

Women's Equality in Afghanistan

Introduction

Afghanistan is making strides toward repairing the devastating effects of 25 years of sustained conflict. A significant consequence of which has been the apparent human rights violations faced by Afghan women. During this period of redefining national identity, efforts have been made to help ensure that voices of women are heard. On center stage, under intense international scrutiny, was the building of Afghanistan's national Constitution. Embedding women's rights in the Constitution was thought to be a pillar in the struggle for women's rights. As such, women were included in the process and helped to shape the outcome of the Constitution. Though it is still too soon to tell what ultimate impact the Constitution will have, there is significant potential for the Constitutional text to help women overcome challenges with respect to key areas of concern such as repressive customary laws, political participation and violence.

CUSTOMARY LAWS

Demographics: What is the nature of customary laws in Afghanistan?

BACKGROUND

Most members of Afghan society abide by regional customary laws. Customary laws are not formal state laws. They are unofficial rules and principles adhered to by ordinary Afghan citizens. These informal laws apply to every aspect of life and are considered an essential part of community cohesion. Anyone disobeying customary laws are traditionally regarded as a criminal and, as a result, condemned by the community.

Throughout history, a formal legal system has not played a central role in governing the lives of the majority of Afghan citizens. The bifurcation of the legal system into official and unofficial law has been a hallmark of Afghanistan's legal history ever since attempts were made to introduce statutory laws.

Customary laws have increasingly gained authority with the fall of the Taliban in 2001, as the central government has lost much of its ability to maintain control and provide security to the public.

Understanding the nature of customary law in Afghanistan requires an appreciation of the country's history and social structure. Within the region now formally known as the Islamic Republic of Afghanistan, there are at least 14 different ethnic groups in 34 provinces divided along tribal and clan lines. Afghanistan was formed by the imposition of borders around these vastly different ethnic groups, all of which shared a common religion – Islam. It is the combination of deeply resonant tribal cultures and strong religious beliefs that underlies the regional customary laws and practices in Afghanistan today.

In Afghanistan, modern Western liberal ideals are, to a large degree, foreign. Rather, it is customary laws that primarily inform and reflect the values placed on community cohesion and the family unit.

Traditionally, men and women have occupied very different spheres in society, with distinct roles carved out by gender. To a large degree, men take on a governing role in the community, acting as leaders and protectors of the family, which in many instances, has led to women being regarded as the property and responsibility of male family members. These arrangements have created restrictive codes of behavior, gender segregation, and the strong association of female virtue with family honor. These characteristics are deeply embedded in many of the customary laws and traditions found throughout Afghanistan.

Religious beliefs, rooted in Islam, have also influenced the development and adherence to customary laws within Afghanistan. Notions of morality and the governance of the community standards – as expressed in customary laws – have, to some degree, been influenced by local interpretations of Islam. Islam is the most prominent religion in Afghanistan, and has become an integral part of social dynamics throughout the country. Some tribes claim to have direct lineage to the Prophet Muhammad or to be descendants of those who received Islam directly from the Prophet, which heightens the fervor by which they defend their tribe, its honour and its practices - though only loosely based on religion. It is in this context that many of the customary laws have evolved in Afghanistan.

CUSTOMARY LAWS IN AFGHANISTAN

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Many customary laws within the Afghanistan are based on principles of restorative justice . A traditional council, know as a Jirga , is called to resolve community disputes. Afghans regard these decisions as law. Women's participation is limited in this process, as Jirgas are generally composed of men, although on rare occasions, women have been known to sit on the council. Council meetings are public and open to all, though most of the time women are excluded as potentially disruptive elements to the process. During a Jirga, council members review the facts of a case and pass a sentence, which will vary based on the offense and tribal custom. Usually sentences involve a formal apology, the payment of blood money, and/or a gift to the victim's family.

Though Jirgas play an important role in generating community cohesion, many customary laws violate women's rights under standards of international law. Such practices include the gifting of women as a punishment for murder, forced marriages and a strong disregard for the dignity of women in cases of rape.

Murder

Most tribes have extreme sentences for crimes of murder, often involving the gifting of a woman to the family of the victim. In one case of murder within the Wazir tribe, the Jirga ordered the offender's family give the victim's family a bad, or payment, typically of two girls, and pay a fine of 300,000 Pakistani rupees. The order also required that one of the girls be married to a member of the victim's family as an expression of his approval of the Jirga's decision. This type of sentence is typical of some tribes, because of the belief that "when the girls are wedded to the victim's family, kinship and blood sharing will transform the severe enmity into friendship".

Adultery/ Kidnapping

In cases involving the kidnapping of women or adultery, some tribes force the parties to marry, even against the wishes of the female involved. Marriage is often ordered in these cases on the basis of a belief that the female's chastity may have been taken, thereby compromising the honour and dignity of the woman and her family.

For example, in Nuristan, if a married women is 'consensually kidnapped', the Jirga compels the current husband to divorce the woman so she can be married to the kidnapper. The former husband would be further compensated with the return of the dowry he previously paid and receiving animals from the offender.

In the Kunduuz Province, if an unmarried couple commits adultery, the couple is ordered to be married, and the family of the woman is compensated.

Rape

Investigation and penalty in rape cases is largely unaddressed within Afghan systems of customary law. Loss of virginity is perceived as ruinous to the prospects of women and girls and, as such, is hidden by the community whenever possible. If a case of rape is discovered, the sentence imposed is harsh. In one example, in a case of rape amongst Hazaras, the Jirga ordered the woman to receive 60 lashes and the male perpetrator be stoned to death. Thereafter, the woman's husband divorced her, she became depressed and ultimately died.

What were women activists in Afghanistan focused on during the period of conflict just prior to the peace/ reconstruction/ constitutional negotiations?

Not long after the Taliban took control of Kabul, swift and substantial changes were made to the lives of Afghan citizens. A strict and extreme interpretation of Islamic law was imposed on the Afghan people, and state-imposed regulations were superimposed on customary laws and tribal practices. Many customary laws and practices were banned under the Taliban's interpretation of Islamic teachings, including the use of women as possessions for barter. Yet, despite the elimination of some of the highly oppressive customary laws during the Taliban rule, women faced serious human rights violations under a different mandate, one of religious extremism.

Under the Taliban, women were largely relegated to the indoor private sphere without economic, physical and intellectual independence. The Taliban removed girls from schools and forbade women from employment outside the home. Women were unable to seek medical attention from male doctors and had limited access to female physicians. The Taliban also forbade women from showing skin or walking without a close male relation in public leaving those too poor to afford appropriate clothing and widows

without a close male relation in public leaving those too poor to afford appropriate clothing and widows with no male relatives to languish behind blackened windows.

Two of the highest priorities for Afghan women under the Taliban regime were security and access to education. Having said this, additional concerns of Afghanistan's women activists included access to employment and physical and mental health services, prevention of sexualized, physical and domestic abuse, public involvement in their communities, and the effects of long-term conflict on refugees (mostly women), widows and the disabled.

Despite some improvements on the terrible conditions facing women under the Taliban regime, many activists are concerned that the new Karzai government holds limited support throughout much of Afghanistan – leaving women to the mercy of customary laws or the fundamentalist Islamic rule of dictators such as Ismail Khan in Herat, both having the potential to lead to serious human rights violations.

What changes were made to the Constitution to respond to concerns about women's equality?

With the fall of the Taliban, and a new Constitution in place, there is significant potential to influence the customary laws and practices impacting the lives of girls and women throughout Afghanistan. The degree of influence the Constitution will ultimately have is contingent on two factors, namely; the customary laws in question, and the degree to which recognition of, and compliance with, the Constitution occurs in the communities in which these girls and women live.

The sources of constitutional protection are anchored both in the provisions of the Constitution that are intentionally designed to address the status of women, and those that are gender-neutral, and apply to all citizens. With respect to the former, the provisions specifically addressing women's rights within the Constitution are few. Article 22, which is unique in its clear recognition of principles of non-discrimination, perhaps offers the greatest potential for combating the injustices faced by women under customary law. In prohibiting discrimination among the citizens of Afghanistan, and declaring that both men and women have equal rights and duties before the law, discriminatory customary laws could be challenged on the basis of these equality guarantees.

Additionally, Article 53, which addresses the protection of the handicapped and disabled, also prescribes that the rights and privileges of women without caretakers are upheld by the state. To the degree that customary law may discriminate against such women, constitutional protection is afforded through this provision. Similarly, Article 54 explicitly deals with the rights of women, recognizing the family as the fundamental unit of society and requiring that the state 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 principles of sacred religion of Islam". This provision may be of particular assistance in rolling back customary laws that permit forced marriages, which, although accepted under custom, are prohibited under Islamic law. Article 54 may also be of assistance combating customary laws that condone violence against women – for example, honour killings, which are often mistakenly justified as being based on the teachings of Islam. Although the large majority of provisions within Afghanistan's new Constitution do not explicitly deal with women's rights, many of the neutral provisions have significant potential to challenge customary laws that negatively impact upon Afghan women. These broad, non-gender specific provisions include Article 6 which, in declaring "the state is obligated to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights..." may provide protection to women in instances where customary laws amount to human rights violations.

Article 7, which similarly addresses human rights, requires the state to uphold its international legal obligations by abiding to international conventions and the Universal Declaration of Human Rights. In this respect, Afghanistan's ratification of The Convention on the Elimination of Discrimination Against Women (CEDAW), which provides a specific commitment to women's rights in the context of public, political, social and cultural life, is of particular relevance. Under CEDAW, responsibilities regarding anti-discrimination fall on state parties, regardless of whether laws are customary or religious in origin. The Convention requires Afghanistan to modify the social and cultural patterns of conduct, with a view to achieving the elimination of prejudicial practices, which are based on the notion of inferiority or superiority of either of the sexes. This leaves considerable latitude to challenge discriminatory practices stemming from the application of customary law.

More specifically, CEDAW addresses issues of forced and underage marriage, which have strong linkages with many of the customary laws within Afghanistan. Although under Afghan law the legal age of marriage

with many of the customary laws within Afghanistan. Although under Afghan law the legal age of marriage is 18 for men, and 16 for women, a pattern of widespread underage marriages has been well documented. Further, in many regions, customary law prescribes the giving of girls as a preferred means of resolving disputes involving murder and assault, and in some instances, as compensation if a woman has eloped. In contrast to custom, CEDAW requires that marriage only be entered into under the free and full consent of both parties, and prohibits underage marriage.

The majority of the provisions under Chapter 2, which outlines the fundamental rights and duties of citizens, may also be interpreted in a way that would benefit women and girls oppressed by customary law. In addition to the aforementioned equality guarantees, Article 23 (right to life) Article 24 (right to liberty and human dignity) and Article 29 (immunity from torture) have the potential to shield women from injurious customary practices. With respect to criminal punishments, Article 26 classifies crimes as 'personal actions', such that "the prosecution, arrest and detention of an accused, and the execution of penalty can not affect another person". This could lead to the outlawing of some forms of bad, which involve the sentencing of women for crimes committed by their male relatives. In a similar vein, Article 27 (3) provides that no one should be detained or punished except under the lawful decision of a court of law. This provision could provide a constitutional bar to honour killings, in which Jirgas, in applying customary law, may permit families to take retribution into their own hands.

What are the main policy and or legal issues re women's equality that have arisen since the constitution was finalized and how were constitutional equality clauses used by a) women, b) government c) others in responding to those concerns?

Given that Afghanistan's Constitution is so new, specific examples of its use and efficacy in responding to women's concerns are highly limited. Certainly, the symbolic effects of a Constitution can be powerful – reflecting and reinforcing collective goals and visions for a more just and equitable society. From a theoretical perspective, constitutional recognition of women's rights is certainly valuable, creating a 'place' for women within a framework that represents societies highest ideals. However, it is clear that a Constitution alone will not eradicate the many injustices faced by women in Afghanistan. Although the Constitution has significant potential as a tool for renegotiating the role of customary law in the lives of Afghan women, the document may have limited impact on the lived experiences of women. Having addressed the potential protection the Constitution may offer women in the preceding section, what remains is a set of policy and legal concerns with respect to the Constitution's capacity to reach into the realm of customary law and improve the situation of girls and women in Afghanistan.

Certainly, a Constitutional can act as tool for challenging state activity in the courts. However, Constitutional rights are also expressed in terms of generalities, and the meanings ascribed to various provisions are heavily influenced by the interpretations of the judiciary. Now that the document has been finalized, the Constitution's practical application has become a central concern. How the text is interpreted will be key to the Constitution's effectiveness – and certainly the potential exists for the broad, gender-neutral provisions to be read in a way that fails to fully support and promote the rights of women. Perhaps the most pronounced example of this is Article 3, an omnibus provision declaring, "no law can be contrary to the beliefs and provisions of the sacred religion of Islam". This article has the potential to have a profound impact of the lives of girls and women within Afghanistan. On one hand, such a broad provision could be beneficial, allowing for a progressive interpretation of Islamic law compatible with constitutional rights and Afghanistan's international law commitments - and quashing conflicting customary law. Alternately, there is concern that matters not deemed to fall within the scope of the Constitution will be adjudicated under religious and customary laws that leave women's rights vulnerable to extremist interpretations. Gaps within the Constitutional text also present challenges to advancing the rights of women. Although the formal recognition of positive rights for women is a step forward, Article 22, which states "the citizens of Afghanistan- whether man or woman- have equal rights and duties before the law" may provide equality before the law, but unfortunately fails to ensure equal protection of the law. The inclusion of such a provision, which relates to legal status of women, would provide guarantees against the adverse effect of the law; for example, this provision might determine whether the law grants women and men equal rights to a choice in marriage.

Ultimately, the ideals embodied in the Constitution will only take effect when there is formal and informal recognition of the shared values expressed in the text. Given the great cultural diversity of Afghanistan.

recognition of the shared values expressed in the text. Given the great cultural diversity of Afghanistan, and the fragmentation both along clan lines and between the urban and rural areas, widespread 'buy-in' will be difficult, and will undoubtedly take considerable time. Popular belief in the Constitution will likely remain an ongoing challenge, and will be influenced both by how the text is interpreted, and whether the outcome of future cases supports or erodes Afghans' perceptions of the effectiveness of progressive social change through Constitutional means.

What are the top two current priorities for women's activism in Afghanistan now?

"The development of a fair and effective justice system in Afghanistan is a vital requirement to meet the needs of the Afghan people and to protect their human rights, with special consideration for the most vulnerable sections of society, to ensure peaceful dispute resolution, to promote good governance an effective justice system is essential not only for the successful development of Afghan society as a whole, but also to achieve lasting peace and security in Afghanistan." Final statement of the Rome Conference on Justice in Afghanistan, December 2002.

Currently, the top two priorities of women activists with respect to customary laws in Afghanistan are 1) the creation of representative, trusted and accountable judicial institutions and 2) ensuring that women have access to justice through these institutions. Both of these requirements are central to maintaining peace, stability and ensuring the protection of women's rights.

As discussed, customary law consists of traditional, non-formal justice mechanisms that are rooted in tradition and preside over the lives of the majority of Afghans. Many customary laws have been regarded as procedurally and substantively repressive to women – particularly those resulting in exclusion of women from the public domain, gifting of women in cases of murder, forced and underage marriages and extreme punishment for cases of adultery/kidnapping. The elimination of these practices has been the focus of much of women's activism both within and outside the country.

Although considerable attention has been drawn to specific areas of customary laws that demonstrate clear violations of women's rights, many activists groups have focused on the larger question of how to ensure women's rights generally are protected against the possibility of injustice through the informal system of customary laws. Afghan civil society has recognized that a formal justice system, one that protects women's rights while respecting the diverse cultural norms of the people of Afghanistan, will have to play a central role if women are to realize their rights.

JUDICIAL INSTITUTIONS

The role of an effective, functioning justice system is to provide remedy to victims of human rights abuses and to bring the accused to justice in accordance with state law and international standards for fair trial. Failure to provide justice and protection from abuse acts to perpetuate violence against women, as these crimes go not only unpunished, but unacknowledged, both by the perpetrators and by society more broadly. Legal reform and the rebuilding of the judicial system with international support are currently moving ahead in Afghanistan.

Activists have recognized that this stage of rebuilding offers a significant opportunity to protect the rights of women and girls. There are concerns, however, over the absence of a clear strategy both to eliminate the discrimination against women within the existing structures, and to enhance their rights in the future. Further, the mix of Shari'a law, Afghan customary law and statutory law - and the lack of clarity, uniformity and consistency with which these laws are applied - may have particularly negative implications for women.

ACCESS TO JUSTICE

Women's access to the formal justice system in Afghanistan has been well documented. The functioning of the formal justice system is primarily limited to urban areas, while in rural areas - where the majority of Afghanistan's women reside – the majority of disputes and crimes are currently dealt with under customary law by Jurgas or Shuras. Given the stronghold of customary law in these areas, the degree to which the Constitutional law will be disseminated, accepted and enforced in outside urban centers is unclear. Even

Constitutional law will be disseminated, accepted and enforced in outside urban centers is unclear. Even in urban centers authorities are reluctant to respond to women's complaints of domestic violence, rape, sexual violence or other assaults. Prosecutors for the most part, refuse to open investigations into cases involving domestic violence or order protective measures for women at risk from their family or community. Complaints from victims of domestic violence are widely dismissed by the police as a private matter and victims are often advised, and sometimes pressured not to take action. Further, in much of Afghanistan, interactions between women and unrelated men are limited, and in some instances, are prohibited. This greatly inhibits women's access to both formal and informal justice mechanisms, as these bodies are almost exclusively male. Perhaps an even greater concern is that a large majority of women's rights come in to conflict with customary law within the context of family law, an area not covered by the Constitution.

POLITICAL PARTICIPATION

Demographics

Number of Women in National Parliament: 68/249 seats (27.3%)

Number women in cabinet: 23/102 seats (22.5%)

Number of women in local government: unknown

What were women activists in Afghanistan focused on during the period of conflict just prior to the peace/reconstruction/ constitutional negotiations?

The harsh restrictions on participation in public life under the Taliban meant that women's activism in Afghanistan was driven underground or outside of the country. Women's activism and political participation under the Taliban can be roughly divided into three categories: clandestine activity within Afghanistan, work within refugee populations beyond Afghanistan's borders and political activism in the international arena. Two grassroots - women's organizations, RAWA and Negar, were highly active promoters of women's rights throughout the Taliban reign.

CLANDESTINE ACTIVITY WITHIN AFGHANISTAN

Many Afghan women groups operated extensive underground networks "for advocacy, fund-raising, awareness raising, and at times implementing projects." Groups such as the Afghan Women's Network, the Afghan Women's Council used the networks to promote health, education and income generation, to teach skills training and for relief distributions. One of the best known Afghan women's groups, the Revolutionary Association of Women of Afghanistan ("RAWA"), operated one of the largest of these networks, a web of over 2,000 members dedicated to providing humanitarian relief to women and children. Throughout the Taliban occupation, the RAWA network ran clandestine schools and textile workshops out of urban homes.

Writing on women's activism during the Taliban reign, Sippi Azerbaijani-Moghadam, technical adviser on gender for the Women's Commission for Refugee Women and Children documented the various "informal women's groups that are very active, effective, and influential at community level." She recorded activities such as business women organizing other women for income generation activities and Afghan mosque groups (Shiite Muslims) who gathered women for sermons on women's rights in Islam, for literacy and for Quranic education or home schools.

WORK WITHIN REFUGEE POPULATIONS

RAWA and other women's organizations also offered humanitarian aid to Afghani women and children in refugee camps in Pakistan and Iran. Like most of the humanitarian work happening domestically, this work was not directly political, but focused on meeting basic needs of medical care, education, skills training and relief distribution. Afghan women in exile were also active in resisting the Taliban and the constraints it placed on women.

INTERNATIONAL POLITICAL ACTIVISM

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In addition to humanitarian and refugee work, RAWA has also been a strong voice of political activism internationally. They have fought against the rise of the kind of religious fundamentalism that was so damaging to women under the Taliban regime. In the wake of the September 11 attacks, RAWA, who had emphatically denounced the use of Afghanistan as a political playground for foreign power, called on the U.N. "to help the establishment of a broad-based government based on democratic values," while denouncing the Northern Alliance as a fundamentalist organization with a history of lawlessness and violence exceeding that of the Taliban.

Using the cover of the burqa, RAWA workers within Afghanistan were able to smuggle journalists like Shaila Shah and Eve Ensler into the country and to document executions, beatings and other human rights abuses. The film "Beneath the Veil" is an example of how such efforts were used to bring international attention to the plight of women under the Taliban.

Negar, a Paris based organization, is another women's group central to promoting Afghan's women's rights at the international level.

In June 2000, Negar organized a conference of Afghan women in Tajikistan aiming to influence the peace process at the U.N. Three hundred women drew up a Declaration of the Essential Rights of Afghan Women, based on U.N. documents and the 1964 and 1977 constitutions of Afghanistan. Each of the ten articles of the Declaration refers to an inalienable human right and is related to one of the Taliban decrees that had cancelled that right.

Despite certain political differences, Afghan women activists seem to have been united in their opposition to the repression experienced by women under the Taliban and the importance of securing human rights for Afghan women. In a letter to Feminist Studies in the fall of 2001, Sameena Nazir, coordinator of the Women's Rights Advocacy Program at the International Human Rights Law Group, described the strong leadership that existed amongst Afghan women, despite overwhelming repression and strongly advocated for their inclusion in the future constitutional process.

What changes were made to the Constitution to respond to concerns about women's equality?

Afghanistan's newly ratified Constitution grew out of a process initiated by the 2001 Bonn Agreement ("Bonn"). Bonn was signed by representatives of anti-Taliban forces, the former King of Afghanistan, and representatives of various other exiled Afghan groups shortly after the fall of the Taliban government. Only three of the 60 representatives at the Bonn talks were women.

Bonn established a timeline and process for the enactment of a new Afghani constitution. By the terms of the agreement, a Constitutional Loya Jirga convened in December 2003 to approve a new constitution, using the somewhat liberal 1964 Constitution as a guide.

The 1964 Constitution, which women helped to draft, gave women the right to vote and guaranteed them "dignity, compulsory education and freedom to work". It had helped to create an environment in which women occupied prominent political and professional roles. Bonn set out basic rules for the development of women's roles and pledged "to include them in political life, particularly by participation in the Loya Jirga and the interim administration."

POLITICAL PARTICIPATION OF WOMEN IN DRAFTING & APPROVAL OF THE 2004 CONSTITUTION

The Afghanistan constitution-making process was set out in three phases.

First, the Constitution Drafting Committee completed a preliminary draft constitution. Second, a Constitution Review Commission prepared, reviewed, and finalized the draft. During this stage, members of the Commission consulted with Afghans. Both the Afghan Independent Human Rights Commission and the U.N. Assistance Mission in Afghanistan (UNAMA) had mandates to monitor the consultative process.

Third, a Constitutional Loya Jirga assembled to review and adopt the draft constitution.

Women took part in each of these three stages. Two of the nine members of the Constitution Drafting Committee, and seven of the thirty-five member Constitution Review Commission, were women. Of the 502 delegates that gathered in western Kabul for the Constitutional Loya Jirga, 100 of the delegates were women.

The women participating in the Constitutional Loya Jirga faced significant challenges. They were made

The women participating in the Constitutional Loya Jirga faced significant challenges. They were made targets of intimidation, threats and harassment. Many female delegates felt unable to express themselves freely because of fear of retaliation upon return to their home communities. As a result of these fears, several delegates left the country temporarily or delayed their return home. A number of women who participated did subsequently experience retaliation in the form of harassment, dismissals from their jobs, and transfers to inferior positions. Despite these difficulties, women at the Constitutional Loya Jirga were able to help entrench provisions in the 2004 Constitution that could further the political participation of Afghani women.

WOMEN'S POLITICAL PARTICIPATION RIGHTS IN THE 2004 CONSTITUTION

The new Constitution of Afghanistan embraces a number of bold purposes, including the creation of a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, and the realization of democracy. It also explicitly prohibits discrimination and recognizes equal rights for men and women: "[a]ny kind of discrimination and privilege between the citizens of Afghanistan are prohibited" and "[t]he citizens of Afghanistan – whether man or woman – have equal rights and duties before the law". Both of these broad provisions may be seen as particularly relevant to the interpretation of other sections of the Constitution that relate directly and indirectly to women's political participation.

Political participation rights of women in Afghanistan are directly addressed in the new Constitution in at least three ways. First, Article 33 gives every citizen "the right to elect and be elected." Second, the Constitution reserves a minimum number of seats for women in Afghanistan's bicameral National Assembly. Women must occupy a minimum of two seats from each province, and a total of 68 of the 249 total seats in the Wolesi Jirga (Council of the People). Fifty percent of the delegates appointed by the President to the Meshrano Jirga (Council of Elders), approximately 16 percent of the total seats, must be women.

Third, Article 7 may protect women's political participation rights by stating that "[t]he state shall abide by the U.N. Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights." This requires the government to comply with the many treaties to which Afghanistan is a party, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country.

In addition to direct protection, the political participation rights of the women of Afghanistan may also be indirectly enhanced by a number of provisions. In particular, provisions recognizing the right of every citizen to a free state-funded education, the state commitment to special education programs for women in particular, and the right of every citizen to acquire private property may help Afghani women to ultimately achieve greater economic independence. This economic independence may in turn facilitate greater participation of women in politics and public life.

Further, the following provisions; "[w]ork is the right of every Afghan", "[c]hoice of occupation is free within the limits of law", and "[f]orced labor is forbidden," may also indirectly encourage the political participation of women by facilitating economic independence and granting some measure of personal freedom and security.

What are the main policy and or legal issues re women's equality that have arisen since the constitution was finalized and how were constitutional equality clauses used by a) women, b) government c) others in responding to those concerns?

Afghanistan's new Constitution, ratified on January 4th, 2004, has been the center of much debate. The U.N. Secretary General labeled it a "historic achievement" and the U.S. ambassador to Afghanistan called it "one of the most enlightened constitutions in the Islamic world". Others have criticized the Constitution for falling far short of what they believe is required to advance the political participation of women.

While still too early to draw any meaningful conclusions on the practical effect of the Constitution on the political participation rights of women, some potential concerns can be highlighted here.

First, while Article 33 on its face facilitates women's political participation by granting every citizen the right to elect and be elected. other constitutional provisions substantially limit this right. For example. Article

to elect and be elected, other constitutional provisions substantially limit this right. For example, Article 72(2) makes higher education necessary for membership in the National Assembly. Given that women have had – and continue to have – fewer opportunities for education in Afghanistan relative to men, women will be disproportionately affected by this provision.

Second, there are no seats reserved for women in provincial councils, which some consider a “serious constitutional omission”. Article 29 of the 2005 Electoral Law does stipulate that at least one quarter of the seats in each council must be reserved for female candidates, but as this is statutory law only, it is easier to change than would be a similar constitutional requirement.

Third, social, political, and economic realities continue to inhibit the transformation of political constitutional rights into lived realities for most women in Afghanistan. General insecurity, targeted threats and harassment, and social and cultural norms prevented many women from voting in Afghanistan’s recent elections, let alone from registering as candidates.

Such obstacles are felt especially acutely by women living in rural areas of Afghanistan, outside the relative stability and security of Kabul. Ultimately, the right to elect means little if you are unable to travel to a voting station and the right to be elected means even less if it only brings death threats and harassment. Women seeking to assert political participation rights in Afghanistan must confront long held prejudices and old attitudes. In December of 2003, the head of the Constitutional Loya Jirga told the assembly, “Even God has not given [women] equal rights because under his decision, two women are counted as equal to one man.” Until these attitudes change, constitutional rights and duties will carry little meaning or importance for the women of Afghanistan.

What are the top two current priorities for women's activism in Afghanistan now?

Non-governmental organizations currently working in Afghanistan are perhaps the best source of information on the concerns facing women activists. Although these organizations face a wide range of pressing issues, two overarching themes emerge from a sampling of their work: education and capacity building (through vocational training, and income generation projects).

Security, a concern vital to all sexes in Afghanistan, is an issue especially pertinent to women as sustained violence impedes women’s rights to social and political participation. However, women’s organizations are currently unable to address such a large scale issue in any effective capacity.

EDUCATION

Afghanistan has one of the lowest literacy rates in the world. Only 14 percent of adult women are literate, with some literacy rates in rural areas as low as 4-5 per cent. Education for girls was severely restricted under the Taliban rule. Since then, girls’ education has been provided through home schools, often run by private individuals or communities or NGOs. The Afghan Ministry of Education is currently working to increase education and raise literacy levels and some progress has been made. 1.2 million girls have enrolled in Afghanistan’s primary schools since 2002, but more than 1 million primary school age girls are still not attending classes. UNICEF and the Afghanistan Ministry of Education are focusing efforts on developing learning opportunities for girls in communities with no formal school, with the aim of providing education for an additional 500,000 girls in 2005.

Challenges include teacher shortages (especially of female teachers), gender disparity in school attendance (in Zabul and Hilmand, no girls attend school), family commitments and oppressive traditions, and lack of transportation to school.

CAPACITY BUILDING, VOCATIONAL SKILLS, INCOME GENERATION

Although women in urban areas had a wide variety of professional jobs before the Taliban came to power, women’s employment was outlawed for the entire reign of the Taliban regime. Skills training and capacity building initiatives range from teaching computer proficiency to developing domestic abilities such as sewing. Many of the NGO programs have evolved from simple skill training classes to providing funding assistance for businesses created with the newfound skills.

VIOLENCE AGAINST WOMEN

VIOLENCE AGAINST WOMEN

INTRODUCTION

Violence, both public and private, is a growing area of concern for women in Afghanistan. The following piece looks at some of the key issues and activism surrounding the issues of violence for women in Afghanistan in three periods. This first section will deal briefly with some of the incidents of violence that have been gathered and documented in order to paint a picture of the pre-constitutional issues prevalent for the women of Afghanistan. The next section will then describe the attempts to bring some of those issues to the constitutional table. Finally, we will conclude by looking at current priorities, given continued public and private violence concerns for the women of Afghanistan.

PRE-CONSTITUTIONAL VIOLENCE: PUBLIC AND PRIVATE

In the period of conflict prior to constitutional negotiations, Afghan women were concerned about two overlapping spheres of violence against women, violence in the family and violence outside the family. Family in Afghanistan follows a fairly traditional heterosexual and nuclear model, although it is acknowledged that there are a variety of family models in Afghanistan this section pertains specifically to a nuclear, heterosexual model with some inclusion of extended family members. Very few statistics exist to support some of what is described anecdotally during this period, and as such our section is partial at best. The picture this story presents, however, is one of considerable violence for women in Afghanistan, both without and within the family.

PUBLIC VIOLENCE

During the pre-constitutional period activists were most concerned with violence by armed groups. Armed groups include militia and factional leaders which filled the void left by the Taliban. These groups have participated in abductions, assault and rape since the fall of the Taliban in November, 2001. Women point to the failure by government or other officials to establish security, leaving women especially vulnerable to violence by these armed groups. The extent and prevalence of violence is unclear because without protections, survivors remain reluctant to speak out and there is limited capacity for monitoring. Human Rights groups, such as Amnesty International ("AI"), were concerned that the police and the Afghan National Army (the "ANA") were colluding with armed groups, evidenced by cases in which the police were unwilling to arrest the perpetrators. As a result of potential government involvement, women were even more reluctant to report abuse. Many women stated that the insecurity and risk of sexual violence during this period made their lives worse than it was under the Taliban era.

The Women's Organization for the Safeguard and Development of Women in Mazar-e Sharif (an Afghan NGO) recounted numerous cases to AI of individual stories of abuse. For example, delegates from AI were told of a local armed commander who abducted a 12-year old girl who was engaged to another man at the time. She was taken to Peshawar and later sold into prostitution.

Violence in Afghanistan during this period has been borne disproportionately by rural women. AI has collected a great deal of anecdotal evidence from women in the Daikundi province in Central Afghanistan. Daikundi is a fertile area where local factional leaders are involved in opium production. These leaders, it is frequently alleged, perpetrate frequent acts of violence against women. For example, Farishta was raped by local commander and her family was forced to leave to Kabul. The same commander and his men have kidnapped other girls and sold them to brothels. As a result of sexual crimes perpetrated by the commander and his men, over 100 families have left since 2002.

Unfortunately, the result of government efforts to address violence in Daikundi, has been a decrease in reports of human rights violations. AI reports indicate that patterns of violence in this part of the country, tied to the drug trade, and to the power and corruption of local leaders supported by the central government, still leave women vulnerable to sexual violence and other indignities.

PRIVATE VIOLENCE

Findings statistics with respect to violence against women inside the home prior to the

Finding statistics with respect to violence against women inside the home prior to the peace/reconstruction/constitutional negotiations has proven difficult. Most available reports deal with public violence suffered by women outside the home. However, organizations, such as AI, have worked to provide some statistical information about the extent and nature of domestic violence experienced by women in Afghanistan during this period. The difficulty in documenting these issues remains that during the reign of the Taliban, there was no official statistical data for recording births, marriages and deaths throughout almost all of the country. During the time the Taliban was in power, it also appears that women were denied the right to obtain a divorce from their husbands. With few protections within the home, and a system of family law with few safeguards for women, a great concern during this period of time is for the ways in which women would face violence and subordination within patriarchal home structures.

CHANGES IN THE NEW CONSTITUTION VS. DISCOURSE IN CIVIL SOCIETY

The political discourse in Afghanistan prior to the writing of the latest constitution indicated that there were many issues that were of central concern to women; primary amongst them being the notions of security and equality before and under the law. While it is important to look at the text of the constitution, to determine to what degree these concerns were addressed, it is also necessary to recognize that full adherence to principles of equality, embedded in any constitution, can only be fully assured if they are combined with progressive applications of customary law and different interpretations of sharia. Prior to the latest constitutional effort, Afghanistan suffered through three decades of war and a climate of instability. The challenge in the new constitution was to create a climate of security whereby the hopes and aspirations of the Afghan people could be realized. The discourse in civil society, at the time, indicated that women wanted equality, social economic and cultural rights, political rights and citizenship rights embedded in the new constitution.

It was suggested, by both outside organizations and Afghan groups, that the best way to address the concerns of women would be to entrench those guarantees within the constitution through the use of a "supremacy clause;" thereby giving the constitution supremacy when inconsistent with other laws (i.e.: customary or sharia). Moreover, it was suggested that an enforcement mechanism, in the form of a remedy clause, would also act to ensure that any rights enumerated within the constitution would effectively be applicable.

Although the new constitution of Afghanistan is progressive in many measures, such as providing for guaranteed numbers of representation of women in both houses of parliament, it nonetheless remains lacking in protection and enforcement of women's rights. Neither a supremacy nor a remedy clause is found within the new constitution. In particular, with regards to the supremacy clause, Ch.1 Article 3 provides that "In Afghanistan, no law can be contrary to the beliefs and provision of the sacred law of Islam." While it is certainly conceivable that the concerns of women of Afghanistan could be met through the implementation of laws in accordance to Islam the aforementioned clause is nonetheless lacking in specificity. It is this ambiguity that raises concerns regarding a continued status quo.

The lack of a supremacy clause and a remedy clause could be used as a bar to any real change in Afghanistan. It remains to be seen whether the new constitution will be effective in addressing the concerns of Afghan women as expressed prior to the drafting of this newest constitution. In this light, it is important to view the changes that were made – to evaluate how these guarantees can offer substantive guarantees for Afghan women. In the next section we will point to some of these provisions.

Comparing the New Constitution to Old Promises

One of the central objectives of the Afghanistan constitution of 2004 is to "provide security to [the] women" of Afghanistan. The Loya Jirga had hoped that the new constitution would effectively promote gender equality and female participation in government. This portion of the analysis will explore the differences between the new and old constitutions with respect to the promotion of gender equality and female political participation.

Article 22(2), the equality provision of the 2004 constitution, provides that "the citizens of Afghanistan -- whether man or woman -- have equal rights and duties before the law" . There is a similar equality

whether man or woman -- have equal rights and duties before the law” . There is a similar equality provision (Article 25) in the 1964 constitution. However, unlike Article 22, Article 25 did not emphasize that both sexes are considered ‘citizens of Afghanistan’ and that women also have equal rights and duties before the law. This is an important change in emphasis for the women of Afghanistan, however, it is also important to note that a guarantee of equality “before the law” remains a formal equality guarantee. Another striking difference is the importance the 2004 constitution places on education for women. Under Article 44, the Afghan state commits itself to implementing “effective programs for balancing and promoting of education for women.”

In the 1964 constitution, Article 34 stipulated that “[e]ducation is the right of every Afghan.... [p]rimary education is compulsory for all children” . Article 34 lacked the specificity of Article 44 in promoting education among women. The emphasis on education is a forward-looking guarantee of women’s substantive equality, but one that needs statutory and positive steps to be more than a hollow promise. As to the promotion of female participation in government, Article 83(6) of the 2004 constitution specifies that in each province, there must be at least two female delegates elected to the House of Representatives. Further, Article 84 provides that the President may appoint a certain number of members to the Senate, but 50% of the people appointed by the President must be female. In the 1964 constitution, there were no such guarantees, and in fact no mention of mandatory female participation in government. Participation by Afghan women in parliament and in other realms of public power will enable the voices of Afghan women, and provide more avenues for the issues of Afghan women to the national agenda. Furthermore, this increased level of participation may lead to greater cultural acceptance of women in positions of power and have a resulting positive impact on the levels of violence against women.

POLITICAL CONCERNS

The efforts of women activists working towards equality for women in Afghanistan are continuously undermined by the corruption and sexist discrimination present at every level of the justice system. Violence against women is widespread and comes from many sources, including family, armed groups, community leaders and agents of the state. Women who experience violence have little recourse. There are few shelters to turn to, and there is a lack of will to prosecute violence against women in the justice system, where they may face further discrimination and violence.

Afghanistan has signed a number of binding international agreements promising to enforce women’s human rights, and has also included provisions guaranteeing equality between men and women, and liberty for all citizens, in the constitution. Although these guarantees have not stopped the application of older discriminatory laws, women activists in Afghanistan and international organizations have seized upon the agreements and the constitution to argue that the government has an obligation to meet certain standards in enforcing women’s human rights. There is a great need for legislation specifically criminalizing all forms of violence against women. However, even if laws are enacted that purport to offer women liberty, dignity and equality before the law, women will be unable to enforce their own rights while the justice system remains corrupt.

Given the overwhelming security and economic concerns facing Afghanistan, the issue of violence against women tends to be given a lower priority within the government. However, violence against women cannot be so easily separated from these dominant concerns. The insecurity of the country has been linked to increases in abductions and rapes of women. The lack of educational and economic opportunities means that women do not have the opportunity to become self-reliant to leave abusive familial situations. The barriers women face attempting to assert their right to live free from violence are symptomatic of the corruption in the justice system. The development of a functional justice system is crucial to dealing with many of the country’s most pressing concerns, including violence against women. Afghanistan has signed a number of international agreements which include promises to uphold women’s human rights, including the UN’s Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Civil and Political Rights (ICCPR). The Bonn Agreement rendered inoperable all existing laws that were inconsistent with these agreements. In addition, the new constitution contains article 22, which prohibits discrimination and guarantees equal legal rights to women and men.

Despite Afghanistan’s international obligations and constitutional guarantees, the government has yet to enact legislation to criminalize domestic violence against women, or guarantee women’s equal rights in the civil code. Many members of the judiciary are continuing to enforce older laws that discriminate against

civil code. Many members of the judiciary are continuing to enforce older laws that discriminate against women, despite the provisions of the Bonn Agreement that would make these laws inoperable. Women currently face discrimination from every level of Afghanistan's justice system, including from police, legal counsel, judges, and the operators of the penal system.

Women are hesitant to come forward when they experience violence because the consequences of bringing attention to their dilemma may be as harmful as the abuse itself. Conversely, women may be arrested for breaking inoperable laws, and face extreme violence within the justice system. Once in the Court system, women continue to face discrimination. Prosecutors are frequently unwilling to investigate cases of domestic violence, or to order protective measures for victims. Women accused of crimes rarely have access to legal aid, and often go unrepresented. Even when women do have legal representation, they must face an exclusively male judiciary.

Perhaps the most significant systemic discrimination faced by women lies in the concerns about corruption of the judiciary. In a recent survey conducted by the Afghanistan Independent Human Rights Commission (AIHRC), when asked, 'what do you think about judges?' the majority of respondents answered "bribing and corrupt." Even where a person accused of committing an act of violence against a woman is arrested, judges may be influenced by bribes or by intimidation, and women are left concerned about their abilities to have a fair trial.

What are the top two current priorities for women's activism in Afghanistan now?

Given the past, the current climate of constitutional change, and a culture of continued concerns, the top two current priorities for women's activism in Afghanistan today are: 1) creating effective mechanism for reporting, combating and punishing violence against women; and 2) including Afghan women in activism against violence.

As articulated, physical, sexual and emotional violence against women can occur both in the home by family members, and outside by strangers and officials of the state. Women who run away to escape such violence in their homes face social stigma, death or imprisonment. Many who have been jailed for the crime of running away (a so called *zina* crime) sometimes have their children with them in jail for the term of their sentence. There are virtually no safeguards to protect them from further sexual and physical abuse in jail. Women (and their children) caught in this situation also face uncertain futures when they leave jail. The economic situation in Afghanistan has also made the trafficking of women and children a rising concern. Traditional Courts in many rural villages have ordered families to hand over their daughters to debtors they can not afford to repay. Many former opium farmers can not afford to repay the dealers from whom they bought their seed. Now that opium production has been banned many of them have been forced to turn over their daughters as payment in this manner. Girls who are traded to pay debts are also prostituted, physically and sexually abused, and some have even been used to sell their blood. Outside of the home the situation for women is still precarious. According to Amnesty International a glut of weaponry remains in the hands of civilians including ex-combatants. Women and girls are being raped, abducted, trafficked and killed by armed men. There is a lack of security for women who face rape and abduction at the point of a gun as they try to conduct their lives daily; there is heightened insecurity for them if they attempt any political participation, or they wish to report incidents of abuse, rape, and assault. No figures exist for the number of women abducted, raped or killed by armed groups and there is no effective mechanism for investigating crimes against women. As a result violence is widespread but remains very private even when it is carried out by agents of the state, non-family members, and other armed groups. The stigma that is associated with the unchaste woman has led many women to commit self immolation in order to avoid a life of further persecution or death for reporting their abusers, family embarrassment.

The only figures known are that mothers in Afghanistan are still dying at a rate of 160 per 10,000 live births which is one of the highest rates in the world; and women's life expectancy is 43 which are among the lowest in the world. Given that women outnumber men 6-4 these patterns affect the majority of the population.

Women's activism in Afghanistan needs to focus on effective mechanisms for reporting such incidents of violence. The fact that no figures exist for the number of women abducted, raped or killed by armed groups, or abused in their homes is alarming and gives women the impression it is not worth reporting. In addition to reporting violence, realistic steps need to be taken to combat violence. Women who are able to

addition to reporting violence, realistic steps need to be taken to combat violence. Women who are able to bring a case before a judge are often humiliated in the courtroom. There is a lack of basic legal skills among legal professionals.

Moreover, sentences for those who perpetrate violence against women need to have more teeth and serve as a deterrent against it. There is no confidence that the legal system will protect women because the system is so weak, and protection for women is seen as secondary to their subordination. The women in Afghanistan need to have their concerns taken seriously. In addition, they need to be apart of the activism, against violence in their communities. The myth of Western world as the saviours of the women of Islam, who will throw off their burqas before their champions needs to be debunked. Activism in Afghanistan also needs to respect the lives of women in that country. Many of the laws that have subjugated women in Afghanistan are tribal laws not Islamic. Activism further needs to respect both the religious, tribal and cultural beliefs of women who live there instead of seeking to enforce Western ideals.

The women of Afghanistan should be equal participants in their liberation. Aid should be earmarked for programs to help end violence against women to provide shelter for those fleeing violent homes, for children in need of protection, for families escaping the threat of rape in rural villages. Aid that is currently earmarked for "job training" "education" is not reaching women in rural villages who are suffering the most. There can only be so many carpet weavers and tailors in a community. There is life outside of Kabul – and as such, aid, education, security, health care, need to be made available to women outside of Kabul.

Credits

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