a minor irrevocable method and remarries her during her divorce waiting period and divorces her again, the wife shall be entitled to complete dowry and should complete the new divorce waiting period, even if this divorce took place before consummation of marriage.

4.2.3. Mahr Provisions in the New Wedding Law and the Family Law Draft

The new Wedding Law, adopted in 2015 (published in the official Gazette), has addressed some neglected aspects of the *mahr* provisions. For instance it provides a definition for *mahr* and *mahr-al-mithl* as well as *jehizia* in the glossary section of the law (Art 3). In Article 11, it allows the wedding parties (man and woman) to decide on the amount of *mahr* by mutual consent before or during the *nikah* and wedding ceremony. The article also calls upon the mullahs who conduct the *nikah*/wedding to encourage the parties to agree on a lower amount as *mahr*, based on Sharia injunctions.[142] In subsection 2, the article also clarifies that *mahr* is the right of the bride and others have no right to make use of it. It also

[142] This is a reference to the hadiths from the Prophet SAW, who advised that best *mahr* is the one that eases the *nikah*. However, when Muslim communities apply this hadith and encourage a lower value for *mahr*, one should question how much they analyse this in the context of the period in which the Prophet SAW made this suggestion; that was a time when Muslims in Madina were hardly able to pay *mahr*. This out-of-context interpretation of hadiths deprives women of their right to an amount of *mahr* suitable to maintain them.

stipulates that expenses of the wedding party, clothes of the bride as well as *jehizia* cannot be accounted as *mahr.* Subsection 3 suggests that jewelry, which in Afghan culture is a very common gift to the bride, cannot be counted in *mahr* if explicitly called a 'gift' when provided to the bride. While it might be hard to prove later whether it was given as gift or not, it is still a good provision to be added to the law. Another subsection (ss 4) requires *mahr* 'in kind' (property or anything else other than cash) to be specified properly so that it does not create conflict in the future. This is also a valuable provision, which may help to reduce some of the problems raised in the next three chapters of the thesis. The most controversial matter, however, remains untouched: the issue of the property of a third person being promised in the *mahr*. The following chapters will show how common a problem this is and how significant a role it plays in the failure of many claims for *mahr* .

Mahr Provisions in the New Draft Family Law

There is another piece of draft law that should be mentioned in passing in this section. Civil society organisations concerned with women's rights in Afghanistan advocate change in the Personal Status Law provisions, to effectively form a new family law. To this end, they have brought together a group of experts to work on draft legislation. The most recent version of the draft does not make any major change in the *mahr* section; rather, it repeats the same provisions from the Civil Code in an improved order.[143] This means a number of articles are swapped or similar articles combined with more sub-articles. The previous 17 provisions are reduced to 11 in this draft, but with few added sub-classes that imitate the Shia version (which is discussed below). There are, however, no new provisions that would represent a major change in the law or improvement on the previous version.

4.2.4. Mahr in the Shiite Personal Status Law

Contrary to the brief form of *mahr* law in the Civil Code, the *mahr* section in the Shiite Personal Status Law (hereinafter will be referred to as Shia Law) is more comprehensive and broader in scope, even though regulated in only sixteen articles. Most of the provisions consist of three to six sub-articles, which creates space for covering more issues related to

[143] The drafted version of the law is not available on the web; it could be found with the members of the drafting committee only. The latest version of the drafted law was shared with the candidate by one of the working committee members on 18 August 2018.

mahr. While the Shia version of *mahr* law in Afghanistan is not necessarily more favourable to women's interests, it is a better form of law in terms of its scope. The purpose of this section is not to compare the two sets of law but to shed light on what is included in each.

The section on *mahr* in the Shia Personal Status Law begins with a definition of *mahr* in Article 104. The definition also includes *mahr-al-sunnah* which is not covered in the Sunni version of the law in the Civil Code. *Mahr-al-sunnah* refers to the *mahr* that was paid to the daughters and wives of the Prophet SAW, as described in Chapter 2 of this thesis. *Mahr-al-sunnah* cannot be more than 500 dirham. The following article describes the types of *mahr*, including the important topic of the property of a third person used as *mahr*. Specifically, the law says that if a husband assigns another person's property as *mahr* without the consent of the owner of the property, his wife is entitled to *mahr-al-mithl* only. This clarification is missing in the *mahr* provisions of the Civil Code, yet research findings indicate it is a problem frequently identified in *mahr* cases. A wife seeking *mahr* is often told that a property does not belong to her husband and, therefore, she cannot receive the promised *mahr* (Interviewees 17& 27).

Article 106 discusses the conditions under which a woman can possess *mahr*. The law says a woman can avoid submission to the will of her husband regarding consummation of a marriage if her *mahr* has not been paid. There are also provisions on transferring authority to a third party to set the amount of *mahr*. In Article 107, the law stipulates that if *mahr* is determined upon *nikah* but divorce happens before consummation, half the *mahr* is returnable to the husband. Subsection 2 says that if *mahr* is consumed or damaged, half the price may be claimed by the husband. The relevant provision in the Sunni version of the law in the Civil Code has a completely different rule that does not allow the husband to claim any spent or damaged *mahr* (Arts. 111–12). This difference reflects varying viewpoints among different schools of Islamic thought.

Article 108 describes possible increases to the *mahr* amount and Article 109 addresses another major problem in *mahr* practice in Afghanistan, namely, forgiving a husband from *mahr* payment. Such forgiveness has happened in most of the cases reviewed for this

research, indicating it is a major reason women are deprived of their right to *mahr*. The article allows men to seek half a *mahr* amount that has not been paid if the sum has been bestowed up on them by their wives or the husbands have been forgiven from payment in cases where divorce happens before consummation. For example, if a *mahr* was set at $A10,000, a wife could free her husband from payment duty. If this marriage is terminated before consummation, the man has a right to ask for A$5000 according to this provision, even though he has not paid anything.

Section 3 in Article 110 suggests that a wife is not entitled to *mahr* even after consummation of the marriage, if there has been an element of deceit in the *nikah*.[144] This indicates that if *faskh* has been granted due to a perceived defect in a woman (in her qualifications or body) that she hid from her fiancé, she cannot have *mahr*. If the deceit happened because of a third party, the wife may be entitled to *mahr*, but the third party is responsible for compensation and the husband can sue him for the loss.

If a husband dies before a marriage has been consummated and a *mahr* settlement has already been established, a woman is entitled to half the amount under this law. Section 4 of Article 110 provides that if dissolution of the marriage takes place due to the death of any parties to the marriage before consummation, a woman is entitled to half of the *mahr* amount that has been fixed. If *nikah* is conducted at a husband's death-bed and the *mahr* is fixed but the marriage has not been consummated, the wife is not entitled to *mahr*.

Section 6 of Article 110 stipulates that if a marriage is dissolved before consummation because of external obstacles, the marriage is considered void (*batil*), and the wife will not receive *mahr*. In case of consummation, she is entitled to *mahr-al-mithl*. If she is aware of the invalidity of *nikah*, she has no entitlement to *mahr*. These provisions seem not to favour women.

Article 111 indicates that if *mahr* is not fixed at *nikah* and the marriage is valid, *mahr* may be fixed later. Section 4 of this article stipulates that if a marriage is dissolved before

[144] Anecdotal evidence suggests that such an event happens occasionally in arranged marriages when the marrying parties may not see each other before the wedding.

consummation because of *talaq* or some defect in the man, no *mahr* is applicable, but the wife will receive *muta'a*. In a situation where dissolution occurs due the spouse's death, conversion or a woman's perceived defects and the marriage is not consummated, no *mahr* is applicable.

Section 5 of Article 111 stipulates that if a marriage is nullified before consummation due to the existence of obstacles and *mahr* was not determined upon *nikah*, the wife will not receive *mahr*. However, if a marriage is consummated, she becomes entitled to *mahr-al-mithl*, provided the amount is no more than the 500 Dirham of *mahr-al-sunnah*. If a wife was aware of her marriage's void status beforehand, she is not entitled to anything. Such provisions speak for themselves in terms of how little help they are to women.

Article 112 invalidates a contract in which *mahr* is denied or negated. This is a positive feature of the law. Article 113 addresses the conditions and circumstances under which determination of *mahr* could be delegated to a husband or a third party. Article 114 is dedicated to disagreements arising over *mahr*. The first section in the article is about a situation in which a husband claims he has paid *mahr*, but his wife asserts that what was paid was a gift. Research interviews indicate that such disputes frequently arise in the family courts. Men try to deny a claim of *mahr*, saying they have paid it already. Then a wife is required to bring proof of her claim that *mahr* has not been paid. The article lays out three principles:

1. The verdict will favour the party who provides the evidence.
2. If both parties provide evidence for of their claims, the wife's reasons and evidence have priority.
3. If both parties fail to provide evidence, the court verdict should be in favour of the man.

The wording does not provide any reason why a husband would be prioritised in the third case. Section 2 in the article says that if *mahr* is not determined upon *nikah* but the wife received something from her husband before their marriage is consummated, that item is considered *mahr*. This is another ruling in the law that does not seem to be friendly to women.

Article 115 is about payment of *mahr* by an agent, and Article 116 addresses disagreements over determination and receipt of *mahr*. An easy way for a man to escape his *mahr* obligation is to take an oath in court denying his wife's claim. This condition causes many women's cases to fail, yet the law accepts it as it is a general Sharia rule in civil case procedures. A reference in Section 2 of Article 116 endorses the swearing an oath in the case of *mahr* disputes:

> When the husband claims the discharge of the obligation, or payment of the *mahr*, and the wife denies having received it, or the wife claims a higher amount and the husband claims less, the person alleging discharge of the obligation or payment of the *mahr* or a higher value shall be required to prove that claim; otherwise, the words of the denier are acceptable on oath.

A problem frequently raised by research participants is third-party property given as *mahr*. While this matter is an issue for a judge to decide, several articles addresses possible deceptive elements that might arise in a case. However, research shows that, apart from specification of one item as *mahr* and then substituting another, there are other forms of deceit that are not covered in Article 116, discussed below. The unofficial translation of the provision says:

> When the *mahr* has been specified but another item is mentioned as *mahr* and the first *mahr* is not intended, the *mahr* agreement shall be deemed nullified. However, where it can be shown that the parties' intention was that the first item specified was always meant to be the marriage *mahr*, then the first item shall be recognized as *mahr*.

Article 118 regulates occasions in which payment of *mahr-al-mithl* is required. While this is addressed in the law, the amount may not be enough in such instances. Apparently, what is contained in this article is intended to be complementary to the punishment set out for such crimes. The potential situations are:

1. In a case where a male causes a girl to lose her virginity by any tool or instrument.
2. If adultery is committed with a female of unsound mind or a minor.
3. In a case where adultery is committed with a woman who does not have knowledge about the illegality of adultery.

Article 119 regulates the method of paying *mahr*.

As such, the law of *mahr* in Afghanistan reflects Islamic teachings, including recognition of women's right to *mahr*. However, the law does not fully protect the rights of women, nor does it guarantee its fulfilment. This means that, through these laws, women are provided with some notion of support, but there are certain limitations that prevent them from having full access to their rights.

On a positive note, the law recognises the right to *mahr* for women and specifies that if an amount is not determined upon *nikah*, the right still exists and *mahr-al-mithl* is applicable. It also recognises that the amount of *mahr* can be increased if the parties agree. Another positive aspect is that the right to *mahr* does not cease with the death of the wife; her relatives inherit her right, which means it remains an obligation on the husband. The law also establishes that *mahr* is the possession of a wife and she can spend it in any way she wants. Furthermore, the law specifies that a father is not allowed to bestow his minor daughter's *mahr* on her husband. The new Wedding Law in particular has covered some neglected aspects of *mahr* in Civil Code, which shows the limitations of the current law are recognised.

On the other hand, some negative aspects of the law limits a woman's ability to claim and enjoy the right to *mahr*. The Sunni version of the law manifests these limitations primarily in failing to address them explicitly. However, in the Shia version some articles exist that are specifically unhelpful to women. Such failure to protect women's rights to *mahr* obviously matters in the Afghan context, where most women have no access to other forms of economic empowerment such as regular incomes and where *mahr* might therefore be relied on as a source of financial support. One major weakness from women's perspective is the acceptance of an oath in a *mahr* dispute. With due respect to the origins of this rule in Shari'a law, employing an oath as a final option in disputes where no evidence is available to prove a claim provides a man an opportunity to avoid paying *mahr*, invalidating his wife's claim.

Thus, it can be argued that the defects and benefits of the law go hand-in-hand. The section on *mahr* provisions in the Shia Personal Status Law seems to create more limitations than that of the Sunni version. However, the Shia version is more comprehensive and establishes

a broader context to cover *mahr* issues. Nonetheless, the existence of *mahr* provisions in the existed laws is better than no provisions at all. The following section assesses bride price in relation to *mahr.*

4.3. Is *Mahr* a Misinterpreted Form of Bride Price?

This section explores the bride price custom versus *mahr*. A combination of sources from web and opinions from the research participants are used to craft the section. It first addresses bride price and *mahr* in relation to one another and then looks into the concept in some literature available on the web. The section also introduces the concept of *jehizia* and how it relates to bride price in terms of justifying the latter. Finally, the chapter explores the notion of bride price in law and Islamic Sharia.

4.3.1. Bride Price: An Alternative to Mahr in Afghanistan

In Afghan tradition and custom, a practice exists that appears to be not just an alternative to the *mahr* concept, but a rival to it. This practice is the bride price, a dominant custom in some parts of the country.

The bride price is known by different names among Afghanistan's different ethnic groups. Pashtuns call it *walwar*; in Tajik-dominated areas, it is known as *shirbaha* or *pishkash*. Among Uzbeks in the north-west of Afghanistan it is called *qalin* (Kamali, 1985: 84; Max Planck Institute, 2005: 12). Research findings and available literature on marriage customs in Afghanistan indicate that a bride price is powerful enough to undermine the actual understanding of *mahr* in the country. This section and the upcoming chapters will discuss this situation.

Hashim Kamali, a well-known Afghan scholar in the field of law and Islamic jurisprudence, defines bride price as 'a sum of money or [commodity] paid by the groom or his family to the head of the bride's household… in consideration of the girl that is given in the marriage' (1985: 85). Although this definition uses the common name given to bride price among Pashtuns, the custom is frequently practiced among other ethnicities in the country.

While the practice is losing ground among the educated classes and wealthy people tend not to consider it important (Max Planck Institute, 2005: 13; Kamali, 1985: 85), the tradition remains strong in rural areas where poverty and lack of education are major social problems. In such areas, a bride price is considered an important financial contribution to poor families (Max Planck Institute: 2005: 13; LandInfo, 2011: 7). For example, some families may ask for a high bride price to cover the wedding costs of a son or other male members of the bride's family due to the high cost of marriage in Afghanistan (Naimi, 2013; Dols, 2010: 18; Muzhary, 2016).[145]

4.3.2. The Position of Bride Price in Relation to Mahr

Whether a bride price is a substitute for *mahr* or a separate customary institution in Afghanistan is difficult to determine. Given its importance among some groups, this question was explored with the research participants. Some of the lawyers strongly believed a bride price is the same thing as *mahr*, and this attitude was also reflected in the official procedures applied by judges in the provincial courts. However, most respondents did not believe bride price could be replaced by *mahr*; they consider the former a wrong practice. The viewpoints of these groups are discussed in the following sections.

4.3.3. Likeness of Mahr and Bride Price

Many people in Afghanistan believe that bride price is *mahr.* This belief is strong among some of the professionals as well. On the conflation of the two concepts, Interviewee 3 who has served as judge and lawyer stated that when he started to work as a lawyer in province C, where bride price is a strong custom, he conducted his own research to determine whether bride price is equivalent to *mahr* in Islamic Sharia. He reported going through different texts and speaking with many religious scholars and professors. His findings confirmed that bride price is indeed *mahr*. The former judge and current lawyer added that a woman's family misuses the concept by taking money from groom but not passing it along to the girl, as Sharia requires; rather, he said it is spent by the father or brother of the girl being married. In a research report titled *Women's Equal Access to Marriage*, conducted by the Women and Children Legal Research Foundation (WCLRF), 18.3% of

[145] See Naimi (2018); Muzhary (2016).

the interviewed women, when questioned why they did not receive *mahr*, responded that their *mahr* was received by their parents, meaning they believed the bride price taken by the father is *mahr* (WCLRF, 2010: 41).

4.3.4. How Bride Price is Dealt with in Official Procedures

In one of the provincial courts, judges strongly believed that the bride price paid to the father of a girl is *mahr*, but they acknowledged that the sum does not often reach women due to Afghan cultural practices and attitudes that deprive women of their rights. While hearing *tafriq* cases, judges work hard to convince women that the money paid to their fathers was *mahr*. On the question of how a court verifies that *mahr* has already been paid, Interviewee 16, a judge from province B said that the court asks the woman claimant whether her family had received something at the wedding. If this is the case, then she is told that the amount, whether major or minor, was *mahr*. The judge added that the claimant would be given a form to complete, and she would also be asked through that form whether her father received something and, if so, how much. The judge was asked to explain how a court could make a woman accept this situation. He gave an example of his approach:

> Once, a woman would not admit that her *mahr* had already been paid and her father had received it. We questioned her if, upon the wedding and *nikah*, something was paid to her father or family at all. She said, 'Yes, but only a small amount of money was presented as a gift or *pishkash*[146] to my father'. Then we asked her, 'If that was just a simple gift, not *mahr*, why would your husband not pay that money to someone else instead of your father, why not pay it to your neighbour? Why pay your father. Then you need to understand that if it was paid to your father, there was a purpose behind it and that says the money was *mahr*.'

Interviewee 28, a male lawyer working with one of the organisations providing legal support to women in Province A, confirmed the same behaviour by judges in that

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[146] The term *pishkash* means 'presented in advance' in Dari. Although scholars such as Kamali (1985) and others have used *pishkash* as a synonym for *mahr*, not every *pishkash* can be considered *mahr*. *Pishkash* refers to money paid to a bride's family in the form of a gift. Normally, when a marriage proposal is brought by the man's family and accepted, a sign of this acceptance is to put some sweets (candies and chocolates) in a tray and present it to the guests to confirm the positive answer (Refugee Documentation Centre, 2017: 3). This custom of presenting sweets/*shirini* shows that a negotiation is complete and the girl has been given to this suitor, so other suitors are informed that she is taken. As a sign of courtesy and respect to the girl and goodwill of her family, as well as expressing enthusiasm for the relationship, the man's family will put a relatively small amount of money in that tray when the sweets are collected. This is not a bride price negotiated between families.

provincial court. He said judges try hard to prove that *toyana*, or whatever gift received by the woman's family, was indeed *mahr* that had already been paid. He said: 'In Province B the judges very obviously argue with women, saying 'Why would you claim you haven't got *mahr*? What was the *pishkash*/*toyana* then that your father received?'.

Interviewee 27, a lawyer and director of a women's organisation, reported similar treatment of bride price in other provincial courts. She stated:

> A major problem with courts in the provinces is that they ask the woman, 'How much *toyana* did your family get?'. Yet *toyana* is taken by the father, while *mahr* is a legitimate right of the woman. Then they add, 'You want to take two *mahr*? One is taken by your father and he gave you to this man, and now you want to take another *mahr*?'. This is how they treat a woman seeking *mahr* in the court.

Interviewee 30, a lawyer in Province C who had represented 400 family cases but no *mahr* case, explained the reason why bride price and *mahr* are treated as the same:

> In most of the cases, when the question of *mahr* is raised, the husband's side responds that *mahr* was paid at the wedding. This means that if a court asks about *mahr*, they respond that *toyana* or *shirbaha* was paid. Therefore, there is no room left for *mahr*, though the father or brother of the woman actually received her payment.

4.3.5. Opponents of Equating Bride Price with Mahr

Those who believe in the difference between *mahr* and bride price absolutely reject the idea that the latter can be considered as the former. They consider bride price a negative custom because of the harm it causes women (Lawyers 18, 28, 39). Lawyer 18 explained, 'I would say taking bride price is 100 per cent harmful and negatively affects the chance of *mahr*'. Interviewee 29, a male judge from Province C, specified that

> [t]here is nothing in the law and Sharia about *qalin* or *toyana*. The law states only that *mahr* is the right of a wife, and she can use it for any purpose that she likes. So, we cannot say that these practices of *qalin* or *toyana* or, as they call it *walwar* in the Pashtu language, are not something legal. In this Province [C], *toyana* or *qalin* is considered *mahr*.

What Lawyer 18 said is also reflected in the Afghanistan Research and Evaluation Unit (AREU) research on marriage practices in Afghanistan (Smith, 2009: 48). Interviewee 11, a female lawyer from Province B, believes that the cultural practice of *toyana* has a direct link to the loss of *mahr*. If a husband has paid the former, he does not agree to pay it again

as *mahr*, saying, 'I have paid it once; why should I pay *mahr* twice?'. Lawyer 36 also confirms that in cases where *toyana* or *qalin* is paid, a woman cannot claim *mahr*. She might say to the court, for example, that the 100,000 or 200,000 AFN that had been paid were in fact taken by her father, not her. However, such argument is useless, and she cannot claim *mahr*.

The views of the research participants indicate that, in practice, bride price is widely confused with *mahr*, and it can be argued that in some areas of the country it serves as a replacement. This is due to an apparent lack of awareness that *mahr* is an essential right of women. Given the poor economic status of people, particularly in rural areas, when bride price has been paid, judges do not consider it appropriate to hold a husband accountable for paying *mahr* as well. As such, bride price effectively and erroneously becomes *mahr*, but it is of no use to a divorced woman when she is in need of financial support.

4.3.6. Bride Price in the Available Literature

In general, marriage is a costly occasion in the life of Afghan people, and the bride price is also a detrimental factor in that regard (WCLRF, 2006: 8; AREU, Smith: 47–48). In areas where the bride price is honoured and practised, it reflects a woman's 'value' (Montana University, 2012: 24), meaning it is considered a sign of respect for the woman who is being married. A higher amount is perceived to add weight and thus show the worth of a girl or woman in the eyes of her family, her community and the clan she is marrying into. Yet, in practical terms, it brings more harm than benefit to women.

The negative effect of the bride price on women is multifaceted. A high bride price can become a source of domestic violence for an Afghan woman in the aftermath of marriage, (Montana University, 2012: 24) as it brings shame on her for effectively being sold to her husband. She may have to bear mental and physical violence,[147] taunting and harassment not only from her husband, who now must pay the wedding debts, but also from his entire family (Smith, 2009: 48; UNAMA, 2010: 25). For an ordinary man and his family, managing the cost of wedding and bride price without incurring heavy debt is difficult

[147] Interview with Lawyer 18.

(UNAMA, 2010: 25; Muzhary, 2016). Some men must travel for long periods to Iran, Pakistan, Saudi Arabia or other Gulf countries to earn enough money to then pay back these debts (Muzhary, 2016; Smith, 2009: 47–48).

Labelling the bride price as a 'harmful practice', the UN Assistance Mission in Afghanistan (UNAMA) reported that, in cases of poverty, high bride prices lead to such harmful practices as forced and child marriages and the selling of daughters (Smith, 2009: 47; UNAMA, 2010: 26). Similarly, reports from AREU and the University of Montana indicate that, for the sake of bride price, poor families may force their young daughters to marry a man who already has a wife, even multiple wives in some instances, (AREU, 2009: 47; Montana University, 2012: 24). One such example was shared by Interviewee 11, a female lawyer in Province B. The 14-year-old client of this lawyer was 'sold' for 800,000 AFN to a man who already had three wives and many children.

Where a bride price is paid, a woman is usually not able to claim *mahr* (WCLRF, 2010: 4).[148] As Shahla Naimi indicates, the Afghan bride price custom is a misnomer for *mahr*, and it has deprived many women their access to a legitimate right and the only form of financial support they can claim after divorce. In areas where the bride price custom is of significance, it is treated as an essential part of marriage negotiations and discussions of this matter take much longer than other aspects of the marriage (Muzhary, 2016; Naimi, 2013). For instance, on some occasions the bride price is so high that a man's family cannot afford it. Then they go back and forth, visiting the bride's family several times, requesting a reduction in the amount. They also gather more influential elders in the area and the neighbourhood to convince the bride's family to reduce the requested amount.

When a marriage proposal is taken to a girl's family, if there is a will to accept it, the first step is to inform the suitor that he will need to pay a significant amount of money. This happens where bride price is an accepted practice in that area's tradition, or if a family is definitely certain they want to take it. Most of the time the amount will be specified from the beginning, along with a list of major necessities for the wedding and gifts and clothing

[148] Also mentioned by Lawyers 1, 2 and 3.

that should be purchased for the bride (Muzhary, 2016). On many occasions, these negotiations are completed before the proposal is accepted.

4.3.7. Common Bride Price Amounts

The amount of bride price differs from one area to another in Afghanistan, depending on the going rate in a particular area, as well as the economic status and position of a family and the characteristics of the young woman, such as skills and beauty (AAN: 2016; Montana University, 2012: 24). For instance, the high cost of bride price among the Turkmen[149] people in the northwestern areas of Afghanistan is due to the superior carpet-waving skills of Turkmen women in this area. A Montana University report on the role of the Afghan women in their society confirms this observation (2012: 24). Indeed, the high-quality carpets woven by these women has made Afghanistan famous worldwide for its beautiful rugs.

Similarly, the marital status of the man can also affect the amount. If a man is rich and willing to marry a second, third or fourth wife, he must pay a much higher bride price. For example, the Max Planck Institute (MPI) report (2005: 13) describes a man who paid US$80,000. This is not a small amount of money in a country like Afghanistan.

Regarding the ongoing rate in different provinces, the figures provided by Kamali (1985: 85–86) are no longer reliable due to changes in overall economic conditions in the country, as well as changes in the applicable currencies. In addition, there is a tendency for families to compete for social importance by exaggerating wedding costs well beyond the range of their living standards and income. Such boasts affect the rate for bride prices where practised. These changes are reflected in the high cost of weddings currently witnessed in the country (Montana University, 2012: 20; UNAMA, 2010; Muzhary, 2016).

The Max Planck Institute's fact-finding mission report (2005) and the article published by the Afghan Analysts Network (Muzhary, 2016) provide more recent estimates of bride price rates that seem to be closer to the reality. The MPI report states (2005: 12): 'The

[149] Turkmens are the fifth ethnic group in Afghanistan, estimated at three per cent of the population. They reside in the northern areas of the country, where Afghanistan has a border with Turkmenistan (Mazhar et.al, 2012: 99).

amount of Walwar can be as high as imaginable. According to members of the Jirga of Gardiz, the center of Paktia Province, Walwar can start from 95,000 AFN (equivalent to 2000 USD) and reach 2,000,000 AFN (equivalent to 40,000 USD)'. Muzhary's article establishes the rate for Kandahar province at '14,590–43,468 USD' and '11,800–21,733 USD' for Farah province, but the latter province is not usually known for high bride prices.

4.3.8. How is Taking Bride Price Justified?

Muzhary (2016) and other texts available on the web, though reflective of the bride price reality in the countryside, nevertheless omit another custom associated with the bride price tradition. In this thesis, discussion of *jehizia*, or the dowry parents give a daughter about to be married, is important. *Jehizia* can be claimed back after divorce[150] and, therefore, on those occasions where a woman might trade away her *mahr* entitlement she may still want the return of her *jehizia*.[151] Apart from Kamali's work and the AREU report, the custom is scarcely mentioned in other texts and reports dedicated to the bride price tradition. Kamali (1985: 85), expanding on the definition of bride price, states:

> Out of this sum [bride price], the bride's family may provide the couple with Jehiz, which usually consists of household furniture and ornaments. But Walwar is basically a payment to the bride's family in consideration of the girl who is given in marriage and is not specifically directed to be spent on the provision of Jehiz.

In Afghan culture, when a daughter is married, she is commonly given furniture for at least one room plus a mattress and bedding.[152] These gifts must be sent to the bride's new home before she arrives there, otherwise, the bride's parents will bear the blame and shame associated with the failure. On other occasions, depending on the financial ability of the parents (Katouzian, 2015, 185) – and particularly if money is taken as bride price – kitchen supplies, major appliances, a television[153] and other necessary goods might be added to the *jehizia*. Rich families might give a considerable amount of gold and even a car.

Nancy Tapper (1999: 143) writes:

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[150] This would still be possible if the woman could prove in the court that she took those particular items with her to the marital household by presenting valid evidence and receipts.
[151] More details are provided in Chapter 7.
[152] The custom extends the necessity to provide a bed and associated homewares, essential clothing and goods for bathing to the first baby born to the wedded daughter.
[153] Depending on where the bride will live, household necessities will be provided. For example, in big cities where electricity is available, a television could be a fashionable part of the *jehizia*.

> Part of the bride price will be returned to the groom's household in the form of a trousseau, but this rarely amounts to more than a third of the whole and the bride's father is likely to make a material profit on the transaction.

4.3.9. Jehizia

The term *jehiz* or *jehizia* in Persian literature refers to the possessions that a bride takes with her to the marital home (Kautozian, 2005: 151, in Sanchooli, 2016: 482). These may include money, property or gold, but mostly women take housewares and furniture to make a contribution to the household. Many reasons can be offered for this custom, such as a woman's interest in helping her husband build the marital home. Because a husband is traditionally responsible for earning income, if a wife wants to play a role as well, she makes a financial contribution. However, the basic reason mentioned for this requirement is a woman's right to inherit compared to that of her brother in Islam (Katouzian, 2015: 185).

Article 3, subsection 10 of the new Wedding Law defines *jehizia* to be dress, carpet, dishes or other homewares that are provided to the bride. Some lawyers were asked whether *jehizia* justifies taking bride price. Lawyer 18, from Province A, said that *jehizia* is just an excuse to justify the bride price:

> Families take *toyana*, making the excuse that they need it to give *jehizia* to their daughter, but that does not happen. They just use it for their year-round family expenses. I have witnessed cases in which the woman is not permitted to visit her parents as the husband told her, 'You are sold to me for the amount of money I paid in *toyana*'. Men think that they have bought their wives for *toyana*, and this strongly influences the future life of that poor woman.

Province C is one of the areas in which the highest bride prices are taken. Judges in that province agreed that *mahr* is taken under names that are culturally attributed to it and then used by the bride's family. Lawyer 2 from this province said that people justify taking a high bride price by saying they must take it to give back to their daughters. Interviewee 3, a lawyer in the same province, was asked why the practice of *toyana* is so common and set at such a high rate in that province. He responded

> The fathers believe that we take money from the groom because we spend it back on our daughter and prepare *jehizia* for her to take to the husband's home. They say: 'We ourselves do not have that much financial ability to do this from our own pockets. What is taken under the name of *qalin*, we know that it is the right of our daughter and

> therefore, we spend it on her. That is how the parents argue when we tell them it is not their right to take *toyana*.' As a result of this *toyana* practice, when women refer to us, seeking assistance to file a divorce case, they have nothing left to receive after divorce as the *mahr* money taken under the name of *toyana* has already been spent.

These views demonstrate that the need for *jehizia* paves the way for taking a bride price and then allows misuse of the custom by getting the highest possible amount they can wish for. The following section explores *jehizia* in applicable laws.

4.3.10. Jehizia in Law

The Personal Status Law in the ACC is silent on the issue of *jehizia*, and there is no mention of it in the entire law. However, the new Wedding Law, under Article 9, articulates that the groom, his parents and relatives can provide an amount of money to the bride's family of their own free will for provision of *jehizia*. That law further adds that bride's family can also gift *jehizia* to their daughter, but exhibiting *jehizia* to others is forbidden. The term 'exhibition' used here relates to another smaller ceremony called *Takhtjammi*, which is held a week or few days after the wedding. Subsection 9 of Article 3 in the law describes it as 'a ceremony that takes place after the wedding in attendance of relatives and friends of the bride and groom, for exhibiting the Jehizia provided for the bride'. In some areas, it is the bride's family that takes charge of the expenses, or a part of them.

Also, the Shia Personal Status Law considers the matter in one five-section article (Art 121). Section 1 defines *jehizia*, and section 2 mentions that taking benefit from the wife's *jehizia* or possession of it for the husband is not a donation/*tabaru* unless it is specified in custom (*urf*) or the wife allows such appropriation.

Section 3 stipulates:

> When the husband or his creditors claim that a specific property or item belongs to the husband, and the wife claims that property is from her own dowry, the party not in possession of the property shall be required to present proof of ownership. But if both parties are possessors or neither party is a possessor of the property, the parties shall be required to present evidence of the ownership.

As was evident from interviews with legal practitioners, one crucial issue that is the source of conflict over *jehizia* occurs when a woman claims she brought many possessions from

her parents' house, but her husband claims these goods are either no longer useable or have been disposed of. Section 4 of the article states:

> When one party of the couple claims damage to or loss of the dowry by the other party, and the other party denies responsibility for that loss, the claimant shall be required to prove the allegation. Otherwise, the oath of the person denying fault shall be the basis for the verdict.

The research findings indicate that women are rarely able to take back what they brought with them to the marital household. Taking this finding into consideration, these provisions in the law relying on the oath as final resort for solving the case, leave ample scope for men to deny the claim and close their eyes to what rightfully belongs to their wives. While this is unproblematic from a legal perspective, as it has basis in law, in practice the application of the provision deprives women of possession of goods that were bought most frequently with money that could have been included in their *mahr*. Divorced women's interests would be better served if the law also provided for compensation of the *jehizia* when no longer available to be returned to a woman.

The final section in Article 121 reflects another issue that is always a source of trouble when returning a woman's' *jehizia* . In Afghan culture, there is a type of *jehizia* called *jehiz doo sara*, which means 'mutually provided *jehizia*'. In this case, the groom pays the cost of all or some of the items bought as the dowry that the bride takes with her to her husband's home. This type of dowry is not common, and when it does take place it is based on the willingness of the groom to buy all or some of the *jehizia*. The law stipulates that in these circumstances the goods purchased are the man's assets and do not belong to the bride, stating, '[t]he wife needs to present ownership evidence if she claims otherwise'.

4.3.11. Bride Price in Islamic Sharia and Afghan Law

A bride price is not the same thing as the *mahr* that Islam obliges every man to pay to his wife as a gift of respect and affection (Azhari & Ali, 2015). This is clear from the fourth verse of the *Nisa* Surah in the holy Qur'an, which says: 'Give women their *nehla*

graciously'.[154] The verse does not say to give *nehla* to a bride's parents. A further important indication that *mahr* belongs to a wife is based on the same verse, relying on changes in the practice of *mahr* in Arab society after Islam was introduced. *Mahr* in pre-Islamic Arab society was practised much as it is in today's Afghanistan. Importantly, when Islam arrived *mahr* was specified to be the exclusive right of a woman (Doi, 1992: 155; Engineer, 1992: 111; Esposito, 2001: 23).

While Islam is clear about *mahr* not being equivalent to a bride price, lack of unity among scholars concerning the terms that refer to *mahr* may have contributed to confusion. While the term 'dower' is used in some written sources on *mahr*, the most-cited authors use the term 'dowry' along with the word *mahr* (Doi, 1992: 154). For instance, Maudoodi uses 'dowry' for *mahr* in the *Laws of Marriage and Divorce in Islam* (1983: 75). Based on Wani's definition, dowry is the property that a bride takes to her husband's home (1995: 29). The term is more reflective of the dowry tradition in India and similar Southeast Asian countries where the same custom is practiced, such as Bangladesh. Using 'dowry' to refer to *mahr* can be a source of confusion.

Similarly, some authors have used 'bride price' when discussing *mahr*. Khadduri and Liebesny (1995: 141) use the term 'bride price' as an alternative for *mahr*. Wani calls this use of the term 'quite unIslamic' and an 'offensive way' to talk about *mahr* (1995: 29). He continues:

> The expression 'bride price' indicates the payment by a husband to his father-in-law and the wife is, in effect, bought from her father. Among Hindus a form of marriage namely Asura, still prevalent among Sudras, serves as an instance. In such a marriage the bridegroom receives a maiden after having given as much wealth as he can afford to her kinsmen. Such a practice has no semblance with *mahr*.

Rejecting the equation of *mahr* with bride price, Jamal Nasir takes the same view as Wani. In *The Status of Women Under Islamic Law and Modern Legislation* (2009), he says that, despite the prevailing 'misconception' in the West, *mahr* is not the same as a bride price

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[154] The terms *nehla* and *sadaqat* used in this verse are translated slightly differently by scholars learned in the Qur'an, but the meanings are synonymous. Abdullah Yusuf Ali uses the term 'dower,' in translating the phrase; Maulana Ashraf Ali Thanvi uses *mahr* to describe it; Syed Abul A'la also uses *mahr* and so does Ibn Kathir (Wani, 1996: 3).

and it is also different from the Western concept of dowry (2009: 87). He describes the latter concept, now very much 'outmoded' in Western society, as

> money, property or both, which any family with a daughter, no matter what their circumstances, would have been expected to provide, in order to literally make the bride more attractive to the perspective suitors and, indeed, to achieve the best match possible.

In the Muslim context, he refers to Article 19 of the Moroccan legal code and Article 62 of the Jordanian code which prohibit suitors from expressing financial expectations to the bride's guardian or parents. He reports that under the law of Jordan the suitor can reclaim gifts he has given after the marriage (Nasir, 2002: 83).

Through several legislative efforts at different periods, bride price was banned in Afghanistan as well. However, it is still considered a customary part of life in some areas of the country. Kamali reports that the first regulations governing marriage in 1921, and later the 'Nezamnamah[155] of Marriage' in 1924, prohibited taking a bride price under the name of 'Walwar, Toyana, Shirbaha and Qalin'. According to Adalatkhah, the Nezamnamah banned *mahr* exceeding 30 AFN (2017: 39).[156] Adalatkhah further suggests that the Law of 1950, provided that if a bride not permitted to be taken by a groom to his residence due to some deficit in the submitted bride price, the husband could complain against his in-laws and the government would force the father to submit the bride to her husband The law prohibited any monetary transaction, apart from Sharia *mahr*, taken under the name of *walwar*, *qaleen* or *pishkash* (Adalatkhah 2017: 40).

In 1971, the marriage law prohibited payment of a bride price under Article 15. At the same time, it indicated that '*mahr* is the right of the bride and it must be paid to her' (Art 16). In 1978,[157] the government of the time banned the practice of bride price through an official decree, called Decree No. 7, which stipulated a punishment of six months to three years imprisonment for breach of the law. It also prohibited *mahr* of more than 300 AFN (ten

[155] The term refers to a collection of orders and regulations in the Dari and Arabic languages.
[156] At the current rate (5 August 2018) this is less than one Australian dollar.
[157] This year refers to the beginning of the USSR-backed communist regime, which was eventually ousted by the Mujahideen in 1992.

dirham at that time) being taken from the groom. It even lifted the burden of clothing and provision of other common stuff for the bride (Tapper, 1992: 292; Schneider, 2007: 110). However, the law triggered resistance from society and appears to have been rescinded, as it was never applied again (Rastin-Tehrani & Yassari, 2012: 12). In 2015, the Afghan Parliament approved a new Wedding Law that refers to Decree No. 7 and declares the formal abolishment of that decree (Art 25). This new law prohibits excessively expensive marriages and limits the maximum number of guests in the wedding parties to 500 (Art 10). The language of the law does not strictly ban the bride price, most probably fearing the possible consequences that were experienced before. It leaves the practice open, but says that groom cannot be forced to pay bride price (Art 6):

> None of the parents or relatives of the bride can force the groom, his parents or other relatives to pay money or anything else in the name of bride price (shirbaha, qalin, Walwar, Galah, Pishkash, Jehizia or similar) and impose it as a pre-condition for occurrence of Nikah or wedding session.

4.4. Final Remarks on the Difference Between *Mahr* and Bride Price

To shed more light on the two concepts of *mahr* and bride price, this section quotes Nancy Tapper from her *Bartered Brides*. Tapper's book focuses on marriage customs among the Durrani Pashtuns and explains how marriages construct identities for this tribal group based on their own defined standards. Tapper describes how these concepts were dealt with in two different ways. *mahr* is regarded as merely a promise to ensure *nikah* is performed properly so that cohabitation with wife is halal, and bride price is considered an important business bargain under which, if the price is not paid entirely before the wedding, the bride will not be accessible to the man (Tapper, 1999: 167).

Tapper's explanation of the bride price payment clearly indicates how bride price differs from the concept of *mahr* in Islam:

> Bride price payments are usually made in installments over a period of several years, and must be completed before the wedding, when the bride leaves her natal home with her trousseau to join her husband. Among Durranis, the Islamic marriage rite, the nikah

> ceremony, performed for all marriages (including all exchanges[158]) always includes the promise of or actual transfer from the groom to his bride of a small sum as *mahr*, the Islamic dower. This presentation is seen as quite independent of any others, including bride price and trousseau. (Tapper 1999: 142)

Tupper also describes *mahr* and how it is dealt with in the *nikah* session. As Chapter 7 will explain, this description is still valid for how *mahr* is treated, but the amount may not be small everywhere, as court records show some remarkable *mahr* amounts.

> The bride and groom are asked if they agree to their marriage and witnesses press towards them to catch their replies. Then their wakils[159] engage in token bargaining over the Islamic mahr. Agreement is soon reached and a small sum commensurate with the wealth of the groom is fixed.

Describing *mahr*, she writes:

> The mahr is a sum of cash (a few thousand Afghanis at most), which the groom promises to give his bride. It is an essential part of the Islamic marriage ceremony, without which the Maduzai claim the marriage would not be proper (halal) and the husband would be punished on Judgement Day. Women explain that mahr as payment for the trouble they undergo in marriage, for sleeping with their husbands and for chores like washing their clothes. In fact, the promised sum is never paid, usually women return it as a free gift to their husbands though some, the less wise, according to most women, treat it as a continuing debt owed them, against which they may ask for gifts of clothing or jewellery.

This *mahr* description matches the perceptions of it that still exist and the way in which it is treated by husbands and by society in general. However, a negotiated *mahr* is not always a small amount. These descriptions show that, almost half a century ago, a group of people living a tribal life with few among them having access to current standards of education, knowledge and information, nevertheless clearly understood the difference between *mahr* and bride price, treating both according to accepted rules and requirements. This is an indicator that *mahr* is not bride price; rather, bride price is an Afghan custom that has no roots in Islamic law. However, if people do treat *mahr* as a bride price, one possible reason is social pretensions. That is, people clearly know that *mahr* cannot be the bride price, but

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[158] This refers to a type of marriage that was one of the main tools for obtaining a wife among this tribe, as Durranis would not allow a woman of their tribe to marry a man from another tribe.

[159] Two people who represent the bride or groom. Usually, a groom speaks for himself and is present in the *nikah* session, but the bride is represented by her *wakil* (proxy).

they want to consider it so, to resolve the *mahr* question. To a large extent, the practice is due to the financial hardship that the majority of Afghans face. In addition, the resentment to which female-initiated divorces give rise among men can play a role in it. The research participants commented that when a woman initiates divorce, the husband may say, 'It is enough that you got the divorce, no more will be paid to you'.[160]

4.5. Summary

In summary, this chapter describes the inadequacies of the law in protecting the rights of women and the strength of the barriers at the cultural level to proper disposition of *mahr*. These provide strong premises for the argument of this thesis that *mahr* cannot be an adequate response to the unavailability of adequate financial support for divorced women in Afghanistan.

Based on the literature and responses from the research participants, the chapter established that bride price is more often a misused application of *mahr* in Afghanistan. The main cause of this deviation from Islamic law is poverty throughout the country. There are, however, other causes. For example, parents may fear that if their daughter is given in marriage without any financial compensation, she will be considered less important and possibly underestimated by her new husband's family. In addition, low levels of literacy and education have led to a lack of awareness about women's rights, which contributes to misuse of a provision intended to protect women.

The next chapter relies on facts and figures from real divorce cases decided in the family courts over a period of 13–14 years to present a true picture of what happens to the right of *mahr* when women seek divorce: do they get it; if not, why not; and if they do, what is the amount paid? Responding to these questions, Chapter 5 supports the argument of this chapter, and of the overall thesis, that *mahr* is not enough to save women from financial hardship.

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[160] Interview with Lawyer 1.

Chapter 5. *Mahr* in the Court Records

5.1. Introduction

Chapter 4 argued that provisions covering the *mahr* institution in the Personal Status Law of Afghanistan do not adequately address every aspect that would protect this right for women. Although some gaps in this law were addressed in the new Wedding Law (2015), the law remains insufficient to address the needs of divorced women. The chapter established that available protection mechanisms are limited, and in various situations a woman can lose her entitlement and any financial support.

The previous chapter also established that bride price, though not a legal concept and prohibited by law, is more widely practised than *mahr* in Afghanistan. Parents may have different reasons, ranging from poverty to the assumption that it elevates the value and status of their daughters, to justify taking a bride price, but the practice deprives a woman from receiving her *mahr*. In poor rural communities a bride price might be a necessary source of income, and some families might consider it a token of honour and esteem for a daughter about to be married. Yet, the outcome might become something entirely negative, placing a new bride in a difficult position where she will be subject to violence and harsh treatment.

This chapter reviews how *mahr* is practised in 'real life', looking into cases contained in court records to draw a picture of how this right has been handled by the courts in previously decided divorce cases. The chapter argues that, although divorce has different forms in Islamic law and *mahr* is treated differently based on the nature of the particular divorce case (that is, *talaq*, *khul*, *tafriq* or *faskh*), it is not considered important in divorce procedures and only small percentage of women receive it. Most often, this is because women trade *mahr* for divorce, or it is simply not considered in a case. This disregard for *mahr*, in turn, means that no arrangements are made for it at the time of marriage, and thus a woman has no hope of receiving it. Such cases are referred to as 'optional' or 'not mentioned' in the research for this thesis.

The chapter analyses 1117 completed cases that were referred to family courts during the period 2003–2015 in order to understand how claims of *mahr* have been addressed by the courts in the post-Taliban era. The court records indicate that from the total number of reviewed cases (n=1117), only 14% (n=157) show *mahr* being obtained, and of these, only 7% (n=11) indicate amounts in the range of 800,000 to 2.73 million AFN and 7.64% (n=12) in the range of 400,00 to 700,000 AFN. The remaining amounts vary from 2000 to 300,000 AFN. These figures clearly reveal that only a small percentage of women in the capital get *mahr*, and the records do not indicate whether the amount was paid as *toyana* or *mahr*. Of the two provinces, one (Province B) completely fail to regard *mahr* and few cases of *mahr* are found in the other (Province C), but the bride price practice is so prevalent that it does not leave room for *mahr* to be questioned.

Analysing court records, the chapter argues in more specific terms that *mahr* is not adequate to provide sufficient financial support for divorced women in Afghanistan. Most often, *mahr* is not determined at the time of a wedding, and even in cases where it has been fixed, a woman in trouble with unhappy marriage may relinquish it to ease divorce procedures. In addition, those who obtain *mahr* do in general not get an amount that would meet their financial needs for more than a few months. The data derived from court records in this chapter are divided into two sections: women-initiated divorces (*tafriq*) and *talaq* divorces initiated by men. The chapter also looks into *mahr* disputes that were found among the court records. Furthermore, it explores *mahr* in *khul* divorces, another form of women-initiated divorce.

It is essential to note that the candidate did not have full authority to examine specific registry books for each year or to ensure a certain number of cases were reviewed. Therefore, in *tafriq* records, the number varies for each year, so that they are not necessarily representative of all cases that were referred to court in that year. Although the number for some years is relatively small, the data gathered still fulfil the research purpose of showing whether women have access to *mahr*. What matters in this research is the ratio between the number of cases examined and those in which women received *mahr*.

5.2. *Mahr* in Women-Initiated Divorces

In general, under the Afghan Civil Code, dissolution of marriage is possible through four avenues. The first one, rescission, known as *faskh* in Afghanistan, allows dissolution of a marriage by a court immediately if a defect that affects validity of the marriage contract arises, whether from the procedures that led to conclusion of marriage contract or conditions that arise after the marriage contract is concluded. The second form is *talaq* which is an exclusive right of men; third one is *khul*, and the fourth *tafriq*, both of which are initiated by the woman (Arts 137–197, ACC). In other words, *khul* and *tafriq* are rights exclusive to women.

The right to *tafriq* permits a wife to apply to the court to seek divorce. In the context of the Afghan Personal Status Law, *tafriq* allows a woman to seek divorce on grounds including physical harm (Art 183), absence of the husband for more than three years without any news (Art 194), lack of maintenance by the husband (Art 191), or a husband's incurable disease or disability, such as impotence (Art 176).

In relation to *mahr* in the case of *tafriq*, Article 188 of the Civil Code restricts this right if it is found in a case of divorce initiated by the woman that she was at fault:

> Article 188: 1: If arbiters do not succeed in reconciling the spouses and if the source of dispute is the husband or both of the spouses or if the source is not known at all, the court shall decide on their separation.[161]
>
> Article 188.2: If a wife is the source of dispute, arbiters shall decide for separation in exchange for all or part of the dowry (*mahr*).[162]

As a result, courts do not allow women to raise *mahr* questions when they fight for *tafriq*. They must file their case only after *tafriq* procedures are finished or—rarely—before the divorce case is heard. This requirement deters women from seeking *mahr*. Among all of the reviewed case folders, in only instance did the defendant husband mentions his wife's *mahr* of 500,000 AFN, but he did not indicate if it had been paid. Thus, despite searching over 70

[161] Subsection 1 in this Article has recently been amended to state that the court may issue the judgement on *tafriq* no matter which party is the source of conflict.
[162] Afghan Civil Code (ACC)

folders of women-initiated divorce cases in which few were specific *mahr* disputes, little was found to satisfy the research inquiries.

5.3. Exploring *Mahr* in *Tafriq* Case Folders

Among the reviewed cases for the research, 73 case folders (mostly containing *tafriq* actions) were reviewed in search of a *mahr* element. In 57 cases, there was no mention of *mahr*; in five, it was indicated that women had relinquished their claim, meaning they bargained this right away so as to open the door to divorce. In one case, the option was left to the woman to claim *mahr* in the future if she wished. Such cases are comparable to those in which *mahr* is not determined. Additionally, there were 10 cases that reported women had received *mahr* (see Figure 5.1).

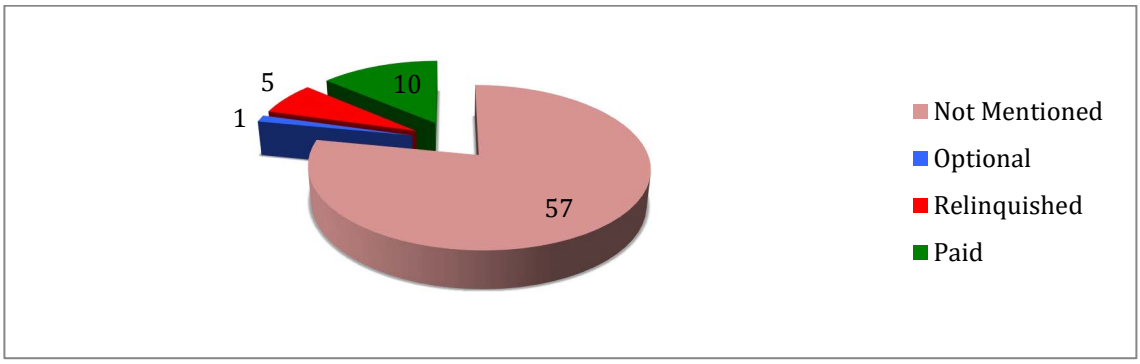

Figure 5.1 Mahr outcomes in *tafriq* cases 2003–2015

These were mostly post-divorce *mahr* disputes in which women apparently first obtained a divorce (it was not clear whether via *talaq* or *tafriq*) and then returned to the court to deal with their *mahr* issues. These figures speak for themselves in conveying the message of the inadequacy of *mahr* protections.[163]

Although *talaq* records were maintained in particular registry books, *tafriq* cases were kept in paper folders to make sure all the case information was kept together.[164] This difference seemed to reflect the complications in *tafriq* cases versus the ease and simplicity in *talaq*

[163] The 'received' number marks cases referred to court after divorce to seek *mahr*; these are the *mahr* disputes standing alone in the court, they are not necessarily part of *tafriq* case procedures.
[164] This was in the capital only; in the provinces, *tafriq* cases were registered in large books that would be hard to store if not folded.

cases. Each *tafriq* case included many files (20–40 pages of documents), stored in small yellow folders made of thick paper; the folders were stored in a cupboard in the court clerks' offices. The cases seemed to contain considerable information; however, much in the folders was irrelevant to the research questions. Nevertheless, the reviewed cases reflect the realities and facts provided by interviewed lawyers. The following notes include some stories from, tafriq case folders followed by narrations from several *mahr* disputes and the *khul* divorce record samples found in the case folders.

5.3.1. Findings from Tafriq Case Folders: Brief Description of the Reviewed Records

In one case of 2015, a married couple had lived together for 12 years and had a six-year-old daughter; the husband's job was not recorded, but the wife was described as a UN employee.[165] The case was *tafriq*, based on physical harm, and did not mention *mahr* in the related documents. The husband claimed in his defence statement that his wife had stolen US$10,000 and three sets of gold jewelry with another necklace plus furniture before leaving home.

Regardless of the truth of this claim, it is safe to assume that such allegations are an example of the strategies that men use to undermine women's claims. For instance, it is quite possible that the charge made about stealing money or furniture are baseless, as the money might have been the woman's savings and the furniture that she was accused of taking could have been what she brought to the marriage as *jehizia*.

In terms of the jewelry that the man accuses his wife of stealing, the claim may not be relevant as the jewelry that a woman possesses is either given to her in the form of immediate *mahr* or is a gift from her parents and relatives. If they can afford it, Afghan families, especially mothers, plan for such gifts to their daughters from childhood. It is also common practice in Afghanistan to buy gold jewelry for a bride at the time of marriage; this is the immediate *mahr* described in Chapter 2.

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[165] In Afghanistan, UN employees earn higher salaries compared to NGOs and government workers. Thus, the woman could have saved some of her earnings, even if she worked in an assistant's position.

Similarly, in another case of the same year, a husband responded in the defence paper that his wife had stolen gold jewelry and had also taken a carpet. He further mentioned that his wife was sold to him for 400,000 AFN, referencing a bride price of approximately US$7000. In this case, both husband and wife were employed. The court decision does not reflect anything about *mahr*. Data from interviews show that such allegations made by men are considered by the court and a woman is required to provide supporting evidence for her rejection of the accusations made against her. This means that a woman must provide bills and receipts to the court for what she claims to own. Yet, few women keep such evidence as no woman plans for divorce in advance (Interviewees 17 and 27).

The court registry books for *talaq* cases, discussed in the next section, show that most registered cases are those in which women relinquish *mahr*. In one case of *tafriq* decided in 2014, the husband and wife had lived together for seven years and had two children, five and three years old at the time. The wife relinquished her *mahr* of 500,000 AFN, plus 6000 AFN *iddat* maintenance. No explanation was given for the relinquishment, but there are two possible reasons: for the sake of children or to facilitate the divorce procedure. As such, one can see that women often file *tafriq* cases, but they effectively end up with *talaq* for which they must relinquish *mahr* and their other financial rights.

Among the remaining cases, few referenced *mahr*. As a result, no further searches for *mahr* were conducted in these folders. In cases reporting on the status of *mahr*, one woman received a *mahr* settlement of 400,000 AFN plus 6000 AFN of *iddat* maintenance, but in the next case, the woman's petition talks about a fixed *mahr* of 600,000 AFN plus the furniture of a room. Yet the court decision does not refer at all to *mahr*. In another dispute concerning *mahr* for an amount of 500,000 AFN, the court decision indicates that final sum paid was 100,000 AFN.

5.4. *Mahr* Disputes

The next three chapters will show that most women seeking divorce simply decide to abandon their claim for *mahr* and not go through further court procedures. Nonetheless, if their *mahr* amount is significant and worth the battle, women do return to court to seek

judicial support for their claims. In this section, some examples of *mahr* disputes are presented.

Lawyers interviewed frequently reported that *mahr* amounts are usually small; if there is a significant amount, it is either reduced through negotiations suggested by the court or allowed to be paid in instalments. Chapter 7 explores this point in more detail. In one *mahr* dispute of 2014 from Kabul, the wife claimed 500,000 AFN, but the court decided she should receive only 100,000 AFN, an amount determined through negotiations between the parties. Such negotiations happen when the parties cannot agree about a *mahr* amount that a woman claims but her husband refuses to pay. The interviewed lawyers and judges indicated that, in such instances, the court may order the parties to go and find a solution and then return to court. These mediation and negotiation sessions take place outside the court, and often a woman will be pressured to compromise. In this way, the amounts determined and fixed at the time of marriage shrink into much smaller amounts to make it easier for a man to pay (Lawyer 27).

A *mahr* claim made by a literate woman from Kabul employed with a government office sought an amount of 700,000 AFN. The amount was estimated as the cost for one room in the house she was taken to as bride (400,000), plus 150,000 AFN for gold and 150,000 AFN in cash. The last two amounts, were apparently paid as immediate *mahr*. The court decided that the husband should pay 400,000 AFN. Initially, the man did not accept this decision, saying he would pay only 50,000 AFN. Eventually, he agreed to the amount, but he asked to pay it in four instalments over four months. In interviews with lawyers, the candidate learned that court orders allowing payment of *mahr* in instalments were considered as effectively similar to failure to pay or non-payment. Lawyer 19 said that it is highly unlikely a man will pay more than one or two instalments. The man either runs away or threatens his ex-wife to discourage her from collecting. The lawyer added, ‘When a *mahr* decision is made, it doesn’t mean the battle is finished. The implementation phase presents further challenges, and quite often leads to physical violence.’

Documents reviewed for the above case indicated that the dispute over *mahr* several times did indeed end in physical clashes between the parties in the corridors of the court. The

husband denied the woman's claim of *mahr*, saying that his wife had no right to *mahr/*he meant she did not have a fixed mahr. This claim is not surprising from someone who has lost a wife (the woman got her *tafriq* first) and now is going to lose money. The husband's lawyer mentioned in his defence paper that the woman had donated the *mahr* to her husband, but the wife rejected that claim.[166]

In such instances, it is not easy for women to prove their husbands are lying. The law does allow a woman to acquit a man from the burden of *mahr* (Arts 12–13, ACC), and if a woman rejects her husband's statement as false, her husband will counter-argue that she did so when they were in complete privacy, without witnesses.[167] At the end of such an argument, the court might ask the husband to take an oath that what he states is true, and that is end of the story of *mahr* for the wife.

In the above case, the claimant woman had also mentioned in the petition that her husband evicted her from their home several times. Before she was divorced, she was abandoned for a year and a half without maintenance, and she spent that time in her parents' home. According to law, a woman has a right to claim maintenance for the period during which she was abandoned.[168] However, given that she was forced to leave home, her husband could oppose her request for support, claiming that she was a disobedient woman. Such disobedience is a legal basis for depriving a woman of alimony for a specific time.

Since the clerks knew the candidate was investigating *mahr* cases, the relevant case folders for any successful *mahr* case decided in the court in recent years were presented to her. One famous case from 2015 was mentioned by several court members and clerks as a successful *mahr* dispute. The amount owed as determined *mahr* was around two million AFN, roughly equivalent to US$40,000. The woman in this case excused her ex-husband from paying 300,000 AFN, but she obtained the remaining amount. The duration of marriage for this case was not mentioned, but the woman was 24 years old at the time and her husband, 28, which shows the marriage was of short duration.

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[166] This matter is touched on from a theoretical perspective in Chapter 2, *Remission of Mahr*.
[167] Interviews with Lawyer 19 and Judge 23.
[168] Articles 119 and 128 of the Afghan Civil Code (ACC).

Such cases are exceptional. A woman will find it easier to obtain *mahr* when her husband initiates the divorce and she has no fault. If a woman is being divorced against her will and victimised, judges will order the man to pay the *mahr* right in the court.[169] This practice was confirmed by Interviewee 39, an independent male lawyer from Province A. He confirmed that women have better chances of obtaining *mahr* in *talaq* cases.

Another case with a significant *mahr* amount was a dispute in which the determined amount was 35 *bahar azadi* (gold coins).[170] Gold coins are a feature of *mahr* in Iran, but they are not common in Afghanistan. Most probably the divorcing parties were Afghan migrants living in Iran when they got married. The court ordered the husband to pay the *mahr* in four instalments. No further information was found on this case except that the couple had a four-year-old daughter, suggesting a relatively short marriage.

A research finding explained in more detail in the following chapters indicates that in Afghanistan it is quite rare to register a marriage officially, and failure to register becomes a major source of difficulty for women in *mahr* cases. Among the cases reviewed was a failed *mahr* claim of 900,000 AFN in 2015, in Province A.[171] In this case, the woman could not prove her claim in court as she did not have an official marriage certificate to present. The marriage had lasted about two years. The lawyers interviewed frequently reported such failures in *mahr* disputes claimed by women. If *mahr* is determined, the most common evidence available would be a simple letter, signed by the groom or his father plus two witnesses, describing the *mahr* agreement. However, this document will not be accepted in court if witnesses are not found to certify either their signatures or the *mahr* promised to the woman (Lawyer 27 interview).

A husband might also hide the marriage certificate from his wife or deceive her in other ways in order to reject any allegations she makes in court. As a result, when a woman is requested to prove what she claimed, she often fails, and the court decides against her. This was the result in this case. The husband said his wife lied, and she did not have evidence to

[169] Interview with Judge 24.
[170] This would be equivalent to US$12,120 as of 18 November 2018.
[171] This amount at the time of the case review was estimated at US$17,000–18,000.

support her claim before the court. In the final stage, court invited the husband to take an oath, the last resort for the Civil Code when there is no valid evidence in a case on which to base a judicial decision.[172]

In another *mahr* dispute from 2015, the marriage had lasted five years and the couple had a three-year-old daughter. The wife argued that the *mahr* promised to her totalled 500,000 AFN. Of this amount, 200,000 AFN was immediate *mahr* in the form of gold jewelry that should have been purchased for her, although this did not happen. The remaining 300,000 AFN was estimated as the cost of a room in the house the bride was taken to. However, the husband responded that his wife had no right to anything and her claims were lies. Although the court decision on this case was not finalised, the nature of the case clearly indicated that the woman would not succeed in her claim as no mention of a marriage certificate was made in the petition.

5.4.1. Mahr Arrangements in Khul Divorces

Another form of woman-initiated divorce is *khul*. Islam has allowed a woman to leave an unhappy marriage by making a financial arrangement with her husband. As discussed before, she can give him property or simply renounce her financial rights such as *mahr* and *iddat* maintenance (Fyzee, 1975: 163). *Khul* is known to be a right for dissolution of marriage by woman's choice, but it is not practical without the consent of her husband. Describing *khul* procedures in Jordanian courts, Welchman suggests that *khul* requires the consent of both parties to come into effect (2000: 273). She adds, 'It is not a guaranteed right for the woman to obtain a *talaq* from her husband by giving up her financial rights.'

In the context of Afghanistan, it is mostly the *tafriq* cases that are turned into *khul* deals. This either happens under the pressure from the husband, or at the suggestion of the court and women's lawyers who represent them in the court.[173] Sabiha Hassan, in her study of a small group of divorced Muslim women in India (2011: 36), interviewed 30 divorced women of which ten cases were *khul* divorces. These cases were separated women who,

[172] Articles 140–143 Civil Procedures Code (CPC).
[173] Interview with Lawyer 19.

after one or two years in that status, filed *tafriq* cases[174] but it turned into *khul* (2011: 33). Relinquishing *mahr* was the first condition imposed by the husband for agreeing to divorce in these cases.

In this study, women who are assigned high amounts of *mahr* do have the option to use their settlements for *khul* purposes. In the court data presented in the following sections, it is seen that the highest rates of the reviewed cases of successful divorces initiated by women are those where *mahr* was relinquished, and this observation can account for the *khul* divorce rate. However, a few cases were also found that showed women paid money in addition to their relinquished *mahr* or paid a large amount of money independently to convince their husbands to divorce them.

In one *khul* case reviewed for this research, a woman paid 1.5 million AFN to her husband to dissolve their marriage. At the time the research was conducted, this amount was equivalent to about US$23,000. In another case, a woman was able to leave a marriage after five years of cohabitation, but she had to pay 1.5 million AFN when the case was decided (US$28,000 at the rate at that time). The candidate also learned of an instance in which the claimant woman relinquished her *mahr* amount of 1.2 million AFN plus 6000 AFN of *iddat* maintenance to get her husband agree to divorce. No detailed information about these cases was found, but in the latter the woman had a 15-month-old daughter.

As can be seen, *mahr* does not have a strong effect in women-initiated divorces. However, the case records presented in the next section are not, in fact, real *talaq* divorces; such cases, initiated by men, are rare in the courts. Divorce cases appearing before the courts are mostly the *tafriq* cases that turn into *talaq* to ease procedures.

5.4.2. Mahr in Talaq Registry Books

As described in the earlier chapters, *talaq* is an exclusive right for a man to repudiate his wife if he so wishes, anytime and anywhere without any barriers or restrictions. Such unlimited power for the man in performance of *talaq* is advocated mostly by the Sunni schools of thought (Shamsudin, 2012: 212). Shias deal with *talaq* differently, as it requires

[174] Judicial divorce referred to as *faskh* in India, which is called *tafriq* in Afghanistan.

the presence of two witnesses to validate the action. This is essential whether *talaq* is performed by a layman or an authorised court official/Imam (Safayee & Imami, 2006: 228; Shamsudin, 2012: 212).

Most of the cases recorded in *talaq* registry books reviewed for this research are *tafriq* cases in which a wife initiated divorce, but eventually she had to make a deal with the husband to convince him pronounce the *talaq*. Court procedures for *tafriq* cases are so long and troublesome that they often compel women to give up on the battle halfway through and resort to allowing their husbands to divorce them in exchange for their right to *mahr* or, in some instances, money. But, it is not easy to distinguish such cases from those that are purely *talaq* ones. Only a small number of cases may be purely *talaq* in nature, rest of it are indeed, *tafriq* disputes registered in the name of *talaq*.

This section reports on information gathered through court *talaq* records in each of the three provinces where research was conducted. An important point to note regarding this section is that *iddat* maintenance figures was not included as part of the research because a woman who loses everything at the end of the marriage cannot count on three months ongoing financial support.

Nevertheless, *iddat* maintenance cannot be ignored in this section as court records report it where the amount of *mahr*, regardless of whether it is paid or relinquished, is mentioned. It is an inevitable part of divorce and *mahr* decisions in the court, and therefore it should be attached to the *mahr* figures reported here.[175] The amount paid for three months' maintenance averages 6000 AFN, equivalent to AU$111.87 as of 20 October 2017. These figures speak for themselves in terms of sufficiency, or more accurately, insufficiency. It is important to note that in the graphs, repeated amounts are taken out in order to focus on the trend.

The following sections presents the reviewed cases in chronological order.

Records for the Year 2003 (1382 AH)

[175] If *mahr* is decided during a divorce case, the question of *iddat* maintenance arises only after divorce.

The year 2002 was the first year of Afghan women's relative liberation after the removal of the Taliban from power; however, for this year there is only one case in the court records. In March 2003, the Family Court was established—or, more accurately, reopened[176]—in Kabul, The Court Registry Book for this year records 15 *talaq* cases. However, there is no case reported in which *mahr* is paid. The column for seven cases is labelled 'optional' which means there was no mention of *mahr* in the case. However, the woman could claim it in the future, which involved just a symbolic statement by filling the relevant column in the page. The registry book also records that *mahr* was relinquished in seven cases; in two, the amount is reported as 50,000 AFN and 10,000 AFN respectively, plus 6000 *iddat* maintenance in the latter case. Since there was no proper system in place for maintaining the data in required order, it is hard for the candidate to say whether this was the total number of case received in 2003. However, that is apparently the case, the reason being that the court was only (re)-established in March that year.

2004 (1383 AH)

Thirty-three cases were reviewed for the year 2004. Of these, 12 indicate that *mahr* was paid, seven are marked relinquished and 13 others are labelled 'optional'. In one case, the records do not mention anything. The highest paid amount was 250,000 AFN and there was another case of US$4000, which is about 200,000 AFN. The later was initially supposed to be US$10,000 as fixed *mahr*. However, the woman received only US$4000, plus 6000 AFN *iddat* maintenance, which means she had to forgo the rest through negotiations. Almost every interviewed lawyer reported that in cases where the *mahr* amount is relatively high, it will be reduced through negotiations or relinquished entirely.[177]

2005 (1384 AH)

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[176] According to a judge who was appointed as Head of the Court in 2003, the Family Court was first established in 1975 (1354 AH). However, in 1987 (1366 AH), when the Afghan legal system was revised to follow the Russian judicial structures, the Court was suspended and family disputes were decided by civil courts established in each district. In 2003, some women judges requested the re-establishment of the Family Court, President Karzai issued permission for that and the Court was then expanded to four other provinces in 2008.

[177] In four out of the seven relinquished cases, the amount is not mentioned. The amounts for rest of the three are highlighted in red in Figure 5.2, below.

The number of cases reviewed for this year was slightly higher than the previous two years. The total number is 54, of which 14 involved payment of *mahr* and 40 did not. To break down the 'not paid' category, in two cases the records do not mention mahr, and 25 cases are marked 'optional'.[178] Thus, the highest number of cases are those in which there is no mahr, but it is said that women can claim it later. These cases are also equal to those that are labelled 'not mentioned', but to fulfil the formalities of *talaq* procedures in the court, the clerks have simply added in the records that women have a right to claim it later. They would not say so if a significant amount of fixed *mahr* was involved in the case.

Based on what the lawyers indicated, it is difficult to make men responsible for *mahr*; this is even more difficult after divorce as they no longer feel bound to the case. Lawyer 39 from Province A mentioned that *mahr* in Afghan weddings and divorces is a part of the 'formalities', and parties address it for the sake of procedures, not as a right for the woman.

The figures indicate that in ten cases women relinquished *mahr*, and three were labelled 'invalid'. With regard to the latter, the substance of *mahr* (that is, the money and other property nominated for *mahr*) cannot be something that is impossible to give. For example, as discussed in Chapter Two, a woman cannot ask for the moon or stars to be assigned as *mahr*, nor can a husband promise something unobtainable. Assigning such items to a *mahr* will render it invalid once a claim is made before the judge. In such a case, the solution would be to seek *mahr-al-mithl*.

The 'invalid' cases reported here may not necessarily be cases involving impossible fulfilment. Based on what interviewed lawyers shared in relation to the assignment of fictional or intangible property included in a *mahr*, the court may have found that what the woman claimed was not the property of her husband. In that case her claim is considered invalid, and the case would be closed. Generalisations are of limited use as each case is different, with specific circumstances that affect a court's decision. In these three cases, the court record in the news column of the registry book simply reports 'invalid'.

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[178] The 'optional' notation would make more sense in cases of *tafriq*, as *mahr* and *tafriq* claims are not accepted together in court. In cases of *talaq*, *mahr* should be a must question, if not paid before.

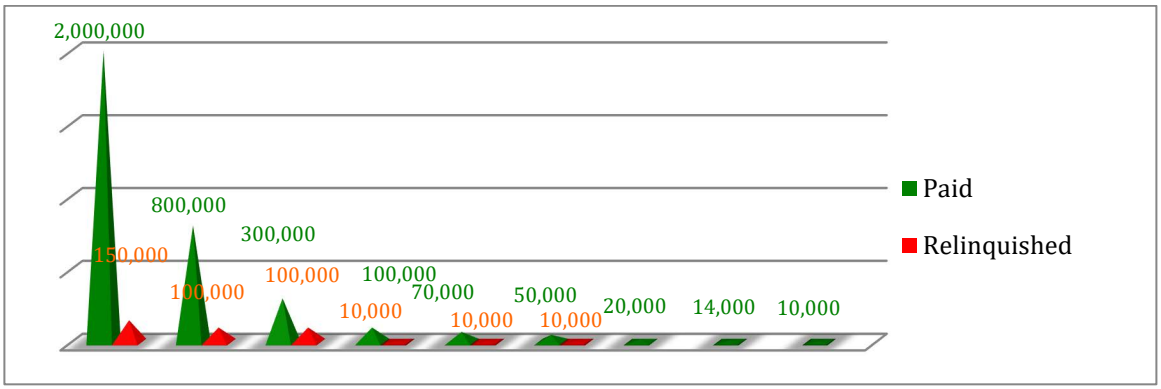

Figure 5.2 Paid *mahr* rate in cases reviewed for 2005

In the list of cases marked 'paid', there were two report amounts noticeably high in comparison to most reviewed cases. In one case two million AFN was to be paid, and in the other 800,000 AFN (it is not clear whether this was paid as *mahr* or *toyana*). There were also cases of 300,000 AFN and 100,000 AFN. The remaining cases involved amounts less than 100,000 AFN, ranging from 70,000 to 2000 AFN. In the ten relinquished cases, the highest amount is 150,000 AFN, paid in cash by the woman claimant as the price for her *khul* divorce. In two cases, women relinquished *mahr* for the sake of their children; in one of these cases, the husband agreed to pay 1000 AFN (around AU$20) per month as maintenance for his daughter while she was in her mother's custody. This amount is very low, but that is what the court decided.

2006 (1385 AH)

Thirty-one cases were reviewed for 2006. As mentioned in the methodology chapter, the number of cases reviewed was not entirely the choice of the candidate and remained subject to availability of the records provided to her under supervision of court clerks. Notwithstanding in the number of cases reviewed, their content is clearly consistent with the patterns of *mahr* revealed through the rest of the research.

From the reviewed cases in 2006, there is no mention of *mahr* in the records of four cases. The choice of *mahr* is recorded as 'optional' in six others, and the records show that *mahr* was relinquished in 16 cases. This can also mean it was traded for the sake of divorce, or, in some instances, for the sake of children; however, the case notes do not provide a reason. The records show that *mahr* was paid in five cases. The amounts paid vary from 10,000 to

450,000 AFN. *Iddat* maintenance is mostly recorded as 6000 AFN, for a period of three months. In this category, there are total 26 cases unpaid versus five paid.

In one case, the claimant, who is a doctor, signed the back of the page containing her case information. The text reads: 'I received *mahr* and *iddat* maintenance and do not have any claim in the future.' However, there is no mention of the amounts received. This may reflect two conditions. First, the *mahr* might have been paid before in form of *toyana*; this seems less likely, as a woman who is a medical doctor likely comes from an educated family, and demanding *toyana* is not a common practice among the educated classes in Afghan society.[179]Additionally, if a woman is paid in court, the amount would have been recorded; there is no reason for it to be omitted. This leaves one possibility: analysis of the text suggests that the case is another of those where *mahr* is relinquished, and the woman has traded off her financial right and benefit to obtain her divorce, or perhaps custody of her children. To ensure his wife does not claim *mahr* in the future, the husband or his lawyer has required the woman to testify in writing that she has already received her settlement.

The highest amount of *mahr* determined in this group is 800,000 AFN, in the 'relinquished' category. A small percentage of recorded *mahr* in all the reviewed cases is above 500,000 AFN, and this is one of those cases. Similarly, the highest amount paid is about half of the highest relinquished, at 450,000 AFN.

The remaining figures, whether relinquished or paid, are below 300,000 AFN. Most of the interviewed lawyers reported that this amount is the current standard rate of *mahr*. The figures clearly demonstrate how low the rate of *mahr* is (when it is paid at all). In turn, this suggests that even if *mahr* is paid, it will not sustain, much less improve, the living standards of a woman who has lost everything because of divorce. *Mahr* was paid in only five cases, compared to 26 where it was not paid.

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[179] Most educated and open-minded Afghan families would prefer to give as much they can to their daughters in form of *jehizia*. Not only does a good *jehizia* bring her pride, it also ensures she does not miss what she had in her parents' home.

2007 (1386 AH)

The number of cases reviewed for 2007 is similar to the previous year. However, there is a difference between the number of cases where *mahr* was relinquished and those that received payment. Compared to 2006, *mahr* was paid in more cases, 12 in total. *Mahr* was 'relinquished' in four cases (in none of which the amount is clarified) and labelled 'optional' in 14 cases; nothing was recorded for other four cases. This is how cases are classified in the case registry books; alternatively they can be sorted into two categories: cases in which *mahr* is paid and those where it is not paid.

These cases differ slightly from those examined for previous years in the amount paid for *iddat* maintenance. In almost all the reviewed cases in previous years, the *iddat* amount was 6000 AFN; however, the 2007 cases show different amounts for those who received the maintenance. It is highly unlikely that all men would have the same financial disability preventing them from paying 2000 AFN[180] per month to divorced women as their living cost of *iddat* maintenance. Yet, that is what the court has done in most cases, requiring every man to pay only 6000 AFN. Judge 24 mentioned that most women who trade *mahr* wish to obtain the *iddat* maintenance, even if it is only 6000 AFN.

Interestingly, in 2007 the amount 6000 AFN is not recorded even once in the list, although the lowest amount displayed is 5000 AFN. The highest amount paid for *iddat* maintenance is 50,000 AFN, followed by lower amounts down to 10,000 AFN.[181] The difference seen in the levels of *iddat* maintenance allocations clearly demonstrates that the authorities who decided these different amounts were not those in charge of the Court in previous years. More recent decisions looked at the matter from a different perspective, not just to address formalities.

[180] AU$37.23 as of 20 October 2017.
[181] These figures are not shown in Figure 5.3 as it represents the *mahr* amounts, not the *iddat* maintenance.

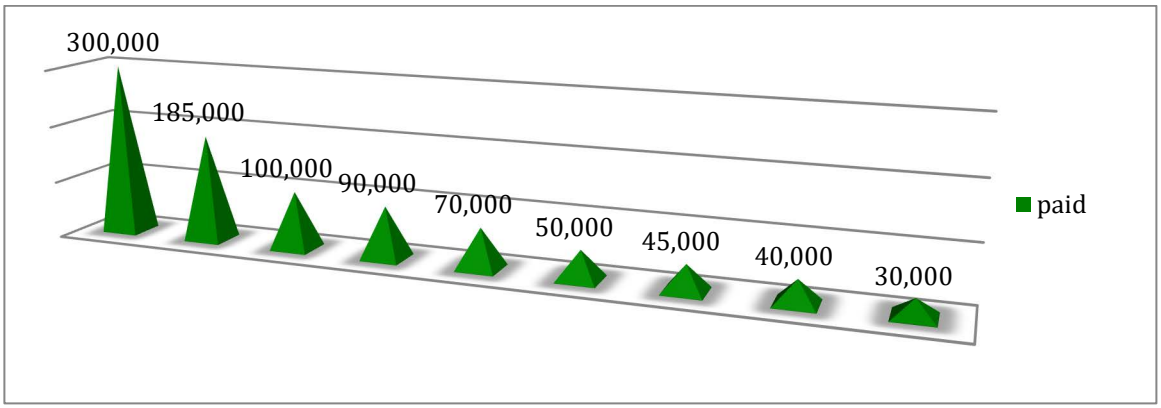


Figure 5.3 Paid *mahr* rates in cases reviewed for 2007

The highest amount paid for *mahr* is 300,000 AFN as shown in Figure 5.3, and the next highest 185,000 AFN. Three cases record 100,000 AFN being paid, and the remaining cases have lower amounts, down to 30,000 AFN. Notably, no amount is mentioned for the cases where *mahr* was relinquished for *iddat* maintenance. In this group of 34 cases, the *mahr* was paid in 12 cases versus 22 where it was not paid.[182]

2008 (1387 AH)

A total of 26 cases were reviewed for this year. As illustrated in the chart, the 'relinquished' cases exceed those paid, and variations are also seen in the amounts. In practical terms, what matters is the number paid, which is six cases. In the remaining 20 cases, whether relinquished (n=9) or optional (n=11), none received *mahr*.

Regardless of whether *mahr* is paid, there is something positive to discuss in this group. The number of cases in which *mahr* is determined exceeds those where *mahr* is not mentioned (meaning those marked 'optional'). This can be considered progress in the context of work undertaken in Afghanistan in the last decade to educate the population about women's rights. As an activist who has been watching the progress herself throughout the period, the candidate believes that even if women had to trade away their *mahr*, the fact that 15 cases out of 26 show *mahr* was determined—and that in some cases the total sum set was high—constitutes major progress in Afghanistan.

[182] The total amount of cases labelled *mentioned*, *optional* or *relinquished*.

The details of amounts in both 'paid' and 'relinquished' cases are shown in the following figure.

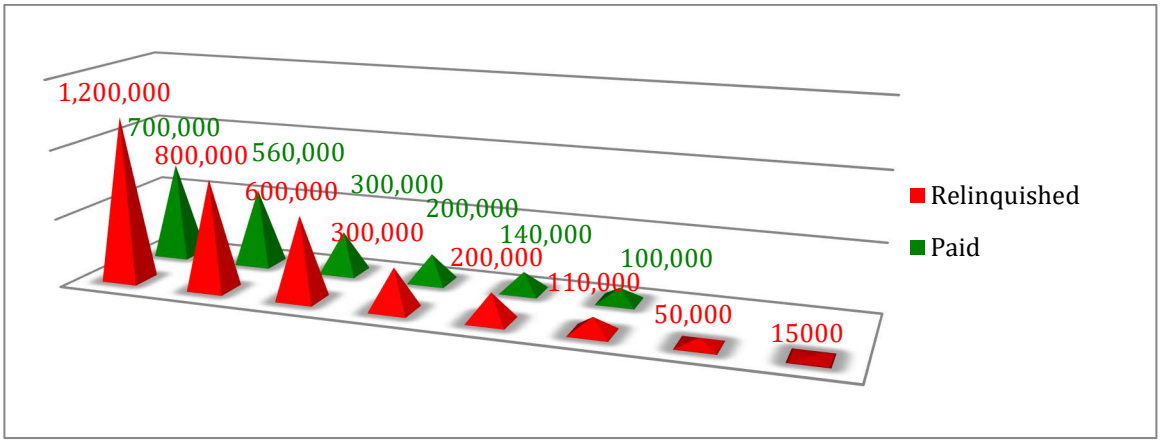


Figure 5.4 Amount of paid & relinquished *mahr* 2008

For example, the highest amount in this group is introduced in US$25,000,[183] which would be equivalent to almost 1.2 million AFN at that time. The *mahr* was relinquished; although the reason is not mentioned, it is most likely sacrificed for divorce. Similarly, in the 'relinquished' list, the amounts of 800,000 AFN and 600,000 AFN appear, and these are not very common among the rates paid. There are also two noteworthy amounts in the 'paid' cases column, 700,000 AFN and 500,000 AFN amounts or US$14,000 and US$10,000 respectively. There is no guarantee that these amounts were paid as *mahr*; possibly the money had been paid as bride price. Nevertheless, they represent good rates in the context of Afghanistan, enough to cover the practical needs of a woman for at least one or two years.

2009 (1388 AH)

There is no significant difference in the cases reviewed for 2009. The number of 'paid' and 'optional' cases are similar, and one does not outweigh the other. However, 'relinquished' cases are double the number of those that show *mahr* as having been paid (25 versus 12). Again, a significant number (11 out of the total 48) are marked 'optional.' The highest rate

[183] Approximately 1.2 million AFN.

of both 'paid' and 'relinquished' cases is 500,000 AFN, which was equivalent to around US$10,000 at the time of payment.

Lawyers reported that one reason for allowing women to relinquish their *mahr* without going through troublesome court procedures was the relatively insignificant amount of the *mahr*. The rate of 'paid' and 'relinquished' *mahr* in this group supports that observation.

2010 (1389 AH)

Among the cases in this group (n=79), those labelled 'relinquished' are twice as many as cases marked 'paid.'

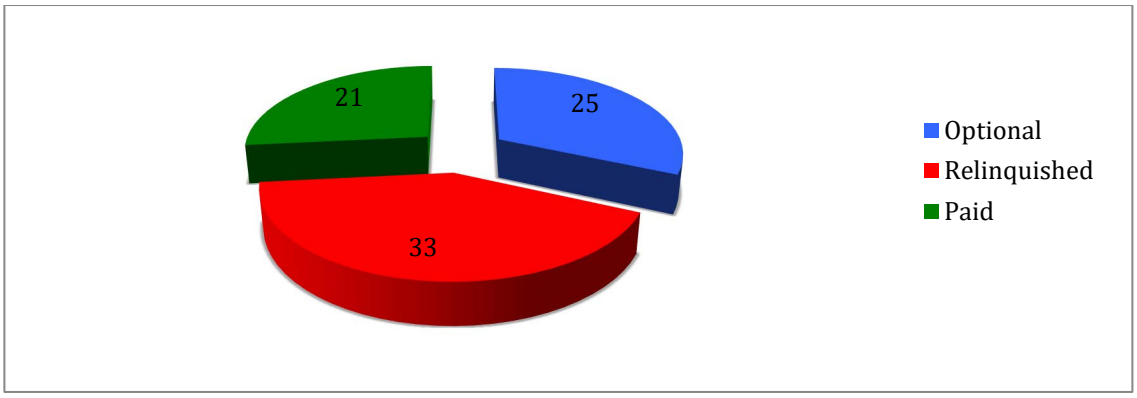


Figure 5.5 Cases reviewed for 2010

However, the rate is low for both categories. In five cases in the top of the 'paid' list, the highest amount is 2.73 million AFN; the rest fall below 200,000 and 100,000 AFN. As Lawyer 19 indicates, amounts lower than 100,000 AFN are not worth a woman's attempting to collect, and nearly half of each list falls under the lower amount. In assessing *mahr* as a substitute for the missing financial rights of divorced women, such small amounts, even if paid, are not significant. One woman received 100,000 AFN at the end of 14 years of marriage. In Afghan culture, the mere mention of divorce disgraces a woman in the eyes of society and takes away her chance of a second marriage, unless she is really special for some reason. A woman who is divorced after a decade or more of marriage is unlikely to get a chance to restart her life. How would 100,000 AFN, the equivalent of US$2000 in 2010, help a woman manage the rest of her life without any steady income?

The highest amount in the 'relinquished' list is 300 gold coins (6.5 million AFN), a common practice for *mahr* in Iran, indicating the couple lived there for most of their life and followed Irani customs in their marriage. If this were not the case, the husband would not have accepted the proposed amount for *mahr*. The case registry book does not give full details and just mentions the woman relinquished the *mahr*. This indicates that she traded the *mahr* to obtain divorce. In the 'paid' list, there are two figures of 800,000 and 650,000 AFN respectively.

2011 (1390 AH)

The data from 2011 seem disappointing, but it represents the reality of *mahr* cases. Something positive that could be drawn from this year's sample is the number of 'optional' labels on cases, which seems relatively small (n=10). Also, there are only two cases where *mahr* has not been determined. This means more cases show that *mahr* is determined, whether at the time of *nikah* or divorce. The positive aspect of this is that *mahr* is given more attention as part of the divorce proceedings. However, the 'relinquished' cases are twice the number of 'paid' ones, and the highest amounts remain in the 'relinquished' category.

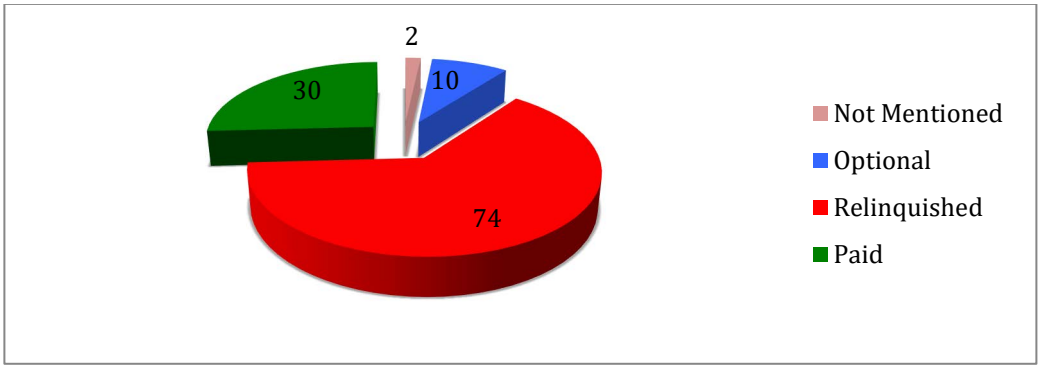


Figure 5.6 Cases reviewed for the year 2011

There are five *mahr* amounts in the one million to nearly ten million AFN range. These sums are unusual in the cases that have been reviewed so far. Six cases report 900,000 or 800,000 AFN, significant amounts of money. There are also ten cases that can be ranked moderate, falling within the 400,000–500,000 AFN range. In half the 73 cases in which *mahr* has been relinquished, the amount falls under 300,000 AFN, confirming that many

women simply give up on *mahr* because of the insignificant amount. However, given that most Afghans are poor, 300,000 AFN might be still worth a divorced woman claiming to ensure financial stability for few months at least.

The last case in the list is one in which a woman's husband has an addiction, and she was referred to court to claim *mahr* from her father-in-law. Chapters 7 and 8 will show that one reason *mahr* cases fail in court is that the property nominated for the *mahr* is often not owned by a husband, and that gives him a valid excuse to escape from the burden. A wife must then rely on luck to obtain the cost of her *mahr*. The court could possibly identify her as woman who does not deserve *mahr* for the wrong she is assumed to have committed in leaving her husband, based on what Judges 22 and 24 shared in their interviews. However, in this case, although the woman is not leaving the husband, it still possible that her claim would be dismissed by the court because she should have filed a case against her husband, not her father-in-law.

2012 (1391 AH)

The group of cases for year 2012 seems unusual in comparison to the rest of the list, in view of the high amounts of *mahr* fixed in all the cases.

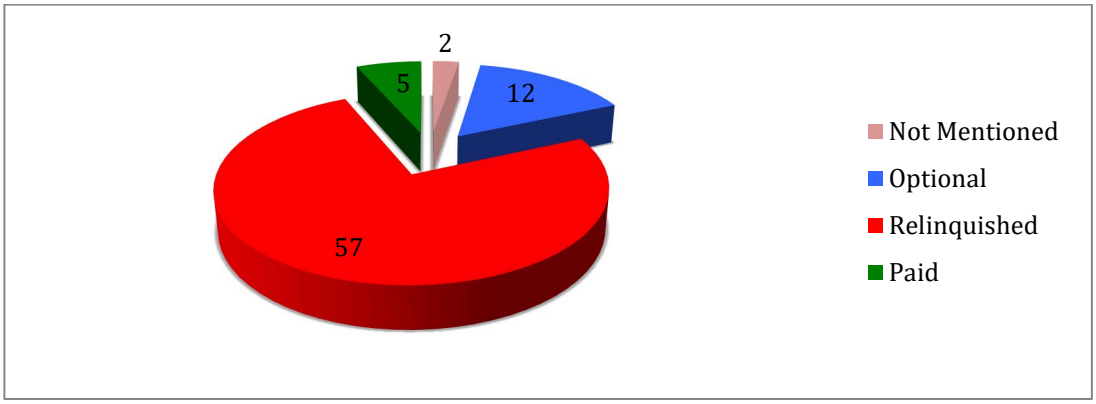


Figure 5.7 Cases reviewed for 2012

There are fourteen cases at least in which *mahr* figures are one million AFN or more. These include two cases involving six million AFN, one of two million AFN and four cases of 1.5 million AFN. The remaining 14 cases fall between one million and 500,00 AFN. These amounts may be attributed to a new awareness of women's rights, but in the context of data

collected for this research, such numbers are higher than might have been expected. Seven more cases have determined *mahr* ranges between 600,000 and 400,000 AFN. Seven cases of 300,000 AFN also appear on the list, and the rest are below 200,000 AFN, with the lowest amount being 6500 AFN.

Despite the high figures set in this year, no such remarkable amounts are actually paid to women, nor is the proportion of paid cases remarkable. Of the total 77 cases, only five are marked paid, with highest of these being 250,000 AFN and the lowest 100,000 AFN. Although all the high amounts are all in the 'relinquished' category, the *mahr* amounts are still atypical. In many instances, only those marriages in which the husband is residing out of the country result in a *mahr* at a significantly higher amount (and even such men will not necessarily pay that total). The candidate witnessed a case in which the *mahr* was determined at US$100,000, but when the couple divorced the woman received only US$12,000.

2013 (1392 AH)

The number of cases reviewed for these two years is small, but this was unavoidable.[184] This small group of 2013 cases is similar to those of 2012. Although small in number (five paid versus 18 relinquished), the list still reflects the general trend in the recorded cases, in which the number of 'relinquished' cases is two, three or even four times greater than those marked 'paid'. Two cases are found with amounts of one million and 1.2 million AFN respectively on the 'relinquished' list and three are at moderate levels (400,000 to 600,000 AFN). The rest are below 300,000 AFN, with the majority at 100,000 AFN. As indicated, this latter amount would be insufficient to provide financial support for a divorced woman in Afghan society. Only five cases are marked 'paid' and they range between 300,000 and 30,000 AFN.

[184] In May 2016 the civil court structure was changed, and the family court in Province A was dissolved and divided into three courts that now function in a new structure. The court was about to be closed and its documents and files were transferred to court archives. Access to the stored material was beyond the permission previously secured.

In one case, the *mahr* is 5000 AFN, and the woman relinquished this amount. However, she received 6000 AFN in *iddat* maintenance. This case confirms Judge 24's observation that some women relinquish *mahr* but ask for *iddat* maintenance, even if it is 6000 AFN or lower. Their decision to ask for *iddat* can be seen as a sign of desperation.

2014 (1393 AH)

Similarly, for the year 2014, only 11 divorce cases were reviewed, and for some reason, most of these were those in which *mahr* was either paid before (*toyana*) or received at the time of divorce. Under normal circumstances, it is unlikely that a woman would win and collect a high-rate *mahr* that was previously determined. If she initiates the divorce, her husband and his family will do their utmost to prevent her succeeding. If she does not want to leave her husband and he is divorcing her against her will, the court will realise that she would be most harmed by divorce, and the judges may ensure she does not lose her *mahr*. Lawyers 39, 2 and 22, among others, noted that women have a better chance with *mahr* if the divorce is initiated by their husbands.

In the list of 2014 cases, one indicated a paid amount of 1.2 million AFN and another at 700,000 AFN; these are the highest rates in the list. There is also a case of 600,000 AFN and another of 300,000 AFN. The rest are around 50,000 to 60,000 AFN, with the lowest at 5000 AFN. There are three 'relinquished' cases between the rates of 1.5 million AFN and 200,000 AFN.

The major point about this group of cases is again the indication that, in recent years, *mahr* has drawn more attention in Province A, both in the courts and society. It should be stressed that this increased attention comes from women's rights education through training programs that are mostly organised by NGOs, supported and encouraged through international organisations and embassies of the donor countries that have been supporting Afghanistan over the last two decade.

2015 (1394 AH)

Based on what the clerks suggested, the trend in the type of cases and the outcomes for the case holders in the last five years of the research period (2011–2015) were all similar and

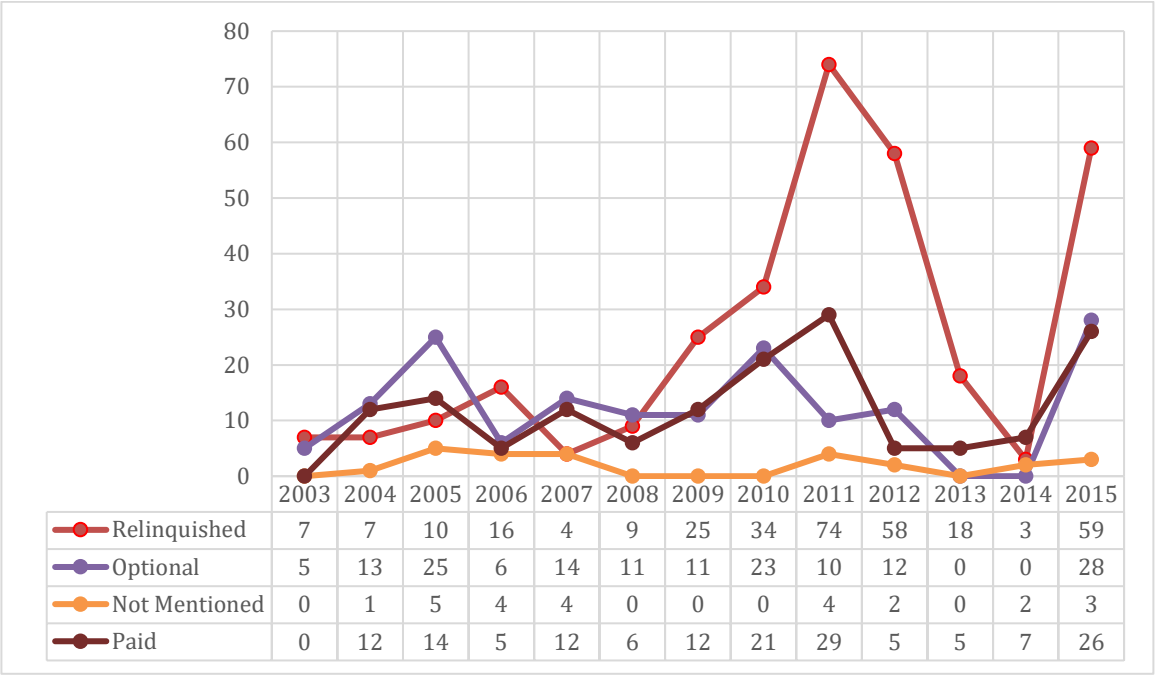
there was not much difference in the type of cases referred to court and the *mahr* requests in them. It was easy to record cases handled in 2015 as they were current and the relevant files and registry books were still in the clerks' office, and therefore easy to obtain for review purpose. The total number of the cases reviewed for this year was 116.

Among the optional cases (n=3) there are two in which the amount is determined and the records says the woman can claim it if she chooses. One of the two cases is 500,000 AFN, which is relatively good amount, and the amount displayed for the other case is 130,000 AFN. From the total 116 cases reviewed for this year, only 26 are marked paid. There is no comparison of the amount of relinquished cases with those paid. The highest amount for the paid list is one million AFN, followed by another case of 900,000 AFN (there is no clear indication that these amounts were paid as *mahr* and not as *toyana*). In one case dated 31 June 2015 (1394 AH), the *mahr* is mentioned 900,000 AFN, but the women received only 500,000 of that. In the relinquished cases (n=59) the amounts of *mahr* identified are 20 million, ten million, four million, 1.5 million and below. These are incredibly high rates compared to the paid amounts. The 'optional' number in this category is 28.

The group of cases reviewed for this year could be the best representative of *mahr* in the capital city in the most recent years. One interesting thing to note observing the records for cases of the last 5–7 years is increase in (a) the number of *mahr* cases in which the amount is determined and (b) the amounts fixed for the *mahr* cases.

5.4.3. Summary of the Tables

According to the figures presented above, the total number of divorce cases reviewed for the capital court was 661, of which only 154 are marked paid. The remaining cases (n=507) are not paid, with 324 relinquished, 158 marked optional and no mention of *mahr* in 25 cases.



	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Relinquished	7	7	10	16	4	9	25	34	74	58	18	3	59
Optional	5	13	25	6	14	11	11	23	10	12	0	0	28
Not Mentioned	0	1	5	4	4	0	0	0	4	2	0	2	3
Paid	0	12	14	5	12	6	12	21	29	5	5	7	26

Figure 5.8 Summary of total reviewed cases (relinquished, optional, paid and not mentioned)

5.4.4. Court Records in the Provinces

The records collected from courts in the two provinces demonstrate significant differences from those obtained from the Kabul Family Court. The first major point of difference is the limitation of the records in general, and in particular in regard to the number of *mahr* cases. An obvious reason for the disparity is that family courts did not exist in the provinces until the last ten years. The family courts in Provinces B and C opened in 2008 and, therefore, fewer records were available to establish a longer background for the court. In addition, the registry books beyond the last two to four years were not available in the courts and thus not accessible to the candidate.[185] Thus, the court records for Province B represent the last four years, and those for Province C the last three years, of the research period.

Records in Province B

The court records collected in Province B, present the most severe picture of the treatment of *mahr* in the three provinces. Although women have better access to legal representation in this province, not a single case was found in the records to indicate *mahr* had been paid

[185] It was said that previous years' registry books were placed in the court's document storage and thus not accessible for the court personnel.

to a divorced woman. Rather, the reviewed cases largely indicated that a women paid the divorce cost, as most of the cases involved *khul*.

In total, 189 cases of *talaq* labelled divorces were reviewed for the years 2012 to 2015, of which 88 were labelled *khul* in exchange for the woman's *mahr* and all other financial rights plus household equipment. The last probably references the woman's *jehizia*. Eighteen cases mentioned nothing about *mahr*, while in 28 cases, the record showed that the husband said his divorced wife would be free to claim her financial rights, although there was no indication whether the wife pursued or received her *mahr* claim. In 55 cases, women relinquished *mahr* and financial rights for divorce and, in addition, paid extra money to convince their husbands to divorce them. Fifty-five *khul* cases (for cash) out of 189 is a large number. One husband involved in a divorce wrote in the registry book, 'I divorce my wife free of charge'. This means he was thinking of khul, in which women pay for divorce, or he thought there is no free of charge divorce for the wife.

In the *khul* cases where women traded their *mahr* for divorce and paid extra money in cash to the husband, the paid amounts generally reflect the women's economic status. Apart from two cases that show 600,000 and 500,000 AFN respectively had been paid, the remaining amounts fall between 100,000 AFN (or lower) and 200,000 AFN. In one case, a woman paid US$4000 and also relinquished her *mahr* of 300,000 AFN. In total, the settlement was about 500,000 AFN at the time it was paid. Two cases report payments of 300,000 and 280,000 AFN.

The figures in the above table and the chart reflect what was observed by the candidate in this province and also what was shared by interviewed lawyers and the judges. The observation chapter sheds more light on the accuracy of the figures as representative of *mahr* in the Province B family court.

Court Records from Province C

In contrast to the records in Province B, a few cases (n=3) are found in Province C that show *mahr* is being paid, with the amounts being 1.2 million, 500,000 and 70,000 AFN. A total of 194 cases were reviewed for Province C. Of these, 88 are *tafriq*, 95 *talaq* and 14 *khul*, but only one involves a *mahr* dispute. One case showing a *mahr* amount of 100,000

AFN was found in the records and the file indicates that *mahr* was paid at the time of *nikah*. However, this payment was most likely considered *toyana* or spent for wedding purposes, even if named as *mahr*. Another case in this category indicates that since *mahr* was not fixed at *nikah*, the court fixed *mahr-al-mithl* of 50,000 AFN, but the husband refused to pay. The case papers indicate the couple lived together for 18 years. Such cases clearly illustrate the truth of what an Afghan woman gains from marital assets at the time of divorce.

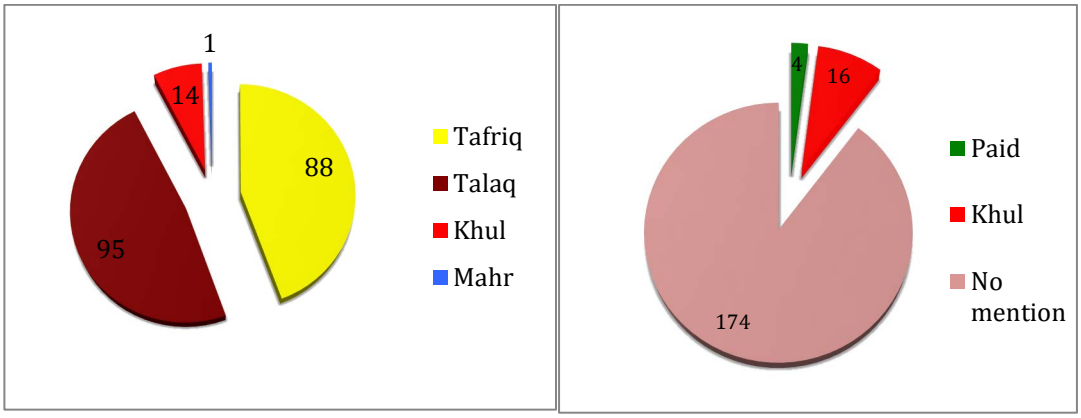


Figure 5.9 Type of case reviewed and disposition of *mahr* in provincial courts

In two more cases in the *tafriq* records, one wife paid 130,000 AFN to purchase the custody of her 3 year-old child while another paid 300,000 AFN to obtain custody of her three-year-old son (the duration was not indicated). According to the law, the woman has full right to child custody for young children.[186] However, she might have been trying to get a longer custodial period or her husband may simply have refused to give up the child. Whatever the mother's rights, the father would ultimately succeed if he ever presented a request to the court demanding the child in the future when the age of custody is finished.

5.4.5. Khul Cases in Province C

As explained in previous chapters, *khul* is a type of divorce initiated by a woman in which she pays something of value to her husband to get divorced in return for that. In actual terms, all cases where women relinquish *mahr* for the sake of divorce are *khul* cases, as

[186] A mother can have custody of a son for seven years and a daughter for nine years, and her husband should pay for their food or maintenance.

women trade away their *mahr* and other financial rights.[187] Although not as common as in Province B, a distinctive feature of the cases reviewed for Province C was the number of *khul* cases found in the list of *tafriq* and *talaq* records. Figure 5.10 below illustrates the amount of money women have paid in Afghan currency.[188] The amounts are significantly larger than those paid by women in Province B. This contrast reflects, in general, economic differences between the provinces, as Province C is more industrialised.

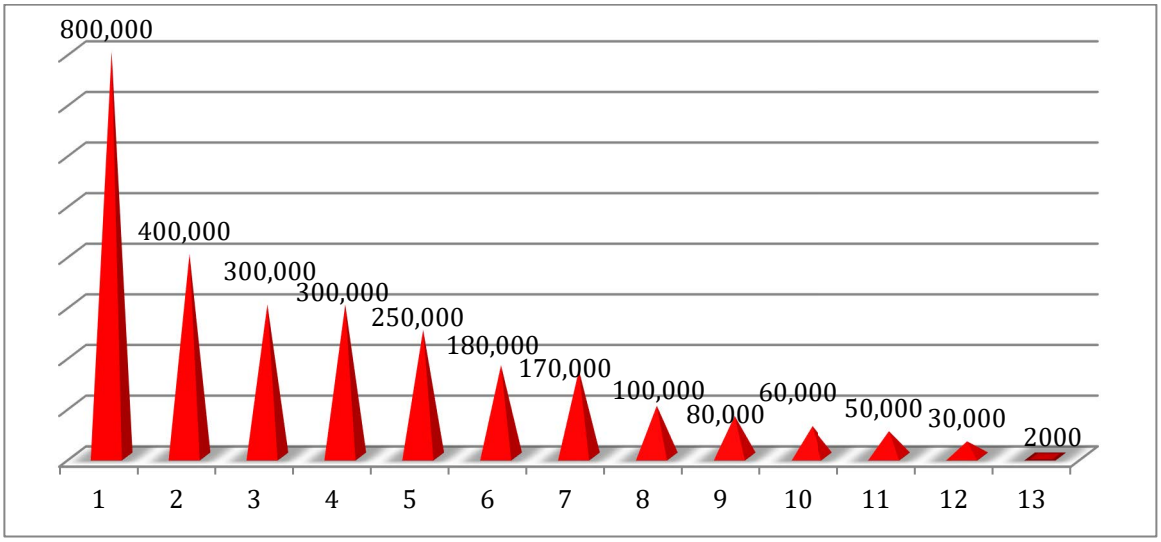


Figure 5.10 Amounts paid in *khul* settlements in Province C

Yet, in the figure presented for Case Number 2 in the chart, the woman gave one necklace, four bangles and five gold rings to her husband along with 400,000 AFN. In Case Number 3, the court records say the woman also paid gold jewelry to her husband but did not specify the items. In Case Number 10, along with the 60,000 AFN the woman gave two gold rings and two sets of earrings. The lowest amount recorded shows that the woman's *mahr* was a copy of the holy Qur'an, and the *khul* was granted at the cost of that the book.

5.4.6. Mahr Disputes in Province C

Although one *mahr* dispute was found in the court records of Province C for the entire number of reviewed cases, a registry book for all incoming requests to the court showed a total of 22 *mahr* claims referred to the court in Province C in the period 2013–2015 and. In

[187] Interview with Judges 22 and 15
[188] As of 12 September 2018, AU$1 was equivalent to 52.93 AFN.

one litigation where a woman fought for *mahr*, her statements indicated that she was beaten, evicted from the marital home and then divorced. Being confronted with severe poverty, she claimed her *mahr* of 300,000 AFN along with one room of furniture in the husband's house. However, she could not provide evidence to support her claim so her request was rejected. Her husband took an oath swearing that she had already received her *mahr*, and the court decided based on that.

5.5. Summary

The quantitative data presented in this chapter provides a stark manifestation of how *mahr* is regarded in Afghanistan. Whether analysed in the context of the entire dataset for the research or standing alone, the data clearly demonstrate that *mahr* in its current form cannot be a substitute for the missing financial support for divorced women in Afghanistan. In total, 661 *talaq* cases plus 73 *tafriq* and *mahr* disputes were reviewed from the records that existed in the Province A Family Court. One hundred and ninety-four (194) cases were reviewed for Province C and 189 for Province B, yielding 1117 cases in total. Of this number, only 154 cases are marked 'paid'. Table 5.1 shows the range of paid amounts.

Table 5.1 Amounts of *mahr* paid 2004–2015

Trend	Number of Cases	Paid Amount	Equivalent in AU$
Highest	11	800,000–2,730,000	14,448–49,304
Higher	12	400,000–700,000	7223–12,641
Average	59	100,000–300,000	1,806–5,418
Lowest	72	90,000–2000	1627–36

This chapter, though contributing data to support the main argument in the thesis, reveals a significant difference in understanding and application of *mahr* as a form of women's financial rights in Afghanistan. The difference is easily visible in reviewed cases for each province. The lack of due regard for *mahr* in the two provinces that contain the major cities

of B and C—considered more progressive compared to rest of the country—indicate that, in general, *mahr* is not a popular concept in Afghanistan; it is neither recognised nor respected as an essential right for women, one that is emphasised by the law and the holy Qur'an. However, the data collected from the Province A is less illustrative of this negative statement; the data show that in the capital, *mahr* is given consideration, to some extent. In particular, the court records clearly show the number of *mahr* cases and the amounts fixed as *mahr* increasing towards the end of the research period. Yet, there is no legal guarantee to ensure women can easily obtain *mahr* if they wish to.

The difference, explained from the candidate's viewpoint, is a result of the enlightening work that has happened in the capital city after the changes in Afghanistan. Based on the contents of the previous chapter, however, it could be argued that, apart from the capital, Afghan society is happier with application of the bride price and other traditional customs practised in most of the country than with strict enforcement of *mahr* rights..

This chapter is well-placed in the thesis structure to support the core premise, that *mahr* is not a well-regarded financial support for women who are likely to suffer severe poverty and destitution after divorce. That is because *mahr* is not often fixed upon marriage, not paid to women themselves, or must be used by women as a bartering chip to leave an abusive and intolerably unhappy marriage. In addition, the amount determined as *mahr*—where it exists—is so trivial that many women obviously prefer to disregard this right to avoid problems and delays associated with legal procedures.

The next chapter supplements the main argument by presenting eyewitness reports from the courtrooms based on non-participant observations of the procedures used in hearing *talaq* or *tafriq* cases. The chapter strengthen the findings of Chapter 5 (and the views expressed in the interviews presented in Chapters 7 and 8) that only a small percentage of women who divorce seek *mahr*, and an even smaller percentage succeed in obtaining it.

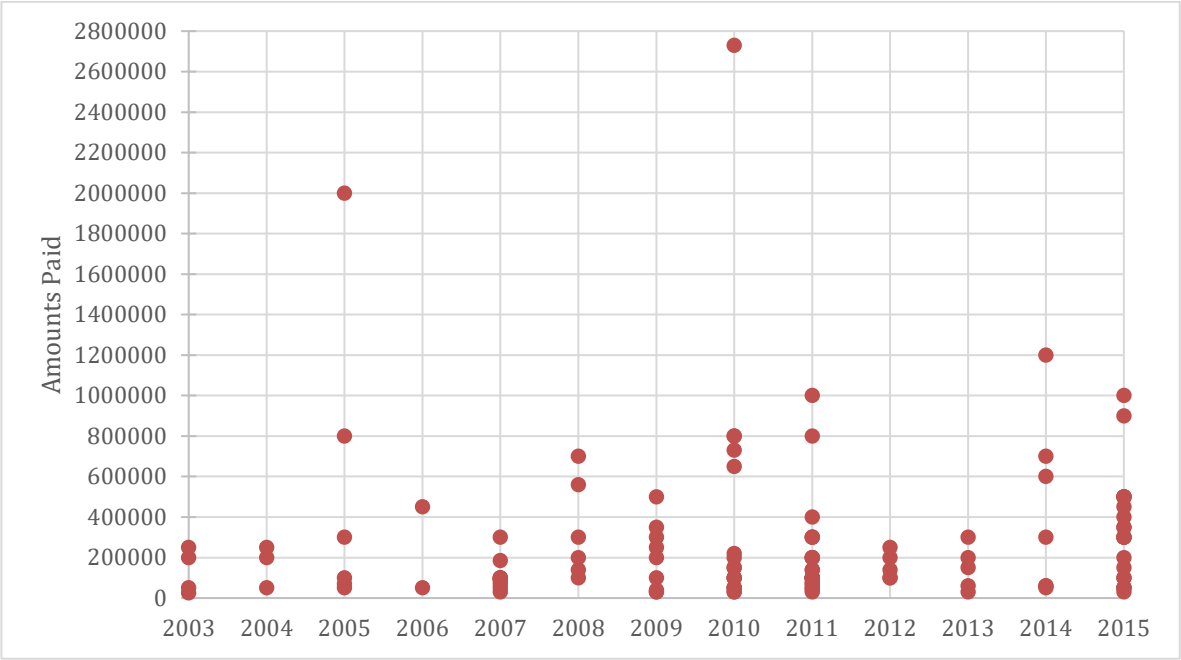


Figure 5.11 Amounts paid for the total number of reviewed cases, per year

Figure 5.12: *Talaq* Registry Book Page (Source: Adalatkhah, 2017: 256)

Chapter 6. *Mahr* in the Court Hearings

6.1. Introduction

This chapter describes observations conducted in Afghan family courts between December 2015 and May 2016. It corroborates and supplements arguments presented in the previous chapter based upon findings from a review of court records. The information gathered during non-participant observations in four family courts in Afghanistan supports the argument that only a small percentage of women succeed in obtaining *mahr*, and the amounts awarded are most often insufficient to meet a woman's financial needs after divorce. However, a very limited number of cases exist in which the *mahr* amount granted is relatively high compared to the rate established in most observed cases. In only one case the *mahr was* paid directly to the former wife.

Court observations further confirm the factors limiting women's access to *mahr*. The previous chapters in the thesis indicate one of these factors is limited knowledge about *mahr* in the general Afghan population. The observations verify this lack, especially among women. Most women attending the courts had no idea that *mahr* is a legal right for women. The erroneous equation of *mahr* with dowry or bride price, neither of which benefits women directly after divorce, is another factor that was frequently noticed in the observed cases. Furthermore, the candidate observed women trading off their right to *mahr* to obtain a divorce quickly or, in some cases, to secure custody of their children.

Apart from the overall objectives of the thesis, the main purpose of the court observations was to investigate whether *mahr* is regularly part of divorce case hearings in Afghan family courts and, if so, whether it is treated with the same level of significance that the Qur'an and Islamic teachings attribute to this concept. The observations also aimed to identify challenges faced by women who rely on the courts to obtain *mahr* and any improvements required to facilitate women's access to court procedures. The candidate also wished to identify whether going to court improves the likelihood of success for those women who do seek *mahr* upon their divorce.

The findings from these observations respond to the original questions of the thesis that focus on the prevalence and adequacy of *mahr* awards issued from divorce proceedings. The findings verify the accuracy of data collected from court records and interviews conducted with lawyers and judges. This chapter also includes case studies of court hearings to provide readers with a rare glimpse into Afghan family court procedures and conduct.

6.2. Criteria for Case Selection

Factors beyond the candidate's control dictated which cases could be observed. In the Province A Family Court (before changes to the court structure), the candidate was permitted to observe only one brief hearing of a *talaq* case. Court authorities advised the candidate that the most useful sessions to attend for observation purposes would be those in which divorce is pronounced, referring to cases of *talaq* that are initiated by men. However, she was not invited to attend more than one case, despite frequent reminders to court personnel and through them to court authorities. Only after changes in the court structure could she secure further permission for observation in one of the two newly established family courts designated to accept cases from their relevant zones. Therefore, the criterion for selection was permission to enter the courtrooms and watch the case. Both *tafriq* and *talaq* cases provided information on the *mahr* aspect, whether or not it was explicitly addressed.

As discussed earlier (see Chapter 2), in cases of divorce initiated by women (*tafriq*) there is no question of *mahr* being awarded or not. Courts will not allow women to proceed with two requests—one for a divorce and one for *mahr*—in one petition. Thus, if a woman is filing a case for divorce based on harm or any other reason and she wants her *mahr* to be paid at the same time, the court will order her to drop one of the two requests. She must either ask for divorce or for *mahr*. The Court will direct the woman to return later to file a new case for the second request. Therefore, observing cases of divorce initiated by women where *mahr* was requested would have been a lengthy two-stage process. Some of the cases observed were such cases where a specific reference to *mahr* was not made.

6.3. Findings

The candidate was able to observe close to 60 cases, of which 15 were from Kabul, 15 from Province C and around 30 from Province B. However, this section focuses on 18 court proceedings. Observation notes indicate that *mahr* was said to be obtained in seven cases (in at least six of these cases, when *mahr* question was raised, it was responded that '*mahr* is paid before', and that was end of the *mahr* conversation in the court without request for further clarification). In one additional case, a promise of future *mahr* payment was made but no amount was specified. In two cases of the seven where *mahr* was obtained, the amount paid was 900,000 and 800,000 AFN respectively; in one of these, *mahr* was paid at the time of marriage, effectively functioning as a bride price. In another, where the divorce was initiated by the husband, 900,000 out of the one million AFN that had been determined as *mahr* was paid to the woman in front of the judges.[189] In the remaining cases, the *mahr* ranged between 50,000 and 400,000 AFN, and the latter amount was not paid in full.[190] Obviously, the lower amounts would not be of use in maintaining a divorced woman for longer than one or two months. A rough calculation of living cost in Afghanistan indicates that a person would need about US$300-500 (15,000–25,000 AFN) per month to cover modest living expenses incurred by people who work as civil servants or teachers. Even if the money paid as dowry or bride price had been given directly to a wife to serve the purpose of *mahr*, most of the awards recorded were far too low to offer a woman meaningful support post-divorce.

The major findings of the observations are presented below, along with case studies arising from court observations

6.3.1. Awarding of Mahr

The most important message that court data deliver and the non-participant observations conducted for this research support is that women succeed in obtaining *mahr* in only a

[189] The remaining 100,000 AFN was paid as immediate *mahr* when the wedding took place.
[190] 200,000 AFN were paid at the time of marriage, and 200,000 remained to be paid upon divorce.

limited number of cases, and have a greater likelihood of winning *mahr* if the amount is small. None of the cases observed in the two provincial courts were *mahr* disputes. In two cases in Province C and in eight out of 15 cases observed in the capital, the issue of *mahr* was raised.

In Case Number 1 observed in the capital court in September 2016, a young man who lived outside Afghanistan had initiated the divorce. He told the court he wanted to divorce his wife because he could not take her with him to his foreign residence. His case was stated with little sympathy for his wife, who sat through the proceedings without saying a word or responding to his request.

The judge asked about *mahr*, specifically the amount and whether it had been paid. The husband, who was accompanied by his two brothers, presented an informal certificate to the court that said a *mahr* of 50,000 AFN had been determined, and the woman agreed she had already received the amount. There were no further exchanges between the parties or questions asked by the judges. The divorcing parties were advised to refer to the administrative section two days later to receive an official court order.

The woman seemed to be literate and the mentioned amount was too small to be determined as *mahr* for a woman like her. As noted in earlier chapters, a common Afghan custom involves presenting money to a girl's family when a suitor's marriage proposal is accepted. Signifying a positive answer, some sweets are presented on a tray, called a *shirini*, to the family or representatives of the suitor. In return, as a token of gratitude and appreciation, as well as respect to the newly formed relationship, a relatively small amount of money is left on that tray. This exchange does not constitute *mahr*. The amount of 50,000 AFN mentioned as *mahr* in this case might well have been nothing more than this customary practice. If so, in this case there was no *mahr*, as that would have been a larger amount of money or some property.

In Case Number 2, *mahr* was determined at 400,000 AFN, but 200,000 had been paid earlier, again suggesting it represented something other than *mahr*. The case involved a man at least 60 years of age and a woman who, although completely covered in a black veil

that revealed only her eyes, sounded about 18 or 20. She held a girl about two years of age in her lap. The couple's age difference would not be considered unusual in Afghanistan.

The woman appeared to have nowhere to go if she was divorced. She kept asking her husband, 'Where should I go, if you want to divorce me? Where should I go, tell me that?' Women's dependence on men in Afghanistan often compels them to stay in bad, even abusive marriages. This woman told judge that one of her husband's sons, who is much older than she is, had raped her three times. Her husband did not seem to care about the attacks. The woman told the judge that her husband had promised to give her a separate home, but now he had placed her with his other wife and large existing family, and she could not live with them.

Under current laws, there is no avenue for women who have no means to defend themselves against arbitrary divorces that men are entitled to pronounce under Islamic law. Although some scholars believe *mahr* is an instrument to discourage such divorces, or at least ensure a woman's financial wellbeing, this woman's situation proved this is not the case. The remaining amount (200,000 out of 400,000 AFN) would not guarantee the woman's financial support longer than five or six months, especially if she had nowhere else to live. Because the court personnel were upset about the noise the woman was making, the case was adjourned to the next session for a decision, and the parties were asked to return with their national identification cards and marriage certificate. The judges criticised the husband (in the absence of his wife) for marrying a second wife at such an old age, without considering the consequences. However, the husband was calm and did not respond to these comments.

The only outcome that would favour the woman was payment of the remaining 200,000 AFN from her appointed *mahr*. The judge could not confirm whether the wife would receive child custody costs as well, nor could anyone in the court tell where the wife would go after the divorce. Considering the small amount of unpaid *mahr*, the woman seemed to be left with little financial support.

In Case Number 3 from Kabul Family Court, the judge asked the woman why she wanted a divorce. The wife answered that she did not get along with her husband's family. The judge

asked whether the couple could rethink their decision. The wife replied that this would be difficult. The conversation between the judges and the couple revealed that the wife had begun a relationship with another man, which an Afghan husband would find unforgivable. In spite of her affair, the husband treated his wife kindly in court; most Afghan husbands would have sought much harsher punishment for their wives in such a case. When the wife was dismissed from the courtroom, one of the female judges asked the husband what he wanted to do. He answered that he loved his wife, but he was heartbroken. The male judge who was in charge of the case told the husband not to hesitate divorcing such a wife. The husband agreed, and then the woman was summoned back to the courtroom. When the judge asked about *mahr*, the man said it was US$1000 US, and she had already received it. The woman agreed. Again, this amount may not have been *mahr*. The man came from a Pashtun background in the southern part of the country where the bride price is prevalent. What the wife received could have been the gift that is commonly left on the sweets tray at the time of engagement.

Several observed cases did not have a genuine *mahr* element. When the court asked about *mahr* during divorce proceedings, either a gift or immediate *mahr* is presented as deferred *mahr* with the claim that the amount had already been paid.[191] If a woman is at fault for the marriage breakdown, or if she has been subjected to abuse and is angry and disappointed with the marriage, she will not care about *mahr*. She just wants the divorce to happen as quickly as possible. This was also confirmed by some of the interviewed judges (Interviewees 22, 24).

In the same court that day, another divorce case (Case 4) was heard in which both parties were absent, and their lawyers represented them. The woman was in Europe and the man in Canada. The woman had taken their two children with her when she went to Europe along with her family, abandoning her husband. The man's lawyer explained to the judge that while the woman's family was moving to Europe, the husband was working on his case to move to Canada. The husband was asked to accompany his wife and her family to Europe, but he did not want to go. They left him behind and did not allow their daughter to wait.

[191] Noted in an interview with Lawyer 39.

When the man reached Canada, he hired a lawyer to divorce the wife in Kabul. The man's lawyer said the *mahr* was 200,000 AFN, and the amount had already paid.

Observation of the above cases, even though limited, revealed that women rarely played an active part in the proceedings. It also appears that often what is claimed to be money paid as *mahr* is not given to a wife at the time of divorce as is intended by both Islamic and civil laws. What is paid to women in the cases described is more likely to be the gift left on the *shirini* tray. However, when it comes to specific *talaq* cases where *mahr* is a crucial question, any money is simply called *mahr* to avoid barriers to the proceedings. As Lawyer 39 said, if *mahr* is addressed in a case, 'it is mostly for formality purposes and not a response to the woman's right'.

6.3.2. Factors Affecting Women's Access to Mahr

The cases described in this section reveal why women's access to *mahr* is limited; they confirm the findings of the court records review in Chapter 5 of the thesis and interview findings in Chapters 7 and 8.

In Case Number 5 heard in the Province A Family Court the parties were not present, but their lawyers read their statements. The case was a request for divorce by a wife (*tafriq*), based on severe abuse. The lawyer representing the woman applicant read an indictment in front of the judge. Then the lawyer representing the husband spoke. The defence statement did not contradict the woman's complaint; rather, it made a strong accusation against the woman.

The husband's lawyer accused the wife of not having been a virgin at the time of the marriage, connecting the husband's mistreatment of his wife and his intense dislike of her to this reason which, he insisted, was factual. The woman's lawyer, the husband's representative, and the judges hearing the matter said nothing about *mahr*. Given the nature of the husband's accusation, if *mahr* had been part of this case, the husband's lawyer might have rejected the claim based on the wife's lie about her premarital virginity. As indicated earlier, some *fiqh* scholars believe *mahr* is the price of a wife's virginity. This claim may appear outdated to those in the western world, but the issue of virginity carries major importance in Afghan culture. In cases where a young wife fails a virginity test, her *mahr*

right would probably collapse, and she might also face severe punishment, even death. Her father would have to return the wedding cost to the husband, and the girl would be returned to her family, a fate often considered worse than being killed (Joya, 2016:10).

In Case Number 6, the lawyer representing the man presented a long list of activities and conditions that the husband demanded in order for his wife to remain in the marriage. The wife had worked outside the home previously, but her husband had banned her from going to work or even leaving the marital home. His actions led to increased tensions until the wife decided to leave him. They were in the mediation phase at the time of this court appearance. The conditions imposed on his wife by the male petitioner included:

- members of the woman's family were not permitted to visit her
- she could visit her family for a short while once a month, but she could not stay with them overnight
- when she visited her family, she could not take their daughter
- she could not argue with her husband
- she was required to live with and respect his family members
- she had to wear a burqa and other Islamic clothing, and
- she was not allowed to have a cellphone.

The judge asked the lawyer if he agreed with his client's enforcing such conditions. The lawyer responded that there were many other things the husband wanted to add to the list, but he had advised against extending his demands as these would not likely be accepted by the court and would undermine his case. The judge told the wife to prepare her case since the response from her husband indicated that he was not willing to solve the dispute through negotiation, and he was apparently not willing to continue the marriage. Given the stage this case had reached, it was not surprising that *mahr* was not mentioned. This case serves as a good example of why some women find it difficult to continue an abusive and violent marriage, and prefer their freedom over any financial benefit. Women caught up in such relationships are likely to trade away their *mahr* for an early divorce.

6.3.3. Strategies Used by Men to Ensure Women Cannot Claim Mahr

Several cases observed illustrated the strategies that husbands use to block their wives' access to *mahr*. One such instance, Case Number 7, involved cancellation of engagement. The parties had performed *nikah* in the engagement ceremony to ensure that evidence of the relationship could be processed later for immigration purposes. The man lived in Canada, one of the many Afghan migrants who return to marry in Afghanistan. These men easily abandon their wives later if they encounter any difficulties in taking them out of the country. The young man had come to the court with his brother, but the young woman was alone.

Because *nikah* had already been performed, based on law, the outcomes—that is, continuing with the marriage—could be applied. For that reason, the couple had come to cancel their engagement in the court. If the matter was simply an engagement, either of the parties would have been legally entitled to the right of cancellation. The sticking point of this case was the type of *mahr* registered in the marriage certificate. On an Afghan marriage certificate, there are two boxes under the amount of *mahr*: one says immediate *mahr*, and the other box says deferred. An amount of 500,000 AFN had been recorded in the immediate *mahr* box. When it comes to formal claim of the *mahr*, the woman can only claim the deferred, and not immediate *mahr* in court because, under the Hanafi school of *fiqh*, whatever gifts women receive at the time of their wedding are considered immediate *mahr*.

When the judge asked for *mahr* and its evidence, the girl said she did not want her *mahr*. However, the judge asked the man to present the evidence of *mahr*. Based on the certificate the fiancé presented, the young woman would not have been able to claim *mahr* in any event. She said she had received nothing in the name of *mahr*, yet the certificate showed a registration of immediate *mahr*. It appeared that the man knew from the outset that he might cancel the marriage or engagement later; therefore, he avoided paying *mahr* through this ruse.

The judges dismissed the man from court to allow the young woman to speak more openly. In his absence, she revealed that her fiancé and his brother had told her to inform the court

that she did not want her *mahr*. She also said that when the marriage certificate was being processed, she was told not to ask for more than 500,000 AFN in front of the officials, as this request would make it impossible to develop the document and she would not be able to accompany her husband to Canada later (that is, they lied to her by saying that if she asked for higher amount of *mahr*, the officials would not process the documents to issue them a marriage certificate and she would therefore not be able to go with the man to Canada, where he lived). She asked the judges to tell the two men that, according to applicable laws, they could not force their will on her, but she herself was silent in the presence of the two young men. She said that she did not know anything about *mahr* and how it could be claimed. She had done whatever they told her to do in the marriage registry office. Apart from her *mahr*, the dispute involved gifts given to the girl, for example, jewelry, clothes and household goods. The judge allowed the men to return but, before they entered, the judge agreed to make them understand that their strategy would not be acceptable to the court. The principal judge told the man that it would be more appropriate and ethical if he did not ask for the gifts to be returned, as the woman would bear the harm of the cancellation. However, the young man said that he had already forgiven many things, and he wanted the gifts returned.

Then the judge started to read him certain provisions of the law that qualified the woman for obtaining *mahr*, but nothing seemed to convince the young man. He appeared certain he would succeed on the strength of his evidence. On the other hand, the woman seemed to hope that this broken engagement might still work; alternatively, she might have been warned not to do anything that would place blame on the fiancé. Apparently for this reason, she did not say or do anything that would offend the two brothers.[192]

In the Case Number 8, the man used a strategy that was reported by the interviewed lawyers (19 & 17) to be a common practice for escaping *mahr* claims. The parties were middle-aged people; the woman was a school teacher and her husband a university lecturer.

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[192] Currently in Afghanistan, a marriage in which the woman will be taken abroad after the wedding is ideal for the families and the young women themselves. In some of these marriages, men agree to pay high *mahr* because the currency exchange rate enables them to spend more.

They had three children, the oldest 18 years old and the youngest seven. The judge questioned the couple about their problems, and why they wanted to divorce. The husband immediately started to speak without pause, repeatedly saying that he does not want his wife and there is no way they could continue to live together.

The husband had lived for many years in one of the neighboring countries to Afghanistan in the north, a route many Afghans take to make their way to western countries. He may not have succeeded in his plan and, for whatever reason, had returned to Afghanistan. The problem he had with his wife must have been deeper and stronger than he indicated because he used every opportunity to insult her in court. The woman said nothing, except to recount her sacrifices in bringing up their children in her husband's absence and how well the children were doing in their education. She told the judge that she did not wish to divorce, but her husband insisted on this action. The judges tried to make the man understand that divorce was not a good choice, and to encourage the couple to resolve their difficulties through negotiation. However, the husband would not accept this advice.

On the subject of *mahr*, the man told the judge 'Tell her to bring the evidence; her *mahr* is 300,000 AFN of Dostom time.'[193] When the judge sent the husband out of the court so that she could talk to the wife, the woman said he had an affair with another woman and wanted to marry her. She said 'He has stolen the letter that was *mahr* evidence, but I have made another one myself. The *mahr* given to me includes two rooms with a corridor in the house where we live and all the furniture. I built the house in his absence; it collapsed once, and I rebuilt while he was away.' However, she was not sure whether her husband would accept the claim.

The judge told her to bring the evidence letter to the court before the next trial to determine whether it could make a valid basis for a decision. When the candidate was coming out of the entrance gate that day to leave the court, she saw the woman coming back; apparently, she had brought the evidence letter to show it to the judge. In a follow-up call to the president of the court about the result of that case, the candidate was told the husband had

[193] Between the years 1992–2003, Afghanistan faced high inflation, so that 1000 AFN from that time is equivalent to 10 AFN in the present time.

rejected his wife's claim of *mahr* based on the evidence she presented to the court, arguing it was fake. The case was dismissed for lack of valid evidence to prove the claim. Neither of the couple showed up again; presumably the divorce happened out of court and the woman failed to obtain anything in the name of *mahr.* As, based on what the husband said, the *mahr* was 300,000 AFN of Dostom time, it could be calculated as $A30 or so at the time of divorce.

6.3.4. Insignificant Mahr Amounts

In Case Number 9, a young woman, married to a man 15 years older than her lodged an application for separation based on abuse. She said she had been engaged to this man for three years, and in all that time, he had been outside Afghanistan. When he returned for their wedding, he spent only one night with her and left again. A year later, he returned. Although he had told the young woman that he was single, she had recently found that he had been married to another woman right from the time they got engaged. Furthermore, he and his first wife had children. The woman told the court that, given that he had another wife, he would not be able to take his second wife with him outside the country. As a result, she wanted to end this marriage. The husband listened, briefly answered some questions that the judge posed to him and did not deny his wife's accusation. When the judge asked about *mahr*, she said it was 200,000 AFN. She told the judge that she did not want the *mahr*, but only to have a divorce decree issued.

Given the harm that the woman endured in this case, both emotional and physical in terms of loss of the virginity that makes her less attractive to men for remarriage as well as the negative reputation of being a divorced woman, the *mahr* should have been a significant amount as compensation, in line with the *mahr* theory from the juristic perspective explained in Chapter 2. In particular, the man could afford *mahr*, given he lived in Canada. However, the woman was so emotionally disturbed and disappointed by her failed marriage that when the judges mentioned *mahr*, she decisively said she did not want it.

The conversation between the judges and the couple indicated that the man lived abroad and did not have another sibling to stay with his parents in Afghanistan. In Afghan culture it is inappropriate to abandon elderly parents. To do so would bring shame to the child.

Therefore, a reason for the man's second marriage may have been to keep a wife in Kabul to look after his family. The woman spoke with evident frustration and disappointment at being deceived by her husband. The man remained silent and said nothing in his own defence.

Based on what the research participants expressed in the interviews presented in Chapters 7 and 8, one of the many causes that lead women to give up on the *mahr* is the trivial amount determined, which is evident in this case. The amount of 200,000 AFN did not seem to be suitable for an educated woman.

6.3.5. Effect of a Wife's Guilt in Establishing the Mahr Amount

Case Number 10 had already been heard before the candidate attended the court, and now the couple was going through the mediation process ordered by court to encourage them reconcile. The case was *tafriq* because the woman had requested the divorce. The marriage may not have been successful from its beginning. The woman, who was mother of five children, ran away from the marital home to save herself from severe domestic violence. However, bad luck followed her. On the way to another province, she was kidnapped and then arrested by the police along with her kidnapper. The woman was sentenced to 18 months in jail for running away from home. When she was freed from prison, she moved to a shelter, and a case was filed for her to get divorced. The wife wore a face-concealing veil, and she did not speak a single word in all the time she sat in court. In contrast, the husband was visibly quite angry. However, he kept quiet and did not speak unless he was questioned.

The *hakam* or court-appointed mediator representing the wife indicated that she would return home to live with her children, provided her husband promised not to repeat the violence she had endured earlier. However, the husband's lawyer said that his client strongly rejected that proposal. He pointed out that the wife had left home once, so she could not return. Yet the husband was not ready to divorce his wife. He had decided that she could neither live with him, nor be divorced. One of the judges mentioned that in a previous session, the husband had said he wanted all the wedding expenses paid back. This demand meant that there would be no question of *mahr* in this case.

The judges hearing the case included one female, one male who oversaw this particular file, and the Head of the Court, also female. The female judge reported to the Head that in the previous session the husband behaved badly, trying to hit the woman inside the courtroom. The male judge did not allow his colleague to speak further, arguing this case was his primary responsibility. At the end of the session, the Head of the Court dismissed the case and appointed another date for rehearing. She ordered the man to decide whether to accept his wife back home or to divorce her peacefully. In cases where a wife is found guilty of causing a divorce, she may lose her *mahr* based on Article 188 of the Civil Code. In this case, the element of guilt on the woman's part appeared strong as she was caught with another man (although she claimed she was kidnapped). That was enough reason to disqualify her from her *mahr* claim.

Case Number 11 concerned a couple who had divorced two years previously. The woman had referred to the court as she required an official letter proving the marriage dissolution. She brought her ex-husband to court so that she could get evidence of the divorce. The judge asked her about her *mahr*; the woman said it was US$2000, but she did not want it. Then the husband was questioned about the amount of the *mahr*; he said it was 10,000 Pakistani rupees, which is less than AU$100. No explanation was given for this discrepancy, but since the woman indicated that she did not want the money, the judge did not interfere further. This case was one where the *mahr* amount was too insignificant to be claimed.

6.3.6. Trading Mahr for Divorce

In many instances, women trade their right to *mahr* in exchange for a divorce, deviating from their original case application. Women are frequently persuaded to change their *tafriq* request into a case of *talaq*, in which the husband requests the divorce and where the procedures are faster and easier to process. The latter type of case has few complications, as *talaq* is the right of husband and he can pronounce it wherever and whenever he wishes without any explanation.

Case Number 12, which was the first case observed in Province A before the changes were made in the Family Court structure (in May 2016), is an example of this tendency. One

clerk indicated that the parties had agreed to divorce, and the woman had relinquished her right to *mahr*. The woman seemed to have made this decision based on guidance provided to her. That she was unhappy with the trade-off was suggested by her demeanour while sitting in court and appearing in the clerks' office.

To perform the divorce formalities, the husband was asked to stand and repeat the divorce words uttered by the judge three times. Then the woman was ordered to stand up, and she was asked to confirm the identity of the man who had repeated the divorce phrases and whether she heard and understood the words he had pronounced. Then she was asked whether she had relinquished the *mahr*; she agreed. The witnesses were asked whether they had heard and understood what had just happened. When they agreed, the process ended, and judge told the parties to leave the courtroom and obtain the evidence from the clerk's office.

In the clerk's office, a female clerk was asked why the woman had given up her *mahr*. The clerk indicated that the woman had been told to do so to ensure her husband would agree to divorce her. The clerk further indicated that the *mahr* amount determined was 500,000 AFN.

Women give up on *mahr* claims based on the recommendations from their lawyers and the court to make the *tafriq* case procedures easier than they normally are. The next two chapters of the thesis illustrate this further. A UNAMA and OHCHR report, *Justice through the Eyes of Afghan Women: Cases of Violence against Women Addressed through Mediation and Court Adjudication* (2015: 21), also confirms this. Through mediation to reconcile parties, the mediators encourage women give up their *mahr* claims to allow their divorces to take place faster; lawyers who were interviewed supported this observation.

In this case, given the considerable sum of money involved, it seems possible that the woman acted without having proper information, advice or knowledge of what she was doing. The female clerk, when asked if the woman had hired a lawyer, responded that her lawyer had suggested she give up her claim to *mahr*. The result seemed unfair as the woman's husband was a doctor who might well be able to pay the 500,000 AFN to his wife as *mahr*.

6.3.7. Confusion of Mahr with Bride Price or Dowry

Observation records and data collected from the court records indicate that *mahr* is dealt with and interpreted in different ways across the country. In Province B, there was no case observed in which *mahr* would be paid. Bride prices, which were widely interpreted as *mahr*, were in the range of 100,000 to 300,000 AFN which is not high compared to other parts of the country. In Province C, the bride price (*qaleen*) was relatively high, in the range of 700,000–800,000 AFN. [194] In this court, *mahr* and the term *qaleen* were used interchangeably by lawyers and court personnel.

In Case No 13, a woman requested *tafriq*, but her husband claimed back the bride price he had paid. The woman was completely covered under a burqa when she entered the court, but her voice and small build indicated she was quite young, perhaps around 16 to 18 years old. She attended the court with her elderly father. The husband arrived at court before her; he seemed to be about 50 years old. The young woman told the judge that she wanted to divorce her husband as he already had a wife and six children. The Head of the Court, a woman herself, responded that this was not a good reason for divorce because the woman knew her husband was already married when she agreed to her marriage.

Listening to the conversations among the judges, the husband and the wife, the candidate noticed that husband received a great deal of attention and respect from the judges and Head of the Court. The woman was insistent in her request for a divorce, arguing directly with the judges. The husband, on the other hand, kept saying that he had given 700,000 AFN as a bride price to his wife's father, and there was no way he would let both the wife and money go.

In front of her husband, the Head of the Court told the wife that she would have to pay back the bride price if she insisted on divorce. The husband seemed to behave as if he was the victim, yet at the same time he appeared confident of his ultimate success. At the end of the session, the Head of the Court ordered the wife to sign a withdrawal of complaint paper and go home with her husband. But she refused; that day, the judges failed to convince the

[194] In Province C a dowry or a bride price is high and reflects the value of a female rug maker, but *mahr* is not well-known to the people as a financial right for women.

young woman to make peace with her husband. The next morning the husband was in court again. He sat in front of the president's desk, talking to her in a very low voice as if he was reporting something. Court personnel later indicated that the young woman had agreed to return to her husband, and the case was closed.

In Case 14, the amount of *mahr* to be paid was not low, but if it had been paid at the time of marriage then it should be considered a dowry and not *mahr*. In this case, the husband was living out of the country and had arranged for the divorce in Kabul. The parties seemed to be related; the husband's uncle represented him, and the woman was accompanied by her father. Seemingly, the young woman had no other option but to accept the divorce. She sat there without saying a word throughout the procedures, but tears were running down on her checks. She had a seven-year-old son who was to be taken from her after divorce. The judge asked about the *mahr*; the parties said that the determined *mahr* was 800,000 AFN, and this sum had been paid earlier, meaning it was the bride price.

The man's representative was supposed to pay 15,000 AFN as *iddat* maintenance, but he did not have money with him. He wanted the divorce document to be issued immediately, but the judge told him that unless he paid *iddat* they would not accelerate the process. The representative of the husband insisted, but the judge continued to deny the man's request. Finally, the father of the woman lent him the amount.

6.3.8. Lack of Knowledge About Women's Right to Mahr

The court observations corroborated women's almost complete lack of familiarity with *mahr*. This was more evident in the provincial courts. In a country where a majority of women are illiterate, it cannot be expected that they would fully understand their rights. In Province C, women coming to court from the remote districts manifested a lack of confidence and self-esteem. They were all completely covered in burqas and always accompanied by men, sometimes in groups of male and female companions. Women appearing in the courtroom rarely spoke in front of the judge or responded to basic questions.

In Case Number 15, observed in Province C, both parties were present in the court; the divorce was initiated by the husband. Based on previous observations, only divorce cases

initiated by men seem to include *mahr* discussions, so in this case, the woman should have been able to exercise her right to *mahr*. When other procedures finished, the judge asked the woman with what appeared to be great reluctance whether she wanted *mahr*. Most probably that question was raised because of the candidate's presence in the courtroom, as the judiciary panel knew what she was researching. The woman showed no sign that she had understood the question. Then the parties were asked to discuss the matter and come back to court.

Similarly, women referred to court in Province B were not familiar with *mahr* either, but they seemed to have greater self-respect and confidence. Every woman who entered the court in this province was accompanied by another woman as her attorney. They all were dressed in long black veils which made it difficult to differentiate between case holders and lawyers, unless they introduced themselves before judges.

6.3.9. Cases Involving Mahr

Case 16 involving *mahr* was not actually observed by the candidate due to delays in gaining access to the court. However, information was relayed to her by the Head of Court in Province A.

Based on the wife's explanation, the couple had applied to the court the previous week for a divorce. The husband had been married before, and he had older children, but his first wife had died. He then married again to the woman he was now seeking to divorce. His claim was that his wife would leave home any time she wanted, and this behaviour was not acceptable to him. The wife responded that her husband's family members abused her, and she had to leave home to get away from them. Violent behaviour seemed to be problem on both sides.

The husband's children apparently found difficulty in accepting the young woman as their second mother. An interesting aspect of the case was the amount of *mahr* registered in the marriage certificate: one million AFN, equivalent to US$15,000. The judge asked the husband to bring the wife's belongings from the family home and to present the *mahr* in the court if he wanted to divorce her. The man responded that he needed some time to prepare the money. However, the day after, he returned to court with the 900,000 AFN that he

submitted to the woman, and she forgave him the remaining 100,000 AFN. This case seemed to proceed smoothly, possibly because the husband had adequate financial resources. Moreover, the marriage did not seem to be appropriate, as the husband had married a young woman his daughter's age. If the man was financially capable as proved before the court, no doubt he would pay the *mahr* as he initiated the divorce. In such cases, court would ensure *mahr* is paid because the woman is the main loser of divorce.

Case 17 involved a *mahr* dispute. A young woman entered the court. Her husband was even younger, and he seemed less experienced than his wife. The couple had divorced three months previously. As the clerk explained to the judges, at the time of divorce, the wife had agreed to exchange her *mahr* of 900,000 AFN (a relatively generous amount of money compared to the common rate) for custody of her daughter, about two years old. However, the woman now regretted this decision, and she had referred to the court to file another case to reclaim her *mahr*.

The woman told the judges that her family and her in-laws had forced her to keep the child and forgo the *mahr*. However, she faced financial problems and she was having difficulty maintaining her daughter in her own father's home. She concluded that if she had to choose between the two, she did not want her daughter at the cost of her *mahr*. Apparently, no-one had advised the woman that she did not have to make such a choice; she could have both the child and the settlement. The child was at an age where she needed her mother, so custody would have been granted to her by law. The arrangement of custody would have to be revisited when the little girl reached the age of nine.

The husband told the court that on their wedding night, he realised that his wife was not a virgin, and therefore, she had no right to claim her *mahr*. In response, the judges said, 'If that was the case, why did you keep her all this time? Why have you waited to have a child with her? Why didn't you take her back to her father the day after the wedding?' The man seemed unprepared for these questions, and he said nothing. The reaction from the judges undermined his argument, and he had no other resource at hand to defend himself.

At the outset, the young man was quite aggressive, speaking boldly and in a loud voice. However, when he realised that his wife might win the case, suddenly both his courage and

his voice collapsed, and he switched to a more apologetic position. As he groped for the right words to express his thoughts, he began to raise issues that indicated his wife had been married before. She had two children in this previous marriage, but she had hidden her personal history from her second husband and his family. In effect, she had deceived them by presenting herself as a single, young girl.

The important point about this case was the amount of *mahr* involved, higher than the common rate. Although the ultimate disposition of the case occurred outside the candidate's observation, this proceeding appeared to reflect that young women living in the capital are now becoming sensitised to the importance of *mahr*. However, if the husband denied the amount, the court could not enforce such a high *mahr*. Rather, the court would most likely examine the man's economic status and revise the amount based on his financial ability. The husband was quite young and did not seem to come from a rich family background. Therefore, it was obvious to the candidate that if the court decided on a reasonable amount payable for the man based on his financial status, it would not go beyond 50,000–100,000 AFN.

In Case 18, observed in Province C, the mother of the husband said his parents would pay the *mahr*, although the amount was not specified at the wedding. The divorce had been initiated by the man who was living out of the country (he wasn't present in the court), but his wife and two children were in Afghanistan. The husband, represented by his lawyer and his relatives, was willing to divorce his wife. The woman was accompanied by her father, a military man, who appeared familiar with the laws governing marriage. He referred to different legal provisions while defending his daughter. However, there was no way the other party would back down. The woman and her father did not want the divorce to happen, while the husband's brother and his lawyer were fighting for it.

The woman's father argued that the couple's marital problems stemmed from the husband's mother who oversaw a large governmental organisation that fought violence against women. As the arguments between the parties were proceeding, a woman suddenly entered the court, went straight to the front to sit close to the Head of the Court and started to give her a lecture on the background of the case. Later, it became clear the woman was the

husband's mother. The Head of the Court was apparently not able to argue with her; she remained quiet and just listened to the woman. The mother said that the husband's family would pay the *mahr* so that the case would not be delayed.

No further information was obtained on the case before the candidate left Province C. Since *mahr* was not fixed at the wedding, the amount fixed by the court could not have been significant. Lawyers interviewed in Province C explained that court-determined *mahr* is always a small amount, though in this case the man was living abroad and could pay a relatively higher sum.

6.4. Reflections on Observations in the Provinces

During six days of observation in the courtroom in Province B, more than 30 cases were heard and resolved, and court decisions were announced for more than ten other cases. However, the issue of *mahr* was neither raised nor talked about during this period. Only once was a young woman questioned whether her father had accepted a dowry when she was married. When the woman said yes, the judge then replied to her, 'That was *mahr*; you will have to return it if he does not show flexibility in divorcing you.'

During a trip to Province B, taking the letter to the family court to observe administrative procedures, the candidate was able to watch a hearing, observing how the couple was questioned and consulted by the judge to prepare them for the next court session. One of the judges posed a series of questions to the wife to see how determined she was to separate from her husband. She was encouraged to avoid divorce, but when the judge realised the woman would not change her mind, he told her, 'There are two possible ways to get a separation. One is the troublesome way through application for the court, which is a request for divorce based on harm. This will take a long time, maybe six months to one year, and you must go through lots of procedures to get it. But there is also an easy way where you can pay something to your husband or refrain from the *mahr* or do both to get his consent to divorce you.' The judge seemed to insist on the latter option, saying 'You need to do *khula* and pay him something so that it is not unfair to your husband and he could manage to marry again.' Seeing this type of advice being given to a woman who had been abused and her rights violated was a troubling indication of limits on women's rights to *mahr*. A

request for divorce was the woman's legitimate right according to the law; she did not need to trade off her right to *mahr* in order to gain this freedom. Following the judge's advice, the woman was sent to write a petition and claim what she wanted.

Later, observations showed that the *khul* form of divorce was popular in that court; directly or indirectly, parties were advised to take the *khul* route in which the woman has to pay the man or relinquish her right to *mahr* to buy her freedom. Given the extreme workload there and the limited number of technical staff, it is possible this option was being promoted as a way to accelerate divorce proceedings and solve more cases in a shorter period of time. *Khul* can be a 'one stop shop' for those women who firmly intend to dissolve their marriages, provided their husband agrees with them and more importantly that, they can afford. Unfortunately, when a man hears about *khul*, he finds it in his interest to avoid divorcing his wife, even if he had previously agreed, in order to receive a financial benefit from her.

On the other hand, judges encouraging the *khul* route may have made a practical calculation. The court records of divorce cases show that the average amount of *mahr*, if determined, was 100,000 AFN, with a maximum in one case of 2.3 million AFN. At the current exchange rate, 100,000 AFN is equivalent to US$1500 or slightly above. Considering the living costs in that city, which may require US$300–500 per month for one person, this amount of money would cover only few months. Thus, it would have little practical value for a woman who has lost her home, husband, children and whatever she possessed during her married life. From the candidate's point of view, if the judges are skilled enough to encourage the husband of a wife demanding *tafriq* to make a deal over such an amount of money (which is determined as woman's *mahr*) and quickly release her from the marriage, then the *khul* approach might be justified. If a woman chooses to go for a contested divorce, she may end up using more than that amount commuting to court during the time that her case is being heard in the court, taking witness statements and collecting evidence such as reports from hospitals and experts to prove before court that she is abused or that the harm she complained of is valid. Most importantly, she will need to pay a lawyer to represent her, as every woman entering that court was accompanied by a female lawyer.

The candidate's observations in the Province C Family Court coincided with the period that changes in the civil court system had already been enforced (i.e. the changes in the family court structures mentioned in Chapter 5). During the three days spent in the court, more than 15 cases were heard but not finalised. In cases where women had been referred to court seeking divorce as a remedy for the violence they had experienced, *mahr* was neither mentioned nor questioned. However, in two cases where a man was the initiator of divorce, the subject was raised.

6.5. Conclusion

Court observations confirm the findings of the records taken from court registry books and verified in interviews with lawyers and judges. These findings support the argument made in the previous chapter that women in Afghanistan do not have adequate access to *mahr*. Where they are granted *mahr*, the amount is most often too limited to meet the purpose. In specific terms, the observations indicated that *mahr* is not considered in the provincial courts, especially if it is found that a bride price has already been paid.

For instance, in the cases observed in Province B, there was no element of *mahr* at all. Observations in the Province A court showed that, in divorces initiated by men, the court ensures *mahr* is dealt with, but it does not question the amount or its sufficiency in terms of the woman's needs. The *mahr*-related conversations between the parties and the judges indicated that what was nominated as *mahr* in the court was indeed the small amount of money that is usually left on the *shirini* plate, not a negotiated amount that is intended to ensure a woman's future financial security in the event a marriage breaks down.

The contributing factors to the findings in this chapter are:

- Women resort to trading off their *mahr* in order to obtain divorce and, in some cases, the custody of their children.
- Afghan society in general, and women in particular, have limited knowledge about the concept of *mahr* as a substantive right for women.
- *Mahr* is often confused with dowry and bride price.
- Women fail to claim *mahr* because the amount is trivial and is not worth the trouble

of claiming it.

- The amounts actually paid are mostly small, ranging from 50,000 to 100,000 AFN.

This chapter and Chapter 5 explored the reality of *mahr* application in Afghan courts, responding to the question of what happens to *mahr*. The next two chapters build on the argument established in these two chapters. Chapters 7 and 8 explore the challenges that prevent women from claiming *mahr*, those that force them to give up halfway through procedures and those that result in their failure to win *mahr* disputes. These chapters are based on interviews with legal practitioners (lawyers and judges) to explore the how and why of what happens to *mahr* in divorce cases that are resolved in the Afghan courts.

Chapter 7. Obstacles Encountered by *Mahr* Seekers

7.1. Introduction

The previous two chapters argued that the number of *mahr* cases is quite limited and it is only in the capital that the concept is known and, to some extent, regarded. In the other two provinces, bride price is more prominent and *mahr* is hardly part of the proceedings in divorce cases. This indicates the two concepts are confused with one another, in particular the requirement of *mahr* payment as part of the *nikah* procedures that should be questioned at divorce time. Bride price seems to be considered *mahr*, or women are sometimes later imposed upon to accept that what was paid as bride price was indeed *mahr* and she is not going to receive it again.

Chapter 6 revealed further that although divorces initiated by men offer women greater chances of access to *mahr*, if *mahr* is not fixed at *nikah*, men can easily escape this legal obligation. Observations proved this happens simply by a husband claiming the *mahr* '*was paid before.*' Due to the lack of adequate knowledge of *mahr* among women, they accept such a statement without much objection. Sometimes their silence and acceptance of what men dictate on their behalf is also the result of frustration over the lengthy court procedures and the emotional pain they have endured. However, there is no means in divorces initiated by men of assessing the woman's loss of social status and financial security after divorce and providing her compensation based on that. This was found to be the most obvious shortage in the legal system in handling divorce cases and *mahr* claims.

To build further on the findings of the previous chapters, this chapter argues that pursuing *mahr* is a difficult contest given the challenges that most of the women engaged in the court process face. Women must think twice before embarking on the journey that is neither safe for them nor guaranteed to reach the desired conclusion. The *mahr* battle requires women to assess their ability, freedom and resources before they decide to pursue their claim.

Based on interviews with 29 lawyers and 11 judges, this chapter argues that once women overcome initial impediments and decide to claim *mahr*, more challenging obstacles emerge. In fact, each stage in the *mahr* procedures is full of hurdles that cannot be anticipated in the previous stages. The findings indicate that even if a woman remains strong and survives one stage, the next stages may present other challenges that are stronger and prove impossible to fight. As such, women might fail despite the strong determination that motivates them to fight for their legitimate right.

7.2. Factors that Prevent Women Claiming *Mahr*

7.2.1. Bride Price: A Strong Rival Rooted in Custom

Taking large amounts of money in exchange for a wife is a common practice in some areas of Afghanistan, as illustrated in Chapter 4. The practice is particularly prevalent in southern and northern areas. In these provinces, *mahr* is not recognised as Islamic teaching. Such confusion might be the main reason for the shortage of *mahr* cases all over the country. For instance, Interviewee 30, a female lawyer working with an NGO that provides legal services to women in Province C, said that she had represented more than 400 cases of family disputes, but she did not have a single case of *mahr*. Interviewee 29, a male judge, said that during his work in family court (for just over two years), he saw no more than two cases of *mahr*, and he cited the prevalence of bride price in the area as the reason.

Interviewee 32, a female judge in the Province C who served in the Family Court for nine years, analysed a limited number of *mahr* cases. She noted that due to the prevalence of feudal customs in Afghan society, women are not able to attend the session where *nikah* is performed; rather, they are represented by men. As a result, they are not directly questioned about whether the matter of *mahr* is being included. When the Imam conducts the ceremony, he asks the families of the wedding parties about the *mahr*, something he is obligated under Islam to do. They respond '*Mahr* is being served.' Lawyer 18 explained that the father and other family members are more concerned about their own benefits and a good bride price, rather than establishing *mahr* as a solid right of the bride. The woman's family might indeed think the bride price they take is *mahr*, and because this misconception is so widespread, there is little blame in them thinking this. Judge 29 added:

> *Mahr* is often not determined when the marriage is conducted. If these women later refer to the Court asking for mahr, they are unlikely to be able to prove their claims as they do not have evidence, or the witnesses are not available or refuse to testify.

As a result, the wide acceptance of bride price in many parts of Afghanistan has created a serious misconception concerning implementation of *mahr*.

7.2.2. Restrictions on Women's Movement

Most Afghan families are not happy to let their female family members appear in public, let alone appear in a court, an activity that is not perceived positively. Every research participant mentioned the length and complexity of court procedures. Judges 12 and 23 noted that a case may remain at the primary court for four months. Each stage of the Appeal and Supreme Court adds an additional month, and the time in between waiting for the case to be heard can also last for several months. Lawyers frequently described the problem of ex-husbands not showing up, causing further delays. Lodging a case might require daily trips to court in the initial stages, and later at least weekly until the case is resolved or closed. Such frequent travel by women away from their homes is not acceptable to Afghans, particularly those living outside major cities. Almost every lawyer interviewed raised the point that cultural restrictions on women's movements discourage women from following up their *mahr* claims.

7.2.3. Prohibitive Costs in Seeking Divorce and Mahr

Research participants (for example, Lawyer 11) also pointed to women's economic inequality as a common factor that discourages them from initiating *mahr* claims. Women simply lack the financial resources to cover the costs of litigation and associated charges. Court and other legal expenses become especially heavy burdens if a case is delayed, because women cannot afford the transportation costs between their homes and the court. Court litigation costs somewhere between 300 and 500 AFN (equivalent to AU$10); although this may not seem a large amount, many women still cannot afford such cost. An elderly, poor father who earns 50–100 AFN daily to support his family, and whose divorced daughter may return to live with him, would find it extremely difficult to afford even the relatively low cost of court proceedings.

Interviewee 34, a female lawyer with seven years of work experience in a women's NGO, has represented around 700 family cases, but only ten were *mahr* cases. Explaining why *mahr* cases are so rare, she said: 'Women can't afford the cost. There are applicable transportation costs and movement problems, and proving a *mahr* claim in the court is too difficult. All these reasons affect a woman's will to pursue *mahr*.' Interviewee 14 (and indeed every other interviewee) pointed to the economic challenges involved in *mahr* disputes. Judges 23, 12 and 16 especially emphasised the length of the proceedings leading to increased costs.

Judge 16 explained that there are few family courts in the country, and this scarcity makes it particularly difficult for women who must apply to these courts from remote areas or even other provinces. To continue her litigation procedures, a woman would need to reside in the city where the court is located. This would require her to rent a place, and this would be a heavy burden on a woman with no income of her own. Moreover, she cannot move alone in public without a male family member, and this requirement also imposes costs. Economic inability to pursue a case is thus among the major obstacles preventing woman pursuing *mahr* claims.

7.2.4. Fear of Ruining Family Relations

Lawyers indicated that women do not discuss *mahr* during their married life as they fear jeopardising their relations with their husbands. Some women reported that their husbands would assume their wives did not trust them if they asked for *mahr*. This point was raised most often by female lawyers (Interviewees 2, 19, 20 and 11). Lawyers 19 and 27 mentioned that working women spend all their salaries and income on their home and family, but they cannot get this investment back later because the court requires proof of their expenditures, which may not be available to them. Lawyer 17 had such a case, in which her client had paid for the construction of the family house but had no evidence to prove it. A similar case was witnessed by the candidate during court observations in Province A.

Given that Islam has granted men a unilateral right to divorce, some women in Muslim societies are extremely vulnerable. As a result, they might be ready to make any sacrifice to

preserve their family life, and they do everything possible to keep a husband happy. Interviewees also reported that women often donate their *mahr* to their husbands to secure their love and attention. Lawyers 39 and 40 (both male) made fun of women during their interviews for bestowing their *mahr* on their husbands in the first days of married life, Lawyer 39 explained:

> In the early days of marriage, women are over the moon and their husbands could easily deceive them by saying they are loved passionately. So, they bestow their mahr out of excitement, saying they will not need money if they have such a loving husband.

7.3. Factors That Force Women to Relinquish Their *Mahr* Claims

A major finding of the court records and candidate observations was women's relinquishment of their *mahr* claims. This may happen halfway through court procedures or at the end of the court process. The matter was raised with research participants to seek their views on factors that force women to do so. This section describes the various reasons reported that compel a woman to give up her claim to *mahr*.

7.3.1. Need to Trade Mahr to Obtain Talaq

As mentioned in Chapter 5, court records indicated that in 545 cases, women relinquished *mahr*. In most instances, *mahr* was traded away to obtain a divorce directly from the husband, even though the case had initially been registered as *tafriq* case. These cases in Province B were registered as *khul* divorces and in Province A, the Court registry book recorded that 'the woman completely relinquished her right to *mahr* and has no further demand in future'. This matter was discussed with every interviewee. The answer from all research participants was that women relinquish their claims out of desperation. Every lawyer and judge indicated that women give up especially when they suffer from abusive marital relationships. They do not care about the financial loss; they just want to get rid of a violent husband or the unhappy marriage they are trapped in.

Surprisingly, judges acknowledged that they are aware of this situation. Judges 12, 14, 15, 16, 22, 23, 25, 24 and 36 all strongly emphasised that women give up *mahr* to get an easy divorce in the form of *talaq* or to shorten the proceedings. Interviewee 35, an experienced

female judge from Province B, said, 'In *tafriq* cases, usually relations between the husband and wife are so bad that the woman has no other choice but to divorce as soon as possible'.

Given the overall situation of women in Afghanistan, where the majority are illiterate with no employment or income to rely on for an independent life, a divorce applicant's decision to give up *mahr* in exchange for a rapid divorce may not be an informed decision. Moreover, a woman in a very difficult domestic situation may find it hard to make well-informed decisions. A woman who decides to relinquish *mahr* and all financial rights to obtain a divorce may not be fully aware that divorce will probably expose her to poverty and a lack of support or acceptance from her family and society. An independent male lawyer, (Interviewee 40 from Province A), indicated he could say with full confidence (based on his interactions and communications with his past and present clients, colleagues and friends) that many divorced women end up resorting to prostitution due to the lack of financial support and complete hopelessness.

The question then arises whether a court, as a powerful legal institution, might assist women to obtain divorce without facing so many challenges and without trading away their *mahr*. In response to this, Judge 23 from the Family Court in Province A said that the court cannot base its decision only on what a woman claims; it needs evidence to prove that the property she seeks belongs to her. So, if a husband denies what a woman claims, it is her responsibility to bring supporting evidence. Judge 22 also said the court has nothing to do with emotions. Judge 25 indicated that where a husband seeks to divorce his wife through court (*talaq)*, conditions might be imposed on him to submit the woman's *mahr* before the court. She said: 'In most cases where we see a woman in a desperate condition, we don't proceed further if the husband does not bring *mahr* and submit it to the woman right in the Court'.

7.3.2. Giving up on Mahr at the Suggestion of the Court

The proposal to relinquish of *mahr* or *khul* may also come from the court. Although judges frequently argued against assigning blame to the courts, one reason for women losing *mahr* was the pressure they experience as their case proceeds. Judges may strongly suggest that a wife negotiate with her husband, even if this means giving up *mahr* as the price of a faster

divorce. Substantial data revealed that women give up on their *mahr* due to encouragement from the court or, as some of the lawyers described it, pressure from the court. Given the position of the court as a platform for implementation of justice and equity, suggesting that judges and lawyers might pressure women to give up their rights seems inappropriate. However, lawyers interviewed insisted that what they call pressure does occur, taking the form of suggestions to clients on the best way to move their case forward (Lawyers 8, 14, 27). From the candidate's perspective this suggestion from the court that a woman give up her claim may be due to a heavy caseload and complications in *tafriq* cases that cause further delays in the proceedings.

A female lawyer from Province B said, 'I have witnessed cases in which the court has not issued a verdict but declared to the woman that if she wants to solve the divorce issue quickly, she should relinquish the *mahr*'. Interviewee 2, a young female lawyer from Province C with four years of work experience, believes that women give up because the Court encourages them to do so:

> I have heard myself from the Court in cases of tafriq that judges suggest to the woman to give up on financial aspects of the case since the man is not in a good mood because of the *tafriq* decision issued by the court. They tell her it is enough that you could walk out of the abusive marriage and away from his torture.

Pressure from the court was discussed with Interviewee 35, an experienced provincial court judge. Responding to the question of why the number of *mahr* cases is limited and why women are told to make deals with men, she differentiated between cases of *talaq* and *tafriq*. She highlighted the issue of women's limitations and hardship associated with *tafriq* cases, something every judge mentioned as a reason for women's loss of *mahr*. Judges say they believe women give up because they are so distracted by their trouble with their husbands that they don't care about financial aspects of the case. Judge 35 explained:

> In cases of *tafriq*, women have reached such a level of despair that they just want to be freed. As such, they do not care about *mahr* or *iddat* maintenance or other matters; they just want to get divorced as soon as possible, so they give up on other claims.

She said that the court does not encourage a woman to take up the issue of *mahr*, as such encouragement is not the court's job. Judge 25 also repeated that *mahr* is a separate matter and should be claimed separately.

Lawyers 27 and 11 agreed that it is entirely inappropriate for the court to encourage a woman to negotiate *mahr* or divorce with her husband in his presence. They noted that when a man sees that the court is on his side, he will push his wife to seek a *khul* or reduce the amount of *mahr*. He is likely to take a firm position not to agree to divorce unless the *mahr* is completely waived or reduced to a very small amount. The lawyers interviewed could recall very few cases where the *mahr* paid was the exact amount decided, unless the total sum was small (equivalent to US$1000 or less). Lawyer 27 reported a judge saying to her client, 'I don't agree at all that this man should pay *mahr*. He has a life too; he needs to get married again. Should he lose his wife and pay the *mahr* too?'

While Judges 23, 12 and 35 from Provinces A, B and C respectively said that accepting *khul* or giving up *mahr* are not compulsory, and the court does not impose these choices on women, Judge 12—alone among the judges interviewed—explicitly acknowledged that the court often advises women to seek a *khul* divorce. He explained, 'They [the women] want to get rid of their husbands, and the court advises them to go for *khul*'. Judge 15, from Province B, said that the court is concerned about the future relations of the divorcing couple, so informs them about the *khul* option to ensure their problems are solved peacefully. Judge 35 from Province C and Judge 25 from Province A stated that the court does not advise women what to do as it must remain neutral. They pointed out the court's job is not to advise women whether they should pursue their *mahr* claim.

Judge 23 was questioned how justice would be perceived in the cases in which women who suffer during their married life must trade away *mahr*, the only hope they have for supporting themselves when they leave everything else behind to escape a bad husband. The same answer was repeated: this is a woman's choice. Judge 23 said, 'They are not compelled, and the court does not require women to give up [the claim to *mahr*]. It is their choice; the court just proposes it.' Judge 25 added that the Court listens to a woman, and if she wants to give up her *mahr* claim then the Court has nothing to do with that:

> In cases where a woman says, 'I don't want the *mahr*', then the Court does not oblige her to take it. If she wants it, then we first hear the *tafriq* case and ask her to come back with evidence for *mahr*.

Some lawyers also confirmed that women choose themselves to give up *mahr*. Interviewee 36, a female lawyer working with an NGO in the Province C, and Lawyer 8 from Province B, said, 'Sometimes women themselves want to give up as they realise the length of the procedure and know it is useless to wait that long'. Lawyer 36 added:

> Some women say, 'If I divorce my husband, I don't want to fight for the *mahr* because I know that even if I prove my claim and win it in the court, he won't be able to pay it as he does not have that much financial capacity'. Therefore, they give up on *mahr* and focus on divorce.

Lawyer 8 said, 'I think some women are so deeply in trouble with men that money is not important to them. I always say to judges, unless women feel miserable, they won't leave.' Lawyer 19 said sometimes it is to a woman's benefit to give up, and that is why lawyers suggest this step.

7.3.3. Relinquishment Due to Insignificance of the Amount

As court records show, in cases where *mahr* is determined the rate is normally very low. Some lawyers said that women give up their right to *mahr* because while fighting for *tafriq*, they learn about court procedures and realise that *mahr* cases are even more complex and lengthy. They realise that if they follow up on the *mahr* case, the cost of what they spend will exceed the actual amount of any *mahr* they might be awarded. Therefore, women give up, or, once *tafriq* is issued, do not consider the next phase to claim *mahr*. Lawyer 26 confirmed:

> Women who go through Court procedures in a *tafriq* case, don't dare then to think of *mahr*; the problems they face discourage them. The cost and challenges associated with a *mahr* dispute make women give up.

Lawyer 19 said that she advises her clients to give up if they can. She added if she finds out that applicable costs exceed the *mahr*, she will suggest her clients relinquish. She said: 'if the *mahr* is not worth the fight, if the amount is insignificant, it would be better for a woman to simply give up and avoid further complications in the divorce'.

Lawyer 2 added:

> If *mahr* is not determined on *nikah*, the court can be requested to fix it, but this may take an entire year to be finally decided. Afterwards, the woman will face more problems obtaining *mahr*. So, women prefer not to go for it.

If the court is to decide, judges will consider the man's financial ability and the woman's overall condition—such as her appearance, education, family background, abilities and wealth—in deciding the amount of *mahr*. Although such considerations may give the appearance of a business transaction, under these circumstances, a woman is unlikely to receive an amount sufficient for her needs. Lawyers reported that the court tends to set small *mahr* amounts because most Afghans are poor people, and the court will take note of this in its decision. In addition, a husband may provide false information about his financial ability, and such deception would result in a relatively small *mahr* amount.

7.3.4. Relinquishment Due to Delays in Procedures

The interviewed lawyers repeatedly mentioned that delays in the procedures tire women emotionally and economically and that is why they give up. Lawyer 40 explained:

> Lack of responsiveness from men causes delay in the procedures. As a result, the case becomes costly for the woman. If she does not have money to pay a lawyer, she must give up her job or normal life to pursue her case. This usually means a loss for her; she will be the loser in both conditions.

Judge 22, who holds a position of authority in the court, was asked why a court would allow delays in procedures. Her response was:

> The Court must ensure a judge is just and fair. When a case comes to Court, judgment should not be based on what one side of the dispute says. We cannot take sides with a woman, thinking she is the one who has been harmed by the man. The only thing we can do is to give priority to a case over others, that is, bringing the hearing date closer. A judge does not delay a case; rather if they see that one side is more harmed, they might help.

The judge explains procedures depend entirely on the woman who files the case. If she wants to hasten her case, she must provide the required documents and anything else needed to prove her claim. This judge noted that, 'If the woman has made a claim, she should stick to it and continue to follow up to get a result'.

7.3.5. Complicated Court Procedures

Another major reason for women's discouragement in continuing with a *mahr* claims is the complexity of court procedures they must undergo (this is further elaborated in Chapter 8). Women may have difficulty during *tafriq* proceedings, or they might get stuck somewhere in their *mahr* claims, finding it impossible to overcome the barriers. Lawyer 27 said:

> The complexity and difficulty of the *mahr* case procedures discourage women and make them give up. Even the lawyers who represent them can be intimidated. When we receive a case of *mahr*, all our lawyers here panic and worry how it will be possible to win.

The lawyer explained this reaction is based on the concern that they will not obtain the desired result.

7.3.6. Inexperienced or Poorly Trained Lawyers

Lawyer 36 from Province C said that when a woman initiates divorce, she has to give up on *mahr* because the law requires this. The lawyer was apparently referring to a situation in which a woman may lose half or all her *mahr* if she is proved to be at fault for the divorce under Article 188 of the Civil Code. This lawyer's argument is a clear indication of her limited knowledge of the law. Lawyer 37 from the same organisation in the same province expressed the same thing. This young lawyer, with three years of experience, said that 'as you know, when a woman initiates divorce, her *mahr* collapses and her right to alimony as well'. Although this may happen in some cases, the outcome is not legally required, nor does it happen in every case as the two lawyers believed.

One independent lawyer from province A (Lawyer 39) had an interesting view on *khul* divorce. He was asked, 'Why do women give up on their *mahr* claims, even though they are harmed and have a full right to seek divorce?' He responded that a lawyer who is not prepared may lose the case in court. He believes the success of a case strongly depends on the talent and experience of a lawyer in defending that case.

7.3.7. Pressure from a Husband

Pressure from a husband is cited as the most common reason women give up their *mahr* claim. Most of the female interviewees reported that men refuse divorce, using it as a

weapon against women to make them give up *mahr*. Lawyer 38 from Province C said if a man is not willing to pay *mahr*, he uses another strategy to confront the woman. She added this happens most often when violence is proved on the man's part, because in this circumstance *mahr* does not collapse and he has to pay it. Lawyer 38 further elaborated that to avoid payment of the *mahr*, the man rejects the divorce request. This delays proceedings, and the woman gets so fed up that she relinquishes her *mahr*; indeed, women give up on *mahr* to ensure their divorce occurs.

This point was also emphasised by Interviewee 17, who said, 'When there is a request for a divorce from a woman, the man will tell her, "If you acquit me from *mahr* payment, I will divorce you"'. Similarly, Lawyer 2 said that men often think that if they divorce a wife, they must pay the *mahr*, but if a woman initiates the divorce and asks for *tafriq*, then the *mahr* claim collapses. So, if men want to divorce, they pressure their wives to seek *tafriq*. However, this lawyer added that if a woman can prove that she was harmed by her husband, her *mahr* claim will not collapse. Judge 22 also confirms the perception that *mahr* will not collapse in all cases of *tafriq*. The Judge further argues it is not accurate to say that men pressure women:

> It is not due to pressure from a man, because by the time a case comes to court, the woman has already left home. She is either with her own family or in a safe house, and therefore she is no longer in a man's control to be pressured. If she files a case when she is still in the man's home, the situation becomes worse as the man would not tolerate her going to Court.

She thought a man is more likely to suggest relinquishment to a woman, but she did not consider this to constitute pressure. She said, 'If one side proposes and the other side shows agreement, then we make the decision'. The judge's statement implicitly indicates that a woman's decision to give up *mahr* is based on her own free will, and there is no element of pressure involved.

7.3.8. Pressure from Elders

Pressure imposed on women may not be limited to that of her husband or the court. Afghan women have traditionally been sacrificed for the sake of peace between families and clans. The practice in Afghanistan in which young women, and even girls, are given in marriage

to solve disputes between the families is a key example. Under this tradition, prohibited both by the Criminal Code and the Prevention of Violence against Women Act but still practised nonetheless, women might be forced to marry the brother or father of a man killed at the hand of her own brother or father (WCLRF, 2004). Women are also given as compensation if their male family member has raped or kidnaped a woman from another family or done something else that cannot be resolved another way.

Interviewee 5, a female lawyer working with a women's rights NGO, explained that some women give up *mahr* in response to a similar type of pressure:

> When a request for divorce is referred to the court, a woman is pressured by the elders on both sides to make her give up on *mahr*. This also happens through pressure from court, or she gives up for the sake of children.

7.3.9. Relinquishment for the Sake of Children

Under Islamic law, child custody is the right of the father, except where children are young and still in need of a mother's care. The duration of the period they could stay with the mother differs among schools of Islamic thought. According to the Afghan Civil Code and the Hanafi school, a mother has custody rights up to the ages of seven years for a boy and nine years for a girl. Child custody is another means of forcing women to give up *mahr*. Upon initiation of divorce proceedings, a husband might threaten his wife with loss of custody of their children unless she gives up *mahr*. Lawyer 5 agreed that women often trade *mahr* for the sake of their children. If *mahr* is on one side and a woman's children on the other, a woman will choose her children. There are cases in which a man might make a bargain with the woman, saying, 'If you give up *mahr*, I will let you have the child/children'. Whatever the negotiation, the law is clear in this regard, and the man can take the children back at the stated age unless he does not have the capacity to raise them, for example through illness.

However, there are also cases where a father might not choose to keep his child or exchange it for the *mahr*. During the court observations, one such case was witnessed in which the divorced wife was caring for her two-year-old daughter and the husband was not willing to have the child, at least not at such a young age.

In remote areas, one tradition, although not common, is the exchange marriage, in which a sister is exchanged for another young woman to be married to her brother or even father (UNICEF, 2018: 34; LandInfo, 2011: 11–12). Therefore, every father will be interested in getting a girl back from his ex-wife so that she can serve such a purpose or get him a big amount of money in form of her bride price. These possibilities make it difficult for a divorced woman to relinquish custody of her daughter, at least not at a young age. Thus, some women give up the *mahr* to ensure they get custody of their child, or in some cases the youngest children.

7.4. Factors that Causes Failure of a *Mahr* Claim

A major finding of this research is that only a small number of women seek *mahr*, and thus the cases referred to courts for that reason are similarly limited. This was clearly visible in the court data and observations and in interviews with lawyers who had represented a small number of *mahr* cases (5–10% of the total number of the family cases they represented). The causes of failure in *mahr* disputes were explored in interviews with lawyers and judges. This section responds to these factors, with the identified answers presented under the coded categories' labels.

7.4.1. Perceptions of Morality and Immorality

Research found that if judges, or even lawyers, suspect a woman of immoral conduct, their perceptions strongly influence their view on her right to *mahr*. In their views, some women seeking divorce intend to leave their husband and marry their lover. If they realize that is the case, they tend to believe that the woman does not deserve *mahr*. Two experienced judges and one lawyer (Interviewee 40) explicitly raised this matter.

Judges 22 and 25 from Province A believe there are two types women who refer to the court for *tafriq*. One group includes those who suffer abusive marriages and brutality on part of their husbands, and their status is clear from their appearance. Judge 22 said that if these women refer to the court, judges ensure they receive the required support. The second category of women includes those who wish to marry another man whom they have in mind or with whom they have already had relations. Lawyers reported that judges seem to believe that if such women insist on divorce, then they should seek *khul* and pay something

to their husbands or acquit them from payment of *mahr* (Lawyer 40). Interviewee 27, a former lawyer, said some judges think such women do not deserve *mahr* because payment is not fair on their husbands.

Judge 25, a middle-aged experienced woman, responding to the question on why women lose their *mahr*, replied that some women who refer to the court have a plan to get rid of their husbands. We can identify which woman is really miserable and has been violated and is righteous. The judge also said righteousness can be seen in the applicant's face. Her comment suggests the status of a woman is obvious from her appearance; this view was shared by Lawyer 39 as well. The judge added:

> For example, we saw in some cases that a woman got divorced, and later she came here with another man to do *nikah*. When they are not interested in their husband, then *mahr* does not matter to them. If these women lose *mahr*, they don't care. But there are also women who are weary of oppression by their husbands and they want to get rid of them.

She knew of such cases, including a woman whose nose was cut off, another whose ear was cut off, a woman whose nails were pulled out, and a woman whose head was shaved. She also knew of instances where women were beaten severely, and bruises were obvious on their body. One such woman, the judge reported, stripped in front of the women judges so they could see how badly she was hurt. This woman said, 'What am I going to do with his *mahr*? Please let me divorce and save me from such treatment. I don't want the *mahr*.'

Based on what the judge said, a woman's perceived moral behaviour may be considered grounds for her to lose her *mahr*. In other words, some judges seem to believe that such women don't deserve *mahr*, so if they trade or relinquish their right, a judge will not intervene. Alternatively, women who trade *mahr* for release from abusive marriages or for the sake of their children are likely to be considered worthy of help. The question arises as to whether it could be determined from a woman's appearance and behaviour if she falls into the 'undeserving and immoral' or 'deserving and moral' category.

Lawyer 40 (male) said that in two cases where he was representing a husband, he ensured the wives did not get the *mahr* because they were 'morally bad women'. Defining a 'bad woman', he said the two women had relations with other men, so they did not deserve to

get *mahr*. He was questioned about his knowledge of the legal basis for *mahr* and whether he acted appropriately in depriving a woman of her right, based on his moral assumptions. In response, he said that the women were wrong, and they harmed their husbands, thus they had no right to get a 'prize of 500,000 AFN' on top of their freedom, referring to one woman's deferred *mahr*.

Lawyer 27 reported that at the end of a case when a divorce was issued, the judge turned to her client and said, 'You got your divorce, but we are 100% certain that you have relations with another man and you want to marry him'. The lawyer said this judge had told her client, 'You will get one *mahr* from this husband, and then get another *mahr* from your new man'. The *mahr* was reported to have been reduced from 600,000 to 60,000 AFN through negotiations that the court suggested to solve the *mahr* dispute.

Lawyer 39 (male) believes that a judge and the lawyer representing a woman should be wise enough to differentiate between a woman who is harmed and another one who may not be. For example, he said a woman may come to court and claim divorce based on harm, appearing courageous and speaking with confidence. However, her face demonstrates no sign of sorrow and gravity. If this woman gives up *mahr*, her case will be dealt with differently, like a *khul* case.

7.4.2. Deception by a Husband

One of the main causes of women's failure to achieve *mahr* is deception committed by men. Research participants described many such instances, related below.

7.4.3. False Documentation and Forgery of the Mahr Certificate

A husband may deceive his wife at the time of *nikah* when the amount of *mahr* is determined and evidence provided to the bride's father or family elders. Given that most Afghan women are illiterate, and a bride has little control over the wedding or *nikah* procedures, women are often unaware of what is determined regarding their *mahr*. In common practice, whatever happens in the *nikah* session is organised by the father or other elders of the bride's family, and these relatives may not care about a bride's wishes. A bride may be too young to be involved, or elders think they know what is best for her. The social and cultural dismissal of women in Afghan culture provides the basis for such attitudes, and

women become victims of deception all too easily. Lawyer 3 believes that deception is a common reason behind women's loss of *mahr*. He said in most of the *nikah* sessions when *mahr* gets determined, arrangements are made to ensure the young woman will not get anything if the marriage ends later. Responding to the question of whether this happens deliberately or out of negligence, the lawyer responded, whether negligence or intention, it happens a lot. He further elaborated that as a man, a lawyer and a former judge, he has been to many *nikah* sessions and he has witnessed that quite often.

Lawyer 3 also mentioned some mistakes that happen:

> On some occasions, the amount of money paid as immediate *mahr* is later counted as deferred *mahr*. The official documents in which *nikah* is registered, and in which *mahr* is mentioned, do not exist as most people don't register marriages [on official marriage certificates, both types of *mahr* should be recorded]. In the evidence that is developed traditionally, such as simple letters signed by two witnesses during *nikah*, the immediate *mahr* paid at that time is recorded. This could be a small amount of money [or] some jewels. Later, when this letter is provided to the court, it seems to show that *mahr* has already been paid because the letter is the only evidence available. As such, the main part of the *mahr*, which is the deferred one, is missed.

Another reason why a woman's right to *mahr* is often denied is illiteracy. Lawyer 27, a female lawyer and current head of a women's organisation from Province A, explained that most women don't have a marriage certificate, and some others have only an informal certificate. The court will give validity to such an informal certificate only if the woman presents witnesses as well. The lawyer said what happens to some women is that the husband keeps that certificate with him, and he might later destroy the document if the recorded *mahr* is a significant amount. If a husband destroys the original (informal) *mahr* letter and develops a new one with lesser amount, he might use some pretext to get his wife's fingerprints on the false document. She explained:

> Most of the women are illiterate and they won't understand what has happened to them if they are deceived in a tricky way. For example, if the relations get sour and the woman seeks a divorce and claims *mahr*, she tells us that her *nikahkhat*[195] is with the husband. When the court asks the man to present the document, the *mahr* appears to be 50,000 AFN instead of 500,000, for example. Only then does the woman realise what has

[195] Marriage certificate.

> happened to her. To prove that she is owed 500,000 AFN, she must bring witnesses to the court. But it is highly unlikely that witness will do well enough to be accepted by the court.

Similar situations were reported by Judge 23:

> Some women have two documents of proof at hand: one is an informal letter and another the formal one which is issued in the relevant court, if the married couple request it. In the informal letter, the amount of *mahr* is substantial, but in the formal one that the husband also presents a copy of, the amount of *mahr* is small. This is such a terrible damage to Afghan women, but they are not aware of it when these documents are developed.

Judge 23 explained this happens mostly in cases where a man has come from abroad to get married here. He deceives the woman, saying, 'Let us get this marriage registration process finished soon to avoid delays in your preparation work so that you could come with me'. She said he may also do that to avoid the taxes required to pay to the court. The judge emphasised that, in official terms, it is the formal marriage certificate that is the more credible proof when a dispute arises, not the informal letter. She said she had observed cases of this kind, but the court identified the deception. In one such case, judges realised that the poor woman was suffering real harm, so the court gave validity to the original evidence that was an informal letter. In this way, the woman was awarded the *mahr* that had been determined in the *nikah* session.

Another common form of deception reported to take place during *nikah* was the fabrication of signatures. Interviewee 19, an experienced woman lawyer from Province A, said that often husbands sign the evidence letter but enter the wrong signature, or, when they add their fingerprint, an ink is used that will later penetrate the paper, ruining the fingerprint. Lawyer 19 added that in some other cases, she saw that a husband had put his fingerprint twice with a little move in the second one to ensure the first signature was invalidated by the second. When such evidence is sent to the forensic office by the court to be authenticated and compared with the man's fingerprint, the signature cannot be proved. On such occasions, a lawyer can do nothing to prove the woman's right before the court since her documentation has been rendered unacceptable, and the wife loses her *mahr*.

7.4.4. Concealing Evidence

Deception may also happen by concealing *mahr* evidence from a wife. Although electronic documentation is still not a common practice in Afghan government offices, official marriage certificates are expected to be registered in *Wasayeq* offices (documents offices) within the relevant courts. Theoretically, this evidence should be made available to the court when needed. Certificates are expected to be filed in those offices, at least for marriages that have taken place after 2002–2003. However, the more common marriage certificates are the informal letters of evidence produced at the time of *nikah* and signed by two witnesses.

Lawyer 27, said that many women who seek help with *mahr* claims complain that evidence has been hidden by the husband and they do not have access to it. In such cases, the only solution for the woman is to present witnesses to the court. However, she may not be lucky enough to find witnesses, or, if found, their testimony may not be accepted. Court observations in Chapter 6 also noted this type of deception.

7.4.5. Assigning Unclaimable Property as Mahr

Nominating an unclaimable property in a *mahr* may not always happen intentionally, but lawyers and judges reported frequent occurrences. Since women are usually not able to prove a deliberate fraud, they consequently lose *mahr*. Interviewee 36, a woman lawyer from Province C, said, 'Women lose *mahr* even if they have a valid marriage certificate at hand. That is because the property recorded in the certificate belongs the father-in-law, not the husband.' She said that judges simply tell a woman, 'You cannot claim this property as it not in the ownership of your husband; it belongs to his father'. The disappointed woman can do nothing more to obtain her right.

Lawyer 17, an experienced female advocate, spoke about a case she was defending at the time of interview. She said that 500 grapefruit trees were nominated in the *mahr* of her client, and an official marriage certificate exists. However, the property did not belong to the husband; it was the property of his father. In this case, the father has many other children and grandchildren, and he is still living. If the father had died, his son would still

inherit a portion of that property, but since the father is alive, the court would not consider that property as a valid subject for the *mahr*.

Judge 24 described the case slightly differently:

> At the moment, I have a case in which the woman says her *mahr* is 500 grape vines, but the husband says that is not true; her *mahr* is 30,000 AFN. The man says the 500 grape trees are his father's property. In this case, we ask the woman to provide evidence to the court and prove it. If she is not able to bring valid evidence, then we ask her to provide witness to give testimony. That testimony should be uttered in the right way according to testimony rules in Islam to prove the 500 grape trees belong to the woman.

The judge said that the wife in this case is likely to receive 30,000 AFN in cash from her husband. The judge said the wife cannot claim the vines as *mahr*.

In another interview with Judge 25, she was asked whether if a property of 500 grape trees nominated for *mahr* had been registered in a formal marriage certificate, it would be valid, even if not owned by the husband. The judge responded:

> We will still question whose property it is. We had many cases like this in which the procedures had reached the *hakam* [mediation] stage, but we had to stop. If the marriage certificate says 500 grape vines are given in exchange for one million AFN, we will question who owns the vines. If these are not the property of the husband, we can issue an order for price of the grape vines only, but the wife can't get the actual grape vines. If the dispute is too complicated and not accepted, then we determine on *mahr-al-mithl*.

One might think that, in such cases, the logical solution might be to estimate the assigned property's cost and to have the husband pay this amount in cash. Lawyer 19 described a case in which she proposed such a solution to the court, and she succeeded. But Judge 25 specified that someone else's property cannot be the subject of *mahr*. She said the court faces this challenge often, and most of the time it proves problematic for the court. Women who lose their *mahr* for this reason then accuse judges of taking sides with men. However, we know the claimed property did not belong to the husband. It would only be considered his if the property had been divided among the heirs and the husband received his part.'

According to Judge 25, she had not yet encountered a situation where a property recorded as *mahr* that would be inherited by many members of a family was divided to pay the

claimed *mahr*. The lawyers reported that when the *mahr* under consideration is a property and the man is not willing to pay the determined amount, the first response in refusing the claim would be, 'This is not my property; it belongs to my grandfather or father' (Lawyer 17). Judge 25 believes that these problems arise due to a general lack of knowledge and understanding of law. At the time of *nikah*, people ignore *mahr* because they do not realise ignorance might create serious problems in the future.

7.4.6. Multiple Assignments of One Property

Another problematic form of negotiating *mahr* occurs when a single property is assigned to more than one bride entering a family. Lawyers 17,19, 26 and 3 mentioned they had represented cases in which one property, such as a house or piece of land, was assigned as *mahr* to more than one woman. Interviewees 17 and 19, two freelance women lawyers from Province A, said that if a man has six sons, for example, and they all married, the father assigns the one house he owns as *mahr* to each of the six brides of his sons. Further, these women might not be the only ones with claims on the property. According to the inheritance rules under Islamic law, all the sons, their children and the father's wife may also inherit an interest in that same property. If the father is still living, no-one can claim it as he probably still holds the ownership documents. Lawyer 17 said that, in such cases, the court tells a woman who claims such a property that she cannot deprive many other people of the property just because it is assigned in her *mahr*. So, the woman has no choice but to let her *mahr* go.

7.4.7. Husband's Perjury

Judges from Province A mentioned that sometimes in the process of hearings, a man will accept a woman's claim and certify that *mahr* evidence presented by her is valid. Such men then pay the *mahr* without creating more problems. However, other men deny the *mahr* claimed, even if the evidence presented to court carries their own signature. A husband's refusal to acknowledge his wife's claim is another cause that might result in a *mahr* right failing. Since marriages are rarely registered, strong supporting evidence that a woman could use to present her claim often does not exist.

Most often, a man simply says that a woman's claim is untrue. Judges 22 and 24 reported that when a man is informed about his wife's claim of *mahr*, he tells the court her claim is false. In that case the women should prove she is right and that is not easy for her. Lawyer 19 said that men can easily create obstacles for women, who then require extra work in collecting supporting evidence.

7.4.8. Pressuring Wife to Initiate Divorce Against Her Will

Judge 22 and some lawyer research participants explained that there is a widely accepted view among men that if a woman requests divorce, there is no question of *mahr*. They think *mahr* is then forgone. Most interviewed lawyers believe that even men who are willing to divorce a wife will pressure her to initiate the action herself. Interviewee 2, a female lawyer from Province C, said:

> In most of the cases where women request divorce, men avoid agreeing because they want *mahr* to be removed. I have witnessed a case in which the man obliged the woman to say to the court that she can't live with him and ask for divorce herself to remove the *mahr* aspect from the case.

The issue of *mahr* collapse was discussed with Judge 22 from Province A. She said:

> Yes, most of the time men think that if women refer to court themselves seeking divorce, their *mahr* will collapse. However, on behalf of the court we announce that is not the case. If a woman claims *tafriq* based on harm and that is proved, the court makes a judgement and the woman's *mahr* does not collapse, she can return and claim it.

Judge 22 also referred to a condition under the Family Law Rules of Maintenance in which a woman loses the right to be maintained by her husband. She added if a woman refers to Court to claim *tafriq*, she does not necessarily lose her right to *mahr*. But, if a husband claims that his wife does not obey him and is not committed to her matrimonial responsibilities and he can prove this, the woman will lose the right to alimony only, Judge 22 added.

However, despite what she said, it is also true that Article 118 of the Civil Code allows the mediation team to decide on complete removal of *mahr* (or to reduce it by half) if a woman

is found to be the cause of the conflict that led to divorce.[196] This condition may have established a false perception about *tafriq* cases and the absolute collapse of *mahr* that encourages men to push for their wives to initiate divorce, when the men themselves wish for it.

7.4.9. Pressure on Wives to Do Khul

Most lawyers interviewed, especially the female ones, believed that men tend to make women forgo *mahr* or make them pay something in exchange for divorce. Lawyer 2 said, 'Men usually try to turn a *tafriq* case into *khul*. Husbands want to receive something in exchange for divorce. They say they have spent money to obtain a wife, and that should be paid back.' She added that in cases where *mahr* has been determined, men want the women to relinquish it. Lawyer 2 said she has come across men who do not accept the court decision on divorce, saying, 'It is I who have the power to divorce; this judgement is not acceptable to me'.

Lawyer 33, from an NGO in Province C, reported**,** '*Tafriq* cases often turns into *khul*'. She said that in one case that she witnessed a woman asked for *tafriq*, but her husband would not agree. Then she proposed that she pay him 300,000 AFN if he would divorce her. But the man refused, saying he had not spent just 300,000 AFN on her; the amount was 700,000 AFN, and she should pay all that back to be divorced. The lawyer said 700,000 AFN is a significant amount and difficult for a woman to repay.

Most of the interviewed lawyers believed that *khul* happens due to the encouragement of the court. They said the court recommends women seek *khul* to get a faster and easier divorce (Lawyers 27, 14, 8, 2, 4). Lawyer 27 was unhappy about this advice; she said that the court encourages women to seek *khul* to shorten the procedures and reduce the workload. She added that cases of *tafriq* are lengthy and complicated, and judges find it easier if parties agree to apply for a *talaq* divorce. She added:

> We are lawyers and know the legal requirements for a case we want to defend. We will not file a *tafriq* case for our client if we see another way for it. However, the court tells

[196] Art 188 s 2 of the Afghan Civil Code.

> the woman, 'Your reasons for claiming *tafriq* are not enough, you should make a deal with your husband to get divorced'.

Other judges interviewed denied that the courts encouraged women to seek *khul*. Judges 23, 24, 22, 32 and 35 denied such a possibility. However, Judge 12 from Province B said the court sometimes takes that route to ensure women's problems are solved peacefully and further conflict is avoided. He said that a court recommendation of *khul* divorce aimed to avoid further problems for the woman and the families engaged in the proceeding. He added the court wants them to solve their problems peacefully. He also emphasised that distance from the court and complex procedures discourage women and make them relinquish *mahr* or apply for *khul*.

Lawyer 8, a young self-employed woman lawyer from Province B, was asked why go for *khul* divorce? The lawyer responded,

> In this province, judges influence women to seek *khul*, and then they blame Sharia, saying it suggests women give up their rights. But they lack knowledge of Sharia. The holy Qur'an allows broad interpretation according to the time of its injunctions' applicability. Unfortunately, our respected judges have memorised the law and do not know how to interpret those provisions.

7.4.10. Excusing a Husband from Payment

A woman might possibly lose her *mahr* due to a mistake that she committed. Her error could release her husband from *mahr* payment, or she might donate it to him. Men then use that against them to deprive the women of *mahr*. Men have latitude to make such an argument before court according to Verse 3 of the *Nisa* sura in the Qur'an, which allows husbands to enjoy *mahr* granted to them by their wives. Article 111 of the Civil Law also allows a wife to acquit the husband of paying the *mahr*. Apparently, these two authorities provide a man with the ability to state in court that *mahr* was bestowed on him. Given the intimacy of relations between husband and wife, the man can take advantage of the privacy they have together. Lawyers 39 and 40 also reported this as a factor that leads women to later lose *mahr*. Judge 23 said, 'In cases where a man denies a woman's claim and says she has donated the *mahr* to me, it is difficult for a woman to provide proof. If the husband is asked to bring proof, he says, "There were only the two of us when she did it, and I have no witness to present." Such occasions may end up depriving the woman of *mahr*.'

7.4.11. Negative Effect of a Bride Price

Lawyer 3 believes that women lose *mahr* because they remain quiet when their parents receive a bride price for their daughter. This lawyer, who previously served as a judge, said that young women may let their parents take bride price out of kindness, although it is really *mahr* that belongs to the bride. This lawyer was perhaps not aware or did not acknowledge that young women are usually not part of decisions that parents make about their life.

7.4.12. Men Have More Chances of Legal Representation

Based on what Lawyer 39 shared and the descriptions of Lawyer 19, in cases where women have a significant amount in their *mahr* records to claim, men will seek legal assistance, increasing the possibility that the women will lose. Since vast majority of women are illiterate and without an income, they do not have the financial ability to pay for legal representation. These two factors affect their chances of success in defending their claims in court. The observation sessions in Province A showed that, even in cases of *tafriq*, men more often have access to legal representation. As Lawyer 19 noted, the reason is obvious: men can afford the cost of a lawyer. She said she had a case in hand in which the *mahr* was two million AFN, and she was representing the man's side in that case.

7.5. Conclusion

This chapter makes an important contribution to the thesis's argument that *mahr* cannot be a solution to the existing gap in the rights of divorced women under Afghan laws. It proves by presenting several factors that seeking *mahr* is a difficult journey in which severe challenges may arise that negatively affect a woman's determination to seek *mahr* and deny her wishes before she is able to gain her right.

At the initial stages of the journey, the obstacles include cultural impediments in the form of bride price, along with economic disparities and restrictions imposed on women's movements in society. Where women fight against these barriers and make a firm stand to go forward with their case, new difficulties appear. The most common challenge is the pressures on women to trade *mahr* for the chance of certain and fast divorce, giving in to external pressures imposed on them, or becoming exhausted by difficult and lengthy court

procedures. On other occasions, if the *mahr* amount is so small that it is not worth a struggle, women simply give up to avoid the trouble.

The chapter further argued that even if a woman's claim is supported by evidence and she has access to legal assistance, other factors may arise to cause her claim to fail. These include a husband's deliberate or inadvertent mistakes in assigning the property to the *mahr*; tricks and strategies used by the husband to deprive woman of the *mahr*; and perjury on the part of the husband in denying the woman's claim. If the authorities sitting in court become suspicious of the woman's motivations for seeking a divorce (her intention to leave her current husband to marry another), they may ensure her cause fails.

The next chapter continues this discussion by exploring the *mahr* outcomes in the courts and during implementation of *mahr* orders. It shows that, even after a successful court litigation and winning a *mahr* award, a woman is not guaranteed to receive her due *mahr*. The chapter narrates the interview responses from judges and lawyers regarding the complexity of the hearings inside the court and the difficulty of providing testimony to support the claims. It also follows *mahr* cases out of the court to the implementation stages to present proof that *mahr* claims are the most difficult cases to win and victory in the court is no guarantee of obtaining *mahr*.

Chapter 8. Limitations In Acess to *Mahr* In and Beyond the Courts

8.1. Introduction

A major finding of the research undertaken for this thesis is the failure of *mahr* disputes in court due to significant complications in court procedures and (lack of) post-court enforcement. This chapter explores the causes and consequences of these problems for women who seek *mahr*. The complications are identified through interviews with lawyers, and then discussed with judges to see how such significant problems arise that women are not able to confront them. Judges and lawyers described court procedures similarly, but their opinions on the challenges faced by women differed. All interviewees agreed, however, that a major difficulty for women at the application stage is locating the husband cited in the divorce. At the hearing stage, another major obstacle arising in the face of a *mahr* claim is lack of a valid marriage certificate, creating the need for witnesses to testify in court. The chapter also explores the outcome of the few cases that do succeed in winning *mahr* through court orders and tracks the success of the issued orders in the implementation stage.

This chapter complements Chapter 7 in exploring the challenges that prevent women from claiming *mahr* as well as the difficulties that lead women to abandon their *mahr* claims. It argues that challenges arising through court procedures may result in the failure not only of the *mahr* cases that lack a valid marriage certificate, but also those of claimants who present the certificate as the evidence required by the court. In the latter cases, a husband can take an oath that his wife has already received her *mahr* or that the property intended to be used for *mahr* does not belong to him.

In the second part, the chapter explores the outcome of *mahr* awards once issued, tracing their fate following the court proceedings. The research described in this part reinforces the argument that even when women are successful in obtaining an award in the court, they

will not necessarily be paid *mahr*. In fact, if the amount involved is relatively high the scenario worsens, and a woman might get only one or two instalments before her husband disappears or becomes too violent for her to approach safely. The findings discussed in this chapter corroborate the main argument of the thesis that while *mahr* is the main financial entitlement for a woman seeking divorce, the realities of actually receiving it, including the operation of the legal system and related court processes, means that *mahr* may never be paid, and thus it cannot serve as the post-divorce financial support that Afghan women lack. Only rarely does a husband volunteer to pay the *mahr* amount owed.

8.2. Court Procedures and *Mahr* Claims

Mahr proceedings begin either with the submission of an application or petition to the Legal Department of the Ministry of Justice or via a direct application to a Family Court. In provinces where family courts do not exist, primary courts are authorised to hear divorce cases. All interviewees unanimously confirmed that, in practice, *mahr* and divorce cases do not go to court simultaneously. *Tafriq* claimants are required to proceed with either the divorce or *mahr* claim first, returning to court for the second part later. Court records and all other research data suggest that women most often file a *tafriq* case first, and then come back to the court later if they are willing to pursue their *mahr*. Interviewees 1 and 2 suggested that if the *mahr* claim is not pursued within a three-month window after *tafriq*, the woman's right to claim lapses and she may not be able to file a case later, even though there is no legal or procedural barrier to doing so.

According to Article 12 of the Afghan Civil Procedures Code (CPC), to begin a civil litigation the applicant can refer directly to the relevant court or refer to the Legal Department of the Ministry of Justice. The respondent/defendant will be informed directly through the court or summoned by the relevant authorities (Art 128 CPC). In the case of delay in responding to the summon letter, Article 145 of the CPC requires three letters of summons to be sent before the next step is taken. If the respondent has still not appeared, the last option is to announce on the radio the requirement of their presence (Art 146 of CPC). If a husband responds to the claim immediately or comes to an agreement with the claimant, the case is finished at the first step and their agreement evidence is attached to the

case file. Otherwise, proceedings will begin. Interviewee 12, a judge of Province B, explained that when a woman files a case of *tafriq* with the court, a file is opened for her and the proceedings begin.

If the case survives any challenges that might arise in the court, the three judges hearing the case will collectively issue their judgment. As Judge 23 mentioned, some men may accept the decision requiring payment, and they will pay the *mahr* in the presence of the court. If challenged by the respondent, the *mahr* decision will need final approval from the Court of Appeal and Supreme Court. The final decision is then sent to the Legal Department for implementation. The best outcome occurs when a husband accepts the court decision and pays the *mahr* in full.

8.3. When an Application Is Lodged

The first common problem reported by the lawyers and judges at this stage is to get a husband to respond to the letter of summons and attend the court. This was the most frequently mentioned challenge of the application stage. Almost 90% of the lawyers interviewed shared this view, and judges confirmed the claim. Interviewee 12, a judge from Province B said, 'Husbands are not happy to come to court when they are informed about the wife's claim.' The man's absence causes delays in the proceedings. The judge added that when the husband finally appears in the court, the couple are first assigned to mediation. If the mediation fails and the couple do not reconcile, then the actual hearings begin.

Before moving to the next section of the discussion, it is important to note that the failure of a respondent husband to appear in the court is not a problem only at the initial stages of case hearings, it is also disruptive to the hearing procedures in their entirety. The man may not show up in the court each time he is required to be there for the holding of a judicial session (Lawyer 40, 28). Lawyer 38 said men do not care about the summons letters sent to them and police do not enforce the summons, arguing that as it is a civil case, not a criminal one, they cannot seize the man from his home. She explained that this is a significant weakness in the law and a reason why men do not respect or respond to subpoenas.

Similarly, Lawyer 36 said that the absence of provisions in the law to force a man to pay *mahr* is a major problem. This lawyer argued that the law should force a husband to respect the court order and fulfil his obligations. If the court suspects that a man will not re-appear again, he should be taken into custody. Currently, neither the court nor the legal departments can do anything when a man does not appear to pay *mahr*. Judge 35 and Lawyers 3 and 36 stated that this problem is also due to a lack of awareness and ignorance about *mahr* and the importance of marriage registration. They pointed out that people in general do not care about women and their rights and only consider what is in the family's interests.

8.4. Challenges at the Hearing Stage

8.4.1. Issues Pertaining to the Marriage Certificate/Nikahnamah

At the hearing stage, what matters most for a woman is to have valid proof that supports her claim in court. All interview participants mentioned repeatedly that the proof required by the court is the official marriage certificate, called *nikahnamah* or *nikahkhat* in the Dari language.

The Civil Code of Afghanistan requires the marriage to be officially registered. Under Article 61, the law stipulates that:

> 1. Marriage contract shall be prepared and registered in the official marriage deed, by the relevant office in three copies. The original copy shall be kept in the relevant office and one copy shall be given to each of the parties to the contract. The Office of Registration of Records shall be notified once the marriage contract is registered, as stated in article 46 of this law.
> 2. If registration of a marriage contract is not possible in this manner, it shall be registered in another way that is stipulated for registration of official documents.

Article 46 and its following provisions require that Afghan citizens attaining the age of 18 years must record their civil status and inform the relevant offices of their personal information, such as name, date and place of birth, occupation, name of spouse and children. However, as the long years of war destroyed so much in Afghanistan, such offices were not active everywhere and many people have not complied with the law concerning marriage registration. What matters most to the general public is that a marriage be

conducted according to appropriate conditions set down for an Islamic marriage. For the followers of Hanafi jurisprudence these conditions are reflected in Article 77 of the Civil Law, and the Shia Personal Status Law regulates the conditions for a valid marriage under Chapter Four, Articles 94–103. Based on Article 77 of the Civil Code, *sahih* (valid marriage conditions) are:

1. Offer and acceptance should be carried out correctly by the parties to the contract or by their guardians.
2. Two witnesses must be present.
3. There must be no permanent or temporary legal prohibition on marriage between the man and the woman who resolve to marry.

The bulk of Afghan marriages are not officially registered, and therefore not many women who apply to the courts for divorce have official documents at hand to prove their *mahr* claims. Lawyer 36 expressed the general view that women cannot prove their claims if their marriages are not registered and they do not have valid certificates to present to court. Existence of a valid marriage certificate in which the previously determined *mahr* is registered is key to a *mahr* claim succeeding (Lawyers 2 and 4). Thus, if a husband does not reject the wife's claim, the court can base its decision on the marriage certificate. Interviewee 4 explained, 'If an official marriage certificate exists, the woman is required to take the subpoena letter to her husband and ask him to appear in court to proceed with hearings.' In other words, the most important aspect in the hearing stage is acceptable proof.

However, the existence of a valid marriage certificate does not mean there will not be other obstacles arising for the claimant. While the research participants agreed that lack of a valid marriage certificate is problematic, they also related other problems that may arise during the hearings. In this section, challenges at the hearing stage are described both in cases where a marriage certificate is available and those where marriage certificate is lacking.

8.4.2. Challenges Arising Despite Existence of a Valid Marriage Certificate

The most frequently reported challenges arising during court hearings despite the existence of a valid marriage certificate involve (a) denial of a woman's claim by her husband—this can be a serious threat to *mahr* claims in practice, though in theory it should not because the marriage certificate should specify the *mahr*; (b) the man's financial inability to pay, whether real or feigned to avoid paying *mahr*; and (c) possible court bias in favour of the husband. These are discussed further below.

Denial of a women's claim

In some cases, a woman may make a claim for which valid evidence exists, but her husband will nonetheless deny what she says during the court hearing. Interviewee 28, a male NGO lawyer from Province A, confirmed that a man can cause delays in procedures by denying the woman's claim; such denial is common, and it becomes stronger and more effective when a marriage certificate does not exist. However, denial of a wife's claim is problematic even when credible evidence is available.

Men with legal representation may learn strategies to assist them in countering *mahr* claims despite the presence of compelling evidence. The interview data indicate that men have better access to lawyers and legal representation because they are better able to afford the cost. Interviewees 39, 40 and 19 spoke about *mahr* cases in which they represented men as respondents. Since divorces initiated by women tend to frustrate men, even if they are able to pay the *mahr*, they may still make excuses to deny the claims. Interviewee 19 suggested, 'A man simply might deny the woman for the sake of maliciousness and disturbance to the procedures.'

Lawyer 36, an NGO lawyer from Province C, said 'There have been cases in which the man has denied the marital relationship, let alone … *mahr* itself.' Given Afghan culture, Lawyer 36's report rings true. Afghan men have total control over the marital relationship, and they can do whatever they wish to make life difficult for their wives. Lawyer 36 continued, 'In some cases of *mahr* that we had, the man has challenged the woman in front of the court saying, "Come and prove that I am your husband. How do you do that? I am not your husband and I don't know you."'

Financial Inability to Pay Mahr

Another ground upon which a *mahr* claim is challenged by respondents is the argument that they do not have the financial ability to pay the determined amount. Interviewee 38, a former female lawyer who worked as advocacy manager for a women's NGO, reported that men often do not respond to the court orders. However, if a woman finally succeeds in getting her husband to appear in court, he may claim that he is unable to pay. The interviewee repeated the words of a client's ex-husband, who said to the judge: 'Yes, I accept that is the amount promised to her in the *mahr*, but I can't pay it. I don't have the financial ability to pay that much money. What would you do with me? From which part of me can you cut that money? Ok, I agree to pay it, but only when God gives me the ability to do so.' In such cases the parties are sent to negotiate and reduce the *mahr* amount so that it is payable for the man.

Court Bias in Favour of Men

Some lawyers believed there was some bias in the courts in favour of male litigants. Lawyers 27, 11 and 8 strongly emphasised this point. To some extent, such a preference was also witnessed during the observation sessions.[197] In courts where the majority of judges are men, male bias may be rooted in the judges' empathy for male respondents; this explanation was reflected in interviews with judges. However, where women were leading the court and the majority of judges were also women, a similar bias was evident, possibly a sign of concern for the reputation of the court, or possibly fear for their own safety and security.

Interviewee 11, a lawyer from Province B who had handled three *mahr* cases out of 100 family disputes over the six years of her legal career, stated, 'The behavior and attitude about *mahr* cases in the court is weird. I don't know why judges don't like it. I would say it is bias towards men because judges are all men.' Male judges treat *mahr* as if it is something to make fun of; it is not taken seriously because they know there is no guarantee

[197] This statement does not refer to the Province A Court where most of the observations took place (Aug 2016) after the changes in the Family Court structure. Although some bias was witnessed in the performance of a male judge, the newly appointed head of this newly established court was a female judge who had a strong sense of women's problems in the country and was quite aware of the human rights laws and gender equality instruments to which Afghanistan is committed.

that an order will be enforced. Lawyer 27 showed visible anger while talking about biases in favour of men, but Lawyer 21 argued that the court has to show concern for men as judges fear for their own safety and security. She said that the Family Court in Province A has had to change location many times, and judges have received threats because their participation in divorce cases was viewed by the public as encouraging marriage breakdown.

8.4.3. Challenges in the Absence of Official Marriage Certificate

Research participants generally agreed that a majority of women do not have official documentation. Judge 23 said that 80% of women who refer to the court seeking divorce do not have a formal marriage certificate at hand. This proportion was estimated at 70% by Judge 12 from Province B. Judges noted that a woman can win her case if she presents a valid marriage certificate along with *mahr* records.

All interviewed lawyers had a similar view. Lawyer 36 explained: 'It is really difficult to prove *mahr* without evidence, even if the woman's story is 100% true.' Lawyer 2 explained that if there is no official marriage certificate, two witnesses who were present at the time of *nikah* or, preferably, signed the customary evidence letter will be required to come to court and present testimony confirming what the woman has claimed.

Lawyers 27 and 2 said some women present videos of their wedding ceremony in which everything is filmed, and this recording is accepted as strong evidence. However, if the husband still denies the claim, the woman is unlikely to get her *mahr*, said Lawyer 2, although she could still be entitled to *mahr-al-mithl*. As explained in Chapter 2, the woman's beauty and qualifications, as well as the *mahr* amount paid to other women of her family such sisters and cousins, are determining factors on setting the amount for this form of *mahr*.

8.4.4. Witness and Testimony Issues

While presenting a witness in court may help a woman overcome a lack of a formal documentary evidence to prove her claim, it is not an easy task. Fully half of the interviewed lawyers expressed frustration with the rigidity and complexity of court testimony requirements. The major problem these lawyers highlighted was the difficulty for

women in getting people to appear in court and reveal what they know. For various reasons, giving testimony is considered unappealing to relatives and friends of the litigant. Testimony at court is associated with a religious burden of sin and responsibility, especially if the evidence is false.[198] Those seriously concerned with religious values will fear forgetting details that, they believe, may cause them serious trouble in the afterlife (Judge 23). In addition, court testimony may cause tension between witnesses for the claimant and her family and the opposing party and his family. Therefore, few are eager to cause problems for themselves by appearing in court to provide testimony (Lawyer 27). Some research participants even suggested that the husband of the woman in whose faveur the testimony is given might threaten witnesses, and they do not dare to appear in court for that reason.

Interviewee 26, an independent lawyer from Province A, noted, 'Although it is so hard to get someone to report the woman's status or give testimony, the court easily rejects the witness statement for not "matching the law requirements". She pointed out that testimony must be presented 'in the same language in which the lawyer has written the defence paper', and that this is not possible for an illiterate witness (and difficult even for a literate witness). She said the same conditions also apply to *mahr* disputes. Lawyer 34 from Province C described a case in which the only available witness refused to come to court to testify. The court then ordered the husband to take an oath rejecting his wife's claim, but he would not. His refusal indicated that the woman, and not her husband, was telling the truth. In other cases men simply take the oath, not caring the about possible consequences in the afterlife. In this case, the husband did not take the risk, and this seems to have been a rare occasion settled in favour of the lawyer's client.

In another example, Interviewee 26 related: 'I asked the witness outside court whether he saw my client being beaten, and the old man said, "Yes … this woman is really victimised, and her right is taken away from her". But later, inside the court, when he was questioned by the Judge, he said, "I don't know anything."' Lawyers 39, 17 and 19 also confirmed that finding someone who will take responsibility for testifying is difficult. Lawyer 39 added

[198] Verses 4:135 of the holy Qur'an.

that finding a witness who remembers what they witnessed decades ago adds to a woman's difficulties. He explained:

> Imagine that someone attended a *nikah* 15 or 20 years ago; does he remember the details? Would an elderly man who hardly remembers things, still recall the *mahr* amount or type in a *nikah* ceremony he attended 15 years ago? Would he be good enough to attend the court and utter the testimony in the same expected words?

Another challenge is obtaining acceptance to introduce family members to the court as witnesses. Every lawyer interviewed agreed that the court does not accept close family members of the parties to testify about *nikah* and the *mahr*. Thus, locating the right witness for a woman is usually a challenging part of *mahr* disputes.

Lawyer 38 said, 'The court does not accept family members as witnesses. Women can bring someone from the man's family to give testimony, but not from their own family.' She percieved this as major source of the complexity around testimony. According to this lawyer, a woman who is willing to divorce is not liked, yet the court expects people to come and give testimony in favour of her, no matter how that affects them. The lawyer said relatives of the woman would not do that for her, far less the relatives of the man. Judge 23 confirmed this view, saying, 'We reject witnesses in many cases because they are chosen from the close relatives of both parties, and this is not permitted by the law. Or, the witness presented is not aware at all and does not know what to say in the court. We reject all these.'[199]

8.4.5. Issues of Informal Evidence

Normally, a piece of ordinary paper entailing *mahr* information signed by two witnesses would suffice as a formal customary evidence document that a woman could present to the court. Article 997 (subsection 1) of the Afghan Civil Code provides that 'signed letters

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[199] In Afghan tradition, the *nikah* is a small session for performing the religious formalities that give legitimacy to the cohabitation of the married couple. This session is usually conducted the night before the wedding day. The wedding itself is a major occasion in which all the relatives and friends of both parties to the marriage are invited for lunch or dinner. If *nikah* is held on a separate date, the number of guests would be limited to close relatives; extended family members may not be invited, yet they are the ones who get permission from the courts to give testimony.

have the [same] status as customary documents.' Thus, any signed letter that mentions or promises something as *mahr* should be counted as a customary document.

In section 15, Article 172, the Civil Code lists the grounds of judgment in civil cases as confession, evidence (documents, witnesses, absolute evidence and circumstantial evidence), a sworn oath and retraction. Article 281 of the CPC further confirms that sources of proof include documents, testimony of witness, and evidence. Article 282 describes documents as being two types: official documents and customary documents. These provisions explicitly state that customary evidence is acceptable in the court. Lawyer 27 explained the difficulties a woman may have in presenting customary evidence:

> The law recognises customary evidence, yet when we take a customary marriage certificate (sold in the bazaar) to the court, though signed by two people as witnesses, the court does not accept it. When I took one such certificate to court, they told me it was not formal. I asked the judge, 'Which one of us as married women of this country has an official marriage certificate; can you show me yours?' None of us have officially registered our marriages in the court, thus the Family Court should understand this problem and accept my client's evidence.

The lawyer further indicated that the judge finally agreed to enter the customary evidence into the case file but required two or three witnesses to support the document. The lawyer expressed her concerns to the judge, namely that it is not easy to find witnesses who are willing to give testimony. She also confirmed that the *nikah* witness in a marriage is normally a close family member of the groom and bride, and thus not acceptable to the court for giving testimony. When asked what happened in this case, she replied, 'If no witness is provided, then the court will stop the case hearing for 15 to 20 days. Then the case is closed and sent back to the Rights Department.'[200] In summary, while for most of the women who claim *mahr*, informal evidence might be the strongest proof they have available to present, customary documents cannot necessarily be used to prove the claim of *mahr* unless backed up by witnesses.

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[200] The reference comes from Lawyer 27, who leads a group of about ten lawyers in Province A. All other lawyers interviewed for this research from Province A appeared in the Family Court before changes were made to the structure of Civil Courts. Their views do not apply to the three other courts that were established in May 2016 to replace the single Family Court.

8.5. Court Perspectives on Challenges That Affect Mahr Claims

In the interviews with judges, they were asked why proof of *mahr* is so difficult and places such a burden on a woman. Judge 35 from Province C explained that the customary proof letters are not developed properly. She added that if two people sign a letter to provide evidence of *mahr*, they would be required to go to the court and give testimony whenever needed. However, when *nikah* is held in front of 1000 people in a wedding, little attention is given to *mahr*. For example, if a man gives a house to his wife in *mahr*, all of the characteristics of the house should be listed so that it can be easily identified. Likewise, if land is given in *mahr*, its location, the area in hectares, or identity of the neighbours must be specified. If a dispute over the *mahr* arises, the law requires the focus of the disagreement to be clearly described, not mentioned vaguely. If a document is customary, then witnesses should list these characteristics in their testimony in the manner required by the court.

The characteristics required to specify a piece of land or a house are found in the ownership documents that the court develops for the owner of a property. The judge was asked how a family could give the ownership papers for their property to a bride at the time of *nikah*, as such a thing is rarely possible in the current circumstances in Afghanistan. After *nikah* and the wedding day, *mahr* temporarily loses its importance, and even if a woman wishes to get it determined or registered, her husband may not agree.

Judge 35 responded that in cases where it is difficult for a woman to prove her claim due to problems with evidence and documentation, the court applies for *mahr-al-mithl*. She observed, 'A woman's *mahr* does not die; it could be even inherited by her siblings and family members and claimed after her death.' She believes that the problems all arise from lack of awareness in Afghan society: that people give less importance to the *mahr*, and it is not clearly determined at the time of *nikah*. She also blamed some lawyers, saying, 'It is also the weakness of lawyers who assist women with their cases.' However, none of the interviewed lawyers mentioned that if the *mahr* claim fails, the client will receive *mahr*-al-Mithl. In fact, the lawyers' view is that there is little value in *mahr-al-mithl* as the amount is usually quite small. Lawyer 2 pointed out that the court considers a man's income and

financial ability in deciding the amount, and men often lie about their income. As a result, what is decided could be only a small amount that hardly serves any purpose in meeting a divorced wife's needs.

8.6. Conditions of Testimony: Legislative Aspects

Every lawyer who participated in this research mentioned at least once that the conditions for testimony are difficult and often lead to a case failing. The Afghan Civil Code provides little information on the conditions required to give testimony before the court. Article 121 (subsection 1) stipulates: 'Testimony of witnesses means giving information as to the truth in the judicial session with the wording of "I swear"'. The law does not specify further conditions; similarly, *Mejalah-el-Ahkam*, a collection of Hanafi *fiqh* rules in Islamic law, provides detailed information about testimony and its conditions under Islamic law.[201] It says little more than that giving testimony should be started with the Arabic term *Ashhad* ('I swear' or 'I attest').

Judge 24 said, 'The testimony needs to be given, based on the same conditions that Islam and the law have predicted. For instance they [i.e. the witnesses] must say, "Yes, we were in the wedding, there were many people there, the woman's proxy came and said that and claimed this much amount, the husband accepted it and so on."' She added that the testimony should be articulated in accordance with Sharia conditions to be acceptable to the court. Although the judge did not provide more details, her statement verifies that formalities in presenting and phrasing testimony are of paramount importance to the judges and the court.

Judge 23 stated, 'They [i.e. witnesses] can't perform the testimony properly'. She added that the law outlines conditions for testimony that need to be followed, but some witnesses who are introduced for this purpose do not know what to present in front of the court or how to express themselves. First, she explained, testimony should be uttered according to law; it might happen that the act is performed properly, but it is not fully compatible with what was stated in the indictment presented to court. In addition, the witness is expected to

[201] *Majallah el-Ahkam-i-Adliya* (Code of Islamic Law).

have full details of the *mahr* awarded; if money is involved, they need to know how much; if property, the characteristics and location. In practice, providing these details is often difficult.

Judge 23 was asked whether the courts would reject testimony because of the wording and manner of presentation, even if the content was valid as the witness attended the wedding and knows the details of the *mahr* arrangement. The judge responded that testimony in such a situation would be rejected. She added, 'The law says when the witnesses stand in front of court, they should use the term *Ashhad*. If a witness says this in Dari, it is not acceptable; it should be stated in Arabic, using exactly the same words mentioned in the law.'

In her explanation, Judge 23 refers to Article 221 of the CPC that says testimony should be stated using the term *Ashhad*. Apparently, the requirement set out in Article 221 to express the message of law in Dari is vague. That law does not provide further clarification, possibly to leave space for interpretation or choice of utterance. What judges reported matched responses from Lawyers 11 and 28 who reported that it is possible for ten to fifteen witnesses to be rejected because their testimony is found not to meet the standard.

Difficulty might also arise because Arabic is not a formal language in Afghanistan, and only a small percentage of the population, such as *fiqh* scholars and students of Sharia faculties and some madrassas, know it. Mullahs (preachers) might have some Arabic knowledge too, but the majority know only what they read in the Qur'an. Thus, an ordinary person who comes to court to give testimony cannot be expected to know any Arabic, not even the phrase 'I swear' (*Ashhad*)' unless he/she has been previously instructed to use the term and how the term should be pronounced in Arabic. Even law and Sharia students may not perform an oath as required by the court if not trained in advance.

Judge 23, asked whether lawyers educate witnesses on how to make a presentation in court, replied:

> Most of them don't want to take the blame by doing that, as giving testimony is not something that should be educated, in religious terms. But the language that needs to be used and words to utter are introduced in the law. Some of the lawyers can communicate that in advance to their clients and witnesses, but others not. I don't

> know why they don't care about this point. Maybe they don't want to be responsible for the possible sin in the afterlife.

Acceptance of the testimony is not the end of the matter. Once the testimony is accepted, there is still another stage for claimants to go through, appraisal of the witness—meaning that witnesses will be evaluated to determine whether they are trustworthy. This can be done before or after the witness presentation. Judge 24 said that if the testimony meets the required conditions as outlined above, then witnesses are appraised to ensure they match the witness criteria. These appraisals usually take place in mosques in the areas in which the witnesses live.

8.6.1. Resorting to Oath

According to Islamic *fiqh* an oath, *al-yameen* in Arabic, confirms something by invoking the name of Allah. It can also be done using other attributes (Subhi, 2008: 325). It is a great sin under Islamic law to lie in taking an oath. A Muslim is not allowed to deprive another Muslim of his property by a making false oath (ibid., 329). If the witnesses are rejected and the testimony is not accepted, Judge 24 explained that the only option left for the woman would be to invite her husband to take an oath rejecting her claim before the court. However, not every woman will choose that option. The judge said:

> In most cases, women step back from this phase as they say that making the other party take the oath has implications on their afterlife. So they say, 'For material benefits and for the sake of life in this world, we don't want to commit the sin.' But there are some who want to exercise the right; then the court gets the man to take the oath and that is the end of the case.

Judge 24 and 35 were asked why, in the current world where piety and truth telling appear to have little value, the court still relies on oaths as a source of evidence for decision-making. They must be aware that some people readily lie for financial benefit. The answer was 'We have a law that introduced oath taking as a powerful source on which judicial decisions can be based. The judiciary organs and courts are responsible to enforce the law.' Judge 24 added, 'Yes, it is difficult, but Afghan society is traditional and religious, and people believe in religious rules. Islam recommends having witnesses at the wedding. If there is no other evidence at hand and a witness is definitely available, since the court requires proof, the witness should be presented.'

8.7 *Mahr* Beyond the Court

As reported, *mahr* case procedures are complicated from beginning to end. Therefore, not every woman is able to initiate, proceed and follow up her case; Lawyers 3, 1, 11, 8, 5, 6, 28 and 19 all made this point. Judges also confirmed this viewpoint, and some (Judges 12, 15 and 16) expressed deep concern over the problem. Lawyer 39 said, 'Those who can afford legal representation hire a lawyer to save themselves trouble, but others usually fail.' In this section, the challenges confronting women in the implementation phase are reported.

Judge 22 was asked to describe what happens when a court decides a woman should receive *mahr* and issues a verdict to this effect. She explained that if the man agrees to the court order, he provides the *mahr* to his former wife in the court. Alternatively, he may agree to pay it in instalments. In principle, if he refuses to pay the payment could be taken from his assets or income. However, while this route is theoretically possible, none of the lawyers referred to this option. Judge 22 said:

> If the man had nothing saved in the bank and his current salary is 30,000 Afs [AFN] per month for example, his wife's *mahr* would be calculated on that basis, but his responsibility for feeding other members of his family will also be taken into account to see how much of that income is essential for others. Then based on his financial ability, the *mahr* will be divided into instalments to make it payable according to his means. This might take two years or more.

Judge 22 was asked who collects the information on a husband's financial ability to pay (as mentioned earlier, lawyers indicated that men can hide their wealth and and lie about their income to the court), the court or the claimant? She replied:

> It is the court responsibility to collect the information. The decision that the court makes should be comprehensive and perfect, nothing should be left vague and unclear. Most of the men are quite unruly, and they do not accept from the beginning to pay the *mahr* even if they have savings and have property and wealth. These men will be pressurised to pay it or they could be sent to the prison if they do not accept the court order.

When asked if she had ever sent a man to prison for disregarding a court order, Judge 22 paused, and then she responded, 'In a few cases', explaining that when the courts confirm their *mahr* decision, husbands realise that there is no way to escape, so they pay. The judge continued that most of the time men put enough pressure on their wives and the women

finally agree to divorce at the cost of forgoing *mahr*. The husband tells his wife he will give her a divorce if she gives up her *mahr*. This was interesting to hear from the judge: 'And this is a very good bargain for women to get rid of ruthless husbands.' Her statement speaks to how perceptions affect court decisions.

If a *mahr* claim reaches the point where the court decides, and if the respondent agrees with the decision, the case ends and the order is enforceable. The respondent or former husband may submit the *mahr* in the court, or, if he is allowed to pay in instalments, the case will go to the relevant legal department for administrative procedures (Lawyer 33). On the other hand, the respondent may object to the decision and take it to the Appeal Court. In that case, two outcomes are possible: the lower court's decision is either upheld or the case is sent back to the primary court for reconsideration (Judge 22 and 23; Lawyer 33). If still not satisfied with the decision, the respondent might refer to the High Court. If the decision is upheld on appeal to the High Court, it is final and binding. The case file will then be sent to the legal department for enforcement, and the man has no other remedy (Judges 12, 15, 22 and 24).

8.7.1. Enforcement of Court Orders for Mahr Payment

The interviewed lawyers believed the lack of an enforcement guarantee for the *mahr* order is the major reason for the challenges that arise at the implementation phase. Interviewees 11 and 19, independent woman lawyers from Provinces B and A respectively, and Lawyer 38, working with a women's organisation in Province A, emphasised this point. Lawyer 38 and 11 noted, 'In the phase where *mahr* needs to be delivered to the woman who has pursued it for months or longer than a year, when the court order is issued and finalised, the husband might disappear, and we can't find him to get the order enforced.' Lawyer 19 explained that a husband is able to create many complications, by denying that the payment is due, by not paying every instalment or, worst of all, by simply disappearing.

Lawyers 33 and 19 reported that in Family Court cases, police do not cooperate in getting the respondent to attend the court. Police do not consider failure to pay *mahr* a criminal matter and they are reluctant to interfere. Thus, the respondent might escape or even leave the country. If he re-appears after several years, chances are the case has been forgotten and

his ex-wife is no longer looking for him. Perhaps, after all difficulty she endured without receiving anything, her family may not let her pursue the matter. The lawyer added:

> We all know it is not the problem of that woman only, she is not independent. She must be accompanied by someone like brother since she can't move around alone. If the husband runs away and she does not get anything the first time, then the family prevents her from second attempt saying, 'You spent all that money and did not get anything, stay calm now and forget about it'.

Lawyer 33, working with a women's NGO, said her client's divorced husband went to the United States, and his ex-wife never received the 500,000 AFN that the court ordered him to pay her. Lawyer 36 reported a similar outcome for one of her clients. She said if *mahr* is proved and court payment order is issued, husbands tend to disappear. She described a case from 2013 in which a woman who was divorced had a *mahr* of 300,000 AFN that she could prove. The case file was sent to the Legal Rights department for follow-up on the payment, but the husband disappeared. After two years he still had not been found, despite frequent summonses. Either the police did not cooperate or the husband had fled beyond their jurisdiction.

As the interview participants indicated, the financial ability of a man is important in a *mahr* case. If the man claims that he does not have the ability to pay, then the court decision may be amended accordingly. In such cases, payment may be ordered in instalments. However, a majority of the 29 lawyers interviewed expressed their unhappiness about such orders and the results for their women clients.

Lawyer 19 said the real challenges for some women who seek *mahr* begin when they receive the court order. The best result for the woman is if the *mahr* is paid all at once. If this does not happen, payment in instalments is often never completed. A woman may receive the first instalment in the proper manner, but the remaining rounds are not just delayed, but not paid at all. If a woman pursues further payments and her husband refuses, the stand-off can lead to further challenges, and even violence between the divorced couple and their families.

In addition, what is paid in instalments may not be enough to cover a woman's basic expenses. Lawyer 21 and 19 suggested a husband might be asked to pay the *mahr* amount

in a few or many instalments, based on his income and expenses of his other family members. Instalments of 2000 or 3000 AFN[202] per month are of little use to a claimant as they are far below basic living expenses.

Lawyer 27, leading a group of lawyers who work for a large women's organisation that provided shelters and legal services to women, was asked whether it is easy to get the court order enforced. She responded that, according to the law, the court order is binding and if someone does not respect it they should be punished. She added, however:

> But we haven't seen any case that would have been followed based on this procedure, I mean I haven't noticed anyone being punished. The court does not follow up on their order's enforcement, the court says it is not our responsibility to enforce the decision.

She related that through their organisation, they had one case that resulted in imprisonment:

> In a case we represented, a man didn't pay attention to the court order to pay the mahr and both parties fought. The man hit the woman in front of us, then we took the case to the prosecution office and he had to go to prison for three months. But he bought his imprisonment by paying the *mahr*,[203] which was a cash amount of 93,000 Afs [AFN] with a gold necklace and six gold bracelets.

In this case, imprisonment was the result of the husband's violent behaviour toward his wife, a criminal act. This case was taken to the Prosecution Office and eventually resulted in the payment of *mahr*, but only because a team of ten lawyers and a large organisation backed up the woman's claim. If this had not been the case, the *mahr* may not have been paid, even though it was a relatively small amount. In fact, the gold jewelry should not have been with the husband as it is immediate *mahr* paid to the wife and she should have retained possession. Lawyer 33 mentioned that when tension arises, some women just give up and do not follow up their claim, or their families stop them. That is understandable in the Afghan context. In cases where women fight for themselves, or even are represented by a lawyer, if a woman is treated violently, she will be discouraged from continuing. Few women are strong enough to survive intimidation from their ex-husbands and continue try to have them imprisoned if they do not obey a court order.

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[202] AU$30–40.
[203] The lawyer meant that the women then withdrew her complaint.

8.7.2. Mahr Orders in Legal Departments

On the question of the *mahr* order enforcement, judges emphasised repeatedly that it is not the court's responsibility to enforce or otherwise follow up on their judgment. That is the job of the legal departments. When a decision is made, the case file is sent to the legal department for implementation (Judges 23, 22 and 16). However, some of the interviewed lawyers expressed great concern in this regard as they believed these departments quite often do not cooperate and, in fact, erect extra hurdles for claimants that might result in non-enforcement of the *mahr* order.

Lawyers 40 and 26 spoke with frustration of what happens within the legal departments when women refer to them. Lawyer 40 said when the court file is referred to the legal departments for implementation, they assume authority and control over the rest of the procedure. Lawyer 40 described how he had witnessed legal departments misuse and manipulate women claimants when it came to enforcement of the court orders, in particular in cases where the men are not responsive. He said, 'Personnel of legal departments take advantage of their authority and expect women to pay bribes, buy them gifts or, in a worst-case scenario, ask women to visit them alone.'

Lawyer 39 said he witnessed a situation in which a woman had been referred to a legal department to follow up her case, and the officer told her if she visited him alone for one night, all of her problems would be solved and her *mahr* would be quickly obtained from her ex-husband. The lawyer said he felt real sympathy for women who have to obtain their *mahr* through legal departments. Similar concerns were expressed by Lawyer 26. The sexual harassment that Lawyer 26 reported is a real threat in the daily lives of Afghan women, and few places offer them complete safety (Qanne, 2017: 1).

8.8. Summary

This chapter has explored further the challenges that women endure in their struggle for *mahr*, specifically addressing problems arising in the court and beyond, including difficulties in enforcing the court orders resulting from the often-difficult proceedings experienced by women claimants, even those who are successful in obtaining *mahr* orders. Reporting on interviews with 40 judges and lawyers, the chapter argues that while fighting

for a *mahr* order in the court is not easy, nor is winning a case necessarily the final victory for the woman whose ultimate goal is to obtain her *mahr*.

Evidence presented in this chapter highlights that court procedures are difficult, complex and rigid in regard to proving *mahr* claims. The obstacles and barriers change form in different stages of the court procedures for a woman who decides to seek *mahr*. Overcoming one hurdle does not mean the destination is reached; in all probability, further stumbling blocks will appear along the way. Lawyers complain that judges do not consider Afghan women's overall conditions in terms of access to the freedom and opportunities that would made it easier for them to present what is required by law, but judges firmly stand by their position and defend the legal provisions and procedures.

The most frequently reported challenge is the long delay in procedures caused by the negligence of men in responding to the court summonses or appearing in the legal department to pay the *mahr*. Even if the *mahr* order allows payment in instalments due to the respondent's financial position, many men still refuse to cooperate. Some lawyers reported that this reluctance to provide timely payment of the *mahr* instalments quite often leads to violence between the divorced couple; it also discourages a woman from continuing to claim *mahr*, leading her to give up despite her success in the court.

The findings indicates that women who seek *mahr* must follow a difficult path in their quest, and that the end of the process does not result in the financial security they require. Thus, the chapter concludes that there is no certainty in a *mahr* case unless a husband agrees to submit the *mahr* in the court himself. As the previous chapters note, this happens only rarely, usually when a man initiates the divorce proceeding and has the financial capacity to pay the *mahr*. The findings of this chapter concerning Afghan women's limited access to justice support the main argument of the thesis that *mahr* cannot be a replacement for Afghan women's financial rights that are missing in the laws and legal system of the country.

Chapter 9. Summary, Discussion and Conclusions

9.1. Summary of Research Findings

This thesis explores women's post-divorce financial entitlements in Afghanistan and whether *mahr*, an important financial right codified in both Islamic law and the Afghan Personal Status Law, could offer financial security to divorced women.

The introduction argues that the harmful effects of divorce are similar around the world. However, due to the lack of available employment opportunities and support systems for women in less-developed countries, the negative impact on women, and especially on their financial position, is more extreme. In a country like Afghanistan, with its multiple economic, social and security problems, the position of divorced women is even worse, primarily because they are dependent on men for income security and their position in society.

Based on academic studies and non-academic source material, the problem statement suggests that greater availability of work and education opportunities for women in western countries, as well as a greater likelihood of their re-partnering and remarriage, facilitate the relatively rapid improvement of their financial status after divorce. In sharp contrast, very few Afghan women can access such solutions. In Afghanistan, education and employment opportunities for women are extremely limited, and a strong social stigma reduces remarriage chances for divorced women. Therefore, Afghan women tend to experience greater financial vulnerability after divorce.

Almost the only recourse divorced women have is to return to their natal family. However, that is not an ideal solution as divorced women are often not welcomed back, for two reasons. The first is that any addition to the household adds to the economic burden,

particularly if a divorced woman brings her children with her; the second, that a divorced woman brings shame to her family because of the taboo associated with marriage breakdown.

The thesis looks at the possible post-divorce financial support provisions available under Afghan laws grounded in Islamic jurisprudence (Chapter 1). The findings indicate that, under Islamic law, a married woman is entitled to financial rights that ought to guarantee lifelong financial security. This protection is primarily entrenched in the duty her husband bears to maintain her financially while she is married to him, lives in his house and agrees to his sexual requests. However, a woman's right to such maintenance ceases when she is divorced; she can claim maintenance only for a period of three months from the time divorce is pronounced, which is, in fact, not a form of genuine post-divorce support.

There is also another financial right for a woman, one that begins even before she starts fulfilling her marital responsibilities. This is the right to *mahr*, which gains its legitimacy from Islamic sources such as the Muslim holy book, the Qur'an, and the hadiths of the Prophet SAW. A woman's right to *mahr* requires payment to a wife, a gift that carries financial value. This gift is supposed to function as economic compensation should she later experience financial hardship. *Mahr* is the primary financial right of a woman, so strongly supported in Islam that she has the option to refuse consummation of the marriage if her husband does not fulfil his obligation of submitting a fixed *mahr* (that is, a *mahr* whose value is determined). If deferred to future, the right to *mahr* continues even after divorce or the death of a wife; in the latter case, the woman's heirs can claim it. The thesis embarked on empirical research to explore the financial value of *mahr* in the real-life experiences of women undergoing divorce through Afghan courts.

Reviewing *mahr* from a theoretical perspective in English and Persian literature, the thesis concludes in Chapter 2 that, while some scholars describe it as a form of financial security for women, *fiqh* jurists tend to consider *mahr* as a cost the husband offers for sexual intercourse with his wife. That is why such scholars uphold the right of a woman to avoid consummation of a marriage if *mahr* is supposed to be paid immediately but has not yet

been paid. This interpretation supports the argument of liberal feminist scholars that such thinking turns *mahr* into the price of a woman's sexuality.

Moving from the theory to the practice of *mahr* (in Afghanistan), the thesis first explored the laws to identify how *mahr* is perceived, projected and protected in the Afghan context (Chapter 4). The findings reveal that legal provisions regulating *mahr* are scattered across three applicable laws in the country. The Personal Law Provisions of the Civil Code address *mahr* briefly, but the relevant section does not cover every aspect of the practice. For instance, it is not specified whether another person's property can be the subject of *mahr*. In the Wedding Ceremony Law of 2015, Article 11, with its four subsections, addresses some shortcomings in the law, but not sufficiently to cover this point. The Personal Status Law, applicable to the Shia population, covers *mahr* in more detail. However, this section does not supersede existing provisions of the Civil Code to offer better protection to the Shia women's right to *mahr*. A new draft Family Law, prepared by civil society organisations, also provide no additional comfort to women seeking *mahr*.

On the cultural side of the discussion (Chapter 4), *mahr* does not appear to be strong enough a concept to stand against the traditional Afghan practice of bride price. Considerable controversy exists among the research participants about the relationship between bride price and *mahr*: some suggest that the bride price is simply a specific form of *mahr*; others counter that the very concept of bride price is wrong and that only *mahr* is legitimate. Aside from this dispute, the available literature, along with findings of the research, indicate that there are fundamental problems with the bride price, but that the custom is widely practised and accepted in most of the areas in Afghanistan, principally for the reason that it provides a source of income for poor families.

Assessing *mahr* from a more practical point of view—that is, how it is applied in family courts—the findings from a review of 1117 previously decided cases revealed that *mahr* was shown as paid in 14% of the reviewed cases, but only in 7% of cases was the amount likely to provide some financial security, provided that a woman received the payment at the time of divorce rather than as a bride price paid to her family. In 86% of cases, *mahr* was either relinquished for divorce or not considered at all. These figures present a clear

story of the lack of women's proper and adequate access to *mahr* and financial resources after divorce.

The data collected through court observations confirmed the findings of the court records. In around 60 cases of *tafriq* or *talaq*, *mahr* was paid in eight, but in only one case did the woman receive it at the time the court was hearing the case. The amount of fixed *mahr* in that case was one million AFN; the wife received 900,000 AFN and forgave the husband the remaining 100,000.

Findings from the court observations further reveal that in cases of divorce initiated by men, *mahr* is more likely to be addressed, but it is usually treated as a requirement for court procedures and not a means of ensuring financial security for a wife. Addressing *mahr* also depends on the willingness of parties and how *mahr* was established at the time of marriage. If the *mahr* is fixed and a woman is divorced against her will, without any fault of her part, the court will ensure that previously 'fixed' *mahr* is paid before divorce, recognising that she will suffer financial harm. This approach holds true even if the *mahr* amount is small and would be of little financial help to the divorced woman. Thus, if a woman is married for 20 years and her *mahr* had been set at 20,000 AFN (about AU$360 as of 15 April 2019), she will get only that amount, without an assessment of her current status and the loss she bears.

The thesis also identified that, in many cases of husband-initiated divorce, a woman's resistance to an arbitrary divorce makes no difference to her *mahr*. However, in cases of wife-initiated divorce, the outcome changes and she may lose the *mahr* under subsection 2 of Article 188 of the Civil Code. No provision exists in the law to compensate a woman for the financial loss she will suffer. Court observations (Chapter 6) also revealed that women's limited knowledge about *mahr* is a major reason for their deprivation of the right. The lack of knowledge leaves women vulnerable to strategies employed by husbands to ensure women do not get their *mahr*.[204]

[204] In an interview with Lawyer 18, she said it is also possible that men pretend they don't know about *mahr* as it is to their benefit to take bride price.

The findings from the court records and observations were then explored further through in-depth interviews with lawyers and judges. The findings from these interviews illustrate the complications at different stages of the court proceedings. The cultural restrictions imposed on women's movements and the high rate of female illiteracy Afghanistan, along with economic disability (which prevents most women from retaining legal counsel) are the major constraining factors in the initial stages. Under these circumstances, women find it difficult to take part in court procedures.

If a woman overcomes these challenges and decides to pursue her *mahr*, she will likely encounter further difficulties. If she has initiated the divorce, she will often face pressure to forgo *mahr* to secure the divorce or obtain custody of her children. Other factors that lead women to give up their claim to *mahr* include lengthy court procedures that erode a woman's energy and patience. Women may also be pressured by their elders to relinquish their *mahr* claim, especially when a divorce case becomes complicated through a husband's refusal to pay the *mahr* amount and the case is referred to mediation. The findings further reveal that initiating a *mahr* dispute in the court is a real challenge if—as is commonly the case in Afghanistan—there is no formal marriage certificate at hand. At least two witnesses are needed to certify the validity of informal evidentiary documents presented to the court. Providing suitable witnesses is difficult for a woman and this hurdle often causes women's claims to fail.

A strong argument of the thesis is that even in cases where all the evidence points to a successful *mahr* claim, winning a court case does not necessarily mean receiving the *mahr* (Chapter 8). Serious conflicts may arise between the two parties at this stage over the *mahr* awarded; a husband may refuse to pay *mahr* and the wife must continue to fight to gain her right. A husband may simply disappear, failing to respond to court orders or to be held accountable. In cases where court orders require payment on monthly basis or in more than one instalment, often only one or two payments are made, and the husband refuses to continue paying. There is no effective enforcement system is in place to ensure the *mahr* orders are fully implemented.

According to normal civil case procedures in such circumstances, a divorced woman may file another case against her former husband for not abiding by the court order and report him to the Prosecution Office. However, the challenging procedures women go through for *mahr* are threatening enough to discourage such action by women. Given the vulnerable status of a divorced woman in Afghan society, few women would dare to create additional challenges by initiating further legal action; to do so would mean a conflict with an ex-husband that could have serious effects on her future life and her family. Corruption and sexual harassment in legal departments may also discourage women from following up on orders for husbands to pay *mahr*.

9.2. Major Conclusions

1. *Mahr* is undermined by the custom of bride price commonly practised in Afghanistan. Where a bride price is paid, *mahr* is not usually an important factor in marriage arrangements.

2. The *mahr* provisions in the Personal Status Provisions of the Civil Code are not detailed enough to cover every aspect of the *mahr* and disputes that may arise in relation to it. This flaw is mitigated to some extent by provisions included in the new Law of the Wedding Ceremony (adopted in 2015), but the code still needs to be expanded to amend its shortcomings.

3. General knowledge about *mahr* in accordance with Islamic teaching is limited, and women in particular are not well informed about *mahr* as their legitimate right.

4. *Mahr* is often disregarded at wedding ceremonies or addressed only verbally so that later its existence and provisions cannot be easily proven in court.

5. Although an essential part of *nikah* in Islam, in Afghanistan *mahr* is generally practised and considered in divorce proceedings only in the Province A.

6. While the number of *mahr* cases in court records is quite limited, most women seeking a divorce and whose *mahr* was fixed at the time of *nikah* trade their right to *mahr* for an easy divorce or give it up due to other social, economic and legal factors.

7. Although *mahr* has a greater chance of implementation in a divorce case initiated by a husband, court observations proved that women rarely get a chance to obtain *mahr* even in such divorces.

8. Court proceedings for *mahr* disputes are complicated, and proving a *mahr* claim in the court is not easy due to demanding requirements for evidence, such as a formal marriage registration certificate.

9. Even winning a *mahr* award in court does not guarantee a woman's ultimate success in receiving the amount owed to her due to weaknesses in existing enforcement mechanisms.

10. The authorities in legal departments responsible for enforcing *mahr* orders issued by courts are not always cooperative towards women, and it is possible they misuse their authority by making illegal demands of women.

9.3. In Search of a Solution: Is There a Way Out?

The research findings indicate that many aspects of the existing laws, and the so-called support mechanisms currently in place, require intervention to improve the situation of divorced women. The initiatives should include amendments to the existing laws of *mahr* and divorce to ensure stronger protection and greater financial rights, as well as strengthening enforcement mechanisms. In other words, the requirement for adequate protection of rights and mechanism for enforcement should be translated into reform of the existing laws. However, the question arises of whether such reform is possible in the Afghan context. Before discussing in further detail what needs to be done and how, it is essential to assess the concept of reform and the likelihood of its application in Afghanistan.

9.3.1. Reform and Its Possibility in Afghanistan

From the Islamic feminists' perspective, Muslim family laws are the major source of discrimination against women, as these laws are associated with the private domain in which, most often, women's rights are violated (Ziba, 2009: 23; Zainah, 2009: 1). Therefore, feminists propose that these laws should be reformed to improve women's

status. However, reform is not a well-accepted concept in the Islamic world, particularly among conservative communities of Muslims. The slightest change to the application of Islamic laws is always opposed and often strongly rejected. Islamic feminists see in this resistance the upholding of patriarchal rules that insist on women's traditional roles and subordination. The work of key feminist scholars in the world of Islam, such as Ziba Mir-Hosseini (2000; 2002; 2009; 2015; 2017), Raffat Hassan (2002; 2003; 2005) Fatima Mirnessi (1975; 1993; 1994), Shaheen Sardar Ali (1993; 2002; 2006), Amina Wadud (2006) and many others, strongly reflect that view.

Tariq Ramadan classifies the reasons behind such backlash into three categories. First, he argues that some Muslims fear that reform will change existing Islamic laws. Some others believe reform will damage the purity vested in the nature of Islamic rules and cause a loss of the 'substance and soul' that Muslims believe is unique to Islam. The third category considers that Islamic teachings are 'timeless and universal' and that, therefore, no change is necessary (Ramadan, 2009: 1).

On the issue of reform in Muslim countries, Hashim Kamali suggests that initiatives addressing gender justice and equality should come from within Muslim society and reflect the realities of the social-cultural conditions that govern that society. Allowing reform to 'get entangled in the heated exchange of secularist, religious and ultra-conservative debates' will intensify the problems instead of providing solutions (2011: 42). He also believes that reform and the process of change should not be 'rushed' but instead wait for the right time and opportunities for purposeful reform.

Nonetheless, Muslim countries have adopted changes in their family laws to improve women's rights. Reforms to improve conditions for women have been an essential requirement of the 21st century, as Mir-Hosseini and Zainah Anwar assert in *Wanted* (2009). UN initiatives—including the International Women's Year in 1975, followed by announcement of the Women's Decade (1976–1985), three major UN-led conferences held during this decade (the 1975 conference in Mexico, the 1980 conference in Copenhagen and the 1985 conference in Nairobi), the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the 1993 UN World Conference on Human

Rights in Vienna—all called upon UN member countries, as well as NGOs and the private sector, to take initiatives to improve women's rights and gender equality and to bring women to forefront of their working agendas (Bunch & Frost, 2000: 2). Most UN members, including Muslim countries, responded to these calls and started to improve their laws and policies relating to women and to increase services and programs to elevate women's status. Afghanistan has attempted reforms to improve women's status in the past, but the country has paid a high price for those initiatives.

The first round of reforms were initiated in the early 20th century, when King Amanullah Khan tried to modernise the country. His efforts included initiatives affecting women as well. For example, he sought to abolish polygamy and grant women broader educational opportunities. His wife and other female members of the Royal Family became the pioneers of change in women's life. The reforms called on women to participate in social and public life and attempted to abolish the custom of purdah and veiling that prevented women from engaging in social activities. These proposals triggered a strong backlash that eventually terminated the king's rule and overturned everything he had initiated (Ahmed-Ghosh, 2003: 2).

The long conflict in Afghanistan that began in 1978 was also an outcome of the reformist policies that the Communist-backed regime initiated in the country, including their emphasis on women's freedom and education. Huma Ahmed-Ghosh, in the above-cited study, refers to consequence of conflict over these reforms as the ten-year war with Russia; a deeper analysis of that conflict from the candidate's perspective suggests that it was not a ten-year conflict but a struggle that, as Afghans know, still continues albeit under a different name.

However, the current period is different and more accepting—even encouraging—of reform. This is reflected in the recent experiences of Afghanistan, with amendments to the Shiite Personal Status Law draft (Oates, 2009) and enactment of the 2009 EVAW Law (Law on Elimination of Violence against Women). These indicate that change in the law is possible, partly because Afghan women's problems have attracted worldwide attention in the last two decades. Funding directed by international organisations and donor countries to

Afghanistan to improve women's causes, introduce gender equality and promote women's rights development work, has paved the way for such change. Thus, the present is an ideal opportunity to initiate further changes in the laws and policies that affect women.

In addition, the legal system is quite open to reform due to its secularised nature, a legacy of foreign government interventions in Afghanistan and their influence in shaping the system and some of its laws. Criminal law, commercial law and general aspects of the civil law have been largely secularised, as pointed out by Wardak (2004: 329). The fact that Afghan women have a right to seek divorce in the court on the basis of 'fault', along with some other grounds, indicates that religious aspects of the law have also been reformed. These new rules are imported from Maliki jurisprudence (Kamali, 2011: 46). Arguably, no constraint exists that would prevent further reform to the Personal Status Law on *mahr* and adding some provisions on division of the marital assets.

Having said that, reform for improvement in the status of divorced women requires intervention in three specific areas of the legal system. The following section details these areas and looks into some similar experiences elsewhere in the Islamic world.

9.3.2. Improvement in the Laws

Improvement in the law requires specific interventions in the following areas.

1. Elimination/amendment of Article 188 section 2 of the Civil Code, as application of this article results in violation of women's right to *mahr*. Women's fault leading to family disputes should not be punished with the loss of *mahr* given the dire lack of post-divorce financial support for women in Afghanistan. According to classic jurist views of *mahr*, it collapses only if the woman initiates divorce before marriage is 'consummated'. It would be unfair if a marriage breaks down after 15 years and the woman still loses the *mahr* for her fault in the conflict leading to divorce. No woman would wish to destroy her life after 15 years of marriage if she did not have serious grounds to do so. Family courts do not accept *mahr* and *tafriq* cases together as they fear *mahr* may collapse by the end of procedures. This matter speaks for itself if one analyses it further.

2. Expansion in the *mahr* section of the Civil Code to address every aspect of the right to *mahr* for women in light of the findings of this research and future studies, as well as direct recommendations from judges and lawyers of the family courts who handle divorce and *mahr* disputes in their day-to-day work. Their experiences are crucial, as they know what gaps and problems exist in the law that need to be addressed. An example of the existing problems is the lack of clarity in the law on the issue of a third person's property given in *mahr* (such as the property and assets of the groom's father). This matter is addressed in the Shiite Personal Status law, but not in the Civil Code provisions.

Additionally, the thesis findings show that, in the capital alone, of the 661 cases reviewed 324 involved the women relinquishing her right to *mahr*.[205] Most often, the reason for this is to facilitate the granting of the divorce. This conveys the message that divorce laws are quite inflexible for women. A balance is required to avoid the sacrifice of *mahr* for divorce by women, in particular those who are victims of family violence. If no improvement is made in divorce laws, then no matter how major the amount of *mahr*, women may always have to trade this right for divorce.

On the other hand, demanding gender equality in divorce law in a conservative Muslim society where the level of literacy and education is low will not be easy. The required balance in Afghanistan would best be attained if the unilateral divorce right for men is limited to exercise with the court's permission. This is not an unrealistic initiative; there are other Muslim countries in the world that have amended their family laws to ban the arbitrary practice of divorce at the sole discretion of men. Morocco and Tunisia are good examples in this regard.

In Morocco, the Maliki school of Sunni jurisprudence applies the Sharia form of law to family matters. The Moroccan reformed Family Law, called *Moudawana*, under its latest reforms of 2004, recognises equal rights for a husband and wife in the family domain (Zoglin, 2009: 970). The reformed law has banned arbitrary divorce by men (*talaq*), and

[205] From the total 661, 324 are marked relinquished and 154 paid; in the remaining cases, *mahr* is not determined. The 324 constitute 67.7% of the 478 for the total number in which *mahr* is determined.

such a divorce now can only happen if officially authorised through the courts (Hursh, 2012: 264). Before registering a divorce, which is a legal requirement for its formal recognition, the determined financial obligations of a man towards his wife and children must be paid in full (Musawah, 2018: 24; Tamanna, 2008: 333). The reformed law also allows a divorced woman to claim a part of family assets acquired during the marriage (UiO, 2013: 11). Tunisia has gone through two stages of reform in family law: in the 1950s, after the country obtained its independence from France, and in the 1990s (Charrad, 2007: 1520). In the first round of reform (1956), polygamy was abolished and men's right to arbitrary divorce (*talaq*) was limited to court permission, granting both parties equal right to divorce (UiO, 2013: 10; Ben Salem, 2010: 2).

9.3.3. Granting Compensation for Unwanted Divorce

Apart from the need to amend existing provisions, additional provisions in the law of divorce are needed to ensure compensation for divorced women, in particular those divorced at the will of their husbands. In woman-initiated divorce, if the woman seeks divorce based on mistreatment or other misbehaviour of her husband, compensation should be available to her. If the decision is left to the discretion of judges, it is essential they take into consideration the number of years the couple were married when assessing the financial award to a woman. Given the life expectancy rate and overall economic situation in Afghanistan, women divorced after 10 or 15 years of marriage have little chance of building a new life. Such women need lifelong support to alleviate their post-divorce hardship. Again, this is not impractical; most Muslim countries have reformed their family laws to include a component of compensation in this regard.

Syria was the first country to introduce reforms offering compensation to women divorced against their will. Judges can award compensation to a wife who is divorced by her husband without her agreement; however, the payment period must not exceed three years (Welchman, 2007: 127; Na'im, 2002: 140). The applicable conditions include the clear need of the woman and the lack of another provider to support her. However, once the right to compensation is established for the woman based on arbitrary divorce from the husband, it is a legitimate entitlement even if she marries another man (Welchman, 2007: 127).

Another example in this regard is Malaysia. The Personal Status Law of Malaysia also provides compensation for a woman who is divorced by her husband (Na'im, 2002: 271). Even a disobedient wife (*nasheza*) who is divorced by her husband may not lose her right to compensation. While judges may determine she is ineligible for *iddat* maintenance, due to her disobedience (*nushuz*), she is still entitled to compensation because she was divorced through her husband's will (Nik Badli Shah, in Quraishi and Vogle, 2008: 193). [206]

In Tunisia, although the equality in the divorce law holds both parties accountable to compensate the other spouse for the 'emotional and material' loss of unwanted divorce, if a woman is divorced against her will, compensation could be granted as a lifelong award of monthly maintenance until she remarries or find another means of living (Welchman, 2007: 129).

Another Muslim country Afghanistan could learn from might be Egypt,[207] where, if a woman is not found guilty of the cause that led to divorce (whether arbitrary divorce by the husband or woman-initiated divorce through the courts), she may be eligible for a compensation award that does not exceed two years, taking into consideration of the length of the marriage (Welchman, 2007: 127). The Egyptian law also allows a woman who has child custody to remain in the marital home after divorce or to be given similar accommodation (Tadros, 2010: 10). However, women who lose custody become homeless, having to rely on their own family, similar to the situation in Afghanistan (Bernard-Maugiron, 2008: 73).

9.3.4. Division of Marital Assets and Property

Given the loss that women endure at the end of the marriage, offering short-term maintenance or compensation may not be the most suitable solution (although better than

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[206] The author says that in the case of *Piah v Che Lah*, the judge found the wife's claim for *iddat* maintenance baseless due to her *nushuz* of leaving the marital home, but she was granted compensation for divorce at the will of her husband (Badli Shah, 2008: 193).

[207] Egypt's Family Law of 1925 (No. 25) went through a series of reforms in 1979, 1985, 2000 and 2004 (Bernard-Maugiron, 2008; Tadros, 2010: 7). The most important of these granted the right of *khul* to women without their needing to seek consent from their husbands, albeit at the price of their 'outstanding financial entitlements' and their right to *mahr* (Sonneveld, 2010: 100).

nothing). Considering the amount of time women spend doing the household work and looking after the family, they need to be recognised equal partners in the property and assets accumulated during the marriage. However, the research findings indicate that, in Afghanistan, even working women who have a regular income and spend it to benefit the family may not be able to recover their contribution when the marriage breaks down. Judge 23 proposed that the Afghan law should recognise women's share in the marital assets. This is something that some Muslim countries have already recognised.

For example, in Turkey the reformed Civil Code of 2001 provides for equal ownership in marriage, so that spouses have the same rights over the family home and an equal share of the family assets and property acquired during the marriage (Ilkkaracan & Amado, 2008: 7; Yildirim, 2005: 365). In Malaysia, a woman who is found eligible to obtain compensation for arbitrary divorce may also apply for division of the assets accumulated during the marriage (Na'im, 2002: 271).

9.3.5. Support from the Community

Although this thesis addresses the limitation of financial support in the private domain only (from the husband), a broader support mechanism might also include measures undertaken by the state and community, including charity organisations. This would work well in the current conditions in Afghanistan, where poverty and corruption have weakened the rule of law, limiting the impact of exclusively legislative intervention. As an example of such broad support mechanisms, Tunisia could be mentioned again. Through Law No. 65, adopted in 1993, Tunisia has created a special fund for alimony and divorce annuities. Where court-ordered alimony is not paid by the husband, this fund will support women and their children (Ben Salem, 2010: 9). Additionally, a bill passed in 2008 ensures the right to housing for the custodial mother (ibid: 10).

9.3.6. Better Enforcement Mechanisms for Mahr Awards

The research findings in the last two chapters of the thesis clearly demonstrate an urgent need for stronger enforcement of *mahr* awards. Looking into other jurisdictions that could

offer some learning experiences, Iran appears to be a good example of *mahr* award implementation.[208]

A distinctive feature of *mahr* in Iran is that women can request it anytime they wish. In the marriage contract, the phrase 'upon request' always follows the *mahr* amount (Mir-Hosseini, 2000: 73). Many women claim *mahr* during their marriage (Saidmirzayee and Raouf, 2009: 48). While no legal constraint prevents them, Afghan women still do not opt for *mahr* during marriage to avoid possible trouble with their husband. Furthermore, the current research clearly indicated in Chapter 8 that obtaining *mahr* in Afghanistan is not easy, even if it is awarded through a court order.

A culture of high value or amounts is another distinctive feature of *mahr* in Iran. It is always an amount far beyond the financial capacity of the man to pay at the time of marriage (Mir-Hosseini, 2002: 74; Saidmirzayee & Raouf, 2009: 149; Jalali, 2010: 184). For instance, the average amount of *mahr* in Iran is 450 Iranian gold coins (a coin is values at approximately US$335).[209] It is common for a wife to claim up to 900–1000 coins (i.e. up to US$335,000) for her *mahr*. Since *mahr* awards are guaranteed and enforced in Iran, if a husband is not able to pay, Article 3 of the Law on Financial Obligations applies, resulting in his imprisonment (Cheragh Research Group, 2018: 2). While this does not seem to be an ideal solution for the wife either, the punishment shows that *mahr* claims have strong legal backup in Iran. In response to the question whether any man had been sent to prison for not complying with a court order to pay *mahr* in Afghanistan, head of the Family Court in the capital said she did not remember any record of such.[210]

When an Iranian woman submits a request to the court or other relevant offices to claim her *mahr*, she can also ask for a waiver of the applicable court fees based on financial inability. Furthermore, if there is a fear that her husband will try to transfer his property or other

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[208] Iranian women also have a right to claim wages for household work (*ujrat-ul-methl*) and the right to a small gift referred to as *nehla*, as well as *muta'a* (Ghanizadeh Bafeqi, 2011: 29; Dawlatabadi, 2006: 28; Na'im, 2002: 110). Furthermore, the divorce registration procedures require that compensation representing the due rights of a divorced woman to be paid in cash (Erfani, 2010: 282).

[209] The cost is calculated based on the gold coin price as of 30 April 2019 (<www.bullionbypost.com/world-coins/persian-gold-coins/1-iranian-bahar-azadi/>).

[210] Many news articles describe an increasing number of Iranian men being jailed for not being able to pay *mahr*. See e.g. Gooderzi (2018: 2) IRNA (2019); Vafai (2010); DW (2015).

assets to his family members to prove to the court that he is not able to pay the *mahr*, she can also request the court to sequester that particular property to prevent him from doing so (Cheragh Research Group, 2015: 24). The Afghan legal system can learn from such positive features.

9.4. Concluding Remarks

This thesis assessed the effectiveness of *mahr*, a major financial right for Muslim women, as a possible solution to the post-divorce financial deprivation Afghan women suffer. Analysing the findings of the research, the thesis concludes that *mahr*, despite its strong position as an independent legal institution in Islamic law, is not strong enough from a practical perspective in the Afghan context to serve that purpose. This is because *mahr* does not have the required recognition or strength to outweigh the bride price custom, which is a more popular concept in Afghan culture and tradition. Furthermore, the right to *mahr* is not well-known to lay people, particularly women, or is conflated (in ignorance or knowingly) with bride price for economic reasons. Above all, the concept is not well protected or enforced by the law and the legal system to guarantee access for those who seek *mahr*.

Further detailed academic studies are needed to address analyse the causes and consequences of the overlap of *mahr* and the bride price in order to identify possible solutions to the barriers that effectively confine the practice of *mahr* to the capital. Additionally, in order to determine the financial status of divorced women, broader research is needed with a specific focus on women's experiences of post-divorce hardship and their ability to cope with the day-to-day financial difficulties arising in the aftermath of divorce. It is also essential to study the small percentage of women who obtain *mahr* to see whether they are able to use it for their personal benefit and welfare.

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