

**ADEQUACY OF CRIMINAL LAW IN PROTECTING
WOMEN AGAINST DOMESTIC VIOLENCE IN
AFGHANISTAN, MALAYSIA AND ISLAM:
A COMPARATIVE EVALUATION**

BY

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**A dissertation submitted in fulfilment of the requirement for
the degree of Master of comparative Laws**

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ABSTRACT

Domestic violence, known as violence between husband and wife or violence between unmarried partners, has become a global issue. It deprives an individual from their human rights, freedom, liberty, and dignity and converts them into a compelled slave. The aggressive individual is frequently exposed to rape, forced marriage, and other practices of exploitation. Domestic abuse has a harmful effect on victims' physical, responsive, and non-physical well-being as well as effect on social norms and human values. In Malaysia, a total of 9,015 domestic violence instances had been documented since March 2020, when the mobility control order was implemented, in Afghanistan, more than half of all Afghan women have been bodily, sexually, or emotionally abused and, more than 60% were married without their permission between 2016 and 2020. Therefore, both countries are attempting to reduce crime and protect victims of these atrocities through the passage of special legislation. The researcher examines the adequacy of the victim protection mechanism in this study. It analyses the protections offered by the Afghanistan and Malaysian Acts and discusses the Acts' positive advancements as well as its weaknesses and shortcomings. The researcher divides this study into seven chapters, using a doctrinal research method and a comparative legal reach method, the researcher formulated the dissertation. To achieve its goal, the study uses a comparative and analytical approach. Researcher gathers material from both primary and secondary sources, including academic journals, books, reports, periodicals, and online databases. Both Acts give certain protections that are beneficial to victims, but they also give many measures that are deemed inadequate. Additionally, there are some features that are missing from both Acts and hence must be incorporated into the Acts. The researcher suggests that both countries take into account the study's recommendations for further enhancing the Acts' provisions on victim protection.

خلاصة البحث

العنف المنزلي، المعروف أيضا باسم العنف بين الزوج والزوجة أو العنف بين الشركاء غير المتزوجين، قضية عالمية. إذ يحرم فرد من حقوق الإنسان والحرية والكرامة وتحويله إلى عبدا مضطربا نفسيا وعقليا . يتعرض الفرد العدواني في كثير من الأحيان للاغتصاب والزواج القسري وغيره من أشكال الاستغلال. إن الاعتداء المنزلي له تأثير جسدي وعاطفي ونفسي على الضحايا وله تأثير ضار على الأسس الاجتماعية والقيم الإنسانية. كانت أفغانستان وماليزيا معرضة لهذا النوع من الجرائم ويحاول كلا من البلدين تقليل هذه الجرائم وحماية ضحايا هذه الفئات من خلال تطبيق التشريعات القانونية الخاصة. يفحص الباحث في هذه الدراسة مدى قدرة وكفاءة هذه القوانين في حماية الضحايا حيث يحلل قوانين الحماية التي تقدمها أفغانستان وماليزيا ويناقش التطورات الإيجابية لهذا القوانين، وكذلك نقاط القوة والضعف وأوجه القصور. يقسم الباحث الدراسة إلى سبعة فصول، الفصل الأول يناقش مشكلة العنف المنزلي، ويركز الفصل الثاني على الإطار النظري للعنف المنزلي، والفصل الثالث والرابع يناقشان الحماية المتاحة بموجب أعمال العنف المنزلي في البلدين. يتوسع الفصل الخامس في التقييم المقارن المتوازن للقوانين والاختلافات ومجالات تحسينها. أما الفصل السادس، فيناقش الموضوع من وجهة نظر إسلامية. الفصل الختامي يلخص النتائج التي توصلت إليها أفغانستان وماليزيا مع ذكر العديد من التوصيات الرئيسية. كما طور باحث الأطروحة باستخدام منهجية البحث في عقيدة ونهج القانوني المقارن. واتبعت الدراسة نهج المقارنة والتحليل حيث تم جمع البيانات من مصادر أولية وثانوية، بما في ذلك المجلات الأكاديمية والكتب والتقارير والدوريات وقواعد البيانات عبر الإنترنت. توصل البحث إلى أن كلا من القوانين يعطي دلالة على وجود بعض الحماية وأنها مفيدة للضحايا، لكن هناك أيضا العديد من التدابير التي تعتبر غير كافية. بالإضافة إلى ذلك، هناك بعض الميزات المفقودة في كلا القوانين، وبالتالي يجب دمجها. يقترح الباحث أن ينظر كلا البلدين في توصيات الدراسة لمواصلة تطوير الأحكام والقوانين لحماية ضحايا العنف المنزلي.

APPROVAL PAGE

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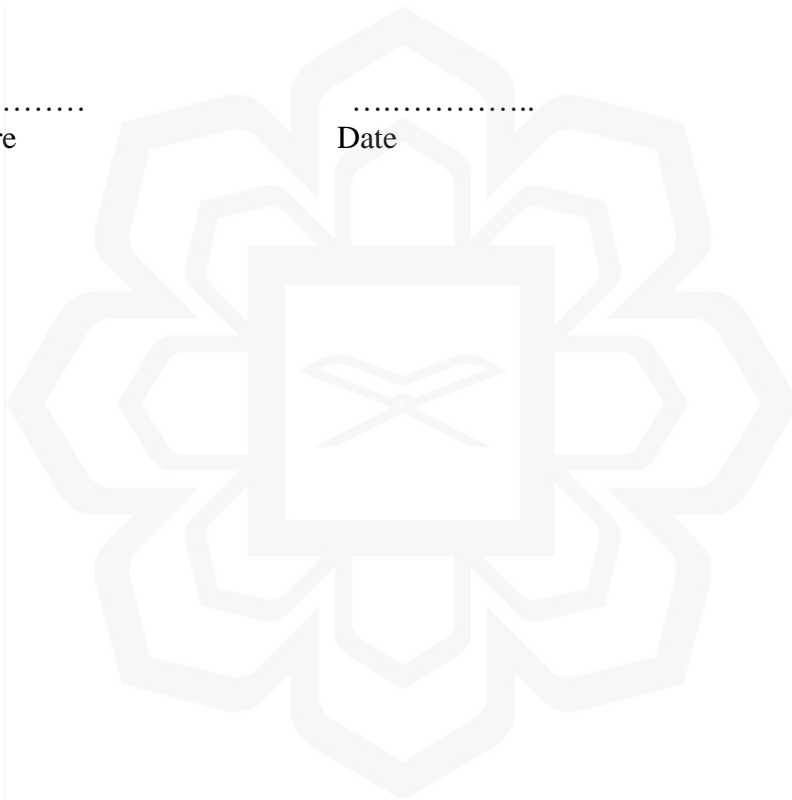
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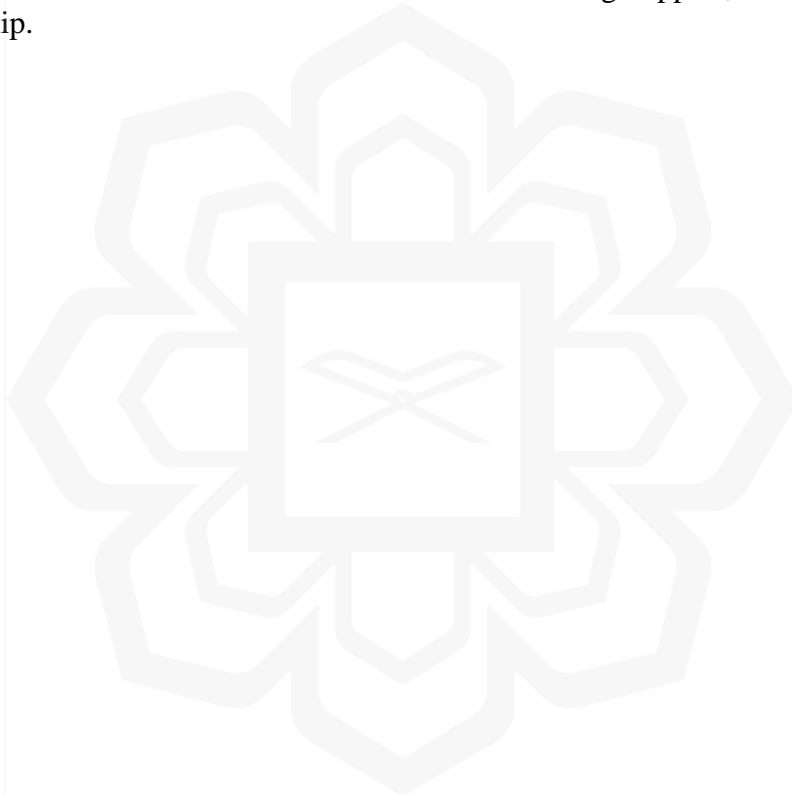


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LIST OF INTERNATIONAL TREATIES

The Universal Declaration of Human Rights (UDHR)

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

The Declaration on the Elimination of Violence against Women



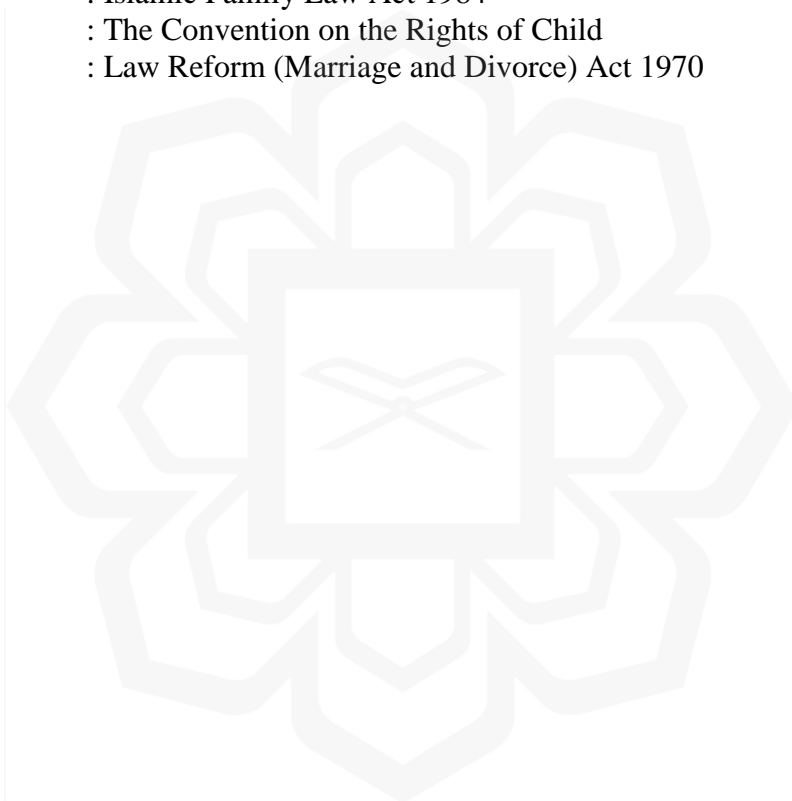
LIST OF STATUTES

The Constitution of Afghanistan 2004
The Law on Elimination of Violence Against Women 2009
The Civil Law of Afghanistan 1977
The Penal Code of Afghanistan
The Federal Constitution
The Penal Code of Malaysia
The Islamic Family Law Act 1984(Federal Territory)
The Law Reform (Marriage and Divorce) Act 1970
The Domestic Violence Act 1994



LIST OF ABBREVIATIONS

UDHR	: Universal Declaration of Human Rights
CEDAW	: Convention on the Elimination of All forms of Discrimination Against Women.
EPO	: Emergency Protection Order
IPO	: Internal Protection Order
SWD	: The Social Department Welfare
OSCC	: One Stop Crisis Center
WAO	: The Women's Aid Organization
GSI	: General Severity Index
IFLA	: Islamic Family Law Act 1984
CRC	: The Convention on the Rights of Child
LAR	: Law Reform (Marriage and Divorce) Act 1970



CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

When social, cultural and psychological factors combined, it creates devastating experience of domestic violence. A study by Mitchell and *Hodson* (1983) found that women are more likely to be victims compared to men, regardless of their marital status. According to "the 2001 British Crime Survey BCS "¹, the percentage of women who have experienced domestic violence is around double that of men. It is a well-known fact. As a result, domestic abuse has been classified as an issue that affects people of various faiths, ethnic backgrounds, and languages, ages, and socioeconomic statuses, as well (Pyles & Postmus, 2004). Although numerous studies have been conducted around the world, there is still a lack of information about the experiences of battered women. Victims, their children, relatives, and friends, as well as society at large, may suffer as a result of such acts of victimization.

The World Health Organization (WHO) defines violence as follows:² "violence is the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, which either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development or deprivation. Additional definitions of violence against women are provided in the 1993 Declaration on the Elimination of Violence Against Women": as follows:

"sexual, and psychological violence within the family, including battering, sexual abuse of female household members, dowry-related violence, marital rape, female genital mutilation, and other harmful

¹ Abdul-Ghani Mariny, "Exploring Domestic Violence Experiences from the Perspective of Abused Women in Malaysia", (Ph.D Thesis, Loughborough University, 2014), 25.

² Muhammad Naseem Khan and et al, "Perceptions and Experiences of Health-Care Personnel Regarding Violence Against Health Care: A Qualitative Multiple Case study", Research Square, <https://www.researchsquare.com/article/rs-273638/v1>, (accessed 11 July, 2021).

traditional practices against women, as well as non-spousal violence and violence related to exploitation; bodily, sexual, and emotional abuse within the overall communal, plus rape, unlawful sexual intercourse, unwanted sexual advances, and pressure at work"³.

Apart from the global picture, in South Asia, rigid societies and oppressive attitudes toward women have resulted in widespread abuse of women at all levels, from individuals to society. At every stage of their lives, women and girls in this area face discriminatory, inequitable, and harmful practices. Violence against women, including female infanticide and culturally specific violence like honor killings and acid attacks in Pakistan and Bangladesh as well as the trafficking of women from Nepal and Sri Lanka to other countries, and forced prostitution and other practices of sexual violence, are commonplace in India and other countries in the region. The acceptance of violence as standard lifetime events for a female is a difficult challenge to disprove because of societal norms and traditions. There is no arguing that the man is the primary breadwinner in a family. Offenders can get away with sexual assault on women because of ineffective legislation.⁴

Afghanistan is a south Asian country with heavily patriarchal, with deep roots in tribal structures, ethnic cultures, and traditions of strict customary practices and religious interpretations of gender roles, adherence to an honor-and-shame system, widespread use of arranged marriages and dowry (*walwar, pashcash*), and deep-seated customs of intergenerational family control over women and girls. These factors, along with the fact that Afghanistan has experienced 30 years of conflict during which VAW has been used as a weapon of war, contribute to the high rates of violence against women (VAW).

³ Unaiza Niaz. "Violence Against Women in South Asia", *Archives of Women's Health*, vol.6,no.2 (2013):10.

⁴ Ibid.

VAW manifests itself in a variety of ways for women in their homes and families, schools, businesses, and communities, some of which are mentioned here. All forms of violence consist of physical hostility, sexual assault and rape, psychological abuse, and economic abuse,⁵ and neglect is all manifestations of violence experienced at home and family by women and girls. At home and inside the family, the cultural preference for boys has played a critical role in sustaining discrimination and violence against girls and women. Indeed, girls are more likely to experience neglect and maltreatment from birth, increasing their risk of newborn and child mortality; neglect has been identified as the leading cause of sickness-related deaths among girls aged two to five years this age.⁶

In 2006, Global Rights performed the first study in Afghanistan on domestic abuse against women. Based on a survey of 4,700 women in 16 provinces, this study indicated that 87.2 percent of women have encountered at least one kind of physical, sexual, or psychological abuse or forced marriage, and 62.0 percent have experienced multiple forms of violence. In addition, the study showed that 58.8% of women were in forcible wedlock forced marriages, rather than organized wedding.⁷ This study also discovered regional variations in VAW rates. Other than sexual Violence, rural areas, the country's south and east, and border regions with Pakistan have some of the highest rates.

More recently, (UNAMA) field-based monitoring from October 2011 to

⁵ Afghanistan Independent Human Rights Commission, "Violence Against Women in Afghanistan", <https://www.aihrc.org.af/media/files/PDF/Violence%20against%20women%20Eng.pdf?cv=1>, (accessed 2 June, 2021).

⁶ UN, "Women Afghanistan Country Office Development Results Narrative", <https://www.impactpool.org/jobs/365125>, (accessed 6 August, 2018).

⁷ Nijhowne Diya, "A National Report on Domestic Abuse in Afghanistan", <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/Living%20with%20Violence%20%20A%20National%20Report%20on%20Domestic%20Violence%20in%20Afghanistan%2C%20Global%20Rights%2C%202008.pdf>, (accessed 20 April, 2021).

September 2013 discovered that among the violations criminalized under the (EVAW) law, battery and lacerations were the cases most frequently reported to the Afghan National Police (ANP) and prosecutors, with 896 complaints registered with prosecutors. The fields of science, technology and the utilization of computer applications have become an essential aspect in the development of nations. In that pursuit, nations started to compete. "Still a long way to go : implementation of the law on the elimination of violence against women in Afghanistan / United Nations Assistance Mission in Afghanistan (UNAMA)." 2012⁸.

In contrast, violence against women remains a problem in Malaysia. There has been minimal public interest in the subject despite multiple high-profile incidents being reported in the media. All forms of violence against women in Malaysia were last counted in 2010, according to "Royal Malaysian Police Force statistics"⁹. Domestic violence accounted for approximately half of all recorded occurrences of abuse against women in Malaysia in 2007, with rape and a minor number of incest, child abuse, and domestic worker abuse making up the rest. Violence against women was at a 10-year high in Malaysia in 2010, according to police data on violence against women from that year. Although various regulations and programs have been put in place to combat this social issue, the number of domestic violence incidents reported continues to rise.¹⁰

As a result, victims of this crime need urgent care, intensive treatment, and proper and adequate recovery and social reintegration policy. Domestic violence is easily perpetrated against uneducated and marginalized women deprived of educational,

⁸ United Nations Assistance Mission in Afghanistan, "Still A Long Way to Go : Implementation of the Law on Elimination of Violence Against Women in Afghanistan", https://unama.unmissions.org/sites/default/files/evaw_still_a_long_way_to_go_11dec12_final.pdf, (accessed 23 April, 2021).

⁹ Abdul-Ghani Mariny, "Exploring Domestic Violence Experiences from the Perspective of Abused Women in Malaysia", (Ph.D Thesis, Loughborough University, 2014), 25.

¹⁰ Ibid.

legal, and social resources and opportunities the majority of women in rural areas are victims of abuse. They eventually become victims of domestic abuse and, in the end, accept a life of agony and torture. This study examines the real-life scenario of this crime in the region, focusing on Afghanistan and Malaysia. It also discusses the roles of both countries under their respective Domestic Violence Acts to protect victims' rights. In addition, the study contrasts the two statutes in terms of the defense measures that these Acts demand. Finally, the researcher offers recommendations for both countries on how to improve their legal systems. And make them more accessible, dependable, and efficient.

1.2 STATEMENT OF THE PROBLEM

Domestic violence has been a severe problem in Afghanistan for decades, ever since it became an independent country. Afghanistan is recognized as a source country for domestic abuse against women in other parts of the world. Various international studies and academic literature document the dire situation of domestic violence in Afghanistan and show that a significant number of women and girls are subjected to domestic violence each year, such as forced marriage, underage marriage, sensual violence, and other forms of exploitation. In the last decade, this crime has grown too much in Afghanistan and has taken on new dimensions.

On the other hand, Malaysia is dealing with such offenses as a destination country. Despite numerous dramatic cases being published on the media, the general public is still uninterested in the topic. The Domestic Violence Act 521 (1994) has been in effect in the nation for nearly 17 years, but it does not adequately protect victims. Some of the legal loopholes that seem to have undermined the Acts' compliance are thought to be the cause.

Both Afghanistan and Malaysia enacted "the Domestic Violence Act of 1994"¹¹ and the Law EVAW to eliminate domestic violence and ensure victim safety. The Act of 2009, on the other hand, offers certain essential safeguards for victims that are incomplete and vague in terms of meaning and clarification of those terms, the lack of detailed descriptions and processes for offering and reserving those protections, and deficiencies in other security mechanisms. Furthermore, the Act lack some main elements; thus, the Acts cannot provide sufficient domestic abuse victims protection.

1.3 RESEARCH QUESTIONS

To achieve the objectives of this study, the researcher formulates the following questions:

1. What is the concept of women's protection from an Islamic perspective?
2. What are the protections available for women under the Afghanistan and Malaysia Domestic violence Acts?
3. What is the loophole of criminal laws to the protection of women in Malaysia and Afghanistan?
4. What are the legal improvement of criminal Acts for better protection of women in both countries?
5. Do the laws in Afghanistan and Malaysia adequately protect women facing domestic violence?

1.4 HYPOTHESIS

Provisions in the criminal acts relating to the protection of women in Malaysia and Afghanistan are inadequate. Therefore, there is a need to critically analyze the existing

¹¹ Domestic Violence (Amendment) Act 2017 Act A1538, in force from 1 January 2016, P.U. (B) 601, s.2.

protection available under both countries' domestic Acts to find out the viable improvement.

1.5 RESEARCH OBJECTIVES

The researcher accomplishes several aims of this research by evaluating the acts of Afghanistan and Malaysia. The following are the primary aims of the current research.

1. To scrutinize the concept of domestic violence against women from an Islamic perspective?
2. To examine the protections available for women under the Afghanistan and Malaysia Domestic violence Acts.
3. To identify what is the loophole of criminal law for the Protection of women in Afghanistan and Malaysia.
4. To suggest amending the legislation in both countries to better protect women.
5. To examine the adequacy of the laws in Afghanistan and Malaysia on women's protection against domestic violence.

1.6 LITERATURE REVIEW

Women's criminal defense against domestic abuse is a major topic in today's world, and there is vast literature on the subject. This essential area of women's advocacy has been the topic of numerous books, theses, and dissertations, as well as national and international reports and scholarly publications. Afghanistan and Malaysia, on the other hand, have insufficient resources when it comes to domestic abuse against women.

The first part of this literature review examines the literature on women's rights as human beings from an international perspective, particularly protection from domestic violence; the second part examines the literature on women's protection from

domestic violence under Afghanistan and Malaysia's Domestic Violence Acts, and the third part examines the literature on women's protection from an Islamic perspective.

Human rights must first be defined and understood, as the majority of the population is unaware of their full range of human rights. Therefore, they are the rights that a person has because of his or her humanity. All persons have the right to have their basic human needs met. Individuals and institutions of authority, such as governments, are the focus of these narratives on power dynamics. Human rights limit the power of the state while also requiring nations to take proactive procedures to ensure that all citizens can exercise their human rights in a safe and secure environment.¹²

All facets of life are covered by human rights. In a spirit of liberty, equality, and human dignity, their exercise empowers all persons to form and choose their own lives. "Civil, political, economic, social, and cultural rights, as well as peoples' rights"¹³, are all included under human rights, rights as a group such as; Right to life, liberty from torment, and harsh, barbaric, or humiliating treatment or punishment in the realm of civil and political rights. Slavery, servitude, and forced labor are abolished. Right to personal liberty and security Detainees have the right to be treated with humankind. Right to a fair trial, prohibition of retroactive criminal laws, right to be recognized as a person in the eyes of the law Freedom of thought, conscience, and religion, as well as the right to privacy The right to freedom of thought and speech, War propaganda and incitement to national, racial, or religious hatred, are prohibited. The right to assemble Freedom of association, the right to marry and start a family, and the right to participate in the conduct of public affairs, including the right to vote, be elected and hold public office. Additionally to economic, social, and cultural rights, including the right to work,

¹² UN Office of the High Commissioner for Human Rights (OHCHR), "*Human Rights*" <https://www.refworld.org/docid/46cea90d2.html>, (accessed 11 October, 2021).

¹³ Ibid.

The right to reasonable and advantageous working conditions; the right to organize and join trade unions; Droit 'azza wajalla la sécurité sociale, Family protection, the right to an appropriate standard of life, which includes adequate food, clothing, and shelter. Right to health, right to education, and, eventually, collective rights. Right of peoples to, Self-determination, Development, Free use of their riches and natural resources, tranquility, a healthy atmosphere, Additional collective rights, Minority rights at the nationwide, cultural, religious, and verbal levels, rights of native people.¹⁴

Women have the same civil liberties and constitutional rights as everyone else. State parties can take essential procedures under international human rights treaties to guarantee that women's human rights are legally safeguarded and to reduce sexism, inequality, and performs that harm women's rights. "Under international human rights law"¹⁵, women may be authorized to extra rights, for instance, reproductive healthcare. Women enjoy unique protection and significance within the United Nations and regional human rights frameworks, owing to their vulnerability. International human rights treaties prohibit gender discrimination and require states to protect and realize women's rights in all areas, from land ownership and abuse-free living to equal access to education and representation in government.¹⁶

"The United Nations Convention on the Elimination of Discrimination Against Women (CEDAW)"¹⁷ is the greatest comprehensive convention on women's rights. It sentences all types of discrimination against women and men and stresses the critical necessity of both genders having equal political, economic, social, cultural, and civil rights. CEDAW recognizes that women should have equal political, economic, social,

¹⁴ UN Office of the High Commissioner for Human Rights (OHCHR), 8.

¹⁵ The International Justice Resource Center, "Women's Human Rights", <https://ijrcenter.org/thematic-research-guides/womens-human-rights>, (accessed 11 October, 2021).

¹⁶ Ibid.

¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December, 1979, entered in to force 3 September 1981) UN (CEDAW), Art 1.