



Chapter-5

Legal Rights and Voice



Legal Rights and Voice

The Constitution of Afghanistan, passed by the Constitutional Loya Jirga in 2003, proclaims that 'any kind of discrimination and privilege among the citizens of Afghanistan is prohibited (Article 22), and the citizens of Afghanistan have equal rights and duties before the law (Article 23). This is by default taken to indicate constitutionally guaranteed equality of men and women. Article 45 furthermore provides that 'the state shall adopt necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the provisions of sacred religion of Islam.¹⁴⁴ The Bonn Agreement was slightly more specific in terms of calling for the creation of a gender-sensitive and fully representative government and underlining the importance of women's participation in the Interim Administration.

Despite Constitutional gender equality, Afghan women's lives are still influenced more by the notion of complementarities between male and female roles rather than equality. Afghan women are far from a homogenous group, and differences by ethnicity, region, socioeconomic status, education level and residence in urban/rural areas are significant. Overall women's lives center on the family and the household, which are seen as their main area of activity. Their rights and duties are assigned by both formal and informal systems, which ultimately define their place in the family and in the society. This chapter discusses the formation of gender relations in the household along with women's limited role in decision-making and control over household

¹⁴⁴ *The Constitution of Afghanistan*, Year 1382 (2003)

assets and planning of family affairs. The subordinate position of females within the domestic sphere is aggravated by their very weak legal position, particularly in relation to Family Law and the informal justice system, as well as the fact that women's access to either of these systems is very limited. Finally, the chapter explores women's ability to act and express themselves, to exercise control over their own lives and to participate in decision-making at local and national levels, not least in connection with the new elected Community Development Councils (CDCs) and the upcoming Parliamentary and provincial and district council elections.¹⁴⁵

Family and Household

Gender relations in Afghanistan are largely defined by the values on which the patrilineal and patriarchal family is based. The extended family and lineage (*qaum*)¹⁴⁶ play a central role in the social order, and in the establishment of social identities. Hence the patrilineal family is the main focal point for the individual man or woman, and a key factor in social relations and critical building block in the social structure. The importance of the patrilineal family and *qaum* extends right from decisions about what marriage alliances to forge with other families or lineages to decisions regarding political loyalties at national level. Whole kinship groups (rather than individuals) constituted the backbone of the Communist movement in the 1960s-70s,¹⁴⁷ just as entire tribal segments pledged their allegiance to the Taliban in the 1990s.

Twenty years of conflict have taken their toll on the social cohesion of Afghan society, but the close networks of family and kinship groupings have survived and provide individuals with social security. The fact that much of this 'social capital' of the Afghans has withstood war, exile and drought has been identified (for example, in the *NRVA*) as one of the key factors in their elaborate coping strategies, which explains why they are not far worse off today.¹⁴⁸

¹⁴⁵ **Sources:** The Feinstein International Famine Center, Tufts University, in its *Human Security and Livelihoods of Rural Afghans, 2002-2003*, used the *NRVA (Nationwide Risk and Vulnerability Assessment)* survey data and added this with primary research of its own in Badghis, Balkh, Herat, Kabul, Kandahar, and Nangarhar. This data provides information on women's role in decision-making in five provinces. All other data are derived from surveys and studies of more limited geographical coverage, such as AREU's Report on NSP (2004) based upon case studies in six districts, reports by the Amnesty International and Human Rights Watch and anthropological and legal studies.

¹⁴⁶ *Qaum* is a relative and situational concept, which is used to refer to a person's "in-group", be it an ethnic group, a lineage, sub-lineage, local community or even religious sect. Hence, when referring to *qaum*, a person refers to his/her primary cultural identity and affiliation (Olesen 1994)

¹⁴⁷ For a discussion of the PDPA, its strategy and the local responses to the Saur Revolution in 1978, see Olesen, 1983

¹⁴⁸ World Bank, 2004 d

In this social order, which is mainly organized around male blood-relations, women and their offspring are seen as part of the property and patrimony of the husband's extended family.¹⁴⁹ Men's lives are also organized around their duties and obligations to the larger family, dominated by the absolute authority of the male head of family. However, the mobility, choice and opportunities of male family members by far exceed that of any female, who are collectively subject to male authority and protection - irrespective of age, as younger brothers may both chaperone and issue orders to much older sisters.

The husband and extended family control the lives of women through control of property, marriage relations and children. Most girls are married off early and may even have been 'promised' to somebody's son at the time of their birth. It is customary to marry within the *qaum*, and marriage among cousins is common. While this may be detrimental for genetic reasons, it is considered preferential compared to handing over the family's women to 'strangers' - and may in most cases also guarantee the bride better treatment by her in-laws, as they are her own close relatives. The children born in the marriage are thus counted as belonging to the father's lineage and *qaum*. The women of the family embody the collective honor of the family, lineage, and sub-lineage, and hence it becomes essential to ensure the chastity of the women and control their behavior and relations (and not least their sexuality) in relation to the outside world. This is the normative framework of *purdah*, which entails the seclusion and veiling of women and in line with which gender relations are being governed by the concept of *mahram*, whereby women and men ideally are permitted to interact only with those of the opposite sex with whom they are closely related by blood or marriage, i.e. wife-husband, parent-children, siblings, and those relatives with whom marriage is forbidden. As a consequence, women's role outside the household gets quite restricted, as it is coined in one of the more extreme local proverbs: "*For the woman, only the house or the grave.*"

Marriages are contracted between families rather than individuals and in most cases involve the payment of bride wealth by the groom's family to the father of the bride. The bride wealth represents 'compensation' for the transfer of rights and responsibilities toward the woman from her family of birth to the groom's family. There are no recent surveys of the amount of bride wealth or bride-price, but in the 1970s, depending on factors such as the ethnicity, rural-urban location, socio-economic and educational status, bride-wealth could amount to

¹⁴⁹ Boesen, 2004

several years' of earnings of the prospective groom.¹⁵⁰ Today, the bride-price reportedly ranges from US\$ 500 to US\$ 2,500 (while the annual per capita income is estimated at 212\$).¹⁵¹

Most newly married couples reside with the groom's family, and the young bride comes under the command of her mother-in-law. She only gradually gains prestige in her new family in accordance with the number of preferably male children she bears. Elderly matriarchs with many sons can thus by force of their personality and support of their sons gain influence within the extended family and local community - most women probably exert far greater influence over their sons than over their husband, not least in view of the often considerable age difference between husband and wife. The veneration of motherhood and mothers is coined in many local sayings such as "*Paradise is at the foot of the mother.*"

One of the most important concepts regarding the upbringing and socialization of children is *tarbia*, which refers to children's manners and the quality of their relationships with others. The four most important parts of *tarbia* are: good and clean language, respect for elders and parents, bodily cleanness, and hospitality. However, *tarbia* does not just refer to children's actions and attitudes - it is a moral quality. Children with good *tarbia* behave or appear well because they know the differences between right and wrong. This knowledge of morality is rooted in religion, so *tarbia* is developed based on religious teaching. While both boys and girls have to learn the basic qualities of *tarbia*, girls are supposed to display qualities such as modesty, while courage is a quality which is promoted among boys.¹⁵² Gender plays a major role in determining the socialization of children: To be a boy or a man is to know about the world and its problems and take on responsibility within it. In contrast, for girls, the time they spend outside the home generally decreases as they get older, and the social pressure on girls to conduct themselves appropriately and to stay within the home grows. Even other children contribute to control and comment on girls' behavior, e.g. boys are being brought up with the responsibility to protect and be responsible for their sisters and their behavior. Since the women are the embodiment of the family's honor, it is little surprise that girls' behavior constitutes a source of conflict in the family far more than boys' behavior. Girls, already brought up to be modest, reportedly further control and curtail their behavior in order to

¹⁵⁰ See Olesen, 1982 and Christensen, 1982

¹⁵¹ UNICEF, 2001a

¹⁵² De Berry, J. and Fazili, A. et al., 2003

avoid family arguments and reprisals. As a girl grows up, the moral standards she has to adhere to get more closely linked with sexuality, and restrictions on mobility, expressions, and social interactions increase accordingly. The guidelines for social interaction for women are based on *mahram* in the sense that contacts with the opposite sex should preferably fall within the *mahram* category, which also constitute the men who can act as protectors of the girl/woman and her reputation. The Taliban took this notion so far that no woman was allowed in public space without the escort of a *mahram*.

Concerns over a girl's chastity are an important impetus for marrying her off at a young age, in order to minimize the risk of pre-marital sex, since virginity before marriage is an absolute requirement. The inability to 'prove' virginity on the wedding night may have serious consequences and may lead to the groom's rejection of the bride.¹⁵³ In order to avoid such a shame befalling the family, parents take all kinds of precautionary measures, such as restricting the girl's mobility to the household, withdrawing her from school upon puberty in order to shield her from the gaze of unrelated males, and so forth. With marriage constituting the only 'career', most girls miss out on their chance to get an education, and early marriage may deprive them of their adolescence. But among conservative sections of the Afghan population, like in many other traditional societies, the idea of an adolescent period between puberty and adulthood is alien. A girl who menstruates can bear children, and is therefore 'a woman'.¹⁵⁴

Children are brought up to feel responsibility for their families and take up a number of duties even from a young age. The different norms for boys and girls are also reflected in the type of demands the family makes on their labor: While 11% of boys in the age group of 7-13 years work at least half a day (defined as 4-12 hours work) "for an income/out of the household", this only is the case for 5% of the girls in this age group. Girls on the other hand have to shoulder far greater responsibilities inside the household, where 23% work at least for half a day, while this is the case for only 11% of the boys of the same age group (7-13 years). Altogether, a higher number of girls have to shoulder a workload inside and outside the house than boys - 28% of girls versus 22% of boys.¹⁵⁵

¹⁵³ E.g. see Olesen, 1982

¹⁵⁴ UNICEF, 2001

¹⁵⁵ UNICEF/Central Statistics Office, 2003

The tradition of paying bride wealth or bride price typically leads to a considerable age difference between bride and groom, since the latter first have to accumulate the required amount of money before getting married. The age difference between spouses also results in a high rate of widowhood. In the 1970s, the rate of widowhood for females was reportedly three times as high as for males: 13.2% of women of 15 years of age and over were widowed compared to 4.5% of men in the same age group.¹⁵⁶ (This is despite the much higher mortality rate for women during their child-bearing years than for men in the same age group - see Chapter 2.) Another reason for the much greater rate of widowhood among women is that remarriage for men is much more common than for women. These broad patterns can be expected to be similar today.

The years of conflict and exile have introduced new perspectives and challenges into the firmly structured and male-dominated Afghan family. Exile and the exposure to other norms and opportunities in terms of education and employment for women have made many families more open toward the idea of letting the female members out in society. Absolute poverty and destitution have forced others to do the same - while the rich can afford honor, the poor must 'eat shame' (see Box 10).

Despite gradually changing norms, Afghan women still have very limited influence over major decision-making within the family according to the NRVA and Tufts University surveys. In the provinces of Badghis, Balkh, Herat, Kabul and Nangarhar, male and female respondents were

Box 10: Poppy Cultivation

A recent report on poppy cultivation gives the account of a poor sharecropper who was imprisoned for defaulting on his loans (as a result of his poppy crop having been eradicated). It was reported that the sharecropper's mother and the current landlord appealed to the district administrator for his release, insisting that the women of the family would help him in the field so that they could repay his debts. The sharecropper was released but was ashamed. He stated that 'no wife or mother work on the land in this district but mine are working with me. My nine-year old daughter and my younger children are also working with me. They cannot go to school as they help me on the land - this is the curse of debt'.¹⁵⁷

¹⁵⁶ Spittler, J.A. and Frank, N., 1977 quoted from Hunte, 1977

¹⁵⁷ Drugs and International Crime Department of the Foreign & Commonwealth Office, 2004

Table 17: Women have NO Role in Decision-making regarding the Following

Province income	Use of household productive assets	Sale of household non-product assets	Sale on household and children's marriage	Family Planning
Badghis	>50% of villages in all districts	>50% of villages in all districts	>50% of villages in all districts	>50% of villages in all districts
Balkh	>26% of villages in 56% districts	>50% of villages in 54% districts	>50% of villages in 62% of districts	>50% of villages in 39% of districts
Herat	>26% of villages in 50% of districts	>50% of villages in 93% of districts	>50% of villages in 93% districts	>50% of villages in 71% of districts
Kabul	>26% of villages in 71% of districts	>50% of villages in 50% of districts	>50% of villages in 29% of districts	>26% of villages in 57% of districts
Nangarhar	>50% of villages in 74% of districts	>50% of villages in 89% of districts	>50% of villages in 89% of districts	>50% of villages in 95% of districts

Source: Human Security and Livelihoods of Rural Afghans, 2004, Feinstein International Famine Center, Tufts University

asked about women's role in deciding on use of household income, sale of productive and non-productive assets, as well as deciding on the number of children and the marriage of children. Overall, women's decision-making power is limited, but women in Balkh and Kabul provinces exert markedly more influence than in Badghis and Nangarhar provinces.¹⁵⁸

As women get older and their sons grow up, they gain greater influence in the family and household. For widows, however, the situation is different. While they may be plunged into destitution by their husband's death and thus lose all influence in the family, they may gain more influence over their own lives. This aspect was explained to Wily during her study of widows in Maimana city:¹⁵⁹

¹⁵⁸ Feinstein International Famine Center, 2004. In Badghis, the study covered 12 villages in three districts, in Balkh in districts, in Herat 16 villages in 4 districts, in Kabul 16 villages in three districts, in Kandahar 16 villages in three districts, in Nangarhar 16 villages in 5 districts. The team conducted app. 350 interviews with women and men

¹⁵⁹ Wily, L. Alden, 2004

"When you are a widow you see how you were oppressed. Husbands control even the money that you earn from embroidery. I get more today from embroidery than I got from my husband.". And in the words of another widow: "Because we are so poor we are allowed to work and to move about the town. When we were married with husbands we could not do that. It is accepted that widows do things that wives can not be entrusted to do".

Legal Position

While Afghan women have enjoyed Constitutional gender equality before the law since 1964, the legal system granted differential rights to men and women. The 1977 Civil Code introduced significant reforms in terms of allowing women to choose a husband without the prior consent of their guardian, allowing women to stipulate a right to divorce should her husband take a second wife, regulating polygamy and rendering divorce pronouncement by an intoxicated husband invalid.¹⁶⁰ During the years of conflict and break-down of state functions, the 1977 Civil Law was no longer enforced and a largely unreformed Hanafi¹⁶¹ family law and customary law held practical validity in the sphere of family law.

The legal framework guiding Afghan women's lives thus consists of a mixture of civil law, customary law, Islamic Law (Hanafi and Shia) and traditions, all of which stress the complementarities of male and female roles more than their equality. The 2003 Constitution states with regard to the functioning of the Judiciary that 'whenever no provision exists in the constitution or the laws for a case under consideration, the court shall follow the provisions of the Hanafi jurisprudence within the provisions set forth in this Constitution.' (article 130), the exception being cases dealing with personal matters belonging to followers of the Shia sect, where the court shall apply Shia jurisprudence (article 131). It is not clear which laws are considered valid, but presumably this includes the laws passed during the democratic decade 1963-73, as the 1964 Constitution was the frame of reference for the Bonn Agreement.¹⁶² This implies that women's rights are formally regulated by laws such as the Law on Marriage

¹⁶⁰ Lau,, 2002

¹⁶¹ The Hanafi school is the first of the four orthodox Sunni schools of law, and is followed by the Sunni majority in Afghanistan. The Hanafi school of law was founded by Nu'man Abu Hanifah (d. 767) in Kufa in Iraq. The Hanafi school bases its interpretation of Islamic Law on the Qur'an, the Traditions of the Prophets, *ijma* (universal concurrence of the community of believers), and *qiyas* (analogical reasoning). In addition to these, local customs are accepted as a secondary source of law in the Hanafi school of law. (philter.ucsm.ac.uk/encyclopaedia/islam/sunni/hana.html)

¹⁶² Amnesty International, 2003a

of 1971/1350 and the Criminal Procedure Law of 1965/1344, which will form the basis for new draft laws to be prepared by the Judicial Reform Commission.

With women's chastity, modesty and overall behavior seen as a reflection of the family honor, most domestic problems and cases involving any perceived transgressions of women tend to be handled inside the family. Restrictions on women's mobility and the expectations that they be accompanied by a male relative when outside their home limit their ability to access courts on their own. Furthermore, according to Shari'a, the testimony of a woman in court is worth half of that of a man, and female defendants thus may face difficulties in proving their innocence. Domestic abuse can be raised as the basis for divorce, but there are no legal codes that criminalize domestic abuse or violence within the home, and the courts routinely send back women to abusive spouses telling them to "come to an agreement."¹⁶³

Afghanistan has signed a number of international conventions related to gender, including the Convention on the Political Rights of Women, the Convention Concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value, and the Convention Concerning Discrimination in respect of Employment and Occupation.¹⁶⁴ These international standards have apparently not affected domestic law. On 5 March 2003, Afghanistan ratified the United Nations' Convention on the Elimination of all forms of Discrimination Against Women, (signed in 1980),¹⁶⁵ which like the other international conventions ratified will require legislative and administrative measures, to give legal backing to the nation's commitment to advancement of its women. Until that happens, a large degree of confusion over the exact rights of women and their legal status will continue to exist.¹⁶⁶ Widespread violations of the most basic rights of women and girls, including physical abuse, underage marriage, exchange of girls to settle feuds, have been reported, i.a. by Amnesty International during recent visits.¹⁶⁷

¹⁶³ Feinstein International Famine Center, 2004 p. 102; Amnesty International, 2003: 39

¹⁶⁴ Amnesty International, 2003: 18

¹⁶⁵ Afghanistan has also ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESR), in January 1983. Afghanistan signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in August 1980, and the Convention on the Rights of the Child (CRC) in September 1990, and ratified it in March 1984. (Human Rights Watch, 2001, note 32)

¹⁶⁶ Lau, 2002

¹⁶⁷ Amnesty International, 2004; 2003; 2003a; Human Rights Watch, 2001

The Judiciary

The personnel of the Afghan judiciary have a wide range of educational and training backgrounds. Most are graduates from religious schools, with a small number from the Shari'a School or the Law School at Kabul University. Indeed, according to the study by the Tufts University team, many lack training in both Islamic and statutory law. The Law School and Shari'a School differ significantly in the training they provide.¹⁶⁸ Traditionally the Shari'a graduates represent the conservative camp in Afghan law while the Law School represents the more progressive camp, which was behind the formulation of the 1964 Constitution and the law reforms in the 1960s and 1970s. Currently, however, the graduates from Shari'a Schools form a majority in the judicial leadership, which presumably affects the judicial reform process.¹⁶⁹

The Judiciary has been an exclusively male domain, which is still largely the case. Of a total of 2,006 sitting judges, only around 27 are female. With the exception of the heads of the juvenile and family courts in Kabul, women are not found in key positions within the judiciary. Where women do serve as judges, reports indicate that they do not perform the same functions as their male counterparts. Female judges tend to act in the capacity of judicial clerks and are rarely involved in the adjudication of cases. In general, there seems to be considerable resistance in the judiciary against greater inclusion of women in the judiciary. However, approximately 25% of law students at the Universities of Balkh and Kabul are women,¹⁷⁰ so the potential for achieving a better gender balance exists. Afghan women who do approach the courts do so mainly for divorce, child custody, inheritance or other matters that are commonly categorized as family law. This area of law is reportedly¹⁷¹ in urgent need of reform, not least because of the absence of functioning family courts. These were established under the Najibullah administration (1986-92) and retained by the Rabbani government (1992-96), but dismantled under the Taliban.

Marriage and Divorce

The Law on Marriage stipulates that marriage must be through choice and that 16 years is the legal age of marriage for women and 18 years for men. However, there is no clear

¹⁶⁸ For a discussion of the development of the religious schools, see Olesen, 1995

¹⁶⁹ Feinstein International Famine Center, 2004, p. 204-211

¹⁷⁰ Amnesty International, 2003

¹⁷¹ According to the Afghan female lawyers interviewed by the International Crisis Group, 2003

provision in the Criminal Procedure Law to penalize those who arrange forced or underage marriages. Article 99 of the Law on Marriage states that marriage of a minor may be conducted by a guardian, known under Shari'a law as a *Shari'a-wali*, i.e. the legal minimum age for marriage can, and is safely ignored. There is currently a failure to treat forced marriage as a criminal offence due to the attitudes of judicial personnel and of the wider society. The Ministry of Women's Affairs is currently advocating for an increase of the legal age of marriage for women to 18 years, as well as a reenactment of the requirement to register marriages also at provincial level.

Comprehensive data on actual marriage age is lacking, as provisions to register marriage and birth are absent in most areas, and many people do not know their exact age. Age of marriage in practice varies between urban and rural areas, and according to ethnic background and economic circumstances. It is customary to marry off girls at a young age¹⁷² in rural areas, and there is evidence that the recent years of abject poverty due to armed conflict and drought has resulted in reducing the marriage age for girls even further, down to the pre-puberty level in some cases. This has partly been a measure to reduce the number of dependents to be fed within the household and partly a way of raising cash for household survival through receipt of bride price.¹⁷³ Child brides are often given to substantially older men, as the second or third wife.¹⁷⁴ Medica Mondiale's work in Kabul's Women Prison during September-December 2003 revealed that of the 32 inmates, 60% were married when they were under the age of 16, and the data suggested a connection between child marriage and family abuse and violence.¹⁷⁵

Marrying a child and being directly paid for the sale are prohibited under both the civil code and Islamic law, although the definition of 'child' differs. Marzia Basel, a former Afghan judge and founder of the Afghan Women Judges Association in Kabul, pointed out that "there are

¹⁷² "A girl should have her first period in her husband's house and not her father's house" is a local saying reflecting this position

¹⁷³ Atmar, Barakat and Strand, 1998. A report written in 2002 for the WFP by Catherine Dunnion of the relief group GOAL Ireland, reported widespread selling of daughters in the far northern province of Jawzjan. She found villages where numerous girls aged 8 to 12 were sold, usually for the equivalent of \$300 to \$800. "Everyone I talked to insisted that this activity has only been happening over the past four years of the drought," Dunnion wrote, adding that in villages that received WFP food, the number of girls sold declined (ibid)

¹⁷⁴ Feinstein International Famine Center, 2004, p. 109

¹⁷⁵ Bahgam & Mukhatari, 2004

Box 11: Child Marriage and Poverty

Recent data from UNICEF indicate shows that approximately 16% of Afghan children are married under the age of 15, while 52% are married under age 18. The Tufts University study found the marriage of child brides to be prevalent in the areas where they conducted research, i.e. in Badghis, Herat, Kabul, Kandahar, and Nangarhar provinces, with up to 30% of families in some provinces reportedly marrying girls off below the age of 15. The study further revealed that child brides often were given to substantially older men, and were usually the groom's second or third wife. The majority of parents said that they had married their under-age daughters primarily for economic reasons.¹⁷⁶ Similar information is provided by a report by Medica Mondiale (May 2004), which argues that the incidence of child marriage is high even in urban areas. The report refers to a Shelter Network study of a random sample of educated people in Herat, where 28.5% of respondents were married before the age of 16 years.

laws, and then there is custom and there is great poverty."¹⁷⁷ It should be stressed, however, that the custom of accepting bride wealth in return for giving a daughter in marriage is not equivalent to a sale and is not considered as such. The family of the bride is supposed to spend part of the bride-wealth on the girl's trousseau and on wedding celebrations. When the PDPA government in 1978 tried to abolish the custom of bride price, it was met with strong resistance.

Arranged marriages also raise the question of whether forced marriages occur. Amnesty International reports that cases of forcible marriage have come to the attention of the courts, but that these have failed to initiate any criminal proceedings against the accused. Since marriages are considered a contractual relationship between two families rather than between two individuals, the transactional aspect of marriage may take over, with girls being exchanged to settle or consolidate economic or political relations between families or even tribal groups. The question of the girl's (and in many cases also the groom's) consent hardly counts in these contexts. According to the Afghan Independent Human Rights Commission, the limitations on access to justice for women have contributed to attempted suicide, suicide, and self-immolation. Over a hundred young women in Herat province reportedly have set themselves on fire, and dozens more in Badakhshan province jumped into the Kokcha River and drowned themselves to escape arranged marriages. The governor of Herat and high-level government officials reportedly condemned women who committed self-immolation to avoid

¹⁷⁶ Feinstein International Famine Center, 2004, p.109

¹⁷⁷ Kaufman, 2003

forced marriages as those who dishonor traditions,¹⁷⁸ and were presumably seen as having 'bad *tarbia*' (see discussion of *tarbia* above).

The right of divorce rests with a husband rather than a wife. However, a woman has the right to a judicial divorce while a husband can divorce his wife through extra-judicial pronouncement of a divorce (*talaq*) either orally or in writing. The grounds for judicial separation include the husband suffering an incurable disease, his failure or inability to maintain his wife, his absence from his wife without reason for more than three years or his imprisonment for ten years or more, in which event the wife can ask for divorce after the first five years of imprisonment.¹⁷⁹ Divorce is not common in Afghanistan, and it is considered shameful for a woman to seek divorce. She also loses custody over older children and her livelihood, and has to return to her own family if they will accept her.

Box 12: Temporary Refuges for Women

In line with their view that advocacy is about 'doing' rather than about 'talking', a small number of Afghan women have taken the initiative to provide temporary protective care for women or girls who have left home to escape from some unacceptable event in their lives. Originally pioneered by Shuhada, three more organizations have developed similar protective services in Kabul and Nimroz. All aim to provide a combination of legal, health, psycho-social, economic and non-formal educational care in order to enhance women's capacities and opportunities for their continued life. Contrary to fears articulated by women as well as men that such centers will attract women and girls away from the wishes of their families, the refuges are very discreet. They accept clients through network referrals rather than on an 'open-door basis', and usually promote mediation with families via professionals as the first line of action. Catering for a range of women's issues, including severe domestic violence and a first-stop for women released from prison on Eid*, one additionally accepts young female orphans who, after thirteen years, are considered too old to be maintained in orphanages. Like other women, they are provided with livelihood skills and, most importantly, with formal education including computer usage and English.

* It is customary for the President to release prisoners on Eid, including several women, among whom some find it unsafe to return home immediately. They seek out the Ministry of Women's Affairs, which has a close partnership with women's refuges for providing temporary shelter while longer-term solutions are worked out by legal professionals.

¹⁷⁸ Feinstein International Famine Center, 2003, p.104-105

¹⁷⁹ Lau, 2002, p. 25

Zina

With the extreme focus on honor, shame and precautionary measures to control women's sexuality, it is little wonder that adultery is considered a serious crime. Adultery and other unlawful sexual activity are referred to as "*zina*"¹⁸⁰ crimes in Afghanistan. Although men may be accused or convicted of *zina* crimes,¹⁸¹ Amnesty International notes that the criminal justice system places disproportionate emphasis on the prosecution of women for *zina* crimes. (see Box 12) Rape is also considered to be included in or conflated with *zina*, as set out in the Penal Code. The problem created by this aspect of the law is illustrated by the comment of a woman prosecutor to Amnesty International when asked about the question of prosecution for rape. "You see we have a problem in our civil code. If a woman comes forward to report rape she is likely to be arrested for *zina*." During the years of internal conflict, rape and sexual violence were used by armed groups as a means of dishonoring and intimidating families and whole communities. Boys too fell prey to abduction and sexual assault. In the absence of effective mechanisms to investigate gender related violence, the vast majority of such violations continue to go unreported and are almost never subject to investigation or prosecution.¹⁸²

Box 13: Defense Lawyers for Justice to Women

Medica Mondiale is enhancing the skills and capacity of defense lawyers to deal with cases strictly within the provisions of the existing laws; in one instance the release of a woman was secured on the basis of procedural issues alone. The organization prepares and distributes to relevant ministries and women's agencies booklets on marriage law and divorce and rights after arrest. It has produced, in collaboration with the Supreme Court, guidelines for defense attorneys in Dari. Over a period of ten months, Medica Mondiale has secured a release rate of 68% (116 cases) of imprisoned women. In Kabul the 46% of *zina* crimes recorded in January 2004 have been reduced to 27% by June. This was achieved by processing *zina* cases more rapidly on the basis of lack of evidence brought to court and the successful defense presented by the counsel. In other cases, divorce and custody of children has been granted to women.

¹⁸⁰ *Zina* refers to adultery or fornication, i.e. sexual intercourse between persons who are not in a state of legal matrimony

¹⁸¹ In June 2002, about 30 women were confined in Kabul jail, the majority of whom were, according to the Law Section of the Ministry of Women's Affairs, detained for a variety of offences related to family law, such as refusing to live with their husbands, refusing to marry a husband chosen by their parents, or for having run away from either the parental or the matrimonial home (Lau,2002)

¹⁸² Amnesty International, 2004

The Criminal Code also prescribes *hadd*¹⁸³ punishments for crimes such as theft, adultery and sex before marriage. These punishments include the payment of fines and retaliation on the part of the victim for crimes that are against Shari'a law. For example, the *hadd* punishment for adultery requires the stoning to death of convicted persons. The Penal Code also permits mitigation of sentences for murders claimed to have been committed in defense of honor. For example, a husband who murders his wife when she is found committing adultery is exempted from punishment for murder on that basis.

Inheritance

Women's inheritance rights are observed in a number of communities in Afghanistan and disregarded in others. The Civil Law, prepared in the mid-1970s and supposedly used by the courts, is clear on the property rights of widows (and daughters), but less clear on how the division of property is to be conducted. Customary practices tend to override both Shari'a (or what is locally understood as Shari'a) and civil law.¹⁸⁴ According to Islamic Law, a daughter inherits half of a son's share and a wife is entitled to only 1/8 of her husband's estate. It was demonstrated in previous chapters that women's right to inherit land is more nominal than real in most cases, as the woman may either transfer the land to her brothers to retain their support and protection, or if she keeps the land it would normally be her male relatives who actually control the land, what to cultivate on it and whether to sell it or not. Women are generally considered to have received their rightful share in the form of the 'trousseau' they bring into their marriage.

Informal Justice Systems

There is heavy reliance on informal justice mechanisms in Afghanistan in the form of *jirga*, among Pashtuns and *shura* among Dari-speakers, consisting of the elders¹⁸⁵ of all lineages and/or extended families of a village or tribal group.¹⁸⁶ The *jirga* and *shura* resolve community problems, including those related to land, property, the family and crime. Since the *jirga* and *shura* throughout Afghanistan are exclusively comprised of men, women are unable to approach these informal mechanisms without the support and assistance of a male family

¹⁸³ *Hadd* refers to punishment laid down for acts forbidden in the Qur'an. The *hadd* is a right or claim of Allah and no pardon or amicable settlement is possible once the case has been brought before the judge

¹⁸⁴ Wily, 2004a, p.51-52

¹⁸⁵ *Spin girey/risb-i safedan*, i.e. "white-beards")

¹⁸⁶ Boesen, 2004

member. In the process of decision making the *jirga* and *shura* apply different sources of law, including Shari'a law, tribal law and other customary law. The predominance of customary law in the *jirga/shura* decisions is by and large to the disadvantage of women, as customary law throughout Afghanistan tends to grant less rights to women than Islamic law or civil law in matters relating to inheritance, property and marriage. The inaccessibility of the *jirga* and *shura* to women also exacerbates the problem of impunity in relation to crimes against women, for example in cases of so-called 'honor killings' for which the perpetrators are generally not punished.

Customary law takes its point of departure in notions of restorative and reparative justice rather than the notion of retributive justice typical of present-day Western law and International law. Rather than being sent to prison for a wrong committed, a criminal offender will be required to pay compensation to the victim and ask forgiveness.¹⁸⁷ Sometimes these cases tend to be settled through material compensations only, and punishment for adultery is based on Shari'a. The norms vary considerably by tribal and regional groups, with Pashtuns and some Tajik groups in the North punishing adultery and elopement with the death sentence for the couple. It is also common to demand girls from the culprit's family as compensation in murder cases. Judicial officials, detainees and members of local *jirgas* in Mazar, Jalalabad and Herat reported adherence to similar practices.¹⁸⁸ A girl who is so 'exchanged', is then forcibly married to a male member of the victim's family. While such crimes are referred to as *bad*, different fines are assessed for different *bad* depending on the severity of the crime.¹⁸⁹ Amnesty International points out that this "practice... violates the prohibitions against slavery and discrimination and also constitutes torture or cruel, inhuman or degrading treatment."¹⁹⁰

Women's Voice in the Public Sphere

Customary systems of local governance have existed for generations in Afghanistan, and in many areas they are still functioning today. While the *jirga/shura* in principle is democratic and operates through consensus, only men can participate in it. The *jirga* principle has been

¹⁸⁷ Khurram, 2003

¹⁸⁸ Amnesty International, 2003

¹⁸⁹ *Bad* refers to crimes ranging from saying an improper word to murder or violating someone's *namus* (reputation/chastity). (Khurram, 2003)

¹⁹⁰ Amnesty International, 2003

elevated to national level right since the foundation of Afghanistan in 1747, when a grand *jirga* of Pashtun tribes elected Ahmad Shah Durrani as their king, as 'the first among equals'. Ever since, a grand *jirga* (*Loya Jirga*) has been seen as embodying the truest representation of the Afghan people.¹⁹¹ Since the *jirga* passing the 1964 Constitution, women have been granted a certain representation in the national level *jirgas*. This is not the case at local level, however.

Local Level: Today, Afghan women countrywide have virtually no role in selecting local leaders and have no or extremely limited involvement in decision making in their villages and communities. This observation is confirmed by all of the case studies and lately also by the comprehensive *NRVA* survey. The Tufts University study showed that the majority of village respondents report that rural Afghan women have no voice in selecting village, area, or district leaders or any other public official. In Badghis, Kandahar and Nangarhar, 100% of both men and women respondents stated that women have no role in selecting village leaders. In Herat and Kabul, over 95% of both male and female respondents said that women have no role in selecting village leadership.¹⁹²

The Government has launched the ambitious National Solidarity Program (NSP) which aims ultimately at covering the whole of Afghanistan with establishment of democratically elected Community Development Committees (CDCs). These committees will exercise a measure of self-governance through administration of block grants for reconstruction and development. The CDC concept is in line with the *jirgalsbura* tradition, although its members are elected rather than selected - but it breaks with traditions by encouraging the equal participation of women. The NSP experiment grants Afghan women their first opportunity to participate in local level politics - and it has been met with skepticism and resistance in a number of places, including suspicion that NSP is a 'foreign' and anti-Islamic program which aims at religious conversion and abolition of traditional Afghan values, especially concerning women and family.¹⁹³

The reluctance to let women participate in decision-making at the community level seems to be closely associated with notions of *purdah* and family honor, as it opens the door for women's participation in public affairs. Hence there were two hurdles - one, to get acceptance

¹⁹¹ Olesen, 1995 discusses the constitutional development in Afghanistan and the varying notions of legitimacy of power inherent in these

¹⁹² Feinstein International Famine Center, 2004: 89

¹⁹³ Boesen, 2004, p. 28-29

of women's participation in elections to CDCs, and thereafter, acceptance of inclusion of elected female candidates in the CDC. In most communities it was accepted that women participate in the elections, but only in a few places were the communities ready to accept that that an elected woman should be sitting with male fellow candidates deciding on community priorities. Objections would primarily come from the elected women's family, whose honor would be tainted by such a public exposure of a female family member.

A number of communities, assisted by NGOs, have overcome this hurdle by forming separate women's CDCs which can then represent women's priorities at the local level. While this may seem like a rather modest beginning, it is in fact a very significant step forward toward granting women their constitutional rights as citizens. The next question is of course whether women will manage to get their voices heard, and that will probably prove considerably harder. The women of a women's *shura* in Aqcha put it in these words:

"First we have meetings among women about the projects. Then the women speak to the men they have permission to (speak with), then the men can present the problems to the (male) shura" (ibid, p. 56).

In a number of CDC elections, as many women voted as men, at 80-100%, and in several locations their number exceeded that of men voting.¹⁹⁴ A number of women did get elected to the CDC, and one CDC even chose a female member as chairperson. It is symptomatic that this person is a school teacher, since it is commonly held that "*women can first participate in elections after they have been educated*"- apparently a view also shared by illiterate men (!) Reservations regarding women's formal participation in community affairs are widespread and common, and female CDC members may find difficulties in getting their views heard and acknowledged, but women may yield indirect influence through male family members, a fact which is acknowledged by men.¹⁹⁵

Apart from the fact that women need their male relatives' (*mahram*) permission to vote, a major obstacle to their participation in local as well as national level politics is their limited

¹⁹⁴ Aide Memoire. NSP Supervision Mission, July 2004. World Bank

¹⁹⁵ This situation was experienced first hand in a rural development project in North Afghanistan during the 1970s, where female family members frequently were decisive for a family's position in community consultations, although only men participated in such meetings

access to information. Being largely illiterate and having very little mobility, women are mainly dependent on the radio for accessing information on their own - or through a male filter. A survey in 2003 found that 78% of Afghan men compared to only 61% of women in urban locations were aware of the constitutional process.¹⁹⁶

National Level: Free and fair elections in the Western style were introduced in Afghanistan with the 1964 Constitution. Despite the formal rights of all Afghan citizens to vote in the elections, there was in reality very limited participation in the rural areas. In the first election in 1965, only 10% voted, and subsequently in 1969 barely 20% cast their vote.¹⁹⁷ Observers ascribed part of the explanation to the great rural-urban divide - which paved the way for the Communist coup and the *jihād* in response to it.

The Interim and Transitional Governments of Afghanistan have given an important place to women, as noted earlier in this report. The Bonn Agreement highlights the need to recognize women's role in society, and the establishment of the Ministry of Women's Affairs provides a structure to focus on the advancement of women. Efforts to give women political voice can be seen from the appointment of three female ministers - the Minister of Public Health, Minister of Women's Affairs and State Minister for Women; the 14% of women representatives in the first Loya Jirga which chose the Transitional Government; and women's participation in the constitutional drafting commission, the Judicial Commission, the Electoral Body, and recognized in the Civil Service Reform program. A further step was taken by the Constitutional Loya Jirga in December 2003, which provided for equality between women and men before the law and allocated to women a minimum of two seats per province in the Lower House and half of the one-third membership of the Upper House selected by the President. In total this will secure for women at least a 25% share in the National Assembly.

The Loya Jirga was not without incidents related to women's roles and rights. Women delegates reportedly felt intimidated on several occasions by conservative male delegates. In one particular case, a female delegate verbally attacking *jihadi* fighters for human rights abuses in the past provoked so much wrath from some male delegates that it was considered prudent

¹⁹⁶ Oates & Helal, 2003, p.13

¹⁹⁷ Grevemeyer 1987

to provide her with protection. This was reminiscent of events in the Afghan Parliament in the 1960s, when the female Communist member (later minister in the PDPA government), Anahita Ratebzad was physically attacked by male colleagues over a speech she had made.¹⁹⁸

The Presidential election took place in October 2004, and was assessed both nationally and internationally as successful. Voter registration had progressed at a highly uneven pace with respect to both region and gender, and had been hampered by increasing numbers of terrorist attacks against UN and government personnel involved in the registration process. As the elections drew closer the level of intimidation also increased - against registration of voters in general, but also targeting female voter registration in particular, as bomb attacks against a mini-bus of female election workers in Nangarhar in June revealed. Despite the unevenness in voting patterns, the high turnout nationwide demonstrated that most Afghans opted to exercise their right to vote, even at some risk to their physical security.

The Afghan government, international donors, and non-governmental organizations (NGOs) had taken many positive steps to encourage female voter registration in advance of the presidential election through civic education programs and hiring of female election workers. These efforts paid off, and more than 41% of registered voters were women, who accounted for around 40% of the votes cast. In the Pashtun areas, voting varied sharply along an east-south axis: Women formed more than 40% of voters in all but one of the eastern and southeastern provinces, while women cast less than 15% of total votes in Uruzgan, Zabul and Helmand. In two other provinces, Dai Kundi and Faryab, with largely Hazara and Uzbek populations, respectively, women comprised more than half of the voters, and in Nuristan there was gender parity.¹⁹⁹

Despite the various hiccups, the Presidential Election was largely successful and a great achievement for Afghanistan. The participation of women in the election was impressive in many locations and clearly illustrated women's wish to participate in national level politics and in decision-making affecting their own and their family's life and welfare. While a thorough assessment has not yet taken place, it can be safely assumed that lack of security was a major reason for the very low voter registration figures in southern provinces. The experience of the Presidential Election provides lessons for conducting successful Parliamentary Elections in 2005.

¹⁹⁸ Dupree, 1973

¹⁹⁹ International Crisis Group, 2004a

Policy Implications

...the gender element is critical, given we are moving from gender apartheid to gender integration, addressing the capabilities of women in the culturally appropriate way requires special attention. However, as shown by the Loya Jirga, when women take on these roles they are accepted, the key is not to discuss the role of women in Afghanistan, but to create facts on the ground regarding integration and women's roles.²⁰⁰

As citizens, Afghan women in principle have Constitutional equality but face legal inequality. Furthermore, there are great discrepancies between customary law, civil law and Islamic Law - as well as the informal justice system, which tend to grant women even fewer rights. Years of conflict and violence have further eroded the protection of women's (limited) rights, and a culture of impunity reigns as far as violence is concerned, including violence against women inside and outside the household. The deteriorating security situation in many parts of the country constitutes the most serious obstacle to promoting rule of law, respect for human rights and introduction of legal reform, which would benefit women more than any other group in society.

The policy implications of the situational assessment are twofold: On the short term there is the need to pursue women's legal rights more effectively within the confines of the current law:

- ✓ securing women's legal rights through legal education, legal aid, traditional mediation systems, discreet helplines and protected refuges
- ✓ information/awareness campaign about the unlawful nature and negative social effects of child marriage and forced marriage combined with incentives to delay marriage until reaching maturity, channeled through mass media and through community elders, religious leaders and teachers
- ✓ improving personal security of men, women and children and strengthen legal system to uphold rule of law
- ✓ support to women's groups at local and national level to enable them to utilize their constitutionally guaranteed political rights and representation to exert political influence

On the longer term there is the need to reform the legal framework/system to ensure that women gain an equal place in society:

- ✓ legal reforms to remove gender inequities within Family Law, in terms of marriage, marriage age, divorce and inheritance with inspiration from Muslim countries like Turkey and Egypt which have gone through a reform process

²⁰⁰ *Securing Afghanistan's Future, 2004*