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Assessing Gendered Access to Justice in Afghanistan

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Introduction

The October 2001 international military intervention was accompanied by a clarion call to protect Afghan women's human rights. However, today, the police, the courts and other justice sector officials seldom address women's complaints of violence, including rape and other sexual violence. Women victims and defendants have little recourse to justice and are discriminated against in both the formal and informal justice systems.²

This paper will investigate and reflect on opportunities and challenges to gender-equal access to justice in Afghanistan, and the consequences of unequal access for efforts to promote gender equality. It takes as its basis the notion that legal justice and social justice are intimately linked. Since 2001, the Afghan government, with support from the international community, has made a significant effort to institute legal rights and guarantees; these efforts have included a newly adopted Constitution, with guarantees of gender equality;³ the establishment of the Afghanistan Independent Human Rights Commission (AIHRC); and the ratification of a number of international human rights treaties such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Despite these successes, efforts to promote and protect human rights and provide all Afghan citizens with equal access to a viable and

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² Amnesty International, "Afghanistan: Justice and rule of law key to Afghanistan's future prosperity" 29 June 2007, <http://www.amnesty.org/en/library/asset/ASA11/007/2007/en/5fc0c8c6-d37f-11dd-a329-2f46302a8cc6/asa110072007en.html>. Accessed 30 September 2009.

³ This is worth noting the additional clauses in the constitution which require all articles of the constitution to comply with *sharia* law thus limiting gender equality and basing it on religious interpretation rather than legal jurisprudence.

equitable justice system have met significant challenges. According to Dr. Suraya Sobhrang, the women's rights commissioner at the AIHRC, "While there has been progress, it is not responding to existing needs. Furthermore, the absence of a proper and systematic approach to improving access to justice for all Afghan citizens remains a major problem."⁴

Access to justice is fundamental to social order and an important component of post-conflict reconstruction efforts. According to the United Nations Development Program (UNDP), access to justice constitutes the "ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."⁵ In theory, every person is equal before the law. This implies that the law and the legal system associated with it would allow both women and men to seek and receive redress and remedy when and where appropriate. For access to justice to be meaningful, however, a strong legal framework is not sufficient. Substantive access must also include physical access (i.e. proximity to service, access to transit to reach services, etc); financial access (ability to pay for legal support services required, to bear the cost of travelling to the court, etc); and technical access (including a level of comfort with legal language and procedural requirements, "the treatment of users by the law enforcement personnel", and "their representation by experts in law").⁶ The continued lack of fair, equitable and timely access to a formal justice system has encouraged the use and legitimacy of an informal system in Afghanistan. Because providing access to justice is typically the responsibility of the state, this raises concerns about processes of state building and state fragility, as well as for women's ability to access justice in traditional forums which do not draw from state laws or international human rights obligations in their rulings.

During three decades of violent conflict and civil war, thousands of Afghans were deprived of their most basic human rights. In addition to lacking access to education, employment and healthcare, Afghans had to contend with a climate of impunity, which included kidnappings, forced disappearances, torture, wrongful imprisonment, and executions. Women in Afghanistan—because of their limited access to education, limited social and political participation, and the existence of patriarchal beliefs and attitudes in the state system—were and continue to be particularly vulnerable to human rights abuses, and the challenges of seeking justice in both the formal and informal system. Social norms and structures that exist at the community level inevitably influence the attitude of those who are in positions of power and who draft and implement legislation, often leading to interpretations of the law that

⁴ Interview with Dr. Suraya Sobhrang, Women's Rights Commissioner, Afghan Independent Human Rights Commission, 22 June 2009.

⁵ UNDP, *Programming for Justice: Access for All, A practitioner's guide to a human rights-based approach to access to justice*. New York: UNDP, 2005.
<<http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/tools/index1.html>> Accessed 30 September 2009.

⁶ Governance and Social Development Resource Centre (GSDRC). "The Justice, Law and Order Sector Programme: Study on Gender and Access to Justice," p. 2 <<http://www.gsdrc.org/docs/open/SSAJ85.pdf>> Accessed 30 September 2009.

circumscribe the rights of women. Moreover, women's lack of access to justice blocks development goals more broadly, as gender discrimination, insecurity and impunity also undermine access to education, employment and health services for women.

Since 2001, there have been some noticeable achievements and positive developments as well as continuing challenges and barriers to promoting women's rights in Afghanistan. Some of the early successes included:

1. a new constitution which guarantees equal rights for women (Article 22);
2. the encouragement of women's participation in parliament through the introduction of a quota system;
3. the establishment of a specific Ministry of Women's Affairs;
4. the establishment of the AIHRC, which aims to protect and promote women's rights; and,
5. the approval of the national plan of action on women's affairs (NAPWA).

These achievements have not come easily and have demanded constant and concerted efforts on the part of human rights and women's rights activists. They have enabled women to promote their participation in political and civil affairs. This progress was overshadowed in April 2008 with the controversy around the Shia personal status law, described in detail below which revealed that Afghan women still face serious impediments in realizing their basic rights, despite positive improvements in the early days of the international intervention. The prevalence of patriarchal cultural beliefs, customs and practices; their lack of economic independence; their limited access to education, employment and health care; their absence from positions of power and authority;⁷ and, the ongoing absence of a judicial system which can effectively combat impunity and enforce the law all contribute to Afghan women's vulnerability and marginalization.

Interview data indicate that in Afghanistan, creating a justice infrastructure and accessing the existing system has proven challenging. The lack of trained professionals such as lawyers, judges, administrators, prosecutors, defence lawyers and other legal experts; the absence of physical infrastructure such as court rooms; long delays; patronage; the lack of de facto protection in prisons and detention centers; and a failure to provide preventive, timely, non-discriminatory, and just remedies has led to a loss of public confidence, which has further popularized the informal justice system. Informal and traditional mechanisms of justice in the form of *shuras* and *jirgas* are often more accessible to the general public, including women.

⁷ It is important to note that although 25% of the Parliament is comprised of women, this presence has not necessarily translated into positive change for women. There is neither a coherent women's caucus, nor a unified vision of women's rights. Indeed, many women Parliamentarians are also aligned with conservative *mujahdeen* factions. Moreover, while women may have a presence in the parliament, they are completely absent from other important loci of power and authority in Afghanistan such as among the clergy and within the judicial system as judges.

However, some respondents argued that these structures have been shown to be less effective and more likely to violate international human rights standards aimed at gender equality, non-discriminatory treatment, and respect for the rights of defendants, in part because of a lack of government oversight over their operations.⁸ Many respondents argue that they also undermine efforts to strengthen and legitimize the formal structure being developed under the auspices of a new central government, which is viewed as vital and critical to state building activities and priorities.⁹

This paper will discuss current strengths and weaknesses of the Afghan justice system with a particular focus on women's access to justice and its implications on peacebuilding and reconstruction efforts. Interview data, case studies and statistics will be used to highlight some of the nuances of this important subject. The paper will begin with a brief description of the historical context of access to justice in Afghanistan, in order to situate some of the tensions that exist today. It will then offer an analysis of the major formal and informal institutions and pieces of legislation that shape access to justice. The paper will then analyze the challenges in gender-equal access to justice in both the formal and informal systems. Finally, it will suggest opportunities for moving forward towards more substantive and meaningful access to justice for men and women.

Public Security

A functioning police force is an important component of a strong justice system, and since 2001, the creation of an effective police force has been a priority of international actors. These efforts, which fall under Afghanistan's National Justice Program, comply with the Millennium Development Goals and are consistent with an holistic approach to security system reform. There are clear linkages between security and justice institutions.¹⁰ Yet, most available research on access to justice in Afghanistan does not discuss public security enforcement structures, resulting in a gap of material and information. Due to these challenges and the limitations of this paper, we will not specifically address the police or other security services, but instead

⁸ Views and opinions about the informal system vary among respondents. Government officials and respondents from the AIHRC generally disapprove of the informal system and feel it is a highly problematic, inappropriate and flawed institution which impedes the development of formal justice structures and discriminates along gender lines. Researchers who have looked at both the formal and informal systems suggest that both systems have their problems but given the historic significance of the *shuras*, it would be impossible and indeed inappropriate to eradicate them completely. They advocate for training and oversight to bring these institutions more in line with Afghan and international law. The authors of the 2007 *Afghanistan Human Development Report* view a hybrid system as the best solution for Afghanistan. See Centre for Policy and Human Development, *Bridging Modernity and Tradition, Rule of Law in the Search for Justice: Afghanistan Human Development Report 2007*, Kabul: Centre for Policy and Human Development.

<http://www.undp.org.af/publications/KeyDocuments/nhdr07_complete.pdf> Accessed 30 September 2009.

⁹ For example, interview with Mr. Hayatullah Hayat, Attorney General's Office, Kabul, 10 June 2009.

¹⁰ Outline of a National Justice Program for Afghanistan and options for funding, Draft Discussion paper at the Rome conference.

hope to use this paper as a foundation for future research on that important topic and the links between justice and security in Afghanistan.

Situating our Discussion: An Historical Overview of Efforts to Establish a Justice Sector in Afghanistan

The creation of a formal justice system in Afghanistan can be traced back to the 1800s, when Amir Abdulrahman strove to regulate local judicial officials and codify their practices.¹¹ His efforts were mainly focused on creating a centralized justice system and a unified code of procedure. As the justice sector evolved in Afghanistan, rulers chose to adopt a system resembling the Egyptian model, which was strongly influenced by the French and Ottoman legal systems. In addition, the Hanafi School of Islamic jurisprudence was selected as the basis for judicial decision-making.¹² The adoption of the first Afghan Constitution in 1923 further consolidated these efforts with the creation of civil and criminal codes. The constitution opened the door for the codification of laws in areas covered by *sharia* (Islamic law)—including criminal and civil matters such as murder, criminal responsibility, the principle of legality of crimes and punishments, etc—as well as those pertaining to the order and function of the state that were not directly derived from *sharia*. The codification process significantly limited the discretion of judges to interpret *sharia* or to apply custom in their decisions; additionally, during this period a formal division between state law and customary law was created.¹³ A courts system was established as well and by 1936 there were 106 primary courts, 19 provincial appeals courts, and a supreme court based in Kabul.

The 1964 constitution made further significant changes to the judicial system, such as making the courts independent, unifying the legal and judicial systems and bringing *sharia* and state courts together in one centralized system. The establishment of the Faculties of Islamic Law and of Law and Political Science at Kabul University increased the number of trained professionals in the field so that by the late 1960s, the Afghan legal community consisted of about 1200 professionals including 715 judges, 170 prosecutors, and 100 lawyers.¹⁴

It is worth noting that as the state made efforts to strengthen a central and formal justice system, it faced resistance and opposition by religious groups and local power holders who had enjoyed unlimited power to mediate conflicts within their communities. Decades of war also

¹¹ Barfield, Thomas, Neamat Nojumi, and J. Alexander Their. “The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan” United State Institute of Peace, p. 18.<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/clash_of_two_goods.pdf> Accessed 30 September 2009.

¹² There are four schools of Sunni Islamic Jurisprudence, including the Hanafi school which is the oldest school and is known for its emphasis on reason. Traditionally, the Hanafi school is considered a more liberal school of thought but this has not been the case in Afghanistan where Islamic jurisprudence is often conflated with local tradition and social codes, such as *Pashtunwali*, making for a more conservative manifestation of Hanafi law. Barfield, Nojumi, and Their. Op. cit. p. 18

¹³ Ibid. p. 18

¹⁴ Ibid. p. 19

undermined efforts to strengthen a formal justice system. Armed conflict led to the destruction of state institutions throughout the country, necessitating that justice be exercised by local actors. As Mazurana, Nojumi, and Stites show, over the course of these periods of violent conflict, traditional power holders such as tribal leaders and large landowners were replaced by a new class of younger military commanders who also assumed responsibility for civil administration. Moreover, the weakness of the central authority allowed the new, armed elite the ability to take the law into their own hands with impunity.¹⁵

This trend was further cemented when the *mujahedeen* groups established *sharia*-based court systems within the areas they controlled.

“The social disruptions of the war also produced the rise of new representative institutions such as village *shuras*, assemblies that were designed to represent local communities. At the same time, the power and influence of the Islamic clergy (*ulema*) rose sharply compared to pre-war Afghanistan, particularly when it came to administering religious law (*sharia*) in the absence of central authority. Military commanders also began to play an important role in community life...”¹⁶

With the deteriorating security situation throughout the *mujahedeen* era, there was no choice but to use the informal justice system to mediate community conflicts, both civil and criminal. The arrival of the Taliban further solidified the use of *jirgas* and *shuras* to dispense justice, typically using very narrow interpretations of Islam.

Mapping Access to Justice in post-Taliban Afghanistan

The fall of the Taliban prompted international efforts to build peace in Afghanistan, including rebuilding the state and reconstructing the infrastructure destroyed by three decades of war. As a signatory of the Universal Declaration of Human Rights and other international treaties, the Afghan government has a binding obligation to ensure justice for its citizens. To that end, it has made judicial reform a national priority and an important aspect of its public investment programs in support of a sustainable peace. The Bonn Conference revitalized various initiatives of the 1960s, such as the codification of laws; the introduction of a new constitution; and the ratification of international human rights conventions as well as the integration of fundamental human rights principles and international standards and procedures into the Afghan justice system.¹⁷ Drafting and enforcing new laws and policies has been difficult as the process is often

¹⁵ Dyan Mazurana, Neamat Nojumi, Elizabeth Stites, “Human Security of Rural Afghans 2002-2003,” Feinstein International Famine Center, Tufts University, June 2004.<http://repository.forcedmigration.org/show_metadata.jsp?.pid=fmo:5023> Accessed 30 September 2009.

¹⁶ Barfield, Nojumi, and Their. Op. cit. p. 14

¹⁷ Asia Foundation, “Statebuilding, Security and Social Change in Afghanistan; Reflection on a Survey on Afghan People”, 2008. <asiafoundation.org/publications/pdf/458>, Accessed 30 September 2009.

challenged and interrupted by an ongoing clash between progressive and traditional forces in parliament and other positions of authority. Debate and controversy around the Shia personal status law earlier this year is but one example.

Afghanistan's formal justice system is comprised of an estimated 255 primary (district) courts and 32 Provincial Courts. Kabul is home to the Supreme Court, headed by the Chief Justice, and the High Court of Appeal (*Estinaf*), which hears appeals made against decisions by the Provincial Courts. The Court of Cassation (*Tamiz*) acts as an administrative Court of Appeal within the Supreme Court.¹⁸ Included in the broader statutory justice system are the police, who fall under the jurisdiction of the Ministry of Interior; the Attorney General's office; and the Ministry of Justice, which covers areas such as legislation, prison management, legal aid, and legal medicine.

Beyond this, in the post-Taliban era, new bodies and laws have been established to help broaden access to justice and protect human rights. For instance, as part of its efforts to address human rights including the right to access justice, the Afghan government established the AIHRC in June 2002. It was later guaranteed in the Constitution as a permanent national institution with a mandate to protect, promote and monitor human rights in Afghanistan.¹⁹ The AIHRC has also proved to be a very useful institution for promoting gender equality through its advocacy efforts in both national and international spheres. The Commission has issued reports, is engaged in advocacy and has intervened to protect the rights of several girls and women who brought their cases forward to the Commission. For instance:

*Otifa, a 19-year-old woman in Sari-Pul ran away in early 2007 to get married to a man that her family did not approve of. Despite the marriage certificate, the police imprisoned both on the grounds that Otifa was engaged to another man by her parents. As a result of AIHRC advocacy and intervention from the governor, the problem was solved and the couple was released from prison.*²⁰

*In Faryab province in 2001, Nassima was married at the age of nine to a 70-year-old man. She has been a servant to him since. He is impotent and never touched her. When she turned 16, she demanded a separation. The court rejected her claim saying that her marriage at nine years old was legal. The AIHRC team filed an appeal early in 2007, but the civil court has still not made a decision on her separation.*²¹

¹⁸ Nojumi, Neamat, Dyan Mazurana, and Elizabeth Stites, "Afghanistan's Systems of Justice: Formal, Traditional, and Customary", *Feinstein International Famine Center, Youth and Community Program*, Tufts University: USA, June 2004, p. 8. <www.gmu.edu/departments/crdc/neamat1.pdf>. Accessed 30 September 2009.

¹⁹ Constitution of Afghanistan, 2004, article 58

²⁰ Afghan Independent Human Rights Commission. "Economic and Social Rights Report in Afghanistan-III," December 2008, p36. <http://www.aihrc.org.af/2008_Dec/Ecn_soc/Eng_Eco_Soc_rep.pdf> Accessed 30 September 2009.

²¹ *Ibid.* p 35.

The AIHRC has also stepped in to protect the rights of girls:

A 14 year old girl was sold by her step-father for marriage to an 80 year old man for \$2000. She was then sold on to another man for \$5000. When the man had sexual intercourse with her she went into a coma and was transferred to hospital where police began to investigate the case. After recovery she was transferred to the prosecution office and then to a rehabilitation centre. She remained there for 3½ months with the judge insisting she should marry the man. Only after intervention of AIHRC and the Child Protection Action Network was she finally released from illegal detention.²²

Although it is by no means always successful, the AIHRC represents one form of recourse for women and girls whose rights are not being respected in their interactions with the formal justice system.

A second major step in Afghanistan was the new constitution, approved in 2003. The new constitution sets out new laws and considers Afghanistan's obligations to international human rights norms following the ratification of various UN Conventions. Despite these commitments, the constitution is weakened by Articles 3 and 7, which highlight compliance with *sharia* as superseding all laws, thereby potentially nullifying progress on gender equality and other fronts, should narrow interpretations of *sharia* be used.²³

Following the adoption of the new Afghan constitution, a number of other new laws were introduced. These included the youth/juvenile justice act, which defines a child as any person under the age of 18 and upgrades the minimum age of criminal responsibility from 7 to 12 for both boys and girls.²⁴ Other new legislation passed since 2001 includes a new prison law; a law on human trafficking; a law on the structure and obligations of the judiciary; a law on implementing procedures governing criminal cases in the courts; and laws to regulate lawyers' affairs. It is worth mentioning, however, that the penal code and the civil code remain untouched.

As mentioned above, the Shia personal status law was passed in August 2009, in spite of great controversy. In April 2009, a bill was presented which included highly problematic and discriminatory clauses including the now infamous 'rape' clause that prohibited women from

²² Afghanistan Independent Human Rights Commission/UNICEF, *Justice for Children: The Situation of Children in Conflict with the Law in Afghanistan*, 2008. p 13 <http://www.afghanconflictmonitor.org/AIHRC_Juvenile_Detention.pdf> Accessed 30 September 2009.

²³ Article 3 says no law in the country can contradict the secret value of Islam and traditional beliefs whereas article 7 says no law in Afghanistan can contradict international obligations and commitment made by Afghanistan. See the Constitution of Afghanistan, 2004.

²⁴ This law proved controversial as several MPs argued that the age of a minor should differ for boys and girls according to Islamic law but the President refused to sign this particular law arguing that it was discriminatory.

refusing sex in their marriage. International outcry, intense pressure and condemnation of the law initially resulted in President Hamid Karzai's call for its revision., but after minor changes were made, and despite his assurances that no discriminatory law would be passed in Afghanistan, the President signed an updated—yet still problematic—bill into law in August in the weeks preceding the election. There are also several new draft laws that could have implications on access to justice, especially for women. For instance, a draft law on the elimination of violence against women is set to be reviewed by the Ministry of Justice in the third quarter of 2009, before going before Parliament for adoption. This law was drafted by the Ministry of Women's Affairs, with extensive collaboration with civil society. Additionally,

Promoting women's rights has been on the agenda of the statebuilding plans in Afghanistan since 2001. For instance, gender equality is one of the three pillars of the Afghanistan National Development Strategy. Additionally, in 2003, Afghanistan ratified CEDAW. The National Action Plan for the Women of Afghanistan (NAPWA), a 10-year Government of Afghanistan plan to implement its CEDAW and constitutional commitments to women, is the main resource for gender mainstreaming in Afghanistan's government institutions. The NAPWA is meant to ensure continuity and consistency in government efforts to protect women's citizenship rights through equality and empowerment. Its vision is to build a peaceful and progressive Afghanistan where both women and men enjoy security, equal rights and opportunities in all aspects of life. Sectors targeted in the NAPWA include: Security, Legal Protection and Human Rights, Leadership and Political Participation, Economy, Work and Poverty, and Health and Education.²⁵ The NAPWA was approved by the President on 8 March 2009, International Women's Day. The government has also outlined a National Justice Program, which aims to improve access to justice for both men and women by improving "professionalism, integrity and credibility which will result in accountable and competent institutions that deliver quality services to the people of Afghanistan."²⁶

In spite of new legal provisions and priorities that might support women's access to justice in the formal sphere, however, if and when they seek justice, the majority of Afghans turn to local level mechanisms such as village elders, district governors, clerics and police chiefs for the settlement and resolution of their disputes, according to reports from NGOs operating in Afghanistan. In all cases, the settlements—involving both criminal and civil matters—follow tribal tradition, religious interpretation, or prerogatives of power.²⁷ These processes rely on "customary laws", which are "an amalgamation of historical traditions, local understandings of Islam and *sharia* and the spiritual role of the *Sufi* leaders."²⁸ The primary means of informal or customary dispute resolution is the *shura* or *jirga*, an ad hoc council of village notables and elders, almost always exclusively men, who are gathered to resolve a specific dispute between

²⁵ UNIFEM Afghanistan, "The National Action Plan for the Women of Afghanistan," 2008.

<<http://afghanistan.unifem.org/prog/MOWA/napwa.html>>. Accessed 30 September 2009.

²⁶ Outline of a National Justice Program for Afghanistan; Discussion Paper for Rome Conference

²⁷ Barfield, Nojumi, and Their. Op. cit. p. 2

²⁸ Asia Foundation. Op. cit. p. 51

individuals, families, villages, or tribes. These bodies are most often engaged as mediators, using their knowledge of custom, Islam, and the parties—as well as social and financial pressure—to establish a consensual settlement. Traditionally, the *shura/jirga* does not impose or enforce outcomes. The primary of coercion available to the community are shunning or exiling a party that refuses to comply. The fundamental goal of the process is to restore community harmony, which is generally achieved by arriving at what is perceived by the mediator as an equitable settlement that rectifies a harm done to honour and/or property.²⁹

According to the 2007 Afghanistan Human Development Report,

Afghans surveyed were just as likely to prefer to go to a *jirga* or *shura* for property disputes not involving land [than going to state courts]. For murder cases, more than 80% of respondents stated that they would prefer to go to a state court. Generally, and for serious crimes in particular, respondents preferred bringing their cases to state courts.³⁰

A survey conducted by the Asia Foundation in 2008 shows that Afghans generally trust state courts and are most positive about accessibility, but least positive about the capacity of state courts to resolve cases in a timely fashion. The same preference has also been expressed in a number of interviews; for example, Mr Ashraf Rasouli, advisor to the President's office, as well as Judge Rahima, the head of the family court, both expressed a belief that certain types of disputes and issues including crimes should not be dealt through informal mechanisms.³¹ Their preference, however, is not consistent with many Afghans' experiences; in many places people continue to use the informal system of justice, in part because of a lack of alternatives due to the inaccessibility of the formal justice system.

Unfortunately, robust sex-disaggregated data to help us tease out the nuances of how women and men may differently view and use informal and formal institutions is not available but we hypothesize that because of the discrimination and injustice that the informal justice system can offer women, they are more likely to prefer dealing with the formal system of justice which they may see as more fair and impartial despite the barriers and inappropriate behaviour of some judges. For instance, some judges have refused to hear cases brought forward by women and have chastised them, telling them they should resolve the matter with the assistance of their family.³² These seemingly-contradictory impulses on the part of Afghan women testify to the tensions inherent in the parallel justice systems during this transition period in Afghanistan. Clearly, Afghan women are negotiating a fine balance between accessibility-as-proximity/affordability/legitimacy and accessibility-as-the protection/realization of human

²⁹ Barfield, Nojumi, and Their. Op. cit. p. 7

³⁰ Center for Policy and Human Development. Op. cit. p 74.

³¹ Interviews with Mr. Ashraf Rasouli, Advisor to the President's office and Judge Rahima, head of the Family court, 10 June 2009, Kabul.

³² Interviews conducted in 2008 with a female human rights activist, a female judge and a female NGO director.

rights. Investigating the nature and reasons behind this tension and these preferences along gender lines would be an important and interesting area of inquiry for future research.

Tensions between the Formal and Informal Systems of Justice

In seeking to promote gender-equal access to justice, the relationship between the formal and informal justice systems remains difficult. The formal legal system does not recognize informal structures such as *jirgas* and *shuras* as legitimate forums for addressing judiciary matters, and condemns this customary approach to exercising justice as a harmful practice because of its use of traditional norms rather than state laws.³³ On the ground, realities are different; the failure of the Afghan government and the international community to expedite the establishment of a functioning formal justice system contributes to the growth and legitimacy of the informal mechanisms. This ambiguity in role, function and relationship between the formal and informal justice systems allows for the continued use and strengthened legitimacy of the informal mechanisms. Further, the impact on substantive access to justice and the protection of rights, especially when it comes to vulnerable and disadvantaged sectors of society such as women, children and minorities, are of particular concern. In the absence of a fully functioning formal justice system, women and other vulnerable groups who already have very limited opportunities to access justice are more likely to be victims of gaps that exist. At the same time, reforming the informal system to make it more responsive to the needs of marginalized or vulnerable groups is challenging in a society which is fiercely protective of its culture and traditions.

Afghanistan's terrain and the inability of central authorities to extend their reach outside of the capital has resulted in a dual system of governance in urban and rural parts of the country. Historically, the urban areas of the country have been under the control of formal governments and their institutions. The inhabitants of economically- and geographically-peripheral areas have remained beyond the bounds of state control and therefore have run their own affairs. State control in these regions has often been indirect or even non-existent. This situation gave rise to the emergence and increasing strength of an informal justice system in response to community needs and the absence of an alternative, state-sponsored system. For people who do not have access to the state/formal justice system because of access barriers (such as road conditions, or a long distance that must be travelled to reach the courts, etc), the informal justice system was the only available option to help solve their problems and disputes. Some people also believe that local mediators, who are community-based and acquainted with the parties and the community context, are better suited to deal with local problems.

Challenges: the formal justice system

³³ Constitution of Afghanistan, 2004. Article 54

It has been argued that a weak justice system has undermined important efforts to improve security, combat the narcotics economy, fight poverty and corruption, and encourage private sector development.³⁴ Despite the universal recognition of the importance of a strong justice sector, less than 1% of Afghanistan's development budget is currently allocated to justice sector reform.³⁵ Furthermore, there have been no resources allocated to efforts aimed at understanding how resource allocation responds to men's and women's often different security and justice needs. To complicate matters, efforts at improving the justice system are impeded by very limited coordination among related ministries, stakeholders and initiatives.³⁶

There are many factors that contribute to a weak justice system in Afghanistan including insecurity, corruption, patronage, a lack of resources and infrastructure, and weak capacities. Due to women's and men's different social roles and responsibilities, as well as cultural barriers to women's equality, these factors often affect women in different ways than men. Indeed, women's lack of access to financial resources and education, as well as cultural restrictions around their movements mean that these barriers are often more pronounced for women. Moreover, not only do these obstacles undermine the efficacy of the formal system, but they also likely encourage citizens to use the informal system, potentially exacerbating state fragility, and certainly leading to weaker observance of human rights standards.

a. Insecurity and Corruption

Insecurity is pervasive throughout the country, and is especially problematic in the South and East. Insecurity causes fear among judges and inhibits their impartiality, particularly when they are threatened by parties to the motions and cases they are hearing. A judge in Nangarhar province, for instance, commented that he feared for his physical security. "One day, I made a decision against the interests of a powerful man in the district. When I announced the decision, the man who lost the case asked me, how could I go safely home now? As I am not from this area and have no one to protect me, I was very frightened; I had to change my decision."³⁷

Insecurity also impedes both women's access to the justice system and their ability to work within it. This lack of protection relates to the interdependence between the justice and security sectors. Given the vulnerable situation of women in Afghanistan, lack of security can further victimize women by preventing them from accessing the judicial system. Statistics presented in a report on women's access to justice shows that at least 12.1% of respondents believe that women who seek help from the police will be sexually assaulted.

³⁴ Islamic Republic of Afghanistan and United Nations Development Program, *Access to Justice at District Level – AFG/00047012*, November 2005, p 4 < http://www.undp.org.af/Projects/Justice/AJDL_ProDoc09.pdf > Accessed 30 September 2009.

³⁵ Contrast this with the significant investment in other parts of the justice and security system, notably military reform. See, for example, Sedra, Mark (ed). *Security Sector Reform Monitor Afghanistan, No. 1*. July 2009. Waterloo: Centre for International Governance Innovation.

³⁶ Islamic Republic of Afghanistan and United Nations Development Program. Op. cit. p 4

³⁷ Centre for Policy and Human Development. Op. cit. p 72.

Corruption among Afghan officials in general and in the judiciary in particular is another major issue undermining efforts to build security and improve the rule of law. A survey conducted by Transparency International in 2004 indicates that corruption outranks even security in terms of the biggest challenges for the Government of Afghanistan to tackle in the near future. According to the Corruption Perception Index of Transparency International, Afghanistan ranked 117th out of 159 countries.³⁸ Fifty-one per cent of respondents to an Asia Foundation survey report corruption-related experience in the judiciary/courts.³⁹ Corruption fuels feelings of injustice, and the courts are perceived as the most corrupt institution, followed by the administrative branches of the government. A survey conducted in 2005 by UNDP found that 76% of Afghans perceive corruption to be high in the judiciary.⁴⁰ Corruption in the judiciary not only denies justice to victims but also denies defendants the basic human right to a fair and impartial trial.

Part of the problem is that it is difficult as a justice sector worker to make ends meet in Afghanistan. The majority of judges in the provinces receive a monthly salary of between US \$35 and US \$50. A junior judge in a district court in Nangarhar province said that: "My monthly salary is 3500 Afghanis (around USD \$70), but I am not from this area and therefore commute to my home every day. Half of my salary is spent on bus fares."⁴¹

Women's weak economic position has made them particularly vulnerable to these obstacles. Studies suggest that most of the women who have come in conflict with the law tend to have very limited or no income. For example, a study by the Women and Children Legal Research Foundation (WCLRF) on women's access to justice shows that 70.1% of female defendants had no income at all and 16.5% more had an income of less than 5000 Afghanis (US \$100) per month.⁴² This lack of financial resources makes it difficult for defendants to hire a lawyer to support them through the system of justice. Moreover, women who are better off are also likely to be educated and engaged in social participation, and are often better able to understand laws and legal procedures. Corruption exacerbates the financial challenges faced by women in accessing the justice system. Their lack of personal resources may prevent them from being able to pay the necessary bribes, thereby further disadvantaging them in the formal system. Finally, most female respondents declared that a lack of trust and confidence about the professional integrity of the judicial officers is a major factor stopping women from taking legal action.⁴³

³⁸ Cited in: Centre for Policy and Human Development. Op. cit. p. 81

³⁹ Asia Foundation. Op. cit. p. 48

⁴⁰ UNDP, Afghanistan Omnibus Frequency Questionnaire. Kabul: UNDP, 2005.

⁴¹ Centre for Policy and Human Development. Op. cit. p. 92.

⁴² Women and Children Legal Research Foundation, *Women's Access to Justice: Problems and Challenges*. July 2008. p 15. <http://www.wclrf.org.af/English/eng_pages/Researches/Women_a_t_Justice/WATJ.pdf> Accessed 30 September 2009.

⁴³ Ibid. p 24.

b. Weak or Absent Physical Infrastructure

Significant structural problems exist in the formal justice system which limit people's access to justice and lead to delays in court hearings and decisions. A lack of physical infrastructure such as court rooms; separate facilities for women who are survivors of family violence; limited spaces and mechanisms to deal with children in conflict with the law, including limited numbers of lawyers and specialized prosecutors, all impact the ability of citizens to receive timely justice through the formal system. According to the *Afghanistan Human Development Report (2007)*, 57.4% of court rooms are in need of complete reconstruction and 40.4% more require rehabilitation or renovation. This implies that a staggering 97.8% of Afghanistan's court houses are in need of repair.⁴⁴ Moreover, in places where court rooms are available, there are rarely separate entrances for men and women or separate rooms for each to make complaints, rendering these places practically and substantively inaccessible to women due to cultural norms.

Partly as a result of this limited infrastructure, limited accessibility is routinely identified as one of the major challenges in the system. This is especially true for those living in rural areas where accessing the state system is further frustrated by the long distances between them and state institutions. Furthermore, access to lawyers is extremely limited. Not surprisingly, a higher proportion of those living in urban areas report taking their case to state courts (67%), than those residing in the rural areas (36%). Accessibility to local informal *shuras* and *jirgas* may partially account for and explain this discrepancy in numbers. Indeed as many as 31% of those living in villages disagree with the statement that state courts are accessible to them, compared to 20% in urban areas. Although sex-disaggregated data for rural and urban respondents are not available, the same report states that from among the respondents 42% of women versus 38% of men would refer their cases to formal courts.⁴⁵ As discussed above, inherent tensions exist for women between the physical accessibility of the informal system versus the formal system and the inaccessibility of the formal system at one level, the varying degrees of justice available to women through each system at another level, and the potential for each to become truly empowering of women and respectful of their rights.

c. Capacity Issues

The professional capacity of lawyers, judges and other justice sector workers poses further challenges to access to justice, for both men and women. Little more than half (56.7%) of the Afghan judges surveyed in the *Afghanistan Human Development Report* completed *setaj-e-qazaiee*, a one-year professional training program that graduates of the law and *sharia* faculties should undertake before working as judges. Only 10.1% of judges said that they had participated in other (often short-term) judicial training programs.⁴⁶ Because of the judiciary's

⁴⁴ Centre for Policy and Human Development. Op. cit. p. 92.

⁴⁵ Asia Foundation. Op. cit. p. 60

⁴⁶ Centre for Policy and Human Development. Op. cit. p. 91

poor qualifications, lack of training and limited access to relevant legal texts, many judges are unfamiliar with the law, and make decisions without reference to it. In many areas, judges' decisions are largely based on personal opinion.⁴⁷ In addition to the lack of clarity about the law, the lack of effective monitoring of and access to legal texts leads some judges to apply their version of *sharia* law to disputes. Under Afghan law, the application of *sharia* is allowed only in a very narrow segment of cases when no Afghan law exists. Judges' application of *sharia*, however, often extends to many areas already covered by Afghan law. At the same time, Afghan citizens know very little about the law and their rights within it. This important factor sometimes has negative consequences, such as effectively locking women in abusive relationships.

Women in particular face enormous challenges when trying to secure legal assistance. A WCLRF report documents the large and noticeable difference between the numbers of women and men working in various legal institutions. Even in Kabul, very few women work in the justice system, while in many other provinces, legal professionals such as judges, prosecutors and police are largely absent, and those that are present are rarely women.⁴⁸ Despite reform efforts now underway, women only account for 3% of judges, despite accounting for 48.9% of the population. Furthermore, it seems that very few women are seeking to work within the judiciary. In the 2005-06 judicial training course only 12 of the 170 students were women.⁴⁹ A similar trend exists among lawyers. In 2003, 25% of law students at Balkh and Kabul universities were female; however, most of these young women do not enter the justice system after their training, often because of their families' preferences or other cultural preferences as well as limited opportunities provided by the state. Some get married, and their husbands' families do not allow them to continue in the legal field. Many prefer to become teachers so they can find part-time employment.

There are several pervasive reasons for this shortage of trained female professionals. First, cultural sensitivities and conservative attitudes among many families create barriers for girls' access to education and freedom of movement. This creates obstacles for women who wish to pursue a legal career. Second, male dominance within the legal profession and cultural attitudes about gender roles have resulted in systemic discrimination which prohibits women from working in the legal profession. Third, there have been no concerted efforts on the part of the government or the judiciary to encourage the appointment of women to the courts and affirmative action programs have not yet been implemented. Finally, security concerns

⁴⁷ Ibid. p. 139

⁴⁸ Women and Children Legal Research Foundation. Op. cit. p 22

⁴⁹ Data are unavailable for the 2005/06 training course, but for the 2007 course, according to the Supreme Court, 635 students applied for 200 places. Of the 635 applicants 30 were women, and 17 of them were selected for the course. It is unclear why so few women are applying, though one could speculate a myriad of social, cultural and economic reasons for their low turnout. Encouraging, though, is the fact that women are being accepted, at least in 2007, at a higher rate than men (with 57% of female applicants being accepted versus 30% of male applicants).

exacerbate the limitations on women's movement and present an important obstacle to women's participation in the judiciary, especially in the rural areas of Afghanistan.

Present numbers of legal professionals are wholly inadequate to meet the system's burgeoning needs. As a result, the rate of female plaintiffs and defendants with access to a lawyer is especially low; throughout the whole country, there are only 800 defence lawyers, of which only 80 are women. The absence of female lawyers deters women from seeking legal counsel. For example, in Kabul, a recent survey shows that only 40.8% of female plaintiffs and 62.5% of female defendants have access to lawyers.⁵⁰ Limited access to legal aid and lack of personal funds to pay for a lawyer are only two of the major factors behind women's lack of access to lawyers. The government has not yet established a legal aid system, and only a few NGOs provide legal aid making it limited in access and scope. Another option is for people to hire lawyers who have permits from the government and mainly work in private practice helping people prepare for their defence, but according to sources at the WLCRF, these lawyers do not have permission to actually present cases in the courts thus further limiting access to lawyers for the public in general and for women in particular. The statistics for access to lawyers is worse in the provinces, where even fewer legal professionals, including women lawyers, live and work.⁵¹

The dearth of women in the judiciary right from the top—the Supreme Court council—down to the district level courts needs to be addressed gradually. Encouraging women to join the judiciary through affirmative action programs should begin in more secure areas and expand as security improves. Moreover, the decision to appoint more women to the Supreme Court rests solely on the political will of the government. In addition, sensitizing male staff in the justice system, as well as designing and executing policies and programs which could improve women's access to justice could also help ameliorate this situation.

d. Cultural Barriers

Traditional gender biases and cultural values obstruct the capability of women to pursue legal action and demand justice. The legal system, highly entrenched with gender biases and discrimination, fails to respond equally to the interests and rights of women.⁵² Typically, gender inequality is cited by critics of the informal justice sector; however women face discrimination in the country's formal institutions as well. Female victims and defendants are often denied equal and fair access to justice because they are rarely permitted to register cases themselves, requiring a male relative (known as a *mahram*) to register on their behalf. In fact, it is difficult and often impossible for women to even leave their homes to make a complaint without being accompanied by a *mahram*. Additionally, interviews revealed that many women are reluctant to bring their cases forward to the state courts because they are often chastised by judges who

⁵⁰ These statistics represent numbers in urban areas and major cities like Kabul, Mazar or Jalalabad.

⁵¹ Women and Children Legal Research Foundation. Op. cit. p 22

⁵² For more on this, see Women and Children Legal Research Foundation. Op. cit.

criticize them for dishonouring their families by bringing a private matter into a public forum. In fact, there is evidence to suggest that some judges even advise women that they should have taken the matter to a local arbitrator in order to protect the family honour. These actions cause great embarrassment for women and make them reluctant to pursue justice on their own behalf through the formal justice system.⁵³

For many Afghans, resolving disputes involving women by working with strangers in government courts and the police contradicts the customary practice of *purdah* (separation of the sexes). Family issues are treated as private matters and people avoid bringing them into public forums. This results in almost complete disenfranchisement of women from the justice system in many parts of the country. When women do appear before the courts the generally conservative judiciary acts to repress their rights.⁵⁴ For example, criminal charges against women who run away from their homes to avoid forced marriage or abusive relationships are of particular concern for the protection of the women. The majority of these cases are ruled on using traditional practices that, at times, contradict civil law. For example,

Farina, a 19-year-old woman from Samangan, ran away from home in late 2006 to get married with the man she liked. The police found and arrested them. The judge ruled that because she ran away she must have had pre-marital sex and sentenced both to 18 months in jail. The couple was not allowed to get married. The case came to the attention of the AIHRC early in 2007; despite the intervention, the higher court refused to overturn the initial decision.⁵⁵

It is worth recalling at this point the limitations to women's access to the formal justice system. As the Asia Foundation shows, women are more likely than men to take cases to state courts instead of informal mechanisms (42% of women versus 38% of men).⁵⁶ One reason for this may be the discrimination against women that prevails in many traditional institutions in Afghanistan. As such, the potential of the state courts to play a stronger role in, strengthening the rule of law in general should not be overlooked. Because of their basis in codified law, stronger state institutions should be better able to promote gender equality and redress the shortcomings of informal justice mechanisms with respect to women's rights and human rights more generally.

Due to this culture of discrimination and human rights abuse, abuses towards women are sometimes accepted as legitimate even by women themselves. This means that some women survivors of abuse are unlikely to seek justice. For example, a 2008 report by AIHRC on women's family life shows that a surprising number of female respondents perceive physical abuse as an absolute and Islamic right of their husbands and thus never protest against it. One female

⁵³ This information was conveyed in interviews with a human rights activist and a female judge in February 2008.

⁵⁴ Barfield Nojumi, and Their. Op. cit. p. 15

⁵⁵ AIHRC, "Economic and Social Rights Report in Afghanistan-III," Op. cit. p. 36

⁵⁶ Asia Foundation. Op. cit. p. 60

respondent who is the wife of a religious leader said, “It’s the right of my husband to beat me up whenever he wants, so to help him I always keep a stick ready in the corner of our room so when he needs it he could use it”.⁵⁷ This points to the great need for awareness-raising among families and communities. The issue of wife battering being seen as an Islamic practice is one of many problematic issues in Afghan communities, and deserves more research and the development of an appropriate policy response.⁵⁸

Challenges: the informal justice system

Over the past few years, talk of ‘access to justice’ has become commonplace in Afghanistan, and informal justice mechanisms are often hailed as the means by which access can be improved. Informal justice systems, which apply customary practices, exist in all over rural Afghanistan but their characteristics and content may differ from one place to another. Moreover, in spite of major differences between such practices and provisions of Islamic law, the practitioners of customary law generally believe that their actions are consistent with Islamic principles in both substance and form. During interviews, however, NGO respondents were asked their opinion of the informal justice system in Afghanistan. Their responses revealed concern over the contradiction of customary and traditional mechanisms not only with international human right standards but also with the Islamic and constitutional provisions of Afghanistan. As one respondent noted, “the practice of inheriting widows, depriving women from their right to *mahr* and heritage and the practice of *bad*⁵⁹ to me are serious violation of human rights and Islamic rights of women which are implemented through informal justice system and I am totally disagree with it [sic].”⁶⁰

In general, the informal justice system in Afghanistan is centered on ‘traditional’ practices, which are not always in line with broader development goals. In recent years there have been many debates about the role such structures could play in insuring access to justice for Afghans. There are two clear lines of thought: one group believes traditional dispute resolution

⁵⁷ AIHRC, *The Situation of Young Women in the Family*, Farsi version, unpublished report, Kabul: no date.

⁵⁸ For a comprehensive study on domestic abuse in Afghanistan, see Global Rights, *Living with Violence: A National Report on Domestic Abuse in Afghanistan*, 2008. <http://www.globalrights.org/site/PageServer?pagename=www_asi_index_58> Accessed 30 September 2009.

⁵⁹ *Bad* is a practice sanctioned by the tribal code as a traditional tool for dispute resolution. This is a non-codified customary practice by which blood debts are settled by the marriage of a female of the offending group to a male of the offended group. For example, if a man from one tribe or family kills a man from another, a sister or daughter of his household must be given to the other family to settle the blood debt. A women married under *bad* practice is generally treated as a servant by her husband’s family and is subject to various forms of abuse for her entire life. Comments the AIHRC, “In April 2007, two men in Panjshir province got into a fight. One of them, 35- year-old Ahmadullah, was badly injured. He complained to the local *jirga*. The elders of the village decided that 5-year-old Mahbuba should be given to him for marriage as restitution for his injuries. Despite intervention from the provincial governor and the AIHRC, the girl was still forced into marriage to Ahmadullah.” Afghan Independent Human Rights Commission. “Economic and Social...” Op. cit. p. 35.

⁶⁰ Interview with Ashraf Rassoli lawyer and legal advisor to the President’s office, 10 June 2009, Kabul.

mechanisms (the informal justice system) should be recognized as a part of the structure of justice to ensure better access, whereas the second believes that such structures should not be further recognized or given resources as they will prove to be an obstacle in ensuring access to justice. The strengths and weaknesses of the system presented here are drawn from the data and analysis provided by a number of national-level reports in Afghanistan, as well as a series of interviews with scholars and organizations working with women who interact with these systems.

a. Informal Justice: Filling an Important gap?

In Afghanistan, the goal of informal justice is not to punish the perpetrator, but to compensate the victim for their loss, and to reintegrate both the victim and offender back into the community. The type of justice promoted by these systems may be the most appropriate option for people living in a close-knit community whose members must rely on continued social and economic cooperation with their neighbours.

Proceedings in the informal justice system are usually conducted in the local language and follow local customs therefore people are less likely to be intimidated in these settings. The informal process is usually much simpler than formal legal proceedings, and more accessible to people of limited financial and educational resources. In cases which do not involve serious offences, informal justice systems can provide a very cost-effective means by which people can voluntarily choose to settle their disputes, thereby reducing court congestion. Informal justice systems are usually close to the homes of the people who fall within their jurisdiction. They are usually free or affordable. Finally, following the old adage that justice delayed is justice denied, citizens show a natural preference for the reasonably swift informal justice system processes, rather than the delays and drawn-out procedures that so often characterize the formal justice system.

At the same time the informal justice system, while not considered as an official or legalized system, continues to exist in the country and competes with the formal justice system. Studies show a considerable amount of referral to and use of these informal mechanisms.⁶¹ Although it is clear that ignoring informal justice systems will not change their problematic practices, strategies to effectively provide communities with better options to access justice through encouraging appropriate reforms need to be developed.

b. Weak Accountability and Weak Capacity

Despite the fact that informal justice systems are widely viewed by Afghan citizens as the most likely way of achieving an outcome that satisfies their sense of justice, there are situations in which local arbitration falls well short of realizing this ideal. In general, informal justice systems are not accountable. The right to appeal, which is an integral part of an accountable and transparent legal system, does not exist in informal dispute resolution mechanisms.

⁶¹ Asia Foundation.

Furthermore, because traditional systems do not have specific enforcement measures to back their decisions, they are often non-binding and rely primarily on social pressure to ensure compliance.

More than this, because they are not embedded in a codified system of rules, often the rulings depend on the knowledge and moral values of the individual mediator/arbitrator. Generally there are no minimum standards that have to be followed. As such, the fairness of proceedings depends upon the person conducting them, and unlike the formal system, in informal justice institutions there are no checks or balances in place for the selection and appointment of judges. Instead, village elders who preside over such proceedings are appointed, often on the basis of who they know or to whom they are related. Because they know powerful people in the area, judges may feel compelled to rule in favour of those who appointed them, undermining their impartiality. Moreover, people appointed in this way may lack the knowledge and skills to adjudicate fairly. Due to informal justice actors' lack of knowledge of the written law, they may make their decisions without taking the formal state law into consideration, thus depriving someone of their lawful rights. Finally, the body of customary law varies from place to place, meaning that interpretations and judgements are inconsistent across the country and posing challenges for the protection of vulnerable populations and the full realization of women's human rights as well as the potential for the formal and informal systems to support each other.

c. Exclusion of Marginalized Groups

Informal justice systems often hold individuals accountable to social collectivities and broader social interests. Preservation of 'harmony'⁶² can take preference over the protection of individual rights. As such, informal justice systems may reinforce existing power hierarchies and social structures at the expense of disadvantaged groups. These systems are often dominated by men of high status and tend to exclude women, minorities, young people and those on the margins of societies. As a result, existing social hierarchies and inequalities are often reflected and reinforced in the dispute resolution system.

Women are almost entirely excluded from participation as either *jirga* or *shura* members or disputants.⁶³ Women and disadvantaged minorities, poor and marginalized individuals and children are denied their voice through the proceedings of this system. In this way, the informal justice mechanism is accessible only to men from powerful communities. Given the barriers to

⁶² Harmony implies putting an end to violent conflict among families and tribes and does not involve the peace and harmony required in the household or for individuals. Efforts to promote 'harmony' then can include social norms such as forcing a woman who is victim of rape to marry her attacker to protect the honour of the family, or giving a woman as *bad*.

⁶³ Barfield, Nojumi, and Their. Op. cit. p. 17. Some conflicting information exists on the existence of female-led *shuras*. Due to the limitations of this paper, this issue has not been addressed; it would be an interesting topic for further inquiry.

women accessing formal justice systems, outlined above, it is clear that women in general are restricted from fully accessing both the formal and the informal justice systems.

Perhaps as a result of this exclusion, according to the Asia Foundation, fewer women have positive views of local *shura* and *jirga* compared to men. The 2008 Asia Foundation survey also shows that women have significantly less positive views of *shura* and *jirga* across all dimensions than men. For example, 70% of female respondents feel that local *jirga* and *shura* are accessible to them, compared to 83% of men. Moreover, women's opinions of *jirga* and *shura* are showing a downward trend: in 2007, 79% of women respondents felt they had access to *jirga* and *shura*. Likewise, in 2008 63% of women considered that local *jirga* and *shura* are fair and trusted compared to 76% in 2007, and 64% agree that they are effective in delivering justice, compared to 73% in 2007.⁶⁴ The reasons for this declining support are not clear, and further research into this question would be useful.

Women's lack of access to these informal institutions (as well as to formal institutions) leaves them powerless and often without recourse. A potent symbol of this powerlessness has emerged in Afghanistan, where many women have run away from their home, set themselves on fire, and committed suicide in recent years in order to escape unbearable domestic situations. Statistics recorded at the AIHRC show that in 2008 alone some 72 cases of self-immolation, 27 cases of suicide and 148 cases of running away were reported.⁶⁵ It is worth mentioning that the numbers of cases reported does not capture the full scope of the problem, as most of the cases remain unregistered.

d. Human Rights Violations

One of the major issues of concern and critiques of the informal justice system is the widespread violation of human rights, in particular the rights of women and minority groups. The poor representation of women in decision-making structures only supports the violation of their rights. Studies show that most of the violations of the rights of women are the result of customary practices within the context of the family and marriage, typically stemming from the treatment of women as commodities.⁶⁶

Informal mechanisms also fail to follow—and sometimes directly contravene—the laws of the land (sometimes through ignorance of the law, sometimes because they choose to not to apply it), making it more difficult to promote justice and protect claimants and defendants in the informal system. Informal structures often assign illegal penalties, such as *bad*, imposing large fines, or burning the houses or property of the perpetrators. As Wardak argues, “*Jirga/shura* has its own problems: in some cases of murder, *jirga* may recommend *badal* (direct

⁶⁴ Asia Foundation. Op. cit. p. 77

⁶⁵ The statistics were shared by the Women's Right's Unit of the Afghanistan Independent Human Right Commission.

⁶⁶ See, for example, Oates, L. and Nijhowne, D. *Living with Violence: A National Report on Domestic Abuse in Afghanistan*. Kabul: Global Rights, 2008.

vengeance), or the marriage of a woman from the party's tribe to the victim's close relative. The first punishment is in direct conflict with the Afghan state laws, and the second one is a clear violation of fundamental human rights."⁶⁷ These systems also lead to procedural problems; informal justice systems sometimes do not give the accused the chance to be heard or adequately represented. Studies to show how this may be different in different areas of the country are not available.

Other actors

The support and partnership of the international community and civil society in Afghanistan is crucial to the development and consolidation of the rule of law and democracy, and in particular the rights of women. Major partners in this regard are the United Nations, international aid donors, international organizations, national institutions such as AIHRC, and Afghan civil society. The primary areas of involvement for these actors individually and collectively include support for drafting new legislation and amending existing laws; lobbying to bring changes to policies and programs; providing protection measures such as establishing shelters and safe houses for survivors of violence; providing legal aid for women; and conducting awareness-raising campaigns at national and local levels. While important, international engagement in the justice sector needs to be more closely examined for a better understanding of the ways in which it has supported and impeded progress in this sector.

For example, over the past two years collective efforts have been organized towards drafting new legislation on violence against women and family issues. The collaboration and effort of stakeholders resulted in a revised and progressive marriage contract form in 2007 and 2008, which allows the couple to negotiate and acknowledge certain rights of each party. Through the lobbying efforts of stakeholders in Parliament, civil society, AIHRC and key women in the government, engaged actors succeeded in pushing President Karzai to reject the juvenile code amendment which legislated discriminatory provisions against girl children. Finally, as mentioned, recent international pressure on the government of Afghanistan and joint efforts from civil society and the AIHRC resulted in President Karzai ordering revisions to the Shia personal status law, which had included sections that were highly problematic and contradictory to the principle of women's rights and gender equality. While some of the most objectionable language was moderated, some problematic provisions remain in the signed bill.

In addition to these efforts to advocate and provide services, various NGOs and think tanks including the Asia Foundation, UNDP, Global Rights, United States Institute of Peace, WCLRF, and AIHRC have undertaken research to develop a better understanding of people's perceptions of and experience with the justice system. Studies conducted by almost all the

⁶⁷ Wardak, Ali, "Building a Post-War Justice System in Afghanistan" *Crime, Law & Social Change* 41 (2004): 319–341: p. 11
http://regnet.anu.edu.au/program/currentevents/pastevents/link_documents/papers/2004/Wardak.pdf Accessed 30 September 2009.

aforementioned organizations suggest that the formal justice system is relatively weak in both urban and rural areas. Problems associated with functioning courts, police, and prisons are among the major issues delaying access to the formal justice system.

However, the capacity of many of these organizations to do their work and reach a wide cross-section of the population is limited; although most of these programs are aimed at reaching people at the grassroots level, the majority of the programs are implemented in major cities and do not reach those in urgent need in the rest of the country. For instance, safe houses and legal aid are lacking in the country as a whole, particularly in the rural areas and provinces.

Entry points for improvement

The path forward for the justice sector in particular, and for the Afghan state in general, is to slowly establish, maintain and expand pockets of effective, fair, and accountable governance in both urban and rural areas of the country. First, some degree of capacity and legitimacy must be restored in significant population centres. Urban areas are more likely to use and respect the formal system, and the impact of consolidating the formal system on the population in these areas may be greater. Once these efforts have deepened, it will be possible to expand the success to surrounding areas and rural villages. Selecting and training officials to be at the vanguard of this process of positive and sustained transformation is critical. Priorities should include building the capacity of officials and raising the public's awareness about their rights, existing laws and procedures such as the constitution of the country, the age of marriage in the civil code, and the rights to education and health for both women and men.

Any provision of support to the formal or informal justice sectors should have the overall aim of improving access to justice for all members of Afghan society regardless of sex, class, ethnicity, religion, and level of education, with special attention paid to women, the poor and other disadvantaged groups. Rather than simply constituting a state of affairs, 'access to justice' is perhaps better envisioned as a process by which a range of different inter-related factors combine to enable citizens to obtain a satisfactory remedy for a grievance. Such factors include, but are not limited to, an adequate legislative framework, basic community legal awareness and functioning formal institutions of justice that are accessible in physical, economic and intellectual terms.

Conclusion

Promoting and ensuring access to justice for all citizens are important objectives and obligations of the Afghan government and the international community. The *2007 Afghanistan Human Development Report* demonstrates that the debate around the strengths and weaknesses of the formal versus the informal system (and whether and how they might work together) will persist until the Afghan government is able to provide its citizens with a trustworthy, timely, and equitable justice system. Supporters of the informal system must recognize that the state and its justice system have an obligation to provide security and

protect the rights of Afghan citizens. A successful outcome of the current statebuilding process will mean a greater role for government in the affairs of its people—and will require local governance mechanisms to cede some of their authority to the state. The supporters of the formal system on the other hand must also strategically work on the existing formal system of justice in order to improve their capacity, work with entities in the informal system and move towards gradual improvement of the situation.

The informal system has several key failings in its ability to deliver justice. Women are generally excluded from informal processes, having to rely on male family members to represent them, and are subject to cultural norms that impose a deep inequality on women. Some practices, such as forced marriage as compensation, are gross human rights violations and cannot be tolerated under Afghan law or under Islam.

A clear relationship between the two mechanisms in the short term can be developed through a process of dialogue, mutual recognition, and small-scale practical experience to ensure informal systems of justice are not interfering with criminal cases and/or violating women's rights and human rights more broadly. Some of the practical approaches to building a relationship between the formal and informal system might include allowing decisions in the informal justice system to be reviewed, recorded, and enforced in formal courts; undertaking public education programs aimed at informing citizens about their rights and obligations; and focusing on eliminating the worst abuses. The formal justice system should use existing opportunities and the support provided by the international community to meet two objectives: improving access to justice and improving protection of citizen's rights.

Afghanistan is on its way to a brighter future than the last thirty years offered, and access to justice and the rule of law is an important component of this long term objective. Stakeholders such as the international community, aid donors, NGOs, the Afghan government and civil society need to better communicate, cooperate and collaborate to expedite social progress and transformation.