

# Women and the Rule of Law in Afghanistan

## Afghanistan's Legal System

Prolonged conflict in Afghanistan has greatly eroded the rule of law, and created a vacuum wherein tribal law and other customary forms of law have been reinforced. Particularly during the civil war period of the early 1990s, under the governments administrated by the Mujahedin factions, law and order diminished drastically and citizens enjoyed little protection from the state, such as basic police services or judicial enforcement of laws. Women and girls in particular were vulnerable, as sexual violence was carried out with impunity in this period, often perpetrated by men affiliated to the ruling Mujahedin factions. The dangers that routinely faced women on the streets reduced their mobility and reinforced their isolation, as families started keeping girls and women at home, in fear of rape, abduction, and other forms of violence that were rampant. As the normative legal system could not provide access to justice, many people became more reliant on localized customary laws, such as informal tribal courts.

*the discontinuity of regimes over the last quarter century has left a patchwork of differing and overlapping laws, and an incoherent collection of security structures.*

- US Institute for Peace, Special Report 117 (2004)

## Codified Law in Afghanistan

Shortly after the fall of the Taliban in 2001, a UN-sponsored conference was held in Bonn, Germany to create a general framework for governance and establish an Interim Authority until the Emergency Loya Jirga could convene and select a Transitional Administration. The Bonn Agreement was signed on December 5, 2001 and specified that a Judicial Commission be established to rebuild the domestic justice system. It was to remain in accordance with Islamic principles, the rule of law and Afghan legal traditions.

Afghanistan passed a new Constitution in 2004, following a Constitutional Loya Jirga, which included 64 women among the 500 delegates. Article 22 of the Afghan Constitution bans discrimination on the basis of gender, and was a significant achievement for women's rights advocates in the country. The adoption of a new Constitution marked a new state of transition for the country's legal system. Codified law in Afghanistan today uses various law adopted from its pre-conflict past, such as the 1977 Civil Code and the 1976 Criminal Code, 1965 Criminal Procedure Code, the 1955 Commercial Law; while the Ministry of Justice is also working to update laws. A new Shiite Personal Status

Code was adopted in 2009, and the Sunni version of the same is reportedly in progress. An Environment Law was legislated in 2007. Several laws have been passed to encourage investment in the country, including law to do with minerals, insurance, banking, investment, hydrocarbons, income tax, customs, and labour. Despite this progress, the justice system and law enforcement still suffer from low human resource and physical infrastructure capacity. In addition, the discontinuity of regimes over the last quarter century left a vacuum of law and order, and today there is much work left to be done to create a more coherent legal framework.

## Legislating in Afghanistan

Afghanistan uses a bicameral parliamentary system, including the Wolesi Jirga (lower house) and the Meshrano Jirga (upper house), together known as the National Assembly. The parliament is responsible for passing new legislation; however, the President and the Supreme Court can also pass legislation by decree under extraordinary circumstances (such as during parliamentary recess), per the Constitution, but must ultimately receive parliamentary approval. Both houses pass laws, approve budgets and ratify treaties. On rare occasions, such as to decide on issues of independence or sovereignty, the National Assembly can convene a grand council (Loya Jirga).

The Judicial branch includes a Supreme Court as its highest court, as well as cassation and sharia as its subordinate courts. The Supreme

## The Rule of Law

The Afghanistan Parliamentary Assistance Project (APAP) defines the rule of law as follows in their *Toolkit #3: Legislative Process*:

The rule of law is the principle whereby all citizens of a country, including its president, are bound by the laws which apply to that country. This means accepting, obeying and following all rules and regulations that have been, previously and legitimately approved and publicly disclosed.

Today Afghanistan has a mixed legal system that includes aspects of civil, customary, and Islamic law. Progress has been made restoring the rule of law as institutions such as the police and courts have been strengthened and expanded; however, the formal legal sector is less accessible in rural areas, and corruption, incompetence and inefficiencies remain rife within the evolving legal institutions of the country.



Above: The Supreme Court in Kabul

Court, or Stera Mahkama, consists of the Supreme Court Chief and eight justices organized into criminal, public security, civil, and commercial divisions, or dewans. Judge selection and term of office are determined by a court chief and justices are appointed by the president with the approval of the Wolesi Jirga. The court chief and justices serve single ten-year terms. Subordinate courts include the Appeals Courts, Primary Courts and Special Courts for issues including narcotics, security, property, family, and juveniles. In 2003, the first 50 female judges were appointed. However, there has been little increase in the number of female judges since, and opposition to women in this role remains high among male judiciary.

#### Treaties and International Law

Afghanistan is a party to numerous international agreements in the areas of international humanitarian law, international human rights law, weapons law, refugee law, international criminal law, and terrorism law. Afghanistan's Constitution stipulates that "the State shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights" (Article 7). Nearly 700 laws currently in force need to be revised or reviewed in order to bring them into compliance with the Afghan Constitution and with international treaty laws.

#### Sharia Law

Article 130 of the Afghan Constitution allows judges to substitute Sharia rulings when crimes are not addressed in Afghan criminal law. The population of Afghanistan is approximately 70-80% Sunni Muslim, 20-30% Shia Muslim, and only 1% other. Islamic ideologies influence much of the

legal system, as well as the enforcement of it, through the influence and provisions of Sharia law. There are four jurisprudential schools in Sunni Islam, and Sunnis in Afghanistan subscribe to the Hanafi school, while Shias subscribe to the Jafaria school, one of two Shia schools.

**Sharia law in its simplest form is the moral code and religious law of Islam. In its strictest definition, it is divine law. It provides the structure of living one's life as a devout Muslim, by providing a method of arriving at decisions on how to live through the study of religious text, to determine divine will. Sharia law deals with all aspects of daily life from contracts and crime to social issues, including dress and daily hygiene.**

– Jessica Richardson (2012) Law & Policy

There are two primary sources for Sharia law: the Quran and the Sunnah. Muslims believe the Quran is the unalterable word of God, while the Sunnah consists of *reports* of Muhammad's sayings and actions. It is primarily contained in the Hadith of which there are many compilations, most of which were recorded long after the death of the

#### Zina

*Zina* is a term used in Sharia law to define sexual intercourse outside of marriage, including premarital and extramarital sex, and sex between two unmarried people. Zina is forbidden under Sharia law; however, to prosecute for zina, Sharia says that there must be four respectable witnesses to the act of penetration. Though this requirement should mean that crimes of zina are almost never prosecuted, in reality in many Muslim countries, customary law has often influenced how zina is treated, with the witness requirement ignored. In Afghanistan, customary law has extended the definition of zina to include elopement and running away from home.

There are various categories of Islamic law, covering an expansive scope including rituals, domestic relations, inheritance, contracts, trade and commerce, administrative procedure, taxation and public finance, torts, crime, property, war, relations with non-Muslims, and ethics. As a legal system, Sharia law treats religious and moral transgression different from legal transgressions, and only the obligatory categories can be the subject of legal action. Outside of the Muslim world, some of the best known punishments prescribed by Sharia are amputations, beheading, and stoning to death, however these punishments are generally considered to be drawn from Hadiths, with disputed authenticity, as opposed to the Quran itself. Sharia law is subject to interpretation, of which there is a wide range of opinion and application, ranging from extremist and fundamentalist views to versions of Sharia that seek to embrace a human rights perspective, including a gender equality perspective.

Prophet, and in some cases, many hundreds of years after his death. Hadith are generally classified as either "authentic", "good", or "weak". Sharia law can also be drawn from *fiqh*, or Islamic jurisprudence, and criminal law tends to draw heavily from *fiqh*.

#### Customary Law

The vacuum of governance in Afghanistan through its long period of armed conflict strengthened informal justice based on traditions and customs as interpreted by all-male councils of elders rather than on codified law. Customary law in Afghanistan has often proven to be misogynist in its application, such as in the

#### Did You Know?

On December 10, 1948 (now celebrated as International Human Rights Day), Afghanistan was one of the 47 countries that voted in favour of the adoption of the UDHR.

Afghanistan is a party to the following international law with particular relevance to the protection of the rights of women and girls:

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) signed in 1980 and ratified in 2003, without reservations
- International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified in 1983
- Convention Against Torture (CAT) signed in 1985 and ratified in 1987
- Convention on the Rights of the Child (CRC) signed in 1990 and ratified in 1994
- Geneva Conventions signed in 1949 and ratified in 1956

trading of women and girls as monetary assets in the settlement of disputes, a practice still prevalent, known as *baad*. Frequently, women face human rights violations resulting from verdicts issued by traditional and informal justice systems. Punishments for 'moral crimes' have included cruel, inhuman and degrading acts such as flogging or mutilation, and executions. In areas under Taliban control in both Afghanistan and Pakistan, there have been numerous documented cases of women stoned to death in the name of tribal "justice".

### The Rule of Law Vs. Customary Law

When the International Development Law Organization convened 200 participants to review gender and the criminal justice system in Afghanistan in 2006, among other recommendations they called for legal reform to the criminal code that would:

Explicitly state that Article 130 of the Constitution of Afghanistan, 2004 does not allow arrest for, or criminal conviction or prosecution of, acts not criminalized by a law as defined by Article 94 of the Constitution. This should be reinforced by sanctions for police, prosecutors, and judges who disregard the Constitution in this regard. Also, explicitly state that compensation will be awarded to any individual who is unjustly detained or prosecuted as contemplated by Article 55 of the Constitution (p.5, Technical Workshop: Gender and Criminal Justice in Afghanistan, 15-16 May 2006, Kabul. Recommendations and Summary of Discussion).

In particular, women who flee abusive homes or forced marriages are often arrested for "running away", which is not a crime per Afghan law, though it is routinely treated as such by both the informal and formal justice sectors. The majority of women in Afghan prisons are there for 'moral crimes' that include running away from home, refusing to marry or marrying someone against their family's wishes, or committing adultery. In the province of Herat alone, 76% of 136 women jailed were convicted of adultery or intent to commit adultery.

### The Way Forward

Afghanistan has reasonably progressive laws on paper, and the Ministry of Justice has worked with other branches of government to revise and introduce many new laws since 2003. While there is still much left to do to fully modernize the legal system, the real



*Above: Inside the Afghan Parliament*

challenge lies in seeing the implementation of laws that already exist. This involves training, capacity building, technical assistance, and robust monitoring of those institutions with enforcement responsibilities, namely, the police and the courts. It also demands raising awareness among all citizens, from youth, to men and women, to community leaders and religious figures, in rural and urban areas alike, of the country's codified laws, and the guarantees they provide for the protection of women's rights. The Afghan Government should cease tolerating informal justice practices, especially those that systematically victimize women and girls, and it must bring to justice any person or institution that violates the rights of women in the name of customary or tribal law.

**Almost all girls in juvenile detention in Afghanistan had been arrested for 'moral crimes,' while about half of women in Afghan prisons were arrested on these charges.**

- Human Rights Watch (2012), "I Had to Run Away": Women and Girls Imprisoned for 'Moral Crimes' in Afghanistan"

### Afghan Women Judges Association

In Afghanistan, there remains a sociocultural stigma against girls and women going to the police for help. The police force is mostly male and most have received no training or sensitization in addressing the kinds of crimes women face most often, such as domestic violence. Sexual harassment and assault by police are common, and women are often told to return to their abusive homes. For these reasons, the Afghan Women Judges Association (AWJA) formed as an alliance to provide legal training to female judges, to run legal aid services for women, and promote rights awareness for women and girls. Since forming, AWJA has brought together nearly 60 women in an association, addressed over 900 women's cases in the provinces, trained hundreds of female lawyers, and offered rights awareness to 2,700 girls and boys.