

# A WOMAN'S PLACE

PERSPECTIVES  
ON AFGHANISTAN'S  
EVOLVING LEGAL  
FRAMEWORK



Droits et Démocratie  
Rights & Democracy

Centre international des droits de la personne et du développement démocratique  
International Centre for Human Rights and Democratic Development

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WOMAN'S  
PLACE

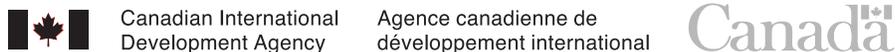
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# CONTENTS

Acronyms .....	ii
Authors.....	iii
Glossary .....	iv
Introduction.....	1
Chapter I - Family Law in Afghanistan: Reflecting on the Past to Understand the Present and Prepare for the Future .....	5
Chapter II - Reforming and Drafting Laws in the Post-Taliban Era: The Role of Coalitions .....	15
Chapter III - The Marriage Contract: Process and Recommendations for its Implementation .....	27
Chapter IV - Words to Inaction: The Disconnect between Theory and Practice.....	37

# ACRONYMS

ACF	Advocacy Coalition Framework
AIHRC	Afghanistan Independent Human Rights Commission
ANDS	Afghanistan National Development Strategy
APPRO	Afghanistan Public Policy Research Organization
AWN	Afghan Women's Network
CAT	Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CWG	Criminal Law Working Group
EVAW	Elimination of Violence Against Women Law
FLDC	Family Law Drafting Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Moj	Ministry of Justice
MoWA	Ministry of Women's Affairs of Afghanistan
NAPWA	National Action Plan for the Women of Afghanistan
SFL	<i>Sunni</i> Family Law
SPSL	<i>Shia</i> Personal Status Law
TAG	Technical Advisory Group
VAW	Violence Against Women

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# GLOSSARY

Bad:	A tribal practice in some regions in Afghanistan in which a female, usually a young girl, is given as compensation to another family or tribe to reconcile a dispute or for bad behaviour committed by the girl's family or tribe.
Bride price:	Money or property given by the groom to his wife's family.
Dower:	A widow's share of her husband's estate. Dower is not to be confused with dowry, which is property brought to the marriage by the bride.
Fiqh:	Jurisprudence; literally meaning understanding, but technically, the science of Islamic law or Shari'a.
Hajj:	Annual pilgrimage to Mecca, Saudi Arabia.
Hanafi:	Sunnite school of law, putatively founded by Abu Hanifah in the second (eighth A.D.) century. The Hanafi school is now the most widespread in the world, including Egypt, Iraq and the Subcontinent.
Islah Khat:	Reformation letter, used as proof that a husband has promised to stop mistreating his wife.
Jirga:	A tribal council or decision-making assembly of leaders; a loya jirga is a grand assembly.
Madhhab:	A Muslim school of law.
Mahr:	A gift given by the groom to the bride upon marriage (mandatory in Islamic cultures).
Mahramyat khat:	A letter indicating that a woman is traveling with her husband as her chaperone.
Maliki:	Second largest of four Islamic schools of law (other three are Shafi'i, Hanbali, and Hanafi).

Nikah:	Marriage ceremony.
Nikahnama:	Marriage contract.
Qadis:	A judge who rules in accordance with Shari'a, Islamic religious law.
Shura:	Arabic for consultation; a consultative council or assembly.
Shia:	One of the two main branches of Islam, followed by about a tenth of Muslims.
Sunni:	The largest of two branches of Islam.
Talaq khat:	Divorce letter, proving that a woman is divorced from her husband.
Taqnin:	Legislative Drafting Unit.
Taskira:	National identification card; required to conduct any business with the government, including the purchase or sale of immovable property, the preparation of official documents (including passports), admission into school and access to social services.
Wakil-e gozar:	Head of the local community.
Worasat khat:	Inheritance letter, describing a woman's entitlement to inheritance after her husband's death.
Zená:	Sex outside marriage.
Zoryat khat:	Power/ability to manage letter, proving that one can manage property, including land; used to establish rightful ownership of property obtained through marriage or purchase and to solve disputes over property after divorce or separation.
Zoujat khat:	Spousal letter, certifying that a couple is married and that any offspring are legal children.





## INTRODUCTION

Well before international intervention began, Afghanistan had signed international conventions that protected human rights. In 1948, Afghanistan voted in favour of the Universal Declaration of Human Rights. Then, in 1983, Afghanistan ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Finally, in 1994, Afghanistan ratified the Convention on the Rights of the Child (CRC).

Post-Taliban Afghanistan has been shaped by the ratification of other international instruments protecting human rights, specifically women's rights, reaffirming the importance of a further equitable development of Afghan society. In 2003, Afghanistan was the first Muslim country to ratify, without reservations, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 2 of CEDAW explicitly refers to the obligations of signatory states to reform or develop a constitution that reflects national principles of equality and non-discrimination. Therefore, states must strive:

To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.<sup>1</sup>

In 2004, the principle of equality was reaffirmed through Article 22 of the Afghan Constitution:

Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan—whether man or woman—have equal rights and duties before the law.<sup>2</sup>

Article 2 of CEDAW also stipulates that the legislative framework of the signatory states should be revised in light of CEDAW's provisions. States are asked:

To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.<sup>3</sup>

Strategies and action plans supporting the implementation of the principles enshrined in the Afghan Constitution have subsequently laid a promising foundation; all sectors of Afghan society, financially supported by the international community, are able to invest in the complex job of rebuilding the

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1 United Nations. Convention on the Elimination of all Forms of Discrimination against Women, December 18, 1979, Article 15. Accessed at: [www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm)

2 Constitution of Afghanistan. Free translation. Accessed at: [www.afghan-web.com/politics/current\\_constitution.html](http://www.afghan-web.com/politics/current_constitution.html)

3 Convention on the Elimination of all Forms of Discrimination against Women, Article 2.

country, with one of the objectives being to secure Afghanistan's new commitments based on existing or emerging national laws.

Gender equality is a cross-cutting theme of one of the three pillars of the Afghanistan National Development Strategy (ANDS). Through the Governance, Rule of Law, and Human Rights pillar, the country formally stresses the importance of reviewing national legislation to suit the new context:

The Government will strengthen its capacity to protect the human rights of all Afghans through the development, ratification and enforcement of legislation that is consistent with Afghanistan's international obligations, such as: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).<sup>4</sup>

The National Action Plan for the Women of Afghanistan (NAPWA), created by the Ministry of Women's Affairs of Afghanistan (MoWA), clearly focuses on the need to reform laws in order to eliminate discriminatory practices:

All laws will be reviewed to bring them into conformity with the Constitution. Laws that are discriminatory against women—especially unfair laws on citizenship, marriage, divorce, property and inheritance—will be amended or abolished. Violence against women and harmful traditional practices, such as forced and early marriages, will be criminalized. (...) In light of protection of the girl child against early marriages, compulsory registration of birth and marriages will be made part of the legal reform agenda. (...) The Government will comply with its obligations to international human rights treaties, most notably CEDAW and the Convention on the Rights of the Child (CRC).<sup>5</sup>

Over the past three years, Rights & Democracy has been directly involved in the reform of family law in Afghanistan. Through our fieldwork and research work, a number of questions, reflections and lines of analysis were raised that needed further discussion. To this end, four authors have reflected on a series of questions that are central themes of this book: the evolution of reforms in 20<sup>th</sup> century Afghanistan; the participation of civil society in the legislative process in the post-Taliban era; the marriage contract and registration of marriages; and the gap between the theoretical discourse and practice with regards to protecting the rights of women.

In the first chapter, "Family Law in Afghanistan: Reflecting on the Past to Understand the Present and Prepare for the Future," Cheshmak Farhoumand-Sims analyzes the societal context in which family law and the marriage contract were reformed throughout the 20<sup>th</sup> century, and the challenges for their implementation prior to 1979. The research reveals that the context in which these legal documents

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<sup>4</sup> Afghanistan. *Afghanistan National Development Strategy, 2008-2013*. Executive Summary, p. 8.

<sup>5</sup> Afghanistan. *National Action Plan for the Women of Afghanistan (2007-2017)*, p. 42. This is the government's main vehicle for implementing policies and commitments to advance the status of women.

were drafted—under foreign influences and subjected to the opposition of a very traditional Afghan society towards reforms—are not so different from the resistance encountered in Afghanistan today.

In “Reforming and Drafting Laws in the Post-Taliban Era: The Role of Coalitions,” Alexandra Gilbert presents an overview of the drafting and revision of the *Shia*<sup>6</sup> Personal Status Law (SPSL), the Elimination of Violence Against Women Law (EVAW) and the *Sunni*<sup>7</sup> Family Law (SFL). She also highlights the dynamics that have emerged among the three main coalitions during these revision processes, and their impact on the laws affecting women’s lives.

In “The Marriage Contract: Process and Recommendations for its Implementation,” Ana Hozyainova tracks the evolution of the marriage contract and the status of marriage registration in present-day Afghanistan. A large part addresses challenges and perspectives for compulsory registration of the marriage contract, the current debate within Afghanistan among stakeholders involved, and the lack of incentives to further promote its use and its implementation.

Finally, in “From Words to Inaction: The Disconnect between Theory and Practice,” Heidi Kingstone explores the perception of Afghan and international stakeholders regarding women’s rights and the laws that protect these rights. She highlights the disconnect between what exists on paper and the hard reality of Afghan women seeking to access justice.

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6 *Shia*: One of the two main branches of Islam, followed by about a tenth of Muslims.

7 *Sunni*: The largest of two branches of Islam.





## CHAPTER I

### Family Law in Afghanistan: Reflecting on the Past to Understand the Present and Prepare for the Future

By Cheshmak Farhoumand-Sims

Family is the fundamental pillar of the society, and shall be protected by the state. The state shall adopt necessary measures to attain the physical and spiritual health of the family, especially of the child and mother, upbringing of children, as well as the elimination of related traditions contrary to the principles of the sacred religion of Islam.

*Constitution of Afghanistan, Article 54<sup>8</sup>*

Family law provisions are a critical vehicle for the protection and promotion of women's rights. Women and girls are particularly vulnerable to human rights violations in the private sphere of their homes and in the public spheres of their immediate communities. Hence, family law, when effectively applied and enforced, becomes a vital tool for the state to ensure the well-being of all its citizens, even in the most private realms of their lives. Traditionally, Afghan law has been based on *Shari'a*, although King Amanullah, who ruled from 1919-1929, introduced statutory law in an effort to modernize the state. But despite almost a century of developments in the courts and legal system, customary traditional law continues to dominate legal interpretation and decision-making. This application of customary law, together with patriarchal customs and traditions, has influenced the interpretation and practice of Islam and *Shari'a* to the detriment of women's rights in Afghanistan. In fact, Malikiyar argues:

Although *qadis*<sup>9</sup> were claiming to base their rulings on the *Hanafi fiqh*<sup>10</sup>, they were greatly influenced by the traditional and customary practices. Perhaps in more than any other area, this was evident in the rights given to women in the *Shari'a*, such as the right to inheritance, ownership and trade, custody of minor children in cases of divorce, giving of *dower*<sup>11</sup> to the

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8 Constitution of Afghanistan. Free translation. Accessed at: [www.afghan-web.com/politics/current\\_constitution.html](http://www.afghan-web.com/politics/current_constitution.html)

9 A judge who rules in accordance with *Shari'a*, Islamic religious law.

10 *Hanafi* is a *Sunni* school of law, putatively founded by Abu Hanifah in the second (eighth A.D.) century. The *Hanafi* school is now the most widespread in the world, including Egypt, Iraq and the Subcontinent. *Fiqh*: jurisprudence; literally meaning understanding, but technically, the science of Islamic law or *Shari'a*.

11 A widow's share of her husband's estate. *Dower* is not to be confused with dowry, which is property brought to the marriage by the bride.

bride instead of the father, freedom of a widow in choosing whether she wants to remarry or not, marriages of minors, and polygamy.<sup>12</sup>

The tribal nature of Afghanistan and the protective norms around family matters, particularly marriage (traditionally viewed as a business transaction and a means of expanding family connections), contributes to the challenges in crafting a family law that complies with national laws and international human rights norms and obligations.

Contemporary efforts to develop and institute a new family law in Afghanistan are but the latest attempt to protect and promote women's rights within the private sphere of their lives. In fact, reforms aimed at improving the situation of women can be traced back to as early as the late 19<sup>th</sup> century.<sup>13</sup> Reforms attempted throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries represent moments in Afghan history where enlightened rulers made the connection between sustainable social and economic development in Afghanistan and the emancipation of women. Following the fall of the Taliban, a number of important national and international instruments, such as the Afghan Constitution (2004), CEDAW, ANDS, and NAPWA, provided parameters for the creation of legal codes and protections for Afghan women. But although this is an extremely important area for further development, there is a dearth of research on the subject matter due to the protracted conflict in Afghanistan<sup>14</sup> with most of the primary material only available in local languages.

What is interesting and compelling about these "moments" in Afghan history is the relevance and the insight they provide on the opportunities, barriers and challenges faced by those who continue to attempt to promote and protect women's rights in Afghanistan, in a highly conservative, traditional and patriarchal context. More specifically, an overview of these earlier efforts can shed light on the importance of family law as a legal tool for promoting and protecting women's rights in the most intimate environments of their every day realities—in their homes and their communities. These insights will enable the crafting of a more effective and constructive family law in post-Taliban Afghanistan, presenting new opportunities for local and international actors to advance women's rights and ensure the well-being of Afghan girls and women.

The evolution of Afghan family law and the accompanying challenge of developing and enforcing it can only be understood and appreciated in light of the complex social, economic, political, cultural and religious forces that intersect and interact, contributing to the development and establishment of this important legal code. As Barfield suggests, "Throughout the twentieth century there was an unresolved battle at the national level between modernists and Islamists over the Afghan legal system that involved replacing an exclusive dependence on *Shari'a* law with statutory law."<sup>15</sup> According to Barfield, the most

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12 Malikyar, Helena. "Development of Family Law in Afghanistan: The Roles of the Hanafi Madhhab, Customary Practices and Power Politics," *Central Asian Survey*, September 1997, 16:3, p. 391.

13 For Afghan laws pertaining to the legal protection of women, please see Pradhan, R. Das & Tweedie, P. *Legal Empowerment and Access to Women to Justice Assessment*. Washington D.C.: USAID, 2008.

14 Schneider, Irene. "Recent Developments in Afghan Family Law," In *Asien* 104, 2007, pp. 106-118.

15 Barfield, T. "Culture and Custom in Nation-Building: Law in Afghanistan," *Missouri Law Review*, 60, 2008, p. 361.

contentious areas of legislation were changes in family law that challenged traditional practices and customs, such as the bride price,<sup>16</sup> early and forced marriage, and rules pertaining to divorce.

## Historical Overview

The first effort to establish a family law in Afghanistan is attributed to Abdur Rahman Khan, who implemented a series of social, economic and political reforms in Afghanistan during his rule (1880-1901), part of his wider effort to create a modern and centralized state.<sup>17</sup> In addition to building and expanding state structures and institutions, he established a civil code and is remembered as the first ruler to embark on a modest series of reforms aimed at benefitting women.

Although he held his own highly conservative and traditional views of women and their place in society, his reforms nonetheless represent the first attempt at establishing family law within a civil code in Afghanistan.<sup>18</sup> They included a ban on child marriage, forced marriages, exorbitant bride prices and the right of women to seek divorce in cases of cruelty and non-support. Abdur Rahman also restored the rights of widows to inheritance, and prohibited the customary practices that required them to remarry next of kin. Further, he endowed minor girls promised in marriage with the right to refuse when they achieved the age of majority.<sup>19</sup> It can be argued that, like many leaders that followed, Abdur Rahman viewed family law issues as an important component of broader legislative reforms aimed at encouraging modernization while weakening the power and influence of religious leaders. Some authors have suggested that Abdur Rahman was influenced by his liberal wife Bobo Jan, the first Afghan queen to appear in public unveiled and wearing European dress.<sup>20</sup>

While these family law reforms appeared radical at the time, they simply reiterated existing rights provided to women within *Shari'a*. However, from the perspective of conservative religious and tribal leaders in a highly patriarchal society, they were seen as controversial and inappropriate. This contest between conservative and liberal interpretations of *Shari'a* continues to lie at the heart of family law issues in Afghanistan as well as across the Muslim world.

Following Abdur Rahman's passing, his son Habibullah sought to expand upon his father's family law reforms. One of his decrees included limiting the practice of taking more than four wives by banning men

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16 Money or property given by the groom to his wife's family.

17 These efforts included: the creation of a regular army, the first institutionalized bureaucracy—including government agencies that functioned like Cabinet ministries; a *loya jirga* (general assembly) that would function alongside his royal council; technological and economic developments including bringing foreign doctors, engineers (especially for mining), geologists and printers to Afghanistan; seeking outside advice from experts in communication, agriculture and irrigation and transportation; importing European machinery and helping to establish small factories for making soap, candles, leather products and other goods. See Nyrop, R. & Seekins, D. *Afghanistan Country Study*. Washington D.C.: American University, 1986. Accessed at <http://www.gliit.edu/govdocs/afghanistan/AbdulRahmanKhan.html>.

18 Please see Dupree, N. H. *Women in Afghanistan*. Stiftung Foundation, 1986, p. 3, for more details about Abdur Rahman and subsequent Afghan rulers' efforts to advance women's rights through family law.

19 International Crisis Group. "Afghanistan: Women and Reconstruction," *ICG Asia Report*, No. 48, 2003. Kabul: International Crisis Group, p. 3.

20 Ahmed-Gosh, H. "A History of Women in Afghanistan: Lessons Learnt for the Future," *Journal of International Women's Studies*, Vol. 4, # 3, May 2003, p. 3.

from keeping concubines and “female slaves.”<sup>21</sup> But other than his strong stance against British attempts to continue their dominance of Afghanistan’s foreign policy, Habibullah’s reign was unremarkable on the domestic front.

It was his son King Amanullah who was perhaps the greatest reformer in Afghan history. Indeed, “it was through the extensive efforts of this monarch that the status of women began to ameliorate.”<sup>22</sup> Some historians have argued that Amanullah’s reforms would have transformed Afghanistan had they been fully enacted, but most were repealed when he abdicated and went into exile.<sup>23</sup> The aggressive family law reforms advanced by Abdur Rahman were part of a “more systematic program of modernization that sought a new intellectual basis in Afghan nationalism and pan-Islamism,” where gender equality became a political issue. Amanullah was inspired by progressive social movements in Turkey and Iran, which were undergoing secularization and westernization programs of their own in an effort to modernize their societies.<sup>24</sup> Amanullah was also heavily influenced by his advisor and father-in-law, Mahmud Tarzi, who had returned from exile with a progressive vision of a modern, unified Afghanistan, which he was determined to see actualized.<sup>25</sup> Hence, inspired by regional realities and encouraged by Tarzi, Amanullah undertook the most aggressive reforms to date by making the advancement of women a central and critical element of his policies.

One of Amanullah’s more radical reforms was the outright prohibition of polygamy. He believed that the *Shari’a* had set out clear criteria and preconditions whereby a Muslim man could take on additional wives. These conditions would include infertility, the inability to produce a male heir, and social contexts such as wartime to protect widows. Most importantly, polygamy was permitted only if a man could provide for and treat all his wives and children equally. Amanullah argued that if the required preconditions did not exist, especially since it was impossible to treat all wives and children equally, polygamy was, in effect, prohibited under *Shari’a*. He also issued unprecedented royal decrees on divorce, *mahr*<sup>26</sup> and the age of majority (effectively banning child marriage for both girls and boys). Other initiatives included various social and educational reforms, including adopting the solar calendar; discouraging veiling and seclusion for women; requiring Western dress in parts of Kabul and some of the rural areas; abolishing slavery and forced labour; and introducing universal, secular education for all Afghans, including girls, adults and nomads.

Amanullah is also credited with impressive political and judicial reforms, including instituting Afghanistan’s first constitution (1923). This constitution granted equal rights to men and women;

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21 International Crisis Group. Op. cit.

22 Malikiyar. Op. cit., p. 392.

23 Nyrop R. & Seekins, D. *Afghanistan Country Study*. Washington D.C.: American University, 1986. Accessed at <http://www.gl.iit.edu/govdocs/afghanistan/ReignofKingAmanullah.html>.

24 Attempts to improve the status of women appear to have been a component of modernization efforts in both Iran and Turkey, and tied to resistance against religious conservatism. For example, during Reza Shah’s leadership, gender equality was presented as a requisite for national progress and women’s affairs were introduced into government policy. See *Iranian Women in the Era of Modernization: A Chronology*. Accessed at <http://www.fis-iran.org/en/women/milestones/pre-revolution>.

25 For an excellent discussion of Mahmud Tarzi’s influence on the modernization program in Afghanistan during the 20th century, see Gregorian, V. “Mahmud Tarzi and Saraj-ol-Akhbar: Ideology of Nationalism and Modernization in Afghanistan,” *Middle East Journal*, 21:3 (Summer 1967), pp. 345-368.

26 *Mahr*: A gift given by the groom to the bride upon marriage, mandatory in Islamic cultures.

guaranteed civil rights, which was first introduced as a royal decree and then included in the constitution; created a national registry including the issuance of identity cards; established a legislative assembly and court system; created a secular penal, civil and commercial code; prohibited the use of blood money in conflict; and abolished subsidies and privileges for tribal chiefs and the royal family. On the economic front, he introduced extensive economic reforms to reorganize and rationalize the tax system; instituted anti-smuggling and anti-corruption campaigns; introduced the Afghani as the Afghan unit of currency; and established the National Bank of Afghanistan (1928).<sup>27</sup>

It is widely reported that Amanullah's reforms were the source of his demise, as influential tribal and religious leaders joined forces to oppose the extensive social, religious and political changes taking place, including attempts to improve the status of women.

The next wave of legal reforms occurred in the 1950s and 1960s under King Zahir Shah, who attempted to reintroduce restrictions on child marriage and raised the legal age of marriage consummation to 15 from the previous nine. The King's Prime Minister, Daoud Khan, was a central actor in pushing for reforms that would advance women's rights in Afghanistan. During his monarchy, women made many noteworthy achievements, including: participating in a female delegation at a conference on Asian women (Ceylon, 1957); working as announcers on Afghan radio (1957); representing Afghanistan for the first time at the United Nations (1958); working as flight attendants and entering jobs at companies and factories (1959). As well, policies were introduced to encourage deveiling, which enabled women to attend university; to support greater roles in education and the workforce (1959); to ensure the right to vote (1964); and to grant equal rights before the law (1977).<sup>28</sup>

Enacted in 1977, the first formalized matrimonial code provided further protection to women and girls by increasing marriageable age to 16, and gave women the unprecedented and unheard of right to enter a marriage contract without the permission of their legal guardian. The efficacy of the matrimonial code was strengthened by provisions in the 1977 Constitution. It granted full equality to men and women, removed reference to *Hanafi* school of Islamic jurisprudence as the official *fiqh* of Afghanistan, and introduced unprecedented laws regarding divorce and the dissolution of marriage.<sup>29</sup> The removal of the *Hanafi* jurisprudence had important ramifications for efforts to promote women's rights. It effectively based legal jurisprudence on a secular rather than religious premise. Moreover, because *Hanafi* interpretations of *Shari'a* tend to be more conservative when it comes to issues pertaining to women's rights, its removal was seen as an important step towards improving the status of women in general, and their status within the family in particular. Not surprisingly, this move was viewed with great suspicion and displeasure by the religious class.

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27 Nyrop, R. & Seekins, D. Op. cit.

28 Ellis, D. *Women of the Afghan War*. Connecticut: Praeger, 2000, p. xvii.

29 *Hanafi* became the official school of jurisprudence in Afghanistan at the founding of the state in 1747. Although *Hanafi* law is prevalent in Afghanistan, it is worth noting that the 1977 Afghan Civil Code also contains certain solutions from the *Maliki* school, especially in regards to divorce. The *Maliki* school is known to be narrower in its interpretations of *Shari'a* in regards to family law issues. For a detailed discussion on the influence of *Hanafi* jurisprudence in Afghan family law, please see Malikiyar, H. "Development of Family Law in Afghanistan: The Roles of the Hanafi Madhhab, Customary Practices and Power Politics," *Central Asian Survey*, 16:3, p. 390.

The last legal reform to family law was introduced in 1978, shortly after the communist regime took over. Known as Decree No. 7, its provisions included the prohibition of marriage for girls under 16 and boys under 18, an infraction punishable by imprisonment up to three years. But this and other “radical” reforms inspired by socialist commitments to gender equality yet again incited the wrath of the conservative clergy and tribal leaders, who accused these legal changes of undermining the family foundation and threatening cultural and religious integrity by providing women added rights. It has even been suggested that Decree No. 7 is responsible for triggering the mass resistance against the communist regime and transforming its scattered elements into an organized jihad movement.<sup>30</sup> As a result, the return of conservative interpretations of *Shari’a*, driven by Pakistan-based resistance groups, pushed for Muslim life in Afghanistan to model the life of the Prophet Muhammad. “Rulings on all aspects of law pertaining to women, including marriage, divorce and inheritance reverted to the pre-20<sup>th</sup> century method of the individual *qadis*’ own interpretation of the law, with customary practices, once again gaining dominance.”<sup>31</sup> The rise of the mujahedin was coupled with an unprecedented decline in women’s rights, as the new political elite once again turned to issues pertaining to women “in an effort to carve out a distinguished socio-political identity.”<sup>32</sup>

This was not the first time that social programs regarding women’s rights led to political opposition and regime change. Huma Ahmed-Gosh suggests that attempts to promote women’s rights as a component of modernization efforts in Afghanistan is perhaps the single issue that has led to the fall of leaders in Afghanistan. Barfield concurs and explains that, “Conservative clerics often used these changes [reforms], actual and proposed, as a way to mobilize opposition to governments in Kabul.”<sup>33</sup> The most widely cited example of this is the opposition to Amanullah’s reforms in the 1920s, which resulted in widespread revolts in rural areas, forcing him to flee and essentially toppling his regime.<sup>34</sup> Malikyar argues:

Amanullah’s efforts in effecting reforms in the family law of Afghanistan played well into the hands of his conservative opponents who accused the king of dishonouring the Afghan nation through his actions on women’s issues.<sup>35</sup>

This was also evident during the communist regime, when efforts were constructed and cast as secular, anti-Muslim, anti-God and heretical, inviting opposition and fuelling the mujahedin movement as they sought to protect the honour and integrity not only of family but also of Islam. This discourse contributed to the rising fundamentalism in Afghanistan, already encouraged by the United States and Western supporters of the mujahedin who viewed these sentiments as opportune in their efforts to fight communism and the domino effect in Central Asia and the Middle East.

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30 Malikyar. Op. cit., p. 395.

31 Ibid.

32 Ibid.

33 Barfield. Op. cit., p. 361.

34 Both Ahmed-Gosh and Barfield refer to the rural opposition to Amanullah’s reforms as the cause of his political demise.

35 Malikyar. Op. cit., p. 394.

It is clear that the development of family law in Afghanistan cannot be separated from the political realities of the country, either regionally or internationally. For example, during Amanullah's reign, constitutional movements and attempts at liberalization and modernization in Iran and Turkey were instrumental to Amanullah's own policies. Nor is the influence of British presence to be underestimated. For their own political interest, the British were not supportive of Amanullah's reform efforts, which they felt would undermine their position in Afghanistan as well as the region—especially if the reforms spread to Iran, Pakistan, India and other key countries.

In the 1970s, again the political situation in the region exerted influence on reform efforts in Afghanistan. The former Soviet Union and the US were engaged in a proxy war in Afghanistan, considered a strategic gateway to the Middle East and Central Asia. The elite who instigated the communist coup were inspired not by socialist policies in the Soviet Union but by events in Iran and the Tudeh movement. The Iranian revolution of 1979 posed another watershed moment by bringing theocracy and fundamentalism into governance in the region, right next door to Afghanistan. Iran's influence on the *Shia* population, and Pakistan's influence on the Pashtu (both groups dislocated during the conflict and seeking refuge in both countries), further contributed to complicating the political scene and heightening conservatism, politicizing religion, ethnicity and gender, all of which inevitably impacted the development of family law.

### **Women's Rights in Afghanistan: Connecting the Dots**

One of the major challenges throughout this time has been the translation of legal reforms into action or enforcement. While throughout the 20<sup>th</sup> century there were valiant efforts to improve the situation of women through legal reforms, particularly in the area of family law, translating policies into practices that would transform gender dynamics proved futile. This can largely be attributed to not only the ambitious nature of the reforms, but also the absence of efforts to first establish the foundation for these reforms, namely by combating illiteracy. Furthermore, reforms were historically led by a small group of elite intellectuals based in the court (during the reigns of Amanullah and Zahir Shah) or political elite (during the communist regime) who were largely out of touch with the ultra-conservative, traditional and tribal nature of rural Afghanistan. Thus their legitimacy was diminished among stakeholders in the rural areas, namely religious and tribal leaders, which effectively rendered their efforts unproductive, resisted and opposed. Further, when the reforms were imposed or enforced without local buy-in, violence often erupted, distancing the centre from the periphery. Finally, local populations preferred settling their disputes with the local *shuras*<sup>36</sup> rather than a Kabul-appointed court.

The lack of success at integrating reform from the top down and garnering support from the general population led to pronounced problems in the Mujahedin and Taliban eras. These regimes effectively nullified any past efforts at promoting women's rights in the private sphere by declaring these un-Islamic

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36 *Shura*: Arabic for consultation; a consultative council or assembly.

and replacing them with strict and narrow interpretations of *Shari'a*. Once again, modernization and liberalization programs, including women's rights, were an elite-led initiative without sufficient popular support, reminiscent of earlier attempts that revealed the disconnect between the elite and the general population in Afghanistan. As Schneider rightly notes, "As could be clearly seen with regard to Decree No. 7 from 1978, legal reforms need social backing or they may be resisted or simply ignored."<sup>37</sup>

It is worth noting that the conflation of religion and culture in Afghanistan further complicates this matter. While legal norms are purported to be based on *Shari'a*, they in fact represent the imposition of tribal code and cultural norms, traditions and practices that are justified by attribution to religious law and jurisprudence. Hence, "reactions to reforms in women's legal rights have arisen not out of contradictions with Islamic philosophy, but as attempts to guard ancient tribal laws and customs."<sup>38</sup> The lack of literacy (both religious and non-religious) compounds this by preventing the population from having the ability to distinguish between tribal and religious law. This issue alone points to the importance of education as a necessary prerequisite to resolving gender inequality and positive and transformative legal reform in the area of family law.

### Current Challenges

Currently, there are four levels of discourse among Afghan jurists about legal dilemmas and possible solutions: secular discourse, based on international conventions and honoured in the 2004 constitution; statutory discourse, referring to statutory laws; Islamic discourse, referring to *Shari'a* interpretations; and customary discourse, referring to Pashtunwali and other local and traditional norms and practices.<sup>39</sup> These customary and Islamic discourses prevail as preferred tools for jurisprudence both in the formal and informal justice systems.

Clearly, issues pertaining to women's rights, particularly rights and responsibilities within family and community, have once again been politicized. The question of women's rights is often a pawn between Afghans who view the protection and promotion of Afghan women's rights in the public and private spheres as integral to sustainable peace and development in the country versus a strong and vocal conservative contingent who prefers the status quo and is highly resistant to reform. This is particularly sensitive given that, historically, the most aggressive efforts to improve the status of women occurred in times of foreign presence, namely the British presence during Amanullah's rule; Soviet presence and influence during the communist rule; and the presence of the international community in contemporary post-Taliban Afghanistan. This foreign presence has further complicated and politicized the rights narrative. In all three instances, while the dominant force behind progress, change and liberalization have been Afghans, the foreign presence has provided opponents with an opportunity to package important efforts such as legal reform, gender equality, and so on, as "foreign," and therefore a threat

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37 Schneider. Op. cit., p. 113.

38 Nawabi, Mariam A. *Women's Rights in the New Constitution of Afghanistan*. 2003. Available at <http://www.cic.nyu.edu/archive/pdf/E22Womens%20RightsFullVersionNawabi.pdf>. For an excellent discussion of Pashtunwali, please see Kakar, P. *Tribal Law of Pashtunwali and Women's Legislative Authority*. Available at <http://www.law.harvard.edu/programs/ilsp/research/kakar.pdf>.

39 Schneider. Op. cit., p. 114.

to the integrity of Afghan culture and religion. Hence, the efforts of individuals, such as Tarzi, and organizations, such as the Afghan Women's Network, who tirelessly call for the improved status of women, are ignored or constructed to represent "foreign influence."

As Moballegh explains, "Many Islamists in Afghanistan argue that equality-based family law is part of the implementation of feminist beliefs, and since feminism is labelled an anti-Islamic movement, the reformed laws will be against the provisions of Islam."<sup>40</sup> He also outlines some of the most salient sources of opposition to a strong family code, including: the difficulty of implementing and enforcing a code in the absence of viable police and justice systems; stereotyped views about the roles and responsibilities afforded to Muslim women in *Shari'a*; fears about the collapse of the family should women gain more rights, including a loosening of divorce laws; and discriminative interpretations of the law.<sup>41</sup> In this climate where women are subjected to gross violations of their human rights in their immediate environment, and in the absence of nation-wide programs and services to assist and protect them, many women turn to the most extreme of measures—suicide—as their only option for freedom.

The sensitive nature of this discourse has even led to some progressive politicians rejecting the revision of family law, fearing that it would be wiser not to put it on the political agenda at a time when extremists dominate the political arena and could take existing provisions and introduce more restrictive laws instead.<sup>42</sup>

## Conclusion

The drafting and passing of the *Shia* Personal Status Law (SPSL) in February 2009 is the latest manifestation of efforts in Afghanistan to codify family law. Once again, social, cultural and political dynamics have had an impact on the development of this process. Iran's influence on the *Shia* community, particularly through its connection to Grand Ayatollah Mohseni; the presence of the international community, construed by some as yet another attempt to alter Afghan culture and religion (thereby requiring firm and strong resistance); and the ongoing conflict and insecurity have all contributed to the narrow interpretations of Islam, which resulted in a contested and controversial family code whose articles are in direct contravention of the Afghan Constitution as well as Afghan obligations under international law (CEDAW, ICCPR, ICESCR, CRC). Now that the SPSL has been signed into existence by the President, without any attempt to debate it in an open and transparent manner, it will be interesting to see how things unfold vis-à-vis the *Sunni* Family Law (SFL).<sup>43</sup> It is hoped that civil society can demand and ensure that the SFL will be in line with the Afghan Constitution and reflect Afghanistan's international human rights obligations. But until the law is formally introduced, one can only anticipate the worst and hope for the best.

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40 Moballegh, Abdul Wahed Zia. *Family Law in Afghanistan: Past Experiences and Future Landscapes*. Montreal: Rights & Democracy, 2008, p. 3.

41 Ibid., p. 4.

42 Ibid.

43 The SPSL did not undergo the usual process of being debated in the lower and upper chambers of Parliament and was quickly signed by President Karzai in the weeks leading up to the presidential election. Criticism from civil society groups and pressure from the international community resulted in President Karzai suggesting that he had not thoroughly read the law before signing it, which eventually led to some scrutiny and minor modifications before it was again passed into law.





## CHAPTER II

### **Reforming and Drafting Laws in the Post-Taliban Era: The Role of Coalitions<sup>44</sup>**

*By Alexandra Gilbert*

The process of drafting and revising the *Shia* Personal Status Law (SPSL), the Elimination of Violence Against Women Law (EVAW) and the *Sunni* Family Law (SFL) took place after 2002, in the context of the international “intervention” in Afghanistan. This process led to three laws affecting family affairs and women’s rights which were influenced by different stakeholders. The absence of a formal provision for public consultations gave these stakeholders the space to influence the law-drafting process, through contacts, lobbying efforts and participation in a variety of alliances based on common interests and a desire to shape Afghanistan’s legal context. This has also given Afghan civil and political society, religious groups and scholars the opportunity to influence these new pieces of legislation.

The first section of this chapter is based on Rights & Democracy’s experience in the law-making process in Afghanistan. Using the Advocacy Coalition Framework (ACF),<sup>45</sup> the second section explores the dynamics and power struggles among the various stakeholders in these law-drafting processes, and seeks to better understand how these dynamics can be changed.

Each legislative process described below was affected by “actors from a variety of public and private organizations who are actively concerned with a policy problem or issue (...) and who regularly seek to influence public policy in that domain.”<sup>46</sup>

These processes were also shaped by advocacy coalitions that emerged through a variety of stakeholders, such as individuals, representatives of government and non-governmental organizations, political society, scholars, the media, religious groups and other special interest groups that: “share a set of normative and causal beliefs and engage in nontrivial degree of coordinated activity over time.”<sup>47</sup> The

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<sup>44</sup> The author would like to acknowledge the support of Saeed Parto, Director of Research, Afghanistan Public Policy Research Organization (APPRO), for his guidance on the Advocacy Coalition Framework.

<sup>45</sup> The Advocacy Coalition Framework is one of the leading theories of the policy process, used to meaningfully describe and explain the complex, dynamic policy-making processes of modern societies. See Sabatier, Paul A. and Jenkins-Smith, H.C. “The Advocacy Coalition Framework. An assessment,” in Paul A. Sabatier (ed) *Theories of the Policy Process*. 1999.

<sup>46</sup> Sabatier. Op. cit.

<sup>47</sup> Sabatier. Op. cit.

term coalition will be used to describe the three *ad hoc* alliances that crosscut each of the legislative processes described in this chapter.

### Coalitions and Processes

#### **Shia Personal Status Law (SPSL)**<sup>48</sup>

Article 131 of the Afghan Constitution adopted in 2004 recognizes the right of the *Shia* community to its own family law:

Courts shall apply *Shia* school of law in cases dealing with personal matters involving the followers of *Shia* Sect in accordance with the provisions of law. (...)In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the *Shia* Sect, courts will resolve the matter according to laws of this Sect.<sup>49</sup>

The *Shia* Uleema Council (council of *mullahs*), chaired by Sheikh Asif Mohseni, a *Shia* Pashtun, is the main coalition behind the draft law to regulate family affairs of the *Shia* community (mainly Hazara), which represents between 10-20% of the Afghan population. Mohseni is described as: “a former anti-Soviet resistance and later militia leader who is very close to the Iranian religious establishment.”<sup>50</sup>

This law was drafted in an environment shaped by the Karzai government’s need for *Shia* votes in the parliamentary elections, and by the presence of a *Shia* Minister of Justice. When the law reached the Lower House to be debated, a series of complex factors affected the process. *Sunni* scholars began to fear the impact such a law, based on *Shia* jurisprudence, would have on their jurisdiction, while *Shia* scholars and MPs did not want to lose the opportunity to have their own family affairs legislation enshrined in the Afghan Constitution. Finally, internal disputes over ethnic-related matters within Parliament further delayed the process,<sup>51</sup> enabling two other groups to play a role in shaping this law: the Kateb Institute of Higher Education, and the Family Law Drafting Committee (FLDC).

The Kateb Institute is a private education facility in Kabul that welcomes both *Shia* and *Sunni* students. Supported by the AIHRC, it organized a two-day seminar that brought scholars together to study the draft.

The FLDC was established in January 2008.<sup>52</sup> This multi-stakeholder working group, hosted by the Ministry of Women’s Affairs (MoWA), was driven by Afghan experts from different fields and various

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48 This section, entitled Coalitions and Processes, has been based largely on numerous field interviews, internal briefing notes, and reports produced by Rights & Democracy’s staff in the framework of Rights & Democracy’s project in Afghanistan, A Measure of Equality for Afghan Women: Rights in Practice.

49 Constitution of Afghanistan, accessed at [www.afghan-web.com](http://www.afghan-web.com).

50 Institute for the Study of War, accessed at [www.understandingwar.org](http://www.understandingwar.org) on October 23, 2010.

51 Wimpelmann Chaudhary, T., Ashraf Nemat, O. and Suhrke, A. “Afghanistan,” in Ole Jacob Sending (ed.): *Learning to Build a Sustainable Peace: Ownership and Everyday Peacebuilding*. Bergen: Chr.Michelsen Institute, 2010, 49 pages.

52 As part of a project led by Rights & Democracy in Afghanistan.

ethnic backgrounds,<sup>53</sup> although predominantly *Shia*. The FLDC's mandate was to review the existing family law<sup>54</sup> and to draft amendments in line with Afghanistan's human rights commitments, supported by *Shari'a*-based arguments and inspired by the experiences of other Muslim countries. The draft SPSL was leaked to the FLDC through a female MP. FLDC members then decided to focus their efforts on the draft SPSL, fearing, as *Sunni* scholars did, but in a different way, that it could have a negative impact on the proposed SFL reform.

The FLDC reviewed the draft and issued more than 200 recommendations. Meetings with MPs and *Shia* Uleema Council members were organized to influence the draft, but resistance was strong. The main argument was that the law had been drafted based on *Shia* jurisprudence; therefore, arguments based on human rights treaties were invalid. The FLDC attempted to engage Kateb University around its recommendations, without success. According to some FLDC members, many of Kateb's recommendations seemed to counter the existing Civil Code, based on an interpretation of *Shia* jurisprudence that was not favourable to women. It is not clear what impact Kateb's recommendations have had on this process. However, it is interesting to note that the AIHRC played a dual role, as FLDC commissioners and participants in the process initiated by the Kateb Institute.

A few articles were integrated into the draft SPSL before it was passed through the Lower House.<sup>55</sup> The draft was then sent to the Upper House, where it was signed in haste by the Karzai government.

The news that the law had been signed hit Kabul after *naw-roz* (the Afghan New Year) in 2009, and an *ad hoc* coalition of FLDC members began to denounce the law, which was seen as codifying customary practices and further restricting women's rights. This *ad hoc* coalition comprised prominent MPs, employees of Afghan and international organizations, AIHRC Commissioners, intellectuals and Afghan government officials. They wrote statements, organized a press conference, conducted television interviews and lobbied parliamentarians, government officials and the international community. A petition was signed by 200 people to protest the SPSL. Meanwhile, the *Sunni* Uleema Council was building alliances with the *Shia* Uleema Council through the Brotherhood Council, arguing against the interference of Western-style values in Afghan laws. Mohseni was outspoken against activists on his private television channel, Tamadon (meaning civilization), which bans music and aims to preserve Islamic values. The topic has also been discussed in mosques, by both *Sunni* and *Shia mullahs*, arguing for the protection of Islamic values against the influence of Western values and agendas. Activists were publicly accused of being "bad Muslims."

On April 15, 2009, the outcry culminated when 300 Afghan women (predominantly *Shia*) protested in the streets of Kabul against the SPSL. Confronting them that day were male and female students, and

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53 The FLDC comprised 18 regular members and numerous ad hoc yet committed participants, including judges of the Juvenile and Supreme Courts, MoWA employees, MoJ, AIHRC commissioners, MPs, Kabul University scholars, members of the Bar Association, and representatives of various civil society organizations, such as Global Rights and Medica Mondiale.

54 The Family Code is the first chapter of Afghanistan's Civil Code. Last reformed in 1979, it is based on *Sunni* jurisprudence.

55 According to internal reports, ten articles were integrated in the draft SPSL. However, other sources indicate that four FLDC articles were considered in the draft.

SPSL supporters mobilized by Mohseni, who argued that opponents were against the *Shia* right to family law based on their jurisprudence.

Overall, the international community maintained a low-profile during the drafting and mobilization process. When the news broke about SPSL, the international community stood behind the coalition against the draft, and was primarily involved in media relations and advocacy outside the country, coordinating efforts inside the country, and acting behind-the-scenes to influence the process.

In an effort to reverse the signed law, the coalition decided to endorse the FLDC's recommendations and stand united, rather than issuing new recommendations that would fragment their voice and jeopardize their efforts. In addition, they rejected Kateb University's recommendations arguing that they were based on a narrow interpretation of *Shia* jurisprudence. Coalition members met with former Minister of Justice Mohammad Sarwar Danesh and President Hamid Karzai to present the recommendations.

On April 4, 2009, President Karzai announced that the Law would be reviewed. Around 60-80% of the recommendations drafted by the FLDC, and supported by the coalition, were included in the revised law, which was signed by President Karzai on July 20, 2009, and gazetted on July 27, 2009.<sup>56</sup>

### **Elimination of Violence Against Women Law (EVAW)**

Ownership of the EVAW drafting process belongs to a fragmented coalition. A first draft was initiated and prepared by MoWA in 2005. It was reportedly done with little consultation outside the ministry. Copies were eventually leaked to MPs, the Afghan Women's Network (AWN) and the UN Entity for Gender Equality and the Empowerment of Women (UN Women). This draft was then seized by AWN and a small group of activists (mainly AIHRC and Afghans working with international NGOs), who considered the provisions insufficient. With the support of UN Women, they started reviewing the draft. However, the revision initiated an entirely new drafting process. During that time, the parliamentary Commission on Women's Affairs was also reviewing the MoWA draft.

MoWA submitted the draft EVAW to *Taqnin* (Legislative Drafting Unit), as per the formal legislative process. They eventually also accepted to send the AWN/UN Women draft to *Taqnin*, and the Commission on Women's Affairs also shared their version as a consultative document. Attempts from MoWA and AWN to engage the Commission on Women's Affairs have reportedly failed.<sup>57</sup>

To help *Taqnin* merge the drafts, another player entered the arena, with a close working relationship with *Taqnin* in the harmonization of criminal laws: the Criminal Law Working Group (CLWG). The CLWG comprises predominantly foreign experts from different agencies.

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<sup>56</sup> Gazette number 988, accessed at [http://www.moj.gov.af/OGs/OfficialGazette/0901/OG\\_0988.pdf](http://www.moj.gov.af/OGs/OfficialGazette/0901/OG_0988.pdf)

<sup>57</sup> Interview with a human rights activist. Kabul, October 2010.

The new EAW was then shared with organizations, through the AIHRC who was sitting on the CLWG. EAW was perceived as having been considerably weakened by *Taqnin* and by not including the CLWG recommendations. It was not clear at the time when the law would be sent to the Lower House for debate. The lack of transparency in the process made it difficult for EAW defenders to strategize, given they were receiving partial information through contacts.

Finally, *Taqnin's* version of the EAW was signed by Presidential decree on July 6, 2009, and gazetted on August 1, 2009.<sup>58</sup> In October 2009, it was reported that EAW would be discussed in the Lower House. Based on Article 79, a law must still be sent to the National Assembly even though it has been signed by a Presidential decree.

The draft was sent to the Lower House for debate, through the Commission on Women's Affairs. Unsatisfied with *Taqnin's* version of the law, the now stronger coalition, which included all previous members, hoped to seize this opportunity to improve certain articles of the law. But opposition to the ideas brought forward by this coalition was strong:

Afghan civil society groups have tried but so far failed to remove the concept of "adultery" from the definition of rape. The primary obstacle is strong opposition from conservative sectors in parliament, the Supreme Court, and the Ministry of Justice to anything that could introduce the crime of rape within marriage. These same groups have also thus far rejected attempts by civil society groups to increase the punishments for so-called "honour killings," a subject that is not addressed in the Elimination of Violence Against Women law.<sup>59</sup>

The parliamentary Commission on Women's Affairs asked for assistance from the Technical Advisory Group (TAG), coordinated by UN Women. As part of this group, UNAMA, UN Women, and UNDOC provided guidance on the criminal aspects of the recommendations and AWN provided guidance on their civil aspects.

The situation in Parliament was worrisome; women MPs appeared fragmented and were unable to reach a consensus. In addition, there was no consensus between the Commission on Women's Affairs and the Afghan or international organizations involved. Moreover, the situation revealed a deep-rooted problem with the current system of commissions, which contributed to the fragmentation of women's voices within Parliament. Women sit on different commissions. Once a commission, largely dominated by male MPs, has made a decision, female MPs can hardly oppose that decision. EAW was seen as a purely Western law, and the opposition's arguments were centered on a given interpretation of Islam:

Prominent conservative figures in parliament such as Abdul Rasul Sayyaf, chair of the international relations committee and a notorious warlord, have already expressed opposition to articles in the law. Sayyaf proposed that articles criminalizing assault should be removed from the law, while articles on child marriage and forced marriage should be brought into

<sup>58</sup> Gazette number 989, accessed at [http://www.moj.gov.af/OGs/OfficialGazette/0901/OG\\_0989.pdf](http://www.moj.gov.af/OGs/OfficialGazette/0901/OG_0989.pdf)

<sup>59</sup> Human Rights Watch. *We Have the Promises of the World*. December 6, 2009.

line with his interpretation of *Shari'a*, which he believes permits child marriage once a girl begins menstruation or has no legal guardian, and allows for a husband or father to use *qahr* (violence or anger) against his wife or daughter as a form of discipline.<sup>60</sup>

Fearing the losses would be greater than the gains, members of the coalition convinced the Commission on Women's Affairs to withdraw EAW from the parliamentary agenda. They thought this would give the judiciary the opportunity to implement it, and that further changes would be difficult to make once it was implemented.

### **Afghan Sunni Family Law (ASFL)**

Family law, as a codified statute,<sup>61</sup> has existed in Afghanistan since the 1920s. It has been reformed many times throughout the 20<sup>th</sup> century (see Chapter 1).

The work to review existing family law was the main mandate of the FLDC. This group of Afghan experts reviewed the family laws of other Muslim countries, to see if they could apply these countries' arguments for reform and the content of their laws to the Afghan context. The FLDC also drafted the Wards and Guardians bill, which could become the first law to protect the interests of children in Afghanistan.

The FLDC held over 40 meetings over a period of two years to review the ASFL. Specific efforts were made to consult lawyers in the provinces of Herat, Mazar, Kunduz and Nangarhar, so that their practical experiences could feed into the draft, fostering a sense of ownership outside of Kabul. As the first draft was completed, consultations within Afghanistan took place: with MPs, the Academy of Sciences, civil society organizations, and legal aid groups, so that they could issue recommendations on the draft. In addition, various experts outside Afghanistan were consulted, without formally involving any foreign experts.<sup>62</sup>

The draft reform was sent to the MoJ in March 2010, through the MoWA. However, there was no indication that the law was on *Taqnin's* agenda. MoWA's legal department sent a letter to President Karzai's office asking for the draft reform to be considered; this request was then sent to the Minister of Justice. After a meeting between MoWA, the FLDC and the Minister of Justice, the latter informed the committee that there was no need to reform the existing family law, as they would focus on new laws, and that the current Family Code, which was last reformed in 1979, was still very relevant.

A campaign to support the draft Family Law has since been organized to raise awareness of the proposed reform and to secure buy-in from a greater number of people. This campaign comprises permanent

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60 Ibid.

61 The first family law drafted in Afghanistan is based on *Sunni* jurisprudence.

62 Rights & Democracy provided financial support to this Afghan-led process.

FLDC members and seeks support from organized and unorganized civil society, such as *attoons* (female *mullahs*), teachers and independent media. Both *Shia* and *Sunni* community members are also involved.

**Advocacy Coalitions and Belief Systems**

We can identify three main coalitions, whose dynamics influenced and shaped each of the processes described in the previous section. The three coalitions were created based on deeply-held **belief systems** (deep beliefs and policy beliefs), which brought coalition members together and shaped the legislative processes.

	Coalition 1 Traditionalist	Coalition 2 Progressive	Coalition 3 International Community
Deep beliefs	Islamic framework	Islamic framework	Western value system
Policy beliefs	Narrow interpretation of Islam Preservation of “traditions” No outside interference Status quo	Progressive interpretation of Islam Principles of equality and non-discrimination within <i>Shari’a</i> Human/women’s rights	Human/women’s rights Western theories of gender equality

The first and second coalitions, comprising traditional and progressive elements of Afghan society, operate within the framework of Islam, as deep beliefs. The first coalition’s policy beliefs are driven by a narrow interpretation of Islam that seeks to preserve the established order—the most notable element being the traditionally low status of women. Their strict interpretation of Islam is used to advocate against interference from new groups that would challenge the traditional balance of power and those usually responsible for interpreting Islam. Among the new groups, there are the organized and semi-organized Afghan civil society groups, and the international community, labelled as the “West” and seen as a threat against “Afghan values”.

The deep beliefs of the second coalition are also anchored in the Islamic framework. However, their policy beliefs are driven by a more progressive interpretation of Islam rooted in the principles of equality, packaged into *Shari’a*-based arguments that promote non-discrimination. They are also inspired by the human/women’s rights principles enshrined in the Afghan Constitution, and by the international human rights treaties ratified by Afghanistan. The third coalition comprises mainly internationals and is driven by deep beliefs that are anchored in a totally different system of reference. They belong to a liberal system of values based on human and women’s rights, while their policy beliefs are driven by a Western discourse and theories of gender equality. While the international community established bridges with the progressive coalition, based on shared policy beliefs, this close relation is certainly a factor that contributed to radicalizing the traditionalist position.

## Strategies to Influence Policies

In the SPSL process, Coalition 1 was, at first, bound largely by ethnic values—a central aspect that remained throughout the process; however, the strength of this coalition has been to expand the discourse from minority rights to the larger preservation of culture and traditions. This brought in new allies, outside ethnic groups, who defended the same values. The ability of coalition members to use the media and address their natural audience are worth noting; they gathered the support of a larger audience that would defend traditional values against perceived “foreign-interference”. This policy belief is also central to the coalition’s strong opposition to EAW. Their reluctance to address taboos and to acknowledge women’s rights through sufficient provisions in a law addressing violence as well as their perception of EAW as a Western product are all elements that reveal a lack of will to advance Afghan society. The ASFL legislative process is still not complete; however, the refusal of the Minister of Justice to consider its revision is perceived as a desire to maintain the status quo—a desire that is shared by many decision-makers.

In the SPSL process, Coalition 2’s major strength has been in unifying a mixed group of *Sunni* and *Shia* men and women around a progressive discourse based on *Shari’a* that defends women’s rights principles. Also, the fact that the debate was taken out of Parliament, and into the public sphere, helped increase interest and raise the profile of this specific piece of legislation. The use of media by a unified coalition 2 also proved to be successful. Although there were a few “free riders” with a personal agenda, the coalition remained united around a common discourse, with many spokespersons readily available to promote it.

The SPSL process reveals that unity and ownership are key words; unity of coalition members behind shared policy beliefs and ownership of a discourse rooted in the Afghan context and mastered by many. However, there has been little mobilization outside of Kabul; even in provinces with a predominance of *Shia*. This can be explained by a lack of awareness of the legislative process as well as the content of the law.

The EAW process reveals the complete opposite: the ownership of this law has been an issue from the beginning. The lack of unity between Progressive Coalition members has affected their capacity to effectively advocate and lobby for increased support. During that time, the traditionalist Coalition 1 members were united against EAW’s principles, hoping to preserve the low-status of women. The question can be raised whether the fragmentation of Coalition 2 opened the door for Coalition 3 members to take leadership of the process’ coordination which became, at one point, very foreign-led. Presumably because of the sensitivity of the issue, no media strategies were implemented by Coalition 2. Did the lack of ownership have an impact on potential relations with the media, who could have raised awareness on violence against women?

The presence of the international community, referred to as Coalition 3, has had a major impact on these processes. In the SPSL process, Coalition 3 engaged mainly with Coalition 2 in an attempt to understand the challenges and to help coordinate efforts. The international community's low-profile attitude— while being supportive through advocacy outside Afghanistan and during discussions behind the scenes— likely contributed to fostering a greater sense of ownership on the part of Coalition 2 members, while giving them some assurance of support from an external player that could intervene if necessary.

In the EAW law process, the omnipresence of Coalition 3 was highly felt. Here, the international community's presence, primarily through human resource allocations, might have posed a threat to Coalition 2 members' sense of ownership and commitment to the process.

When the ASFL is studied by *Taqnin*, and then sent to the newly elected Lower House following the 2010 legislative elections, all these coalitions will already be in place for it. It will be interesting to see what has been learned and how the coalitions will unveil their strategies.

### Engaging in Dialogue

One of the key aspects in fostering policy change is the capacity of members of a given coalition to engage in a dialogue based on logic with opponents from another coalition: "Changes are most likely to occur when there are rational arguments presented (as opposed to subjectivity) and when there are recognized forums so that a multitude of coalitions can participate."

The space or fora in which each of the processes has evolved differs, and this aspect also has an impact on the outcomes.

The SPSL was hugely debated in the public sphere. However, Coalition 2 has made strong efforts to identify and obtain support from people who share the same value system, such as other civil society organizations, lawyers, scholars and MPs. At the same time, Coalition 2 engaged in a dialogue, based on a progressive interpretation of *Shari'a*, with Coalition 1 members, including MPs, government officials, and Uleema Council members, in an effort to influence their value system. Reportedly, some MPs and *Shia* Uleema Council members accepted the arguments, but the importance of having a law based on *Shia* jurisprudence remained stronger.<sup>63</sup>

The EAW debates remained largely within parliament. Coalition 2 failed to identify and engage potential members, such as scholars, lawyers, court officials, or simply women outside elite circles. The result is a law "framed by 20th century interpretations of women's rights, their codification in CEDAW, and the views and experience of progressive Afghan women."<sup>64</sup> Though undocumented, it seems that attempts by Coalition 2 members to engage Coalition 1 members (*Shia* or *Sunni* Uleema Councils, government

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63 Interview with a human rights activist, Kabul, October 2010.

64 Wimpelmann Chaudhary, T., Ashraf Nemat, O. and Suhrke, A. Op. cit.

officials, male MPs) were very low. Finally, progressive *Shari'a*-based arguments were not developed or mastered to better defend such a sensitive law addressing violence against women and this seems to have had an impact on the outcomes of each of the processes.<sup>65</sup>

At the moment, the ASFL is being discussed both outside the public sphere and in Parliament. This process is built around the principle of consensus-building across coalitions. Although led primarily by Coalition 2 members, the AFSL process has engaged members who traditionally belong to Coalition 1, such as *mullahs*, and has attempted to take the debate outside of Kabul elite circles through legal awareness training and consultations in the provinces. Moreover, it has included both *Shia* and *Sunni* community members, men and women, grouped and trained on a set of progressive *Shari'a*-based arguments that can apply to both jurisprudences. At the moment, given that the Minister of Justice refuses to consider the reform, Coalition 2 is attempting to increase support for its policy beliefs through a campaign of legal awareness for different audiences, including organized and unorganized civil society groups, such as teachers, students, female *mullahs*, lawyers and employees of INGOs. Their campaign is supported not only by *Shari'a*-based arguments, but by social and economic arguments that could potentially foster support from Coalition 1 members. The Coalition 2 strategy assumes that members of Coalition 1 could respond positively to very practical arguments that have an impact on daily life and that do not threaten the established order of responsibility for *Shari'a* interpretation.

### Recommendations for Advocacy Coalitions

- **Strengthen arguments rooted in the Afghan context**  
Arguments based on international human rights treaties ratified by Afghanistan are good for the international community, but can hardly be used within Afghanistan given that they are perceived as Western impositions. It is essential to further develop arguments that are rooted in the Afghan context in order to frame a progressive interpretation of *Shari'a* into a rights-based approach. In addition, arguments drawing on the economy, sociology and psychology should be further developed and mastered by Afghans. These could be used to enter into a dialogue with Coalition 1 members who master *Shari'a*-based arguments and frown upon other interpretations.
- **Increase participation in public consultations and access to debates in the Lower House<sup>66</sup>**  
The SPSL and EAW processes reveal the extent of the lack of information about debates in the Lower House, and the status of discussions on legislation. Information is gathered by people who have direct access to the law-makers. This lack of transparency and limited access to information are clearly used to sustain the power struggle; access to debates in the Lower House and the creation of a space for public consultations would enable dialogue between conflicting coalitions.

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<sup>65</sup> Interview with a human rights activist and a researcher, Kabul, October 2010.

<sup>66</sup> Various publications on SPSL reveal how indirect access to information creates confusion on SPSL. It is extremely challenging to ascertain the reality of the situation on the ground. The international community's view of events is also shaped by internal power struggles.

- **Encourage dialogue across coalitions**

This is a key aspect that Coalition 2 can build on in the future: to identify, within Coalition 1, the moderate voices that may be receptive to new arguments, leading to a change in their policy beliefs. For example, a member of Coalition 1, well-versed in *Shari'a*, may not be receptive to a new interpretation, but could be sensitive to other sets of arguments. These elements could probably be mobilized for specific processes, rather than on a regular basis, but could represent strong allies for advocacy.

- **Strengthen the Progressive Coalition**

Members of Coalition 2 should attempt to identify individuals from all sectors of Afghan society, who could join their voice and strengthen their core group. So far, training workshops and conferences as well as informal/formal networks have been used as mobilization tools. However, this coalition needs new adherents from the “unorganized” civil society, such as professors, nurses, doctors, journalists and businessmen/women. This coalition must evolve towards mobilizing on a voluntary basis, around principles that advance equality within Afghan society. Fora should be entirely coordinated by members of this coalition, without other incentives other than their policy beliefs. If necessary, rather than seeking international financial support, the coalition should fundraise locally, through, for example, business associations, as a means to foster local financial commitment to the cause of equality.

## Conclusion

Advocacy coalitions function on the basis of common policy core beliefs. However, “since these are very resistant to change, the line-up of allies and opponents (...) will remain stable over periods of a decade or more (...). The only way to change policy core beliefs within a coalition is through an external shock that redistributes powers and resources.”<sup>67</sup>

All processes described in this chapter are framed by a broader context, shaped by “stable parameters” and “external events.”<sup>68</sup> Afghan Advocacy Coalitions are framed by stable parameters that comprise the articles enshrined in the Afghan Constitution and the socio-cultural values of Afghan society. The international community also shares stable parameters in which they operate, but faces duality in socio-cultural values, as they are dealing with a set of values intrinsic to Afghan society, as well as their own set of values and the pressure from their respective governments to implement specific actions. The international community’s presence is a key external event that contributed to the positioning of Coalition 1 and 2, often against each other.

Each of the three coalitions are affected by changes within the Afghan government (new Parliament, new Ministers, negotiations with insurgents) and within foreign governments (new development priorities);

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<sup>67</sup> Sabatier. Op. cit. Financial resources and resource allocation are a key aspect of the dynamics between coalitions. The source of financial support often influences a coalition’s position. However, this aspect would have required considerable research and analysis, which was not feasible in the framework of this chapter.

<sup>68</sup> Sabatier. Op. cit.

by changes in public opinion within Afghanistan (anger towards the presence of the international community) and within foreign countries (decreased military intervention, troop withdrawal); and by the history of their opposition during previous processes.

At the time of writing, there is a “series of shocks” that are likely to affect coalition dynamics. A new Afghan Parliament was elected in the fall of 2010; talks with the Taliban, including the creation of a High-Peace Council, have raised fears that human and women’s rights enshrined in the Afghan Constitution will be negotiated; the international community is reducing its military presence; there is a growing anti-foreign sentiment affecting the efforts of Afghans working in the area of human and women’s rights, as well as a rising suspicion towards NGOs.

Assuming that: “... in situations in which all major coalitions view a continuation of the current situation as unacceptable, they may be willing to negotiate in the hopes of discovering a compromise that is viewed by everyone as superior to the status quo.”<sup>69</sup> Given this context, there are two scenarios for the near future: Coalition 1 will likely become stronger and see an increase in adherence. Alternatively, this may allow moderate members of Coalition 1 to join the ranks of Coalition 2 as the first coalition becomes increasingly radical, to an extent that would be unacceptable to its moderate members.

Despite the darkness, there is an opportunity here for progressive Afghans to strengthen their unity and to engage in constructive dialogue with moderate citizens.

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<sup>69</sup> Sabatier. Op. cit.



## CHAPTER III

### **The Marriage Contract: Process and Recommendations for its Implementation**

*By Anastasiya Hozyainova<sup>70</sup>*

The 1977 Afghan Civil Code regulates marriage, outlines spousal responsibilities, and provides for formal registration of marriage through a contract called *nikahnama*. Marriage can be registered in family courts or, if unavailable, in civil courts. The marriage contract outlines rights and responsibilities for both parties and has provisions for dissolution of the marriage. While registration of marriages has never been a wide-spread practice in Afghanistan, the informal marriage contract is ubiquitous and is part of a process that begins with engagement and ends with the *nikah* (marriage ceremony). For the most part, registration of marriage takes place only when there is a need to prove the relationship, such as if the couple plans to travel outside the country. However, there are other documents that can be used as proof of marriage for travel or for dispute resolution.

A number of factors hinder marriage registration. Not only is the process overly complicated, but there is also an absence of a cultural practice to register personal status, marriage included. In spite of all that, marriage registration could be used as a tool to protect women's rights and promote consensual marriage. Before this can happen, however, some fundamental issues need to be addressed: an agreement is needed on how to simplify the process and ensure easy access to registration facilities; and awareness-raising campaigns must be conducted to promote the benefits of marriage registration, especially for women. Within these policy efforts to achieve a cultural shift, the message must be transmitted that marriage registration is beneficial and that the well-being of a woman in marriage is as important as the well-being of a man.

#### **Marriage Contracts in Afghanistan**

The 1977 Afghan Civil Code is the most recent comprehensive code regulating marriage. Article 60 of the Civil Code defines marriage as a contract legalizing intercourse between man and woman with the objective to establish a family.<sup>71</sup> It also outlines spousal responsibilities; outlaws child marriage

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<sup>70</sup> The author would like to acknowledge contributions of Mandana Hendessi and Ahmad Shaheer Anil of Afghan Public Policy Research Organization (APPRO) in conceptualizing this chapter and collecting data.

<sup>71</sup> Civil Code of Afghanistan, 1977.

by setting the minimum age of marriage at 16 years for females and 18 for males; grants both men and women the right to choose their spouse, including granting any woman over the age of majority the right to marry without parental blessing.<sup>72</sup> Article 61 provides for registration of marriage through formalization of a marriage contract in a document called *nikahnama*, at the appropriate offices.

*Nikahnama* is a marriage contract that outlines provisions of alimonies, *mahr*, divorce and many other responsibilities of spouses, such as limitations on the number of wives the husband can marry or the wife's ability to work or study after marriage. In Afghanistan, the term *nikahnama* is used in both formal and informal senses. For the purposes of this chapter, *nikahnama* refers to the formal marriage contract only, whereas any references to other arrangements will identify the level of formality.

Formally, *nikahnama* is a document issued by the court following the registration of marriage. It outlines and formalizes all terms and conditions of marriage as negotiated by the families, as it is rare for the couple themselves to negotiate terms of their own marriage. Formal *nikahnama* can be used in courts to settle disputes and serves as proof of marriage.<sup>73</sup>

Informally, *nikahnama* refers to an agreement reached between a bride's and groom's family after lengthy negotiations concerning the conditions of marriage, rights of the wife, and any penalty in case of mistreatment or divorce. If there is a literate member of the family, this agreement is put in writing. If not, these agreements largely remain verbal and are concluded in the presence of male relatives of both parties. The groom could be present at these negotiations, but is rarely involved in the discussion of the terms and conditions, whereas the bride is always absent and is represented by her father and other male relatives.<sup>74</sup> But the informal marriage contract is not recognized by the courts and cannot be used to resolve disputes in the formal justice system.<sup>75</sup>

The Afghan Civil Code outlines conditions for the recognition of marriage. The ceremony of *nikah* (offer and consent by the parties or their guardians) is conducted between a man 18 years or older and a woman 16 years or older in the presence of two witnesses<sup>76</sup>—provided there are no permanent or temporary marriage prohibitions for either of the parties. For 15-year old girls, consent of their legal guardian is required.<sup>77</sup> The court may marry couples who are “of the Book,” in other words, Muslim, Jewish or Christian, but the ceremony must follow Islamic rules. A Muslim man can marry any woman of the Book,<sup>78</sup> but if the woman practices a different religion she must convert to Islam before the marriage.<sup>79</sup> A non-Muslim man cannot marry a Muslim woman unless he first converts to Islam.<sup>80</sup> After

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72 Ibid.

73 Interview with a civil servant in the Ministry of Justice (MoJ), Kabul, July 29, 2010.

74 Confirmed in interviews with a MoJ civil servant, a family court official and a group of Afghan men about marriage negotiations in Afghanistan, Kabul, July 28, 29 and August 2, 2010.

75 An interview with a family court official, Kabul, August 2, 2010.

76 Civil Code of Afghanistan, 1977, Article 70.

77 Ibid., Article 71.

78 Ibid., Article 92.

79 Ibid., Article 85.

80 Ibid., Article 92.

the couple's eligibility is confirmed and the marriage contract is signed, the court official performs the religious *nikah* ceremony (which may be omitted if the couple is either Jewish or Christian). The court usually takes a week to process and issue the document of *nikahnama* to the couple.<sup>81</sup> There appears to be no provision in the Afghan Civil Code for the registration of couples who have had *nikah* performed by a *mullah* outside the family court system.

### Role of *Nikahnama* in Afghanistan

Marriage registration, as evidenced by *nikahnama*, promotes the idea of consensual marriage through the ceremony of offer and consent. Since 2007, the idea of mutual consent is also central to the updated marriage contract. It could be used as a mechanism to counteract under-age marriage, forced marriage, and the practice of *bad*.<sup>82,83</sup>

The contract also offers a degree of protection for women while they are married, or in the case of their husband's death, divorce or separation. But the prenuptial negotiations conducted by families are rarely written, and when they are these papers are not recognized by the court. Also, due to the nature of the engagement negotiations, women are not always able to access nor request that the community elders bear witness to their rights. As a result, it is hard for a woman to claim her right to alimony and *mahr* in the case of divorce; in the case of the death of her husband, she has no legal recourse to collect her inheritance. Women are usually vulnerable to abuse in the absence of a formal marriage registration.<sup>84</sup>

Marriage registration is not a new phenomenon in Afghanistan. It was introduced along with codification of marriage, a process that began in the early 20<sup>th</sup> century.<sup>85</sup> In spite of that, the number of official registrations has been consistently low. "Only recently since women's rights groups started to push for mandatory registration of marriages the numbers started to increase."<sup>86</sup>

### Alternatives to *Nikahnama* for Proof of Marriage

*Nikahnama* is not the only legal means to provide proof of a relationship. There are a number of documents that a couple can obtain for travel or to resolve disputes. These include:

- *Pilgrimage Nikahnama*, obtained solely for a couple to travel for *hajj*<sup>87</sup>.
- *Mahramyat Khat*, obtained to indicate that a woman is traveling with her husband as her chaperone.

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81 An interview with a family court official, Kabul, August 2, 2010.

82 An employee of the Women's Rights Unit in the Afghanistan Independent Human Rights Commission (AIHRC), Kabul, July 27, 2010.

83 *Bad* is a tribal practice in some regions in Afghanistan in which a female, usually a young girl, is given as compensation to another family or tribe to reconcile a dispute or for bad behaviour committed by the girl's family or tribe.

84 Interviews in Kabul with an AIHRC employee of the Women's Rights Unit, July 27, 2010, and a family court official, August 2, 2010.

85 An interview with the Legal Advisor to the Department of Appeals in Kabul, August 2, 2010.

86 Ibid.

87 Annual pilgrimage to Mecca, Saudi Arabia.

- *Nikahnama*, obtained as proof that a couple is indeed married and had a marriage ceremony in the presence of both families.
- *Zoujat Khat* (spousal letter), obtained to certify that a couple is married and that any offspring are legal children; could be obtained after the couple has their first child.
- *Worasat Khat* (inheritance letter), describes a woman's entitlement to inheritance after her husband's death.
- *Talaq Khat* (divorce letter), proves that a woman has been divorced from her husband.
- *Islah Khat* (reformation letter), could be obtained as proof that a husband has promised to stop mistreating his wife.
- Solitary Letter, used when youths travel outside the country to prove that they are single and eligible for insurance or other benefits.
- *Zoryat Khat* (power/ability to manage letter), issued as proof that one can manage property, including land; used to establish rightful ownership of the property obtained by means of marriage or purchase; and could be used to solve disputes over property after divorce or separation.

### Obtaining a *Nikahnama*

Currently, marriage may be registered in a family court or, if unavailable, in civil courts. In early 2008, the Supreme Court granted the power to register marriages to provincial court directorates. District is the lowest level where courts are present, although this is not true in all districts as only large and medium-sized districts will have a court.<sup>88</sup> It is unclear how many of the courts are aware of the law and able to register marriages. Directives are not always implemented and judges function as a safeguard for established cultural practices rather than codified laws.<sup>89</sup> In most cases, given the fact that the judicial system is slow and overloaded, not all courts have the capacity to register marriages. As a result, the system remains largely inaccessible.

Typically, a couple will apply for a *nikahnama* when they have been blessed by a *mullah* and already had their wedding celebration. This is a departure from the legal guidance of the Afghan Civil Code. Application procedures have been developed on the assumption that married couples will have to register their marriage, and in the hope that the campaign for marriage registration will increase the number of marriages performed by courts.

To obtain a *nikahnama*, the couple must petition the family court in the capital city of their province. The petition should include the names of both parties. For couples who are not literate, self-employed clerks sitting outside the government offices can write the petition for a fee—20 to 50 Afis (US\$0.30 to US\$1). The court then refers the petition to the municipality, and the municipality refers the petition to either the district office or directly to the *wakil-e gozar* (head of the local community) to verify that this

<sup>88</sup> Exact number of civil and family courts is not available.

<sup>89</sup> Interview with a lawyer, member of Afghanistan Independent Bar Association, Kabul, July 25, 2010.

couple indeed resides in that area. The *wakil-e gozar* writes a letter confirming identity, age and family history of both the bride and groom and sends it back through the same chain to the court. The family court then issues the marriage certificate with the names of both bride and groom and two witnesses and grants it to the couple.<sup>90</sup>

In Kabul, this process is altered by delegating the intermediate work of accepting the petitions and issuing the certificates to the district courts to facilitate access to the process. The district court sends the verified petition with the issued marriage certificate to the family court, which signs and stamps the certificate and grants it to each spouse. Due to the density of the population, Kabul has family court offices in 14 out of 19 city districts to ensure easy access to the court. This has not been replicated in the rest of Afghanistan.<sup>91</sup>

### **Barriers to the Registration of Marriage**

Articles 46 through 50 of the Afghan Civil Code mandate civil status registration of all people over 18 in special registration books, where residency address, marriage, births, divorce and death are noted. Nevertheless, such registrations happen rarely, if at all. Family matters in Afghanistan are almost exclusively seen as private domain and thus outside the state's reach.<sup>92</sup> As a result, the need to protect women's rights in marriage is a foreign idea: protection of women is usually seen as a matter of family pride and must be dealt with between the families in private.<sup>93</sup> Additionally, Afghans see the state at best as a neutral agency, and at worst as an invading entity that has no place in the highly intimate affairs of marriage. In this context, numerous barriers create an environment in which a campaign for enforcement of mandatory registration of marriages is doomed to fail. First, there is the lack of incentives to register marriage. Second, state institutions reach at best only half of the population in Afghanistan. Third, the registration process is lengthy and costly. Fourth, there is a lack of awareness about the fact that registration of marriages is available in Afghanistan. Fifth, there is no consensus on how to reform the system.

#### **1. Lack of incentives for the registration of marriage**

There are only two incentives to register marriages in Afghanistan. First, to obtain proof of a relationship for the purposes of travel: agreeing on a marriage contract is part of any engagement negotiations; however, the real need to register marriages comes when the couple travels outside Afghanistan and requires proof of their marriage. However, as shown above, there are a number of other officially recognized documents that can serve as proof of marriage.

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90 Interviews with court officials in Jalalabad, July 27, 2010 and Herat, August 7, 2010.

91 *Ibid.*, Kabul, August 2, 2010.

92 Hassan, Palwasha. "Women's Empowerment in Post Conflict Afghanistan," in Jennifer Bennet, Ed., *Scratching the Surface: Democracy, Traditions, Gender*. Lahore: Heinrich Boll Foundation, 2007. Accessed July 13, 2010 at: [www.boell.de/downloads/worldwide/Scratching\\_surface\\_section1\\_womens\\_empowerment\\_Hassan\\_2007.pdf](http://www.boell.de/downloads/worldwide/Scratching_surface_section1_womens_empowerment_Hassan_2007.pdf)

93 Human Rights Watch. *We Have the Promises of the World*. December 6, 2009.

The second incentive is to legalize the relationship if the couple is fleeing disapproval of their families or an arranged marriage. However, even registration can fail to protect the couple. Marriage in Afghanistan is a strictly codified cultural process. Traditionally, engagement is considered to be as binding as marriage itself, despite the fact that Article 64 of the Afghan Civil Code specifically stipulates that a promise to get married is not itself a marriage. If an engagement is broken, the woman is usually considered to be a divorcee. Similarly, if a woman flees an arranged marriage before the wedding and elopes with a man other than her fiancé, both are usually charged with adultery when discovered.<sup>94</sup>

In other countries, registration of civil status with government authorities offers both benefits and penalties for non-compliance. In Iran, for example, a couple who have no marriage certificate could be charged with *zená* (extramarital sex) and prosecuted. Children born out of unregistered marriages are denied Iranian citizenship and as a result do not have access to schooling, health care and other social services. In many Central Asian countries and in Egypt, marriage offers tax breaks for couples, childcare support, help with adoption for childless couples, and pensions for the elderly. However, all of these countries have a well-established bureaucracy that offers significant benefits to having formal legal status. They are also capable of enforcing registration requirements by threatening to deny social benefits to those who lack appropriate registration.

The government of Afghanistan does not have the capacity to offer any of these benefits.<sup>95</sup> Schooling still remains inaccessible to half of all Afghan children, especially those in remote areas. Health care is free for all Afghan citizens; however, a significant number of Afghans—20% to 40% of the population—still live more than six hours away from the nearest health clinic. National identification or proof of citizenship is not required to access services. Pensions are provided to civil servants, the disabled and widows, but again are only available where there are government offices.

## 2. The state is largely inaccessible to regular Afghans

The majority of official institutions remain largely remote for the majority of Afghans. In the last available assessment (2005), only 12 out of 34 provinces<sup>96</sup> in Afghanistan—approximately 27% of the population—had to travel less than an hour to reach a government office.<sup>97</sup> The situation has improved somewhat, but only for those provinces that already enjoy relatively good access: Kabul, Balkh, Herat and Nangarhar.<sup>98</sup> This is a significant challenge, given that some 80% of the Afghan population is located in rural and hard to access areas.<sup>99</sup> Even the district courts are too removed from the village level, and it remains unrealistic to expect a couple from a remote village to travel to the district to register their marriage.

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94 Afghan Independent Human Rights Commission. Report on the Situation of Economic and Social Rights in Afghanistan. Kabul: AIHRC, 2008 and 2009.

95 Ibid.

96 27 – 45% of people have access to governmental services in Paktya, Nangarhar, Kunduz, Lagman, Baglan, Takhar; 46 to 73% of people have access to governmental services in Jawjan, Khost, Logar and Parwan, and 74 to 100% of people have access to services in Kapisa and Kabul.

97 Swiss Cooperation Office and United Nations Population Fund. *Afghanistan: A socio-economic and demographic profile*, 2005.

98 Central Statistics Organization. *National Risk and Vulnerability Assessment*, 2007.

99 Ibid.

This remoteness of the government from the people of Afghanistan is also seen in other registration processes, such as registration of births, adoption and deaths. The registration of births remains low. UNICEF is funding a project to register each newborn delivered in hospitals; however, this currently represents only 2% of all births.<sup>100</sup> Despite the fact that adoption is not an uncommon phenomenon in Afghanistan, there is no legal mechanism for formal adoption and the state actively forbids it. Neither is there a mechanism to register deaths. This can be an issue in cases when there is a need to register a formal claim for inheritance or in cases when a widow requires proof that she is indeed a widow, especially if it is a declaration of death in absentia.

Another consequence of the inadequate reach of the state is the lack of identity cards. If a couple decides to register their marriage, they have to provide a copy of their *taskira*.<sup>101</sup> This is a challenge, because despite the fact that it is mandatory for each adult to have a national identification card, only about 70% of the Afghan population possesses a *taskira*.<sup>102</sup> In this case, the couple first has to ensure that both spouses have a *taskira*, or they have to add an additional step to the process whereby village elders first confirm the applicant's identity and then confirm that this person is indeed engaged or married as indicated in the application.<sup>103</sup>

### 3. Complicated registration process

Lengthy registration processes and ample opportunities for officials to ask for bribes serve as further barriers to the registration of marriage. Depending on the province and district, the couple is obliged to go to as many as six offices to collect all the required documents.<sup>104</sup> These documents must be verified by the *wakil-e gozar*. The official fee for a marriage certificate is 500Afs (approximately US\$10).<sup>105</sup> However, each of these offices will ask for an informal fee or present. According to one of the officers promoting marriage registration, "It is not an easy process. When a person comes to register their marriage, the officials say: oh you got married recently, congratulations; will you bring me some sweets to celebrate your marriage?"<sup>106</sup> It is customary for a newlywed to bring some sweets to their friends and colleagues to share the celebration. So it is not an open request for bribe, but nonetheless it is a suggestion that one should give a small present to the official. For a poor person, the fee of 500Afs might constitute wages for anywhere between three days to a full week. This, combined with the high cost of marriage, inaccessibility of institutions, and all the small presents required to obtain the documents, ensures that the marriage registration process represents a significant extra expense.

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100 AIHRC. Op. cit.

101 *Taskiras* are national identification cards and are required to conduct any business with the government, including the purchase or sale of immovable property, the preparation of official documents (including passports), admission into school and access to social services.

102 Immigration and Refugee Board of Canada. Afghanistan: Issuance of taskera (tazkira) inside or outside of Afghanistan; information contained in the document during the Taliban and post-Taliban period, Ottawa: IRB, December 18, 2007, AFG102680.E, accessed September 14, 2010 at: <http://www.unhcr.org/refworld/docid/47d6543dc.html>

103 An interview with a court official, Jalalabad, July 27, 2010.

104 An interview with a civil society representative, May 10, 2010.

105 An interview with a court official, Jalalabad. Op. cit.

106 An interview with a civil society representative. Op. cit.

#### 4. Lack of awareness of the law

Most people, including officials, are either unaware of the existence of the formal marriage registration or do not see a value in it. A local trainer, who promotes marriage registration, says that the majority of *mullahs* and representatives of civil society organizations do not know that marriage registration is available in Afghanistan, although they tend to recognize its need once they learn about the protection it can offer women.<sup>107</sup> However, upon learning about the procedures involved, they all express concern about the feasibility of the process.

Another issue is that the Government of Afghanistan has invested very little in the civil education of its citizens. Of course, war and instability are key factors preventing civil education. But, even ten years after the new government has come into power, it is still difficult to obtain copies of the law. Moreover, it is not uncommon for officials to demand an explanation for the request. Although there are a number of legal awareness projects, including legal libraries maintained via USAID funding, they remain too small or too remote to provide enough information to raise public awareness about basic provisions in the Afghan Civil Code.

#### 5. Lack of consensus on how to reform the system

Another key challenge comes in the form of a thorny debate about how Afghanistan should carry out and enforce registration. The debate could be roughly divided into two sides. One side is represented by religious leaders, and another is represented by civil society, women's organizations, the Supreme Court and the MoJ. Both religious and civil society leaders support the idea of marriage registration as this is in line with the requirements of *Shari'a* and helps ensure that both parties enter marriage with the full understanding of their obligations. Both sides also agree that the process has to be simplified. But neither believes that the other should be responsible for the registration process, nor do they agree on what shape this process should take.

Religious leaders argue that because Afghanistan is an Islamic state, all registrations should go through a *mullah*. All key registration functions are strictly codified in informal customary law and are already enforced by *mullahs* and community leaders. A *mullah* must bless all Muslim marriages in Afghanistan in order for the union to be socially acceptable. When a child is seven days old it is brought to a *mullah* for the naming ceremony. The *mullah* is a part of the *shura* that would hear a separation claim from a woman. A *mullah* is also the person who performs last rites and is central in the funeral ceremony. *Mullahs* are present in each village in Afghanistan, no matter how small. Thus the religious leaders argue that because the *mullah* is there for all key moments of a person's life, the registration of all civil status must be conducted by a *mullah*, including recording, completing and approving the final document.

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<sup>107</sup> Ibid.

But certain women's rights activists argue that the courts are better placed to conduct registrations and grant marriage status through the *nikah* ceremony. These are the institutions that enforce the rule of law, and most Muslims, such as a court official, can read a *nikah*. Opposition of the *mullahs* to civil status registration comes from the fact that it is the conservative religious leaders who usually justify child marriage and teach women obedience to the wishes of the family, thus facilitating forced and arranged marriages. The typical argument used against *mullahs* is that they have an incentive to falsify the age of girls in order to allow underage marriage. But this argument is moot if the community is educated about Afghan family law and the legal age of marriage. In small communities, where the majority of Afghans live, it will be harder for the community *mullah* to bless illegal unions. In fact, it is much easier to bribe a judge located in a district centre far away to register an illegal union. The MoJ and the Supreme Court also support enforced recording, completing and approving of the *nikahnama* via local courts. Their reasoning has more to do with protection of their own interests than protection of women's rights.

### Possible Ways Forward

When deciding a way forward, all parties must answer two key questions: Which structure is most likely to be accepted and used by the population? What needs to be done in order to ensure that the formal system is beneficial and inviting to the process of registration?

In this context, the process of marriage registration must go hand-in-hand with other types of civil status registration, the rule of law, and an awareness-raising campaign that educates officials about their obligations to citizens as well as Afghans about their rights and obligations to the state.

In 2008, civil society and women's rights groups began a campaign to reform the marriage registration process and ensure its enforcement. A number of propositions were developed to enforce marriage registrations, such as outlawing unregistered marriages, making the marriage contract a condition for employment and including civil status in the Afghan national identification. All these efforts will remain hollow if the state does not develop its capacity to enforce the law.

There is a need to change attitudes towards marriage and divorce in order to move them from the private to the public domain. Despite the fact that domestic violence is rampant in Afghanistan, the divorce rate remains low because divorce is considered to be a taboo subject. The issue of divorce is usually framed as a feminist attack on the institution of family, as opposed to a way to protect women from abusive behaviour in marriage. This claim of private domain allows *mullahs* and judges to refuse to process and register a divorce or separation,<sup>108</sup> which then denies women the right to remarry. AIHRC registers cases of women who are persecuted for *zená* after their husbands divorce them without registering the divorce. A few years later, he can change his mind, demand his ex-wife's return and file a complaint that his wife is an adulteress. In other cases, women, despite maltreatment, are not able to process their claims for separation.<sup>109</sup>

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108 Moballeggh. Op. cit.

109 AIHRC. Op. cit.

Registering marriage is an important step in securing the rights of women in marriage and protecting her rights in case of divorce or death of the husband. However, the process is currently so complicated and inaccessible that it remains unlikely that registration can be enforced. The system needs to be simplified so that every couple can have access to registration. The state needs to provide incentives for couples to register; incentives that are usually employed elsewhere are not available due to limited services provided by the state. In this environment, the Government of Afghanistan has two options: either to use already existing mechanisms, such as authorizing *mullahs* to formalize civil status, including registration of births, marriages, divorces or separations, and deaths, or to develop a comprehensive and accessible system of civil courts that are able to register all changes in civil status, with an adequate system of incentives for registration.



## CHAPTER IV

### **Words to Inaction: The Disconnect between Theory and Practice**

*By Heidi Kingstone*

A young girl in Afghanistan was sold twice, once for US\$2,000 and again for US\$5,000. The case came before a judge. He ruled that the man who bought the girl for US\$5,000 was her husband and so the girl should stay with him. In other countries and in other contexts, this would clearly be seen as slavery. These kinds of human rights abuses make it difficult to see through the existing fog of despair to a better future.

However, other stories bring some hope for women, such as this one about a widow with four young children. In Afghan tradition, the brother-in-law often marries his late brother's wife. One particular woman, however, married another man and wanted to claim her children's inheritance from her in-laws, but they refused to give it to her because she had not married their other son. She took her case to the courts. The judge explained that under both Islamic law and civil law she was entitled to receive her husband's property. Persevering through three court sessions, she won her case and her in-laws gave her the property she was owed.

As these two stories show, rights, and the understanding of these rights, for women in Afghanistan are a complex and shifting concern.

With 2010 coming to a close and the security situation continuing its steady decline, the political situation in Afghanistan is even more complex. The presence of the Taliban is felt more keenly with the government's strategy of reconciliation and reintegration firmly on the political agenda. Despite various attempts over the past nine years by the international community, there are few hopeful signs for improving the lives of women. Nonetheless, efforts continue on the part of Afghan groups to bring laws related to women, such as the SPSL, EAW and the SFL in line with the Afghan Constitution and the international treaties ratified by Afghanistan.

But overall, the mood in the country remains gloomy, especially when it comes to the implementation of laws and the development of a more equitable legal framework. This is reflected in the extensive discussions conducted for this chapter with a range of international experts and Afghan stakeholders—Afghan men and women—about the situation and the likelihood of positive change. The 12 interviews

reveal the social stigmas attached to women seeking access to justice, the lack of awareness of existing laws, and the resistance to implement laws in this traditional society that lacks a proper judicial infrastructure. There is still an alarming, though not surprising, disconnect between what exists on paper and what happens on the ground. Despite the principle of equality enshrined in the Afghan Constitution, there is little will, political or otherwise, to implement laws that protect women's rights. Implementation is also made increasingly difficult as the government only operates in a limited number of Afghanistan's 34 provinces, as much of the country remains unstable.

One reason women are not afforded adequate legal protection is that their status remains much lower than men. It is often dangerous for a woman to approach the justice system independently. The conservative framework of traditional Afghan society makes taking the problem outside the home shameful, often leaving the victim open to further victimization. Not only are women regarded as the property of their husbands and fathers, they are also considered the guardians of family honour and chastity.

The presence of a woman in the office of a male lawyer or a judge could make her vulnerable to accusations of adultery, even in cases of rape. *Zená*, regardless of circumstance, is a crime. Women who use the legal system are caught on two fronts: they are seen as supporting the unpopular and corrupt government, and challenging the status quo. Illiteracy, social stigma, a corrupt justice system, conservative *mullahs* and tribal elders all add to the virtually insurmountable barriers to change. In rural areas, the decisions of the *jirgas* and *shuras*, structures that traditionally resolve family and social conflicts, are dictated by customary practices.

The problem is further exacerbated by the contradiction between formal and informal systems. "You can't have both," says Humaira Rasuli, Country Director of Medica Mondiale Afghanistan, a German NGO. "We need to choose one system. The men on the *jirga* are fundamentalists and know nothing about the law or about *Shari'a*. They simply decide what they want to decide."

Accessing the legal system can also be expensive. The costs involved prohibit most people from going to court. Someone must be hired to write the defense, and the plaintiffs must leave their village to go to the district office, which may involve renting a car and losing valuable working days. "If you don't pay the judge, you are definitely going to lose," says Haroun Mir, a leading Kabul-based Afghan analyst.

Not wanting to jeopardize their own or their family's status, women have learned to manoeuvre around the patriarchal system. But they are not only victims of a patriarchal, misogynistic and brutal system; they are also part of it. To add to the complexity, a woman's circumstance also depends on class, ethnicity, what part of the country she lives in, and whether she is urban or rural, educated or uneducated, conservative or liberal.

As most Afghan women cannot read or write, they are unaware of their rights; and their capacity to access legal information is low. Moreover, they suffer enormous social stigmas when accessing the formal justice system. A woman suffering from extreme domestic abuse described her feelings as she

struggled with the idea of approaching the formal justice system, thinking of her dead mother and her tribe: “I knew how upset she would be because of the shame it would bring to have a daughter who divorced her husband. So I stayed.” This case illustrates the impossible predicament in which many women find themselves due to a conservative culture, ancient traditions, and the inability of the population to access justice.

We need good laws, but it is only a very small percentage of what needs to be done. “It is not straightforward,” says Sogol Zand, a senior analyst with the Afghan Research and Evaluation Unit (AREU) in Kabul. “Here is an example of the complexity. A woman went to court to claim the land that was given to her by her father. In Islam, women are entitled to inherit land from their fathers and they can legally claim it after their father’s death. The court granted her claim, but she was ostracized by the entire community.”

There was a woman who thought it was simply her fate to be beaten by her husband, which he did on a regular basis. He told her that it was his right, and she knew no better. She kept quiet because her in-laws threatened to kill her if she complained. One day a relative, who had links to an Afghan NGO, told her that she had rights, and offered to take her to the mediation centre, which could assist her as a legal client and because of her poor psychological health.

When she first came, said the social worker, she could not stop crying, she was so depressed. The counsellor mediated between the woman and her husband, explaining that women possess rights under civil law and under Islamic law. Her husband responded to the counsellor: “I am a man and I can do anything I want and no one can stop me. It is my right to beat my wife.”

The social worker contacted the lawyer who explained to the woman that her husband would never stop abusing her and that under the law it was her right to ask for a divorce. Her family did not want to accept her back, disappointed that she had asked for a divorce and worried about the shame it would bring on the honour of the family. The social worker mediated again between the woman and her parents, who eventually agreed to have her and her two young children live with them. Eight months later, her divorce was granted.

For another woman, living in a shelter, the bribes given to the lawyers and prosecutors at the court proved more powerful than the law itself. Seeking divorce, her husband refused to return her dowry—20 acres of land that is rightfully hers. She was also dissuaded by the judge who told her she would lose her children. After the age of seven for a boy and nine for a girl, the father automatically is given custody. Going to a women’s shelter is a short-term solution. In any case, once a woman leaves there is nowhere to go except back to her husband.

“Other women, particularly in rural areas, resort to suicide,” said the director of the shelter who wishes to remain anonymous. “If they knew a way out, they would take it.” According to a report by the

Institute for War and Peace Reporting (IWPR), the number of suicides committed by women grew 50% in 2009 in the province of Herat alone.<sup>110</sup>

Many women believe that the miserable state of their lives is their fate and god's will, so they repress their feelings. "Women see themselves as victims and in no position to express their needs," says Rasuli. "They are not empowered and receive no support from their families and they are not protected by the law, which is like a tiger without teeth. Men replicate the cycle of violence that they grew up with in their own homes, so see nothing wrong with their behaviour. And women learn not to feel."

"If you go to my village, which is only 40km from Kabul," says Haroun Mir, "women accept whatever is imposed on them. It is all that they know. The rights women have in the West are something unimaginable for these women. It is like asking people who have never tasted fruit to imagine how sweet it is." For women with little experience outside the home, it is difficult for them to comprehend what their rights are even when they are explained by a lawyer. "The women understand that what they are going through is terrible, but they have no way to resolve the problems," says the director of a shelter. Moreover, the issue of gender is not a top priority for women when poverty, access to public services, insecurity, and unemployment rank even higher.

Some positive and significant changes have occurred despite the gloom. "Those changes have been tremendous," says Mir. "Look at the role women play in the media, or in NGOs, where they have important positions. In many cases, they are the breadwinner earning US\$200 or US\$300 or even US\$500 a month, which gives them great respect in their families." Even in these cases, however, sometimes women are used by their families and the money is taken away from them.

The legal reforms and laws drafted to protect women's rights in the post-Taliban era are seen as being imposed by the West and thought to be against the cultural traditions of Afghanistan. Many *mullahs* think the reforms are against *Shari'a* law. Lawyers and judges might not actually know what the current laws are or have access to them.

Janan Mosazai, an independent candidate running in the September 2010 parliamentary elections, is more positive than many others and thinks there is much more awareness of family law than in the past. He credits the Afghan media for this and their role in the aftermath of the SPSL backlash of 2009. The law was interpreted by Western media as effectively giving men the right to rape their wives. According to Mosazai, "There were extensive and high volume debates on TV and radio, in the local, national and international media, particularly about the emphasis put on certain parts of the law that discriminated against women." As complex as the law is, the coverage it got made the issue of family law a topic of discussion at the grassroots level, inside and outside Kabul.

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110 Institute for War and Peace Reporting. "Female Suicide on Rise in Herat," ARR Issue 363, June 7, 2010.

By July 2010 in Kabul, over 90 women came forward to the newly-established Violence Against Women (VAW) Unit at the Attorney General's office and said they wanted to prosecute their husbands, in-laws, or other abusers. "This is an incredible step forward," says Tzili Mor, Justice Advisor at the International Development Law Organization (IDLO) in Afghanistan. "The women prosecutors [at the special unit] told us that some of the women who had come forward to complain had heard about the EAW in the media—on TV and radio, including from publicity generated around the formal opening of the VAW Unit in March 2010. Just the title of it excites women. The number of women coming has been going up, the female prosecutor told me, and it is because women have increasingly been hearing about the law."

EAW has been very controversial and its buy-in is still very low. It is a progressive measure that works specifically to address the issue of VAW, which touches many taboos of Afghan society. It uses the terms "duress" and "coercion" but leaves them undefined. The ultra-conservative wing of parliament wanted it amended. According to Torunn Wimpelmann Chaudhary, a PhD student at the School of Oriental and African Studies in London, female activists say, "the international community works with two hands here; one supports women activists, but the other empowers the people in government who don't care about these laws." Women activists know they will have to make difficult choices, and it will be problematic in the long run. The internationals will leave and the women will be increasingly isolated.

"What we need to do in the West is to support them with the means they need to be emancipated—and that boils down to education, education, education, and work opportunities. Raise boys and girls together, make them understand and respect each other," says Fouz Abdel Hadi, a Technical Advisor from CANADEM's Government Support Office (CGSO), who works with the Afghan Moj in the *Taqnin*, the legislative drafting unit. The nature of extended families in Afghanistan makes it difficult for even the young generation to change because they have to obey their elders, and they are not separated from them. "Afghanistan also has a very tough landscape," she says. Women are not highly educated and they cannot find jobs, so they do not have the tools to survive alone or support their families. Rasuli asks what will a woman gain if she leaves her home and family? "Nothing," she replies.

"Even if we have this new 'beautiful' EAW that says the husband can't beat the wife," continues Abdel Hadi, "the woman cannot even leave the house to go to the shelter, and what kind of plan is there to integrate these women into society once they leave?" They cannot stay at the shelter forever. Can they live with the stigma and the shame? Even if they are just girls, and not married, they will be seen as revolutionaries, outsiders who cannot accommodate the difficulties in their families. There are practical issues when it comes to implementing laws. "As a woman and as a Muslim woman originally from Palestine," she continues, "the idea of the wife's obedience is a misinterpretation of the *Qur'an*. We need to integrate the correct interpretation into family law. Islam came with substantive equality, and all the laws will start to be solved when women ask for their inheritance, but you need to have consensus."

"There are some very daring, radical and courageous women who want a higher social status for Afghan women, but they do not form enough of a critical mass to push law reforms forward," thinks Mandana Hendessi, Social Development consultant, formerly Medica Mondiale Afghanistan's head of mission.

She explains:

The conservatives want customary laws and *Shari'a* laws to govern Afghanistan forever. Young people, agents of change, on the other hand, want modernity within an Islamic framework. The conflict has to be resolved at some point. The question is who holds the power? Any law reform will only succeed if it has sufficient supporters amongst the population who believe in it and can carry it through. The family law is no exception. We are supporting the voice of change, but what happens when we are not here? This is a question many Afghans ask me. They have this fear of abandonment because they know how fragile the voice for change is in Afghanistan.

“The people I work with don’t even mention the new laws,” says Abdel Hadi, “not because they don’t know or don’t care. They are lawyers; but they don’t think any change in the law will provide much difference to their family life, and I agree. There is a difference between the provisions of the law and what exists in reality. “

According to a director of an international non-governmental organization in Afghanistan:

In terms of enforcement, you can’t make people enforce what they don’t really believe in. A lot of women, as well as many men, remain very conservative. After all it’s a conservative world and it is how many men and women were raised. The fact alone that one is born a woman, without regard to cultural experience, life experience, opportunities for seeing and experiencing different ways of thinking, hardly makes one a feminist or advocate for same equal rights—not in the UK, not in the US and not in Afghanistan.

“If the laws can’t be implemented, there will be continued violence against women,” says Rasuli. “Judges misinterpret and misuse the articles of civil law because they are too vague. The current buzzword to promote real change is to empower the ‘grassroots’ organizations, but women are hardly empowered enough either to seek justice from the courts or to unite and demand their rights (when they even know what they are). “

Janan Mosazai believes people have to fight for their rights. “No one is going to give them to you on a silver platter,” he says. “Other Muslim countries like Algeria, Indonesia, and Malaysia have wonderful family laws in accordance with the *Qur’an* and *Shari’a*. Will it be difficult for women? What is easy in this country? It won’t be easy but it is not impossible.” Mosazai wants to revive the countless historic Afghan female role models, poets, historians and other brave women, the most famous of all Malalai of Maiwand, who implored her brothers on in battle, urging them not to run away but to fight. The men stayed and went on to defeat the British. “There are countless other tales,” he concluded.

The atmosphere in the country does not allow any real freedom of expression, says a young Afghan man:

For us it is tormenting. I don’t want *mullahs* to tell us what to do, but you cannot move against an entire society. I want the *mullahs* to step aside as these religious functionaries have ruined

this country, but I can't say that. We have to wait, and be patient. I think 200 years from now what we are going through now will have some effect on society. People are tired, they want peace. For ten years the government and the foreign forces have been battling the Taliban, playing this cat and mouse game. People remember the Taliban's many atrocities, but they say the government can't protect us and the Taliban are here. They clash and we suffer.

As the discussions shift to "realism", there is a sense that Afghans feel they have the government they deserve. According to Mosazai:

There is a belief that Afghanistan is a traditional society and it will not change, but I spend half my time in my village and if you spend time with people and listen to them they open up to you, and they want change. Perhaps Afghanistan is not a lost cause, but there are no quick fixes. It requires sacrifices, to commit your whole life to the cause, as well as doing things beyond your comfort zone.

Rasuli believes that the international community needs to put pressure on the government to ensure the ratification and implementation of laws that protect women's rights. "In my view the international support for Afghan women seems slower and less sensitive to the growing opposition we face," she says. "The strategy of the international donors has changed to development delivered by the military and away from human rights. Here in Afghanistan, the lives of maybe 50% of women have improved in the cities, but for the rest of our women, nothing has changed."

Regardless, nothing in Afghanistan changes without patience and persistence. Rasuli believes the international community must continue their support, or the Afghans will not be able to continue either. "It's that simple," she says. "As it stands now, the law has not changed the situation for women."

## Conclusion

A laminated poster hangs on the wall in the Kabul shelter. An Afghan man in a light coloured *shalwar kameez* strides in front of his heavily pregnant wife who walks behind him wearing an enveloping blue synthetic burqa burdened down with a small child who she carries in one arm while balancing a large plastic bag full of groceries in the other. The image, and sadly accurate stereotype, aptly depicts the imbalance in society between men and women.

Historically, change has been difficult to bring to Afghanistan and has been met with extreme resistance. Despite years of international involvement and Afghan investment, the situation for women remains deeply distressing. Perhaps an observer will be proved right that change is on the agenda. There are certainly many impressive men and women who long for a brighter future; maybe the glimmers of hope will turn out to be more than faint shards in the darkness. As they say in Afghanistan, drop by drop a river is formed.

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WOMAN'S  
PLACE

# A WOMAN'S PLACE



Droits et Démocratie  
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Centre international des droits de la personne et du développement démocratique  
International Centre for Human Rights and Democratic Development

Rights & Democracy is a non-partisan, independent Canadian institution created by an Act of Parliament in 1988 to promote democratic development and to advocate and defend human rights, as set out in the International Bill of Human Rights. In cooperation with civil society and governments in Canada and abroad, Rights & Democracy initiates and supports programmes to strengthen laws and democratic institutions, principally in developing countries.

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In *A Woman's Place: Perspectives on Afghanistan's Evolving Legal Framework*, readers will explore the contemporary evolution of the legislative processes affecting Afghan families and women.